“SHOW ME THE MONEY”—
BUT DON’T MAKE ME PAY FOR IT: AN ANALYSIS OF WHY LEGISLATION BANNING ATM SURCHARGES IS INAPPROPRIATE AND UNWARRANTED

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Introduction

An automated teller machine (ATM) is an “electronic funds transfer (EFT) terminal that is capable of performing many routine banking services for the consumer,” including deposits, withdrawals, balance inquiries, and transfers of funds between savings and checking accounts.[1] Banks first offered ATM services to customers and non-customers free of charge. However, rising costs, both in operating the machines and in providing security around ATMs, necessitated the levying of a transaction fee, commonly known as a “surcharge,” upon the consumer. Consumers, historically distrustful of banks and “big money,” immediately clamored that banks were price gouging by exacting exorbitant fees in order to make a profit.[2]

Recognizing that banks have historically been a heavily regulated industry, consumers looked to the legislature for relief. Anxious to take a pro-consumer stance at election time, federal, state, and local legislators nationwide joined the anti-surcharge crusade, introducing bills in Congress and state legislatures. At the local level, the California cities of Berkeley, Santa Monica, and San Francisco enacted ordinances banning surcharges.[3]

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1. Norman Penney & Donald I. Baker, The Law of Electronic Fund Transfers Systems 6-1 to 6-2 (1980).

2. *See, e.g.*, Ed Mierzwinski, *Banks’ ATM-Gouging Must Halt*, Newsday, Sept. 22, 1997, at A29-30; Deirdre Cummings, *ATM Surcharge Should Be Banned*, Boston Globe, Oct. 3, 1997, at A18 (arguing in Letters to the Editor that “ATM fees are excessive and amount to price gouging”).

3. *See infra* notes 162-68, 257-63 and accompanying text.

Proponents of anti-surcharge legislation have had only limited success. The local anti-surcharge ordinances in California face legal challenges,[4] and in 1999, the Connecticut Supreme Court overturned the state banking commissioner's four-year prohibition on such fees, leaving Iowa as the only state with an enforceable ban.[5]

As the Connecticut Supreme Court's decision indicates, legislation in this area is both inappropriate and unwarranted. By tightening controls and subjecting banks to increased regulation in times of crisis, the federal government has wrongly perpetuated the notion that banks are akin to public utilities, institutions historically subject to greater regulation than private enterprises. However, financial institutions are not public utilities—they are profit-maximizing entities which view non-interest income as a means to cover costs as well as a source of profit. Banks must be allowed to levy surcharges and participate in the free market without government intervention. It is only through their unfettered participation in the free market that financial institutions will be able to provide consumers the convenience that has become synonymous with the ATM.

Part I of this Note presents a brief history of ATMs and ATM fees, discussing and analyzing the origins of the ATM surcharge debate. Part II argues that legislation in the area of ATM surcharges is a direct result of long-standing populist notions of banks and banking. A general distrust of banks has led to the belief that these institutions must be appropriately regulated, lest they wield too much economic power. Armed with this belief, lawmakers have argued in favor of legislation banning ATM surcharges. Part III examines these legislative attempts at the federal, state, and local levels and assesses the likelihood of future action in these jurisdictions. Following an examination of arguments in favor of anti-surcharge legislation, Part IV concludes that surcharging is not anti-competitive, and that ATM fees should be determined by the market. Additionally, Part IV posits that a ban on surcharges will ultimately hurt consumers by decreasing future deployment of ATMs and stifling innovation. Part V analyzes the fate of anti-surcharge legislation in Connecticut and Iowa and the litigation surrounding these laws. Although this Note concludes that legislation is both inappropriate and unwarranted, Part VI explores the best forum—federal, state or local—in which to enact legislation if

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4. *See infra* notes 169-71, 257-62 and accompanying text.

5. *See* Burke v. Fleet Nat'l Bank, 742 A.2d 293 (Conn. 1999). *See also* Helen Stock, *Conn. Banks Slow to Start ATM Surcharging*, AM. BANKER, Jan. 6, 2000, at 12 [hereinafter Stock, *Conn. Banks*].

opponents of surcharges succeed in convincing the government that banks should provide their services for free.

I
Automated Teller Machines and Their Fees: A Historical Background

An ATM network "provides the communication and routing services required to authorize customer transactions at shared ATM [devices]" and "arranges for the clearing and settlement of resulting interbank payments."[6] Most joint venture ATM networks[7] entail two types of fees: wholesale fees and retail fees. Wholesale fees are set by the ATM networks and paid by the card-issuing bank to the ATM owner or to the network.[8] Retail fees, on the other hand, are paid by the consumer conducting the ATM transaction to the card-issuing bank or the ATM owner.[9]

Wholesale fees are comprised of the network membership fee, the switch fee, and the interchange fee.[10] As the name suggests, the network membership fee is paid by the bank member to the network, usually on a monthly or annual basis.[11] Similarly, switch fees are levied by the network to cover the costs of "routing transactions through the network's computer switching system."[12] An interchange fee is paid by the card-issuing bank to the ATM owner for each transaction

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6. David Balto & James McAndrews, *Joint Venture Payment Networks and Public Policy*, 3 Elec. Banking L. & Com. Rep., June 1998, at 9, 11.

7. ATM networks, such as Cirrus, PLUS, NYCE, and Magic Line, allow the sharing of ATMs by cardholders of various financial institutions. *See Analysis of the Impact of ATM Double-Charges on Consumers and Competition: Hearing Before the Senate Comm. on Banking, Hous., and Urban Aff.*, 105th Cong. 107 (1998) (statement of John G. Bascom, President, Magic Line, Inc.). *See generally* Karen L. Grimm & David A. Balto, *Consumer Pricing for ATM Services: Antitrust Constraints and Legislative Alternatives*, 9 Ga. St. U. L. Rev. 839 (1993). When ATM networks were formed in the 1980s, two types of networks emerged. First, proprietary systems were developed by a large bank or bank holding company that would in turn market network participation and ATM services to other financial institutions. In proprietary networks, a bank or bank holding company commonly sets pricing issues. In the second type of network, banks formed a joint venture with other depository institutions. In joint venture networks, the joint venture's board of directors establish pricing and other rules. *See id*. at 840-41.

8. *See* Balto & McAndrews, *supra* note 6, at 11.

9. *See id*.

10. *See id*.

11. *See The Practice of Automatic Teller Machine Surcharging: Hearing Before the Senate Comm. on Banking, Hous., and Urban Aff.*, 105th Cong. 59 (1998) (testimony of Jan Paul Acton, Assistant Director, Natural Resources and Commerce Division, Congressional Budget Office) [hereinafter Testimony of Acton] (noting that membership fee, ranging from $0-$125,000, is usually paid either monthly or annually).

12. Balto & McAndrews, *supra* note 6, at 11.

made by the bank's customers.[13] This fee compensates the ATM owner for the costs of processing foreign transactions at ATMs in locations designed to accommodate the ATM owner's own cardholders.[14]

Retail fees are set by the cardholder's bank and the ATM owner.[15] In order to recoup the costs of the switch and interchange fees, banks charge their customers a foreign or "off-us" fee, levied when the card-issuing bank's customer uses a "foreign" ATM, an ATM that is not owned by the card-issuing bank.[16] According to a *bankrate.com* survey of 348 banks in the thirty-five largest markets nationwide, more than eighty-seven percent of banks charge their customers a foreign or "off-us" fee,[17] at an average rate of $1.31 per transaction.[18] ATM surcharges are also retail fees. Levied by the ATM owner, surcharges are paid by the cardholder on a per-transaction basis at the time of the transaction. Whereas non-bank ATM owners[19] typically charge all customers using their ATMs, when a bank owns the ATM, the bank typically charges only the customers of other banks. Opponents of ATM surcharges refer to the practice of surcharging as "double dipping," claiming that the ATM owner often receives not only a portion of the interchange fee, but also the entire surcharge; thus cardholders, in essence, pay twice.[20]

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13. *See* Grimm & Balto, *supra* note 7, at 842 (noting that ATM networks charge different fees depending on type of transaction).

14. *See* George L. Albright, *Bearding the Surcharging Dilemma*, FIN. SERVICE ONLINE, Sept./Oct. 1996, at 9. The belief that the interchange fee did not sufficiently compensate ATM owners led to the current surcharge debate. For a discussion of this issue, see *infra* notes 54-65 and accompanying text.

15. *See* Balto & McAndrews, *supra* note 6, at 11.

16. *See* Grimm & Balto, *supra* note 7, at 843.

17. *See ATMs and Debit Cards: ATM Fees*, BANKRATE.COM (visited Mar. 28, 2000) <http://www.bankrate.com/brm/green/atm/atm3a.asp>.

18. *See id.*

19. Independent sales organizations (ISOs), also called independent service providers, are companies that offer merchants in smaller venues, such as convenience stores, ATM packages for those locations. *See* THE ATM PRICING & PROFITABILITY HANDBOOK 271 (1999) [hereinafter HANDBOOK]. In return for a portion of the fee income, such packages include procurement of the ATM and processing services. *See id.*

20. *See, e.g.*, *The Expanding ATM Market and Increased Surcharge Fees: Hearing Before the Senate Comm. on Banking, Hous., and Urban Aff.*, 105th Cong. 1 (1997) (opening statement of Sen. Alfonse D'Amato (R-NY)) [hereinafter Statement of Sen. D'Amato] (discussing GAO report that "details the spread of a new wave of anticonsumer, anticompetitive and . . . antifree market practice . . . double-billing of ATM fees."). *But see, e.g.*, JOHN CHARLES BRADBURY, ATM SURCHARGES AND THE EXPANSION OF CONSUMER CHOICE 2 (CATO Inst. Briefing Paper No. 36, 1998) [hereinafter BRADBURY, ATM SURCHARGES] (acknowledging that consumers may be charged two fees, but asserting that charges cover two different costs).

A. The Growth of ATMs and the Corresponding Rise in ATM Fees

Traditionally, banks derived profits from net interest income—the revenue generated from taking deposits and making loans.[21] Banks refrained from maximizing potential fee income because they feared customer backlash. Under Federal Reserve Regulation Q,[22] banks paid lower interest rates on customer deposits and avoided imposing fees that might cause customers to remove their accounts.[23] With the repeal of Regulation Q, banks could begin to pay competitive rates for balances. Once depositors could earn a better return on their money, banks became less concerned with losing customers by charging fees.[24]

In time, fee income, once viewed as a "dependable offset to the cyclical nature of lending without requiring too much of a capital commitment," became a primary source of income.[25] In addition to the traditional fees generated by checking and savings accounts, financial institutions began to collect fees from additional types of businesses, such as mortgage servicing, credit cards, mutual fund management, and securities brokerages.[26] By taking advantage of these previously untapped sources of income, banks witnessed an unprecedented 152% growth in fee income from 1987 to 1997, whereas net interest income grew by only 75% during the same period.[27] Concurrently, banks began to offer customers the ability to withdraw cash at offsite ATMs.

Since their inception in 1969, ATMs have provided an important extension of banking services to the public.[28] Professor Norman Penney claims the development of ATM services occurred for three rea-

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21. *See* Amber Veverka, *Customers Learning to Accept Banking Fees*, LAS VEGAS REV. J., Feb. 7, 1999, at 1K. *See also* John Kimelman, *Forget the Spread–the Name of the Game Now is Fee Income*, AM. BANKER, May 30, 1997, at 6.

22. *See* Banking Act of 1933, ch. 89, § 11(b), 48 Stat. 162, 182 (codified as amended at 12 U.S.C. § 371b (1994)) (granting Federal Reserve authority to cap interest rates). The Federal Reserve's implementing regulation, Regulation Q, was found at 12 C.F.R. § 217.

23. *See* Paul M. Horvitz, *ATM Surcharges: Their Effect on Competition and Efficiency*, 18 J. RETAIL BANKING SERVICES, Autumn 1996, at 60.

24. *See* Paul S. Nadler, *Outcry Over ATM Fees Epitomizes Anti-Bank Bias*, AM. BANKER, Aug. 16, 1996, at 11.

25. Kimelman, *supra* note 21, at 1 (noting that revenue from non-interest sources has risen from 17% in 1964 to 36.5% in 1996). *See also* Veverka, *supra* note 21, at 1K.

26. *See* Kimelman, *supra* note 21, at 6 (noting that this growth was possibly due to widening of legal barriers that once prohibited banks from engaging in securities underwriting and insurance sales).

27. *See* Veverka, *supra* note 21, at 1K.

28. *See* BRADBURY, ATM SURCHARGES, *supra* note 20, at 2.

sons. First, financial institutions hoped to "improve their competitive positions by attracting customer accounts and . . . increase their revenues by increasing loans, creating higher balances, and enhancing their financial services packages."[29] Second, ATMs were designed to perform many of the same tasks as a human teller at a lower cost.[30] Finally, Professor Penney notes that some financial institutions made ATM decisions based on marketing considerations.[31] For example, before building a new branch, one financial institution in Florida used its ATM to test whether the location would support a branch office.[32] Financial institutions have also used ATMs to encourage the direct deposit of payroll.[33]

Regarding his second assertion, Professor Penney fails to acknowledge that the anticipated cost savings expected from ATMs were never fully realized: While supplementing teller services, ATMs did not replace them.[34] Many bank customers still preferred to use human tellers for certain transactions, such as depositing money. Therefore, despite a sevenfold increase in the number of ATMs, the number of staffed bank offices also increased 15% between 1985 and 1998 and the number of tellers decreased only 8% between 1983 and 1998.[35] Because consumers tend to use ATMs more often than they use live tellers, "[I]ncreased use of ATMs tends to eat up the cost savings that might be achieved if consumers simply substituted ATM transactions for the same number of teller transactions."[36] Moreover, banks cite increased costs as a result of additional security around ATMs in the form of "lighting, cameras, kiosks and in some cases phones or panic buttons."[37]

Since the deployment of the first ATM, the banking industry has witnessed a rapid growth in the number of ATMs in the United States—from less than 100,000 in the early 1990s to approximately

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29. PENNEY & BAKER, *supra* note 1, at 6-12.

30. *See id*. at 6-13.

31. *See id.*

32. *See id.*

33. *See id.*

34. *See* BRADBURY, ATM SURCHARGES, *supra* note 20, at 3 (discussing FDIC's prediction of large economies of scale in ATM use due to replacement of bank branches).

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

36. *See id*. at 5.

37. Robert E. Litan, *ATM Fees: An Economic Analysis*, AM. BANKERS ASS'N, at 9 (Nov. 11, 1999), *available in* <http://www.aba.com/aba/ABANews&Issues/GR_ATM_Issue.asp>.

227,000 in 1999, with roughly 708,555 ATMs worldwide.[38] The advent of the ATM signaled the end of many of the inconveniences associated with banking, such as waiting in line for a teller, withdrawing enough cash for the entire weekend on a Friday afternoon, and banking during inconvenient business hours.[39] With ATMs, customers could bank twenty-four hours a day, 365 days a year, and with the development of ATM networks, members of the public could access their money worldwide.[40] However, this increased convenience came at a cost.

B. Origin of the Debate over ATM Surcharges

For banks, ATM networks, and ATM owners, the initial ability to self-regulate ATM fees served an important purpose.[41] ATM networks "market[ed] a new product[:] 'easy access to cash.' "[42] Any additional fees to the consumer, therefore, would make it difficult for the product to gain consumer acceptance—especially for services previously provided to the consumer free of charge.[43] Moreover, "because the interchange fee [was] intended to compensate fully ATM owners for the use of their ATMs by other members' cardholders, many networks adopted rules prohibiting . . . any additional charge on the cardholder."[44] In fact, before 1996, the two largest national ATM networks, VISA U.S.A.'s Plus network and MasterCard International's Cirrus network,[45] banned ATM surcharges so that no ATM owner who wanted to connect to their network could impose a surcharge on users.[46]

38. *See ATM Fact Sheet*, AM. BANKERS ASS'N (Nov. 1999) <http://www.aba.com/aba/ABANews&Issues/GR_ATM_Issue.asp> [hereinafter *ATM Fact Sheet*].
39. *See* BRADBURY, ATM SURCHARGES, *supra* note 20, at 1.
40. *See id*.
41. *See* Balto & McAndrews, *supra* note 6, at 12.
42. *Id*.
43. *See id*.
44. Grimm & Balto, *supra* note 7, at 842.
45. In actuality, neither Cirrus nor Plus issue ATM cards to consumers. Rather, MasterCard and Visa "simply license the use of their service marks to their member financial institutions . . . [whose] members . . . issue cards and operate ATMs at which those cards may be used to get cash." *See Analysis of the Impact of ATM Double-Charges on Consumers and Competition: Hearing Before the Senate Comm. on Banking, Hous., and Urban Aff.*, 105th Cong. 101 (1997) (prepared testimony of G. Henry Mundt, III, President & CEO, Cirrus Systems, Inc.) [hereinafter Testimony of Mundt]. The Cirrus system does not have any relationships with customers nor any involvement in the decision of individual banks whether to impose ATM access fees. *See id*. Such decisions are made expressly by the financial institutions participating in the network. *See id*.
46. *See* Testimony of Acton, *supra* note 11, at 55.

Despite this ban by Plus and Cirrus, fifteen states enacted legislation to overrule the ban,[47] and many regional networks allowed surcharging. In 1984, Valley Bank of Nevada ("Valley"), a member of the Plus network, brought an antitrust suit against Plus for the network's failure to allow Valley to surcharge cardholders from another bank.[48] While the suit was pending, however, Nevada Senate Bill 404 was enacted and became law on June 16, 1989.[49] The bill provided that an agreement to share ATMs "may not prohibit, limit or restrict the right of a financial institution to charge a customer any fees allowed by state or federal law, or require a financial institution to limit or waive its rights or obligations under this chapter."[50] When Valley began to charge a transaction fee, Plus notified Valley of its belief that Nevada Senate Bill 404 violated the Commerce Clause.[51] In response, Valley amended its complaint to request a declaratory judgment on the constitutionality of the statute.[52] The Ninth Circuit affirmed the district court's grant of summary judgment in favor of Valley Bank holding that Nevada Senate Bill 404 did not violate the Commerce Clause. The decision permitted Valley to impose a surcharge on a cardholder who withdrew funds from Valley's ATM but held an account with another bank.[53]

Not everyone shared the belief that the interchange fee sufficiently compensated the ATM owner for the operation and installation costs of an ATM.[54] Consequently, in 1989 "the fragile balance of regulating consumer pricing began to dissolve."[55] First Texas Savings Association ("First Texas"), a member of the PULSE ATM network, deployed a large number of ATMs at non-bank locations.[56] When PULSE responded by decreasing the interchange fee, First Texas entered into arbitration with PULSE alleging that the reduction of the

47. These states were: Alabama, Arkansas, Georgia, Idaho, Louisiana, Maine, Mississippi, Montana, Nevada, New Mexico, North Dakota, South Dakota, Texas, Utah, and Wyoming. *See* Testimony of Mundt, *supra* note 45, at 102.

48. *See* Valley Bank of Nevada v. Plus Sys., Inc., 914 F.2d 1186 (9th Cir. 1990).

49. *See id*. at 1188.

50. NEV. REV. STAT. § 660.095(3) (1989).

51. *See Valley Bank*, 914 F.2d at 1189.

52. *See id.*

53. *See id.* at 1188.

54. *See* Albright, *supra* note 14, at 9; *The Practice of Automated Teller Machine Surcharging: Hearing Before the Senate Comm. on Banking, Hous., and Urban Aff.*, 105th Cong. 135 (1998) (prepared testimony of John Ward, President, 1st American Bank) [hereinafter Testimony of Ward]. *See also* Litan, *supra* note 37, at 9.

55. Balto & McAndrews, *supra* note 6, at 12.

56. *See id.* at 12.

interchange fee was illegal price-fixing in violation of antitrust laws.[57] Basing its claim on a free-market approach, First Texas asserted that limiting an ATM owner's compensation to the interchange fee restricted the ATM owner's ability to deploy additional machines.[58] As a result, the consumer would be deprived of the increased convenience and quality a free-market environment would provide.[59] Under First Texas's proposed free-market system, interchange fees would be eliminated, thereby allowing the ATM owner to charge the consumer directly for his use of an ATM machine by debiting the cardholder's account at the point of transaction.[60]

Agreeing with First Texas, the arbitrator concluded that, "[T]he ATM owner is in the best position to identify and respond to consumer demand. Consumer choice is generally enhanced through a maximization of price/quality/convenience options."[61] Thereafter, PULSE joined the many regional networks that permitted surcharging.[62] Other profit-starved financial institutions in search of additional sources of income immediately acted on the opportunity for additional revenue generated by ATM surcharges.[63] Consequently, financial institutions began to apply pressure on the national networks, Cirrus and Plus, to lift their bans on surcharging.[64] They also increased their lobbying efforts in state legislatures to encourage the passage of laws allowing surcharges.[65]

Banks argued that in order to deploy ATMs at "remote" or nonbank locations such as hotels and resorts, convention centers, airports, and highway rest stops—locations convenient to consumers, but expensive to operate—they needed the added revenue that surcharging would provide.[66] Empirical evidence showed that in 1994 there were

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57. *See id*. at 12, n.15 (citing *In re* Arbitration Between First Texas Savings Ass'n and Financial Interchange, Inc., 55 Antitrust & Trade Reg. Rep. (BNA) No. 1380, at 340 (1988) (Kauper, Arb.)).

58. *See* Balto & McAndrews, *supra* note 6, at 12.

59. *See id*.

60. *See id*.

61. *See id*.

62. *See* Testimony of Acton, *supra* note 11, at 55; William Chipps, *ATM Surcharging: Boon or Boondoggle?*, FIN. SERVICE ONLINE, July/Aug. 1996, at 53-56.

63. *See Like Jericho, ATM Surcharge Walls are Tumbling Down*, BANK NETWORK NEWS, Jan. 11, 1992, *available in* 1992 WL 2707970.

64. In 1992, Plus System Senior Vice President Ron Reed noted that Plus had received six member surcharge requests in the past year. *See id*.

65. *See id.*

66. *See Banks Begin New ATM Charges: Transactions, Especially in Tourist Areas, May Now Include a Cut for the Machine's Owner*, YORK DAILY REC. (York, Pa.), Apr. 22, 1996, at 5. For example, Valley Bank of Nevada's imposition of a surcharge on ATMs located in casinos, hotels and airports resulted in $3.2 million in increased

approximately 29,000 off-premise ATMs, equaling 26.3% of all ATMs in the United States.[67] By 1997, the number had nearly doubled to 67,000 machines, or 40.6% of the 165,000 ATMs in the United States.[68] By 1999, the number had risen to 117,000.[69] With the increased number of ATMs installed off bank premises, surcharges helped financial institutions cover the cost of deploying these ATMs and also subsidized the costs associated with their operation—renting space and paying for "telephone lines, modems, encryptors, computers, audit tapes and receipts,"[70] and pick-up and delivery of cash for the machine.[71]

Bowing to pressure by state and federal authorities, both Cirrus and Plus followed the lead of many states as well as regional ATM networks and lifted their bans on surcharging on April 1, 1996, thereby allowing member banks to surcharge non-accountholders for using their ATMs.[72] Both networks conceded that the change came as a result of "reevaluation" culminating in a realization that a failure to lift their ban on surcharges would likely result in "a significant number of ATM operators withdrawing from [the] ATM network, with a concomitant loss of service and acceptance to [the] remaining members' cardholders."[73] Ironically, some federal and state legislators now advocate a ban on the same surcharges that they fought to allow less than four years ago.

In response to the actions of Cirrus and Plus, major financial institutions in Florida and throughout the Southeast quickly moved to

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revenues after three years. In a letter to Congresswoman Roukema, Stan Paur, President of the PULSE ATM network, wrote, "Since the allowance of surcharges, the number of ATMs deployed and available to consumers has literally exploded. One undeniable fact in Texas and the Southwest is that ATM surcharges led to the proliferation of ATMs in sites where the placement of these devices would not have been economically viable before surcharges." *See* Horvitz, *supra* note 23, at 59.

67. *See* HANDBOOK, *supra* note 19, at 7.

68. *See id*.

69. *See ATM Fact Sheet*, *supra* note 38.

70. Litan, *supra* note 37, at 9.

71. *See* Walter A. Dods, Jr., *Surveys Show Most People are Willing to Pay in Order to Save Time, Effort*, AM. BANKERS ASS'N (visited Mar. 28, 2000) <http://www.aba.com/aba/ConsumerConnection/ConsComm_ATMPress.asp>.

72. *See* UNITED STATES PUBLIC INTEREST RESEARCH GROUP, A FOURTH PIRG NATIONAL SURVEY OF ATM SURCHARGING RATES 1 (1999) [hereinafter 1999 PIRG REPORT].

73. *See* Testimony of Mundt, *supra* note 45, at 102. *See also Analysis of the Impact of ATM Double-Charges on Consumers and Competition: Hearing Before the Senate Comm. on Banking, Hous., and Urban Aff.*, 105th Cong. 105 (1997) (prepared statement of Anthony N. McEwen, Director and Executive Vice President, Plus System, Inc.) (noting states favored laws prohibiting Plus's ATM surcharges at hearing even though states had formerly enacted law forbidding prohibition).

impose fees for the use of their ATMs.[74] It is hardly surprising that surcharging spread rapidly throughout these areas,[75] given the high number of tourists. In contrast, financial institutions in the Mid-Atlantic and New England states were slower to respond to surcharging[76]—not surprising given the regions' pro-consumer reputations. Banks in these latter regions were immediately placed on the defensive by a media intent on exposing another example of price gouging.[77] In addition to the negative publicity, bankers feared a consumer backlash, decreased ATM usage,[78] and the passage of laws prohibiting surcharges.[79]

Despite these concerns, in the three years since Cirrus and Plus lifted their bans on surcharges, the number of banks surcharging increased dramatically, and the average surcharge rose. According to a 1999 report ("1999 PIRG Report"), by the United States Public Interest Research Group (U.S. PIRG), approximately 93% of 336 banks surcharge non-accountholders,[80] a 31% increase over the 71% of banks that surcharged non-accountholders in 1998.[81] During this time, the average surcharge increased from $1.23 to $1.37.[82]

Given the reasons proffered by many financial institutions for levying surcharges, most notably the need to cover costs,[83] this data is especially troubling to consumers and consumer advocacy groups. In

74. *See Surcharges: South Sizzles, Others Simmer*, BANK NETWORK NEWS, Apr. 11, 1996, *available in* 1996 WL 10403773 [hereinafter *South Sizzles*].

75. In reality, many banks in Georgia, Alabama, and Texas, three of the fifteen states with laws overriding the surcharge prohibition, were already surcharging consumers. *See id*.

76. *See* Albright, *supra* note 14, at 10.

77. *See id*.

78. Publicity over the surcharge issue immediately following the decision by Plus and Cirrus to allow surcharges did, in fact, lead to decreased ATM volume at several networks, including Star, NYCE, Honor, and Magic Line. *See* Horvitz, *supra* note 23, at 59 (citing Valerie Block, *Brief Dip in ATM Volume Followed Go-Ahead for Surcharges*, AM. BANKER, June 11, 1996, at 13). Specifically, in April 1996, volume at NYCE decreased by 5%, despite little surcharging, while volume decreased by 12% at Honor with substantial surcharging. *See id*.

79. *See South Sizzles*, *supra* note 74.

80. *See* 1999 PIRG REPORT, *supra* note 72, at 2. The percentage of "big banks" imposing surcharges increased from 83% in 1998 to 95% in 1999. *See id*. at 2. Additionally, the 1999 PIRG Report noted that the percentage of small banks imposing surcharges has also increased, from 65% in 1998 to 91% in 1999. *See id*.

81. *See id.*

82. *See id*. at 3. The most common surcharge increased from $1.00 to $1.50 in 57% of banks surveyed, up from 40% of banks surveyed in 1998. The second most common increase was $1.00 in 21% of banks surveyed, a decrease from 49% of all banks in 1998. *See id*. at 4.

83. See *supra* notes 34-37 and accompanying text for a discussion of financial institutions' reasons for imposing surcharges.

1999, these groups reported that big banks[84] earned record profits for the eighth consecutive year.[85] In 1998, industry earnings totaled nearly $62 billion.[86] In addition, the 1999 PIRG Report noted that a growing number of small banks and credit unions were surcharging.[87] In the face of the seemingly contradictory evidence—the profitability of banks and rising surcharges—consumers demanded to know why they now had to pay for services that had formerly been offered for free.[88]

Seizing upon the much-publicized decisions by Cirrus and Plus to lift their prohibition on surcharging, consumer advocacy groups immediately stepped into the forefront of the surcharge battle. In 1998, U.S. PIRG's consumer programs director expressed his hopes of getting a surcharge ban passed, noting that it was "an election year for a lot of senators, and people are fed up with their banks."[89] Similarly, anti-surcharge advocates expressed optimism about the prospects of passing such a bill because many congressmen and state legislators were up for reelection.[90] Opponents of the fees clamored that surcharging was anti-consumer, anti-competitive, and an attempt by big banks to increase revenues at the expense of smaller banks, credit unions, and consumers.[91] This debate spilled into many statehouses, where bills to limit or ban surcharging appeared.[92]

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84. The 1999 PIRG Report defines "big banks" as the 300 largest banks of the approximately 9,000 banks nationwide that control nearly two-thirds of all deposits. *See* 1999 PIRG REPORT, *supra* note 72, at 2.

85. *See* UNITED STATES PUBLIC INTEREST RESEARCH GROUP, BIG BANKS, BIGGER FEES: PIRG'S 1999 BANK SURVEY 7 (Oct. 1999) [hereinafter BIG BANKS, BIGGER FEES].

86. *See id*.

87. *See id.*

88. *See, e.g.*, Dean Faust, *Mad As Hell At the Cash Machine*, BUS. WEEK, Sept. 15, 1997, at 124; Victoria Shannon, *Off the Paper Trail, Into Online Finance*, WASH. POST, Feb. 2, 1997, at H4.

89. *See Fee Foes Make Headlines, Not Headway*, BANK NETWORK NEWS, Mar. 12, 1998, at 1, 4.

90. *See id*. at 1.

91. *See, e.g.*, Statement of Sen. D'Amato, *supra* note 20, at 1, 2; Mierzwinski, *supra* note 2, at A29-30.

92. *See* Statement of Sen. D'Amato, *supra* note 20, at 4, 7. For an example of bills introduced at this time, see H.B. 1176, 1998 Leg. Sess. (N.H. 1998) (proposing ban on ATM fees (defeated by vote of 221-76)); S.B. 212 (Ala. 1998) (proposing ban on ATM fees (movement out of committee unlikely)); S.B. 18 (Mass. 1997) (proposing ban on ATM fees (passed in Senate but stalled in House committee)). *See id.*

II
GOVERNMENT'S ROLE IN REGULATING BANKING HAS PERPETUATED THE BELIEF THAT ATM LEGISLATION IS APPROPRIATE

Banking has traditionally been one of the most heavily regulated industries in the United States.[93] Unlike other industries, it is subject to both federal and state legislation. Historically, the public has had a long-standing distrust of banking, and has feared that banks would abuse their significant political and economic power.[94] To many individuals, banks represented the "ultimate symbols of big bucks—their execs long caricatured as wheeling-dealing, cigar-chewing fat-cats with money spilling out of their pockets."[95] To address these concerns, regulations were designed to ensure the safe and sound operation of financial institutions.[96] A dominant reason for government intervention was "the prospect of failure in an unregulated banking market and the economic instability that would result."[97]

Typically, the federal government has responded to banking crises—most notably the banking crisis of the 1930s—with regulation.[98] This pattern of government intervention has perpetuated the notion that banks are akin to public utilities, and should therefore be subject to extensive regulation.[99] However, this mindset ignores both the role of banks and the rationales behind the historical regulation of the banking industry. There is little doubt that certain governmental regulations are warranted and are necessary to ensure an effective and

93. *See* George J. Benston, *Federal Regulation of Banking: Historical Overview*, *in* DEREGULATING FINANCIAL SERVICES: PUBLIC POLICY IN FLUX 1, 3-32 (George G. Kaufman & Roger C. Kormendi eds., 1986).

94. *See* Robert A. Eisenbeis, *Risk as a Criterion for Expanding Banking Activities*, *in* DEREGULATING FINANCIAL SERVICES PUBLIC POLICY IN FLUX 169, 172 (George G. Kaufman & Roger C. Kormendi eds., 1986).

95. Ross Mackenzie, *A Complaint Based on Deep Leftist/Populistic Resentment*, RICHMOND-TIMES DISPATCH, Nov. 18, 1999, at A23.

96. *See* Eisenbeis, *supra* note 94, at 172.

97. KERRY COOPER & DONALD R. FRASER, BANKING DEREGULATION AND THE NEW COMPETITION IN FINANCIAL SERVICES 42 (1984). *But cf*. ALFRED POLLARD ET AL., BANKING LAW IN THE UNITED STATES 23 n.17 (1988) (citing DOCUMENTARY HISTORY OF BANKING AND CURRENCY IN THE UNITED STATES 2665 (Herman E. Krooss ed., 1969), and noting that "[b]anker opposition . . . centered on unworkability and 'socialist elements' of government intervention and guarantees in the marketplace.").

98. *See infra* notes 101-107 and accompanying text.

99. This position has been taken by Connecticut Attorney General Richard Blumenthal, who has consistently supported a ban on ATM surcharges. *See infra* notes 210-243 and accompanying text for a discussion of the legal battles surrounding Connecticut's prohibition on ATM surcharges. *See also* Nadler, *supra* note 24, at 11 (urging public to recognize that banks are private operations in business of making profits).

sound banking system. For example, capital adequacy requirements[100] that protect consumers from banking system failures are crucial to discouraging risky lending on the part of financial institutions. Nevertheless, the government's power to regulate should not be considered universal. Legislation banning ATM fees ensures neither the solvency of banks nor the integrity of the banking industry.

Bank failure and financial instability have played a part in the economic life of the United States since the early 1800s.[101] The establishment of the Federal Reserve Board in 1913, and the subsequent creation of state deposit insurance plans did little to stem the tide of continued financial instability.[102] In the wake of the stock market crash of 1929 and the ensuing economic depression, Congress enacted the Banking Act of 1933[103] and created the Federal Deposit Insurance Corporation (FDIC)[104] in an effort to inject vitality into the depressed economy. The FDIC was designed both to avert such crises and to protect consumers through an extensive supervisory and regulatory scheme.[105] Scholars have commented that this legislation "reflected an implicit legislative judgment that forces of the market were malfunctioning and that government intrusion into the workings of the market was necessary."[106] In 1982, in the face of the Savings and Loan (S&L) scandal, the federal government again stepped in and instituted a system whereby the government broadened its powers to rescue floundering or failing financial institutions.[107]

Nevertheless, Professor George Bentson notes that "most of the historical reasons for regulating financial institutions are no longer relevant (if they ever were) to our society . . . [and] financial institutions are simply businesses with only a few special features that require regulation."[108] Legislation ensuring the safety of the banking system and reducing the risk of insolvency—such as federal deposit insurance—is valid, and differs fundamentally from legislation governing the business judgment of a bank. Banks are for-profit corporations and should be free to impose ATM surcharges just as they are free to

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100. *See* 12 C.F.R. §§ 208, 225, 263.80-.83 (1999).
101. *See* POLLARD ET AL., *supra* note 97, at 22.
102. *See id*. at 22-23.
103. Ch. 89, 48 Stat. 162 (codified as amended in scattered sections of 12 U.S.C.).
104. *See* POLLARD ET AL., *supra* note 97, at 23.
105. *See* COOPER & FRASER, *supra* note 97, at 150.
106. JOHN D. HAWKE, JR., COMMENTARIES ON BANKING REGULATION 85 (1985).
107. *See* COOPER & FRASIER, *supra* note 97, at 130.
108. Bentson, *supra* note 93, at 2-3. *See also* Richard A. Posner, *The Effects of Deregulation on Competition: The Experience of the United States*, 23 FORDHAM INT'L L.J. S7, S13 (2000).

impose fees on a multitude of other services.[109] As Chief Judge Richard Posner states, "[R]egulators have not tried to limit the profits of banks or told them what prices to charge to particular customers."[110] A bank sets rates on the pricing of safe deposit boxes, wire transfers, and certificate of deposit (CD) interest rates without government intrusion; therefore, there is little reason for the government to get involved in regulating surcharges.[111]

Although legislators are fully aware that a bank is a for-profit corporation whose board of directors is just as accountable to shareholders as the board of any other corporation, they nevertheless try to capitalize on the public's populist sentiment in an effort to appear pro-consumer. Opponents of ATM surcharges argue that a prohibition of fees may be viewed as consumer protection regulation. However, a sampling of federal consumer protection laws reveals that the bases of most consumer protection regulations are fundamentally different from the reasons for enacting ATM surcharges. In the 1960s and 1970s, financial institutions were among the numerous industries affected by a wave of consumer protection legislation, much of which dealt with the avoidance of potential discrimination by lenders and protection against fraud. For example, the Truth in Lending Act of 1968 requires full disclosure of the terms of consumer loans;[112] the Real Estate Settlement Procedures Act of 1974 (RESPA) requires mortgage lenders to provide a detailed statement of lending charges to all borrowers;[113] and the Fair Housing Act of 1968 forbids the consideration of race, color, religion, gender, or national origin by mortgage lenders in making loan decisions.[114] Although legislators argue that surcharging is "anti-consumer,"[115] the surcharge issue is incomparable to the true "anti-consumer" practices confronted by the aforemen-

109. In addition to ATM surcharges, banks have also increased the fees that they charge for a variety of other banking services, including checking account fees. Some banks also charge a fee for customers to see a teller if the customer's account is one that requires use of an ATM. *See* BIG BANKS, BIGGER FEES, *supra* note 85, at 4-5. Some banks charge a fee to consumers who close an account that has been open for less than one year. *See id*. at 6.

110. Posner, *supra* note 108, at S13.

111. *See* Horvitz, *supra* note 23, at 60.

112. Pub. L. 90-321, 82 Stat. 146 (codified as amended at 15 U.S.C. § 1601-1667f (1994)).

113. Pub. L. 93-533, 88 Stat. 1724 (codified as amended at 12 U.S.C. § 2601-2617 (1994)).

114. Pub. L. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. § 3601-3631 (1994)).

115. *See, e.g.*, Statement of Sen. D'Amato, *supra* note 20, at 2. *But see* JOHN D. HAWKE, JR., *supra* note 106, at 253-54 ("[W]hile the leadership of the congressional committees has elevated 'consumer protection' to a position of prime importance in

tioned legislation. Moreover, this argument fails to take into account that the consumer is not paying for the right to use his money; he is paying for the convenience of having access to that money at any time, throughout the United States and the world.

Convenience fees are certainly not unique to banking. In fact, the American consumer pays for convenience on a daily basis, for example, when using a public telephone, ordering tickets over the phone, or purchasing items via the Internet. Just as TicketMaster adds a surcharge to the tickets it sells, banks should not be prohibited from adding a surcharge in exchange for the convenience of a non-customer's use of their ATM. Alternatively, one can analogize an ATM surcharge to a membership fee. In the same way that members of a particular gym must go to that gym's locations or pay an additional fee to use another gym, customers of one bank must use their own bank's ATMs in order to avoid paying a surcharge. Becoming a member of a certain bank comes with the knowledge that cash may be withdrawn at only a finite number of ATMs free of charge. If those locations are not convenient to consumers, they are free to join another bank.

III
LEGISLATION

A. Federal Legislation

In 1997, the ATM surcharge debate gained momentum on a national level when Sen. Alfonse D'Amato (R-NY), Chairman of the Senate Banking Committee, and an outspoken opponent of ATM surcharges brought the debate to the floor of the United States Senate.[116] Up for reelection the following year, Senator D'Amato requested the Government Accounting Office (GAO) to conduct a survey of 246 banks in the United States. Eighty-seven percent of

bank regulation, it seems clear that the great preponderance of bank regulation is really contrary to the interests of consumers.").

116. Sen. D'Amato's crusade against ATM fees was seen by some as a pure re-election ploy. *See, e.g.*, John Charles Bradbury, *Ban Fees, and You Banish ATMs*, WALL ST. J., July 14, 1997, at A14 ("Sen. Alfonse D'Amato, the New York Republican, is up for re-election next year. And so he needs an issue. Something that really ticks people off. Something that TV producers can understand. Something that only Sen. D'Amato, as chairman of the powerful Senate Banking Committee, can fix. Above all, it has to be something that will portray Sen. D'Amato as the champion of regular folks."). When Sen. D'Amato pulled ahead in the polls during the 1998 New York senatorial campaign, some attributed D'Amato's comeback in part to "a canny choice of issues, such as a crusade against ATM surcharges." Richard S. Dunham, *A Smooth Road for Senator Pothole*, BUS. WEEK, July 20, 1998, at 4.

banks responded. "[S]hocked to find that, in just over a year . . . the number of ATMs that double-charge consumers has risen 320 percent,"[117] Senator D'Amato introduced Senate Bill 885, the Fair ATM Fees for Consumers Act ("Fair ATM Fees Act"), which would have prohibited banks from collecting surcharges from non-bank customers for an ATM transaction.[118] The bill would have amended section 903 of the Electronic Funds Transfer Act (EFTA)[119] by adding the definition of "electronic terminal surcharge," as a "transaction fee assessed by a financial institution that is the owner or operator of the electronic terminal . . . ."[120] Additionally, the bill defined "electronic banking network," as "a communications system linking financial institutions through electronic terminals."[121] Further, the bill would have amended section 905 of the EFTA by adding the following language:

> (d) LIMITATION ON FEES—With respect to a transaction conducted at an electronic terminal, an electronic terminal surcharge may not be assessed against a consumer if the transaction—
> (1) does not relate to or affect an account held by the consumer with the financial institution that is the owner or operator of the electronic terminal; and
> (2) is conducted through a national or regional electronic banking network.[122]

In 1998, the bill failed to pass the Senate by a vote of 72-26. Nevertheless Senator D'Amato vowed to continue his crusade against surcharging.[123]

Senator D'Amato subsequently lost his Senate seat to Charles Schumer (D-NY) in 1998.[124] Senator Schumer, who initially supported a ban on surcharges, lacked the zeal that Senator D'Amato had shown in his anti-surcharge crusade and supported a bill requiring only disclosure of fees charged by the bank.[125] Without Senator

117. Statement of Sen. D'Amato, *supra* note 20, at 1.
118. *See* S. 885, 105th Cong. (1997).
119. *See id*.
120. *See id*.
121. *Id*.
122. *Id*.
123. *See Senate Rejects Ban on Extra ATM Fees*, L.A. TIMES, Sept. 18, 1998, at A17.
124. *See ATM Surcharge Foe Loses Reelection Bid*, BANK NETWORK NEWS, Nov. 9, 1998, at 8.
125. *See id.*; H.R. 264, 105th Cong (1997). This bill was introduced Jan. 7, 1997, by then Congressman Schumer (D-NY) and House Banking Subcommittee on Financial Institutions Chairwoman, Marge Roukema (R-NJ). *See id*. The bill would amend the EFTA to "require notice of certain fees imposed by the operator of an automated teller machine in connection with an electronic fund transfer initiated by a consumer at the machine." *Id*.

D'Amato's strong opposition to surcharging by banks, the surcharge battle lost much of its steam in Congress.

On April 27, 1999, Rep. Maurice D. Hinchey (R-NY) introduced House Bill 1575, the Fair ATM Fees for Consumers Act.[126] The bill, which was referred to the Subcommittee on Financial Institutions and Consumer Credit on May 13, 1999, faces an uphill battle in the House and even greater resistance in the Senate.[127] Sen. Phil Gramm, the current Chairman of the Senate Banking Committee, voted against Senator D'Amato's bill two years ago. In light of Senator Gramm's reputation as an avid supporter of the free market, passage of this renewed effort to ban ATM surcharges on a federal level is unlikely.[128]

As surcharges become more widespread, it is likely that consumers will respond in one of two ways: they will either pay the surcharge—in the face of initial and perhaps still lingering opposition—for the convenience of having access to cash where and when it is needed; or they will seek surcharge-free alternatives. Recent evidence shows that consumers are taking matters into their own hands and avoiding surcharges by using ATMs less,[129] using debit cards instead of retrieving cash at ATMs,[130] using checks or credit cards, or only using their own bank for ATM transactions.[131] *Business Week* recently reported that six out of seven ATM users do not pay surcharges.[132] Similarly, in response to the debate over surcharges, groups of banks and banking associations are beginning to form "no-surcharge alliances," whereby the groups allow reciprocal ATM usage for customers of participating banks.[133]

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126. *See* H.R. 1575, 106th Cong. (1999) (using same language as D'Amato's bill).

127. *See Bill Summary & Status for the 106th Congress*, LIBR. CONGRESS (visited Mar. 29, 2000) <http://thomas.loc.gov>.

128. *See supra* note 124, at 8.

129. *See Network ATM Volumes Fall on Hard Times*, BANK NETWORK NEWS, July 23, 1999, at 1.

130. *See Online POS Increases Counter ATM Decline*, BANK NETWORK NEWS, July 23, 1999, at 1.

131. *See id.* at 6.

132. *See* Mike McNamee, *Why ATM Outrage Is So Misplaced*, BUS. WEEK, Nov. 29, 1999, at 44.

133. *See e.g.*, Julie Carrick Dalton, *Banking Groups Work on Deal to Restrict ATM Fees*, BOSTON BUS. J. (Jan. 27, 1997) <http://www.amcity.com/boston/stories/1997/01/27/newscolumn2.html> (discussing alliance of Massachusetts Bankers Association and Community Bank League of New England); Steven Syre & Charles Stein, *Fee Compromise: ATM Levy Hot Potato Cooled in Mix of SUM, Political Jawboning*, BOSTON GLOBE, Nov. 30, 1999, at D1 (discussing SUM program, alliance of banks who agree not to levy surcharges on customers of other member banks, with more than 200 banks signed up and total of 1,200 ATM machines).

B. State Legislation

As Senator D'Amato's bill languished in Congress, consumer groups and legislators, anxious to capitalize on a "hot" issue, turned to state legislatures. Bills to limit or ban ATM surcharges have been introduced in 26 states since 1997: Alabama,[134] Alaska,[135] Arizona,[136] Arkansas,[137] California,[138] Connecticut,[139] Illinois,[140] Iowa,[141] Kentucky,[142] Maryland,[143] Massachusetts,[144] Michigan,[145] Minnesota,[146] Missouri,[147] Montana,[148] New Hampshire,[149] New Jersey,[150] New Mexico,[151] North Carolina,[152] Ohio,[153] Oregon,[154]

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134. *See, e.g.*, S.B. 356, 1998 Sess. (Ala. 1999) (capping surcharges at 50 cents (died in committee)).

135. *See, e.g.*, H.R. 311, 20th Leg., 2d Sess. (Alaska 1998) (prohibiting surcharges unless ATM is attached to bank office (died in committee)); S.B. 212, 20th Leg., 2d Sess. (Alaska 1998) (prohibiting surcharges (died in committee)).

136. *See, e.g.*, H.B. 2212, 43rd Leg., 1st Sess. (Ariz. 1997) (prohibiting surcharges (died in committee)).

137. *See* Michelle Samaad, *It's Getting Harder to Avoid ATMs but Easier to Avoid Their Ever-Higher Fees*, BANKRATE.COM (visited Mar. 6, 2000) <wysiwyg://35/http://www.bankrate.com/brm/news/atm/19990518.asp>.

138. *See, e.g.*, S.B. 270, 1999-2000 Reg. Sess. (Cal. 1999) (prohibiting surcharges).

139. *See, e.g.*, R.B. 5014, Feb. Sess. (Conn. 2000) (prohibiting surcharges). This issue is subject to an ongoing legal dispute. *See infra* notes 210-43 and accompanying text for a discussion of Connecticut's ongoing legal battles over ATM surcharges.

140. *See, e.g.*, H.B. 527, 91st Leg. (Ill. 1999) (prohibiting surcharges (tabled in House)).

141. *See* 1999 PIRG REPORT, *supra* note 72, at 7. Iowa is the only state to ban surcharging by regulation. *See infra* notes 244-51 and accompanying text.

142. *See, e.g.*, H.B. 600, 1998 Reg. Sess. (Ky. 1998) (prohibiting surcharging (died in committee)).

143. *See, e.g.*, H.B. 915, 1998 Reg. Sess. (Md. 1998) (prohibiting surcharges (died in committee)).

144. *See, e.g.*, S.B. 12, 181st Leg., Reg. Sess. (Mass. 1999) (prohibiting surcharges for banks and non-bank owners (died in committee)).

145. *See, e.g.*, H.B. 5501, 1997-1998 Leg. Sess. (Mich. 1998) (prohibiting surcharges (died in committee)).

146. *See, e.g.*, H.F. 1041, 81st Sess. (Minn. 1999) (prohibiting surcharges (referred to Commerce Committee)).

147. *See, e.g.*, H.B. 924, 89th Gen. Assem., 2d Reg. Sess. (Mo. 1998) (requiring fee disclosure (died upon adjournment)).

148. *See, e.g.*, S.B. 373, 1999 Leg. Sess. (Mont. 1999) (prohibiting surcharges (probably dead)).

149. *See, e.g.*, H.B. 1176, 1998 Leg. Sess. (N.H. 1998) (prohibiting surcharges (died in committee)).

150. *See, e.g.*, A. 508, 208th Leg., 1st Sess. (N.J. 1997) (prohibiting surcharges (died in committee)).

151. *See, e.g.*, S.B. 732, 44th Leg., 1st Sess. (N.M. 1999) (capping surcharges at 50 cents (died in committee)).

152. *See, e.g.*, 1166, 1999 Leg. Sess. (N.C. 1999) (prohibiting surcharges); H.B. 916, 1997 Leg. Sess. (N.C. 1997) (same (died in committee)); S.B. 808, 1997 Leg. Sess. (N.C. 1997) (same (died in committee)).

Rhode Island,[155] Tennessee,[156] Texas,[157] Washington,[158] and Wisconsin.[159]

The bills in state legislatures to limit or ban ATM surcharges met the same fate as those in federal legislatures. Despite numerous attempts since 1997, no single state legislature except Iowa has enacted a ban on ATM fees. Nevertheless, inroads have been made in some states to enact laws requiring ATM operators to disclose their fees, and to allow customers to cancel the transaction once apprised of the fee that will be charged.[160] Additionally, three states—Arkansas, Mississippi, and Wyoming—have enacted legislation capping ATM surcharges.[161]

C. *Municipal Legislation*

Faced with disappointing results at the federal and state levels, the battle over ATM surcharges is now being waged at the municipal level. In 1999, the city of Berkeley, California became the first city in the nation to pass an ordinance banning ATM surcharges for individu-

153. *See, e.g.*, S.B. 25, 123rd Gen. Assem., 1999-2000 Sess. (Oh. 1999) (prohibiting surcharges).

154. *See, e.g.*, H.B. 3102, 70th Leg., 1999 Reg. Sess. (Or. 1999) (prohibiting ATM operators from charging higher fees to non-customers); H.B. 3142, 70th Leg., 1999 Reg. Sess. (Or. 1999) (requiring disclosure of fees (engrossed)).

155. *See, e.g.*, S.B. 247, 1999 Leg., Jan. Sess. (R.I. 1999) (prohibiting surcharges (died in committee)); S.B. 445, 1999 Leg., Jan. Sess. (R.I. 1999) (prohibiting surcharges).

156. *See, e.g.*, S.B. 2994 (Tenn. 1998) (prohibiting surcharges (defeated by Senate)).

157. *See, e.g.*, S.B. 1052, 76th Leg., Reg. Sess. (Tex. 1999) (limiting ATM surcharge to one dollar (died in committee)); H.B. 3211, 76th Leg., Reg. Sess. (Tex. 1999) (same (died in committee)).

158. *See, e.g.*, H.B. 2118, 55th Leg., 1997 Reg. Sess. (Wash. 1997) (requiring disclosure of ATM fees (died in committee)); S.B. 5813, 55th Leg., 1997 Sess. (Wash. 1997) (same (died in committee)).

159. *See, e.g.*, A.B. 131, 1999-2000 Leg. (Wis. 1999) (prohibiting surcharges). On February 8, 2000, the state Senate rejected the bill by a vote of 17-16. *See Senate Rejects ATM Fee Ban Bill*, WISC. ST. J., Feb. 10, 2000, at 3F.

160. The Financial Modernization Act similarly mandates the up-front disclosure of ATM fees. *See* Financial Services Modernization Act of 1999, Pub. L. No. 106-102, § 702, 113 Stat. 1338 (1999).

161. *See* Michael Warren, *Banks Win Round on ATM Fees: Nonaccount-holders Surcharge Ban Likely Unconstitutional, Judge Says*, DENVER POST, Nov. 16, 1999, at 16C. The Wyoming Banking Commission recently approved raising the cap on ATM fees from $1.00 to $1.50. *See Across the USA, News From Every State*, USA TODAY, Dec. 6, 1999, at 15A. At the direction of the Wyoming state legislature, the Banking Commission conducted a study of the fees and concluded that no financial institution breaks even with the $1.00 fee. *See id*.

als who use terminals not owned by their bank.[162] Citizens may also file civil lawsuits if a financial institution imposes a surcharge.[163] Shortly thereafter, Santa Monica, California followed suit and enacted a local law prohibiting banks from charging non-customers extra fees for using the banks' ATMs.[164] Most recently, in November 1999, residents of San Francisco overwhelmingly approved, by a margin of 66% to 34%, a ballot initiative designed to prohibit ATM surcharges.[165] The San Francisco initiative marked the first referendum on ATM surcharges.[166] Although the ordinances in Santa Monica and San Francisco are currently being challenged in court,[167] the ATM fee rebellion is likely to spread quickly. Already, city officials in Los Angeles, New York, New Orleans, and Miami have said that their cities would consider similar ordinances.[168]

D. The Surcharge Debate Regains the Spotlight

In the most recent chapter of the debate, banks are fighting back. In the face of the local law enacted in Santa Monica, two of the nation's largest banks, Bank of America and Wells Fargo & Co., reprogrammed their ATMs so that cash would only be dispensed to

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162. *See* Edmund Sanders, *Berkeley Gives Preliminary OK to ATM Surcharge Ban*, L.A. TIMES, Apr. 15, 1999, at C2. Under the city's bylaws, however, the ordinance must be approved a second time before it can take effect. *See id*.

163. *See id*. (noting that ordinance allows ATM users to file civil lawsuits for minimum of $250 in actual damages and maximum of $5,000 in punitive damages, plus unspecified attorney's fees).

164. *See* Monte Morin, *Santa Monica May Ban Some ATM Fees*, L.A. TIMES, Oct. 7, 1999, at B3.

165. *See* Michael Warren, *Calif. Banks Contest San Franciscans' Ban on ATM Surcharges*, STAR-LEDGER (N.J.), Nov. 4, 1999, at 7 (noting that ban garnered 78,049 votes for and 47,345 against).

166. *See* John M. Glionna, *Banks Sue to Halt Voters' Bans on ATM Fees for Non-Customers*, L.A. TIMES, Nov. 4, 1999, at A13.

167. *See infra* notes 257-63 and accompanying text.

168. *See* Helen Stock, *N.Y. Council Chief Files Bill to Ban ATM Fees, Predicts Banks Will Sue*, AM. BANKER, Jan. 20, 2000, at 9 (noting that New York City Council Speaker Peter Vallone followed through on promise to introduce legislation that would prevent banks from surcharging non-customers). Although Vallone had planned to hold hearings on his bill in December of last year, his staff was "'sidetracked' by the threat of a citywide transportation strike and other projects." *See* Helen Stock, *Push for Curbs on ATM Fees Is Held Up in New York City*, AM. BANKER, Dec. 20, 1999, at 26. Florida's Miami-Dade County Commissioner Miguel Diaz de la Portilla is also considering proposing a county ban on ATM surcharges. *See* Sharon Harvey Rosenberg, *Ban the Bank Fees?*, MIAMI DAILY BUS. REV., Nov. 24, 1999, at 1; Sam Zuckerman, *Banks Win Reprieve on ATM Fee Ban,* S.F. CHRON., Nov. 16, 1999, at A1.

customers of their banks.[169] Instead of getting cash, non-customers received the message, "Thanks to a recent vote by the city council, the ATMs are providing cash only to the bank's account holders."[170] In light of the anti-surcharge crusade, banks are warning consumers to "be careful what they wish for."[171] The anti-surcharge ordinance in Santa Monica illustrates a consequence of legislating ATM fees—taking away the convenience of ATMs. If other legislative initiatives are enacted, banks and bankers' associations nationwide are threatening to follow the lead of Bank of America and Wells Fargo.[172]

As a result of the publicity surrounding the events in San Francisco and Santa Monica,[173] the ATM surcharge debate has reclaimed a place on the front pages of newspapers, giving legislators the opportunity to once again capitalize on a hot consumer topic. Former Sen. Alfonse D'Amato has an heir apparent in Rep. Bernie Sanders, a Vermont Independent and a senior member of the House Banking Committee, who introduced House Bill 3229, the Electronic Fund Transfer Fees Act of 1999 ("ATM Fees Act") on November 4, 1999.[174] Under the proposed bill, the EFTA would be amended by inserting the following section:

> Sec. 918. FEES.
>
> In the case of any electronic fund transfer which
>
> (1) is initiated by a consumer from an electronic terminal operated by a person other than the financial institution holding the account of the consumer; and
>
> (2) utilizes a national or regional communication network to effect the transaction between such person and the financial institution holding the account of the consumer, no fee may be imposed on the

169. *See* William Booth, *Banks Retaliate Against ATM Fee Ban in California*, WASH. POST, Nov. 12, 1999, at A1.

170. *Id*. Bank of America said that "it will not provide ATM service to non-customers in San Francisco if the anti-fee ordinance takes effect [in December] there." *Id*.

171. Helen Stock, *Debate Over ATM Fees Flaring Up in Congress*, AM. BANKER, Nov. 19, 1999, at 10 [hereinafter Stock, *Debate Flaring*].

172. *See, e.g.*, Stock, *Debate Flaring*, *supra* note 171, at 10 (noting that Fleet Boston spokesman predicted "any new rule would prompt banks to impose limits on customer access similar to those adopted by BankAmerica and Wells Fargo . . . .").

173. See *infra* notes 257-63 and accompanying text for a discussion of the legal battles resulting from the surcharge prohibitions in San Francisco and Santa Monica.

174. *See* H.R. 3229, 106th Cong. (1999). The bill was originally introduced in tandem with Sen. D'Amato's anti-surcharge legislation. *See* Stock, *Debate Flaring*, *supra* note 171, at 10. When asked his opinion on the prospects of Rep. Sanders' bill, Sen. D'Amato commented, "It will be difficult to pass Rep. Bernie Sanders' legislation. I had a very hard time getting up for a vote in the Senate, and I was chairman of the committee. I only got 23 votes." *Id.*

> consumer with respect to such transaction by the person operating the electronic terminal at which the transfer is initiated.[175]

In response to the recent decision by district court Judge Vaughn Walker to block enforcement of the surcharge bans in both San Francisco and Santa Monica,[176] Representative Sanders introduced House Bill 3494, the State and Local Automated Teller Machine Regulation Protection Act of 1999.[177] This bill clarifies that nothing in federal law preempts states and localities from regulating ATM surcharges.[178] Representative Sanders noted that the EFTA "does not annul, alter, or affect the laws of any State relating to electronic fund transfers . . . . A State law is not inconsistent with [the EFTA] if the protection such law affords any consumer is greater than the protection afforded by [the EFTA]."[179] The success of this argument, however, is questionable in light of Judge Walker's rejection of the language used by both San Francisco and Santa Monica. While Judge Walker agreed that the EFTA gives state and localities the power to regulate issues such as fee disclosure, it does not give them authority over fees.[180]

On November 18, 1999, Rep. Maxine Waters (D-Cal.), introduced House Bill 3503, the ATM Surcharge Elimination and Consumer Empowerment Act.[181] In addition to providing for low-cost banking accounts and reauthorizing a bank fee survey to be conducted by the Board of Governors of the Federal Reserve System, Representative Waters' bill would eliminate certain ATM surcharges.[182]

IV
LEGISLATION REGULATING ATM SURCHARGES IS INAPPROPRIATE

A. Surcharges Are Not Anti-Competitive

Competition is a founding principle of this nation's economy. In the banking industry, however, little attention was paid to competition

175. H.R. 3229, 106th Cong. § 918 (1999).

176. *See* Zuckerman, *supra* note 168, at A1. For a further discussion of Judge Walker's decision, see *infra* notes 260-63 and accompanying text.

177. *See* H.R. 3494, 106th Cong. (1999).

178. *See id*.

179. 15 U.S.C. § 1693q (1994).

180. *See* Zuckerman, *supra* note 168, at A1.

181. *See* H.R. 3503, 106th Cong. (1999).

182. The proposed language to eliminate ATM surcharges is the same in both House Bill 3503 (introduced by Rep. Waters) and House Bill 3229 (introduced by Rep. Sanders). See *supra* note 175 and accompanying text for the proposed language of House Bill 3229.

until after World War II.[183] In the 1960s banks began to witness growing competition from neighboring depository institutions, among them credit unions, savings and loans, and mutual savings banks.[184] Commercial banks continued to dominate, but thrifts were the first in the local markets to offer "new consumer-oriented innovations—weekend hours, 'free' transactions via telephone and by mail, financial counseling services, [and] loan rebates . . . ."[185] Non-bank depository institutions began to fill a variety of consumer needs. Mutual savings banks and savings and loans arose out of a growing need for small savings deposit programs and home mortgage credit, and the growing demand for consumer installment loans led to the development of the credit union.[186] These institutions began to take on increasingly prominent roles in society.[187] Spurred by the changes in federal law and banking regulation of the 1980s, they became major competitors of large financial institutions.[188]

A common argument levied against surcharges is that they are anti-competitive and harmful to these small banks and credit unions. The argument states that when large banks with ATMs in many locations charge a fee to non-customers, the customers will prefer to change banks rather than be charged this fee. These fees drive customers from smaller banks with limited ATM service to larger banks, hence eliminating customer choice.[189] Because these banks gain the benefits of the customer's deposit accounts at the expense of small banks and credit unions, the argument follows that these community institutions will thereby be put out of business, resulting in a less competitive banking industry.[190]

The evidence, however, does not clearly support this argument. A recent article in the *American Banker* reported that as many as 65% of small banks and 13% of credit unions are imposing convenience fees.[191] Even the Independent Community Bankers of America

183. *See* PETER S. ROSE, THE CHANGING STRUCTURE OF AMERICAN BANKING 303 (1987).
184. *See id*.
185. *Id*.
186. *See id*. at 304.
187. *See id.* at 303-04.
188. *See id*. at 305.
189. *See, e.g.*, Horvitz, *supra* note 23, at 60-61.
190. *See The Practice of Automated Teller Machine Surcharging: Hearing Before the Senate Comm. on Banking, Hous., and Urban Aff.*, 105th Cong. 28 (1998) (opening statement of Wayne A. Cottle, President, Dean Co-operative Bank). *See also id.* at 30 (opening statement of Raymond Curtin, President and CEO, Empire Federal Credit Union).
191. *See* Testimony of Ward, *supra* note 54, at 135.

(ICBA), formerly known as the Independent Bankers Association of America, lists as one of its public policy initiatives the goal of preserving ATM availability. In particular, "ICBA is striving to prevent the need for legislation that would limit or prohibit the imposition of fees for ATM usage. Such legislation would . . . restrict the availability of convenient ATM locations for consumers."[192] This is compelling evidence that surcharges do not jeopardize smaller institutions and credit unions. Rather, the imposition of surcharges by smaller banks or credit unions generates revenue, thereby increasing the institution's incentive and ability to install additional ATMs.[193] With the increased convenience that comes with the additional ATMs, customers no longer need to move to larger banks to reap the convenience of their services.[194] Alternatively, groups of smaller depositories have banded together to form "no-surcharge alliances" in an effort to provide customers with the greater convenience of more ATMs, as well as the benefit of not being charged at any of the alliance's member banks.[195]

As one community banker argued, community banks "compete for [their] customer's business the old-fashioned way: by offering a superior product and superior service at a reasonable price. The greatest strength of community banks is their ability to give their customers personal attention . . . [while] offer[ing] better interest rates and pricing for [their] services."[196] Because this personal service and attention is often impossible at large financial institutions, customers may choose to stay at their smaller bank for reasons unrelated to the bank's ATM deployment.

B. The Market Will Best Determine Fees Charged By Banks

The history of banking is marked by a constant tension between "market forces and the regulatory presence."[197] In fact, much of the regulation surrounding banking

> has its genesis in a congressional perception of market dysfunctions, just as did the 1933 legislation. Truth in Lending, for example, responded to the perception that market forces were not

192. *Public Policy, Public Policy Initiatives*, INDEPENDENT COMMUNITY BANKERS OF AMERICA (last visited Feb. 25, 2000) <http://www.ibaa.org/polini.html>.

193. *See* BRADBURY, ATM SURCHARGES, *supra* note 20, at 5.

194. *See id*. at 5-6.

195. For a discussion of "no-surcharge alliances," see *supra* note 133 and accompanying text.

196. Testimony of Ward, *supra* note 54, at 134.

197. H. Robert Heller, *Governing Banking's Future: A View From the Fed*, *in* GOVERNING BANKING'S FUTURE: MARKETS VS. REGULATION 11 (Catherine England ed., 1991).

> working to encourage accurate disclosure of interest rates on consumer loans. The Fair Credit Billing Act was implicitly premised on the assumption that the market had not worked to make creditors responsive to customer complaints about inaccurate billing. The Equal Credit Opportunity Act and the Community Reinvestment Act were based on the perception that market forces were inadequate to cause creditors to overcome irrational constraints on lending and to compete to serve unmet credit needs.[198]

There is no evidence, however, of market "dysfunction" in the case of ATM fees. Because the market will correctly and efficiently value a good or a service, there is no reason why market forces should be interrupted by legislation banning ATM surcharges. Left unfettered, the market will control the fees that banks charge. Intrusion by the government into pricing decisions by a private sector entity is dangerous. In the absence of market failure, such behavior is akin to the imposition of price controls by the federal government, and the result will be harm to a market that is ultimately moving toward fairer pricing.[199] This position, supported by many interest groups, including the American Bankers Association, has also been advanced by the Chairman of the Electronic Funds Transfer Association's Task Force on ATM Surcharges, who stated: "Government should not interfere in ATM pricing because the market is highly competitive, prices are clearly disclosed, many consumer alternatives exist, and consumers' decisions about the value of convenience versus price will determine the future level of ATM access fees."[200]

Most importantly, the government should not take away the consumer's choice by enacting legislation. Prohibitions on ATM surcharging will have serious consequences for the consumer. Without the revenue that ATM surcharges generate, many banks will not be able to deploy additional ATMs, resulting in decreased convenience. Additionally, banks may find themselves unable to afford many of their existing ATMs, thereby necessitating a sale of these machines to non-bank ATM operators who are shielded by the proposed legislation and can continue to surcharge. Because six out of seven customers do not pay surcharges, banning the fees "will force the vast majority of bank customers to underwrite the few who demand access

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198. John D. Hawke, Jr., *supra* note 106, at 86 (questioning advisability of government to "muscle" market into shape when market forces have failed).

199. *See* McNamee, *supra* note 132, at 44.

200. *The Expanding ATM Market and Increased Surcharge Fees: Hearing Before the Senate Comm. on Banking, Hous., and Urban Aff.*, 105th Cong. 28-29 (1997) (opening statement of Henry Polmer, General Counsel, Electronic Funds Transfer Association (EFTA)).

to cash wherever they are."[201] In this scenario, the consumer has lost all choice: since it is impossible to become a customer of a non-bank ATM operator, the consumer is forced to pay whatever fee the operator charges or forego the withdrawal of cash.

C. Eliminating Surcharges Will Reduce Innovation

A major concern of opponents of surcharge legislation is that regulation at the federal, state, or local level will "stifle innovation and inhibit the creation of new services" designed to enhance consumer convenience and satisfaction.[202] The public has already witnessed the convergence of non-cash services—namely stamps and tickets—with the ATM's traditional services.[203] Services are likely to expand as technology advances and additional familiarity is gained with the capabilities of multiple-function ATMs.[204] It is possible that instead of reading the "Please wait while your transaction is being processed" message currently on ATM machines, the ten to twenty seconds could be filled with advertisements or movie trailers.[205] It is only through the operation of a free-market system that fair pricing, better services, and new technologies can be assured.

In the area of high technology, the growth in the use of personal computers and the rise of the Internet may be attributed to unfettered competition in a free market.[206] For example, in an effort to "stimulate innovation," Sun Microsystems, Inc. announced that it would publish extensive details about its computer chips on a public Web site, thereby allowing others to experiment with the technology.[207] Similarly, Linux, a rival to Microsoft Windows NT, is quickly spreading through free downloads.[208] But the high tech arena is not the only

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201. McNamee, *supra* note 132, at 44.

202. *The Practice of Automated Teller Machine Surcharging: Hearing Before the Senate Comm. on Banking, Hous., and Urban Aff.*, 105th Cong. 33 (1998) (opening statement of Linda F. Echard, President and CEO, IBAA Bancard).

203. *See Turning the ATM Into A Vending Machine*, BANK NETWORK NEWS, Nov. 11, 1997, *reprinted in* HANDBOOK, *supra* note 19, at 377.

204. *See id*.

205. *See id.* at 380 (noting that Electronic Data Systems, Inc. (EDS) unveiled 15-second movie running for one month at 165 EDS ATMs located in 7-11 convenience stores in San Diego area and may offer movie tickets for sale on same machines in future).

206. *See* Telecommunications Act of 1996, 47 U.S.C. § 230(b)(2) (Supp. III 1994) (providing that it is policy of United States "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation").

207. *See* Susan B. Garland & Andy Reinhardt, *Making Antitrust Fit High Tech*, BUS. WEEK, Mar. 22, 1999, at 36.

208. *See id.*

industry that can reap these benefits. To promote similar competition and enhanced consumer services, the market for ATM services is best left undisturbed. Additionally, the reinvigoration of antitrust regulation is likely to encourage even greater competition and innovation.[209]

V
CASE IN POINT: CONNECTICUT AND IOWA

In an August 1, 1995, letter to the Connecticut Banking Commissioner, Fleet Bank, N.A. ("Fleet"), a national banking association organized under the National Banking Act, inquired about its ability to impose a surcharge on non-depositor customers who used the bank's ATMs.[210] The National Banking Act (the "Act") confers upon national banking associations the power "[t]o exercise . . . all such incidental powers as shall be necessary to carry on the business of banking."[211] Among such incidental powers is the ability to establish and maintain ATMs.[212] In his response on September 14, 1995, Connecticut Banking Commissioner John P. Burke stated, "The Connecticut statutes governing the establishment and use of ATMs do not authorize banks to impose the transaction fees" as requested by Fleet.[213] Burke pointed out that Connecticut's General Statutes section 36a-156(a) specifically authorizes "a bank that has established an ATM to impose a usage [or interchange] fee on other banks whose customers use the [establishing bank's] ATM to cover 'a reasonably proportionate share of all acquisition, installation and operating costs.' "[214] By stating, "It is an established rule of statutory construction that a statute which provides that a thing shall be done in a certain way carries with it an implied prohibition against the thing another way," Burke reasoned that while Connecticut's statutes allow an interchange fee, they prohibit banks such as Fleet from imposing surcharges.[215]

In response, Fleet filed a complaint against Burke in the U.S. District Court for the District of Connecticut.[216] In its complaint,

209. *See id*. at 34.
210. *See* Fleet Bank v. Burke, 160 F.3d 883, 884 (2d Cir. 1998).
211. National Banking Act, 12 U.S.C. § 24 (1994).
212. *See, e.g.*, OCC Interpretive Letter No. 789 [Transfer Binder], Fed. Banking Law Rep. (CCH) ¶¶ 81-216 (June 27, 1997).
213. Letter from John P. Burke, Banking Commissioner, State of Connecticut, Department of Banking, to Fleet Bank (Sept. 14, 1995), *reprinted in* HANDBOOK, *supra* note 19, at 231.
214. *Id*.
215. *Id*.
216. *See generally* Plaintiff's Complaint, Fleet Bank v. Burke, *reprinted in* HANDBOOK, *supra* note 19, at 232-34.

Fleet set forth two arguments. First, Fleet urged that Burke "adopted an arbitrary, capricious, and erroneous view of the Connecticut ATM statutes insofar as they conclude that these statutes prohibit Fleet from charging fees to non-depositor customers . . . ."[217] Fleet thus sought a declaratory judgment holding that Connecticut's statutes do not bar it from imposing surcharges on non-depositor customers.[218] Second, Fleet argued that even if Burke's interpretation of Connecticut's statutes were correct, the ban should not apply to Fleet because Fleet is a national bank regulated by the National Banking Act, which takes precedence over the Connecticut ATM statutes under the Supremacy Clause of the United States Constitution.[219]

Defendants, Banking Commissioner Burke and the Connecticut Department of Banking, moved to dismiss, arguing that because the Connecticut ATM statutes have not been construed by any state court, the abstention doctrine, as enunciated in *Railroad Commission of Texas v. Pullman Co.*,[220] mandates that the district court abstain from consideration of the issue and allow the issue to first be determined by a Connecticut state court.[221] District court Judge Arterton disagreed with the defendants and explained that the fact that a state statute has not yet been interpreted does not mean that the statute is unclear or uncertain.[222] Therefore, the defendants did not prove the first prong of the *Pullman* test, and Judge Arterton denied the defendant's motion to dismiss.[223]

At this stage, the Office of the Comptroller of the Currency (OCC), the federal agency responsible for administering federal banking policies, filed an amicus curiae brief with the District Court of Connecticut in support of Fleet.[224] The OCC's position was that Fleet had an "incidental power" to operate ATMs under the National Bank-

217. *Id.* ¶ 18, *reprinted in* HANDBOOK, *supra* note 19, at 233.

218. *See Fleet Bank*, 990 F. Supp. 50, 52 (D. Conn. 1997).

219. *See* Plaintiff's Complaint ¶¶ 10, 19, Fleet Bank v. Burke, *reprinted in* HANDBOOK, *supra* note 19, at 233.

220. 312 U.S. 496 (1941) (holding that interpretation of Texas statute belonged to Supreme Court of Texas and not federal district court).

221. *See Fleet Bank*, 990 F. Supp. at 52.

222. *See id*. at 54 (*citing* Planned Parenthood of Dutchess-Ulster, Inc. v. Steinhaus, 60 F.3d 122, 126 (2d Cir. 1995)). Under *Pullman*, in order to justify abstention, it must also be established that "determination of the federal issue must depend upon the interpretation given to the ambiguous state provision; and . . . the state law must be susceptible of an interpretation that would avoid or modify the federal constitutional issue." *Id*. at 53 (*citing* United Fence & Guard Rail Corp. v. Cuomo, 878 F.2d 588, 594 (2d Cir. 1989)).

223. *See Fleet Bank*, 990 F. Supp. at 54.

224. *See* Fleet Bank v. Burke, 23 F.Supp.2d 196, 203 n.1 (D. Conn. 1998).

ing Act, and thus had permission to charge service fees to non-depositing customers.[225]

In a trial on the merits, Judge Arterton agreed with Fleet and ruled that Connecticut statutes do not prohibit ATM surcharging.[226] However, the court neither addressed the issue of a national bank's authority to impose a surcharge under the "incidental powers" granted by the National Banking Act, nor the question of whether the state law would be preempted by federal law in this instance.[227]

On appeal, the Court of Appeals for the Second Circuit reversed Judge Arterton's decision, holding that federal jurisdiction was lacking.[228] The court declared that in a case in which the parties seek an interpretation of a state regulatory scheme, the state court must rule on the issue of whether the surcharge ban is legitimate before federal courts rule on the question.[229] The court of appeals vacated the judgment of the district court and remanded with directions to dismiss for lack of subject matter jurisdiction.[230] Subsequently, the state's largest ATM owners, Fleet, BankBoston, and First Union introduced $1 surcharges.[231] In response, Burke issued a cease and desist order threatening them with $7,500 for every surcharged withdrawal, with which the banks complied.[232] Soon thereafter, Fleet and First Union filed applications in Connecticut state court for temporary injunctions against the cease and desist order.[233] Finding that Fleet did not "clearly demonstrate[ ] such compelling reasons for the granting of a temporary injunction against the commissioner's temporary cease and desist order," the court denied plaintiffs' applications for a temporary injunction.[234]

The OCC, which had filed an amicus curiae brief in support of Fleet in its 1998 district court action, entered the fray once again, seeking to become a party by filing an intervening complaint.[235] Claiming that Congress intended the OCC to have "exclusive administrative enforcement authority over national banks for all laws, including state banking laws related to ATM transaction fees," the OCC

225. *See id*.
226. *See id*. at 202.
227. *See id*. at 203.
228. *See* Fleet Bank v. Burke, 160 F.3d 883, 884 (2d Cir. 1998).
229. *See id*.
230. *See id*. *See also A Dizzying Surcharge Spat in Connecticut*, BANK NETWORK NEWS, Nov. 24, 1998, at 7.
231. *See id.*
232. *See id*.
233. *See* Fleet Nat'l Bank v. Burke, 727 A.2d 823, 825 (Conn. Super. Ct. 1998).
234. *Id*. at 831.
235. *See* First Union Nat'l Bank v. Burke, 48 F.Supp.2d 132, 135 (D.Conn. 1999).

sought a preliminary injunction to enjoin the Banking Commissioner from enforcing the temporary cease and desist orders against Fleet and the other banks.[236] The OCC based its argument on language found in official OCC Regulations:

> A national bank may charge its customers non-interest charges and fees, including deposit account service charges . . . . All charges and fees should be arrived at by each bank on a competitive basis and not on the basis of any agreement, arrangement, undertaking, understanding, or discussion with other banks or their officers.[237]

On April 7, 1999, Judge Arterton granted the OCC's motion, thereby enjoining Burke from enforcing the orders against Fleet and First Union.[238] The court's order, however, failed to address Burke's interpretation of Connecticut's ATM statutes, leaving open both the possibility for Burke to seek enforcement of his cease and desist orders through alternative judicial means, and the opportunity for the OCC to initiate its own administrative proceeding related to the interpretation of the state statute.[239]

On April 19, 1999, Connecticut Attorney General Richard Blumenthal announced the filing of a lawsuit in state court against defendants Fleet National Bank, First Union National Bank, and BankBoston to prevent the banks from imposing ATM surcharges on Connecticut customers.[240] In order to expedite a final ruling, the parties agreed to certify the action to the Connecticut Supreme Court, where oral argument was held on September 29, 1999. On December 20, 1999, the Connecticut Supreme Court issued a ruling rejecting Blumenthal's argument that state regulations bar banks from charging non-customers ATM fees.[241] Specifically, the court concluded that Connecticut General Statutes section 36a-156 "does not, either expressly or by implication, govern the imposition of customer fees" because the law on which the ban is based was not drafted with ATMs in mind.[242]

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236. *Id*.

237. Stock, *supra* note 171, at 10 (quoting from Section 7.4002 of Interpretive Rulings, OCC Regulations, Dec. 1997).

238. *See First Union Nat'l Bank*, 48 F. Supp. 2d at 135.

239. *See id*.

240. *See Press Release, Lawsuit Filed To Stop ATM Surcharges*, CONN. ATT'Y GEN.'S OFF. (Apr. 19, 1999) <http://www.cslnet.ctstateu.edu/attygenl/press/1999/coniss/atm.htm>.

241. *See* Burke v. Fleet Nat'l Bank, 742 A.2d 293 (Conn. 1999).

242. *Id*. at 299. The court also stated, "No one, including our legislature, could have foreseen at that time what the economic and competitive effects of ATMs would be. Indeed, . . . the marketplace already has begun to respond to the purported dominance by large banks." *Id.* at 306.

The Connecticut court ruling signaled a possible end to attempts to ban surcharges at the local and municipal levels, giving security to many in the electronic funds transfers industry. Calling the recent ruling by the Connecticut Supreme Court "a defeat for consumers," Attorney General Blumenthal vowed to continue his efforts to ban the charges.[243]

In Iowa, a similar controversy to the one in Connecticut has been raging. Consumer officials in Iowa, like Connecticut, prohibited ATM surcharges, alleging that the fees violated the state's consumer protection laws.[244] In response to the prohibition, Bank One, a national banking association whose principal office is in Salt Lake City, Utah, challenged the rule in federal court. On April 9, 1999, Bank One submitted Judge Arterton's entire 43-page ruling into evidence in its case against Iowa, then pending in the Court of Appeals for the Eighth Circuit, arguing that the Connecticut ruling was central to its case.[245] Unlike the Connecticut case, however, the OCC has only filed an amicus curiae brief on behalf of Bank One—they are not a litigant in the case.[246] Therefore, experts predicted that it would be more difficult to argue that the state of Iowa was preempting the OCC's regulatory power since the agency was not part of the litigation.[247] Ruling in favor of Bank One, the Eighth Circuit held that the National Banking Act preempted Iowa's Electronic Funds Transfer Act, and remanded the case for entry of a permanent injunction that would prevent Iowa from enforcing state statutes restricting Bank One's operation of ATMs.[248] Legal experts speculated that Iowa would be the most likely candidate to bring the issue to the Supreme Court; however, most also agree that even if the Court were to hear the case, it is unlikely that it would resolve the surcharge issue.[249] In

243. *See* Steve Feica, *Court Rejects ATM Fee Ban: Connecticut Upholds Noncustomer Charge*, CINCINNATI ENQUIRER, Dec. 21, 1999, at A5. Despite FleetBoston and First Union's immediate imposition of surcharges, other financial institutions in the area refrained "unconvinced that the legal and legislative fights are over and—perhaps more important—unsure of how consumers would react." Helen Stock, *Conn. Banks Slow to Start ATM Surcharging*, AM. BANKER, Jan. 6, 2000, at 12.

244. *See Surcharge Bans are Breathing Their Last Gasps*, BANK NETWORK NEWS, Apr. 27, 1999, *available in* 1999 WL 10293133 [hereinafter *Surcharge Bans Breathing Last Gasps*]. The Iowa Electronic Funds Transfer Act restricts out-of-state banks from operating ATMs within Iowa. *See* Iowa Code § 527.4(1)-(4) (1991).

245. *See Surcharge Bans Breathing Last Gasps*, *supra* note 244.

246. *See id*. *See also* Comptroller of the Currency Amicus Curiae Brief in Support of Bank One, *reprinted in* HANDBOOK, *supra* note 19, at 314.

247. *See Surcharge Bans Breathing Last Gasps*, *supra* note 244.

248. *See* Bank One v. Guttau, 190 F.3d 844, 851 (8th Cir. 1999).

249. *See* Lisa Fickenscher, *ATM Surcharge Battle Headed for High Court?*, AM. BANKER, Nov. 19, 1999, at 1, 15.

issues of federal preemption, courts customarily give great discretion to the OCC's opinion regarding the rights of nationally chartered banks under the National Banking Act; experts predict that it will be no different in the case of ATM surcharges.[250] On February 2, 2000, Iowa Attorney General Tom Miller and Iowa Banking Superintendent Holmes Foster appealed the Eighth Circuit's ruling to the Supreme Court.[251] Iowa's law banning surcharges will remain in effect until the Supreme Court decides whether to hear the appeal.

VI
State Versus Federal Legislation

Assuming, arguendo, that legislation in the arena of ATM surcharging is warranted, the question remains as to whether federal, state, or local legislation is preferable. Proposed federal legislation has not yet been enacted,[252] and state legislation has met a similar fate.[253] It has only been at the local and municipal levels that surcharge prohibitions have been remotely successful.[254] However, these municipalities are already facing significant legal challenges to their surcharge bans.[255]

Faced with pending (and previously failed) legislation at the federal level and unanswered questions at the state level, some municipal officials took matters into their own hands and enacted city ordinances prohibiting surcharges.[256] Challenges to the San Francisco and Santa Monica ordinances demonstrate that these laws are far from ideal. In response to the Santa Monica ordinance, Bank of America, Wells Fargo, and the California Bankers Association filed a lawsuit in federal district court challenging the ATM surcharge bans.[257] The plaintiffs emphasized that "federal law gives [federal] bank regulators sole authority over the fee practices of nationally chartered banks."[258] City

250. *See id*. at 15 (quoting former OCC attorney, "Unless it's way outside of what would be a reasonable interpretation of the law, the courts are not likely to overturn it."). *See also* Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843-44 (1983) (giving deference to agency interpretation of statutes unless they are "arbitrary, capricious, or manifestly contrary to the statute.").

251. *See* Dean Anason, *Iowa Takes Battle Over ATM Fees to High Court*, Am. Banker, Feb. 4, 2000, at 1.

252. *See supra* notes 116-33 and accompanying text.

253. *See supra* notes 134-61 and accompanying text.

254. *See supra* notes 162-68 and accompanying text.

255. *See supra* notes 169-71 and accompanying text.

256. For a discussion of the local bans enacted, see *supra* notes 162-171 and accompanying text.

257. *See* Zuckerman, *supra* note 168, at A1.

258. *Id*.

officials countered that the Electronic Funds Transfer Act grants states and localities the right to enact consumer protections to safeguard their residents when federal law is weak.[259]

Siding with the banks, district court Judge Vaughn Walker issued a temporary restraining order blocking San Francisco's initiative and ordering authorities in Santa Monica not to enforce a similar ordinance.[260] While agreeing that the cities would most likely be able to regulate ATM lighting, signage, and design, Judge Walker asserted "that's a far cry from permitting price regulation—or, in this case, price prohibition."[261] Judge Walker, did, however, make one concession to San Francisco and Santa Monica, requiring the banks to keep records of surcharges, thereby facilitating refund of the money to consumers if the cities should prevail on the merits.[262] On March 31, 2000, a three-judge panel of the Ninth Circuit Court of Appeals ruled that Walker did not abuse his discretion in ordering a preliminary injunction against the surcharge bans in San Francisco and Santa Monica. The judges opted not to rule on the case as a whole and referred it back to Judge Walker's court for a full trial.[263]

Given this impasse at the state and local level, it is apparent that if legislators are successful in passing anti-surcharge legislation it should be limited to federal law. Leaving the decision to the states, as some proponents argue,[264] could result in a system lacking in uniformity, thus leading to confusion and a decrease in consumer convenience. For example, a bank that owns and operates ATMs in more than one state may be able to surcharge in one state but not another. As a result, ATMs might be more available to consumers in one state than another. The confusion would be compounded if the decision was left to individual cities. Practical considerations like these weigh in favor of federal legislation. At the very least, federal legislation would offer uniformity of service. As Judge Walker stated, "It doesn't

259. *See* Fickenscher, *supra* note 249, at 1.

260. *See* Zuckerman, *supra* note 168, at A14 ("Walker's order only covers the authority of San Francisco and Santa Monica officials to enforce the bans and does not actually nullify the laws themselves.").

261. Fickenscher, *supra* note 249, at 15.

262. *See* Zuckerman, *supra* note 168, at A14.

263. *See* Bank of America v. City and County of San Francisco, No. 99-17590 (9th Cir. 2000).

264. *See Analysis of the Impact of ATM Double-Charges on Consumers and Competition: Hearing Before the Senate Comm. on Banking, Hous., and Urban Aff.*, 105th Cong. 5-6 (1997) (opening statement of Sen. Richard Shelby (R-Ala.)) (arguing that federal legislation would set dangerous precedent of federal government price setting at local level).

make any sense to have a system where there are different fees all over the country."[265]

Conclusion

In 1969, the advent of the automated teller machine brought increased convenience to all consumers. Since that time, the number of ATMs, their capabilities, and the services they provide have increased. These accomplishments have been applauded by the consumer, as long as the services are free. The populist notion that banks should provide services at no charge, however, ignores both the costs associated with ATMs and the role of financial institutions as profit-maximizing corporations. Inviting the federal, state, or local government to interfere with market forces by prohibiting surcharging is an invalid government intrusion into business practice. The result will be decreased ATM availability and decreased convenience—or perhaps the flashing message, "this ATM provides cash only to the bank's accountholders" the next time a consumer attempts to withdraw money.

265. Warren, *supra* note 161, at 1.