

9-1-1985

The Case for the Validity of State Regional Banking Laws

Arthur E. Wilmarth Jr.

Recommended Citation

Arthur E. Wilmarth Jr., *The Case for the Validity of State Regional Banking Laws*, 18 Loy. L.A. L. Rev. 1017 (1985).
Available at: <https://digitalcommons.lmu.edu/lr/vol18/iss4/3>

This Symposium is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

THE CASE FOR THE VALIDITY OF STATE REGIONAL BANKING LAWS

*Arthur E. Wilmarth, Jr.**

I. INTRODUCTION

On January 7, 1985, the United States Supreme Court granted certiorari to review the decision of the Second Circuit Court of Appeals in *Northeast Bancorp, Inc. v. Board of Governors*.¹ By granting certiorari, the Supreme Court agreed to consider whether the interstate regional banking laws enacted by Connecticut and Massachusetts—which were upheld by the Second Circuit—are authorized under section 3(d) of the Bank Holding Company Act,² and therefore constitutional. The Supreme Court's decision will have a significant and widespread impact. As of March 15, 1985, eight states in addition to Connecticut and Massachusetts have enacted regional banking laws and about twenty other states may consider adopting similar laws in 1985.³

The Connecticut and Massachusetts statutes permit out-of-state bank holding companies to acquire in-state banks subject to regional and reciprocal limitations. Each statute provides that an out-of-state bank holding company may acquire an in-state bank if: (1) the out-of-state holding company is located in another state within the New England region; and (2) the other state provides reciprocal privileges to bank holding companies located in the bank's home state.⁴

The Connecticut and Massachusetts laws have been challenged before the Supreme Court by petitioners Citicorp, Northeast Bancorp and Union Trust Company on two grounds.⁵ First, petitioners argue that the New England regional restriction contained in the challenged

* B.A. 1972, Yale University; J.D. 1975, Harvard University. Partner, Jones, Day, Reavis & Pogue, Washington, D.C.

1. 740 F.2d 203 (2d Cir. 1984), *cert. granted*, 105 S. Ct. 776 (1985).

2. 12 U.S.C. § 1842(d) (1982) (popularly known as the Douglas Amendment).

3. *See infra* notes 106-10 and accompanying text.

4. *See infra* notes 106-07 and accompanying text.

5. Briefs *amici curiae* in support of petitioners have been filed with the Supreme Court by Bank of New York Company, Inc., Chase Manhattan Corp., David F. Bolger Revocable Trust, the New York State Bankers Association, and jointly by U.S. Senators Alphonse D'Amato and Daniel Moynihan and U.S. Representatives Hamilton Fish, Robert Garcia, John LaFalce, Stanley Lundine, Charles Schumer and George Wortley who are all members of New York's congressional delegation.

statutes constitutes an unlawful discrimination against states outside the region (especially New York) in violation of the commerce clause.⁶ Second, petitioner maintain that Connecticut's and Massachusetts' enactment of parallel statutes with a similar regional restriction represents an unlawful interstate "compact" in violation of the compact clause.⁷

Despite the constitutional nature of petitioners' arguments, it is clear that the validity of the challenged statutes (and of regional banking laws in general) depends upon the Supreme Court's construction of the authority granted to the states under section 3(d) of the Bank Holding Company Act (BHC Act), popularly known as the Douglas Amendment.⁸ The Douglas Amendment, which was enacted as part of the original BHC Act in 1956, prohibits every bank holding company from acquiring a bank located in a state other than the state in which the holding company's principal banking subsidiaries are located, *unless* such 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."⁹

There are two fundamental questions to be answered by the Supreme Court with respect to the Douglas Amendment. First, does the statute give to each state a *general authority* to determine the extent to which out-of-state bank holding companies may acquire banks within its borders? Second, if the first question is answered in the affirmative, do

6. U.S. CONST. art. I, § 8, cl. 3.

7. U.S. CONST. art. I, § 10, cl. 3. Petitioners also contended before the Second Circuit that the Connecticut and Massachusetts statutes violate the equal protection clause of the fourteenth amendment (U.S. CONST. amend. XIV, § 1). The Second Circuit rejected this contention, 740 F.2d at 209-10, and petitioners did not initially raise their equal protection challenge before the Supreme Court. On April 8, 1985, following the Supreme Court's decision in *Metropolitan Life Ins. Co. v. Ward*, 53 U.S.L.W. 4399 (U.S. Mar. 26, 1985), petitioners filed a Supplemental Memorandum with the Supreme Court seeking to reintroduce their equal protection claim. *Metropolitan* struck down an Alabama tax on insurance companies which discriminated against all companies which were not incorporated under Alabama law and did not maintain their principal place of business in the state. The Supreme Court held that the tax violated the equal protection clause even though it was shielded from commerce clause scrutiny by the McCarran-Ferguson Act. *Id.* at 4402. Respondents filed a Supplemental Brief on April 10, 1985, in which they opposed petitioners' effort to revive their equal protection clause challenge and argued that *Metropolitan* is inapposite to the state regional banking laws challenged in *Northeast Bancorp.*

8. It appears to be undisputed by the parties that regional banking laws are constitutional if they represent valid exercises of the authority granted to the states under the Douglas Amendment. *See, e.g.*, Brief for Petitioner Citicorp at 15, *Northeast Bancorp., Inc. v. Board of Governors*, 740 F.2d 203 (2d Cir. 1984), *cert. granted*, 105 S. Ct. 776 (1985) (hereinafter Briefs are cited without the case name); Brief for Petitioners Northeast Bancorp, Inc. (Northeast) and Union Trust Company (Union Trust), *supra*, at 15.

9. 12 U.S.C. § 1842(d) (1982) (emphasis added).

the terms and legislative history of the Douglas Amendment, or the principles of statutory construction, reveal any *limitation* on state authority which would *prevent* the states from enacting regional bank holding company laws? In sum, as the Solicitor General of the United States has said, *Northeast Bancorp* presents "a relatively straightforward question of statutory interpretation" of the Douglas Amendment.¹⁰

It will be the thesis of this Article that Congress has granted to the states, under the Douglas Amendment, a *general and unqualified power* to determine the extent to which bank holding companies may acquire banks across state lines. Neither the terms nor the legislative history of the Douglas Amendment indicate that Congress intended to limit the authority granted to the states to the single decision of whether to allow entry by *all* out-of-state bank holding companies or by *none*. Yet, this is the only choice which petitioners would effectively allow the states.¹¹ Nor do the language and legislative history of the Douglas Amendment support petitioners' assertion that the states may not place regional limitations on acquisitions of banks by out-of-state bank holding companies.

In fact, petitioners' construction of the Douglas Amendment is *contrary* to the legislative history of the BHC Act of 1956, as well as congressional enactments both before the 1956 Act and thereafter. As described below, this history demonstrates that Congress has consistently sought to provide each state with full authority to determine the banking structure which it deems most suitable for the needs of its citizens and local economy. Congress has delegated to the states the power to regulate both the ownership of banks by bank holding companies and the establishment of branches by banks. Congress concluded that state control of banking structure would ensure a decentralized banking system, composed of many banks of varying size, which would be responsive to the needs of both urban and rural communities and small as well as large businesses.¹²

10. Brief for the Federal Respondent in Opposition to the Petition for Certiorari, *supra* note 8, at 14.

11. See *infra* notes 147-51 and accompanying text.

12. The federal policy of deference to state control of banking structure has resulted in a decentralized banking system. See, e.g., Bell & Wilmarth, *The Interstate Banking Controversy: President Carter's McFadden Act Report*, 99 BANKING L.J. 722, 731-34 (1982). As of December 31, 1983, there were 14,890 commercial banks in the United States, including 4,751 national banks and 10,139 state banks. FEDERAL DEPOSIT INS. CORP., CHANGES AMONG OPERATING BANKS AND BRANCHES, 1983 at 4 (1984). Even among the 300 largest United States commercial banks, the total deposits held by each bank, as of December 31, 1984, ranged from \$757 million (Summit Bank, Fort Wayne, Ind.) to over \$79 billion (Citibank) and over \$88 billion (Bank of America). *The Top 300 Banks in the United States*, AM. BANKER, Mar. 15, 1985, at 44.

In order to place the Douglas Amendment in its historical context, this Article will first discuss the development of the United States banking system through the BHC Act of 1956. Second, the legislative history of the Douglas Amendment's enactment in 1956 will be described. Third, the evidence of congressional intent which can be gleaned from post-1956 statutes will be considered. Fourth, judicial and federal agency constructions of the Douglas Amendment, and state exercises of the authority granted thereunder, will be reviewed. It will be shown, based upon this four-part analysis, that the limitation of state authority argued for by petitioners in *Northeast Bancorp* is contrary to congressional intent and the relevant judicial authorities. Finally, in view of the authority granted to the states under the Douglas Amendment, it will be shown that state regional banking laws are valid under both the commerce clause and the compact clause.

II. THE HISTORICAL BACKGROUND OF THE DOUGLAS AMENDMENT

A. *The Federal Policy of Deference to State Determination of Banking Structure*

It is a basic rule of statutory construction that a statute must be construed in accordance with its historical context and policy, including its relationship to previous statutory and judicial authorities with respect to the same or a similar subject matter.¹³ Yet petitioners ignore this important principle. Instead, they begin from the hypothetical premise that there should be free and unrestrained "interstate banking" in the United States, and argue that the Connecticut and Massachusetts statutes are "protectionist statutes . . . that intentionally discriminate against commerce from excluded states."¹⁴

Petitioners' premise is fatally flawed because it fails to recognize the historical and present reality of banking in the United States. The fact is that "interstate banking"—in the sense of interstate acquisitions of banks by bank holding companies—does *not* exist in the United States *except as permitted by the States*.¹⁵ Under the Douglas Amendment, Congress has

13. See, e.g., *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 388-93 (1970); 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 45.10 (N. Singer 4th ed. 1984).

14. Brief for Petitioner Citicorp, *supra* note 8, at 11. See also Brief for Petitioners Northeast and Union Trust, *supra* note 8, at 2-3.

15. As described below, 22 states (including Connecticut and Massachusetts) have adopted laws which permit out-of-state bank holding companies, under varying circumstances, to acquire in-state banks. See *infra* notes 99-109 and accompanying text. Under the Douglas Amendment, interstate bank acquisitions could not occur without these state laws. Thus, as the Second Circuit stated, "[T]he Massachusetts and Connecticut statutes would appear to promote interstate commerce rather than restrict it." *Northeast Bancorp*, 740 F.2d at 208.

delegated to *the States* the power to determine the extent to which such interstate acquisitions may occur. Indeed the business of banking is "unique among major American businesses" in that banks may not operate or be acquired across state lines without state authorization.¹⁶

The Douglas Amendment is not an isolated example of congressional deference to state law in the regulation of banking. Congress has incorporated numerous provisions of state law into the federal statutes governing national banks and bank holding companies.¹⁷ In this regard, the Third Circuit Court of Appeals has said:

Whatever may be the history of the federal-state relations in other fields, *regulation of banking has been one of dual control* since the passage of the first National Bank Act in 1863. . . . [U]nquestionably, as in other businesses, federal presence in the banking field has grown in recent times. But *congressional support remains for dual regulation*.¹⁸

Nowhere has Congress deferred to the states so completely as in the regulation of banking structure. As discussed in further detail below, the McFadden Act¹⁹ authorizes each state to determine when, where and how both national banks and state banks may establish branches within its borders.²⁰ Moreover, by authorizing each state to regulate acquisitions of in-state banks by out-of-state bank holding companies, the Douglas Amendment ensures that each state can maintain "control over the ownership of banks within its borders."²¹

As shown below, the federal government has consistently followed a policy of deference to state control over banking structure since the 1830's. This federal policy has been based upon two essential determinations: (1) that federal control over banking structure could cause a concentration of financial resources which would be dangerous to the political and economic health of the nation; and (2) that state control over banking structure would result in a decentralized banking system responsive to the differing needs of local communities and businesses. Accordingly, petitioners' attacks on the constitutionality of the Connecti-

16. Ginsburg, *Interstate Banking*, 9 HOFSTRA L. REV. 1133, 1137, 1167-68 (1981).

17. See, e.g., *Indep. Bankers Ass'n of Am. v. Smith*, 534 F.2d 921, 932 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976); *Iowa Indep. Bankers v. Board of Governors*, 511 F.2d 1288, 1291-92, 1296-97 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975).

18. *National State Bank v. Long*, 630 F.2d 981, 985 (3d Cir. 1980) (citations omitted) (emphasis added).

19. 12 U.S.C. § 36 (1982).

20. *First Nat'l Bank in Plant City v. Dickinson*, 396 U.S. 122, 131 (1969). See *infra* notes 34-42 and accompanying text.

21. *Girard Bank v. Board of Governors*, 748 F.2d 838, 842 (3d Cir. 1984).

cut and Massachusetts statutes must be judged against this historical background of delegated *state* authority over the structure of the banking industry, instead of petitioners' premise of nationwide "interstate banking."²²

B. The History of State Control of Banking Structure from the Demise of the Second Bank of the United States through the McFadden Act, as Amended by the Banking Act of 1933

1. President Jackson's veto of the rechartering of the Second Bank of the United States

Prominent among those who supported President Andrew Jackson's veto of the rechartering of the Second Bank of the United States in 1832 were the owners of state banks—both in the East and in the West—who resented the Second Bank's exclusive control over the nation's currency and, thereby, the effective allocation of credit resources. Moreover, state banks were the direct beneficiaries of Jackson's decision in 1833 to remove the federal government's deposits from the Second Bank and place them in selected state banks.²³

Jackson and those who supported him viewed the Second Bank as a dangerous center of concentrated financial power which threatened political and social democracy.²⁴ Accordingly, the fight against the centralized financial resources of the Second Bank led naturally to the state "free banking" movement which began in the late 1830's. As typified by New York's banking law of 1838, "free banking" statutes permitted state banks to be chartered under general rules of incorporation rather than requiring special acts of the legislature. The intent of these state laws was "to encourage the growth of banking, but at the same time . . . to prevent the concentration of banking power."²⁵

22. In *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946), where the Supreme Court upheld a discriminatory South Carolina tax on out-of-state insurance companies based upon the authority granted to the states under the McCarran-Ferguson Act, the Court stated: "No phase has had a more atypical history than regulation of the business of insurance. This fact is important for the problems now presented. They have origin in that history. Their solution cannot escape its influence." *Id.* at 413. See also *infra* notes 124-32 and accompanying text.

23. See R. HOFSTADTER, *THE AMERICAN POLITICAL TRADITION* 72-81 (1974); A. SCHLESINGER, *THE AGE OF JACKSON* 74-80, 90-92, 97-102 (1945).

24. See R. HOFSTADTER, *supra* note 23, at 74-79; A. SCHLESINGER, *supra* note 23, at 89-94, 97-102, 105-10.

25. Golembe, *Our Remarkable Banking System*, 53 VA. L. REV. 1091, 1096 (1967). See also R. HOFSTADTER, *supra* note 23, at 81-82.

2. The National Bank Act of 1864

Following the expiration of the Second Bank's charter in 1836, the federal government did not again enter the bank chartering field until the Civil War. During the interim period, the states were the exclusive chartering and regulatory authorities for banks. In 1863, responding to problems encountered in financing the war effort, Congress enacted the National Currency Act²⁶—replaced by the National Bank Act of 1864²⁷—to authorize a system of federally-chartered but privately-owned national banks which would issue a new national paper currency. However, instead of creating another central bank (a step which was not taken until the Federal Reserve Act of 1913²⁸), Congress chose the “free banking” model for the new system of privately-owned national banks.²⁹

The National Bank Act did not give the new national banks any branching authority, a situation which placed such banks at a competitive disadvantage with state banks in states which permitted branching. This situation was only slightly remedied by an 1865 statute³⁰ which permitted state banks converting to national charter to retain their existing branches, and a 1918 law³¹ which allowed national banks to acquire branches by consolidating with a converted state bank.³² Moreover, in 1924, when a St. Louis national bank sought to establish a branch in violation of Missouri's branching law for *state* banks, the Supreme Court upheld the application of the state law to the national bank.³³ Thus in 1924, as well as 1836, *state* law effectively governed the nation's banking structure.

3. The McFadden Act of 1927 and the Banking Act of 1933

In response to the competitive inequality faced by national banks with respect to branching, Congress adopted the McFadden Act of 1927,³⁴ which authorized national banks to establish branches within the

26. Act of Feb. 25, 1863, ch. 58, 12 Stat. 665 (1863).

27. Act of June 3, 1864, ch. 106, 13 Stat. 99 (1864) (codified at 12 U.S.C. § 165).

28. Act of Dec. 23, 1913, ch. 6, 38 Stat. 251 (1913) (codified in scattered sections of 12 U.S.C.).

29. Ginsburg, *supra* note 16, at 1139-41; Golembe, *supra* note 25, at 1094-97. It is true that Congress in 1865 sought to drive state banks out of existence by placing a prohibitive tax on the circulation of bank notes by state banks. This effort failed, however, because state banks successfully shifted to a deposit-based business, and Congress never again took such a preemptive step. *Id.* at 1094.

30. Act of Mar. 3, 1865, ch. 7, 13 Stat. 484 (proviso).

31. Act of Nov. 7, 1918, ch. 209, 40 Stat. 1043 (1918).

32. Ginsburg, *supra* note 16, at 1153.

33. *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 656-60 (1924).

34. Act of Feb. 25, 1927, ch. 191, § 7, 44 Stat. 1228 (codified at 12 U.S.C. § 36).

municipality where their main banking facilities were located, *but only if permitted by state law*. The Senate Banking and Currency Committee stated that the McFadden Act would permit "national banks to have branches in those cities *where State banks are allowed to have them under State laws*."³⁵

During the Great Depression, the Comptroller of the Currency (the regulator of national banks) and others argued that national banks should be authorized to branch *regardless of state law*. Their argument was, in part, that smaller rural banks were undercapitalized and should be replaced by branches of larger banks.³⁶ In accordance with this view, Senator Carter Glass of Virginia introduced a bill³⁷ in 1932 which would have authorized national banks to establish branches outside of their home city: (1) at any point within their home state, "*irrespective of State laws*;" and (2) at any point in *contiguous* states within fifty miles of their main office, subject to the approval of the Federal Reserve Board.³⁸

Although Senator Glass' bill passed the Senate, it was strongly opposed on the ground that it would deprive the states of their control over banking structure and would lead to a greater concentration of banking resources. Thus, the minority of the Senate Banking and Currency Committee stated:

There is a movement on foot to control the banking industry of the United States by centralization. . . . The only way it can be accomplished, apparently, is through nation-wide branch banking and the complete elimination of the unit bank.

. . . .

Our dual system of banking has been one of the great motivating factors in making the United States the outstanding country that it is to-day. Our country is too large, too widely diversified, to expect one banking system to be so versatile as to deal with so complex a situation efficiently. . . .

. . . .

The placing of our banking structure with the one overburdened bureaucracy in Washington is in direct violation of the principle of State rights.³⁹

Senator Glass' bill was defeated in the House in 1932, and when he

35. S. REP. NO. 473, 69th Cong., 1st Sess. 14 (1926) (emphasis added), *quoted in* First Nat'l Bank of Logan v. Walker Bank & Trust Co., 385 U.S. 252, 258 (1966).

36. *See* First Nat'l Bank of Logan v. Walker Bank & Trust Co., 385 U.S. 252, 259 (1966).

37. S. 4412, 72d Cong., 1st Sess. (1932).

38. *See* S. REP. NO. 584, 72d Cong., 1st Sess. 11, 16 (1932) (emphasis added).

39. S. REP. NO. 584, 72d Cong., 1st Sess. Part II, 3-4 (1932) (minority views).

introduced a new bill in 1933,⁴⁰ it provided that national banks could establish branches *only within their home state and only to the extent permitted by state law*. Thus, Senator Glass explained that the new branching provision, which was adopted as section 23 of the Banking Act of 1933,⁴¹ would permit national banks to establish branches "in only those States the laws of which permit branch banking, and only to the extent that the State laws permit branch banking."⁴²

It is also noteworthy that proponents of the dual banking system in Congress defeated proposals in 1932-33 to provide deposit insurance only for national banks and state banks which were members of the Federal Reserve System. Such proposals were opposed as attempts "to destroy the State banking system."⁴³ Instead, the proponents of the dual banking system obtained deposit insurance coverage under section 8 of the Banking Act of 1933 for *all* state as well as national banks, thereby preserving "a decentralized unit banking system, subject to a minimum of federal control."⁴⁴

III. THE LEGISLATIVE HISTORY OF THE BANK HOLDING COMPANY ACT OF 1956

A. *The House and Senate Committee Proposals*

As already shown, the McFadden Act, as amended by the Banking Act of 1933, firmly established state control over branching by national and state banks, and thereby sought to provide each state with authority to determine its banking structure. In the early 1950's, however, supporters of the decentralized dual banking system became concerned with the growth of multibank holding companies. It was evident that large banking organizations were using the holding company mechanism to evade state branching laws by creating numerous subsidiary banks, both within and across state lines, and then operating such banks in a unitary fashion similar to branches. The development of multibank holding companies was most strongly opposed by the "independent" unit banks

40. S. 1631, 73d Cong., 1st Sess. (1933).

41. Act of June 16, 1933, ch. 89, § 23, 48 Stat. 189 (codified at 12 U.S.C. § 36(c), (d)).

42. 76 CONG. REC. 2511 (1933), *quoted in* First Nat'l Bank of Logan v. Walker Bank & Trust Co., 385 U.S. 252, 259 (1966). *See also* S. REP. No. 77, 73d Cong., 1st Sess. 11, 16-17 (1933).

43. S. REP. No. 584, Part II, *supra* note 39, at 6-7.

44. Golembe, *supra* note 25, at 1098-100. The federal deposit insurance program as originally enacted in 1933 required state nonmember banks to apply for membership in the Federal Reserve System in order to obtain insurance, but the requirement of actual membership was postponed and later rescinded, thereby allowing state banks to retain deposit insurance in their status as nonmember banks. *Id.* at 1099-100.

and their supporters, who called for a federal law which would: (1) prohibit any further acquisitions of banks across state lines by bank holding companies; and (2) permit bank holding companies to acquire banks within their home state only to the extent that state law would permit banks to establish branches under the same circumstances.⁴⁵

In response to the independent bankers' proposals, the House Banking and Currency Committee reported a bill⁴⁶ which was passed by the full House in 1955. Section 5(c) of the bill provided that bank holding companies could not acquire any additional banks outside of their home state, and limited further home state acquisitions to those areas in which bank branching was permitted or in which holding company acquisitions had been specifically authorized by state law.⁴⁷

In explaining the objectives of the bill, the House Banking and Currency Committee stressed that the unrestricted ability of bank holding companies to acquire banks within and across state lines would undermine state control of banking structure pursuant to the McFadden Act. Moreover, the House Committee believed that unrestrained bank holding company expansion would result in greater concentration of financial resources and thereby diminish the availability of credit to local communities and small businesses:

Congress has declared its approval of the American system of local independent and competitive banks, and has left the matter of branches to the States to determine, each State for itself. . . .

. . . .

. . . [T]he declared will of Congress in favor of independent competitive banking is being thwarted by indirect branch banking, through the mechanism of the holding company.

. . . .

. . . [T]his is the only country left where most communities are served by home-owned and home-managed banks

45. See, e.g., *Control and Regulation of Bank Holding Companies: Hearings on S. 2674 Before the House Comm. on Banking and Currency, 84th Cong., 1st Sess. 153-63 (1955)* (testimony of W.J. Bryan, president, Indep. Bankers Ass'n of America) [hereinafter cited as *1955 House Hearings*]; *id.* at 163-73 (testimony of H.J. Harding, president, Indep. Bankers Ass'n, 12th Federal Reserve District); *Control of Bank Holding Companies: Hearings on S. 880, S. 2350 and H.R. 6227 Before a Subcomm. of the Senate Comm. on Banking and Currency, 84th Cong., 1st Sess. 104-31 (1955)* (testimony of Messrs. Bryan and Harding) [hereinafter cited as *1955 Senate Hearings*].

46. H.R. 6227, 84th Cong., 1st Sess. (1955).

47. H.R. 6227, 84th Cong., 1st Sess., § 5(c) (1955), reprinted in *1955 Senate Hearings*, *supra* note 45, at 25. See also H.R. REP. NO. 609, 84th Cong., 1st Sess. 15, 24 (1955).

which are aware of and responsive to the needs of the people of their areas. Our independent banking system has been a vital factor in the development of the United States. . . .

. . . .

Other countries must depend on 3, 4 or 5 banks having up to thousands of branches. Policies and important credit decisions are made hundreds or thousands of miles from many of the branches. . . . This inevitably tends toward concentration in all lines, cartels, the stifling of new enterprises, and stagnation⁴⁸

The Senate Committee on Banking and Currency, while agreeing with the House that a federal law regulating bank holding companies was needed,⁴⁹ took a different approach with respect to holding company acquisitions of banks. Instead of adopting an absolute federal prohibition against all holding company acquisitions across state lines or within states where branching was not permitted, the Senate Committee's bill⁵⁰ provided that such acquisitions would be permitted, subject to: (1) prior Federal Reserve Board approval; and (2) the ability of each state to affirmatively prohibit such acquisitions.⁵¹

B. THE DOUGLAS AMENDMENT

With respect to interstate acquisitions of banks by bank holding companies, the American Bankers Association (ABA) (representing ninety-eight percent of United States banks) did not favor either the House bill or the Senate Committee bill. Instead, the ABA proposed a compromise which would confer the following authority upon the states over bank holding company acquisitions:

It is vital that each state should be permitted to determine . . . whether or not it should permit a holding company domiciled

48. H.R. REP. NO. 609, *supra* note 47, at 2,3, 6 (emphasis added).

49. See S. REP. NO. 1095, 84th Cong. 1st Sess. (1955), *reprinted in* 1956 U.S. CODE CONG. & AD. NEWS 2482, 2483.

50. S. 2577, 84th Cong., 1st Sess. (1955).

51. S. REP. NO. 1095, *supra* note 49, at 2489-93. In this regard, Senator Willis Robertson of Virginia, chief sponsor and floor manager of S. 2577, stated that § 7 of the bill (which was enacted as § 7 of the BHC Act) would preserve the authority of each state "to permit or prohibit the operation of bank holding companies within its borders," including the specific power to prohibit acquisitions of in-state banks by out-of-state bank holding companies. 102 CONG. REC. 6751, 6752 (1956) (quoting 1952 speech by Sen. Maybank); *id.* at 6855 (colloquy between Senators Langer and Capehart). As an example of state legislation which would be permissible under § 7, Senator Robertson pointed to a Georgia statute which prohibited all in-state and out-of-state holding companies from acquiring more than 15% of the voting stock of two or more Georgia banks. *Id.* at 6752-53.

in another State to cross State lines and operate within such State. . . . [N]o bank holding company should be permitted to expand outside of the State in which it is domiciled unless the laws of such outside State expressly permit such expansion.⁵²

The ABA compromise position was similar to a floor amendment proposed by Senator Paul Douglas of Illinois during the Senate debate on its bill.⁵³ Senator Douglas' amendment, which was enacted as section 3(d) of the original BHC Act of 1956, provided that no bank holding company could acquire a bank located in a state other than the state in which the holding company's principal place of business was located or its "principal operations" were conducted, *unless* such acquisition was "specifically authorized" by the statutory law of such other state.⁵⁴ The Douglas Amendment was supported by the independent bankers (who found it an acceptable substitute for section 5(c) of the House bill) as well as the ABA.⁵⁵

Senator Douglas emphasized that the primary purpose of his amendment was to carry out the long-established federal policy against the undue concentration of financial resources. He declared that this policy was necessary to ensure both political liberty and economic competition:

[T]he pending bill, and [the] amendment . . . are in the true American tradition, for what the sponsors of the amendment are seeking to do is to prevent an undue concentration of banking and financial power, and instead to keep the private control of credit diffused as much as possible. For we know that when the credit resources of a country become concentrated and fall into a few hands, then the industry and trade of that country also become concentrated.

. . . .

Andrew Jackson realized all this when he faced Nicholas

52. 1955 House Hearings, *supra* note 45, at 406 (testimony of G.R. Boyles on behalf of the ABA); 1955 Senate hearings, *supra* note 45, at 289 (supplemental statement of Mr. Boyles on behalf of the ABA).

53. See 102 CONG. REC. 6860 (1956). For the Senate debates on the Douglas Amendment, see *id.* at 6760-61, 6856-63. Senator Douglas previously had offered his amendment before the Senate Committee, but it was defeated by a vote of 6-4. *Id.* at 6761, 6862.

54. *Id.* at 6857 (emphasis added). The Douglas Amendment was amended in 1966 to remove the reference to the principal office or place of business of a bank holding company, and to specify that the state of its "principal operations" would be deemed to be the state in which its subsidiary banks had the largest total amount of deposits. See *infra* notes 65-66 and accompanying text.

55. 102 CONG. REC. 6760 (1956) (statement of Sen. Robertson); *id.* at 6860 (statement of Sen. Douglas).

Biddle and the Second Bank of the United States. . . . Jackson not only opposed the private creation of monetary purchasing power by the [B]ank, but also its tendency toward monopolizing credit by driving out the small banks. He wanted credit and banking to be decentralized and diffused so that men might be free.⁵⁶

Senator Douglas pointed out that where banking resources had become concentrated in a few giant banks—as in Canada, Great Britain, and Germany—competition had diminished and industry had become concentrated. He also asserted that the concentration of banking resources in Germany had contributed to the rise of Hitler. Therefore, he argued that the pending bill and his amendment were critically needed to “check and, if possible, to roll back the concentration of banking and credit” in the United States.⁵⁷

Senator Douglas also contended that his amendment was necessary to prevent further evasion by bank holding companies of restrictions imposed by state law and the McFadden Act upon bank branching. In this regard, he stated:

[O]ur amendment aims . . . 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.

. . . .

Holding companies have been developed in part—I would say largely—in order to get around restrictions on branch banking.

. . . .

[Our amendment] is a logical continuation of the principles of the McFadden Act, which tried to prevent the Federal power from being used to permit national banks to expand across State lines in a way contrary to State policy⁵⁸

Congress plainly understood that the Douglas Amendment would give each state full authority to decide whether to permit entry by out-of-state bank holding companies on a case-by-case *and* state-by-state basis.

56. 102 CONG. REC. 6857 (1956) (statement of Sen. Douglas).

57. *Id.* See also *id.* at 6861-62 (statements of Sen. Payne and Sen. Morse).

58. *Id.* at 6858, 6860 (statement of Sen. Douglas) (emphasis added).

Both the ABA (in its testimony before the House and Senate Committees) and Senator Douglas (during the Senate debate) said that the Amendment would require state authorization for each acquisition of an in-state bank by "a bank holding company" located in "another State."⁵⁹ Senator Robertson, who *opposed* the Douglas Amendment, acknowledged that the Amendment "specifically says *no* bank holding company in the future may cross a State line unless the laws of *the State involved* permit *it* to do so."⁶⁰

In sum, there can be no doubt that Congress delegated to each state, under the Douglas Amendment, a *general and unqualified power* to determine the degree to which *any* out-of-state bank holding company from *any* state could acquire banks within that state's borders. Nowhere did Congress indicate an intent to limit a state's authority under section 3(d) to the mere choice of whether to permit entry by *all* out-of-state bank holding companies or by *none*. Nor did Congress anywhere express a purpose to require a state to treat bank holding companies from *all other states* in the same manner. Thus, petitioners' argument against the authority of states to impose "regional" limitations on entry by out-of-state bank holding companies finds no support in the legislative history of the Douglas Amendment.

Indeed, Congress understood that the Douglas Amendment would cause discrimination against interstate commerce. Senator Bennett of Utah opposed the Douglas Amendment on this very ground. He argued that it would "require every State that does not now have legislation prohibiting bank holding companies 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*."⁶¹ Senator Bennett further contended that "[f]or Congress to *require discrimination in interstate commerce*, and then leave it to *the several States to correct it*, is a strange approach."⁶² Nevertheless, the Douglas Amendment was adopted by an overwhelming 58-18 vote of the Senate,⁶³ and unanimously approved by the House,⁶⁴

59. 1955 House Hearings, *supra* note 45, at 406; 1955 Senate Hearings, *supra* note 45, at 289; 102 CONG. REC. 6860 (1956) (statement of Sen. Douglas) (emphasis added). *See also id.* at 6862 (statement of Sen. Payne).

60. *Id.* at 6760 (emphasis added).

61. *Id.* at 6860 (statement of Sen. Bennett) (emphasis added). *See also id.* at 6862 (statement of Sen. Bricker).

62. *Id.* at 6860 (statement of Sen. Bennett) (emphasis added).

63. *Id.* at 6863. In addition, of the nine absent and nonvoting Senators who indicated their views on the Douglas Amendment, seven supported the Amendment. *Id.*

64. *Id.* at 7165.

thereby confirming Congress' clear decision to authorize discrimination against interstate commerce with respect to acquisitions of banks by bank holding companies.

IV. CONGRESSIONAL REAFFIRMATIONS OF STATE AUTHORITY UNDER THE DOUGLAS AMENDMENT

On several occasions since 1956, Congress has reconsidered the policy on interstate banking structure set forth in the Douglas Amendment. In each instance, Congress has *confirmed* the authority of the states to determine the extent to which bank holding companies may acquire banks located in other states.

In 1966, Congress amended the Douglas Amendment by providing that the "home state" of each bank holding company would be the state in which its operations were "principally conducted" (defined as the state in which the total deposits of the holding company's banking subsidiaries were the largest). The 1966 amendment removed the previous alternative reference to the "principal office and place of business" of a bank holding company.⁶⁵ The amendment was designed to preclude the possibility that a holding company might establish its principal office in one state and its principal operations in another, and then claim that it had *two* "home states" in which it could acquire banks without the approval of *either* state.⁶⁶ Thus, the 1966 amendment reiterated Congress' firm intent to prohibit bank holding companies from acquiring banks in more than one state without state approval.

Twelve years later, Congress enacted the International Banking Act of 1978 (IBA), which extended the dual system of federal and state regulation to foreign banks operating in the United States.⁶⁷ A principal reason for the IBA was that, prior thereto, foreign banks and bank holding companies were *not* subject to the McFadden Act or the Douglas Amendment. Consequently, these foreign institutions could own deposit-taking branches or subsidiary banks in more than one state. Congress determined that this situation gave foreign banks a significant competitive advantage over United States banks because foreign banks could accept "domestic" deposits (that is, deposits from United States

65. Act of July 1, 1966, Pub. L. No. 89-485, § 7(d), 80 Stat. 236, 238 (1966) (codified as amended at 12 U.S.C. § 1842(d) (1982)).

66. See S. REP. NO. 1179, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2385, 2393.

67. Pub. L. No. 95-369, 92 Stat. 607 (1978) (codified as amended at 12 U.S.C. §§ 3101-3108 (1982)). Prior to the IBA, foreign banks had been regulated almost exclusively by the states. See S. REP. NO. 1073, 95th Cong., 2d Sess. 1-2, 6-7 (1978).

residents) in more than one state.⁶⁸ Congress also concluded that to "exempt" foreign banks from the McFadden/Douglas limitations "could have untoward effects on the concentration of banking resources in the United States and would be fundamentally destructive of our dual banking system."⁶⁹

Accordingly, Congress decided to apply the McFadden Act and the Douglas Amendment to foreign banks operating in the United States. Under section 4(h) of the IBA,⁷⁰ a foreign bank may establish more than one branch in its "home state" *only* to the extent that a national bank located in the same state may establish branches under the McFadden Act.⁷¹ In addition, under section 5(a) of the IBA,⁷² a foreign bank may *not*: (1) establish a branch which accepts domestic deposits outside of its home state; or (2) acquire a subsidiary bank outside of its home state unless such acquisition would be permitted under the Douglas Amendment by a domestic bank holding company located in the same state.⁷³

Thus, in 1978 Congress again reaffirmed the policies of the McFadden Act and the Douglas Amendment by extending those policies to foreign banks. Congress' action in this regard is significant because it was taken despite considerable criticism of the McFadden Act during the hearings on the IBA. In response to such criticism, Congress directed President Carter, under section 14 of the IBA, to submit recommendations to Congress "with regard to the applicability of the McFadden Act

68. S. REP. NO. 1073, *supra* note 67, at 7-8. Congress cited testimony that United States banks were *not* at a disadvantage with respect to foreign banks in *other* areas of the banking business because United States banks and their holding companies could make commercial and consumer loans, accept foreign-related deposits, and provide financially-related nonbanking services on a *nationwide* basis through loan production offices, Edge Act corporations and nonbanking subsidiaries. *Id.* at 8. One commentator has pointed out that bank holding companies today can offer a complete array of banking and related services on an interstate basis, *except for the acceptance of deposits through banks or bank branches*. Ginsburg, *supra* note 16, at 1175-219.

69. S. REP. NO. 1073, *supra* note 67, at 9-10.

70. 12 U.S.C. § 3102(h) (1982).

71. The "home state" of a foreign bank, which is determined pursuant to § 5(c) of the IBA and regulations issued thereunder by the Federal Reserve Board, 12 C.F.R. § 211.22 (1984), is generally the first state in which the foreign bank: (1) establishes a branch which accepts domestic deposits; or (2) acquires a subsidiary bank.

72. 12 U.S.C. § 3103(a) (1982).

73. *Id.* See S. REP. NO. 1073, *supra* note 67, at 10-11, 21-22. Section 5(a) of the IBA permits a foreign bank to establish branches outside of its home state to the extent permitted by state law, but limits the deposits which may be accepted by such "interstate" branches to the types of foreign-related deposits (*i.e.*, deposits from foreign persons not residing in the United States or deposits related to international trade or investment) which may be accepted by Edge Act corporations. See *id.* at 10.

to the current banking structure.”⁷⁴

Pursuant to Congress' directive, President Carter issued his report on the McFadden Act in January 1981.⁷⁵ President Carter's report went beyond Congress' directive and recommended three substantial modifications of the Douglas Amendment as well as the McFadden Act. First, the report recommended that the Douglas Amendment be modified to permit interstate acquisitions of banks by bank holding companies *regardless of state law*, although at first *only on a regional basis*.⁷⁶ Second, the report advocated a phased liberalization of the McFadden Act with the ultimate objective of permitting national banks, *without* state approval, to deploy electronic funds transfer (EFT) terminals nationwide and to establish interstate brick-and-mortar branches within “natural market areas” (for example, metropolitan areas).⁷⁷ Third, the report suggested that the Douglas Amendment should be amended to permit bank holding companies to acquire out-of-state “failing banks” *without* state permission.⁷⁸

Notwithstanding the far-reaching recommendations of President Carter's report, Congress has adopted *only* the third—and *most limited*—of its suggestions. Under section 116 of the Garn-St Germain Depository Institutions Act of 1982,⁷⁹ Congress has authorized the Federal Deposit Insurance Corporation (FDIC) to approve, without state permission, the acquisition of a closed bank having total assets of \$500 million or more (or a mutual savings bank of equal size in danger of closing) by an out-of-state bank holding company. However, section 116 preserves a substantial degree of state determination. For example, if the responsible state bank supervisor objects to such an acquisition, the FDIC may approve the acquisition only by a unanimous vote of its Board of Directors. Moreover, in evaluating bids by bank holding companies for a closed or failing bank, the FDIC must give priority to bidders located within the same state as the bank, or (if an out-of-state bidder is to be chosen) to bidders located in adjacent states. Finally, any bank acquired by an out-of-state bank holding company pursuant to section 116 may thereafter establish branches only to the extent that it would be permitted to do so as a national bank under the McFadden

74. S. REP. NO. 1073, *supra* note 67, at 19.

75. REPORT OF THE PRESIDENT, DEP'T OF THE TREAS., GEOGRAPHIC RESTRICTIONS ON COMMERCIAL BANKING IN THE UNITED STATES (Jan. 1981).

76. *Id.* at 17-18.

77. *Id.* at 19.

78. *Id.* at 20.

79. Act of Oct. 15, 1982, Pub. L. No. 97-320, § 116, 96 Stat. 1469, 1476 (codified at 12 U.S.C. § 1823(f) (1982)).

Act.⁸⁰

In sum, Congress has reconsidered the Douglas Amendment on several occasions since its enactment in 1956. Each time, Congress has *reaffirmed* the Douglas Amendment (with the carefully limited exception involving acquisitions of failing banks), despite repeated claims that the Amendment should be rescinded or modified.⁸¹ Accordingly, there can be no doubt of Congress' intent that the states should *retain* their authority to determine the extent to which bank holding companies may expand across state lines.

V. JUDICIAL CONSTRUCTIONS OF THE DOUGLAS AMENDMENT AND STATE STATUTES ENACTED THEREUNDER

The federal courts have uniformly interpreted the Douglas Amendment in accordance with Congress' intent that the states should have full power to regulate the extent to which out-of-state bank holding companies may acquire in-state banks. None of these decisions has suggested that the authority of the states under the Douglas Amendment is narrowly limited to the all or nothing choice advocated by petitioners. Moreover, petitioners' argument that the Douglas Amendment does not permit the states to impose regional and other "discriminatory" limitations on interstate bank acquisitions is contrary to the actions taken by more than twenty states in permitting varying degrees of entry. The Federal Reserve Board and the courts have consistently given effect to such state laws.

A. *Judicial Interpretations of the Douglas Amendment*

Three Courts of Appeals—the District of Columbia Circuit in *Iowa Independent Bankers*, the Second Circuit in *Northeast Bancorp*, and the Third Circuit in *Girard Bank*—have interpreted the Douglas Amendment. In addition, the Supreme Court discussed the Douglas Amendment in dicta in *Lewis v. BT Investment Managers, Inc.*⁸² Each of these decisions has construed the statute to grant broad authority to the states

80. See S. REP. NO. 536, 97th Cong., 2d Sess. 5-6, 47 (1982), reprinted in 1982 U.S. CODE CONG. & AD. NEWS 3054, 3059-60, 3101; S. REP. NO. 641, 97th Cong., 2d Sess. 85-86 (1982) (Conf. Rep.), reprinted in 1982 U.S. CODE CONG. & AD. NEWS 3128, 3128-29.

81. Although such post-enactment events are not entitled to be given the same weight as contemporaneous legislative history in construing the Douglas Amendment, the Supreme Court has stated that post-enactment history can properly be relied upon to give "further confirmation of Congress' intent." *Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 166-67 n.19 (1982).

82. 447 U.S. 27 (1980).

to determine the circumstances under which out-of-state bank holding companies may acquire in-state banks.

In *Iowa Independent Bankers*, the District of Columbia Circuit considered the effect of a 1972 Iowa statute,⁸³ which "grandfathered" the right of one out-of-state bank holding company (Northwest Bancorporation, which owned four Iowa banks in 1972) to continue to acquire banks in Iowa, but barred all such acquisitions by other out-of-state holding companies.⁸⁴ The Iowa Independent Bankers argued that the state statute was invalid under both the Douglas Amendment and the equal protection clause, and claimed that the Douglas Amendment authorized Iowa to decide only whether to permit entry by *all* out-of-state bank holding companies or by *none*.⁸⁵

The court of appeals upheld the Iowa statute. First, the court found that the Iowa legislature had acted in a "rational" manner, for purposes of the equal protection clause, in concluding that Northwest Bancorporation (which had a "pre-existing stake in the Iowa banking system" and had "proven itself to be a positive force in the system") should be treated differently from *other* out-of-state bank holding companies.⁸⁶ The court also upheld Iowa's decision that "the state would not be well served if out-of-state bank holding companies were allowed wholesale entry into the Iowa market."⁸⁷ Second, after reviewing the legislative history of the Douglas Amendment,⁸⁸ the court rejected the "all or nothing" interpretation advanced by the petitioner:

Senator Douglas seems to anticipate that *states might be selective in allowing bank holding companies to cross state lines*. . . .

. . . .

. . . [T]he 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*. Petitioner's suggested interpretation of section 1842(d) would rob the states of

83. Iowa Code Ann. § 524.1805 (West Supp. 1984-1985).

84. 511 F.2d at 1294.

85. *Id.* at 1294-96.

86. *Id.* at 1294.

87. *Id.*

88. The court of appeals also referred to § 7 of the Bank Holding Company Act, 12 U.S.C. § 1846 (1982), which reserves to each state "such powers and jurisdiction which it now has [that is, in 1956, when § 7 was enacted] or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof." 511 F.2d at 1296 n.10. *See supra* note 51. With respect to the state authority preserved under § 7, the court of appeals stated: "[T]here can be no doubt that prior to the passage of the [BHC] Act, the states were free to regulate in-state bank acquisitions by out-of-state bank holding companies." 511 F.2d at 1296.

this power. In short, we think that *petitioner has failed to demonstrate that Congress intended to bar discrimination* of the sort found in Iowa Code Ann. § 524.1805.⁸⁹

It is significant that the District of Columbia Circuit, having found that the Douglas Amendment granted to the states a *general power* to be "selective" with respect to acquisitions of in-state banks by out-of-state bank holding companies, placed the burden upon the petitioner to prove that Congress intended to bar Iowa from imposing the challenged "discrimination." The same approach is fully warranted in the Supreme Court's consideration of *Northeast Bancorp.*

In 1983, the District of Columbia Circuit reviewed its decision in *Iowa Independent Bankers*, and reaffirmed its holding that "the Douglas Amendment empowered states to discriminate among out-of-state bank holding companies when deciding which could enter."⁹⁰ These judicial findings, which were based upon a careful review of the legislative history of the Douglas Amendment, contradict the arguments presented by petitioners in *Northeast Bancorp.*

The Second Circuit's decision in *Northeast Bancorp*, which is under review in the Supreme Court, adopted a similarly broad interpretation of the Douglas Amendment. The Second Circuit determined that the Connecticut and Massachusetts regional banking statutes did not violate the commerce clause because the Douglas Amendment authorized the states to permit entry by out-of-state bank holding companies on a regional basis.⁹¹ In addition, the Second Circuit found that the Connecticut and Massachusetts laws did not violate the compact clause because they did not "encroach upon or interfere with the supremacy of the United States."⁹² In this regard, the Court gave deference to the Federal Reserve Board's finding that the Douglas Amendment represented a "renunciation of federal interest in regulating the interstate acquisitions of banks by bank holding companies."⁹³

Finally, the Second Circuit determined that the regional limitation contained in the Connecticut and Massachusetts statutes did not violate the equal protection clause because the limitation was rationally related to those states' legitimate concern that "their banks could be dominated

89. 511 F.2d at 1296-97 (emphasis added).

90. Conference of State Bank Supervisors v. Conover, 715 F.2d 604, 613, 615 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 1708 (1984).

91. 740 F.2d at 207-08.

92. *Id.* at 209 (quoting United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 471 (1978)).

93. *Id.* at 207 (quoting Bank of New England Corp., 70 Fed. Res. Bull. 374, 380 (1984)).

by large bank holding companies located in New York or Chicago if such holding companies were allowed to acquire their banks."⁹⁴ The court pointed out that each of the four largest bank holding companies in New York had greater assets than those of *all* New England bank holding companies *combined*.⁹⁵

Most recently, the Third Circuit considered the Douglas Amendment in *Girard Bank*. In that case, Mellon National Corporation, a Pennsylvania bank holding company, sought to acquire control of Heritage National Bank, a New Jersey national bank which owned a "grandfathered" (pre-McFadden Act) branch in Philadelphia. Mellon argued that the acquisition did not require New Jersey's authorization, because Heritage was not "located outside of Pennsylvania" in view of its Philadelphia branch. The Board and the Third Circuit rejected this argument, since Heritage maintained ninety branches and more than ninety-nine percent of its deposits in New Jersey.⁹⁶ The Third Circuit therefore held that Mellon could not proceed with the acquisition without New Jersey's specific authorization, in view of "the control over the ownership of banks within its borders that Congress clearly intended [New Jersey] to have."⁹⁷

The Supreme Court discussed the Douglas Amendment in dicta in *BT Investment*, which struck down a Florida statute prohibiting out-of-state bank holding companies from establishing nonbanking investment advisory subsidiaries in Florida. The Comptroller of Florida argued that the Douglas Amendment gave Florida *implicit* authority to control acquisitions of *nonbanking* entities by out-of-state bank holding companies. The Supreme Court rejected this argument, holding that section 3(d) by its terms applies only to acquisitions of *banks*, but made the following observations with respect to section 3(d):

The language of the [Douglas Amendment] 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.⁹⁸

94. *Id.* at 209.

95. *Id.* at 209 n.16.

96. *Girard Bank v. Board of Governors*, 748 F.2d 838, 841-42 (3d Cir. 1984).

97. *Id.* at 842.

98. *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 47 (1980) (emphasis in original). The Supreme Court also said that "it is doubtful that § 3(d) authorizes state restrictions of any nature on bank holding company activities." *Id.* This statement must be evaluated in the context of the *BT Investment* case, where the Comptroller of Florida argued that § 3(d) per-

Connecticut and Massachusetts have done precisely what the Supreme Court said the states may do under the Douglas Amendment: they have created "exceptions" to the general federal prohibition on interstate bank acquisitions and thereby "permit" acquisition which would otherwise be federally prohibited. Significantly, the Supreme Court did not express any limitation on state authority to create "exceptions" under section 3(d).

In sum, the relevant judicial authorities confirm what the terms and legislative history of the Douglas Amendment indicate—namely, that Congress has granted to the states a broad power to determine the extent to which interstate bank acquisitions may occur. These authorities plainly contradict petitioners' argument that the states lack authority to impose geographic or other allegedly "discriminatory" limitations on interstate acquisitions.

B. *State Statutes Enacted Pursuant to the Douglas Amendment*

As of March 15, 1985, twenty-two states have adopted statutes pursuant to the Douglas Amendment which permit varying degrees of entry by out-of-state bank holding companies. The first such statute was Iowa's 1972 "grandfather" statute,⁹⁹ which was upheld in *Iowa Independent Bankers*.¹⁰⁰ Since 1972, Florida, Illinois, Nebraska and Utah have enacted similar "grandfather" statutes, which permit interstate bank acquisitions only by those out-of-state bank holding companies which had a specified type of presence in the state on a stipulated date.¹⁰¹

In addition, beginning in 1980, six states have adopted "limited purpose" interstate banking laws. These laws generally permit an out-of-state bank holding company to acquire a single in-state bank to carry on a specified and limited type of business, usually the issuance of credit cards. These statutes also often require the limited-purpose bank to employ a minimum number of state residents and to operate at a single location in a manner which does not attract customers of local banks.¹⁰²

mitted Florida to prohibit out-of-state bank holding companies from engaging in *nonbanking activities* which were otherwise *permitted* by federal laws under § 4(c)(8) of the BHC Act. In contrast, the Connecticut and Massachusetts statutes *permit* out-of-state bank holding companies to make *acquisitions of banks* which would otherwise be *prohibited* under § 3(d), and this is exactly the type of state action contemplated by the Supreme Court's dicta quoted above in the text.

99. IOWA CODE ANN. § 524.1805 (West Supp. 1984-1985).

100. See *supra* notes 83-89 and accompanying text.

101. FLA. STAT. ANN. § 658.29(3)(d) (West 1984); ILL. ANN. STAT. ch. 17, § 2510 (Smith-Hurd 1981); NEB. REV. STAT. § 8-903 (Cum. Supp. 1984); UTAH CODE ANN. § 7-3-2(4) (Supp. 1984).

102. DEL. CODE ANN. tit. 5, § 803 (Cum. Supp. 1984); MD. FIN. INST. CODE ANN. §§ 5-

In addition, four states have authorized out-of-state bank holding companies to acquire failing or closed banks subject to specified conditions.¹⁰³

Two states—Alaska and Maine—permit acquisitions of in-state banks by any out-of-state bank holding company, but impose certain conditions on such acquisitions.¹⁰⁴ Similarly, New York does not allow an out-of-state bank holding company to acquire New York banks unless that holding company's home state extends reciprocal privileges to New York bank holding companies.¹⁰⁵

On December 30, 1982, Massachusetts adopted the first regional interstate banking law. The Massachusetts statute authorizes an out-of-state bank holding company to acquire an in-state bank if: (1) the holding company (as well as any parent company thereof) conducts its principal banking operations and maintains its principal place of business in one of the other five New England states; and (2) the holding company's home state provides reciprocal privileges to Massachusetts bank holding companies.¹⁰⁶

In 1983, Connecticut and Rhode Island enacted regional interstate banking laws similar to the Massachusetts statute.¹⁰⁷ Florida, Georgia, North Carolina and South Carolina subsequently have adopted reciprocal laws which authorize interstate bank acquisitions among them (and other Southeastern states which enact similar laws) beginning on July 1, 1985 (or July 1, 1986 in the case of South Carolina).¹⁰⁸ Kentucky, Oregon and Utah have also enacted interstate banking laws with regional

901 to 5-908 (Cum. Supp. 1984); NEB. REV. STAT. § 8-1512 (Supp. 1983 & 1984); NEB. REV. STAT. ch. 666.132 (Cum. Supp. 1984); S.D. CODIFIED LAWS ANN. §§ 51-16-40 to 51-16-45 (1980 & Supp. 1984); VA. CODE §§ 6.1-390 to 6.1-397 (1983).

103. ILL. ANN. STAT. ch. 17, § 2508 (Smith-Hurd Supp. 1984-1985); 1985 Or. Laws ch. 12; UTAH CODE ANN. § 7-19-1 (Supp. 1984); WASH. REV. CODE ANN. § 30.04.230 (Supp. 1985).

104. Maine imposes minimum capitalization requirements on banks which are acquired by out-of-state bank holding companies and requires any such acquisitions to bring "net new funds" into Maine. ME. REV. STAT. ANN. tit. 9B § 1013 (Supp. 1984). Alaska permits out-of-state bank holding companies to acquire only banks established prior to July 1, 1982. ALASKA STAT. § 06.05.235 (Supp. 1984).

105. N.Y. BANKING LAW § 142-b (McKinney Supp. 1984).

106. MASS. GEN. LAWS ANN. ch. 167A, § 2 (West 1971 & Supp. 1984).

107. 1983 Conn. Pub. Acts 411 (Reg. Sess.), § 2, as amended by 1984 Conn. Pub. Act 329 (Reg. Sess.), § 1; R.I. GEN. LAWS §§ 19-30-1 & 19-30-2 (Supp. 1983). The regional limitation contained in Rhode Island's statute is scheduled to expire on July 1, 1986.

108. FLA. STAT. ANN. § 658.295 (West Supp. 1984); GA. CODE § 7-1-620, *et seq.* (Supp. 1984); N.C. GEN. STAT. §§ 53-209 to 53-218 (Interim Supp. 1984); S.C. CODE tit. 34, ch. 24 (Supp. 1984). These laws are not identical. For example, Georgia does not include (as do the other states) Arkansas, Maryland, West Virginia, and the District of Columbia within the defined Southeastern region for reciprocal acquisitions.

and reciprocal limitations.¹⁰⁹ In addition, about twenty other states are likely to consider regional banking legislation in 1985.¹¹⁰

The Federal Reserve Board has consistently given effect to state-adopted interstate banking laws with "grandfather,"¹¹¹ "limited purpose,"¹¹² and "failed bank" limitations.¹¹³ Moreover, in a series of three decisions upheld by the Second Circuit in *Northeast Bancorp*, the Board approved acquisitions pursuant to the Connecticut and Massachusetts statutes.¹¹⁴ The Board also *denied* an application by Bank of New York Company, Inc. (BNY), a New York bank holding company, to acquire Petitioner Northeast, a Connecticut bank holding company, in violation of the regional limitation contained in Connecticut's statute.¹¹⁵ In the *Bank of New York* case, the Board specifically *rejected* BNY's argument that Connecticut had opened its borders to entry by *all* out-of-state bank holding companies when it adopted its regional banking statute:

BNY's interpretation of the Douglas Amendment would transform the numerous state statutes that allow acquisition of banks by *limited* classes of out-of-state bank holding companies into *unlimited*-entry statutes. BNY's argument, if accepted, would cause full interstate banking in those states, *a result contrary to the Congressional intent underlying the Douglas Amendment of allowing the states to apply their own policies regarding interstate banking* to the acquisition by out-of-state bank holding companies of banks located within the borders of a state. Such a sweeping reinterpretation of the Douglas Amendment should appropriately be accomplished only by legislative

109. KY. REV. STAT. § 287.900-287.905 (Cum. Supp. 1984); 1985 Or. Laws ch. 12; UTAH CODE ANN. § 7-1-102 & 7-1-702 (interim Supp. 1984).

110. See Sudo, *Interstate Bills Dominate State Slates in '85*, AM. BANKER, Dec. 28, 1984, at 1.

111. *E.g.*, Northwest Bancorporation, 38 FED. REG. 21530 (1973), *aff'd sub nom.* Iowa Indep. Bankers v. Board of Governors, 511 F.2d 1288 (D.C. Cir.) (Iowa law), *cert. denied*, 423 U.S. 875 (1975); NCNB Corp., 68 Fed. Res. Bull. 54 (1982) (Florida law).

112. *E.g.*, Citicorp, 67 Fed. Res. Bull. 181 (1981) (South Dakota law); J.P. Morgan & Co., 67 Fed. Res. Bull. 917 (1981) (Delaware law); Citicorp, 71 Fed. Res. Bull. 101 (1985) (Nevada law).

113. *E.g.*, BankAmerica Corp., 69 Fed. Res. Bull. 568 (1983) (Washington law).

114. Bank of New England Corp., 70 Fed. Res. Bull. 374 (1984); Hartford Nat'l Corp., 70 Fed. Res. Bull. 353 (1984); Bank of Boston Corp., 70 Fed. Res. Bull. 524 (1984). Since the Second Circuit's decision in *Northeast Bancorp*, the Board has approved further acquisitions under the Rhode Island, Florida and Georgia statutes. *E.g.*, Hartford Nat'l Corp., 71 Fed. Res. Bull. 43 (1985) (Rhode Island law); SunTrust Banks, Inc., 71 Fed. Res. Bull. 176 (1985) (Florida and Georgia law).

115. Bank of New York Co., 70 Fed. Res. Bull. 527 (1984).

action.¹¹⁶

The Board's assessment of the validity of state regional banking laws, and its evaluation of congressional intent as embodied in the Douglas Amendment, are entitled to the "greatest deference" in view of the Board's primary responsibility for interpreting and applying the BHC Act.¹¹⁷ As shown below, petitioners in *Northeast Bancorp* are presenting, in effect, the same "all or nothing" argument advanced by BNY, and petitioners' contentions therefore are erroneous for the reasons stated by the Board.

VI. THE VALIDITY OF STATE REGIONAL BANKING LAWS UNDER THE COMMERCE CLAUSE

The Supreme Court held in *BT Investment*,¹¹⁸ that the commerce clause applies to state regulation of nonbanking financially-related services provided by bank holding companies. However, the Court also pointed out that Congress may "confe[r] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy."¹¹⁹ In view of the terms and legislative history of the Douglas Amendment, it is clear that Congress *has* authorized the states to adopt regional banking laws. Accordingly, such laws do not violate the commerce clause.

A. *The Supreme Court's Analysis in Commerce Clause Cases Involving Congressional Grants of Regulatory Authority to the States*

Petitioners argue that the Douglas Amendment does not represent "specific Congressional authorization for . . . concerted, discriminatory state statutes." They contend that Congress must "deliberately and specifically authoriz[e] the *particular* deviation from the constitutional mandate" which is at issue, and that "the Douglas Amendment says nothing about groups of states joining together to discriminate against commerce

116. *Id.* at 528 (emphasis added). The Board stated in *Bank of New York*, as it did in *Bank of New England*, that the constitutionality of state regional banking laws "is not free from doubt," but the Board concluded in each case that "there is no clear and unequivocal basis to find these statutes to be inconsistent with the Constitution." 70 Fed. Res. Bull. at 528. See also 70 Fed. Res. Bull. at 376-77.

117. *E.g.*, *Board of Governors v. Inv. Co. Inst.*, 450 U.S. 46, 56-57 (1981); *Board of Governors v. First Lincolnwood Corp.*, 439 U.S. 234, 251 (1978).

118. *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 38-39 (1980).

119. *Id.* at 44.

deriving from disfavored sister states."¹²⁰

Petitioners' analysis is contrary to the approach taken by the Supreme Court in determining whether Congress has authorized the states to regulate an area of interstate commerce. The Supreme Court has stated that Congress must "affirmatively contemplate" state regulation of interstate commerce in order to immunize it from scrutiny under the commerce clause.¹²¹ However, rather than requiring "specific" authorization for each "particular [state] deviation" from the commerce clause—as petitioners argue—the Supreme Court has held instead that if Congress *generally* authorizes the states to regulate a defined field of commerce, *all* state regulation pursuant to such authority is valid under the commerce clause: "If Congress ordains that the States may freely regulate an aspect of interstate commerce, *any* action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge."¹²²

In *Western & Southern Life Insurance Co. v. State Board of Equalization*,¹²³ as well as in its earlier decision *Prudential Insurance Co. v. Benjamin*,¹²⁴ the Supreme Court determined that "Congress removed all Commerce Clause limitations on the authority of the States to regulate and tax the business of insurance when it passed the McCarran-Ferguson Act."¹²⁵ The Court particularly relied upon section 2(a) of the McCarran-Ferguson Act, which provides: "The business of insurance . . . shall be subject to the laws of the several States which relate to the regulation or taxation of such business."¹²⁶ The Court noted that the "unequivocal language of the Act suggests no exceptions."¹²⁷ The Court also emphasized that Congress had enacted the McCarran-Ferguson Act against the background of extensive *state* regulation of insurance: "[I]n taking this action Congress must have had full knowledge of the nationwide existence of state systems of regulation and taxation [of insurance] [I]ts purpose was evidently to throw the whole weight of its power

120. Brief for Petitioner Citicorp, *supra* note 8, at 18, 22-23 (emphasis added). *See also* Brief for Petitioners Northeast and Union Trust, *supra* note 8, at 22-23, 26.

121. *South-Central Timber Dev., Inc. v. Wunnicke*, 104 S. Ct. 2237, 2242 (1984).

122. *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 652-53 (1981) (emphasis added).

123. 451 U.S. 648, 652-53 (1981).

124. 328 U.S. 408 (1946).

125. *Western & S. Life*, 451 U.S. at 653 (citations omitted). *See also Prudential*, 328 U.S. at 430, 436.

126. *Western & S. Life*, 451 U.S. at 653.

127. *Id.*

behind the state systems"¹²⁸

Having determined that the McCarran-Ferguson Act granted to the states a *general* power to regulate and tax the business of insurance, the Court *rejected* the contention that the commerce clause prevented the states from imposing " 'anti-competitive state taxation that discriminates against out-of-state insurers.' "¹²⁹ The Court found "no such limitation in the language or history of the Act."¹³⁰ Accordingly, in *Prudential* the Court upheld a South Carolina tax which applied *only* to out-of-state insurance companies, and in *Western & Southern Life* the Court sustained a California "retaliatory tax" that was assessed against insurance companies from *other* states that imposed taxes higher than those of California.

Significantly, the Court did *not* base its holdings in *Western & Southern Life* and *Prudential* upon a finding that the McCarran-Ferguson Act *specifically* authorized the states to adopt *discriminatory* taxes with respect to out-of-state insurance companies. The Court found it sufficient that Congress had *generally* authorized the states to regulate and tax the business of insurance.¹³¹ Thus, the Supreme Court's approach in these cases contradicts the petitioners' argument that the Douglas Amendment must have "specifically" contemplated the enactment of state regional banking laws.¹³²

B. The General and Unqualified Regulatory Power Granted to the States by the Douglas Amendment

The Supreme Court's reasoning in *Western & Southern Life* and *Prudential* is directly applicable to the controversy surrounding state regional banking laws. The express language of the Douglas Amendment, in a manner similar to the McCarran-Ferguson Act, grants to the states a general and unqualified power to regulate interstate acquisitions of banks by bank holding companies. The Douglas Amendment provides that such an acquisition may not occur *unless* it 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."¹³³ It would be difficult to conceive of a more explicit and unconditional delegation of power by Con-

128. *Prudential*, 328 U.S. at 430. *See also Western & S. Life*, 451 U.S. at 654 (quoting *Prudential*, 328 U.S. at 430).

129. *Western & S. Life*, 451 U.S. at 653.

130. *Id.*

131. *Id.* at 653-55; *Prudential*, 328 U.S. 429-31.

132. *See supra* note 120 and accompanying text.

133. 12 U.S.C. § 1842(d) (1982).

gress to the states.¹³⁴

Moreover, as in the case of the McCarran-Ferguson Act, there is no indication that Congress has placed restrictions on the authority granted to the states under the Douglas Amendment. In *BT Investment*, the Supreme Court stated that the Douglas Amendment authorizes the states "to create exceptions . . . [which] *permit* expansion of banking across state lines where it otherwise would be federally prohibited."¹³⁵ The Court did not indicate any limitation on the authority of the states to create such "exceptions." In fact, while the Court held that section 7 of the BHC Act authorized the states to enact statutes only "within the boundaries marked by the Commerce Clause,"¹³⁶ it stated *no* such view with respect to the *Douglas Amendment*, which is contained in *section 3(d)* of the Act.

As shown above in Part III(B), the legislative history of the Douglas Amendment confirms what explicit terms of the statute indicate—namely, that Congress intended to provide the states with broad authority to determine the extent to which interstate bank acquisitions could occur. Senator Douglas stated that his amendment would permit out-of-state holding companies to acquire banks in other states "*only to the degree that State laws expressly permit them.*"¹³⁷ Similarly, Senator Robertson, the chief sponsor of the BHC Act, acknowledged (although opposed to the Douglas Amendment) that the Amendment would provide that

134. In contrast, the cases relied upon by the petitioners involved federal statutes which did *not* contain any similar delegation of power to the states. In *South-Central Timber Dev., Inc. v. Wunnicke*, 104 S. Ct. 2237, 2241-43 (1984), the federal statutes in question dealt only with timber cut from *federal* lands and did *not* apply to *state* lands. In *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982), the federal statute contained only "a standard 'nonpreemption' clause" which granted no additional authority to the states. *Id.* at 340-43. Finally, each of the federal statutes involved in *Sporhase v. Nebraska*, 458 U.S. 941, 958-60 (1982), contained only a similar nonpreemption clause and a provision stating that water rights arising in connection with *federal* projects would be governed by state law. *Id.* at 959. The latter provision was not relevant to the state reciprocity restriction on exportation of water which was at issue in *Sporhase*.

135. 447 U.S. at 47 (emphasis in original). See *supra* note 98 and accompanying text.

136. 447 U.S. at 49.

137. 102 CONG. REC. 6858 (1956) (emphasis added). Petitioners claim that the Supreme Court should not give credence to Senator Douglas' remarks because they represent only "isolated fragments" of legislative history. Brief for Petitioner Citicorp, *supra* note 8, at 27, and Brief for Petitioners Northeast and Union Trust, *supra* note 8, at 26 (quoting *New England Power Co. v. New Hampshire*, 455 U.S. 331, 342 (1982)).

However, *New England Power* involved only the brief floor remarks of a *single* Congressman. In contrast, the Senate's discussion of the Douglas Amendment covers more than eight pages of the Congressional Record, 102 CONG. REC. at 6760-61 & 6856-63, and every Senator who described the legal effect of the Douglas Amendment concurred with Senator Douglas' description. See 102 CONG. REC. 6760 (remarks of Sen. Robertson); *id.* at 6860 (remarks of Sen. Bennett); *id.* at 6861 (remarks of Sen. Bricker); *id.* at 6862 (statement of Sen. Payne).

“no bank holding company in the future may cross a State line *unless the laws of the State involved permit it to do so.*”¹³⁸

Senator Douglas repeatedly pointed to the McFadden Act as the model for his amendment.¹³⁹ As described above in Part II(B)(3), the McFadden Act (as amended in 1933) authorized national banks to establish branches *only* in “those States the laws of which permit [branching], and even there *‘only to the extent that the State laws permit branch banking.’*”¹⁴⁰ Under the McFadden Act, the federal courts have held that branching by national banks is subject to state laws which regulate the *method* by which branches may be established,¹⁴¹ or which place *geographical limitations* on the opening of branches.¹⁴² Senator Douglas himself noted that, in 1956, New York was divided by state branching laws into ten geographic zones, and that both state and national banks were prohibited from branching outside the zone where their home offices were located.¹⁴³ Thus, Senator Douglas’ statement that his amendment would embody “the principles of the McFadden Act”¹⁴⁴ strongly indicates that Congress intended to permit the states to place *geographical and other limitations* on acquisitions of banks by out-of-state bank holding companies.

These extended and consistent statements cannot be dismissed as “isolated fragments” of legislative history.

Petitioners also quote *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979), for the proposition that “[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history.” Brief for Petitioner Citicorp, *supra* note 8, at 27; Brief for Petitioners Northeast and Union Trust, *supra* note 8, at 26 n.23. The Court in *Chrysler Corp.* explained that “[the sponsor’s] statement must be considered with the Reports of both Houses and the statements of other Congressmen.” 441 U.S. at 311. *Unlike* the 1958 amendment to 5 U.S.C. § 301 (1982), which was considered in *Chrysler Corp.*, however, the Douglas Amendment was *not* included in a House or Senate committee bill and there are no committee reports to consider in this case. Therefore, Senator Douglas’ remarks are “an authoritative guide to the statute’s construction,” *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982), and gain further significance in view of their consistency with the statements of other Senators who both supported *and* opposed the Douglas Amendment. *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564-66 (1976); *Hilton v. Sullivan*, 34 U.S. 323, 338-39 (1948).

138. 102 CONG. REC. 6760 (1956) (emphasis added).

139. 102 CONG. REC. 6858, 6860 (1956).

140. *First Nat’l Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966) (emphasis added).

141. *See e.g., id.* at 261-62 (1966) (state law permitting branching only by merger with an existing bank).

142. *E.g., First Union Bank & Trust Co. v. Heimann*, 600 F.2d 91, 94, 96-99 (7th Cir.) (state law prohibiting branching *except* in a city or town where no other bank is located), *cert. denied*, 444 U.S. 950 (1979); *Nat’l Bank of Detroit v. Wayne Oakland Bank*, 252 F.2d 537, 539-41 (6th Cir.) (state law prohibiting branching in a city or village in which another bank has its main office or a branch), *cert. denied*, 358 U.S. 830 (1958).

143. 102 CONG. REC. 6858 (1956).

144. *Id.* at 6860.

It is also evident from Senator Douglas' remarks that each state would have authority to be "selective" and to admit out-of-state bank holding companies on a case-by-case and state-by-state basis.¹⁴⁵ In fact, certain Senators who opposed the Douglas Amendment attacked the provision on the ground that it would mandate "discrimination" in interstate commerce, thus confirming the understanding of both proponents *and* opponents that the Douglas Amendment would authorize the states to regulate interstate bank acquisitions without regard to commerce clause limitations.¹⁴⁶

C. *The Petitioners' All or Nothing Interpretation of the Douglas Amendment*

In contrast to the broad state authority indicated by the terms and legislative history of the Douglas Amendment, petitioners would effectively relegate to the states the mere choice of permitting entry by *all* out-of-state bank holding companies or by *none*. Petitioners argue that the Douglas Amendment does *not* make state laws enacted thereunder "immune from the commerce clause."¹⁴⁷ If this position were correct, it would create substantial doubt as to the validity of *all* of the state-enacted interstate banking laws discussed above in Part V(B), because *none* of those laws permit out-of-state bank holding companies to acquire in-state banks on the same basis as in-state holding companies.¹⁴⁸

Petitioner Citicorp seeks to distinguish state regional banking laws from other state laws.¹⁴⁹ However, as the Solicitor General has pointed out, state laws which place "reciprocal" or "limited purpose" conditions on bank acquisitions by out-of-state bank holding companies are of doubtful validity, unless the Douglas Amendment immunizes such laws from scrutiny under the commerce clause.¹⁵⁰

145. See *Iowa Indep. Bankers v. Board of Governors*, 511 F.2d 1288, 1296 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975); *supra* notes 59-60 and accompanying text.

146. See *supra* notes 61-64 and accompanying text. See also *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458-61 (1974); *Hilton v. Sullivan*, 334 U.S. 323, 339 (1948).

147. Brief for Petitioner Citicorp, *supra* note 8, at 21. See also Brief for Petitioners Northeast and Union Trust, *supra* note 8, at 22.

148. See e.g., *BT Investment*, 447 U.S. at 36-37.

149. Brief for Petitioner Citicorp, *supra* note 6, at 37. Citicorp has a strong incentive to defend the validity of state limited-purpose laws because it has actively exploited the interstate banking opportunities provided by such laws. See *supra* note 112.

150. Brief for the Federal Respondent, *supra* note 8, at 13-14 n.18. See, e.g., *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366 (1976) (state law placing reciprocity condition on importation of out-of-state milk violated commerce clause); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949) (state order prohibiting establishment of in-state milk plant by out-of-state corporation, on ground that proposed plant would divert customers from existing in-state

Thus, petitioners effectively would require each state either to permit bank acquisitions by *all* out-of-state bank holding companies without *any* conditions, or to allow *no* such acquisitions. This all or nothing interpretation of the Douglas Amendment is directly contrary to the decisions of the Federal Reserve Board in *Bank of New York*, the District of Columbia Circuit in *Iowa Independent Bankers* and the Second Circuit in *Northeast Bancorp*.¹⁵¹

Moreover, petitioners' interpretation contravenes the fundamental federal policy that the states should have full authority to determine their respective banking structures, in order to ensure a decentralized and un-concentrated banking system. As shown above in Parts II through IV, Congress consistently has affirmed the right of each state to regulate branching by state and national banks within its borders, and to control acquisitions of in-state banks by out-of-state bank holding companies. Congress has also repeatedly *rejected* proposals which would allow national banks to establish branches, or permit bank holding companies to acquire banks across state lines, *without* regard to state laws.¹⁵²

As in the case of the insurance business, Congress has acted with "full knowledge" of the different state systems for regulating banking structure, and has "throw[n] the whole weight of its power behind the state systems."¹⁵³ Accordingly, state regional banking laws operate within the scope of authority granted by Congress and, therefore, do not violate the commerce clause.

VII. THE VALIDITY OF STATE REGIONAL BANKING LAWS UNDER THE COMPACT CLAUSE

Petitioners contend that the Connecticut, Massachusetts and Rhode Island regional banking statutes constitute a "compact" which "inflicts substantial injury on all excluded states" and "impermissibly disrupts the balance of power between the states and the Federal Government" with

plants, was contrary to commerce clause); *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945) (state law limiting size of freight and passenger trains violated commerce clause).

151. *See supra* notes 88-93 & 116-17 and accompanying text.

152. *See supra* notes 36-42 & 74-81 and accompanying text. The only exception Congress has made to the policy of state control over banking structure is 12 U.S.C. § 1823(f) (1982), which authorizes the FDIC, under carefully defined circumstances, to arrange an acquisition of a closed bank by an out-of-state bank holding company without state permission. *See supra* note 80 and accompanying text. The fact that Congress has created this *express* and *carefully limited* exception to state authority under the Douglas Amendment seriously undermines petitioners' efforts to create additional *implied* exceptions to state authority thereunder. *See Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980); 2A J. SUTHERLAND, *supra* note 13, at § 47.11.

153. *Prudential*, 328 U.S. at 430.

respect to the regulation of banking.¹⁵⁴ Because Congress has not specifically consented to these state laws, petitioners claim that they violate the compact clause.

Petitioners' analysis is unsound in several respects. First, it does not appear that the challenged statutes represent a "compact." Despite petitioners' arguments concerning the effect of the consultations and communications between Connecticut and Massachusetts legislators,¹⁵⁵ the fact is that each of the statutes was enacted *independently*. Unlike other cases in which the Court has found a "compact," the New England statutes do not embody a formal agreement between states,¹⁵⁶ nor do they create powers which: (1) may be exercised by an authority separate from each enacting state; and (2) are conditioned upon the acceptance of *other* states.¹⁵⁷ On the contrary, each of the challenged statutes *independently* specifies the circumstances under which bank holding companies from other states may acquire banks within the enacting state's borders.¹⁵⁸

Second, even assuming *arguendo* that the challenged statutes are based upon an implicit agreement, the Supreme Court has held that such reciprocal state laws do *not* create a "compact" which requires congressional consent *unless* they result in an "enhancement of state power at the expense of the federal supremacy."¹⁵⁹ As the Supreme Court held in *United States Steel Corp. v. Multistate Tax Commission*, "the test [under the compact clause] is whether the Compact enhances state power *quoad* the National Government."¹⁶⁰

The challenged statutes create no such "compact," because they do *not* authorize the enacting states to exercise any powers *collectively* which

154. Brief for Petitioner Citicorp, *supra* note 8, at 14. See also Brief for Petitioners Northeast and Union Trust, *supra* note 8, at 33.

155. Brief for Petitioner Citicorp, *supra* note 8, at 5-6, 39-40; Brief for Petitioners Northeast and Union Trust, *supra* note 8, at 32. The Federal Reserve Board noted the degrees of consultation and communication among New England legislators and said that the Connecticut and Massachusetts statutes "can be considered to be part of an implicit compact or agreement." But the Board did not rely upon any finding of an *actual* compact. Bank of New England Corp., 70 Fed. Res. Bull. at 380.

156. Compare, e.g., *New Hampshire v. Maine*, 426 U.S. 363 (1976) (consent decree locating boundary line not a compact) with *Virginia v. Tennessee*, 148 U.S. 503 (1893) (agreement fixing boundary line is a compact).

157. But see, e.g., *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 491-93 (1978) (White, J., dissenting) (agreement creating multistate commission with power to conduct audits and issue subpoenas, and whose existence was conditioned upon the approval of at least seven states not a compact).

158. It is significant that the *legal* effect of each of the challenged statutes was *not* conditioned upon reciprocal action by any specified number of states. Cf. *id.*

159. *Multistate Tax Comm'n*, 434 U.S. at 469-70. See also *New York v. O'Neill*, 359 U.S. 1, 6 (1959); *Bode v. Barrett*, 344 U.S. 583, 586 (1953).

160. 434 U.S. at 473.

each state could not exercise individually.¹⁶¹ As shown above, the Douglas Amendment authorizes *each* state to adopt legislation controlling the extent to which out-of-state bank holding companies may acquire in-state banks. Under the Douglas Amendment, *each* state is free to place geographical and other limitations on such acquisitions.¹⁶² Thus, even if the challenged statutes were enacted pursuant to an agreement, they do no more *collectively* than what Congress has empowered each state to do *separately* under the Douglas Amendment.¹⁶³

Third, as already shown, *Congress has completely deferred to state regulation* in the area of interstate bank acquisitions. Therefore, state regional banking laws do not encroach upon any aspect of "federal supremacy" in violation of the impact clause.¹⁶⁴

Finally, the challenged statutes do not injure non-New England States in any manner which violates the compact clause. These statutes regulate private corporations and in no way purport to affect the sovereignty of other states. Moreover, in the regulatory context, the Supreme

161. *See id.* at 474-75.

162. *See supra* notes 137-46 and accompanying text.

163. In support of their argument that the Douglas Amendment does not constitute congressional "consent" for the challenged statutes, petitioners emphasize that in 1984 Congress failed to approve bills which would have specifically authorized state regional banking laws (e.g., Brief for Petitioner Citicorp, *supra* note 8, at 7, 47). However, petitioners' reliance on such legislative history is unavailing for two reasons. First, in *Multistate Tax Comm'n*, the Supreme Court's decision was *not* affected by the fact that Congress had failed to pass any of the 12 bills which had been introduced to provide specific authorization for the challenged commission. *See* 434 U.S. at 458 n.8, 486 (White, J., dissenting).

Second, in 1984 the Senate *did* pass a bill, S. 2851, 98th Cong., 2d Sess., § 903 (1984), by a vote of 89-5, which would have specifically authorized state regional banking laws. 130 CONG. REC. S11162, S11178 (daily ed. Sept. 13, 1984). Senator Jake Garn, the chief sponsor and floor manager of the bill, stated that the provision was "merely a clarification of the powers that the States have always retained under the Douglas amendment," and was fully in accord with the Second Circuit's interpretation of the Douglas Amendment in *Northeast Bancorp. Id.* at S11153. *See also id.* (remarks of Sen. Tsongas). Thus the only chamber of Congress which actually considered the issue in 1984 overwhelmingly *affirmed* the authority of states to enact regional banking laws. *But see* 130 CONG. REC. H10005 (daily ed. Sept. 24, 1984) (remarks of Rep. St Germain concerning *absence* of House hearings or debates on regional banking and other provisions of S. 2851).

164. Despite petitioners' claims with respect to the "vital federal interest" in interstate banking (e.g., Brief for Petitioner Citicorp, *supra* note 8, at 45), the Supreme Court has specifically held that the existence of a "federal interest" is *not* sufficient to implicate the compact clause. The Court emphasized that only a collective state encroachment upon "federal supremacy" will violate the compact clause. *Multistate Tax Comm'n*, 434 U.S. at 479-80 n.33 (emphasis added). Moreover, in *Northeast Bancorp* both the Second Circuit and the Federal Reserve Board concluded that the Douglas Amendment represents a "renunciation of federal interest in regulating the interstate acquisitions of banks by bank holding companies." *Northeast Bancorp*, 740 F.2d at 207 (quoting Bank of New England Corp., 70 Fed. Res. Bull. at 380 (emphasis added)).

Court has noted that actions by particular states may place "economic pressure" on other states, but nevertheless held: "Unless that pressure transgresses the bounds of the Commerce Clause or the Privileges and Immunities Clause of Art. IV, § 2, . . . it is not clear how our federal structure is implicated."¹⁶⁵

As shown above in Part VI, state regional banking laws do *not* violate the commerce clause. In addition, corporations such as petitioners are *not* within the class of persons protected by the privileges and immunities clause.¹⁶⁶ Accordingly, petitioners have *not* demonstrated that the challenged statutes will have any impact upon non-New England states which is forbidden by the compact clause.¹⁶⁷

VIII. CONCLUSION

Since the 1830's, the federal government consistently has deferred to states with respect to the regulation of banking structure. Under the McFadden Act and the Douglas Amendment, Congress has implemented this federal policy by empowering the states to determine the extent to which: (1) national and state banks may establish branches *within* their borders; and (2) bank holding companies may acquire banks *across* their borders. Moreover, Congress has repeatedly rejected proposed legislation which would have authorized interstate branching or interstate acquisitions of banks by bank holding companies *without* state approval.

In view of this long-established history of federal deference to state control of banking structure, as well as the terms and legislative history of the Douglas Amendment, state regional banking laws plainly operate within the scope of authority granted by Congress to the states. Accordingly, these state laws do not violate the commerce clause, nor do they intrude upon any area of "federal supremacy" in violation of the compact clause. It therefore is evident that petitioners' challenge to the Connecticut and Massachusetts regional banking statutes in *Northeast*

165. *Multistate Tax Comm'n*, 434 U.S. at 478 (citation omitted).

166. *Western & S. Life*, 451 U.S. at 656.

167. As noted above, see *supra* note 95 and accompanying text, in *Northeast Bancorp* the Second Circuit pointed out that the four largest bank holding companies in New York (including petitioner Citicorp) have greater assets than those of *all* New England bank holding companies combined. *Northeast Bancorp*, 740 F.2d at 209 n.16. Thus, it is difficult to conceive how the New England regional banking laws could place any kind of practical "economic pressure" upon New York (the sole state outside New England represented by petitioners and supporting *amici*). At most, the challenged statutes merely permit banks within New England to consolidate and thereby compete on a *less unequal* basis with the much larger "money center" banks in New York.

Bancorp is without legal foundation, and that those statutes should be upheld by the Supreme Court.

