

CASENOTES

The Constitutionality of Regional Banking Laws: *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*¹ — The banking industry is undergoing major transformation as states pass statutes lifting the traditional barriers to interstate banking. Since 1982, many states have enacted legislation allowing out-of-state bank holding companies to acquire their banks.² The federal Bank Holding Company Act of 1956 (BHCA) regulates the acquisition of banks by bank holding companies.³ The BHCA requires a bank or bank holding company to obtain approval from the Board of Governors of the Federal Reserve System (Federal Reserve Board) before acquiring a bank or substantially all of the assets of a bank.⁴ The Douglas Amendment, section 3(d) of the BHCA, prohibits the Federal Reserve Board from approving any acquisition of a bank located in one state by a bank or bank holding company in another state unless "the acquisition . . . is specifically authorized by the statute laws of the state in which such bank [the one to be acquired] is located, by language to that effect and not merely by implication."⁵

¹ 105 S. Ct. 2545 (1985).

² See *infra* notes 70–84 and accompanying text for a discussion of state statutes permitting interstate banking. See *infra* note 3 for a definition of "bank holding company." See *infra* note 3 for a definition of "bank."

³ Bank Holding Company Act, 12 U.S.C. §§ 1841–50 (1982). The BHCA defines a "bank" as an "institution . . . which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." *Id.* § 1841(c). A "bank holding company" is defined by the BHCA as a company that controls any bank or bank holding company. *Id.* § 1841(a)(1).

⁴ *Id.* § 1842(a). The BHCA provides:

It shall be unlawful, except with prior approval of the Board, (1) for any action to be taken that causes any company to become a bank holding company; (2) for any action to be taken that causes a bank to become a subsidiary of a bank holding company; (3) for any bank holding company to acquire direct or indirect ownership or control of . . . any bank; (4) for any bank holding company or subsidiary thereof other than a bank, to acquire all or substantially all of the assets of a bank; or (5) for any bank holding company to merge or consolidate with any other bank holding company.

Id.

The Federal Reserve Act of 1913 established the Federal Reserve System. 12 U.S.C. §§ 221–530 (1982). Since 1914, national banks have been required and state banks have been permitted to become members of the Federal Reserve System. *Id.* §§ 282, 321. See *infra* note 55 and accompanying text. Banks that are members of the Federal Reserve System (member banks) are subject to certain requirements, such as the maintenance of reserves against a percentage of demand and time deposits, and qualify for certain benefits, such as the Federal Reserve System's check clearing system. Ginsburg, *Interstate Banking*, 9 HOFSTRA L. REV. 1137, 1151 (1981).

The Board of Governors of the Federal Reserve System is composed of seven members, appointed by the President for terms of fourteen years. 12 U.S.C. § 241 (1982). The Board has the authority to supervise member banks, control the money supply, and regulate bank holding companies. Ginsburg, *supra*, at 1151, 1157. See also Federal Reserve Act, 12 U.S.C. § 248 (1982); Bank Holding Company Act, 12 U.S.C. §§ 1841–50.

⁵ 12 U.S.C. § 1842(d). The Douglas Amendment was added to the BHCA on the Senate floor. See generally 102 CONG. REC. 6750–58, 6854–62 (1956). Senator Douglas of Illinois proposed the amendment. See *id.* The Douglas Amendment states:

[N]o application . . . shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank

At the time Congress passed the BHCA, no state had enacted the requisite authorizing statute.⁶ Therefore, the Douglas Amendment's initial effect was to ban all interstate bank acquisitions. In 1982, however, Massachusetts passed a statute lifting this ban on interstate bank acquisitions on a regional basis.⁷ The Massachusetts statute allows out-of-state bank holding companies based in New England to establish or acquire Massachusetts banks provided the acquiring company's home state gives equal acquisition privileges to Massachusetts bank holding companies.⁸ Connecticut adopted a similar regional banking statute in 1983.⁹ The effect of

located outside the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966, or the date on which such company became a bank holding company, whichever is later, unless the acquisition . . . is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication.

12 U.S.C. § 1842(d).

⁶ *Northeast Bancorp, Inc. v. Board of Governors of the Fed. Reserve Sys.*, 105 S. Ct. 2545, 2548 (1985). Beginning in 1972, states passed statutes permitting interstate bank acquisitions in limited circumstances. See *infra* notes 69-84 and accompanying text.

⁷ *Northeast Bancorp.*, 105 S. Ct. at 2548; MASS. GEN. LAWS ANN. ch. 167A, § 2 (West 1984). The Massachusetts statute provides in part:

[A]n out-of-state bank holding company . . . may establish or acquire direct or indirect ownership or control of more than five per cent of the voting stock of one or more banking institutions or bank holding companies; provided that the laws of the state in which operations of the subsidiary banks of such out-of-state bank holding company are principally conducted expressly authorized, under conditions no more restrictive than those imposed by the laws of the commonwealth as determined by the commissioner, the establishment or the acquisition of direct or indirect ownership or control of more than five per cent of the voting stock of banks, or companies controlling one or more banks in that state, by bank holding companies whose banking institutions principally conduct their operations in the commonwealth For the purposes of this section, the term "out-of-state bank holding company" . . . shall include only those companies which have their principal places of business in one of the states of Connecticut, Maine, New Hampshire, Rhode Island or Vermont and which are not directly or indirectly controlled, within the meaning set forth in said Bank Holding Company Act, by another corporation which has its principal place of business in a state other than the commonwealth or one of the states referred to above.

Id.

⁸ *Id.* The Massachusetts statute has what is referred to as a reciprocal privileges clause. See *id.* New England bank holding companies include those located in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. See *id.*

⁹ CONN. GEN. STAT. § 36-552 to 36-557 (1985). The Connecticut statute provides in part: Any New England bank holding company may, with the approval of the commissioner, establish or acquire and retain direct or indirect ownership or control of all or part of the voting stock of any Connecticut bank, Connecticut savings bank, Connecticut savings and loan association or Connecticut bank holding company, if the laws of the state in which the operations of the subsidiary banks of such New England bank holding company are principally conducted, within the meaning of 12 U.S.C. Section 1842(d), expressly authorize, under conditions no more restrictive than those imposed by the laws of Connecticut as determined by the commissioner, the establishment or acquisition and retention of direct or indirect ownership or control of all or part of the voting stock of banks, savings banks, savings and loan associations or bank holding companies having their principal places of business in such state by Connecticut bank holding companies.

Id. § 36-553 (1985). The Connecticut statute further restricts the definition of "New England bank holding companies" to exclude bank holding companies directly or indirectly controlled by bank

these statutes and others like them has been the formation of interstate banking regions.¹⁰

These banking confederations typically exclude the large money-center banks¹¹ and some of these banks have challenged the constitutionality of state regional banking laws.¹² Because these new statutes discriminate against out-of-region holding companies and arguably conflict with the Douglas Amendment, they raise substantial equal protection and supremacy clause issues. The supremacy clause¹³ of the Constitution requires consistency between state regional banking statutes and federal banking legislation.¹⁴ Opponents of regional banking laws argue that the Douglas Amendment did not contemplate state banking legislation that is regional in nature, and therefore, the state statutes are invalid under the supremacy clause or the commerce clause.¹⁵ Furthermore, the equal protection clause¹⁶ of the fourteenth amendment of the Constitution prohibits states from drawing statutory classifications that are not rationally related to furthering a legitimate state purpose.¹⁷ Because regional banking statutes classify out-of-region bank

holding companies outside of New England. *Id.* 36-552(j)(3) (1985). This provision eliminates the possibility of a non-New England bank holding company "leapfrogging" into the Connecticut market through a New England state that may enact an interstate banking statute without regional restrictions. *Appendix to the Order Approving the Application of Bank of New England Corporation, Boston, Massachusetts, to Merge with CBT Corporation, Hartford, Connecticut*, 70 Fed. Res. Bull. 379, 379 n.1 (1984) [hereinafter *Appendix*]. See *infra* note 30.

¹⁰ See *infra* notes 77-84 and accompanying text for a discussion of the development of regional banking zones.

¹¹ The money-center banks are those located in New York, Illinois, California and Texas. Note, *The Supreme Court — Leading Cases*, 99 HARV. L. REV. 120, 283 n.3 (1985). See also *Northeast Bancorp*, 105 S. Ct. at 2549.

¹² Citicorp has been one of the most active challengers to the regional banking laws. See *Northeast Bancorp*, 105 S. Ct. at 2549. See also *Amicus Curiae Briefs of Bank of New York and Chase Manhattan Bank, Northeast Bancorp v. Board of Governors of the Fed. Reserve Sys.*, 105 S. Ct. 2545 (1985).

¹³ The supremacy clause of the Constitution provides: "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

¹⁴ Under the supremacy clause, enforcement of any state law requires that it not be in conflict with federal law. *McDermott v. Wisconsin*, 228 U.S. 115, 132 (1913) (where there is a direct conflict, federal regulation supersedes state regulation); *Savage v. Jones*, 225 U.S. 501, 533 (1912) (dictum) (state legislation must give way to federal legislation where a valid "act of Congress fairly interpreted is in actual conflict with the law of the State"). See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 6-24 (1978). See also *infra* note 177 and accompanying text.

¹⁵ Golembe & Kumin, *Regional Interstate Banking Compacts: Ill-Conceived and Unconstitutional Anomalies*, 18 LOY. L.A.L. REV. 993 (1985); Note, *supra* note 11 at 283; Note, *Regional Banking Laws: An Analysis of Constitutionality Under the Commerce Clause*, 60 NOTRE DAME L. REV. 548 (1984) [hereinafter Note, *Regional Banking Laws*]; Note, *The Constitutionality of State Statutes Governing Interstate Acquisitions by Bank Holding Companies: Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, 59 ST. JOHN'S L. REV. 380 (1985) [hereinafter Note, *State Statutes*].

¹⁶ The equal protection clause provides that no state may "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

¹⁷ Legislation that does not classify on the basis of a suspect classification or infringe on a fundamental right is subject to the rational basis standard of review. *Vance v. Bradley*, 440 U.S. 93, 97 (1979). This standard requires that state legislation be "rationally related to furthering a legitimate state interest." *Id.* An illegitimate purpose is sufficient to invalidate a state statute. *Zobel v. Williams*, 457 U.S. 55, 63, 65 (1982). In *Zobel*, the Court used the rational basis test to determine the constitutionality of an Alaska statute which provided for payments of dividends to citizens according to the length of their residence in the state. *Id.* at 58-60. The Court held the statute

holding companies according to their home state and exclude nonregional holding companies to promote the economic well-being of local, regional banks, equal protection problems are inherent.¹⁸ In *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, the Supreme Court examined the effects of the supremacy and the equal protection clauses on regional banking laws.¹⁹

*Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*²⁰ arose out of three applications to the Federal Reserve Board for approval of interstate bank acquisitions.²¹ Bank of New England Corporation, a Massachusetts bank holding company, applied for approval of its merger with CBT Corporation, a Connecticut bank holding company.²² Next, Hartford National Corporation applied for approval of its acquisition of Arltru Bank Corporation, a Massachusetts bank holding company.²³ Lastly, Bank of Boston Corporation of Massachusetts sought approval of its proposed acquisition of Colonial Bancorp, Inc., a Connecticut bank holding company.²⁴

The Federal Reserve Board invited public comments on the three proposed interstate mergers.²⁵ Three banking institutions — Northeast Bancorp, Inc., Union Trust Company, and Citicorp — challenged the proposed interstate mergers,²⁶ claiming that

unconstitutional under the rational basis test on the grounds that its purpose of rewarding long-term residents for past contributions was "not a legitimate state purpose." *Id.* at 63.

¹⁸ See *Metropolitan Life Insurance Co. v. Ward*, 105 S. Ct. 1676 (1985). In *Metropolitan Life*, the Court held that promoting domestic business and encouraging capital investment in state assets were not legitimate purposes under the equal protection clause. *Id.* at 1684.

¹⁹ 105 S. Ct. 2545, 2548 (1985). The Supreme Court in *Northeast Bancorp* did not mention the supremacy clause, but it addressed a supremacy clause issue in analyzing whether the state statutes are consistent with the Douglas Amendment, which is a federal statute. *Id.* at 2550-53.

²⁰ 105 S. Ct. 2545 (1985).

²¹ *Id.* at 2549. The Bank Holding Company Act requires application for Federal Reserve Board approval. 12 U.S.C. § 1842(a). See *supra* note 4.

²² Bank of New England Corp., 70 Fed. Res. Bull. 374, 374 (1984). See *Northeast Bancorp v. Board of Governors*, 740 F.2d 203, 205 (2d Cir. 1984).

²³ Hartford Nat'l Corp., 70 Fed. Res. Bull. 353, 353 (1984). See *Northeast Bancorp*, 740 F.2d at 204. Arltru Bank Corporation owns the Arlington Trust Company, a bank located in Lawrence, Massachusetts. *Hartford Nat'l*, 70 Fed. Res. Bull. at 353.

²⁴ Bank of Boston Corp., 70 Fed. Res. Bull. 524, 524 (1984). See *Northeast Bancorp*, 740 F.2d at 204.

²⁵ *Northeast Bancorp*, 740 F.2d at 205-06. The Board must send notice of applications it receives to the Federal Register for publication. 12 C.F.R. § 225.14(b)(2) (1985). The Federal Register notice invites comment on the application for a period of no more than 30 days. *Id.* See Application Notice, 49 Fed. Reg. 6012 (1984) (notice of Bank of Boston application); Application Notice, 48 Fed. Reg. 53,172 (1983) (notice of Hartford National Corp. application); Application Notice, 48 Fed. Reg. 41,524 (1983) (notice of Bank of New England application).

²⁶ See Appendix, 70 Fed. Res. Bull. at 379; *Northeast Bancorp*, 105 S. Ct. at 2549. Under the Bank Holding Company Act, 12 U.S.C. § 1850,

a party who would become a competitor of the applicant or subsidiary thereof by virtue of the . . . acquisition . . . shall have the right to be a party in interest in the proceeding and, in the event of an adverse order of the Board, shall have the right as an aggrieved party to obtain judicial review thereof

Northeast Bancorp, Inc. and Union Trust Company both challenged Bank of New England's proposed acquisition of CBT Corp. *Northeast Bancorp*, 105 S. Ct. at 2549. Northeast Bancorp, Inc. owns Union Trust Company, a Connecticut bank that competes directly with banks owned by CBT Corp., Hartford National Corp., and Colonial. *Id.* The Federal Reserve Board held that Northeast Bancorp, Inc., a Connecticut bank holding company, would clearly become a competitor to the Bank of New England (based in Massachusetts) upon consummation of its acquisition of CBT Corp.

the Massachusetts and Connecticut regional banking legislation was discriminatory and unconstitutional under the commerce,²⁷ equal protection,²⁸ and compact clauses²⁹ of the United States Constitution. Nevertheless, the Federal Reserve Board approved all three of the proposed interstate bank acquisitions.³⁰ The Board determined that the acquisitions came within the Douglas Amendment because the Massachusetts and Connecticut interstate banking statutes specifically authorized them.³¹ The Board found that Congress intended to give the states discretion to lift partially the Douglas Amendment's prohibition on interstate bank acquisitions.³² According to the Board, "while the issue was not free from doubt," there was no "clear and unequivocal" basis for finding the regional banking laws unconstitutional.³³

The three banking institution challengers petitioned the United States Court of Appeals for the Second Circuit for review of the Board's orders approving the Bank of

(a Connecticut bank). *Bank of New England*, 70 Fed. Res. Bull. at 376 n.6. See 12 U.S.C. § 1850 (1982). In addition, Bank of New York agreed to acquire Northeast Bancorp if Connecticut or the United States enacts the necessary enabling legislation. See *Northeast Bancorp*, 105 S. Ct. at 2549. See also *Bank of New York Co., Inc.*, 70 Fed. Res. Bull. 527 (1984) (Board denied Bank of New York's application for approval of its proposed acquisition of Northeast Bancorp of Connecticut).

Northeast Bancorp previously had tried to challenge the Connecticut regional banking statute, but the Connecticut federal district court dismissed the action on the grounds that Northeast Bancorp lacked standing. *Northeast Bancorp, Inc. v. Woolf*, 576 F. Supp. 1225, 1234 (D. Conn. 1983) (court held that plaintiffs failed to allege concrete injury traceable to the challenged statute and redressable by a favorable decision of the court), *aff'd mem.*, 742 F.2d 1439 (2d Cir. 1984).

Citicorp, a New York bank holding company, challenged all three proposed acquisitions. *Northeast Bancorp*, 105 S. Ct. at 2549. As a corporation offering financial services to consumers and businesses nationally through its bank and nonbank subsidiaries, Citicorp perceived the statutes of Connecticut and Massachusetts as an obstruction to its own acquisition objectives in New England. See *id.* The Federal Reserve Board held that Citicorp was a party in interest because Citicorp competes on a limited basis in Connecticut and Massachusetts and, except for the restrictions in Massachusetts's and Connecticut's regional banking laws, it has the potential to become a more substantial competitor. *Bank of New England*, 70 Fed. Res. Bull. at 376 n.6.

²⁷ See *infra* note 36 for the text of the commerce clause. Those challenging the state regional banking legislation contended that the statutes burdened commerce outside the region and that the Douglas Amendment did not authorize specifically such a burden. See *Northeast Bancorp*, 105 S. Ct. at 2553-54.

²⁸ See *supra* note 16 for the text of the equal protection clause. The banks, such as Citicorp, claimed that the state statutes violated the equal protection clause by excluding bank holding companies from some states and admitting those from other states. See *Northeast Bancorp*, 105 S. Ct. at 2555.

²⁹ See *infra* note 47 for the text of the compact clause. The challengers of the Massachusetts and Connecticut statutes claimed that the statutes constituted a compact to exclude non-New England banks in violation of the compact clause, which prohibits certain agreements between states. See *Northeast Bancorp*, 105 S. Ct. at 2554.

³⁰ *Bank of Boston*, 70 Fed. Res. Bull. at 525-26; *Bank of New England*, 70 Fed. Res. Bull. at 376-77; *Hartford Nat'l*, 70 Fed. Res. Bull. at 354. For the Board's constitutional analysis with respect to all three of these applications, see *Appendix*, 70 Fed. Res. Bull. at 379-86.

³¹ *Bank of Boston*, 70 Fed. Res. Bull. at 525; *Bank of New England*, 70 Fed. Res. Bull. at 375; *Hartford Nat'l*, 70 Fed. Res. Bull. at 354.

³² *Appendix*, 70 Fed. Res. Bull. at 386. The Board said that "the Douglas Amendment should be read as a renunciation of federal interest in regulating the interstate acquisition of banks by bank holding companies." *Id.* at 380.

³³ *Bank of New England*, 70 Fed. Res. Bull. at 377. The Board maintained that it would not hold a state law unconstitutional unless it found clear and unequivocal evidence of unconstitutionality. *Id.*

New England-CBT and Hartford National Corporation-Arltru acquisitions.³⁴ The Second Circuit consolidated the three petitions for review and stayed the acquisitions pending review.³⁵

The Second Circuit found no violation of the commerce clause,³⁶ holding that the Douglas Amendment authorized Massachusetts and Connecticut to enact statutes permitting interstate bank acquisitions on a regional basis.³⁷ The court reasoned that without these state laws, no interstate bank acquisitions could occur, so the statutes actually promoted interstate commerce rather than restricting it.³⁸ In considering the application

³⁴ *Northeast Bancorp.*, 740 F.2d at 206. Under section 9 of the Bank Holding Company Act, any party aggrieved by an order of the Board may petition for a review of the order in the United States Court of Appeals, and the court shall have jurisdiction to affirm, set aside, or modify the Board's order. 12 U.S.C. § 1848 (1982).

³⁵ *Northeast Bancorp.*, 740 F.2d at 206. Initially, the court of appeals consolidated the petitions for review of the orders of the Board approving the Bank of New England-CBT and Hartford National Corporation-Arltru acquisitions. *Id.* The court then permitted Bank of New England, CBT, Hartford National Corporation, the State of Connecticut, and the Commonwealth of Massachusetts to intervene. *Id.* At the same time, the court granted Bank of Boston Corporation's motion to consolidate the petition for review filed in its action with the petitions already before the court. *Id.*

³⁶ 740 F.2d at 208. The commerce clause grants Congress the power "[t]o regulate Commerce . . . among the several states . . ." U.S. CONST. art. I, § 8, cl. 3. The commerce clause has a dual purpose. It is both an affirmative grant of power to Congress to regulate interstate commerce and a limitation on state power to burden such commerce. *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 652 (1981); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35-36 (1980); *Great Atl. & Pac. Tea Co. v. Cottrel*, 424 U.S. 366, 370-71 (1976).

When a party challenges a state statute, claiming that it interferes with Congress's authority to regulate interstate commerce or burdens such commerce, and Congress has not authorized the state to regulate such commerce, the Court weighs the state interests furthered by the statute against the burden on interstate commerce. *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). In *Pike v. Bruce Church*, the Court summarized its commerce clause balancing test:

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id.

When the state legislation evinces economic protectionism, the Court has applied strict scrutiny. See *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) (facial discrimination invokes the strictest scrutiny). The Court has held that state legislation that is discriminatory on its face and effects simple economic protectionism gives rise to a presumption of invalidity. *Lewis*, 447 U.S. at 36 (citing *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

A clear and affirmative authorization from Congress will exempt the states from commerce clause limitations. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91-92 (1984). Where Congress has not acted, commerce clause restrictions described above remain intact. Where Congress has been silent, the commerce clause is often referred to as the dormant or negative commerce clause. See *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 418-21, 433 (1946).

³⁷ *Northeast Bancorp.*, 740 F.2d at 208. The court of appeals noted that congressional authorization which removes state laws from commerce clause scrutiny "must be clear." *Id.* (citing *South-Central Timber*, 467 U.S. at 91; *White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204, 213 (1983); *Western & Southern*, 451 U.S. at 653-54).

³⁸ *Northeast Bancorp.*, 740 F.2d at 208. In addition to finding no violation of the commerce clause, the appellate court found no violation of the compact clause. *Id.* at 208-09. See *infra* note 47.

of the equal protection clause to the Massachusetts and Connecticut regional banking statutes, the appellate court maintained that the state legislation must be rationally related to the achievement of legitimate state purposes.³⁹ These regional banking laws, the court found, fostered the banking industry in New England and protected Massachusetts and Connecticut banks from competition with larger banks in New York and Chicago.⁴⁰ The court concluded that because banking is of "profound local concern,"⁴¹ the state statutes furthered legitimate purposes and did not violate the equal protection clause.⁴²

The challengers petitioned the United States Supreme Court for certiorari. They again claimed that the Douglas Amendment did not authorize the regional bank acquisitions and that the state statutes permitting interstate bank acquisitions only on a regional basis were unconstitutional.⁴³ The Supreme Court granted certiorari.⁴⁴

In *Northeast Bancorp.*, the United States Supreme Court held that the Connecticut and Massachusetts statutes are consistent with federal law embodied in the Douglas Amendment⁴⁵ and do not violate the commerce,⁴⁶ compact,⁴⁷ or equal protection⁴⁸ clauses of the United States Constitution.⁴⁹ The Court found that, in adopting the Douglas Amendment, Congress intended to allow states to lift partially the ban on interstate banking.⁵⁰ The Court therefore concluded that the state regional banking statutes are consistent with federal law.⁵¹ Because Congress authorized these state statutes through the Douglas Amendment, the Court explained, the statutes are invulnerable to consti-

Although the court found evidence of an agreement between Massachusetts and Connecticut, it noted that an agreement only violates the compact clause if it interferes with the supremacy of the United States. *Id.* at 209. The appellate court concluded that regional banking statutes would not violate the compact clause because they would not increase the political power of New England or infringe upon federal supremacy. *Id.* at 209.

³⁹ *Id.* Under the equal protection clause, economic legislation must bear a rational relationship to a legitimate state purpose to survive equal protection scrutiny. See *supra* note 17 and accompanying text.

⁴⁰ *Northeast Bancorp.*, 740 F.2d at 209. The court of appeals acknowledged that each of the four largest New York bank holding companies has greater assets than those of all the New England bank holding companies combined. *Id.* at 206 n.16.

⁴¹ *Id.* at 209 (quoting *Lewis*, 447 U.S. at 38).

⁴² *Id.* at 209-10.

⁴³ *Northeast Bancorp.*, 105 S. Ct. at 2548.

⁴⁴ *Northeast Bancorp.*, 105 S. Ct. 776 (1985).

⁴⁵ *Northeast Bancorp.*, 105 S. Ct. at 2553. For text of Douglas Amendment, see *supra* note 5. In reviewing the issue of consistency between the federal and state statutes, the *Northeast Bancorp.* Court was deciding a supremacy clause question, although the Court did not specifically identify it as such.

⁴⁶ See *supra* note 36.

⁴⁷ The compact clause provides, "[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . ." U.S. CONST. art. I, § 10, cl. 3. An agreement between states violates the compact clause if it is "directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." *United States Steel Corp. v. Multistate Tax Comm'n.*, 434 U.S. 452, 468 (1978) (quoting *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893)). In *Northeast Bancorp.*, the Court held that even if a compact exists, it does not violate the compact clause because it does not infringe upon federal supremacy. 105 S. Ct. at 2555. This casenote does not include an analysis of the compact clause issues in the *Northeast Bancorp.* case.

⁴⁸ See *supra* notes 16-17 and accompanying text.

⁴⁹ *Northeast Bancorp.*, 105 S. Ct. at 2556.

⁵⁰ *Id.* at 2553.

⁵¹ *Id.*

tutional attack under the commerce clause.⁵² Finally, the Court held that the regional banking laws are rationally related to legitimate state purposes and therefore do not violate the equal protection clause.⁵³

In *Northeast Bancorp.*, the Supreme Court failed to recognize that protectionism effected by discriminatory legislation is never a legitimate state purpose. The Court therefore inappropriately upheld discriminatory state statutes granting acquisition privileges to a specified region's banks while excluding all out-of-region banks. The equal protection clause should protect out-of-state entities from state parochialism. While Congress could devise a regional banking system free of the dangers of state parochialism, a state statute permitting interstate banking only within a preferred region and excluding disfavored states raises significant equal protection issues. Because the Massachusetts and Connecticut statutes were designed to foster the growth of their local banks and to insulate them from competition from large money-center banks, these statutes are invalid under the equal protection clause. Because Congress historically has deferred to states with respect to the geographic expansion of banking, it is likely that Congress intended to exempt the states from commerce clause limitations when it enacted the Douglas Amendment. Congressional authorization, however, does not remove state regional banking laws from equal protection scrutiny. For this type of banking legislation to be valid under the Constitution, Congress, not the states, must enact a regional banking system.

This casenote begins by tracing the background of the statutory regulation of interstate banking. Section II discusses recent court decisions that are relevant to the constitutionality of regional banking laws. Section III presents the Supreme Court's opinion in *Northeast Bancorp.* Section IV then analyzes the Massachusetts and Connecticut regional banking laws in light of federal statutory law and the equal protection clause. This section concludes that although these regional banking laws are consistent with federal law, they are unconstitutional under the equal protection clause. The history of banking together with the language and legislative history of the Douglas Amendment indicate that Congress intended to permit the states to enact regional banking laws. These state statutes, however, violate the equal protection clause. By upholding regional banking laws as enacted by individual states, the Court's decision will lead to haphazard and inconsistent development of regional banking zones. Congress could create a regional banking system, but the states do not have that power. Until Congress creates such a regional system, the Court should find state laws authorizing interstate bank acquisitions by banks from a select group of states in violation of the equal protection clause.

I. STATUTORY BANKING REGULATION

A dual system of federal and state legislation regulates the banking industry in the United States.⁵⁴ Banks may be chartered by federal law (a national bank) or by state law

⁵² *Id.*

⁵³ *Id.* at 2556. Petitioners abandoned the equal protection claim in the petition for certiorari, but after the *Metropolitan Life* decision, 105 S. Ct. 1676 (1985), discussed *infra* notes 118-22, petitioners filed a supplemental brief urging the Court to consider the equal protection issue. *Northeast Bancorp.*, 105 S. Ct. at 2555. The Court agreed to do so because the Federal Reserve Board and the court of appeals had reviewed the issue. *Id.*

⁵⁴ See generally W.A. LOVETT, *BANKING AND FINANCIAL INSTITUTIONS IN A NUTSHELL* (1984);

(a state bank).⁵⁵ At the heart of federal banking regulation is the Bank Holding Company Act (BHCA) of 1956, which brings corporations owning banks under federal regulation.⁵⁶

When Congress first proposed the BHCA in 1955, the McFadden Act already prohibited banks from engaging in interstate branch banking.⁵⁷ The McFadden Act, however, did not regulate holding companies and thus, banks used holding companies as a device to provide interstate branch banking.⁵⁸ Congress designed the BHCA to close this loophole and bring bank holding companies under federal regulation.⁵⁹ The two primary purposes of the BHCA were to prevent undue concentration in commercial banking⁶⁰ and to separate banking from nonbanking activities.⁶¹

Ginsburg, *supra* note 4; Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 STAN. L. REV. 1 (1977).

⁵⁵ Ginsburg, *supra* note 4, at 1139. A bank must have a charter expressly authorizing it to engage in the business of banking. *Id.* The chartering entity primarily regulates the bank, but banks may freely convert from state charter to national charter and vice versa. Scott, *supra* note 54, at 8-9. Originally, states served as the sole chartering authority for banks. See W.A. LOVETT, *supra* note 54, at 10; Scott, *supra* note 54, at 5 n.22. Congress created a national bank system in 1863. W.A. LOVETT, *supra* note 54, at 11; Scott, *supra* note 54, at 5 n.22.

⁵⁶ 12 U.S.C. §§ 1841-50 (1982). See *supra* note 3 for the definition of a bank holding company. See also Ginsburg, *supra* note 4, at 1157-60.

⁵⁷ 12 U.S.C. § 36(c) (1982). A bank "branches" when it establishes an office "physically separated from its main office, with common services and functions, and corporately part of the bank." BLACK'S LAW DICTIONARY 170 (5th ed. 1979). State laws varied widely in the extent to which they permitted branching. Some states did not permit any branching ("unit bank" states), while others allowed limited branching, such as within the home or contiguous county. See Ginsburg, *supra* note 4, at 1153. The McFadden Act allows national banks to branch to the extent the statute law of the bank's home state authorizes state banks to branch, but only "at any point within the state in which it is situated." 12 U.S.C. § 36(c). See also *Boatmen's Nat'l Bank of St. Louis v. Hughes*, 385 Ill. 431, 436, 53 N.E.2d 403, 405 (1944) (The McFadden Act "expressly prohibits the opening of any branch or additional office in any state other than that of its domicile."). Thus, the state-by-state banking system originated in state law but became embedded in federal law through the McFadden Act and the Douglas Amendment to the BHCA. Ginsburg, *supra* note 4, at 1156.

⁵⁸ 102 CONG. REC. 6858 (1956) (statement of Sen. Douglas); Ginsburg, *supra* note 4, at 1156 (citing G. FISCHER, *BANK HOLDING COMPANIES* 25 (1961)). Banks also used holding companies to circumvent state laws restricting intrastate branching. Ginsburg, *supra* note 4, at 1156. See also W.A. LOVETT, *supra* note 54, at 153.

⁵⁹ H.R. REP. NO. 609, 84th Cong., 1st Sess. 3-4, 11 (1955). See CONG. REC. 6858-61 (1956). The BHCA of 1956, through the Douglas Amendment, prohibited almost entirely interstate "branching" in contravention of state law. See 12 U.S.C. § 1842(d) (1982).

⁶⁰ S. REP. NO. 1095, 84th Cong., 2d Sess. 2, reprinted in 1956 U.S. CODE CONG. & ADMIN. NEWS 2483.

⁶¹ *Id.* Section 3(a) of the BHCA requires Federal Reserve Board approval for transactions such as formation of a bank holding company and merger of bank holding companies. 12 U.S.C. § 1842(a) (1982). See *supra* note 4 for the statutory language of section 3(a). In determining whether to grant approval for a proposed transaction, the Board considers anticompetitive effects, financial and managerial resources, and community needs. 12 U.S.C. § 1842(c) (1982). Section 4 of the Act curtails the acquisition of certain nonbanking enterprises by banks. *Id.* § 1843. Section 7 reserves to the states a continuing role in the regulation of bank holding companies. *Id.* § 1846. Section 7 is sometimes referred to as the savings provision. It provides:

The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies and subsidiaries thereof.

Id.

As the Senate considered the BHCA, Senator Douglas proposed, and the Senate passed, an amendment prohibiting a bank holding company from owning a bank in a state other than that of its principal bank unless the other state by statute allows the ownership.⁶² Although the original House bill contained an absolute prohibition on interstate bank acquisitions, Congress enacted the Douglas Amendment with consent from the House.⁶³ Legislative history suggests that Congress viewed the immediate effect of the Douglas Amendment as a flat ban on interstate banking because no state permitted any interstate bank acquisitions.⁶⁴ In fact, no state passed the requisite enabling legislation until 1972.⁶⁵

Although state legislation allowing interstate bank acquisitions is a recent phenomenon, banks have employed a variety of other means to offer services on an interstate basis.⁶⁶ Technological developments in automation, data processing, electronic flows of information, and electronic funds transfer enable banks to communicate and to service customers over long interstate distances.⁶⁷ Banks use nonbank subsidiaries not subject to state and federal banking legislation to provide limited bank services in interstate markets.⁶⁸ Thus, with the advent of state statutes lifting some of the barriers to full interstate banking, banking institutions were already offering limited financial services on a multistate basis.⁶⁹

⁶² *Id.* § 1842(d). See *supra* note 5 for the text of the Douglas Amendment.

⁶³ H.R. 6227, 84th Cong., 1st Sess. (1955). See Davis, *A Legal Analysis of Reciprocal Interstate Banking*, in *COMMERCIAL BANKING AND INTERSTATE EXPANSION* 147, 148 (1985).

⁶⁴ See 102 CONG. REC. 6861 (1956). Senator Bricker stated: "[I]n effect, [the Douglas Amendment] constitutes an absolute prohibition against future expansion by bank holding companies." *Id.*

⁶⁵ See *infra* note 70 and accompanying text.

⁶⁶ See generally W.A. LOVETT, *supra* note 54, at 151; Frieder, *Legislating for Interstate Bank Expansion: Financial Deregulation and Public Policy*, 9 J. CORP. L. 673, 697-706 (1984); Ginsburg, *The Future of Interstate Banking*, 9 J. CORP. L. 655, 659 (1984).

Frieder describes various methods that banking organizations use to provide financial services on an interstate basis. Frieder, *supra*, at 697-706. Those bank holding companies that expanded interstate before Congress enacted the Douglas Amendment were permitted to continue their existing operations under "grandfather provisions." *Id.* at 697.

⁶⁷ Ginsburg, *supra* note 66, at 655-56. There is some debate as to whether banks experience economies of scale when they expand. See *id.* at 659. Mr. Ginsburg suggests that declining data communication costs and the economies of scale associated with information handling will result in substantial savings for expanding multibillion dollar banks. *Id.* He acknowledges, however, that most empirical studies have found that banks do not experience economies of scale above a relatively small size. *Id.*

⁶⁸ The Bank Holding Company Act defines a bank as an entity that both offers demand deposits and makes commercial loans. 12 U.S.C. § 1841(c) (1982). See *supra* note 3 for text of statute. Therefore, an institution that does not provide both of these services does not qualify as a "bank" and is free to open offices on an interstate basis. These institutions that offer a more limited range of financial services than commercial banks and are not defined as banks are called "nonbank banks" or "nonbanks." Nonbank activity is permissible if it is deemed to be "so closely related to banking or managing or controlling banks as to be a proper incident thereto . . ." BHCA, 12 U.S.C. § 1843(c)(8) (1982). Bank holding companies may engage in various nonbank activities, including mortgage banking, credit-card servicing, operating trust companies, and investment advising. For a current list of approved activities, see 12 C.F.R. § 225.25 (1985). Banks use loan production offices (LPO's) to solicit loans on a nationwide basis. See Ginsburg, *supra* note 66, at 684 n.49.

⁶⁹ In addition to operating nonbank institutions on a nationwide basis, the bank holding companies that had expanded prior to the 1956 BHCA were permitted to maintain the banks they had already acquired. Ginsburg, *supra* note 4, at 1159. The Douglas Amendment "grandfathered" the

The state statutes lifting the Douglas Amendment's prohibition on interstate banking have varied widely. Iowa, the first state to enact interstate banking legislation, in 1972 permitted an out-of-state bank holding company already owning Iowa banks to acquire additional banks within the state.⁷⁰ Alaska,⁷¹ Maine,⁷² and Arizona⁷³ have adopted full-scale interstate banking and permit unlimited entry by out-of-state bank holding companies. New York allows out-of-state bank holding companies to acquire their banks only if the acquiring bank holding company's home state accords reciprocal acquisition privileges to New York bank holding companies.⁷⁴ Other states have allowed out-of-state bank holding companies to establish special-purpose banks⁷⁵ or to acquire "failing banks."⁷⁶

In 1982, Massachusetts became the first state to enact a regional interstate banking law, allowing out-of-state bank holding companies only from the other New England states to acquire Massachusetts banks.⁷⁷ The statute specifically admits only those out-of-state bank holding companies with principal places of business in one of the New England states of Connecticut, Maine, New Hampshire, Rhode Island, or Vermont.⁷⁸ The Massachusetts statute also contains a "reciprocal privileges" provision limiting the purchase of a Massachusetts bank to those bank holding companies based in states which accord equivalent bank acquisition privileges to Massachusetts bank holding companies.⁷⁹ Connecticut passed a statute almost identical to Massachusetts' in 1983.⁸⁰

nineteen multistate bank holding companies in existence in 1956. *Id.* at 1159 n.122 (citing GOLEMBE ASSOCIATES, INC., A STUDY OF INTERSTATE BANKING BY BANK HOLDING COMPANIES 33 (1979)).

⁷⁰ IOWA CODE ANN. § 524.1805 (West Supp. 1985). See *infra* note 87. The BHCA grandfathered the out-of-state bank holding company already owning Iowa banks. See *infra* notes 85-102 and accompanying text.

⁷¹ ALASKA STAT. § 06.05.235(e) (Supp. 1985).

⁷² ME. REV. STAT. ANN. tit. 9-B, § 1013 (Supp. 1985).

⁷³ ARIZ. REV. STAT. ANN. ch. 116, §§ 6-218, 6-321 to 6-327 (Supp. 1985).

⁷⁴ N.Y. BANKING LAW § 143-b (McKinney Supp. 1986). In August, 1986, the states of New York and California came to a tentative agreement which would permit New York and other bank holding companies to enter California beginning in 1991. Kristof, *California Banking Accord*, N.Y. Times, Aug. 23, 1986, at D1, col. 6.

⁷⁵ See, e.g., DEL. CODE ANN. tit. 5, § 803 (1985) (permitting out-of-state bank holding companies to establish consumer credit banks in Delaware that are "operated in a manner and at a location that is not likely to attract customers from the general public in this State . . ."); S.D. CODIFIED LAWS ANN. § 51-16-40 to 51-16-41 (1980); VA. CODE ANN. § 6.1-392 (Supp. 1986) (permitting out-of-state bank holding companies to establish financial service center banks in Virginia).

⁷⁶ WASH. REV. CODE § 30.04.230(4)(b)(i) (Supp. 1986). Other states, such as Iowa, authorized out-of-state bank holding companies already operating in-state banks to acquire others. IOWA CODE ANN. § 524.1805 (West Supp. 1985); FLA. STAT. ANN. § 658.29 (West 1984); ILL. ANN. STAT. ch. 17, § 2510 (Smith-Hurd 1981). The out-of-state bank holding companies already present in the states of Florida, Iowa, and Illinois would have been among those grandfathered by the Douglas Amendment.

⁷⁷ MASS. GEN. LAWS ANN. ch. 167A, § 2 (West 1984). See *supra* note 7 for text of the Massachusetts regional banking statute.

⁷⁸ MASS. GEN. LAWS ANN. ch. 167A, § 2 (West 1984). The statute also contains a provision which prevents a bank holding company from a non-New England state to leapfrog into Massachusetts through Maine, which allows interstate banking without the regional restriction. *Id.*

⁷⁹ *Id.*

⁸⁰ CONN. GEN. STAT. § 36-552 to 36-557 (1985). See *supra* note 9 for the text of the Connecticut regional banking statute. The *Northeast Bancorp* Court considered the constitutionality of both the Massachusetts and Connecticut statutes. 105 S. Ct. at 2553. Rhode Island also passed a regionally restrictive interstate banking law, but its geographic limitation expires on July 1, 1987. R.I. GEN.

The New England states are not the only states to create a regional banking zone. In 1984, Florida, Georgia, North Carolina, and South Carolina passed reciprocal legislation creating a southeastern banking region.⁸¹ Utah also has passed a regional banking law which creates a western region of eleven states.⁸² This western region, however, includes Alaska and Hawaii but excludes California.⁸³ These states have enacted and others are considering enacting some type of interstate banking statute mainly because of the Supreme Court's *Northeast Bancorp* decision upholding the regional banking laws of Massachusetts and Connecticut.⁸⁴

II. CASE LAW

Because regional banking laws are relatively new, courts have decided few cases bearing directly on their constitutionality. Three cases decided prior to *Northeast Bancorp* are instructive because they involved the constitutionality of state statutes restricting the activities of out-of-state companies.⁸⁵ These cases raise significant issues with respect to regional banking laws and their relationship to the federal Bank Holding Company Act.

Laws §§ 19-30-1 to 19-30-2 (Supp. 1985). The remaining New England states — New Hampshire and Vermont — have not enacted any legislation which would allow out-of-state bank holding companies into their states. *Northeast Bancorp*, 105 S. Ct. at 2549.

⁸¹ FLA. STAT. ANN. § 658.295 (West 1984); GA. CODE ANN. §§ 7-1-620 to 7-1-625 (Supp. 1986); N.C. GEN. STAT. § 53-210 to 53-215 (Supp. 1985); S.C. CODE ANN. §§ 34-24-10 to 34-24-100 (Law. Co-op. Supp. 1985); VA. CODE §§ 6.1-398 to 6.1-407. The Florida statute is entitled the "Regional Reciprocal Banking Act of 1984" and authorizes bank holding companies from a southeastern region consisting of twelve states and the District of Columbia to acquire Florida banks and bank holding companies provided the home state of the acquiring bank holding company accords equivalent privileges to Florida bank holding companies. FLA. STAT. ANN. § 658.295 (West 1984). The Florida statute defines its southeastern "region" as Alabama, Arkansas, Florida, Georgia, Louisiana, Maryland, Mississippi, North Carolina, South Carolina, Tennessee, Virginia, West Virginia, and the District of Columbia. The Georgia statute, also a reciprocal regional banking statute, defines "Southern Region states" more narrowly than the Florida statute, including only the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia. GA. CODE ANN. § 7-1-620(10) (Supp. 1985). The North Carolina and South Carolina statutes, also adopting regional reciprocal banking, create a region that is the same as Florida's except that North and South Carolina add Kentucky to the region. N.C. GEN. STAT. § 53-210 (11) (Supp. 1985); S.C. CODE ANN. § 34-24-20(12) (Law. Co-op. Supp. 1985). Kentucky has enacted a statute which permits acquisitions of in-state banks by out-of-state bank holding companies based in states contiguous to Kentucky. KY. REV. STAT. ANN. § 287.900(6)(a) (Supp. 1986). In 1985, Virginia enacted a reciprocal regional banking statute and defined its region to include the same states that North Carolina and South Carolina include in their southeastern region. VA. CODE §§ 6.1-398 to 6.1-407. See also 1985 Ohio Laws § 1101.05 (admits out-of-state bank holding companies from states contiguous to Ohio, Delaware, District of Columbia, Illinois, Maryland, Missouri, New Jersey, Tennessee, Virginia, and Wisconsin; after three years this geographic limitation expires and Ohio will admit banks from any state).

⁸² UTAH CODE ANN. § 7-1-102 (1985). The Utah statute permits acquisitions of Utah banks by out-of-state banks or bank holding companies "only if such depository institution or out-of-state depository institution holding company conducts its operations principally in Alaska, Washington, Oregon, Idaho, Wyoming, Montana, Colorado, New Mexico, Arizona, Nevada or Hawaii . . ." *Id.* § 7-1-102(2)(b).

⁸³ *Id.* § 7-1-102. California tentatively plans to adopt a statute admitting banks from a western region of states on July 1, 1987 and admitting banks from all other states, including New York, on January 1, 1991. Kristof, *supra* note 74, at D1, col. 6.

⁸⁴ *Northeast Bancorp*, 105 S. Ct. at 2545.

⁸⁵ *Iowa Indep. Bankers v. Board of Governors of the Fed. Reserve Sys.*, 511 F.2d 1288, 1292

In *Iowa Independent Bankers v. Board of Governors of the Federal Reserve System*,⁸⁶ the United States Court of Appeals for the District of Columbia Circuit in 1975 considered the validity of an Iowa statute⁸⁷ permitting out-of-state bank holding companies already owning Iowa banks to acquire other in-state banks.⁸⁸ The practical effect of the statute was to allow only one out-of-state bank holding company, Northwest Bancorporation of Minnesota, to acquire Iowa banks.⁸⁹ The association of Iowa Independent Bankers argued that the statute violated the equal protection clause and conflicted with the Douglas Amendment to the BHCA.⁹⁰

The D.C. Circuit found no violation of the equal protection clause.⁹¹ In analyzing the equal protection issue, the court first identified the applicable standard of review as "whether the statute bears a rational relationship to a legitimate state purpose."⁹² From legislative history, the court determined that Iowa wanted to allow all preexisting bank holding companies to compete equally but at the same time, prevent an influx of new out-of-state bank holding companies.⁹³ The *Iowa Bankers* court found that the Iowa statute permitted a type of grandfathering that the Supreme Court has consistently upheld.⁹⁴ The court concluded that the law was rationally related to a legitimate state purpose and therefore constitutional under the equal protection clause.⁹⁵

In addition to finding that the Iowa statute did not violate the equal protection clause, the court of appeals held that the statute did not conflict with the Douglas Amendment to the BHCA.⁹⁶ The court rejected the Iowa Bankers' argument that the Douglas Amendment implicitly prohibits discrimination between out-of-state bank holding companies and requires states either to allow all out-of-state bank holding companies to acquire in-state banks or to prohibit such acquisitions entirely.⁹⁷ The court suggested

(D.C. Cir.), *cert. denied*, 423 U.S. 87 (1975), and *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27 (1980), are the only two cases prior to *Northeast Bancorp* which consider the validity of a state interstate banking statute in light of the Douglas Amendment. *Metropolitan Life Ins. Co. v. Ward*, 105 S. Ct. 1676 (1985), is the most recent in a long line of cases evaluating state tax statutes that discriminate between out-of-state and in-state corporations.

⁸⁶ 511 F.2d 1288 (D.C. Cir. 1975).

⁸⁷ *Id.* at 1292. Iowa passed several statutes in 1972 regulating bank holding companies. The Iowa Independent Bankers challenged the following statute:

Nothing in this division shall be construed to authorize a bank holding company which is with respect to the state of Iowa an "out-of-state bank holding company" . . . to acquire any . . . interest in . . . any bank in this state, unless such bank holding company was on January 1, 1971, registered with the federal reserve board as a bank holding company, and on that date owned at least two banks in this state.

IOWA CODE ANN. § 524.1805 (West Supp. 1985). See *Iowa Bankers*, 511 F.2d at 1292.

⁸⁸ 511 F.2d at 1292.

⁸⁹ *Id.* at 1294.

⁹⁰ *Id.* at 1294, 1296. The D.C. Circuit held that Iowa Independent Bankers, an association of over 400 banks in Iowa, had standing to challenge the constitutionality of the Iowa statute. *Id.* at 1293. The court first held that the plaintiff had standing to sue under the BHCA. *Id.* Then the court found that the Iowa Independent Bankers had the right to assert the rights of those out-of-state bank holding companies allegedly being discriminated against by the Iowa statute. *Id.*

⁹¹ *Id.* at 1294-96.

⁹² *Id.* at 1294.

⁹³ *Id.* at 1294-95.

⁹⁴ *Id.* at 1295.

⁹⁵ See *id.* at 1295-96.

⁹⁶ *Id.* at 1297. This is essentially a supremacy clause issue. See *supra* note 19.

⁹⁷ *Id.*

that this interpretation would conflict with section 7 of the BHCA, which reserves to the states the powers they possessed before the Act.⁹⁸ According to the court, the conflict would arise because prior to the Act, the states were free to regulate in-state bank acquisitions by out-of-state bank holding companies.⁹⁹ The court concluded that the Douglas Amendment intended to grant states the power to control the expansion of bank holding companies across state lines.¹⁰⁰ Therefore, the court found Iowa's regulation consistent with federal banking law.¹⁰¹

While the D.C. Circuit Court's interpretation of Iowa's interstate banking statute is informative, the Iowa statute at issue is very narrowly drawn. The court recognized Iowa's grandfather provision, distinguishing between holding companies already owning Iowa banks and those not owning banks in Iowa, as furthering a legitimate state purpose.¹⁰² It remained an open question, however, whether a statute classifying out-of-state bank holding companies on different grounds, such as their home state, would also meet equal protection standards.

While the *Iowa Bankers* case dealt with an equal protection issue and a statutory construction question, *Lewis v. BT Investment Managers, Inc.* raised a commerce clause issue.¹⁰³ In *Lewis*, the United States Supreme Court in 1980 addressed the validity of a Florida statute prohibiting out-of-state bank holding companies from owning Florida businesses providing investment advisory services.¹⁰⁴ The Court explained that although banking and related financial activities are of profound local concern,¹⁰⁵ they have significant interstate attributes and therefore commerce clause limitations apply to state regulations in these areas.¹⁰⁶ The Court found that the Florida statute was "parochial" because it overtly prohibited out-of-state bank holding companies from competing in the Florida investment advisory services market.¹⁰⁷ The *Lewis* Court stated that it need not decide if local favoritism rendered the Florida statute per se invalid under the commerce clause, however, because the legislation was invalid under the commerce clause balancing test.¹⁰⁸ The Court held that no legitimate state interests justified the burden on interstate commerce.¹⁰⁹

According to the Court, Florida's interests in discouraging economic concentration and in protecting the citizenry from fraud did not justify the heavy burden on out-of-

⁹⁸ *Id.* at 1296. See *supra* note 61.

⁹⁹ 511 F.2d at 1296.

¹⁰⁰ *Id.* at 1297.

¹⁰¹ *Id.* The *Iowa Bankers* case dealt with other issues, including standing, Iowa constitutional issues, and jurisdiction, but none of these issues are relevant to this casenote. See *id.* at 1293-94, 1297-99, 1300-02.

¹⁰² *Id.* at 1295.

¹⁰³ *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27 (1980).

¹⁰⁴ *Id.* at 31. While the Douglas Amendment prohibits bank holding companies from acquiring banks across state lines without an authorizing state statute, it does not prohibit bank holding companies from acquiring out-of-state businesses providing investment advisory services. See *supra* note 68. See also *Lewis*, 447 U.S. at 47.

¹⁰⁵ *Lewis*, 447 U.S. at 38.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 39.

¹⁰⁸ *Id.* at 42. The Court's commerce clause balancing test weighs the burden imposed on interstate commerce by the statute against the legitimate state purposes advanced by the statute. See *supra* note 36.

¹⁰⁹ *Lewis*, 447 U.S. at 43.

state bank holding companies.¹¹⁰ Some intermediate form of regulation other than complete exclusion, the Court reasoned, would have been as effective.¹¹¹ Moreover, the state's interest in maximizing local control over financial institutions did not justify the statute's discrimination.¹¹² The Court held this state interest to be parochial and in conflict with "the general principle that the commerce clause prohibits a state from using its regulatory power to protect its own citizens from outside competition."¹¹³

The Court further rejected the appellant's argument that the Douglas Amendment and section 7 of the BHCA permitted Florida to impose such a burden on interstate commerce.¹¹⁴ The Douglas Amendment, the Court found, authorizes states to permit bank holding companies to acquire banks across state lines, but does not authorize state restrictions on bank holding company activities.¹¹⁵ Moreover, the Court reasoned, the Douglas Amendment applies only to acquisitions of banks and not to acquisitions of nonbanking subsidiaries which the Florida statute regulates.¹¹⁶ In addition, the *Lewis* Court found that section 7 of the BHCA did not extend to the states any new powers to regulate banking but merely preserved existing state regulations of bank holding companies.¹¹⁷

The third case of significance to *Northeast Bancorp* does not involve banking law, as do the two previously discussed cases, but rather, concerns state legislation discriminating against out-of-state businesses. In *Metropolitan Life Insurance Co. v. Ward*, which was decided in 1985, the Supreme Court addressed the constitutionality of an Alabama statute imposing higher taxes on out-of-state insurance companies than on in-state insurance companies.¹¹⁸ Under the equal protection clause, the Court will sustain discriminatory tax laws only if the discrimination is rationally related to a legitimate state purpose.¹¹⁹ The *Metropolitan Life* Court held that neither promoting domestic business

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *See id.* at 43-44.

¹¹³ *Id.* The Court further stated:

With regard to the asserted interest in promoting local control over financial institutions, we doubt that the interest itself is entirely clear of any tinge of local parochialism. In almost any Commerce Clause case, it would be possible for a State to argue that it has an interest in bolstering local ownership, or wealth, or control of business enterprise. Yet these arguments are at odds with the general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition.

Id.

¹¹⁴ *Id.* at 44-45, 49.

¹¹⁵ *Id.* at 47. The Court stated:

The language of the statute establishes a general federal prohibition on the acquisition or expansion of banking subsidiaries across state lines. The only authority granted to the States is the authority to create exceptions to this general prohibition, that is, to permit expansion of banking across state lines where it otherwise would be federally prohibited.

Id. (emphasis in original).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 48-49. The court found that Congress intended section 7 not only to preserve those powers the states had in the dual banking system but also to clarify that the states could not enact legislation inconsistent with the BHCA. *Id.* at 49. *See supra* note 61 for the text of section 7.

¹¹⁸ *Metropolitan Life Ins. v. Ward*, 105 S. Ct. 1676, 1679 (1985).

¹¹⁹ *Id.* (citing *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 667-68 (1981)). Prior to *Western & Southern*, courts often classified discriminatory state taxes as "privilege

nor encouraging investment in domestic assets is a legitimate state purpose justifying the domestic preference tax.¹²⁰ The *Metropolitan Life* Court concluded that Alabama's discriminatory tax statute "constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent."¹²¹ The Court stated that the "tax gives the 'home team' an advantage by burdening all foreign corporations seeking to do business within the state . . ."¹²²

taxes" and held them to be immune from equal protection challenge. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 181 (1869) (a state may impose conditions on the grant of the privilege to do business within its borders); *Lincoln Nat'l Life Ins. Co. v. Read*, 325 U.S. 673, 678 (1945) ("privilege" taxes imposed on foreign corporations are immune from equal protection challenge). In *Western & Southern*, the Court traced its prior decisions concerning discriminatory state tax schemes. 451 U.S. at 658-69. The *Western & Southern* Court found a conflict between the "privilege tax" doctrine adopted in *Paul v. Virginia* and followed in *Lincoln* and other Supreme Court decisions which held that a state may not impose unconstitutional conditions on the grant of a privilege. *Id.* at 657-58. The Court cited cases both before and after *Lincoln* which held that states may not discriminate against foreign corporations by imposing more onerous conditions on them than they impose on domestic corporations. *Id.* at 662-69. See, e.g., *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 571-74 (1949) (Ohio ad valorem tax on intangible property of out-of-state corporations violated the equal protection clause because it was not imposed on identical property of Ohio corporations); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 530 (1959) (Ohio tax imposed only on Ohio residents and exempting nonresidents was subject to the equal protection clause and sustained); *WHYY v. Glassboro*, 393 U.S. 117, 120 (1968) (New Jersey statute taxing nonprofit out-of-state corporations and exempting New Jersey corporations was held to violate the equal protection clause). In *Western & Southern*, the Court concluded that all state taxes discriminating between out-of-state and in-state corporations "must bear a rational relation to a legitimate state purpose." 451 U.S. at 669.

¹²⁰ *Metropolitan Life*, 105 S. Ct. at 1684. Although the Court defined the issue before it in *Metropolitan Life* as the constitutionality of the Alabama domestic preference tax statute, the actual issue the Court addressed was much narrower. *Id.* at 1678. Because of the procedural status of the case, the only question the Court considered was whether Alabama's purposes of promoting domestic business and encouraging domestic investments were legitimate. *Id.* at 1680 & n.5. The Court did not decide whether other purposes for the tax advanced by Alabama were legitimate or whether the statute's classification bore a rational relationship to any of these purposes. *Id.* Nevertheless, the Court indicated that the constitutionality of the statute under the equal protection clause depended on the legitimacy of the state purpose:

In the Equal Protection context, however, if the State's purpose is found to be legitimate, the state law stands as long as the burden it imposes is found to be rationally related to that purpose, a relationship that is not difficult to establish.

Id. at 1683.

¹²¹ *Id.* at 1681-82.

¹²² *Id.* at 1682. The Court observed that equal protection restraints applied although the statute imposed a burden which also would concern the commerce clause. *Id.* at 1683. The *Metropolitan Life* Court noted that discriminatory tax laws place a burden on foreign insurers who desire to do business within the state and thereby burden interstate commerce. *Id.* The McCarran-Ferguson Act, however, authorized states to impose taxes that burden interstate commerce on insurance companies:

Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states.

15 U.S.C. § 1011 (1982). The *Metropolitan Life* Court held that "[a]lthough the McCarran-Ferguson Act exempts the insurance industry from Commerce Clause restrictions, it does not purport to limit in any way the applicability of the Equal Protection Clause." *Metropolitan Life*, 105 S. Ct. at 1683.

Thus, as the case discussion illustrates, a tension exists in the field of interstate banking between what is authorized by federal law and what is prohibited by the commerce and equal protection clauses of the Constitution. While the D.C. Circuit in *Iowa Bankers* found that the Douglas Amendment gave the states the power to regulate in-state bank acquisitions by out-of-state bank holding companies,¹²³ the Supreme Court established in *Lewis* that state regulations must be consistent with the BHCA and within the boundaries marked by the commerce clause.¹²⁴ The *Iowa Bankers* court upheld a narrowly drawn statute allowing interstate bank acquisitions under a grandfather provision,¹²⁵ and the *Lewis* court struck down a broad, overtly protectionist statute prohibiting out-of-state bank holding companies from owning Florida investment advisory services.¹²⁶ *Metropolitan Life* established that different treatment of out-of-state and in-state corporations must bear a rational relation to some legitimate state purpose other than simply promoting domestic business and investments.¹²⁷ The question remained after these cases whether state laws regulating interstate bank acquisitions according to the acquiring bank's home state would fall within the authority granted by the Douglas Amendment and the limitations imposed by the commerce and the equal protection clauses.

III. *NORTHEAST BANCORP V. BOARD OF GOVERNORS*

In *Northeast Bancorp*, the Supreme Court affirmed the decision of the United States Court of Appeals for the Second Circuit upholding the Massachusetts and Connecticut regional banking laws.¹²⁸ The Court held that both state statutes were consistent with federal law embodied in the Douglas Amendment and the BHCA.¹²⁹ The Court found that because the Douglas Amendment authorized the state regional banking laws, it exempted the state statutes from commerce clause scrutiny.¹³⁰ The Supreme Court further found that legitimate concern for the independence of local banking institutions motivated the Massachusetts and Connecticut statutes and, therefore, these statutes did not violate the equal protection clause.¹³¹

The Court first addressed the question whether the Massachusetts and Connecticut statutes were consistent with the Douglas Amendment to the Bank Holding Company Act.¹³² The Court initially looked to the language of the Douglas Amendment.¹³³ The

¹²³ See *supra* notes 96-101 and accompanying text.

¹²⁴ See *supra* notes 105-17 and accompanying text.

¹²⁵ See *supra* notes 94-95 and accompanying text.

¹²⁶ See *supra* note 107 and accompanying text.

¹²⁷ See *supra* notes 118-22 and accompanying text.

¹²⁸ *Northeast Bancorp*, 105 S. Ct. at 2556.

¹²⁹ *Id.* at 2553.

¹³⁰ *Id.* at 2554.

¹³¹ *Id.* at 2555-56.

¹³² *Id.* at 2550. According to the Court, the analysis begins with this threshold question because state laws inconsistent with federal statutory law are invalid. *Id.* While the opinion does not mention specifically the supremacy clause, the Court essentially is reviewing a supremacy clause issue. See *supra* note 13 for the text of the supremacy clause. In reviewing the Douglas Amendment, the Court acknowledged that the Federal Reserve Board is an authoritative voice on the meaning of a federal banking statute. 105 S. Ct. at 2551. The Supreme Court opinion additionally suggested that the Board may have applied an unnecessarily strict standard when it sought a "clear authorization" for regional interstate banking laws in the Douglas Amendment. *Id.* at 2551.

¹³³ *Id.* See *supra* note 5 for the text of the Douglas Amendment.

Court found that the Douglas Amendment clearly permits states to lift the federal ban on interstate banking entirely, but noted that the Amendment does not indicate whether states have the authority to lift the ban partially, such as on a regional basis.¹³⁴ The Court observed that it need not decide what the language of the Amendment authorizes because the legislative history of the Amendment provides a sufficient indication of Congress's purposes.¹³⁵ The Court recognized that one of the primary purposes of the Bank Holding Company Act was to close a loophole in the McFadden Act's prohibition of interstate branch banking.¹³⁶ Prior to the BHCA, banks circumvented the McFadden Act by creating a holding company which would purchase banks in different states.¹³⁷

The Court next addressed the legislative history of the Douglas Amendment.¹³⁸ The Court noted that policies of community control and local responsiveness of banks led the House of Representatives to prohibit completely interstate bank acquisitions in their version of the BHCA.¹³⁹ The bill reported out by the Senate Committee on Banking and Currency permitted interstate bank acquisitions conditioned only on approval by the Federal Reserve Board.¹⁴⁰ According to the Court, some Congressional members who perceived the flat ban in the House bill offensive to states' rights therefore supported the Senate Committee's bill.¹⁴¹

The Douglas Amendment, the Court found, was a compromise that accommodated those concerned about states' rights¹⁴² by giving states the flexibility to retain the ban on interstate acquisitions of their banks, lift the ban entirely, or lift the ban to whatever degree the state desired.¹⁴³ The Court quoted Senator Douglas's explanation that his amendment would permit bank holding companies to acquire banks in other states "only to the degree that State laws expressly permit them."¹⁴⁴ Senator Douglas analogized his proposed amendment to the McFadden Act, the Court noted.¹⁴⁵ The Court reasoned that the McFadden Act, which subjected national banks to state branching restrictions,

¹³⁴ *Northeast Bancorp.*, 105 S. Ct. at 2551.

¹³⁵ *Id.*

¹³⁶ *Id.* See *supra* note 59 and accompanying text.

¹³⁷ *Northeast Bancorp.*, 105 S. Ct. at 2551.

¹³⁸ *Id.* The Court noted that because the Senate debate is the only legislative history available, the comments of individual legislators "carry substantial weight." *Id.*

¹³⁹ *Id.* The House enacted the BHCA in 1955. *Id.*

¹⁴⁰ *Id.* The Court noted that the large bank holding companies seeking further expansion favored the original Senate bill. *Id.*

¹⁴¹ *Id.* at 2552.

¹⁴² *Id.* The Court quotes Senator Douglas, who proposed the Amendment: "[o]ur amendment would prohibit bank holding companies from purchasing banks in other states unless such purchases by out-of-State holding companies were specifically permitted by law in such States." *Id.* (quoting 102 CONG. REC. 6860 (1956) (statement of Sen. Douglas)).

¹⁴³ 105 S. Ct. at 2552.

¹⁴⁴ *Id.* (quoting 102 CONG. REC. 6858 (1956) (statement of Sen. Douglas)).

¹⁴⁵ *Id.* The Court quoted Senator Douglas in part:

[B]y the McFadden Act and other measures, national banks have been permitted to open branches only to the degree permitted by State laws and State authorities.

I may say that what our amendment aims to do is to carry over into the field of holding companies the same provisions which already apply for branch banking under the McFadden Act — namely, our amendment will permit out-of-State holding companies to acquire banks in other States only to the degree that State laws expressly permit them; and that is the provision of the McFadden Act.

105 S. Ct. at 2552 (quoting 102 CONG. REC. 6858 (1956) (statement of Sen. Douglas)).

gave the states more than an "all-or-nothing choice with respect to branch banking."¹⁴⁶ Therefore, the Court concluded, Congress could not have intended the Douglas Amendment to offer the states only an all-or-nothing choice with respect to interstate banking.¹⁴⁷

After concluding that Congress intended to allow states to lift partially the ban on interstate banking, the Court examined the Massachusetts and Connecticut statutes.¹⁴⁸ Observing that the purpose of the Douglas Amendment was to retain local, community control over banking, the Court held that the regional banking laws furthered the objectives of federal banking law.¹⁴⁹ The Court recognized that the states were seeking an alternative to full-scale interstate banking in an effort to retain local control over banking.¹⁵⁰ The Connecticut Legislature, the Court noted, viewed its regional banking law as a precursor to a broader interstate banking law.¹⁵¹ This kind of flexibility, the Court concluded, was precisely what the Douglas Amendment contemplated when it gave the states the power to allow interstate bank acquisitions.¹⁵²

Having found the state statutes consistent with federal statutory law, the Court next addressed the constitutionality of the Massachusetts and Connecticut statutes.¹⁵³ The Court noted that regional banking laws would violate the commerce clause if Congress had remained silent on the subject.¹⁵⁴ The Court found, however, that Congress authorized these laws when it enacted the Douglas Amendment to the BHCA.¹⁵⁵ Specifically, the Court stated, "[w]hen Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause."¹⁵⁶ Therefore, the Court concluded that the challenged laws are constitutional under the commerce clause.¹⁵⁷

¹⁴⁶ *Northeast Bancorp.*, 105 S. Ct. at 2552.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 2553.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* The *Northeast Bancorp.* opinion quotes a Report to the General Assembly of the State of Connecticut made by a commission which proposed the regional banking law. See *infra* note 238. The excerpts quoted indicate that the Connecticut legislature designed the law to promote "local ownership and control of banks" and "the preservation of a close relationship between those in our communities who need credit and those who provide credit." *Northeast Bancorp.*, 105 S. Ct. at 2553 (quoting REPORT TO THE GENERAL ASSEMBLY OF THE STATE OF CONNECTICUT, 4 App. in No. 84-4047, (CA 2), at 1230, 1240-41 (1983)).

¹⁵¹ *Northeast Bancorp.*, 105 S. Ct. at 2553.

¹⁵² *Id.*

¹⁵³ *Id.* at 2553-56.

¹⁵⁴ *Id.* at 2553-54. The Court cites *Lewis*, 447 U.S. at 39-44 (1980), and *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), for the proposition that the dormant commerce clause plainly would prohibit states from passing regional banking laws such as the ones in question. 105 S. Ct. at 2553-54.

¹⁵⁵ *Id.* at 2554.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* After disposing of the commerce clause argument, the Court then turned to the issue of whether the Massachusetts and Connecticut statutes violated the compact clause of the Constitution. *Id.* For the text of the compact clause, see *supra* note 47. The Court expressed skepticism as to whether these regional banking laws amounted to a compact. *Northeast Bancorp.*, 105 S. Ct. at 2554. As evidence supporting the existence of an agreement, the Court cited the similarity of the two statutes; both statutes require reciprocity and both state legislatures favor the establishment of regional banking within New England. The Court noted that evidence exists showing cooperation among legislators, officials, and bankers in Massachusetts and Connecticut in studying the idea and lobbying for the laws. *Id.* As evidence suggesting that no agreement exists, the Court stated that

Finally, the Court reviewed the equal protection issue.¹⁵⁸ The Court distinguished the regional banking laws at issue in *Northeast Bancorp* from the domestic preference tax laws at issue in *Metropolitan Life*.¹⁵⁹ The Massachusetts and Connecticut statutes do not favor in-state corporations over out-of-state corporations, the Court reasoned, but favor New England based corporations over corporations from non-New England states.¹⁶⁰ In addition, the Court noted the tradition of "dispersed control of banking" in this country¹⁶¹ and found that banking is of "profound local concern."¹⁶² The Court held that Connecticut's purpose of increasing bank competition while preserving a close relationship between those in the community who need credit and those who provide credit was legitimate.¹⁶³ The Court also approved of the Connecticut Legislature's concern that unrestricted interstate banking would threaten the independence of local banks.¹⁶⁴ The Court concluded that the regional banking laws did not violate the equal protection clause of the fourteenth amendment.¹⁶⁵

Justice O'Connor, who had dissented from the Court's holding in *Metropolitan Life*, concurred in a separate opinion in *Northeast Bancorp*.¹⁶⁶ Justice O'Connor agreed that the regional banking laws did not violate the commerce, compact, or equal protection clauses, but wrote a separate opinion to point out some inconsistencies.¹⁶⁷ Justice O'Connor addressed the inconsistency between the Court's equal protection analysis in this case and in *Metropolitan Life*.¹⁶⁸ Barring the banks of forty-four states, Justice O'Connor contended, is no less discriminatory than Alabama's taxing insurance companies of forty-nine states at a higher rate.¹⁶⁹ It is not logical, Justice O'Connor observed, for the equal

there is no joint organization to enforce the banking laws, neither statute is conditioned on the other state's law, and each state is free to modify or repeal its law without affecting the other. *Id.* In addition, the other New England states encompassed by the alleged compact have different banking laws. *See supra* note 80.

The Court, however, did not resolve this issue because it found that even if there was a compact, it did not infringe upon federal supremacy and therefore was not an unconstitutional compact. 105 S. Ct. at 2554. The compact clause prohibits only those agreements that are "directed to the formation of any combination tending to increase the political power in the States, which may encroach upon or interfere with the just supremacy of the United States." *Id.* (quoting *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893)). The Court concluded that the state statutes did not infringe upon federal supremacy since they were authorized by the Douglas Amendment. *Id.*

¹⁵⁸ *Id.* at 2555. The Court reviewed the equal protection clause although the petitioners did not address the issue in their petition for certiorari or in their briefs. *Id.* After the Supreme Court's decision in *Metropolitan Life Ins. Co. v. Ward*, the petitioners filed a supplemental brief requesting the Court to review the equal protection issue. *Id.* The Court agreed to do so because the Federal Reserve Board and the court of appeals had reviewed the issue and because it did not want to leave a "cloud" over other pending bank acquisition applications. *Id.* at 2556.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 2555. The Court acknowledged that these laws may be said to discriminate against corporations from states not in the New England region. *Id.*

¹⁶¹ *Id.* The Court noted that this country has approximately 15,000 commercial banks, whereas many countries are "dominated by a handful of centralized banks." *Id.*

¹⁶² *Id.* (quoting *Lewis*, 447 U.S. at 38).

¹⁶³ *See id.* at 2555-56.

¹⁶⁴ *Id.* at 2555.

¹⁶⁵ *Id.* at 2556.

¹⁶⁶ *Id.* at 2556-57 (O'Connor, J., concurring).

¹⁶⁷ *Id.* at 2556 (O'Connor, J., concurring).

¹⁶⁸ *Id.* *See Metropolitan Life*, 105 S. Ct. at 1676.

¹⁶⁹ 105 S. Ct. at 2556 (O'Connor, J., concurring).

protection clause to condemn a state "home team" but not condemn a regional "home team."¹⁷⁰

Justice O'Connor compared the businesses of insurance and banking, finding them both to be recognized as local concerns and historically regulated by the states.¹⁷¹ The majority opinion had distinguished the regional banking laws on the grounds that they have a valid purpose: "to preserve a close relationship between those in the community who need credit and those who provide credit."¹⁷² Justice O'Connor pointed out, however, that although Alabama also advanced an interest in preserving local institutions responsive to local needs, the Court nevertheless did not uphold its insurance tax.¹⁷³ According to Justice O'Connor, the Court should not invalidate classifications under the equal protection clause designed to encourage domestic businesses where Congress has authorized the states to enact such laws free from commerce clause restraints.¹⁷⁴ Justice O'Connor concluded that the equal protection clause should permit economic regulations that differentiate between local and out-of-state groups because local groups are often of legitimate interest to the state.¹⁷⁵

IV. THE VALIDITY OF REGIONAL BANKING LAWS

A. *The Douglas Amendment*

In *Northeast Bancorp.*, the Supreme Court failed to strike down discriminatory state banking statutes which violate the equal protection clause. Although the language and legislative history of the Douglas Amendment to the federal Bank Holding Company Act indicate that Congress intended to defer to the states with respect to regional interstate banking, a federal authorization does not free the state statutes from equal protection scrutiny. Under the equal protection clause, states may enact interstate banking statutes that further legitimate state purposes, but economic protectionism is not a legitimate state purpose. Because the Massachusetts and Connecticut statutes are designed to foster the growth of local banks by insulating them from competition with large money-center banks, the Court should have held these statutes invalid under the equal protection clause.

With the enactment of the federal Bank Holding Company Act in 1956, Congress brought bank holding companies under federal control.¹⁷⁶ Under the supremacy clause, any state statute regulating bank holding companies must be consistent with federal bank holding company legislation to be valid.¹⁷⁷ The Douglas Amendment to the BHCA

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 2555.

¹⁷³ *Id.* at 2556 (O'Connor, J., concurring). According to Justice O'Connor, this purpose survives as one of the "15 additional purposes" the Court remanded for reconsideration. *Id.* (citing *Metro-politan Life*, 105 S. Ct. at 1680 n.5).

¹⁷⁴ 105 S. Ct. at 2556-57 (O'Connor, J., concurring).

¹⁷⁵ *Id.* at 2557 (O'Connor, J., concurring).

¹⁷⁶ 12 U.S.C. §§ 1841-50 (1982). See *supra* notes 3 & 61.

¹⁷⁷ See *supra* note 13 for the text of the supremacy clause. Federal legislation prevails over state legislation when an "act of Congress fairly interpreted is in actual conflict with the law of the State." *Savage v. Jones*, 225 U.S. 501, 533 (1912) (dictum). See also *Northeast Bancorp.*, 105 S. Ct. at 2550 (The proposed acquisitions authorized by state law must be consistent with the Douglas Amendment or they are invalid). See generally L. TRIBE, *supra* note 14, § 6-24.

prohibits interstate bank acquisitions unless the home state of the target bank authorizes the acquisition by statute.¹⁷⁸ Thus, a state law admitting out-of-state bank holding companies must be consistent with the Douglas Amendment to be valid.¹⁷⁹ It is not immediately clear, however, what type of state laws Congress contemplated when it enacted the Douglas Amendment.

There are four possible interpretations of the Douglas Amendment. The first possibility is that Congress intended to preempt the field of interstate banking and to prohibit any state law authorizing interstate bank acquisitions.¹⁸⁰ Second, the Douglas Amendment could be viewed as offering the states an all-or-nothing choice of either allowing full-scale interstate banking or prohibiting it entirely.¹⁸¹ Third, the Douglas Amendment could be interpreted as authorizing states to pass only interstate banking statutes that are evenhanded and nondiscriminatory.¹⁸² This view is the interpretation most commonly adopted by critics of the Supreme Court's *Northeast Bancorp* decision and those opposed to state regional banking legislation.¹⁸³ The fourth possible interpretation and the one adopted by the Supreme Court in *Northeast Bancorp* is that the Douglas Amendment represents a congressional deferral to state policy with regard to the regulation of out-of-state bank holding companies desiring acquisition of in-state banks.¹⁸⁴

The first possibility — that Congress intended to preempt the field of bank holding company interstate acquisitions — is at odds with the language of the Douglas Amendment. Preemption would invalidate all state regulation of bank holding company expansion¹⁸⁵ and make the Douglas Amendment's prohibition on interstate bank acquisitions absolute. The Douglas Amendment, however, explicitly provides for state statutes authorizing an out-of-state bank holding company to acquire a domestic bank.¹⁸⁶ The Senate rejected the House bill's flat ban on bank holding company expansion across state lines and instead adopted the language of the Douglas Amendment, which was later assented to by the House.¹⁸⁷ The Amendment states that the Federal Reserve Board shall not approve interstate bank acquisitions "unless the acquisition . . . is specifically

¹⁷⁸ 12 U.S.C. § 1842(d) (1982). See *supra* note 21.

¹⁷⁹ See *Northeast Bancorp*, 105 S. Ct. at 2550.

¹⁸⁰ See *infra* notes 185–90 and accompanying text.

¹⁸¹ See *infra* notes 191–94 and accompanying text. See also *Northeast Bancorp*, 105 S. Ct. at 2552.

¹⁸² See *infra* notes 195–98 and accompanying text.

¹⁸³ See *infra* note 195 for authors advocating this interpretation.

¹⁸⁴ See *infra* notes 212–23 and accompanying text. See *Northeast Bancorp*, 105 S. Ct. at 2552–53.

¹⁸⁵ See generally L. TRIBE, *supra* note 14, § 6-25, at 384 ("If Congress has validly decided to 'occupy the field' for the federal government, state regulations will be invalidated."). See, e.g., *Jones v. Rath Packing Co.*, 450 U.S. 519, 539, 543 (1977) (Court held that congressional provision forbidding imposition of regulations regarding labeling, packaging, or requiring of ingredients different from those made under federal statutes preempted state labeling requirement with respect to packaged bacon); *Campbell v. Hussey*, 368 U.S. 297, 301 (1961) (Court held that "Congress, in legislating . . . preempted the field and left no room for any supplementary state regulation . . .").

¹⁸⁶ 12 U.S.C. § 1842(d) (1956). See *supra* note 5 for the text of the Douglas Amendment.

¹⁸⁷ See *supra* note 63 and accompanying text. As enacted by the House in 1955, the BHCA contained a flat ban on interstate bank acquisitions. *Id.* The Douglas Amendment, adopted on the Senate floor, modified this ban by giving states the prerogative to lift it. 12 U.S.C. § 1842(d) (1982). See CONG. REC. 6858–60 (1956). It would be illogical to conclude that although Congress explicitly authorized the state statutes lifting the prohibition on interstate banking, Congress intended to preempt the field.

authorized by the statute laws of the State . . . ”¹⁸⁸ An interpretation of the Douglas Amendment as a ban on all interstate bank acquisitions would render the “unless” clause quoted above meaningless. The statutory language indicates that Congress intended the states to decide when and if to permit out-of-state bank holding companies within their borders.¹⁸⁹

The legislative history of the Douglas Amendment must be examined to determine what type of state laws authorizing interstate bank acquisitions Congress intended when it enacted the BHCA. If the regional banking statutes are inconsistent with congressional intent embodied in the Douglas Amendment, they will be unconstitutional under the supremacy clause. Unfortunately, the Douglas Amendment was proposed and adopted on the Senate floor; therefore, its legislative history is confined to the Senate debate.¹⁹⁰ The limited legislative history, however, suggests that Congress intended to give the states broad discretion with respect to interstate banking statutes.

The second possible interpretation of the Douglas Amendment — that Congress intended only to allow the states an all-or-nothing approach — is not supported by the record of the Senate debate.¹⁹¹ There is no mention of such a limit, and statements of Senators during their debate indicate that the Senate contemplated that the states and the Federal Reserve Board might authorize such acquisitions on a limited basis. Senator Robertson mentioned the need for interstate bank acquisitions to be considered on an individual basis.¹⁹² Senator Douglas stated that his “amendment will permit out-of-state holding companies to acquire banks in other States only *to the degree* that State laws expressly permit them.”¹⁹³ Upon a review of the legislative history, both the D.C. Circuit

¹⁸⁸ 12 U.S.C. § 1842(d).

¹⁸⁹ The legislative history also undermines such an interpretation. See *infra* notes 192–93 and accompanying text.

¹⁹⁰ *Northeast Bancorp.*, 105 S. Ct. at 2551.

¹⁹¹ See 102 CONG. REC. 6750–58, 6854–62 (1956). See also *Northeast Bancorp.*, 105 S. Ct. at 2552 (Court cited some of Senator Douglas’s comments in support of its conclusion that the Douglas Amendment “did not simply leave to each State a choice one way or another — either to permit or bar interstate acquisitions of local banks — but . . . allow[ed] each State flexibility in its approach”).

¹⁹² 102 CONG. REC. 6752 (1956). Senator Robertson expressed his disagreement with the House bill’s ban on interstate bank acquisitions and stated that “[a]n absolute prohibition of that nature would constitute a Federal freeze on future expansion without regard to the merits of *each individual case*.” *Id.* (emphasis added). Senator Robertson then quoted Senator Maybank:

It is conceivable, for instance, that a State might seek for its banks financial assistance which an *out-of-state holding company* might be able to render. Yet a State would be powerless to do so if proposals for a flat prohibition by Federal law against expansion of bank holding companies across State lines existed.

Id. (statement of Sen. Robertson) (quoting Sen. Maybank) (emphasis added). These statements suggest that giving authority to the states to control bank holding company expansion was not meant to be an all-or-nothing choice.

¹⁹³ *Id.* at 6858 (statement of Sen. Douglas) (emphasis added). Senator Douglas may have believed that under his amendment a state would have the authority to admit one bank holding company: “[i]f and when individual States permitted a *bank holding company* from another State to acquire assets across State lines, then the Federal Reserve Board would have final jurisdiction in those cases as well.” *Id.* at 6850 (emphasis added). Senator Payne’s statement also suggests that the states could do more under the Douglas Amendment than prohibit interstate banking or lift the bar completely: “[t]his amendment would require that state legislatures pass specific legislation authorizing bank holding companies from *another State* to acquire interests in State banks located within its borders.” *Id.* at 6862 (statement of Sen. Payne) (emphasis added).

in *Iowa Bankers* and the Supreme Court in *Northeast Bancorp* found that the Douglas Amendment did not simply grant the states an all-or-nothing choice with respect to interstate banking.¹⁹⁴

It is similarly unlikely that Congress only intended to permit the states to lift the prohibition on interstate banking in a strictly evenhanded manner, as the third possible interpretation of the Douglas Amendment would require. Proponents of this third possible interpretation argue that the states are not permitted to lift the ban on interstate banking on a regional basis but only may lift the ban according to neutral criteria such as size.¹⁹⁵ This is an appealing argument to those opposed to regional banking laws, but it is not supported by the language or legislative history of the Douglas Amendment. The Senate debate's emphasis on states' rights supports the fourth possible interpretation of the amendment — an unrestricted grant of power to the states. Although Senator Douglas proposed his amendment because he believed that "further expansion of holding companies in the field of banking would be contrary to the public interest,"¹⁹⁶ he suggested that his amendment would appeal to "[a]nyone who favors States rights."¹⁹⁷ Senator Payne also stressed that states have a primary interest in controlling bank holding company expansion across state lines.¹⁹⁸ This emphasis on states' rights indicates that Congress intended to give the states broad discretion over interstate bank acquisitions.

Senator Douglas's analogy between his amendment and the McFadden Act provides additional support for an interpretation of the Douglas Amendment which involves a deferral to state policy.¹⁹⁹ The general rule regarding banking regulation is that the federal government has exclusive jurisdiction over national banks and the states have exclusive jurisdiction over state banks.²⁰⁰ With respect to geographic expansion in banking, however, state law has prevailed.²⁰¹ The McFadden Act authorized national banks to branch, but only to the same extent that state statutes permit state banks to branch.²⁰² Under the McFadden Act, Congress deferred to state policy with respect to geographic limitations on bank branching.²⁰³ Senator Douglas emphasized that his amendment

¹⁹⁴ See *supra* notes 86–102 and accompanying text for a discussion of the *Iowa Bankers* case. See *supra* text accompanying note 147 for the Supreme Court's findings in *Northeast Bancorp* on this issue.

¹⁹⁵ See generally Golembe & Kumin, *supra* note 15, at 993; Note, *supra* note 11, at 283; Note, *Regional Banking Laws*, *supra* note 15, at 548; Note, *State Statutes*, *supra* note 15, at 380.

¹⁹⁶ 102 CONG. REC. 6859 (1956) (statement of Sen. Douglas).

¹⁹⁷ *Id.* at 6860 (statement of Sen. Douglas). See also *id.* at 6752 (statement of Sen. Robertson) (quoting Sen. Maybank).

¹⁹⁸ *Id.* at 6862 (statement of Sen. Payne). Senator Payne stated that "the control of expansion of bank holding companies across State lines into State banks is a matter of primary concern to the State governments and is an area best left to their discretion rather than to have it solely under the jurisdiction of the Federal Reserve Board." *Id.*

¹⁹⁹ *Id.* at 6858 (statement of Sen. Douglas).

²⁰⁰ See *id.* at 6861 (statement of Sen. Bricker).

²⁰¹ H.R. REP. NO. 609, 84th Cong., 1st Sess. 3 (1955). The report states:

In the past, Congress has repeatedly been urged both to permit national banks to carry on branch banking across State lines and to allow them to operate interstate branches without regard to State branch banking laws. The Congress however has steadfastly respected the rights of the States to specify the extent to which branch banking shall be practiced within their respective borders.

Id.

²⁰² 12 U.S.C. § 36(c) (1982). See *supra* note 57.

²⁰³ See *supra* note 57.

aimed "to carry over into the field of holding companies the same provisions which already apply for branch banking under the McFadden Act — namely, our Amendment will permit out-of-State holding companies to acquire banks in other States only to the degree that State laws expressly permit them" ²⁰⁴ The Senate debate shows that Congress intended to defer to state policy with respect to interstate bank acquisitions by bank holding companies just as they deferred to state policy with respect to branching.

Reading a requirement of evenhandedness into the Douglas Amendment's authorization to states to admit out-of-state bank holding companies would be inconsistent with the language and legislative history of the Amendment. The Douglas Amendment simply states that interstate bank acquisitions are prohibited unless the acquisition is authorized specifically by state law.²⁰⁵ Its language is broad and includes no reference to restrictions on a state's power to admit out-of-state bank holding companies.

Neither the *Iowa Bankers* court nor the *Northeast Bancorp* Court found an implicit requirement of evenhandedness in the Douglas Amendment. The D.C. Circuit observed that the Iowa Independent Bankers argued that "implicit in the Douglas amendment is a prohibition against discrimination between out-of-state bank holding companies."²⁰⁶ This is the same argument that those opposing the Massachusetts and Connecticut regional banking statutes make. The *Iowa Bankers* court found that "the intent of the Douglas Amendment was to assure that the states had sufficient power to control the expansion of bank holding companies across state lines so that such expansion would not contravene state policy."²⁰⁷ The court of appeals concluded that the petitioner's interpretation of the Douglas Amendment "would rob the states of this power."²⁰⁸ According to the court, "the petitioner failed to demonstrate that Congress intended to bar discriminations of the sort found in [the Iowa statute]," and therefore the court held that there was no conflict between the Iowa statute and federal statutory law.²⁰⁹ The Supreme Court, in *Northeast Bancorp*, similarly concluded that the Douglas Amendment offered states flexibility and permitted them to take a variety of approaches to interstate banking.²¹⁰

Proponents of the theory that the Douglas Amendment authorizes the states to lift the ban on interstate banking but does not authorize the states to do so on a discriminatory basis favoring a certain region, rely on the assumption that Congress did not contemplate the possibility of states lifting the prohibition on interstate acquisitions on a regional basis.²¹¹ This assumption is necessary because the Douglas Amendment contains such broad language authorizing the states to enact statutes permitting interstate

²⁰⁴ 102 CONG. REC. 6858 (1956) (statement of Sen. Douglas).

²⁰⁵ 12 U.S.C. § 1842(d) (1956). See *supra* note 5 for the text of the Douglas Amendment.

²⁰⁶ *Iowa Bankers*, 511 F.2d at 1296.

²⁰⁷ *Id.* at 1297.

²⁰⁸ *Id.*

²⁰⁹ *Id.* For further discussion of the *Iowa Bankers* case, see *supra* notes 86–102 and accompanying text. In addition, the Supreme Court in *Lewis* explained that the Douglas Amendment granted states "the authority to create exceptions to this general prohibition, that is to *permit* expansion of banking across state lines where it otherwise would be federally prohibited." *Lewis*, 447 U.S. at 47 (emphasis in original) (Court holds that a Florida statute imposing restrictions on out-of-state bank holding companies greater than those imposed or authorized by the Douglas Amendment violates the commerce clause).

²¹⁰ *Northeast Bancorp*, 105 S. Ct. at 2552–53.

²¹¹ See *supra* note 195.

acquisitions. If Congress were aware that regional legislation might develop and yet still approved the broad language in the Douglas Amendment, then this theory that regionalism is not permitted fails.

Legislative history shows that members of Congress were aware that a regional approach to interstate banking had considerable support. A House report of 1955 acknowledged the continued support for the expansion of branch banking on a "trade area" or "Federal Reserve district basis."²¹² Representatives from banks testified at Senate hearings about the benefits of allowing banks to serve "trade territor[ies]" as opposed to restricting their services within state borders.²¹³ Despite Congress's knowledge that support existed for banking expansion on a trade area basis, both the House and the Senate approved of the Douglas Amendment's very general grant of power to the states. Congress's knowledge of the interest in regional approaches to banking, together with the broad language of the Douglas Amendment, suggest that the Amendment was intended to permit state statutes admitting out-of-state bank holding companies on a regional or trade-area basis. Thus, the Connecticut and Massachusetts regional banking laws are consistent with federal legislation embodied in the Douglas Amendment and constitutional under the supremacy clause.²¹⁴

²¹² A House committee report that accompanied the House version of the BHCA noted: Repeatedly Congress has been urged to break down the restrictions in the national banking law regarding branches of national banks. Congress has been urged to permit branches, regardless of State bank laws, on a trade area basis, or an interstate or Federal Reserve district basis, and in fact on a nationwide basis.

H.R. REP. NO. 609, 84th Cong., 1st Sess. 2-3 (1955).

²¹³ During this Senate hearing, a witness from a Minneapolis bank explained that he was opposed to an absolute ban on interstate bank acquisitions because such a ban would limit the banking services provided by Minneapolis bank holding companies to the region including Minnesota, North Dakota, South Dakota, and Montana. *Control of Bank Holding Companies, 1955: Hearings on S. 880, S. 2350, and H.R. 6227 Before the Subcomm. on Banking of the Senate Comm. on Banking and Currency, 84th Cong., 1st Sess. 135 (1955)* (statement of Ellwood O. Jenkins, First Bank Stock Corp., Minneapolis, Minnesota). Mr. Jenkins stated that "Minnesota, North Dakota, South Dakota, and Montana form a *trade territory* which looks to the Twin Cities as its business, commercial, and financial capital." *Id.* (emphasis added). He stated that North Dakota, Montana, and South Dakota do not have the banking capital they need in light of their expanding economy. *Id.* at 135-36. He suggested that bank holding companies are particularly useful because they can supply needed banking capital. *Id.* Mr. Jenkins told the committee that "[f]or 26 years, our corporation through its affiliated banks has served our 4-state area with a fine banking service." *Id.* at 136. Prior to the 1956 Bank Holding Company Act, holding companies were not subject to federal regulation and therefore multistate bank holding companies developed in a number of areas. *See supra* notes 58 & 69 and accompanying text.

Another witness before this same committee noted that "a trade-area approach such as a Federal Reserve district for instance . . . could be defended quite logically whereas State lines are historical accident. Massachusetts is a little State because it is an old State, and why should that historical accident serve today to penalize them?" *Id.* at 140 (statement of John T. Noonan, Baystate Corp., Boston, Massachusetts).

²¹⁴ If courts found the state statutes authorizing regional bank acquisitions inconsistent with federal law, they would hold the statutes invalid under the supremacy clause. *See supra* note 177 and accompanying text. The laws, therefore, would not be sufficient under the Douglas Amendment to remove the Amendment's general prohibition on all interstate bank acquisition. *Northeast Bancorp.*, 105 S. Ct. at 2550.

Legislative history also indicates that Congress knew of the discriminatory effects of the Douglas Amendment. *See* 102 CONG. REC. 6860-61 (1955) (statements of Sens. Bennett and Bricker). Senator

Congress asserted in the Douglas Amendment its intent to give the states authority to control out-of-state bank holding company acquisitions of their local banks. The money-center banks and several commentators contend, however, that the Amendment does not expressly authorize the states to distinguish between out-of-state bank holding companies in lifting the Douglas Amendment's ban on interstate acquisitions.²¹⁵ They contend that without express authorization, the state regional banking statutes are subject to the commerce clause, and because the statutes discriminate in interstate commerce, they are unconstitutional.²¹⁶ This argument, however, relies on cases in which there was no federal statute directly on point authorizing the state action in question. In *South-Central Timber Development, Inc. v. Wunnicke*, for example, the Supreme Court held that an Alaska statute requiring Alaskan timber to be processed within Alaska violated the commerce clause.²¹⁷ The Supreme Court reversed the appellate court's finding that there was congressional authorization for the Alaska statute.²¹⁸ The Court rejected Alaska's argument that federal policy with respect to timber from federal lands impliedly authorizes its statute.²¹⁹ The Supreme Court explained that "a clear expression of approval by Congress" is necessary and refused to infer congressional approval of the state statute regarding state lands from Congress's policies with respect to federal lands.²²⁰ In the

Bennett objected to the Douglas Amendment, noting that it "require[s] discrimination in interstate commerce." *Id.* at 6860 (statement of Sen. Bennett). Senator Bennett explained:

The net effect of the amendment is to require every State . . . to discriminate in favor of such corporations that may be resident in their State and against bank holding companies resident in any other State and requires affirmative legislation to remove the discrimination.

Id.

The Senate and House approved of the Douglas Amendment knowing that it prohibited bank holding companies from engaging in interstate commerce in the absence of appropriate state legislation. If Congress endorsed a plan requiring states to discriminate against all out-of-state bank holding companies, it is likely that in permitting states to lift this ban on interstate bank acquisitions, Congress intended to allow states to discriminate among out-of-state bank holding companies. *See id.* Any differentiations made between out-of-state bank holding companies by state statutes, however, must be rationally related to a legitimate state purpose under the equal protection clause. *See infra* notes 225-30 and accompanying text.

²¹⁵ *See supra* note 195.

²¹⁶ *Id.* In *South-Central Timber Dev. Inc. v. Wunnicke*, the Supreme Court required "unmistakably clear" congressional intent to exempt a state regulation from the limitations imposed on state action by the commerce clause. 467 U.S. 82, 91 (1984). In *Northeast Bancorp.*, the Court acknowledged that without congressional authorization, regional banking laws would be invalid under the commerce clause. 105 S. Ct. at 2553-54.

²¹⁷ 467 U.S. at 100.

²¹⁸ *Id.* at 92-93.

²¹⁹ *Id.* at 92.

²²⁰ *Id.* at 92-93. In two other Supreme Court cases often cited for the proposition that express congressional authorization is required to remove state statutes from commerce clause scrutiny, there was no federal statute directly on point. In these two cases, *Sporhase v. Nebraska*, 458 U.S. 941, 960 (1982), and *New England Power Co. v. New Hampshire*, 455 U.S. 331, 341 (1982), the Supreme Court held that congressional intent to remove state legislation from commerce clause scrutiny was not "expressly stated." In *Sporhase*, the Court rejected Nebraska's contention that Congress authorized the state to restrict interstate use of its ground water by its practice of deferring to state water law and its failure to create a federal water law. 458 U.S. at 958-60. In *New England Power Co.*, the Court refused to find that a "savings clause" of the Federal Power Act authorized New Hampshire's restriction on the interstate flow of privately produced electricity. 455 U.S. at 341. *See* Federal Power Act, 16 U.S.C. § 824(b) (The Act "shall not . . . deprive a State . . . of its

case of interstate banking, there is no need to infer congressional approval of state statutes from federal policy. A federal banking statute on point provides that no interstate bank acquisitions shall take place unless the states by statute authorize such acquisitions.²²¹ The Douglas Amendment contains exactly the type of authorization the Court looks for when it requires a "clear expression of approval by Congress."²²² It is sufficient for Congress to specify the type of commerce it is authorizing the states to regulate. It would be impractical to require Congress to consider all variations of state statutes or even to specify expressly that the state is free of commerce clause restraints.²²³

B. Regional Banking Laws and the Equal Protection Clause

While Congress probably intended to defer to the states and permit them to regulate the admission of out-of-state bank holding companies into their borders, the states must

lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line.").

In the BHCA, there is a savings clause similar to that contained in the Federal Power Act which preserves existing state regulations of bank holding companies. See *supra* note 61. The Douglas Amendment, however, goes much further than a savings clause preserving existing state law. It specifically authorizes the states to enact statutes admitting out-of-state bank holding companies. See *supra* note 5 for text of the Douglas Amendment.

²²¹ 12 U.S.C. § 1842(d). See *supra* note 5.

²²² See *South-Central Timber*, 467 U.S. at 92.

²²³ Congressional power to authorize states to discriminate overtly in interstate commerce has never been challenged but nevertheless is at odds with the policies underlying the commerce clause. *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 434 (1946) ("The power of Congress over commerce exercised entirely without reference to coordinated action of the states is not restricted, except as the Constitution expressly provides, by any limitation which forbids it to discriminate against interstate commerce and in favor of local trade."). The Constitution does not forbid Congress from discriminating in interstate commerce and favoring local interests. *Id.* The Douglas Amendment's complete prohibition of bank acquisitions across state lines is a great burden on interstate commerce and an example of Congress's plenary power over commerce.

Moreover, Congress may confer on states the power to regulate interstate commerce in a manner that they otherwise would not enjoy. *Western & Southern*, 451 U.S. at 652 (citing *Lewis*, 447 U.S. at 44). Authorizing states to form banking zones and to discriminate against banks from states they disfavor nevertheless seems inconsistent with the concept of the federal system established by the Constitution:

The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of several states must sink or swim together, and that in the long run prosperity and salvation are in union and not in division.

Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366, 380-81 (1976) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935)). At the time of the adoption of the Constitution, the framers were very concerned about discriminatory trade policies among the states and regional factionalism. *THE FEDERALIST* No. 7, at 39-40 (Cooke ed. 1961) ("Each . . . separate confederacy . . . would pursue a system of commercial policy peculiar to itself. This would occasion distinctions, preferences and exclusions which would beget discontent."). In discussing the reasons for the adoption of the Constitution, Madison stated: "[i]t seems to be feared that the Northern States will oppress the trade of the South The middle States may apprehend . . . combinations against them between the Eastern and Southern States." Madison, *Debates in the Federal Convention of 1787*, reprinted in *Documents Illustrative of the Formation of the Union of the American States*, H.R. Doc. No. 398, 69th Cong., 1st Sess. 584-87 (1927). Under current constitutional law, congressional authority to delegate power over interstate commerce is unchallenged. See *Western & Southern*, 451 U.S. at 652. Nevertheless, perhaps the Court should interpret the Constitution to impose a limit on Congress's authority to delegate to the states the power to discriminate in interstate commerce in light of the underlying policies of the commerce clause and the federal system.

regulate within the scope of the equal protection clause.²²⁴ The equal protection clause of the fourteenth amendment protects persons²²⁵ from discrimination by the states.²²⁶ Regional banking legislation does not classify on the basis of a suspect classification²²⁷ nor infringe upon a fundamental right²²⁸ and is consequently subject to the rational basis standard of review.²²⁹ Under this rational basis test, regional banking laws must be "rationally related to furthering a legitimate state interest."²³⁰

Although the Supreme Court has not defined legitimate state purpose, it has held that state legislation that purposely discriminates and is not supported by a valid state interest is unconstitutional under the equal protection clause.²³¹ The *Metropolitan Life* Court evaluated parochial state legislation under the equal protection clause.²³² The *Metropolitan Life* Court found that Alabama had erected barriers to out-of-state insurance companies to improve its domestic insurers' ability to compete at home and to encourage capital investments in Alabama assets.²³³ The Court declared that this parochial discrimination is precisely the type of discrimination that the equal protection clause was intended to prevent.²³⁴ The *Metropolitan Life* Court emphasized that the equal protection clause always has forbidden a state from discriminating in favor of its own residents

²²⁴ See *supra* note 16 for the text of the equal protection clause.

²²⁵ A corporation falls within the definition of "person" for the purposes of the equal protection clause of the fourteenth amendment. *Metropolitan Life*, 105 S. Ct. at 1683 n.9; *Western & Southern*, 451 U.S. at 660 n.12; *Pembina Mining Co. v. Pennsylvania*, 125 U.S. 181, 188-89 (1888).

²²⁶ *Metropolitan Life*, 105 S. Ct. at 1683.

²²⁷ See J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 448-50 (1978) [hereinafter NOWAK]. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 216 (1944) ("all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and subject to "most rigid scrutiny").

²²⁸ *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966) (courts subject classifications which invade or restrain "fundamental rights and liberties," such as the right to vote, to close scrutiny). See generally NOWAK, *supra* note 227, at 816-31.

²²⁹ *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (Under the equal protection clause, economic regulations that do not impinge fundamental rights or draw inherently suspect distinctions are constitutional if rationally related to a legitimate state interest.). See *Northeast Bancorp.*, 105 S. Ct. at 2556 (Court applied the traditional rational basis standard of review).

²³⁰ See *supra* note 17 and accompanying text. See also *Western & Southern*, 451 U.S. at 667-68 (the statute is sustained if "its classification is rationally related to achievement of a legitimate state purpose").

²³¹ See *Western & Southern*, 451 U.S. at 669. In *Western & Southern*, the Supreme Court explained: In determining whether a challenged classification is rationally related to achievement of a legitimate state purpose, we must answer two questions: (1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?

Id. In *Metropolitan Life*, the Court stated: "[i]n the equal protection context, however, if the State's purpose is found to be legitimate, the state law stands as long as the burden it imposes is found to be rationally related to that purpose, a relationship that is not difficult to establish." 105 S. Ct. at 1683. See also Note, *Regional Banking Laws and the Equal Protection Clause*, 84 COLUM. L. REV. 2025, 2029-32 (1985).

For example, in *Zobel v. Williams*, 457 U.S. 55, 57 (1982), the Supreme Court struck down an Alaska statute which provided for payments of dividends by the states to its citizens according to the length of their residence in the state. The Court held that this statute violated the equal protection clause because Alaska's purpose of rewarding their long-term residents for past contributions was "not a legitimate purpose." *Id.* at 63. See also Note, *supra*, at 2030.

²³² See *supra* notes 118-22 and accompanying text.

²³³ *Metropolitan Life*, 105 S. Ct. at 1681.

²³⁴ *Id.* at 1681-82.

solely by burdening "the residents of other state members of our federation."²³⁵ The Court in *Metropolitan Life* thus held that Alabama's purposes in enacting the domestic preference tax were not legitimate.²³⁶

The Supreme Court, in *Northeast Bancorp*, identified the purpose of Connecticut's regional banking law as combining "the beneficial effect of increasing the number of banking competitors with the need to preserve a close relationship between those in the community who need credit and those who provide credit."²³⁷ Preserving this close relationship is essentially retaining local control over local banking institutions and local capital. The legislative history of Connecticut's statute supports this interpretation of the purpose of regional banking laws.²³⁸ A Connecticut legislative committee reported:

The promotion of local ownership and control of banks has as one of its objectives the preservation of a close relationship between those in our communities who need credit and those who provide credit. To allow the control of credit that is essential for the health of our state economy to pass to hands that are not immediately responsive to the interests of Connecticut citizens and businesses would not . . . serve our state well.²³⁹

Legislative history of both the Massachusetts and Connecticut statutes indicates that the statutes were designed to insulate the banks in New England from competition from the "big money center banks."²⁴⁰ Massachusetts Senator John A. Brennan stated, "I just didn't think it would be good for [Massachusetts] if the big money center banks came in here. Our banks need the space to grow first."²⁴¹ The Connecticut Legislature also intended that the statute discriminate against non-New England out-of-state banks and foster the growth of Connecticut and other New England banks. The Connecticut Legislature's Hebb Commission Report²⁴² proposed the regional banking law, noting that, "to expose our smaller banks to the rigors of unlimited competition from large out-of-state banking organizations . . . would not be wise."²⁴³

Although the *Northeast Bancorp* Court upheld regional banking laws under the equal protection clause, this decision conflicts with the Court's prior holdings that promoting local business by discriminating against nonresident competitors is not a legitimate state purpose.²⁴⁴ Regional banking laws use discriminatory means to promote local banking.

²³⁵ *Id.* at 1682 (quoting *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959) (Brennan, J. & Harlan, J., concurring)).

²³⁶ *Id.* at 1684.

²³⁷ *Northeast Bancorp*, 105 S. Ct. at 2555.

²³⁸ A valuable source of legislative history of the Connecticut regional banking statute is the REPORT TO THE GENERAL ASSEMBLY OF THE STATE OF CONNECTICUT OF THE FINDINGS AND RECOMMENDATIONS OF THE COMMISSION TO STUDY LEGISLATION TO LIMIT THE CONDUCT OF BUSINESS IN CONNECTICUT BY SUBSIDIARIES OF BANK HOLDING COMPANIES AND THE IMPACT OF NON-DEPOSITORY INSTITUTIONS ON TRADITIONAL BANKING ACTIVITIES (1983) [hereinafter HEBB COMMISSION REPORT].

²³⁹ *Id.* at 10.

²⁴⁰ See *infra* note 241 and accompanying text.

²⁴¹ *Enlivening Banking For Fun — Fireworks*, N.Y. Times, Apr. 3, 1983, at F4, cited in Note, *supra* note 231, at 554.

²⁴² HEBB COMMISSION REPORT, *supra* note 238.

²⁴³ *Id.* at 10-11.

²⁴⁴ *Metropolitan Life*, 105 S. Ct. at 1684 ("We hold that under the circumstances of this case, promotion of domestic business by discriminating against nonresident competitors is not a legitimate state purpose.") Moreover, even if promoting domestic banking and ensuring local community-based control over banking were held to be legitimate state purposes, it is doubtful that regional

In *Metropolitan Life*, the Court held that while, "a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry," . . . a State may not constitutionally impose a discriminatory burden upon the business of other States, merely to protect and promote local business."²⁴⁵ Thus, the *Metropolitan Life* Court held that Alabama's statute did not promote a legitimate state purpose because it sought to benefit domestic industry by erecting barriers to foreign companies wishing to do interstate business within its borders.²⁴⁶ Yet the Massachusetts and Connecticut regional banking laws had analogous purposes — to foster New England banks by erecting barriers to non-New England banks desiring to acquire banks in Massachusetts and Connecticut. Regional banking laws protect local banks by discriminating against out-of-region banks based solely on their geographic location. This regional favoritism is inconsistent with the general principle that state laws promoting local interests must "regulat[e] evenhandedly."²⁴⁷ The equal protection clause should protect out-of-state banks from discriminatory state legislation.

The Court in *Northeast Bancorp* pointed out that regional banking laws do not favor only the adopting state's banks at the expense of all out-of-state banks.²⁴⁸ Instead, the laws favor a region over the rest of the country.²⁴⁹ Justice O'Connor, however, questioned whether this difference was significant:

It is not clear to me why completely barring the banks of 44 states is less discriminatory than Alabama's scheme of taxing the insurance companies from 49 states at a slightly higher rate. Nor is it clear why the Equal Protection Clause should tolerate a regional "home team" when it condemns a state "home team."²⁵⁰

The Federal Reserve Board also observed that there was no precedent for a state law that discriminated on a regional basis.²⁵¹

In distinguishing *Metropolitan Life*, the *Northeast Bancorp* Court also emphasized that banking is of profound local concern.²⁵² This reasoning is not persuasive, however, because both Congress and the Supreme Court consider insurance, like banking, to be

banking laws contribute to such goals. Evidence indicates that regional banking laws will not result in greater local control of banking but will actually reduce the number of truly local banks. See Note, *supra* note 11, at 289–90.

²⁴⁵ *Metropolitan Life*, 105 S. Ct. at 1681 n.6 (quoting *Bacchus Imports, Ltd. v. Dias*, 104 S. Ct. 3049, 3056 (1984)).

²⁴⁶ *Id.* at 1684.

²⁴⁷ *Id.* (quoting *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970)).

²⁴⁸ *Northeast Bancorp*, 105 S. Ct. at 2555.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 2556 (O'Connor, J., concurring). Justice O'Connor found regional banking laws constitutional. *Id.* Justice O'Connor dissented in *Metropolitan Life*, emphasizing states' rights to preserve and promote local institutions and businesses. See 104 S. Ct. at 1684–94 (O'Connor, J., dissenting).

²⁵¹ Appendix, 70 Fed. Res. Bull. at 379. The Federal Reserve Board noted:

There are many decided cases defining the permissible scope of state regulations favoring their own residents against those of all other states, but apparently no judicial decisions testing the constitutionality of state regulatory arrangements which discriminate in favor of residents of selected regional groupings of states and exclude residents of all other states from the benefits provided to the regional groups.

Id.

²⁵² *Northeast Bancorp*, 105 S. Ct. at 2555.

"of profound local concern."²⁵³ With respect to insurance, federal law specifically authorizes the "continued regulation and taxation by the several States of the business of insurance" and furthermore, states that the "silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states."²⁵⁴ Even with this type of federal law authorizing state taxation of insurance companies, the Court in *Metropolitan Life* held invalid under the equal protection clause a state tax that Alabama did not impose evenhandedly.²⁵⁵

The Court should have interpreted the Connecticut and Massachusetts regional banking laws similarly. While the Douglas Amendment to the BHCA authorizes the states to lift the ban on interstate banking, the states should not have the power to lift the ban in a discriminatory fashion.²⁵⁶ Congress may authorize the states to enact interstate banking laws but may not authorize the states to enact statutes which violate the equal protection clause.²⁵⁷ A state may not give its "home team" an advantage by burdening foreign corporations seeking to do business within the state.²⁵⁸ The equal protection clause prohibits a state from discriminating in favor of its own residents by burdening the residents of other states²⁵⁹ and should prohibit states from enacting regional banking laws.

C. Outlook

Not only are state-enacted regional banking laws unconstitutional under the equal protection clause, but the concept of a regional banking system is one that Congress would be better able to plan and implement. Because these state statutes violate the equal protection clause, Congress does not have the power simply to authorize and thereby validate such statutes.²⁶⁰ Although the equal protection clause applies to federal legislation,²⁶¹ Congress would not be prohibited from establishing a regional banking

²⁵³ *Id.* at 2556 (O'Connor, J., concurring); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 415 (1946) (insurance is a uniquely local concern).

²⁵⁴ See *Northeast Bancorp.*, 105 S. Ct. at 2556 (O'Connor, J., concurring) (citing McCarran-Ferguson Act, 15 U.S.C. § 1011 (1945)). See *supra* note 122 for discussion of the McCarran-Ferguson Act.

²⁵⁵ See *Metropolitan Life*, 105 S. Ct. at 1684.

²⁵⁶ See Note, *supra* note 231, at 2034-37. See also Note, *Taxing Out-of-State Corporations After Western & Southern: An Equal Protection Analysis*, 34 STAN. L. REV. 877 (1982). A state could probably avoid equal protection clause restraints by enacting a statute restricting bank holding company acquisitions based on the company's total banking assets or total deposits rather than on the location of the holding company's home state. See Note, *Regional Banking Laws*, *supra* note 15, at 556. Nevertheless, a uniform federal interstate banking policy would be preferable to regulation by the individual states. See *infra* notes 264-71 and accompanying text.

²⁵⁷ See, e.g., *Metropolitan Life*, 105 S. Ct. at 1683 (although McCarran-Ferguson Act authorizes states to regulate insurance companies, the state statutes are still subject to equal protection scrutiny). See also *infra* note 260 and accompanying text.

²⁵⁸ *Metropolitan Life*, 105 S. Ct. at 1682.

²⁵⁹ *Id.* (quoting *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 533 (1959) (Brennan, J., concurring)).

²⁶⁰ See *Mississippi University for Women v. Hogan*, 458 U.S. 718, 732 (1982) (dictum) ("[N]either Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment."). See also Cohen, *Congressional Power to Validate Unconstitutional Laws: A Forgotten Solution to an Old Enigma*, 35 STAN. L. REV. 387, 389 (1983).

²⁶¹ *Bolling v. Sharpe*, 347 U.S. 497 (1954).

system.²⁶² Because all the states are represented when Congress acts, the threat of state parochialism is greatly diminished.²⁶³ If Congress divided the country into regions, there would be less danger of discrimination.

Moreover, a federally implemented regional banking system would be more uniform and equitable. State implementation is putting money-center banks at a competitive disadvantage.²⁶⁴ States with large banking institutions, such as California, New York, Illinois, and Texas are being excluded from all regions.²⁶⁵ Many bankers believe that a haphazard pattern of interstate banking zones is undermining the policies of the BHCA.²⁶⁶ Developments in the New England region show that the state-by-state implementation of a regional banking system is resulting in inconsistencies. While Massachusetts and Connecticut exclude non-New England bank holding companies from their states, Maine permits full-scale interstate banking.²⁶⁷ Rhode Island has a regionally restrictive interstate banking law similar to Massachusetts's and Connecticut's, but the regional limitation will expire in 1987.²⁶⁸

The southeastern region currently forming has similar problems. Florida, Georgia, North Carolina, South Carolina and Virginia all have regional reciprocal banking laws, but their definitions of the southeastern region vary.²⁶⁹ Georgia's definition of its region contains four fewer states than the definitions adopted by North and South Carolina and Virginia.²⁷⁰ Furthermore, Georgia, North Carolina, South Carolina and Virginia include Kentucky in their definition of the southeastern region, but Kentucky has enacted a more restrictive statute admitting into Kentucky only those out-of-state bank holding companies from states contiguous to Kentucky.²⁷¹ Congressional action is required if the nation is to have a workable and equitable regional banking system.

²⁶² See Note, *supra* note 231, at 2038 n.81.

²⁶³ *Id.* In *South-Central Timber*, the Court noted that "when Congress acts, all segments of the country are represented and there is significantly less danger that one State will be in a position to exploit others." 104 S. Ct. at 2243. This case concerned state parochialism under the commerce clause, but the Court's comment concerning Congress's power is equally relevant to questions of parochialism under the equal protection clause.

²⁶⁴ Empirical Research Project, *Regional Banking — A Viable Alternative? An Empirical Study*, 9 J. CORP. L. 815, 850 (1984).

²⁶⁵ See *supra* notes 78 & 83 and accompanying text. The Utah statute excludes California from its western region. UTAH CODE ANN. § 7-1-102 (1984). But see Kristof, *supra* note 74, at D1, col. 6.

²⁶⁶ The November 1985 American Bar Association Journal quoted the Association of Bank Holding Companies as follows:

"The existing laws vary markedly," the association said. "Some promote regional reciprocal bank holding company acquisitions, and several of these provide a trigger to nationwide banking. Some allow national reciprocity, others allow any bank holding company anywhere to buy an institution in the state; some permit acquisition of limited-purpose banks, while others prohibit such acquisition." Given the diversity of these laws, the association believes the federal government has no choice but to prevent what Volcker refers to as "bankization."

Dunn, *The Wild World of Interstate Banking*, 71 A.B.A. J. 54, 56 (1985).

The Journal article then quoted Don Rogers of the American Bank Holding Companies as stating: "[w]e desperately need national guidelines . . . If we leave it all up to the states, no banker will be able to plan." *Id.* at 57.

²⁶⁷ See *supra* notes 7, 9, & 72.

²⁶⁸ See *supra* note 80.

²⁶⁹ See *supra* note 81.

²⁷⁰ See *id.*

²⁷¹ See *id.*

Regional banking laws employ protectionist policies in regulating interstate banking. Federal law embodied in the Douglas Amendment permits states to regulate interstate bank acquisitions. Legislative history indicates that Congress envisioned selective lifting of the federal prohibition on interstate bank acquisitions by bank holding companies. Congress was aware of the support in banking circles for regional or trade-area arrangements and still approved the language of the Douglas Amendment, which granted states the discretion to enact statutes permitting out-of-state bank holding companies to acquire their in-state banks. The regional banking statutes, however, violate the equal protection clause. The Massachusetts and Connecticut statutes distinguish between out-of-state New England banks and out-of-state non-New England banks for the sole purpose of fostering the growth of in-state and New England banks. This violates the equal protection clause, which prohibits a state from giving its "home team" an advantage by imposing discriminatory regulations on foreign corporations.

The Supreme Court's decision to uphold regional banking laws is likely to have a divisive effect unless Congress takes some action. Under *Northeast Bancorp.*, each individual state legislature has the power to decide which states' bank holding companies it will admit into its borders. Regions, consequently, are developing haphazardly. Discrimination will exclude large money-center banks from all regions. Congress should determine what kind of regional or interstate banking system is best for the nation and should oversee its implementation.

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