BANKS AND BANKING—INTERSTATE BRANCHING—STATES MAY SELECTIVELY AUTHORIZE REGIONAL BANK HOLDING COMPANY ACQUISITIONS—*Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, 105 S. Ct. 2545 (1985).

The financial services industry has traditionally been one of the most regulated sectors of the United States economy.[1] Banks, in particular, are subject to a stringent regulatory system that limits both the services which may be offered and the geographic areas available for branch expansion.[2] In addition, banking in the United States exists under a dual system that enables both the state and federal governments to independently charter, supervise, and regulate banks.[3]

The federal law governing the formation and operation of bank holding companies (BHC's) is embodied in the Bank Holding Company Act of 1956 (BHCA).[4] Under the BHCA, a company becomes a BHC by acquiring control[5] of either a bank or

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[1] *See, e.g.*, EUGENE NELSON WHITE, THE REGULATION AND REFORM OF THE AMERICAN BANKING SYSTEM 3 (1983) [hereinafter WHITE].

[2] *See, e.g.*, Banking Act of 1933 (Glass-Steagall Act), ch. 89, 48 Stat. 184 (1933), (codified as amended at 12 U.S.C. §§ 24, 78, 377, 378 (1982)). The Glass-Steagall Act, for instance, regulates the investment and commercial banking industries in several ways. The Act prohibits commercial banks from underwriting or otherwise making a market in stocks and nongovernment debt instruments. Furthermore, the Act bars commercial banks from maintaining personnel or financial ties to investment banks and prevents investment banks from engaging in the commercial banking business. *See* 12 U.S.C. § 24 (setting forth powers of national banking associations); *see also* McFadden Act, ch. 191, 44 Stat. 1224 (1927) (codified as amended at 12 U.S.C. § 36(c)(1) (1982)) (limiting national banks' ability to branch across state lines).

[3] EDWARD L. SYMONS, JR. & JAMES J. WHITE, BANKING LAW 69 (2d ed. 1984) [hereinafter SYMONS & WHITE].

[4] Bank Holding Company Act of 1956, ch. 240, 70 Stat. 133 (1956) (codified as amended at 12 U.S.C. §§ 1841-1850 (1982)).

[5] The BHCA describes "control" as follows:

> (2) Any company has control over a bank or over any company if—
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> (A) the company directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25 percentum or more of any class of voting securities of the bank or company;
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> (B) the company controls in any manner the election of a majority of the directors or trustees of the bank or company; or
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> (C) the Board determines, after notice and opportunity for hearing, that the company directly or indirectly exercises a controlling influence over the management or policies of the bank or company.

12 U.S.C. § 1841(a)(2).

"Control" is further defined as:

> (i) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting securities of the bank or

another BHC.[6] Section 1842(d) of the BHCA, known as the Douglas Amendment,[7] proscribes the acquisition of a bank by another bank or bank holding company situated in another state unless the merger "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."[8] In essence, the Douglas Amendment serves as the federal barrier to interstate

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other company, directly or indirectly or acting through one or more other persons;

(ii) Control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of the bank or other company;

(iii) The power to exercise, directly or indirectly, a controlling influence over the management or policies of the bank or other company, as determined by the Board after notice and opportunity for hearing in accordance with § 225.31 of Subpart D of this regulation; or

(iv) Conditioning in any manner the transfer of 25 percent or more of the outstanding shares of any class of voting securities of a bank or other company upon the transfer of 25 percent or more of the outstanding shares of any class of voting securities of another bank or other company.

(2) A bank or other company is deemed to control voting securities or assets owned, controlled, or held, directly or indirectly:

(i) By any subsidiary of the bank or other company;

(ii) In a fiduciary capacity (including by pension and profit-sharing trusts) for the benefit of the shareholders, members, or employees (or individuals serving in similar capacities) of the bank or other company or of any of its subsidiaries; or

(iii) In a fiduciary capacity for the benefit of the bank or other company or any of its subsidiaries.

12 C.F.R. § 25.2(d)(1) (1985). This definition is promulgated by the Federal Reserve pursuant to its authority under the BHCA. 12 U.S.C. § 1844(b).

6 *See* 12 U.S.C. § 1841(a)(1).

7 *See* 12 U.S.C. § 1842(d). The Douglas Amendment provides:

Notwithstanding any other provision of this section, no application (except an application filed as a result of a transaction authorized under section 1823(f) of this title) shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966, or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company 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. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest.

Id.

8 *Id.*

acquisition of banks.[9] The Douglas Amendment, however, expressly reserves to the states the right to adopt legislation removing the prohibition.[10]

Today, the financial services sector is in the midst of a transformation that will revolutionize the variety of products and services available to the public.[11] In the wake of technological advances and economic development, several restrictions in the banking industry have begun to erode.[12] This deregulation encompasses three interrelated dimensions of the banking industry.[13] These components include price, which involves easing restrictions on the interest rates offered by banks to attract funds; product, which reduces the limitations on the types of services banks may offer to the public; and geographic, which refers to the removal of the limitations on the areas where banks may operate deposit taking facilities.[14] Federal deregulation has dealt primarily with price and product issues.[15] In addition, a recent United States Supreme Court decision substantially eroded the legal barriers prohibiting banks from crossing state lines.[16] In *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*,[17] the Supreme Court held that state statutes authorizing interstate BHC acquisitions on a regional basis were valid under the Douglas Amendment,[18] as well as the commerce,[19] compact,[20] and

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9 *See* SYMONS & WHITE, *supra* note 3, at 341.

10 *See supra* note 7 for text of Douglas Amendment.

11 *See* Fraser, *Structural and Competitive Implications of Interstate Banking*, 9 J. CORP. L. 643, 643 (1984).

12 *Id.*

13 *Id.*

14 *Id.*

15 *See, e.g.*, Depository Institutions Deregulation Act of 1980, Pub. L. No. 96-221, 94 Stat. 142-145 (codified as amended at 12 U.S.C. §§ 3501-3509 (1982)) (authorizing depository institutions eligible for federal deposit insurance to offer accounts accessible by negotiable orders of withdrawal).

16 *See* Northeast Bancorp, Inc. v. Board of Governors of the Fed. Reserve Sys., 105 S. Ct. 2545 (1985).

17 *Id.*

18 *See supra* note 7 for text of Douglas Amendment.

19 The commerce clause provides, in pertinent part, that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . . ." U.S. CONST. art. I, § 8, cl. 3. The Supreme Court has held that the purposes of the commerce clause are to establish the creation of a common market among the states. *See* H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 537-38 (1947) (commerce clause designed to create "federal free trade unit" based on "principle that our economic unit is the nation" and that "the states are not separable economic units"); to prohibit internal trade barriers; *see id.*, and to prevent an economic Balkanization of the union, *see* Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1978) (central concern behind commerce clause is a desire "to avoid the ten-

equal protection[21] clauses of the United States Constitution.[22]

The facts giving rise to the *Northeast Bancorp* case originated in December 1982 when the Massachusetts Legislature enacted a statute designed to lift the federal prohibition on interstate banking imposed by the Douglas Amendment.[23] The Massachusetts'

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dencies toward economic Balkinization that had plagued relations between the Colonies and later among States under the Articles of Confederation"). As a result, individual states have been prohibited from imposing statutory barriers which unduly burden the flow of interstate commerce. *See Hughes*, 441 U.S. at 338 (state statute prohibiting the transportation of natural minnows out of state for purposes of sale violative of commerce clause); *H.P. Hood & Sons*, 336 U.S. at 545 (state statute denying facilities to acquire and ship milk in interstate commerce violative of commerce clause). The Supreme Court has also stated, however, that Congress may prohibit as well as promote commerce by conferring that power on the states. *See, e.g.*, Prudential Insurance Co. v. Benjamin, 328 U.S. 408, 434 (1946) (plenary scope of Congress's power over commerce enables Congress not only to promote but also to prohibit interstate commerce).

There is an extensive array of decisions under the commerce clause adjudicating the validity of state statutes that provide a preference for their own residents over residents of other states. *See* Lewis v. BT Inv. Managers, 447 U.S. 27, 36 (1980); *Hughes*, 441 U.S. at 337-38; *H.P. Hood & Sons*, 336 U.S. at 542-43. Similarly, the Supreme Court has upheld congressional authorization of such discrimination as long as it is "expressly," *see, e.g.*, New England Power Co. v. New Hampshire, 455 U.S. 331, 339-41 (1982) (New Hampshire statute prohibiting sale of hydroelectric energy out of state inconsistent with commerce clause absent federal legislation); "explicitly," *see, e.g.*, Western & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 653-54 (1981) (Congress removed all commerce clause limitations on authority of states to regulate and tax business of insurance when it passed the McCarran-Ferguson Act); or "specifically," *see, e.g.*, White v. Massachusetts Council of Constr. Employers, Inc., 460 U.S. 204, 213 (1983) (Boston mayor's order mandating construction project work crews consist of at least 50% Boston residents does not violate commerce clause because sanctioned by federal legislation) provided for in the federal law.

[20] The compact clause states, in pertinent part, that "No state shall, without the Consent of Congress . . . enter into any Agreement or Compact with another state, or with a foreign Power. . . ." U.S. CONST. art. I, § 10, cl. 3.

[21] The equal protection clause, in pertinent part, stipulates that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[22] *Northeast Bancorp*, 105 S. Ct. at 2556.

[23] *Id.* at 2548. The Massachusetts statute states in pertinent part:

> Notwithstanding the provisions of this section, an out-of-state bank holding company, with the prior written approval of the board of bank incorporation, may establish or acquire direct or indirect ownership or control of more than five per cent of the voting stock of one or more banking institutions or bank holding companies; provided that the laws of the state in which operations of the subsidiary banks of such out-of-state bank holding company are principally conducted expressly authorized, under conditions no more restrictive than those imposed by the laws of the commonwealth . . . . For the purposes of this section, the term "out-of-state bank holding company". . . shall include only those companies which have their principal places of business in one of the states of Connecticut, Maine, New Hampshire, Rhode Island or Ver-

Act authorized an out-of-state BHC to acquire a Massachusetts bank provided that two criteria were satisfied.[24] First, the acquiring institution must conduct its principle banking operations in a New England state,[25] and second, reciprocal opportunities to acquire BHC's must be made available to Massachusetts' banking concerns by the other states within the region.[26] Following the lead of its sister state, Connecticut adopted an interstate banking statute modeled on the Massachusetts legislation in June 1983.[27]

Subsequently, several large New England banks utilized the favorable legislation enacted by Massachusetts and Connecticut.[28] In August 1983, the Bank of New England Corporation, the fourth largest Massachusetts BHC,[29] and CBT Corporation, the largest Connecticut BHC,[30] agreed to merge.[31] In September 1983, Hartford National Corporation agreed to acquire Arltru Bancorporation, a Massachusetts holding company.[32]

> mont and which are not directly or indirectly controlled . . . by another corporation which has its principal place of business in a state other than the commonwealth or one of the states referred to above.

MASS. ANN. LAWS ch. 167A, § 2 (Law. Co-op. 1986).

24 *See id.*

25 The New England states named in the statute are Connecticut, Maine, New Hampshire, Rhode Island, Massachusetts, and Vermont. *Id.*

26 *See id.*

27 *Northeast Bancorp*, 105 S. Ct. at 2549. The Connecticut statute states in pertinent part:

> Any New England bank holding company may, with the approval of the commissioner, establish or acquire and retain direct or indirect ownership or control of all or part of the voting stock of any . . . Connecticut bank holding company, if the laws of the state in which the operations of the subsidiary banks of such New England bank holding company are . . . expressly authorize, [sic] under conditions no more restrictive than those imposed by the laws of Connecticut as determined by the commissioner, the establishment or acquisition and retention of direct or indirect ownership or control of all or part of the voting stock of banks, savings banks, savings and loan associations or bank holding companies having their principal places of business in such state by Connecticut bank holding companies.

CONN. GEN. STAT. ANN. § 36-553 (West Supp. 1985).

Other New England states passed similar legislation. *See, e.g.*, R.I. GEN. LAWS § 19-30-2 (Supp. 1985); ME. REV. STAT. ANN. tit. 9-B, § 1013 (Supp. 1985) (interstate banking statutes with reciprocity and regional provisions modeled on Massachusetts Act.). The remaining New England states, New Hampshire and Vermont, have not adopted legislation removing the Douglas Amendment's prohibition of interstate bank mergers. *See Northeast Bancorp*, 105 S. Ct. at 2549.

28 *See Northeast Bancorp*, 105 S. Ct. at 2549.

29 Bank of New England Corp., 70 Fed. Res. Bull. 374, 375 (1984).

30 *Id.* at 375.

31 *See* Northeast Bancorp, Inc. v. Board of Governors of the Fed. Reserve Sys., 740 F.2d 203, 205 (2d Cir. 1984), *aff'd*, 105 S. Ct. 2545 (1985).

32 *Id.* at 206.

Thereafter, Bank of Boston Corporation, a Massachusetts BHC, entered into a merger agreement with Colonial Bancorp, Inc., the owner of a Connecticut bank.[33]

Pursuant to § 1842(a) of the BHCA,[34] the acquiring institutions applied to the Federal Reserve Board for approval of their respective acquisitions.[35] Petitioners Northeast Bancorp, Inc., Citicorp, and Union Trust Company[36] opposed the merger applications alleging that the Massachusetts and Connecticut statutes were violative of the Douglas Amendment.[37] The petitioners further claimed that the state statutes contravened the commerce, compact, and equal protection clauses of the United States Constitution because the legislation discriminated against BHC's located outside of New England.[38]

On March 26, 1984, the Federal Reserve Board approved the mergers of the Hartford National Corporation-Arltru Bancorporation and the Bank of New England Corporation-CBT Corporation.[39] The Board approved the Bank of Boston Corporation-Colonial Bancorp, Inc. merger on May 18, 1984.[40] The Federal Reserve Board determined that the proposed acquisitions were specifically authorized by the Douglas Amendment as well as the Massachusetts and Connecticut statutes.[41] Furthermore, the Board concluded that the proposed acquisitions constituted a reasonable attempt to preserve a " 'banking system responsive to local needs.' "[42] Thereafter, the petitioners, Northeast Bancorp, Inc., Union Trust, and Citicorp, sought review of the Board's decision by the United States Court of Ap-

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33 *Northeast Bancorp*, 105 S. Ct. at 2549.

34 *See* 12 U.S.C. § 1842(a) (Federal Reserve Board's approval required prior to acquisition of bank shares or assets).

35 *Northeast Bancorp*, 740 F.2d at 206.

36 Citicorp markets a variety of financial services through its national network of bank and nonbank subsidiaries. *Northeast Bancorp*, 105 S. Ct. at 2549. Northeast Bancorp is the owner of petitioner Union Trust Company, a Connecticut bank, which competes with banks owned by Colonial Bancorp, Inc., CBT Corporation, and Hartford National Corporation. *Id.*

37 *Id.*

38 *Id.*

39 *See* Hartford Nat'l Corp., 70 Fed. Res. Bull. 353, 355 (1984) (approving proposed merger between Hartford National Corporation and Arltru Bancorporation); Bank of New England Corp., 70 Fed. Res. Bull. 374, 379 (1984) (approving proposed merger between Bank of New England Corporation and CBT Corporation).

40 *See* Bank of Boston Corp., 70 Fed. Res. Bull. 524, 526 (1984) (approving proposed merger between Bank of Boston Corporation and Colonial Bancorp, Inc.).

41 *See Northeast Bancorp*, 105 S. Ct. at 2549-50.

42 *Id.* at 2550 (quoting Bank of New England Corp., 70 Fed. Res. Bull. 374, 381 (1984)).

peals for the Second Circuit.[43] The appellate court adopted the Board's reasoning and upheld the challenged statutes and proposed acquisitions.[44] The Supreme Court granted certiorari[45] in view of the significance of the issues involved.[46] The Court unanimously affirmed the lower court's decision and held that the Massachusetts and Connecticut statutes authorizing regional BHC acquisitions were authorized by the Douglas Amendment.[47] The Court further held that the statutes did not violate the commerce, compact, and equal protection clauses of the United States Constitution.[48]

The first comprehensive federal legislation regulating BHC's was enacted in 1956.[49] BHC's, however, are not a recent phenomena.[50] In fact, BHC's evolved from an early form of multibranch banking in which each member of a purported unitary organization operated independently.[51] In the nineteenth century, large groups of these apparently separate "chain" banks were formed by individuals or associations who purchased the controlling stock of several banks.[52] By acquiring a majority interest in the bank's stock, these shareholders controlled the election of the board of directors of each bank and, as a result, were able to establish the policies of each entity in the "chain."[53] In the 1920's, these small, multi-unit branches were often converted into holding company form and gained prominence in the financial services industry.[54]

In 1927, the McFadden Act[55] was enacted. The McFadden

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[43] *Id.* Petitioners relied on that section of the BHCA which provides that "[a]ny party aggrieved by an order of the Board" may seek review in a federal court of appeals. *See* 12 U.S.C. § 1848; *see also* § 1850 which permits prospective competitors to be "aggrieved parties" under § 1848. 12 U.S.C. § 1850.

[44] *See Northeast Bancorp*, 740 F.2d at 207-10.

[45] Northeast Bancorp, Inc. v. Board of Governors of the Fed. Reserve Sys., 105 S. Ct. 776 (1985).

[46] *Northeast Bancorp*, 105 S. Ct. at 2548.

[47] *Id.* at 2550-53.

[48] *Id.* at 2556.

[49] *See* Bank Holding Company Act of 1956, ch. 240, 70 Stat. 133 (1956) (codified as amended at 12 U.S.C. §§ 1841-1850 (1982)).

[50] SYMONS & WHITE, *supra* note 3, at 344.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] McFadden Act, ch. 191, 44 Stat. 1224 (1927) (codified as amended at 12 U.S.C. § 36 (1982)). The McFadden Act states in pertinent part:

> (c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1)

Act, the basic federal bank branching law, permitted intrastate expansion of national banks only to the degree that state chartered banks were authorized to do so by state law.[56] Although multibank holding companies were traditionally subject to state corporate law statutes, they were not regulated with respect to their bank acquisitions or their nonbank commercial activities.[57] The apparent lack of comprehensive federal control in this area, however, was recognized by several authorities. Indeed, as early as 1938, President Franklin D. Roosevelt recommended that Congress enact legislation to regulate the operations of BHC's.[58] Initial attempts at regulation, however, proved futile.[59]

The absence of adequate regulatory safeguards resulted in the concentration of commercial bank facilities in several large BHC's.[60] Some of these conglomerates deviated from the established practice of separating banking from other commercial enterprises.[61] The continued inadequacy of comprehensive federal supervision respecting the unrestricted ability of BHC's to expand geographically and the objectionable combination of banking and nonbanking activities under the control of a BHC lead to a series of statutory proposals between 1938 and 1955.[62] Ulti-

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> Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute laws of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.

12 U.S.C. § 36(c).

56 *See id.*

57 SYMONS & WHITE, *supra* note 3, at 98.

58 *See* S. REP. No. 1095, 84th Cong., 1st Sess. 2, *reprinted in* 1956 U.S. CODE CONG. & ADMIN. NEWS 2482, 2484 [hereinafter Hearings].

59 *Id.* For a comprehensive history of proposed bank holding company legislation from 1938 to 1955, see *id.*

60 *Id.*

61 *Id. See* 102 CONG. REC. 6858-59 (statement of Sen. Douglas); 101 CONG. REC. 8028-29 (statement of Rep. Patman); 101 CONG. REC. 4407 (statement of Rep. Wier); *see also* First Lincolnwood Corp. v. Board of Governors of Fed. Reserve Sys., 560 F.2d 258 (7th Cir. 1977), *rev'd on other grounds*, 439 U.S. 234 (1978) (Congress' principal concern in regulating acquisition of banks by bank holding companies is anti-competitive potential).

62 *See* Hearings, *supra* note 58, at 2482-83. The General Statement of the Senate Report to the BHCA states:

> [P]ublic welfare requires the enactment of legislation providing Federal regulation of the growth of bank holding companies and the type of

mately, the Bank Holding Company Act of 1956 was enacted in an attempt to alleviate the problems presented by the increasing proliferation of BHC's.[63]

The BHCA defines a BHC as "any company which has control over any bank or over any company that is or becomes a bank holding company by virtue of this chapter."[64] The Act establishes various methods of control which have been amended by subsequent federal regulations.[65] The BHCA vests regulatory power in the Federal Reserve Board and state authorities[66] and requires that corporations, business trusts, and other similar organizations which control two or more banks register with the Board.[67] Furthermore, the BHCA requires that the Federal Reserve Board approve the formation of a BHC.[68] Finally, the Act limits the extent to which bank holding companies may engage in enterprises other than banking.[69]

The BHC legislation originally proposed by the House of Representatives contained a complete ban on interstate acquisitions of banks by BHC's.[70] The Senate version of the BHCA, however, permitted interstate bank acquisitions upon approval of the Federal Reserve Board.[71] The Senate version was supported

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> assets it is appropriate for such companies to control. In general, the philosophy of this bill is that bank holding companies ought to confine their activities to the management and control of banks and that such activities should be conducted in a manner consistent with the public interest. Your committee believes that bank holding companies ought not to manage or control nonbanking assets having no close relationship to banking.
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> It is not the committee's contention that bank holding companies are evil of themselves. However, because of the importance of the banking system to the national economy, adequate safeguards should be provided against undue concentration of control of banking activities. The dangers accompanying monopoly in this field are particularly undesirable in view of the significant part played by banking in our present national economy.

Id.

63 *See id.*

64 *See* 12 U.S.C. § 1841(a)(1).

65 *Id. See supra* note 5 for definition of control for purposes of Bank Holding Company Act.

66 *See* 12 U.S.C. § 1846 (BHCA does not prevent state from exercising inherent power respecting banks).

67 *See* 12 U.S.C. § 1844(a) (registration required within 180 days).

68 *See* 12 U.S.C. § 1842(a).

69 *See* 12 U.S.C. § 1843.

70 *See* H.R. REP. No. 609, 84th Cong., 1st Sess. 3, 15 (1955) (discussing negative implications of interstate branch banking).

71 *See* S. REP. No. 1095, 84th Cong., 1st Sess. 4, 11 (1955) (concluding that bill will safeguard public interest).

by many large BHC's which sought further geographic expansion[72] and by those who regarded the total prohibition proposed by the House of Representatives offensive to state rights.[73] During the ensuing debates, Senator Paul H. Douglas of Illinois proposed a compromise amendment on the Senate floor.[74] The amendment, which was ultimately adopted, permitted interstate acquisitions of banks only if specifically authorized by state law.[75]

During the Senate debates, Douglas stated that his provision was designed to "permit out-of-State holding companies to acquire banks in other States only to the degree that State laws expressly permit them."[76] According to Senator Douglas, his amendment was "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 policy. . . ."[77] Senator Douglas acknowledged that the amendment would preclude interstate acquisitions by bank holding companies;[78] however, "the amendment would [also] leave the way open for States to make explicit provision for such purchases and acquisitions if they so decided."[79] As a result, the Douglas Amendment prohibits a BHC from controlling banks in more than one state unless authorized by state law,[80] just as the McFadden Act precludes a bank from branching in more than one state.[81]

In recent years, many states exercised their prerogative

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72 *See Control of Bank Holding Companies, 1955: Hearings on S. 880, S.2350, and H.R. 6227 Before the Subcomm. of the Senate Comm. on Banking and Currency*, 84th Cong., 1st Sess. 298-99 (1955) (statement of Baldwin Maull, President Marine Midland Corp.).

73 *See* 102 CONG. REC. 6751-52 (statement of Sen. Robertson, floor manager of Committee bill) (quoting Sen. Maybank).

74 *See* 102 CONG. REC. 6856-57 (statement of Sen. Douglas) [hereinafter *Douglas statement*].

75 *See* 12 U.S.C. § 1842(d) (1982). *See also supra* note 7 for text of Douglas Amendment.

76 *Douglas statement*, *supra* note 74, at 6858.

77 *Id.* at 6860. Senator Douglas further explained:

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

Id. at 6858.

78 *Id.* at 6860.

79 *Id.*

80 *See id.*

81 *See id.*; *see also supra* note 55 for text of McFadden Act.

under the Douglas Amendment by enacting statutes to open their borders to foreign BHC's.[82] In 1972, the state of Iowa authorized the acquisition of its banks by any out-of-state holding company owning at least two banks in Iowa.[83] The validity of Iowa's Bank Holding Company statute was challenged in *Iowa Independent Bankers v. Board of Governors of the Federal Reserve System*,[84] the first case to address a state's authority to exercise its prerogative under the Douglas Amendment.[85]

In *Iowa Independent Bankers*, an association of banks petitioned the United States Court of Appeals for the District of Columbia Circuit to set aside the Board of Governors' order approving the acquisitions of two Iowa banks by an out-of-state BHC.[86] The petitioners argued that the Douglas Amendment implicitly prohibits discrimination between out-of-state BHC's.[87] Specifically, petitioners maintained that the Douglas Amendment requires states either to permit the acquisition of in-state banks by any out-of-state BHC's or to ban all such acquisitions entirely.[88] The petitioners further alleged that the Iowa interstate banking statute violated the equal protection clause of the United States Constitution.[89] The court of appeals rejected these argu-

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[82] *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 6-321 to -327 (West Supp. 1985); CONN. GEN. STAT. ANN. §§ 36-552 to -563 (West Supp. 1985); DEL. CODE ANN. tit. 5, §§ 801 to -826 (Supp. 1985); FLA. STAT. ANN. § 658.295 (West 1984); IOWA CODE ANN. §§ 524.1804 to -.1806; ME. REV. STAT. ANN. tit. 9B, §§ 1011 to -1019 (Supp. 1985); MASS. ANN. LAWS ch. 167A, §§ 1 to -4A (Law. Co-op. Supp. 1986); N.Y. BANKING LAW §§ 141 to -143b (McKinney 1986); OHIO REV. CODE ANN. §§ 1101.01 to -1103.14 (Anderson 1986); OR. REV. STAT. §§ 715.010 to -715.910 (1985); R.I. GEN. LAWS §§ 19-30-1 to -19-30-13 (1985); WASH. REV. CODE ANN. § 30.04.230 (Supp. 1985); *see also* 1986 N.J. Sess. Law Serv. 202 (West 1986). New Jersey's legislation establishes regional and national interstate banking under a reciprocal format. The bill establishes a Central-Atlantic region for interstate banking comprised of New Jersey, Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, Missouri, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia, Wisconsin, and the District of Columbia. This region will be formed when three of these states which individually have at least $20 billion in commercial banks enact reciprocal legislation authorizing New Jersey BHC's to acquire banks or BHC's in their states.

The bill also has a national trigger in the event that at least 13 states, including at least four of the nation's ten largest, authorize New Jersey BHC's to acquire banks or BHC's in those states. New Jersey will then authorize reciprocal privileges to out-of-state BHC's.

[83] *See* IOWA CODE ANN. § 524.1805 (West Supp. 1985).

[84] 511 F.2d 1288 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975).

[85] *See* Bank of New England Corp., 70 Fed. Res. Bull. 374, 385 (1984).

[86] *Iowa Independent Bankers*, 511 F.2d at 1293.

[87] *Id.* at 1296.

[88] *Id.*

[89] *Id.* at 1294. Iowa Independent Bankers charged that the Iowa statute did not bear "a rational relationship to a legitimate state purpose." *Id.*

ments and upheld the validity of the proposed acquisitions and the challenged statute.[90]

Initially, the court noted that the Iowa statute created neither a suspect classification nor impinged upon a fundamental right.[91] The court reasoned, therefore, that a state need only demonstrate a "rational nondiscriminatory justification" for the legislature's actions.[92] In addition, the court concluded that it was reasonable for the Iowa Legislature to distinguish between in-state and out-of-state BHC's.[93] The court justified the distinction by noting that only one out-of-state BHC had a pre-existing interest in the Iowa banking system because it had owned four banks in Iowa since the 1950's.[94] As a result, the court opined that it was rational for Iowa to allow *all* pre-existing BHC's, whether in-state or out-of-state, to compete on an equal basis, while simultaneously preventing an influx of new out-of-state BHC's in Iowa.[95] Finally, the court relied on the legislative history of the Douglas Amendment in concluding that states may selectively authorize bank holding companies to cross state lines.[96]

In March 1985, in *Metropolitan Life Insurance Co. v. Ward*,[97] the Supreme Court was presented with an equal protection clause challenge similar to the one raised in *Iowa Independent Bankers*.[98] The issue in *Metropolitan Life*, however, involved an Alabama tax statute.[99] The applicable legislation provided that out-of-state insurance companies be taxed at higher rates than domestic companies.[100] In holding that the Alabama tax scheme was unconsti-

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90 *Id.* at 1302.

91 *Id.* at 1294.

92 *Id.*

93 *Id.* at 1294-95.

94 *Id.*

95 *Id.*

96 *Id.* at 1296-97. In determining that the Douglas Amendment permits a partial lifting on interstate bank holding company acquisitions, the court noted that "[n]ot once in the entire debate is the discrimination issue raised." *Id.* at 1296. Furthermore, according to the court, "Senator Douglas seem[ed] to [have] anticipate[d] that states might be selective in allowing bank holding companies to cross state lines." *Id.* (citations omitted).

97 105 S. Ct. 1676 (1985).

98 *See id.*

99 *Id.* at 1678.

100 *Id.* The Alabama tax preference statute assessed domestic insurance companies at one percent of total gross premiums collected in Alabama. *Id.* In contrast, an out-of-state company paid either three or four percent. *Id.* However, the statute further provided that out-of-state companies could reduce their tax rate if certain capital investments in Alabama were made. *Id.* In no event could a foreign com-

tutionally discriminatory, the Court ruled that the purposes advanced by the state in support of the biased legislation were not legitimate.[101] The majority found that Alabama's asserted justification of promoting in-state businesses was not a legitimate purpose if accomplished by discriminating against out-of-state companies.[102]

In a comprehensive dissent, four justices disagreed that the purposes behind the Alabama tax statute were illegitimate.[103] Relying on prior law, Justice O'Connor reasoned that Congress has explicitly approved parochialism respecting the regulation of the insurance industry.[104] Furthermore, the dissent posited that differential tax treatment need merely rest on reasonable policy considerations.[105] Citing a number of these justifications,[106] the dissent concluded that rational basis scrutiny does not demand mathematical precision in the treatment of foreign and domestic companies.[107]

It was against this dearth of judicial decisions involving the BHCA that the Supreme Court rendered its decision in *Northeast Bancorp*. In that case, the Court held that states may selectively lift the BHCA's ban on interstate BHC acquisitions.[108] Justice Rehnquist, writing for a unanimous court,[109] rejected the argument that states in exercising their prerogative under the Douglas Amendment must either permit all interstate bank acquisitions or, alternatively, impose a complete ban on such ac-

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pany reduce its tax rate to the one percent rate charged to domestic insurance companies. *Id.* at 1678-79.

101 *Id.* at 1684. The state proffered the dual aims of promotion of new insurance companies and encouragement of foreign capital investment to support the constitutional rational basis requirement. *Id.* at 1679.

102 *Id.* at 1682-84.

103 *Id.* at 1694 (O'Connor, J., dissenting). The dissenting opinion authored by Justice O'Connor was joined by Justices Brennan, Marshall, and Rehnquist.

104 *Id.* at 1693 (O'Connor, J., dissenting). The dissenters stressed that the legislative history of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1982 & Supp. I 1983), indicated that Congress intended to give broad support to state systems of insurance company taxation. *Metropolitan Life*, 105 S. Ct. at 1687-88 (O'Connor, J., dissenting).

105 *Metropolitan Life*, 105 S. Ct. at 1692 (O'Connor, J., dissenting).

106 The dissenters pointed to the need for local insurance companies to be responsive to local conditions, differing insurance needs between industrial and rural states, the advantages of state-by-state insurance regulation, and the importance of tax collection as a source of state revenue. *Id.* at 1687 (O'Connor, J., dissenting).

107 *Id.* at 1692 (O'Connor, J., dissenting).

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

109 Justice Powell did not participate in the Court's decision. *Id.* at 2556.

quisitions.[110] The Court held that the Massachusetts and Connecticut BHC statutes authorizing regional interstate BHC acquisitions were valid under the Douglas Amendment, as well as the commerce, compact, and equal protection clauses of the Constitution.[111]

The Court initially reviewed the language and legislative history of the Douglas Amendment to determine whether the challenged state statutes effectively lifted the ban imposed by the federal legislation.[112] Justice Rehnquist opined that the express language of the Douglas Amendment permitted states to remove the federal ban entirely thereby allowing BHC's to acquire banks within the authorizing state regardless of their state of incorporation.[113] The Court noted, however, that the Douglas Amendment is ambiguous with regard to partial or selective removal of the federal prohibition.[114] The Court, nevertheless, reasoned that the legislative history of the Douglas Amendment provides adequate guidance of congressional intent regarding the validity of a selective waiver of the federal ban on interstate BHC acquisitions.[115]

In considering the legislative history of the BHCA, the Court noted that it was enacted to eliminate the possibility of circumventing the branching restrictions of the McFadden Act and to "promote a pluralistic banking system sensitive to local credit needs."[116] The Court further noted that Senator Douglas, in defending his amendment, stated that BHC's would be able to acquire banks in other states "only to the degree that State laws expressly permit them"[117] and that his amendment was analogous to the McFadden Act.[118] As a result, the Court rejected the

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110 *Id.* at 2552.

111 *Id.* at 2556.

112 *See id.* at 2550-53.

113 *Id.* at 2551.

114 *Id.*

115 *Id.* at 2551-53.

116 *Id.* at 2551.

117 *Id.* at 2552 (citing 102 CONG. REC. 6858) (statement of Sen. Douglas).

118 *Id.* at 2552-53 (citing 102 CONG. REC. 6858-60) (statement of Sen. Douglas). Drawing on Senator Douglas's analogy to the McFadden Act, Justice Rehnquist reasoned that the states were able to adopt a variety of approaches in addressing the interstate branching issue. *Id.* at 2552. For instance, the State of New York, utilizing the McFadden Act, was divided into ten regions and permitted banks to branch into only one zone. *Id.* at 2552-53 (citing 102 CONG. REC. 6858) (remarks of Sen. Douglas). Similarly, Justice Rehnquist noted that Pennsylvania, under the McFadden Act, permitted bank branching only in contiguous counties. *Id.* This scheme was upheld in Upper Darby National Bank v. Myers, 386 Pa. 12, 124 A.2d 116 (1956). *Northeast Bancorp*, 105 S. Ct. at 2553. Therefore, by analogy to the McFad-

petitioners' contentions and held that states could selectively lift the federal ban on interstate bank acquisitions.[119] Thus, each state was permitted flexibility regarding the acquisition of interstate banks by out-of-state banks.[120]

Justice Rehnquist next examined the challenged regional banking statutes under the commerce, compact, and equal protection clauses of the Constitution.[121] Initially, the Court rejected the petitioners' contention that the regional restriction resulted in an "economic Balkanization" whereby commerce was free to flow only into the region.[122] The Court opined that the dormant commerce clause would prohibit states from establishing a regional banking system if Congress had remained silent on the question[123] or if a state took it upon itself to comprehensively regulate the interstate acquisitions of BHC's.[124] Justice Rehnquist reasoned, however, that in passing the BHCA and the

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den Act, the Court concluded that Congress intended that states may "partially lift the ban on interstate banking without opening themselves up to interstate banking from everywhere in the Nation." *Id.*

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

120 *Id.* at 2552. *See also* First Nat'l Bank v. Walker Bank & Trust Co., 385 U.S. 252 (1966) (Congress intended question of desirability of branch banking be left to states).

121 *See Northeast Bancorp*, 105 S. Ct. at 2553-56.

122 *Id.* at 2553. For a discussion of the validity of state statutes burdening the flow of interstate commerce, see Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979) (state statute prohibiting transportation of natural minnows out of state for purposes of sale held violative of commerce clause); H. P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 533 (1949) (state statute restricting interstate shipment of milk held violative of commerce clause).

123 *See* Lewis v. BT Inv. Managers, Inc., 447 U.S. 27 (1980) (state statute prohibiting out-of-state banks, trusts, and BHC from owning businesses providing investment advisory services violated implicit limitation on state power under commerce clause).

The commerce clause has been interpreted by the Supreme Court not only as an authorization for congressional action, but also as a restriction on permissible state regulation, even in the absence of a conflicting federal statute. *See generally H.P. Hood & Sons*, 336 U.S. at 525. In *Hood*, the Court stated:

> The Commerce Clause is one of the most prolific sources of national power and an equally prolific source of conflict with legislation of the state. While the Constitution vests in Congress the power to regulate commerce among the states, it does not say what the states may or may not do in the absence of congressional action, nor how to draw the line between what is and what is not commerce among the states. Perhaps even more than by interpretation of its written word, this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the Constitution.

Id. at 534-35.

124 *Northeast Bancorp*, 105 S. Ct. at 2553-54 (citing Sporhase v. Nebraska, 458 U.S. 941 (1982)).

Douglas Amendment, Congress *had* addressed the validity of selective interstate regional banking statutes.[125] Because the Massachusetts and Connecticut statutes were thus in fact expressly authorized by Congress, the Court held that the challenged legislation could not be successfully attacked under the commerce clause.[126]

The Court next rejected petitioners' argument that the Massachusetts and Connecticut regional statutes constituted a compact to exclude non-New England banking organizations.[127] Justice Rehnquist opined that an interstate agreement would be subject to congressional consent, as required by the compact clause, only if it were to increase the power of the compacting states at the expense of federal supremacy.[128] The Court noted that the interstate BHC statutes in two of the alleged compact states, Maine and Rhode Island, did not contain similar regional limitations.[129] Moreover, assuming arguendo that the challenged statutes constituted a compact, the Court reasoned that the agreement was not violative of the compact clause because it was not directed towards " 'the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.' "[130] Noting that the Douglas Amendment authorized selective regional banking, Justice Rehnquist concluded that the challenged statutes neither "enhance[d] the *political* power of the New England States at the expense of other States [n]or [had] an 'impact on our federal structure' " and thus did not violate the compact clause.[131]

Lastly, the Court addressed the petitioners' argument that the statutes in question violated the equal protection clause of

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125 *Id.* at 2554.

126 *Id. See, e.g.*, Western & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648 (1981) (McCarran-Ferguson Act leaves regulation and taxation of insurance companies to states and removes commerce clause restriction upon state's power to tax such companies).

127 *Northeast Bancorp*, 105 S. Ct. at 2554-55.

128 *Id.* at 2554. In New Hampshire v. Maine, 426 U.S. 363 (1976), for instance, the Court stated "[t]he application of the Compact Clause is limited to agreements that are 'directed to the formation of any combination tending to the increase of political power in the States which may encroach upon or interfere with the just supremacy of the United States.' " *Id.* at 369 (quoting Virginia v. Tennessee, 148 U.S. 503, 519 (1893)).

129 *Northeast Bancorp*, 105 S. Ct. at 2554.

130 *Id.* (citations omitted).

131 *Id.* at 2555 (citing United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 471 (1978)) (emphasis in original).

the Constitution because they permitted New England BHC acquisitions while simultaneously prohibiting similar acquisitions by non-New England BHC's.[132] Justice Rehnquist noted that the Court had ruled in *Metropolitan Life*[133] that state regulation of its own economy " 'may not be accomplished by imposing discriminatorily higher taxes on nonresident corporations solely because they are nonresidents.' "[134] Justice Rehnquist, however, distinguished the challenged Massachusetts and Connecticut banking statutes from the Alabama tax statute at issue in *Metropolitan Life*.[135] According to Justice Rehnquist, the Massachusetts and Connecticut statutes, though discriminatory because they favored out-of-state BHC's domiciled in New England, are constitutional because of the states' desire to protect the independence of local banks within the region.[136] Moreover, Justice Rehnquist noted that " 'banking and related financial activities are of profound local concern.' "[137] Consequently, the Court concluded that the challenged BHC statutes are rationally related to Massachusetts's and Connecticut's goal of promoting a pluralistic regional banking system and thus did not violate the equal protection clause.[138]

Justice O'Connor filed a concurring opinion.[139] In her view, there was no significant distinction between the challenged Massachusetts and Connecticut legislation and the Alabama statute addressed in *Metropolitan Life* for purposes of analysis under the equal protection clause.[140] According to Justice O'Connor, the majority's distinction results in the equal protection clause "tolerat[ing] a regional 'home team' [but] condemn[ing] a state 'home team.' "[141] Although agreeing with the majority that the business of banking is "of profound local concern," Justice O'Connor opined that the states have similarly regulated the insurance industry in order to promote the financial security of

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132 *Id.* at 2555-56.

133 *See supra* notes 97-107 and accompanying text for discussion of *Metropolitan Life Insurance.*

134 *Northeast Bancorp*, 105 S. Ct. at 2555 (quoting Metropolitan Life Ins. Co. v. Ward, 105 S. Ct. 1676, 1684 n.10 (1985)).

135 *See Northeast Bancorp*, 105 S. Ct. at 2555.

136 *Id.*

137 *Id.* (quoting Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 38 (1980)).

138 *Id.* at 2556.

139 *See id.* at 2556 (O'Connor, J., concurring).

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

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

their local communities.[142] Justice O'Connor nevertheless concurred in the opinion because "the Equal Protection Clause permits economic regulation that distinguishes between groups that *are* legitimately different—as local institutions so often are—in ways relevant to the proper goals of the State."[143]

In the wake of the Supreme Court's decision in *Northeast Bancorp*, several states have enacted reciprocal legislation that establishes banking regions based on geographic boundaries.[144] If adopted throughout the nation, such regional pacts will undoubtedly restructure America's banking system.[145] The Supreme Court's holding in *Northeast Bancorp* permitting the "selective" structure of interstate banking arrangements, however, raises several provocative issues.

The question presented to the Supreme Court in *Northeast Bancorp* involved the definition of the parameters of a state's authority to discriminate in lifting the Douglas Amendment's ban against interstate acquisitions of banks by BHC's.[146] Arguably, the Douglas Amendment does not appear to authorize discrimination by a state in favor of its own residents or those of other selected states.[147] The Douglas Amendment's general authorization of interstate BHC acquisitions, if they are "specifically authorized by the statute laws of the state in which the bank is located, by language to that effect and not merely by implication,"[148] does not meet the stringent test of explicitness enunciated by the Supreme Court because the Amendment merely creates exceptions to the general federal prohibition on interstate acquisitions.[149] The *Northeast Bancorp* Court failed to adequately address this issue; instead, it relied on the sparse legislative history of the Douglas Amendment to determine congressional intent regarding the ability of states to selectively lift the federal ban.[150]

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142 *Id.*

143 *Id.* at 2557 (O'Connor, J., concurring) (emphasis in original).

144 *See supra* note 82.

145 *See* Bank of New England Corp., 70 Fed. Res. Bull. 374, 375-76 (1984), in which the Board of Governors of the Federal Reserve stated that "[b]oth the increasing number of states considering such proposals and the progress of the proposed legislation toward enactment suggest . . . a system of regional zones may develop involving major areas of the nation." *Id.*

146 *See Northeast Bancorp*, 105 S. Ct. at 2550-53.

147 *See supra* note 7 for text of Douglas Amendment.

148 *See* 12 U.S.C. § 1842(d).

149 *See supra* notes 74-81 and accompanying text.

150 *See Northeast Bancorp*, 105 S. Ct. at 2551.

Although reliance on the legislative history of a statute may be a valid method for determining congressional intent, the Supreme Court has expressed reluctance in utilizing this approach when states are discriminating against residents of other states.[151] The Court has recognized that the judiciary does not have authority to rewrite legislation "based on mere speculation of what Congress probably had in mind."[152] This is especially true when Congress has not expressly authorized legislation inconsistent with the commerce clause.[153] Indeed, the Court has stated "[r]eliance on . . . isolated fragments of legislative history in defining the intent of Congress is an exercise fraught with hazards and a step to be taken cautiously."[154]

The Douglas Amendment was proposed during the Senate debates on the Bank Holding Company Act. Consequently, there are no committee reports or other significant legislative histories to clarify its meaning.[155] The record of debate does reveal a limited discussion of the power of states to lift the federal ban imposed by the Douglas Amendment; however, there is no reference to the power of states to discriminate among potential out-of-state entrants.[156] Apparently, Congress was more concerned with the federal prohibition on interstate acquisitions than on terms under which states could lift the ban. Thus, the excerpts from the Senate debate are fragmentary and ambiguous and therefore cannot document congressional intent authorizing discrimination contrary to the commerce clause.

Moreover, the *Northeast Bancorp* Court relied on a comparison of the BHCA's legislative history to the McFadden Act.[157] Reasoning by analogy, the Court noted that since national banks' intrastate branching abilities were controlled by state laws, Congress must also have intended that the interstate banking abilities of bank holding companies would be controlled by state laws.[158] Significantly, however, the *Northeast Bancorp* Court ignored the complete ban on interstate branch banking by national banks in the McFadden Act. Instead, the Court concentrated on the per-

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151 *See supra* note 19 and accompanying text.

152 New England Power Co. v. New Hampshire, 455 U.S. 331, 343 (1982).

153 *See id.*

154 *Id.* at 341 (quoting Pyres v. Chris-Craft Industries, Inc., 430 U.S. 1, 26 (1976)).

155 *See Northeast Bancorp*, 105 S. Ct. at 2551.

156 *See Douglas statement, supra* note 74, at 6854-62 (Douglas Amendment debates).

157 *See supra* note 118 and accompanying text.

158 *Northeast Bancorp*, 105 S. Ct. at 2550-53.

missibility of state sanctioned *intrastate* banking under the McFadden Act. Indeed, the Court failed to consider the possibility that the Douglas Amendment was modeled after the McFadden Act's *interstate* branching prohibition.

An additional perplexing aspect of the *Northeast Bancorp* decision is the Court's attempt to distinguish the instant case from the issues presented in *Metropolitan Life*.[159] Insurance, like banking, has traditionally been regarded as a matter of local concern.[160] Justice Rehnquist nevertheless attempted to distinguish the challenged banking statutes in *Northeast Bancorp* from the taxation of insurance companies involved in *Metropolitan Life* because the Massachusetts and Connecticut statutes favored only *neighboring* out-of-state banks.[161] As Justice O'Connor noted in her concurring opinion, however, such a rationale fails to explain why a ban of forty-four states from doing business in New England is any less offensive than the discriminatory taxing of all out-of-state insurance companies in *Metropolitan Life*.[162]

As a result of the *Northeast Bancorp* decision, the geographic areas available for BHC expansion have significantly increased. Implicit in the Supreme Court's decision is a recognition that the financial services industry is in the midst of a dramatic transformation which will revolutionize both the structure of the banking industry and the scope of the products and services available to the public. Indeed, the Court's determination that the Douglas Amendment authorizes states to selectively lift the federal prohibition on interstate BHC acquisitions will undoubtedly result in a national interstate banking system in the United States. While the public will benefit from this transformation, the underlying

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159 *See id.* at 2556 (O'Connor, J., concurring).

160 *See* McCarran-Ferguson Act, ch. 20, 59 Stat. 33 (1945) (codified as amended at 15 U.S.C. §§ 1011-1015 (1982 & Supp. I 1983)). The Act states in pertinent part:

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

Id. at § 1011 (emphasis added). *See also Northeast Bancorp*, 105 S. Ct. at 2556 (O'Connor, J., concurring).

161 *Northeast Bancorp*, 105 S. Ct. at 2556-57 (O'Connor, J., concurring).

162 *Id.* (O'Connor, J., concurring).

policy ramifications of this decision may ultimately have to be addressed by Congress.

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