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The Constitutionality of State Statutes Governing Interstate Acquisitions by Bank Holding Companies: Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System

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**THE CONSTITUTIONALITY OF STATE
STATUTES GOVERNING INTERSTATE
ACQUISITIONS BY BANK HOLDING
COMPANIES: *NORTHEAST BANCORP, INC.*
*V. BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM***

Federal law governing the formation and activities of bank holding companies (BHCs)¹ is principally embodied in the Bank Holding Company Act (the Act).² Section 3(d) of the Act, the Douglas Amendment, prohibits BHCs from acquiring an interest in any bank located in another state, unless such acquisition is specif-

¹ See 12 U.S.C. § 1841(a)(1) (1982). A bank holding company (BHC) is generally defined as "any company which has control over any bank or over any company that is or becomes a bank holding company . . ." *Id.* A company is deemed to have control over a bank if: (1) it has control over at least 25% of the bank's voting securities, or (2) it controls the election of a majority of directors or trustees of the bank, or (3) the Federal Reserve Board determines that the company directly or indirectly exercises a controlling influence over the management or policies of the bank. *Id.* § 1841(a)(2)-(c).

² 12 U.S.C. §§ 1841-1850 (1982). Originally enacted as the Bank Holding Company Act of 1956, ch. 240, 70 Stat. 133, this legislation was inspired by a desire to prevent the uncontrolled expansion of bank holding companies, to limit their ability to consolidate control of banking facilities in a particular area, and to restrict their activity in non-banking enterprises. S. REP. No. 1095, 84th Cong., 1st Sess. 1-2, *reprinted in* 1956 U.S. CODE CONG. & AD. NEWS 2482, 2482-83. The Act represents a congressional attempt to apply the general purposes of antitrust legislation—the promotion of competition and the prevention of monopolization—as well as the general purpose of the Glass-Steagall Act (Banking Act of 1933), ch. 89, 48 Stat. 162 (1933) (codified in scattered sections of 12 U.S.C.)—the prevention of excessive connections between banking and other businesses—to the field of banking and bank holding companies. S. REP. No. 1179, 89th Cong., 2d Sess. 2, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2385, 2386.

Ownership and control of any bank or bank holding company in excess of 5% of the voting shares may not be obtained without prior approval of the Federal Reserve Board. See 12 U.S.C. § 1842(a) (1982). The Board may not approve any proposed acquisition that would result in monopolization or a restraint of trade "unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." See 12 U.S.C. § 1842(c) (1982). For a general discussion of federal laws regulating expansion of banks and bank holding companies, see P. HELLER, *HANDBOOK OF FEDERAL BANK HOLDING COMPANY LAW* 86-93 (1976); Pitts & Cranmore, *Considerations Under the Federal Banking and Securities Laws with Respect to Bank Merger or TakeOvers*, 36 OKLA. L. REV. 789, 791-813 (1983).

ically authorized by the laws of that state.³ Although this provision effectively prevented all interstate acquisitions in the past,⁴ several states recently have enacted statutes that authorize certain acquisitions by non-domiciliary BHCs.⁵ Some of these statutes limit this authorization to interstate acquisitions by BHCs with a home state⁶ that is located within a certain region and that has enacted a reciprocal statute.⁷ Such statutes have been perceived as attempts

³ See 12 U.S.C. § 1842(d) (1982). The Douglas Amendment states, in pertinent part:

[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 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.

Id.

The Amendment does not prohibit a non-domiciliary BHC from acquiring up to 5% of the voting shares of a bank because such an acquisition does not require Board approval under the Act. See 12 U.S.C. § 1842(a)(3) (1982); P. HELLER, *supra* note 2, at 71.

⁴ See H. HUTCHINSON, MONEY, BANKING, AND THE UNITED STATES ECONOMY 82 (5th ed. 1984). The Douglas Amendment, together with the McFadden Act, ch. 191, 44 Stat. 1224 (1953) (codified in scattered sections of 12 U.S.C.), effectively barred interstate banking for many years. See H. HUTCHINSON, *supra*, at 82; see also DEPARTMENT OF THE TREASURY, GEOGRAPHIC RESTRICTIONS ON COMMERCIAL BANKING IN THE UNITED STATES, reprinted in BANK EXPANSION IN THE 80'S: MERGERS, ACQUISITIONS & INTERSTATE BANKING 582 (1981) (McFadden Act and Douglas Amendment embody principles restricting interstate full-service banking and geographic expansion, and foster state control of multi-office structure). The McFadden Act requires that national banks adhere to the branching laws of the state in which their home offices are located and thereby substantially limits interstate banking. See H. HUTCHINSON, *supra*, at 82. Many states allow branching only on a limited basis, such as within a city or within a county, see *id.* at 84, and, until recently, most states did not allow acquisitions of banks within their state by an out-of-state bank holding company. Thus, interstate banking in both branch and holding company form was precluded. See *id.* at 87.

⁵ See, e.g., ALASKA STAT. § 06.05.235(e) (Supp. 1983) (out-of-state bank may acquire voting securities or capital stock of other bank if other is not recently formed); IOWA CODE ANN. § 524.1805 (West Supp. 1982-1983) (registered bank with Federal Reserve which owns at least two Iowa banks may acquire other banks); ME. REV. STAT. ANN. tit. 9-B, § 1013(2) (Supp. 1984-1985) (prior approval of superintendent required for authorization); see *infra* note 7; see also Pitts & Cranmore, *supra* note 2, at 805 (various states amending laws to allow interstate banking); Hawke, *Are State Laws Permitting Interstate Banking Constitutional?*, AM. BANKER, Dec. 15, 1982, at 4 (states easing attitude toward entry by out-of-state BHCs).

⁶ See 12 U.S.C. § 1842(d) (1982). For the purpose of any statute enacted by a state under the authority of the Douglas Amendment, "the [s]tate in which the operations of a bank holding company's subsidiaries are principally conducted," or the "home" state, "is that [s]tate in which total deposits of all such banking subsidiaries are largest." *Id.*

⁷ See, e.g., 1983 Conn. Acts 83-411 (Reg. Sess.); MASS. GEN. LAWS ANN. ch. 167A, § 2 (West Supp. 1983); R.I. GEN. LAWS § 2 (Supp. 1984); see also 1984 Fla. Sess. Law. Serv. ch.

by the states to create regional banking systems, the constitutionality of which has been the subject of considerable debate.⁸ Recently, in *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*,⁹ the United States Court of Appeals for the Second Circuit held that Massachusetts and Connecticut statutes limiting non-domiciliary acquisitions to BHCs based in New England states with reciprocal statutes¹⁰ are constitutional,¹¹ and,

84-42, § 658.295 (3)(a) & (4)(a) (West); GA. CODE § 41A-2802 (Supp. 1984); UTAH CODE ANN. § 7-1-103(24) (Supp. 1984). New York allows acquisitions on a reciprocal basis, but does not impose geographic limitations on acquisitions. See N.Y. BANKING LAW § 142-b (McKinney Supp. 1982-1983).

⁸ Compare Hawke, *Of Legal Bogs and New England Clam Chowder: A Rejoinder*, BANKING EXPANSION REP., March 7, 1983, at 1 (zones are not unconstitutional) and Hawke, *supra* note 5, at 4 (favoring zones, though recognizing uncertainties regarding constitutionality) with Golembe, *Massachusetts Interstate Banking*, BANKING EXPANSION REP., Jan. 17, 1983, at 1 (asserting that zones are unconstitutional and recommending elimination of all state barriers).

⁹ 740 F.2d 203 (2d Cir. 1984), cert. granted, 105 S. Ct. 776 (1985).

¹⁰ See MASS. GEN. LAWS ANN. ch. 167A, § 2 (West Supp. 1983); 1983 Conn. Acts 83-411 (Reg. Sess.). The Massachusetts statute states in pertinent part:

[A]n out-of-state bank holding company . . . may establish or acquire direct or indirect ownership or control of more than five percent 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 commonwealth . . . the establishment of the acquisition of direct or indirect ownership or control of more than five percent 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. [T]he term "out-of-state bank holding company" . . . shall include only those companies which have their principal place of business in one of the states of Connecticut, Maine, New Hampshire, Rhode Island or Vermont

MASS. GEN. LAWS ANN. ch. 167A, § 2 (West Supp. 1983).

The Connecticut statute states in pertinent part:

Any New England bank holding company may . . . establish or acquire and retain direct or indirect ownership or control of all or part of the voting stock of any Connecticut bank . . . 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 . . . expressly authorized, under conditions no more restrictive than those imposed by the laws of Connecticut . . . the establishment or acquisition and retention of direct or indirect ownership or control of all or part of the voting stock of banks . . . or bank holding companies having their principal places of business in the state by Connecticut bank holding companies.

1983 Conn. Acts 83-411 (Reg. Sess.).

¹¹ The *Northeast Bancorp* court held that the statutes were consistent with the Commerce, Compact, and Equal Protection Clauses of the Constitution. 740 F.2d at 208-10; see *infra* notes 18-24 and accompanying text.

in fact, are exempt from Commerce Clause scrutiny by the Douglas Amendment.¹²

In *Northeast Bancorp*, one Connecticut and two Massachusetts BHCs sought approval from the Board of Governors of the Federal Reserve System (the Board) for proposed interstate mergers with BHCs in Massachusetts and Connecticut, respectively.¹³ Northeast Bancorp and Citicorp formally challenged the proposed acquisitions,¹⁴ alleging that the statutes were violative of the Compact, Equal Protection, and Commerce Clauses.¹⁵ The Board, how-

¹² See *Northeast Bancorp*, 740 F.2d at 208; U.S. CONST. art. I, § 8, cl. 3.

¹³ See 740 F.2d at 204. The first of the proposed mergers was between Bank of New England, a Massachusetts BHC, and CBT Corp., a Connecticut BHC. See *id.* The \$10 billion combination was the largest proposed merger since the New England states had enacted legislation allowing interstate acquisitions. See Carson, *Conn., Mass., Banks Announce Big Interstate Merger Plan*, *Am. Banker*, June 14, 1983, at 1. Under the authority of the Connecticut statute, Bank of New England entered into a formal agreement to acquire CBT. See *Northeast Bancorp*, 740 F.2d at 205.

The second application, submitted by Hartford National Corp., a Connecticut BHC, requested approval of a proposed acquisition of Arltru Bankcorporation, a Massachusetts BHC. *Id.* at 204. This agreement was entered into under the authority of the Massachusetts statute. *Id.* at 206; see Fraust, *New England Interstate Merger Set: Hartford Nat'l to Buy Arltru Bancorp*, *Am. Banker*, Sept. 2, 1983, at 1 (discussion of details of merger plan).

The third application concerned the proposed acquisition of Colonial Bancorp, Inc., a Connecticut BHC, by Bank of Boston Corp., a Massachusetts BHC. See *Northeast Bancorp*, 740 F.2d at 204; see also Forde, *Bank of Boston, Colonial Bancorp Agree to Merger*, *Am. Banker*, Oct. 4, 1983, at 23 (details of merger plan).

¹⁴ See *Hartford National Corp.*, 70 Fed. Res. Bull. 353, 354 (1984); *Bank of New England Corp.*, 70 Fed. Res. Bull. 374, 376 (1984); *Bank of Boston Corp.*, 70 Fed. Res. Bull. 524, 524 (1984). Citicorp and Northeast Bancorp responded to an invitation by the Board for public comment on the merger. See Application Notice, 49 Fed. Reg. 6012 (1984) (notice of Bank of Boston Corp. application); Application Notice, 48 Fed. Reg. 53,172 (1983) (Hartford National Corp. application); Application Notice, 48 Fed. Reg. 41,524 (1983) (Bank of New England application).

¹⁵ See *Bank of New England Corp.*, 70 Fed. Res. Bull. 374, 380-81 (1984). Citicorp, a New York BHC, reportedly challenged the three acquisitions because the statutes effectively barred it from fulfilling its own acquisition objectives in Massachusetts. See Matthews, *Citicorp Eyes Massachusetts Acquisitions*, *Am. Banker*, Dec. 8, 1983, at 1. Northeast Bancorp, a Connecticut BHC, challenged only the application by the Bank of New England to acquire CBT Corp. See *Northeast Bancorp*, 740 F.2d at 205-06. It had previously brought an action challenging the Connecticut law in the United States District Court for the District of Connecticut, see *Northeast Bancorp, Inc. v. Woolf*, 576 F. Supp. 1225 (D. Conn. 1983), *aff'd mem.*, 742 F.2d 1439 (2d Cir. 1984), but the complaint was dismissed on the ground that Northeast lacked standing to challenge the constitutionality of the statute, 576 F. Supp. at 1234. Northeast claimed that the statute placed them at a competitive disadvantage by prohibiting its planned merger with the Bank of New York while authorizing other Connecticut BHCs to merge with New England BHCs. See *id.* at 1229; Matthews, *Northeast Challenges Fed Approval of Bank of New England-CBT Merger*, *Am. Banker*, Mar. 30, 1984, at 11.

ever, approved the acquisitions,¹⁶ and, on appeal, the Second Circuit affirmed.¹⁷

Writing for the court, Judge Bonsal held that the statutes were not violative of the Compact Clause, asserting that the creation of a regional banking system would neither increase the political power of the New England states nor impair the "just supremacy" of the national government.¹⁸ In addition, the Second

¹⁶ See *Hartford National Corp.*, 70 Fed. Res. Bull. 353, 354 (1984); *Bank of New England Corp.*, 70 Fed. Res. Bull. 374, 376-77 (1984); *Bank of Boston Corp.*, 70 Fed. Res. Bull. 524, 525-26 (1984). The Board's constitutional analysis is contained in *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, 379-86 (1984) [hereinafter cited as *Appendix*]. Although the *Appendix* addressed the constitutional issues relative to the Bank of New England petition and the Connecticut statute, the constitutional analysis contained therein was determinative in the Board's review of the other two applications. See *Hartford National Corp.*, 70 Fed. Res. Bull. at 354 (analysis in *Appendix* applicable to Massachusetts statute and is basis for approval of petition); *Bank of Boston Corp.*, 70 Fed. Res. Bull. at 525 (constitutional analysis in *Appendix* determinative).

¹⁷ See *Northeast Bancorp*, 740 F.2d at 210. Under § 9 of the Bank Holding Company Act, 12 U.S.C. § 1848 (1982), a "party aggrieved by an order of the Board" has the right to appeal the order directly to the United States Court of Appeals in either the circuit in which the party's principal place of business is located, or the Court of Appeals for the District of Columbia Circuit. *Id.*

¹⁸ See *Northeast Bancorp*, 740 F.2d at 209; U.S. CONST. art. I, § 10, cl. 3. The Compact Clause states that "[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." See *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893); see also *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 471 (1978); *New Hampshire v. Maine*, 426 U.S. 363, 369 (1976). The Compact Clause has been limited to its literal meaning to avoid the total preclusion of agreements between and among states. See *Union Branch R.R. v. East Tenn. & G. R.R.*, 14 Ga. 327, 340 (1853) (cited in *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 466-67 (1978), as the basis for the Compact Clause interpretation in *Virginia v. Tennessee*, 148 U.S. 503 (1893)). Thus, not every agreement between states is subject to Compact Clause scrutiny. See *United States Steel Corp.*, 434 U.S. at 469. A violation of the Compact Clause will occur only if an agreement entered into without congressional consent upsets the political balance of the states in some manner, such as by relocating boundary lines, or by encroaching upon the free exercise of the authority of the federal government. See Engdahl, *Characterization of Interstate Arrangements: When Is a Compact Not a Compact?*, 64 MICH. L. REV. 63, 66-67 (1965) (discussing scope and analytical vices of rule enunciated in *Virginia v. Tennessee*).

Reciprocal legislation, such as the statutes in question in *Northeast Bancorp*, though not within the traditional form of an agreement or compact, may be violative of the Compact Clause. See *United States Steel Corp.*, 434 U.S. at 470. Such enactments may subordinate federal supremacy through the enhancement of state power in much the same manner as formal agreements. *Id.* at 470-71 (both formal and informal agreements are reached by Compact Clause if they impact on federal structure).

Circuit disagreed with the petitioners' claim that the statutes violated the Equal Protection Clause by discriminating against non-New England BHCs.¹⁹ The court determined that the disparate treatment of the non-New England BHCs was rationally related to the legitimate state purposes of fostering local banking institutions and preventing their domination by large New York and Chicago BHCs.²⁰

Addressing the Commerce Clause issue, Judge Bonsal reasoned that, since the Douglas Amendment prohibits all interstate acquisitions not authorized by state law, the Massachusetts and Connecticut statutes actually permit a degree of interstate commerce where it otherwise would not exist.²¹ Moreover, the court noted that Congress possesses the power to exempt certain state statutes from Commerce Clause scrutiny²² and asserted that the Douglas Amendment had effectively done so with respect to the Massachusetts and Connecticut statutes.²³ The petitioners' argument that the Douglas Amendment merely allows states either to permit absolutely or to bar unqualifiedly all non-domiciliary acquisitions was refuted by Judge Bonsal's conclusion that permitting interstate acquisitions on a limited basis is consistent with the language and legislative history of the Amendment.²⁴

¹⁹ See *Northeast Bancorp*, 740 F.2d at 209-10.

²⁰ See *id.* at 209. In determining whether the Connecticut and Massachusetts statutes violated the Equal Protection Clause, Judge Bonsal applied the rational basis standard of review. See *id.*; J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 591 (2d ed. 1983). Under this test, the court will not invalidate legislation if the classifications created by it conceivably bear a rational relationship to any governmental purpose permitted by the Constitution. See *Clements v. Fashing*, 457 U.S. 957, 963 (1982) (statutory classifications will be "set aside . . . only if no grounds can be conceived to justify them"); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981) (whether legislation will promote state goal is not in issue; concern is whether legislature "could rationally have decided" that the law would achieve goal); *McGowan v. Maryland*, 366 U.S. 420, 426 (1961) (legislation "will not be set aside if any state of facts reasonably may be conceived to justify it"). The Supreme Court has applied this standard consistently in its analysis of classifications created by general economic legislation. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra*, at 591; see, e.g., *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976). Furthermore, any legislation resulting in a classification that neither impinges on a fundamental constitutional right, nor defines the relevant class through use of race, sex, or other suspect characteristic, will be scrutinized under the rational basis standard. See *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 408 (1982); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 174 (1980).

²¹ *Northeast Bancorp*, 740 F.2d at 207-08.

²² See *id.*

²³ See *id.*

²⁴ See *id.* The court relied quite heavily upon statements of Senator Douglas, the spon-

Proponents of regional banking have hailed the Second Circuit's decision in *Northeast Bancorp* as lifting the "cloud of uncertainty" surrounding the constitutionality of state laws that restrict interstate banking to particular regions.²⁵ It is submitted, however, that while the court's analysis of the Equal Protection issue was adequate,²⁶ its analyses of the Compact and Commerce Clause questions were not sufficient to establish beyond doubt the constitutionality of the statutes in question.²⁷ This Comment will ad-

sor of the amendment, that asserted that the provision was intended to permit acquisitions by out-of-state BHCs "only to the degree that state laws expressly permit them . . ." *Id.* at 207 (quoting 102 Cong. Rec. 6858 (1956) (statement of Sen. Paul Douglas)). The court also stressed that § 7 of the Bank Holding Company Act reserved to the states all the powers to regulate BHCs previously possessed by the states. *See Northeast Bancorp.*, 740 F.2d at 208; *see also* 12 U.S.C. § 1846 (1982).

²⁵ *See Fraust, Court Lifts Cloud Over Regional Interstate Laws*, Am. Banker, Aug. 3, 1984, at 1. Proponents of regional banking have praised the *Northeast Bancorp* decision as a clear indication that interstate banking is within the purview of state action. *Id.* at 5, col. 1. Many expect the ruling to inspire interstate acquisitions in New England and the Southeast, and to encourage other sections of the country to develop regional interstate plans. *Id.* at 1, col. 4.

²⁶ *See Northeast Bancorp*, 740 F.2d at 209-10. Classifications created by economic legislation will be deemed valid under the Equal Protection Clause if they bear a rational relationship to any legitimate governmental purpose. *See supra* note 20 and accompanying text. It is submitted that the Second Circuit appropriately applied this standard of review to the Connecticut and Massachusetts statutes. The statutes are economic in nature, and the distinctions created between New England and non-New England BHCs arguably bear a rational relationship to the states' purported goals of fostering banking concerns that are responsive to local needs. *See Northeast Bancorp*, 740 F.2d at 209; *Appendix, supra* note 16, at 381; *see also* *Iowa Indep. Bankers v. Board of Governors*, 511 F.2d 1288, 1294-96 (D.C. Cir.) (Iowa statute limiting out-of-state acquisitions to BHCs that control two or more Iowa banks on a specified date does not violate Equal Protection Clause because statute bore rational relationship to state goal of ensuring presence of banks that serve local needs), *cert. denied*, 423 U.S. 875 (1975).

It must be noted that the standards for reviewing state action under the Equal Protection Clause are much less stringent than those applied in Commerce Clause review. *See Appendix, supra* note 16, at 385. A statute will survive Equal Protection scrutiny if it is conceivable that its discriminatory scheme may promote some legitimate state end, whether or not such an end is actually achieved. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464, 466 (1981). The application of this less-than-stringent standard for compliance with the Equal Protection Clause, it is submitted, enabled the Second Circuit easily to dispose of the allegation that the Massachusetts and Connecticut statutes create unconstitutional classifications.

²⁷ *See Northeast Bancorp*, 740 F.2d at 208-09. As noted by the Federal Reserve Board, "an interstate agreement is within the parameters of the Compact Clause and thus requires congressional consent only when: (1) an interstate compact or agreement exists, (2) that tends to increase the power of the compacting states in such a manner as to interfere with federal supremacy." *Appendix, supra* note 16, at 380 (citing *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978); *Virginia v. Tennessee*, 148 U.S. 503 (1893)); *see infra* note 29.

dress shortcomings in the Second Circuit's abbreviated Commerce Clause analysis and will suggest that the Douglas Amendment lacks sufficient specificity to exempt the Connecticut and Massachusetts statutes from traditional Commerce Clause review. In addition, it will be asserted that the reciprocity scheme contained in the statutes, as well as the regional banking system the statutes attempt to create, cannot survive appropriate Commerce Clause scrutiny.

A reciprocity scheme, such as the one created by the Massachusetts and Connecticut statutes, may be deemed an interstate agreement subject to Compact Clause scrutiny. See *United States Steel Corp.*, 434 U.S. at 470; *supra* note 18. The history of the enactments reveals a coordinated effort by the New England states to create a regional banking zone. See *Appendix*, *supra* note 16, at 380.

Once it has been determined that the statutes are a compact or agreement, "the compatibility of [the statute] with the Compact Clause turns on whether Congress in the Douglas Amendment granted the states plenary power to regulate entry of out-of-state bank holding companies, thereby renouncing a federal interest in such regulation . . ." *Id.* In *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978), the Supreme Court determined that an interstate compact to facilitate the determination and collection of state income tax from multistate businesses did not encroach upon federal supremacy in the area of interstate commerce. See *id.* at 473. The Court determined that there was no encroachment of federal power because no power was conferred upon the Multistate Tax Commission that could not have been exercised by the states independently. See *id.* at 490 (White, J., dissenting). However, in recognizing that reciprocal legislation might enhance state power to the detriment of federal supremacy, the Court acknowledged that "the absence of an autonomous authority" cannot always be determinative. *Id.* at 491 (White, J., dissenting).

This Comment will establish that the Douglas Amendment does not authorize the reciprocal banking statutes or the interstate banking zone that the statutes attempt to create, see *infra* notes 31-40 and accompanying text, and will assert that the Massachusetts and Connecticut statutes are void under the Commerce Clause, see *infra* notes 47-62 and accompanying text. It is suggested that the Connecticut and Massachusetts statutes violate the Compact Clause because they constitute an interstate agreement that exceeds state authority to regulate interstate commerce, and, thus, interfere with federal supremacy in that area. Had the Second Circuit properly determined that the Massachusetts and Connecticut statutes were violative of the Commerce Clause, it is submitted that the court would have been required to find a Compact Clause violation as well. If the attempt to create a regional banking system through passage of reciprocal statutes is discriminatory and circumvents the flow of commerce in the national marketplace, the enacting states have exceeded "permissible limits within the federal structure," and have exercised regulatory power that only Congress may authorize. See J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 20, at 268. It must be noted, however, that while a Compact Clause violation appears to arise naturally from the Commerce Clause infirmity in this case, a court need not reach both issues since only one basis of unconstitutionality is necessary to invalidate a statute. This Comment will, therefore, focus on the *Northeast Bancorp* court's resolution of the Commerce Clause issue.

THE DOUGLAS AMENDMENT—DOES IT EXEMPT DISCRIMINATORY
STATE STATUTES FROM COMMERCE CLAUSE SCRUTINY?

Although the *Northeast Bancorp* court recognized that Commerce Clause issues were implicated in the case, the court concluded that the Douglas Amendment constituted congressional authorization for the regulatory scheme imposed by the Massachusetts and Connecticut statutes, and thus determined that the statutes were exempt from Commerce Clause scrutiny.²⁸ While it is generally accepted that Congress may enact legislation authorizing states to regulate interstate commerce in a manner that would otherwise violate the Commerce Clause,²⁹ the Supreme Court consistently has held that for Congress to do so, the federal legislation must clearly and affirmatively authorize the state regulation.³⁰

²⁸ See *Northeast Bancorp*, 740 F.2d at 208.

²⁹ See *South-Central Timber Dev., Inc. v. Wunnicke*, 104 S. Ct. 2237, 2240 (1984); *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 213 (1983); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339-40 (1982); *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 652 (1981); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 44 (1980); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 427 (1946); *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 769 (1945).

³⁰ See *South-Central Timber Dev., Inc. v. Wunnicke*, 104 S. Ct. 2237, 2242-43 (1984); *Sporhase v. Nebraska ex rel Douglas*, 458 U.S. 941, 960 (1982); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 343 (1982); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 427, 431 (1946).

In *South-Central Timber*, the Supreme Court considered whether federal law specifically authorized an Alaska statute requiring Alaskan timber to be processed within the state. See 104 S. Ct. 2237, 2242 (1984). The Court held that the state regulation was in conflict with the Commerce Clause and was not consented to by Congress. See *id.* The Court noted that when such "consent has been found, congressional intent and policy to insulate state legislation from Commerce Clause attack have been 'expressly stated.'" *Id.* (citing *Sporhase v. Nebraska ex rel Douglas*, 458 U.S. 941, 960 (1982)). The Court stated that while there is "no talismanic significance to the phrase 'expressly stated,' . . . [t]he requirement that Congress affirmatively contemplate otherwise invalid state legislation is mandated by the policies underlying [the] dormant Commerce Clause doctrine." *South-Central Timber*, 104 S. Ct. at 2242 (emphasis added).

In *Sporhase*, the Supreme Court undertook to determine whether federal legislation authorized a Nebraska statute prohibiting the transportation of water to another state unless the receiving state had a reciprocal statute. 458 U.S. at 958-60. The Court concluded that while 37 federal statutes and interstate compacts evidenced congressional deference to state water laws, they did not indicate congressional intent to remove Commerce Clause restraints on such laws entirely. *Id.* at 959-60.

The absence of an express authorization of regional reciprocal statutes in the Douglas Amendment is apparent when *Northeast Bancorp* is compared with cases in which the Court has found such express consent. See, e.g., *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 213 (1983); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429-33 (1946). In *Prudential*, the Supreme Court determined that the McCarran Act, 15

In its decision, the Federal Reserve Board conceded that the Douglas Amendment apparently lacked the explicit authorization generally required of federal statutes exempting state enactments from Commerce Clause scrutiny.³¹ The Supreme Court has stated in *Lewis v. B.T. Investment Managers, Inc.* that "it is doubtful that [the Douglas Amendment] authorizes state restrictions of any nature on bank holding company activities."³² However, both the Board and the Second Circuit, when searching the legislative history of the Douglas Amendment for such an express authorization, concluded that it must exist because nothing in the statute or the legislative history appeared to prohibit it.³³ It is suggested that the

U.S.C. §§ 1011-1015 (1945) (current version at 15 U.S.C. §§ 1011-1015 (1982)), exempted state regulation and taxation of the insurance business from Commerce Clause attack. See 328 U.S. at 429-33. The Act expressly stated that: the business of insurance was to be subject to state regulation; that congressional silence was not to be construed as a barrier to state regulation or taxation; and that no act of Congress was to be construed as to "invalidate, impair or supersede" any state provision that regulated or taxed such business. 15 U.S.C. §§ 1011-1012 (1945).

In *White*, the Supreme Court held that certain federal regulations, promulgated under the authority of federal statutes, authorized an executive order of the Mayor of Boston that all construction projects funded by local and federal funds were required to employ 50% Boston residents. See 460 U.S. at 205-06, 213. The federal regulations governing the application of the funds specifically provided that "[t]he maximum feasible employment of local labor shall be made in the construction . . . projects receiving direct grants and loans . . . [E]very contractor . . . shall be required to employ . . . qualified persons who regularly reside in the designated area where such project is to be located . . ." *Id.* at 214 n.11 (emphasis omitted) (quoting 13 C.F.R. § 305.54(a) (1982)). Thus, the Court concluded that the federal regulations governing the program expressly and "affirmatively permitted the type of parochial favoritism" found in the Mayor's executive order. See *White*, 460 U.S. at 213.

³¹ *Appendix, supra* note 16, at 384.

³² 447 U.S. 27, 47 (1980) (emphasis added).

³³ See *Northeast Bancorp*, 740 F.2d at 208; *Appendix, supra* note 16, at 386. The *Northeast Bancorp* court relied upon *Iowa Indep. Bankers Assoc. v. Board of Governors*, 511 F.2d 1288, 1296-97 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975), to determine that the Douglas Amendment does not prohibit state statutes that discriminate against interstate commerce. See *Northeast Bancorp*, 740 F.2d at 208. In *Iowa Independent Bankers*, the Court of Appeals for the District of Columbia Circuit extensively reviewed the legislative history of the Douglas Amendment. See 511 F.2d at 1296-97. This inquiry was made to determine if the Amendment conflicted with an Iowa statute that permitted acquisitions only by those out-of-state BHCs that owned at least two banks in the state before a given date. See *id.* at 1292, 1296. The petitioner had claimed that the state statute conflicted with the Douglas Amendment, contending that, under the Amendment, states must "extend the right to acquire in-state banks to all out-of-state bank holding companies, or . . . prohibit such acquisitions entirely." *Id.* at 1296. Searching for preemptive force, the court determined that the Douglas Amendment contained no expression of congressional intent to prohibit states from discriminating among out-of-state BHCs. *Id.* at 1296. This finding was made strictly for the purpose of ascertaining any conflict between federal and state law. See

court erroneously construed the silence of the Douglas Amendment on the matter of regional reciprocal statutes. The mere conclusion that there is an absence of a prohibition in a broadly worded statute does not of itself justify a determination that such a statute affirmatively authorizes a specific type of state regulation of interstate commerce.³⁴

In examining the legislative history, the Second Circuit relied heavily upon statements by Senator Douglas, the sponsor of the Amendment.³⁵ The Supreme Court, however, has recently stated that congressional intent to exempt state statutes from Commerce Clause constraints may not be implied from legislative history when no such intent is expressly stated in the statute.³⁶

id. at 1297.

It is submitted that the *Iowa Independent Bankers* court's analysis was complete once it was determined that the Douglas Amendment did not preempt the limited acquisition scheme contained in the Iowa statute. In *Northeast Bancorp*, however, the court could not reach any conclusion based upon the *absence of congressional prohibition* of regional reciprocal statutes in the Douglas Amendment because it was required to find *specific congressional authorization* for such limited non-domiciliary acquisitions. See *supra* note 30 and accompanying text.

³⁴ Compare *Iowa Indep. Bankers Assoc. v. Board of Governors*, 511 F.2d 1288, 1296-97 (D.C. Cir.) (analysis of Douglas Amendment to find prohibition against state statute to ascertain if federal law preempts), *cert. denied*, 423 U.S. 875 (1975) with *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340-43 (1982) (analysis of federal statute to find affirmative, express consent to state regulation to ascertain if Congress exempted state regulations from Commerce Clause).

³⁵ See *Northeast Bancorp*, 740 F.2d at 207. During the Senate debate on the Bank Holding Company Act, Senator Douglas stated:

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 . . .

102 CONG. REC. 6858 (1956) (quoted in *Northeast Bancorp*, 740 F.2d at 207).

³⁶ See *New England Power Co. v. New Hampshire*, 455 U.S. 331, 342-43 (1982); *supra* note 30; see also Note, *Natural Resources—Constitutional Law*, 23 NAT. RESOURCES J. 933, 939 (1983) (congressional consent to otherwise impermissible state regulation cannot be implied from legislative history, but must be expressly stated in statute). In *New England Power*, New Hampshire argued that the Federal Power Act, 16 U.S.C. §§ 792-824 (1982), authorized state restrictions on the exportation of hydroelectric power. 455 U.S. at 344. The state relied heavily upon an excerpt from the House debate in which the representative from New Hampshire expressed hope that his state would not be denied its right to control the export of power. *Id.* at 342 (quoting 79 CONG. REC. 10,527 (1935) (statement of Rep. Rogers)). The Court, however, concluded that “[r]eliance on such isolated fragments of legislative history in divining the intent of Congress is an exercise fraught with hazards, and ‘a step to be taken cautiously.’” *New England Power*, 455 U.S. at 342 (quoting *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 26 (1977)). Chief Justice Burger concluded that “when Congress has not ‘expressly stated its intent and policy’ to sustain state legislation from attack under

The Second Circuit concluded that the Douglas Amendment could not limit the power of the states to regulate interstate banking in degrees because section 7 of the Bank Holding Company Act³⁷ "reserves to the states the power and jurisdiction they possessed before [the act] was enacted."³⁸ However, in *Lewis v. BT Investment Managers, Inc.*,³⁹ the Supreme Court, in examining the validity of a Florida statute that discriminated against out-of-state BHCs, determined that section 7 applies only to state legislation that operates within the boundaries of the Commerce Clause.⁴⁰ It

the Commerce Clause, we have no authority to rewrite its legislation based on mere speculation as to what Congress 'probably had in mind.'" *New England Power*, 455 U.S. at 343. Indeed, the Federal Reserve Board in *Northeast Bancorp* conceded that the excerpts from the congressional debate concerning the Douglas Amendment might be too "fragmentary and unspecific to show congressional intent to authorize discrimination otherwise contrary to the Commerce Clause . . ." See *Appendix, supra* note 16, at 385.

It is submitted that Senator Douglas' statement asserting that BHCs could make interstate acquisitions "to the degree that [s]tate laws expressly permit them," 102 CONG. REC. 6858 (1956); *supra* note 35, relied upon by the Second Circuit, see *Northeast Bancorp*, 740 F.2d at 207, is subject to more than one reasonable interpretation. It is suggested that the Senator was alluding to the fact that some states could allow acquisitions, while others could refrain from doing so, thus constituting the "degree" to which states in general could permit them. It is submitted, therefore, that the Senator's statement does not constitute definitive evidence that Congress considered whether an individual state may permit acquisitions in a limited manner. As the Board correctly indicated, the legislative history contains no discussion of state power to discriminate between out-of-state BHCs, and evinces an overriding congressional concern with the federal prohibition of interstate acquisitions, rather than the manner in which states could lift such a ban. See *Appendix, supra* note 16, at 385.

³⁷ 12 U.S.C. § 1846 (1982).

³⁸ *Northeast Bancorp*, 740 F.2d at 208 (footnote omitted). Section 7 of the Bank Holding Company Act states:

[the Act] 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.

12 U.S.C. § 1846 (1982). Although Congress and the courts have interpreted § 7 as granting the states authority to impose more severe restrictions on BHC expansion than those imposed by the Act, see, e.g., *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 48-49 (1980) (section intended to preserve state regulations, even if more restrictive than federal law); S. REP. NO. 1095, 84th Cong., 1st Sess. 22 (1955), there are strong indications that state discriminatory restrictions on expansions are not legally sustainable, see Shay, *State Law Considerations (Bank Holding Company Act, section 7)*, in *BANK ACQUISITIONS & HOLDING COMPANY EXPANSIONS* 510, 510 (1980); *infra* note 51 and accompanying text.

³⁹ 447 U.S. 27 (1980).

⁴⁰ *Id.* at 49. The *Lewis* Court determined that the legislative history of § 7 evinces an intent to forestall the development of state power to discriminate between local and foreign BHCs. See *id.* The Court concluded that "§ 7 applies only to state legislation that operates within the boundaries marked by the Commerce Clause." *Id.*

In 1955, while considering bank holding company legislation containing a provision identical to § 7 of the Bank Holding Company Act, see H.R. 6227, 84th Cong., 1st Sess. § 8 (1955), the House Banking Committee determined that "[t]here is no constitutional basis by

is submitted, therefore, that section 7 cannot be construed as an indication that the Douglas Amendment specifically authorizes violations of the Commerce Clause by discriminatory statutes such as those passed in Massachusetts and Connecticut. Thus, the necessity for a traditional Commerce Clause review is not eliminated by the Douglas Amendment.⁴¹

APPLYING THE COMMERCE CLAUSE TO THE MASSACHUSETTS AND CONNECTICUT STATUTES

The Commerce Clause traditionally has been construed not merely as an affirmative grant of power to Congress to regulate interstate commerce, but, in addition, as a limitation on state authority to restrict such commerce.⁴² Indeed, in *Northeast Bancorp*, the Federal Reserve Board recognized that two fundamental purposes behind the Commerce Clause are the prevention of "economic balkanization" and the development of the nation into a single "federal free trade unit."⁴³ Therefore, the acquisition of

which a State could prohibit a corporation chartered in another State from owning or controlling a national bank located within its borders." H.R. REP. No. 609, 84th Cong., 1st Sess. 7 (1955); see Shay, *supra* note 38, at 512.

⁴¹ Cf. *South-Central Timber Dev., Inc. v. Wunnicke*, 104 S. Ct. 2237, 2243, 2246-47 (1984) (no congressional exemption exists, and traditional Commerce Clause analysis applies).

⁴² See *Western & S. 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); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 440 (1978); *Freeman v. Hewit*, 329 U.S. 249, 252 (1946); *Northeast Bancorp*, 740 F.2d at 208; see also *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1852) (certain subjects of commerce power require exclusive federal legislation); W. RUTLEDGE, A DECLARATION OF LEGAL FAITH 33 (1947).

The constitutional grant of power to Congress to regulate commerce "among the several states," U.S. CONST. art. I, § 8, cl. 3, was never specifically examined at the Constitutional Convention, and there exists no determinative legislative history to clarify the intent of the Framers with regard to state authority to regulate interstate commerce, see J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 20, at 144-45.

⁴³ See *Appendix, supra* note 16, at 381 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 538 (1949)). "Balkanization" is defined as the act of breaking up "(as a region) into smaller ineffectual and frequently conflicting units." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 166 (1976). In the context of trade, it has been described as the erection of "barriers so high between the states that the stream of interstate commerce cannot flow over them." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 554 (1949) (Black, J., dissenting) (footnote omitted). Indeed, courts have interpreted the Commerce Clause in light of the historical background that inspired its adoption; it has been viewed as a reaction to the proliferation of state-imposed trade barriers and sanctions that caused economic chaos under the Articles of Confederation. See *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979); J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 20, at 145-46; see also Schwartz,

BHCs across state lines and the state-imposed regulation of such activities obviously present profound Commerce Clause implications.⁴⁴ It is submitted that the Massachusetts and Connecticut statutes, and the regional interstate banking system they encourage, are fundamentally inconsistent with "the Commerce Clause's overriding requirement of a national 'common market.'"⁴⁵ The protectionist policies underlying the regional restrictions imposed by these statutes are intended to foster the same type of economic balkanization that the Commerce Clause was designed to prohibit.⁴⁶

Per Se Unconstitutionality

State statutes effecting "simple economic protectionism" have been declared per se violations of the Commerce Clause.⁴⁷ A statute may be deemed to promote economic protectionism because it

Commerce, The States, and the Burger Court, 74 Nw. U.L. REV. 409, 410-11 (1979) (inability to stem rising tide of state protectionism led to rejection of Articles of Confederation and adoption of Constitution); see generally C. WARREN, *THE MAKING OF THE CONSTITUTION* 567-89 (1928) (recounting adoption of Commerce Clause at Federal Convention of 1787).

⁴⁴ See *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 38-39 (1980) (federal regulation of banking industry is evidence of its interstate nature).

⁴⁵ *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977).

⁴⁶ Cf. *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 381 (1976) (Mississippi requirement that Louisiana sign reciprocity agreement or be foreclosed from exporting milk into Mississippi creates preferential trade areas prohibited by Commerce Clause).

It is interesting to note that a Presidential report to Congress on the applicability of the McFadden Act and the Douglas Amendment advocated the abolition of all restrictions on interstate banking, including those imposed by Congress. See DEPARTMENT OF THE TREASURY, *GEOGRAPHIC RESTRICTIONS ON COMMERCIAL BANKING IN THE UNITED STATES: THE REPORT OF THE PRESIDENT*, reprinted in *BANK EXPANSION IN THE 80'S: MERGERS, ACQUISITIONS & INTERSTATE BANKING* 569, 582-83 (1981). The report asserted that geographic boundaries preclude pro-competitive market entry and undermine the competitive objectives they were designed to achieve. See *id.* It also asserted that elimination of geographic constraints would increase the range of financial services available to local communities without threatening small banks or the stability of the banking system. See *id.* at 588. Although it was suggested that Congress authorize regional banking systems as an interim step toward full liberalization of bank expansion restrictions, see *id.* at 594, this suggestion has been criticized as a delaying tactic and an attempt at "regional power grabs," see *Presentation of Patrick J. Mulhern in BANK EXPANSION IN THE 80'S: MERGERS, ACQUISITIONS & INTERSTATE BANKING* 598, 606-07 (1981).

⁴⁷ *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); see, e.g., *South-Central Timber Dev., Inc. v. Wunnicke*, 104 S. Ct. 2237, 2247 (1984) (requirement of Alaska that logs for export be processed locally falls within rule of per se invalidity); see *Bacchus Imports, Ltd. v. Dias*, 104 S. Ct. 3049, 3055 (1984); cf. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981) (state statute did not effect protectionism and thus did not warrant application of per se rule).

is determined to have either a discriminatory purpose or a discriminatory effect.⁴⁸ Considering the Connecticut statute, the Federal Reserve Board noted that the discriminatory purpose of the statute "is apparent from [the] legislative history, which demonstrates the intention of the Connecticut legislature to permit Connecticut banks and bank holding companies to develop and consolidate on a regional basis before having to compete with banks outside the region."⁴⁹ In fact, the Second Circuit acknowledged that the legislatures were motivated to enact the statutes by the desire to foster local banks and prevent their domination by large New York and Chicago BHCs.⁵⁰ These goals are contrary to the well established doctrine that states may not "build up [their] domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States,"⁵¹ and, therefore, it is submitted, the statutes are per se unconstitutional. It is suggested that even if the statutes were not deemed protectionist, they could not be upheld under less stringent standards of Commerce Clause review.⁵²

⁴⁸ *Bacchus Imports, Ltd. v. Dias*, 104 S. Ct. 3049, 3055 (1984); see, e.g., *Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978) (discriminatory effect); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 352-53 (1977) (dictum) (discriminatory purpose).

⁴⁹ 70 Fed. Res. Bull. at 382 (citing *The Report to the General Assembly of the State of Connecticut to Study Legislation to Limit the Conduct of Business in Connecticut by Subsidiaries of Bank Holding Companies*, Jan. 5, 1983, at 10, 12-13; Transcripts of Connecticut Senate Debate, May 18, 1983, at 60, 64, 70 (statement of Sen. Sullivan); Transcripts of Connecticut House of Representatives Debate, May 26, 1983, at 241, 258 (statement of Rep. Onorato)).

An examination of the legislative history of a state enactment often will reveal a discriminatory purpose. See *Bacchus Imports, Ltd. v. Dias*, 104 S. Ct. 3049, 3055-56 (1984). In *Bacchus Imports*, the Supreme Court determined that a Hawaii statute exempting certain locally-produced liquors from state taxation constituted economic protectionism subject to a declaration of per se unconstitutionality. See *id.* at 3056-57. The Court relied on the legislative history of the statute to determine the legislators' motives, and thus reveal the discriminatory purpose of the statute. See *id.* at 3055-56. After determining that the legislators were motivated by a desire to encourage and promote local industry, the Court concluded that the disparate treatment of local and out-of-state liquors to achieve such ends was per se violative of the Commerce Clause. See *id.* at 3056-57.

⁵⁰ See *Northeast Bancorp*, 740 F.2d at 209.

⁵¹ *Bacchus Imports, Ltd. v. Dias*, 104 S. Ct. 3049, 3057 (1984) (quoting *Guy v. Baltimore*, 100 U.S. 434, 443 (1880)); see also *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 43-44 (1980) (state interest in bolstering local ownership or wealth conflicts with general principle that Commerce Clause prohibits state regulation to shield residents from outside competition).

⁵² See *infra* notes 53-62 and accompanying text.

The Balancing Test

A non-protectionist state statute that impinges on interstate commerce but allegedly advances legitimate state goals is scrutinized under the balancing test enunciated by the Supreme Court in *Pike v. Bruce Church, Inc.*⁵³ "Where the statute regulates evenhandedly 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."⁵⁴ Once it has been determined that a legitimate local purpose is advanced by the statute, the extent to which burdens on interstate commerce will be tolerated will "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."⁵⁵

In *Lewis v. BT Investment Managers, Inc.*,⁵⁶ the Supreme Court applied a *Pike* analysis to a Florida statute that prohibited out-of-state banks and BHCs from acquiring Florida businesses selling investment advisory services.⁵⁷ The Court established that, under *Pike*, statutory attempts to prohibit out-of-state BHCs from acquiring in-state businesses are not evenhanded when locally based BHCs are permitted to make similar acquisitions.⁵⁸ It is suggested that the geographic restriction and the reciprocity scheme contained in the Massachusetts and Connecticut statutes involved in *Northeast Bancorp* do not constitute an "evenhanded" regulation, because under the statutes local BHCs are free to make acquisitions, while BHCs from forty-four, non-New England states are not.⁵⁹

⁵³ 397 U.S. 137, 142 (1970); accord *Sporhase v. Nebraska ex rel Douglas*, 458 U.S. 941, 954 (1982) (quoting *Pike*, 397 U.S. at 142); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 36-37 (1980) (quoting *Pike*, 397 U.S. at 142); see *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977). See generally Comment, *Constitutional Law—Commerce Clause—Bank Holding Company Act—Lewis v. BT Inv. Managers, Inc.*, 26 N.Y.L. Sch. L. Rev. 1089, 1097-1102 (1981) (Supreme Court has frequently followed *Pike* approach in Commerce Clause cases).

⁵⁴ 397 U.S. at 142.

⁵⁵ *Id.*

⁵⁶ 447 U.S. 27 (1980).

⁵⁷ See *id.* at 29, 42-44.

⁵⁸ See *id.* at 42. The *Lewis* Court noted that the Florida statute discriminated "among affected business entities according to the extent of their contacts with the local economy," and demonstrated "a local favoritism or protectionism that significantly alters its Commerce Clause status." *Id.* (emphasis in original).

⁵⁹ See Appendix, *supra* note 16, at 384. The Board recognized that the form of discrim-

In deciding on the Massachusetts and Connecticut statutes, the Federal Reserve Board intimated that the enactment of the statutes might have been motivated in part by a desire to maximize local control of banks, to discourage excessive concentration, and to protect local residents from fraud.⁶⁰ Nevertheless, the Board conceded that these arguably legitimate local concerns do not justify the disparate treatment of non-New England BHCs.⁶¹ In addition, the discriminatory effect of the statutes is not justified by these putative benefits because the same benefits could be attained through other, less discriminatory measures.⁶²

ination against interstate commerce effected by the statutes is unusual in that the statutes do not discriminate against all states, but instead favor selected states. *See id.* Nevertheless, the Supreme Court has declared state statutes to be unduly discriminatory even when those statutes effectively discriminate against only a few states. *See, e.g.,* *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 348-50 (1977). In *Hunt*, a North Carolina statute required all apples shipped into the state to bear the U.S. grade. *See id.* at 335. Seven of the thirteen states that shipped apples to North Carolina used their own grading systems, and were thus affected by the requirement. *See id.* at 349. The Court held that the North Carolina provision particularly discriminated against apples produced in the State of Washington by denying that state the unique competitive advantage it had earned through employing inspection and grading standards that surpassed federal standards. *See id.* at 351. It is submitted that the North Carolina regulatory scheme in *Hunt* benefited not only local apple producers, but also conceivably benefited other states using the less-stringent federal standards when those states attempted to compete with superior Washington apples in the North Carolina market. Analogously, it is submitted that the Massachusetts and Connecticut statutes are no less discriminatory because they discriminate against some states, while benefiting others.

⁶⁰ *See Appendix, supra* note 16, at 383. The Second Circuit recognized such local concerns when it referred to the concern of the states over possible domination of local banks by large BHCs from New York and Chicago. *See Northeast Bancorp*, 740 F.2d at 209.

⁶¹ *See Appendix, supra* note 16, at 383 (citing *Lewis*, 447 U.S. at 43). In concluding that the legitimate purposes of the state statute failed to justify the disproportionate burden placed upon out-of-state BHCs, the *Lewis* Court found little support for the contention propounded by the state that out-of-state BHCs presented a greater threat of monopolization or of fraudulent practices than did local BHCs. *See Lewis*, 447 U.S. at 43. Therefore, the Second Circuit's apparent acceptance of the rationale that large New York and Chicago BHCs pose a greater threat to Massachusetts and Connecticut local banks and residents than do BHCs from other New England states appears inconsistent with the Supreme Court's determination in *Lewis*. *See Northeast Bancorp*, 740 F.2d at 209-10; *see also* DEPARTMENT OF THE TREASURY, GEOGRAPHIC RESTRICTIONS ON COMMERCIAL BANKING IN THE UNITED STATES, *supra* note 46, at 590-91 (relaxation of geographic restraints would actually improve service to local communities and not threaten local banks).

⁶² *See Appendix, supra* note 16, at 383. The Board suggested that Massachusetts and Connecticut could have accomplished their objectives in a non-discriminatory manner by placing limitations on the total banking assets that a BHC could maintain in order to qualify for acquisitions within the state. *See id.* It must be noted that existing federal antitrust statutes already act to prevent monopolization by large BHCs. *See Pitts & Cranmore, supra* note 2, at 795. In addition, § 3 of the Bank Holding Company Act, 12 U.S.C. § 1842(c) (1982), prohibits the Board from approving acquisitions that would result in monopoly or in

Thus, it is submitted, that under the standards explicated in *Pike*, the Massachusetts and Connecticut statutes appear to violate the Commerce Clause, whether or not the enactments arguably advance legitimate state goals.

CONCLUSION

The resolution of the constitutional questions presented in *Northeast Bancorp* will profoundly affect the future of the banking industry in the United States. The vagueness of the congressional intent behind the Douglas Amendment, as well as the Supreme Court precedent requiring an express statement of congressional authorization for state enactments to interfere with interstate commerce, cast doubt on the Second Circuit's determination that the Douglas Amendment immunizes the Massachusetts and Connecticut statutes from attack under the Commerce Clause. Without specific authorization, the Massachusetts and Connecticut statutes and other statutes that similarly create regional banking systems, fail to withstand traditional Commerce Clause scrutiny. Therefore, absent resolution by the Supreme Court or congressional intervention in the form of a clarifying amendment to the Douglas Amendment, the banking community and the many states contemplating enactment of similar legislation cannot act with a sufficient degree of certainty.

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