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## Regional Banking Laws: An Analysis of Constitutionality Under the Commerce Clause

Congress has established a two tier system for regulating bank holding companies.<sup>1</sup> The federal portion of this regulatory scheme includes a provision, the Douglas Amendment, which prohibits the interstate acquisition of banks by bank holding companies. The Douglas Amendment, however, has an exception: interstate acquisitions are not prohibited if the state of the acquiree bank has enacted legislation specifically authorizing acquisitions.<sup>2</sup> Capitalizing on this exception, at least sixteen states have recently enacted or are considering enacting regional banking laws.<sup>3</sup>

Regional banking laws permit out-of-state bank holding companies to acquire in-state banks only when the out-of-state holding company is located within a specified region. These statutes generally require that the acquiring company's home state grant reciprocal rights to bank holding companies located within the enacting state.<sup>4</sup> Recently, the constitutionality of these laws has been questioned under commerce clause, compact clause, and equal protection clause analyses.<sup>5</sup> To date, such statutes have withstood these constitutional attacks.

This note specifically focuses on regional banking laws in light of the restrictions imposed by the commerce clause. Part I discusses the federal regulation of bank holding companies and the state statutory provisions for regional banking. Part II evaluates these regional banking laws under the traditional commerce clause analyses employed by the United States Supreme Court. Part II concludes that these regional banking laws violate the commerce clause. Next, assuming a violation, part III addresses the contention that the Douglas Amendment is specific congressional authorization for states to enact regional banking laws and therefore absolves the states of any commerce clause violation. In evaluating this theory, part III concludes that neither the plain language of the Douglas Amendment, nor its legislative history, exhibits such congressional authorization. Part IV discusses *Northeast Bancorp, Inc. v.*

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1 See note 10 *infra* and accompanying text.

2 Section 3(d) of the Bank Holding Company Act, 12 U.S.C. § 1846(d) (1982); see note 13 *infra* and accompanying text.

3 See note 20 *infra* and accompanying text.

4 See notes 14-21 *infra* and accompanying text.

5 See note 32 *infra* and accompanying text.

*Board of Governors of the Federal Reserve System*,<sup>6</sup> which held that the Douglas Amendment is congressional authorization for states to enact regional banking laws. Finally, Part V argues for a reversal of *Northeast* because regional banking laws present a number of disadvantages which Congress must debate before such statutes are permitted to restructure the nation's financial network.

## I. The Statutory Framework

Bank holding company regulation began with the Banking Act of 1933,<sup>7</sup> which required the Board of Governors of the Federal Reserve System ("Board") to approve all transactions in which a company sought to own a controlling interest in a member bank.<sup>8</sup> Congress, considering the Banking Act of 1933 deficient in its regulation of bank holding companies, enacted the Bank Holding Company Act of 1956 ("BHCA") which still regulates bank holding companies today.<sup>9</sup>

The BHCA vests in both the Board and state authorities regulatory power over bank holding companies.<sup>10</sup> As originally passed

6 740 F.2d 203 (2d Cir. 1984), *cert. granted*, 105 S. Ct. 776 (1985). This is the only federal court of appeals decision in this area.

7 Act of June 16, 1933, ch. 89, 48 Stat. 162 (codified in various sections of 12 U.S.C.).

8 *Id.*

9 Act of May 9, 1956, ch. 240, 70 Stat. 133, 12 U.S.C. §§ 1841-1850 (1982). Generally, the BHCA was enacted to achieve two primary goals. First, it was designed to prevent the undue concentration and control of banking activities in the hands of a few companies. Second, it was intended to further a congressional policy against the combination of banking and non-banking enterprises. S. REP. NO. 1095, 84th Cong., 1st Sess. 2 (1955). See also *Lewis v. BT Inv. Managers*, 447 U.S. 27, 46 (1980); *Board of Governors v. First Lincolnwood Corp.*, 439 U.S. 234, 242-43 (1978). A desire to prevent anticompetitive effects in the banking industry was the basis of both goals. See S. REP. NO. 1084, 91st Cong., 2d Sess. 2-3 (1970). See also 447 U.S. at 46.

10 The BHCA also requires bank holding companies to register with the Board, 12 U.S.C. § 1844(a) (1982); and, before acquiring a bank, a bank holding company must obtain prior Board approval, 12 U.S.C. § 1842(a) (1982).

Regarding state authority over bank holding companies, § 7 of the BHCA, 12 U.S.C. § 1846 (1982), provides that the BHCA "shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof." *Id.* A state may impose restrictions greater than those imposed by the BHCA, but a state may not allow a bank holding company to act contrary to the BHCA's requirements. S. REP. NO. 1095, *supra* note 9, at 22. *Lewis v. BT Inv. Managers*, 447 U.S. 27 (1980), examined the extent of a state's ability to regulate bank holding companies under § 7 of the BHCA. In *Lewis*, the Court held unconstitutional a Florida statute which prohibited an out-of-state bank holding company from owning or controlling a business within Florida that sells investment advisory services. 447 U.S. at 31, 49. According to the Court, the statute placed an impermissible burden upon interstate commerce in violation of the commerce clause. *Id.* at 49.

In examining the extent of state authority under § 7, the Court held that although a state may impose greater restrictions upon bank holding companies than is required by the BHCA, the BHCA does not extend new powers to the states that they did not possess before enactment of the BHCA. *Id.* at 48-49. Thus, the Court concluded that state legislation is subject to the limitations imposed by the commerce clause. *Id.* at 49.

by the House of Representatives, one of the provisions of the BHCA completely banned interstate acquisitions of banks.<sup>11</sup> During the Senate debates, however, Senator Douglas from Illinois proposed an amendment to this provision.<sup>12</sup> The amendment created an exception to the blanket prohibition by allowing interstate acquisitions if the laws of the state of the acquiree bank specifically authorize such acquisitions.<sup>13</sup>

When the Douglas Amendment was adopted, Congress did not believe that states would immediately authorize acquisitions of banks by out-of-state bank holding companies.<sup>14</sup> In fact, states did not begin to enact such legislation until recently. Beginning with Massachusetts in 1982, at least sixteen states have now enacted or are considering enacting regional banking laws.<sup>15</sup> Generally, these regional banking laws condition acquisitions on two factors. First, the acquiring bank holding company must be principally located within a state specified in the statute.<sup>16</sup> Second, the home state of the bank holding company must grant reciprocal privileges to bank holding companies principally located within the enacting state.<sup>17</sup> The Massachusetts statute is illustrative.<sup>18</sup> Like the standard

11 H.R. REP. NO. 609, 84th Cong., 1st Sess. 3, 15 (1955).

12 See 102 CONG. REC. 6856-57 (1956).

13 Section 3(d) of the BHCA, 12 U.S.C. § 1842(d) (1982), (the Douglas Amendment) provides:

(d) Limitation by State boundaries.

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.

14 Thus, in stating his opposition to the Douglas Amendment, Senator Bricker during the debate stated that "in effect, [the Douglas Amendment] constitutes an absolute prohibition against future expansion by bank holding companies." 102 CONG. REC. 6861 (1956) (statement of Sen. Bricker). Moreover, Senator Douglas stated, in reference to his amendment, that "the immediate practical effect would be to bar the expansion of bank holding companies across State lines." *Id.* at 6860 (statement of Sen. Douglas).

15 See note 20 *infra*.

16 See, e.g., note 18 *infra*.

17 See, e.g., note 18 *infra*.

18 Massachusetts' regional banking statute provides in relevant part:

Companies Forbidden to Do Certain Acts without Approval of Board of Bank Incorporation.

Notwithstanding the provisions of this section an out-of-state bank holding

scheme, the Massachusetts act contains a "reciprocal privileges" provision; further, the act limits the acquiring company by requiring that its home state be either Connecticut, Maine, Vermont, New Hampshire, or Rhode Island (i.e., within the New England region).<sup>19</sup>

Such regional arrangements, if enacted throughout the country,<sup>20</sup> could restructure the nation's banking system. Thus, the Board has stated that "[b]oth the increasing number of states considering such proposals and the progress of the proposed legislation toward enactment suggest that . . . a system of regional zones may develop involving major areas of the nation."<sup>21</sup> The discriminatory effect upon states excluded from the regional banking arrangements threatens commerce clause principles.

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company, with the prior written approval of the board of bank incorporation, may establish or acquire . . . ownership or banking institutions of 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 [authorize] . . . the establishment or the acquisition of direct or indirect ownership or control of . . . companies controlling one or more banks in that state, by bank holding companies whose banking institutions principally conduct their operations in the commonwealth . . . . For the purposes of this section, the term "out-of-state bank holding company" . . . shall include only those companies which have their principal places of business in one of the states of Connecticut, Maine, New Hampshire, Rhode Island, or Vermont and which are not directly or indirectly controlled . . . 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 (Michie/Law. Coop. 1982).

19 Of the five states included in the Massachusetts arrangement, Connecticut and Rhode Island have enacted regional banking laws which grant reciprocal rights to Massachusetts. The Connecticut statute is similar to the Massachusetts statute. *See* 1983 Conn. Acts 411 (Reg. Sess.). The regional restriction in the Rhode Island statute, which was enacted in May 1983, expires on July 1, 1986. R.I. GEN. LAWS §§ 19-30-1 to 19-30-2 (1984).

20 The petition for certiorari in *Northeast* illustrates the recent growth of regional banking laws throughout the country. *See* Petition for Writ of Certiorari 11 n.13, *Northeast Bancorp, Inc. v. Board of Governors*, 740 F.2d 203 (2d Cir. 1984), *cert. granted*, 105 S. Ct. 776 (1985). In the Northeast, Connecticut, Massachusetts, and Rhode Island have enacted regional banking laws. In the Midwest, Iowa, Iowa S.B. 512, Minnesota, Minn. S.B. 1837, Missouri, Mo. H.B. 1239, Nebraska, Neb. L.B. 1069, and Wisconsin, Wis. A.B. 800, all considered such legislation. In the Southeast, Georgia, 1984 Ga. Laws 1467, Florida, FLA. STAT. ANN. § 658.295 (West 1984), Kentucky, KY. REV. STAT. ANN. § 287.904 (Baldwin Supp. 1984), North Carolina, N.C. GEN. STAT. §§ 53-209 to 53-218 (1984), and South Carolina, S.C. CODE ANN. §§ 34-24-10 to 34-24-100 (Law. Co-op. 1984), have all enacted regional banking legislation. Finally, in the West, Arizona, Ariz. H.B. 2117, is considering such legislation and Utah, UTAH CODE ANN. § 7-1-102 (1984), has enacted a regional banking law. The legislation generally excludes those states which are home to the largest bank holding companies. Specifically, the legislation excludes California, Illinois, New York, and Texas. *See generally*, Simonson, Pringle & Cardwell, *Regional Interstate Banking Developments*, 10 OKLA. CRTV U. L. REV. 69 (1985); *see also* Loumiet & Crim, *Florida's Regional Reciprocal Banking Act of 1984*, 14 STETSON L. REV. 1 (1984).

21 *Bank of New England Corp.*, 70 Fed. Res. Bull. 374, 375-76 (1984).

## II. Regional Banking Laws Under the Commerce Clause

States are enacting regional banking laws "even though there are serious questions both about the constitutionality of such arrangements and their implications for public policy."<sup>22</sup> Under the commerce clause, Congress has the power "[t]o regulate commerce . . . among the several States."<sup>23</sup> As a corollary to the powers this clause gives Congress, the Supreme Court has held that the commerce clause also prohibits a state from imposing barriers which burden interstate commerce.<sup>24</sup>

The purposes behind the commerce clause were to establish and further the creation of a common market among the states, to prohibit internal trade barriers, and to prevent economic balkanization of the Union.<sup>25</sup> Court interpretations of the commerce clause have recognized that the predominant goal of the commerce clause was to establish a unified national economy.<sup>26</sup>

Arguably, because Congress has established a complete prohibition of interstate acquisitions of banks by bank holding companies unless specifically authorized by statute, the state regional banking laws which permit such interstate acquisitions (even if only regionally) may be characterized as actually promoting commerce rather than restricting it.<sup>27</sup> Nevertheless, an examination of the commerce clause's underlying purposes, preventing economic balkanization and maintaining an undivided federal free trade unit, discloses the potential for commerce clause violation.

Congress, in creating the absolute prohibition of interstate acquisitions, acted without dividing the "federal free trade unit."

22 Statement of Paul A. Volcker, Chairman, Board of Governors of the Federal Reserve System, before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce, Apr. 4, 1984, *reprinted in* 70 Fed. Res. Bull. 312, 318 (1984).

23 U.S. CONST. art. I, § 8, cl. 3.

24 *South-Central Timber Dev. v. Wunnicke*, 104 S. Ct. 2237, 2240 (1984); *Lewis v. BT Inv. Managers*, 447 U.S. 27, 35 (1980); *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979); *Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978); *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 370-71 (1976); *H. P. Hood & Sons v. Du Mond*, 336 U.S. 525, 534-38 (1949); *Cooley v. Board of Wardens*, 53 U.S.(12 How.) 299, 317 (1852).

25 The Supreme Court has held that an underlying purpose of the commerce clause was to avoid "the tendencies toward economic Balkanization that had plagued the relations among the Colonies and later among the States under the Articles of Confederation." *Hughes*, 441 U.S. at 325-26. Moreover, the Court has held that the commerce clause strives to establish a "federal free trade unit," *H. P. Hood*, 336 U.S. at 538, which furthers the notion that "our economic unit is the Nation," *id.* at 537, and that "the states are not separable economic units," *id.* at 538. See also *Lewis*, 447 U.S. at 36; *Philadelphia*, 437 U.S. at 623-24; *Great Atlantic*, 424 U.S. at 370-71; *H. P. Hood*, 336 U.S. at 531-39; *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 330 (1944); *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 527 (1935); J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 267-68 (2d ed. 1983).

26 See note 25 *supra*.

27 See *Northeast*, 740 F.2d at 208.

Although no interstate acquisitions were allowed, Congress did not "balkanize" the nation or frustrate the creation of a common market. States which have enacted regional banking laws have allowed interstate acquisitions, and in this sense they may have "promoted" interstate commerce on a regional level. Regional banking laws, however, frustrate the predominant goal of the commerce clause which is the establishment of a unified national economy. Thus, the effect of regional banking laws is the balkanization of the nation's banking industry and the creation of internal trade barriers on a regional basis.<sup>28</sup> In this sense, regional banking laws create possible commerce clause violations.

Given this burden on interstate commerce, the Court has traditionally employed one of two tests for the commerce clause limitation upon the states.<sup>29</sup> On the one hand, the Court has employed a virtual per se rule of unconstitutionality where "simple economic protectionism is effected by state legislation."<sup>30</sup> On the other hand, the Court has used a balancing test to uphold narrowly drawn state legislation which promotes a legitimate state interest in a nondiscriminatory fashion.<sup>31</sup> Under either the virtual per se rule of invalidity or the balancing test, regional banking laws do not pass constitutional muster.<sup>32</sup>

The Supreme Court has held statutes virtually per se unconstitutional where states enact legislation with the purpose of economic protectionism, or where the legislation is patently discriminatory.<sup>33</sup> Under the commerce clause, a state may not use its regulatory power to protect its citizens from competition.<sup>34</sup> Regional banking laws, however, result in protecting local banks from competition with companies which are not principally located in one of the states included within the regional arrangements; therefore, they are susceptible to the virtual per se analysis.<sup>35</sup>

If regional banking laws were not intended to protect local

28 See text accompanying note 113 *infra*.

29 See *Lewis*, 447 U.S. at 36.

30 *Philadelphia*, 437 U.S. at 624. See also *Lewis*, 447 U.S. at 36.

31 See *Lewis*, 447 U.S. at 36-37; *Hughes*, 441 U.S. at 336; *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977); *Great Atlantic*, 424 U.S. at 371-72; *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443 (1960).

32 In addition to commerce clause challenges, regional banking laws have been challenged under the compact clause, U.S. CONST. art. I, § 10, cl. 3, and the equal protection clause, U.S. CONST. amend. XIV, § 1. See, e.g., *Northeast Bancorp, Inc. v. Board of Governors*, 740 F.2d 203 (2d Cir. 1984), *cert. granted*, 105 S. Ct. 776 (1985). See also Note, *Regional Banking Statutes and the Equal Protection Clause*, 84 COLUM. L. REV. 2025 (1984) (concluding that regional banking laws result in discrimination among bank holding companies in violation of the equal protection clause).

33 *Philadelphia*, 437 U.S. at 624. See also *Lewis*, 447 U.S. at 36.

34 See, e.g., *Lewis*, 447 U.S. at 44 (citing *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. at 538). See also *Buck v. Kuykendall*, 267 U.S. 307, 315-16 (1925).

35 *Bank of New England Corp.*, 70 Fed. Res. Bull. 374, 382 (1984).

banks, then there would be some relation between the regional arrangement and the natural market area in the region. Such a correlation, however, does not exist.<sup>36</sup> Rather, the legislation creates regions by simply excluding states which are home to the nation's largest banks.<sup>37</sup> For example, the Utah regional banking law creates a region of eleven states which includes Alaska and Hawaii but excludes California.<sup>38</sup> Moreover, the legislative histories of the Connecticut and Massachusetts statutes suggest the protectionist purpose of regional banking laws. Massachusetts Senator John A. Brennan stated: "I just didn't think it would be good for [Massachusetts] if the big money center banks came in here. Our banks need the space to grow first."<sup>39</sup> Further, the Connecticut legislative history indicates that the legislature intended to give Connecticut banks time to merge and consolidate with larger banks not located within the New England region.<sup>40</sup> Thus, regional banking laws could be virtually per se unconstitutional since they result in simple economic protectionism of banks located within the enacting states.<sup>41</sup>

Apart from the per se test, in some circumstances the Supreme Court has balanced the state interest promoted by the state legislation against the federal interest in unburdened interstate commerce. This balancing approach has traditionally been used when a state statute promotes a legitimate state interest in a nondiscriminatory fashion and the statute is narrowly drawn to achieve that purpose.<sup>42</sup> Accordingly, even if regional banking laws are not a per se

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36 S. REP. NO. 560, 98th Cong., 2d Sess. 110 (1984) (additional views of Senator D'Amato).

37 Principally, California, Illinois, New York, and Texas are excluded. See note 20 *supra* and accompanying text.

38 UTAH CODE ANN. § 7-1-102 (1984); see S. REP. NO. 560, *supra* note 36, at 112 (additional views of Sen. D'Amato). The regional zone created by the New England arrangement includes Connecticut but excludes New York, 1983 Conn. Acts 411 (Reg. Sess.), though more Connecticut residents commute to New York than to Massachusetts or Maine, two states which are included in the arrangement. See S. REP. NO. 560, *supra* note 36, at 110.

39 See *Enlivening Banking for Fun and Fireworks*, N.Y. Times, Apr. 3, 1983, at F4.

40 The Report to the General Assembly of the State of Connecticut of the Commission to Study Legislation to Limit the Conduct of Business in Connecticut, January 5, 1983, at 12.

41 See *Bank of New England Corp.*, 70 Fed. Res. Bull. 374, 384 (1984) (holding that the Connecticut regional banking statute is per se unconstitutional).

42 See note 31 *supra* and accompanying text. The Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), delineated the nature of the inquiry when employing the balancing test. The Court stated:

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated



unconstitutional burden on interstate commerce, they nonetheless fail this balancing test because no reasonable relationship exists between their geographic distinctions and a proper state goal.<sup>43</sup>

In *Lewis v. BT Investment Managers, Inc.*,<sup>44</sup> the Court held unconstitutional a Florida statute which overtly prohibited an out-of-state bank holding company from controlling a Florida investment advisory service. The Court determined that such a restriction imposed an impermissible burden on interstate commerce in violation of the commerce clause.<sup>45</sup> The Court recognized that a state has legitimate interests, with respect to banking, in "discouraging undue economic concentration in the arena of high finance,"<sup>46</sup> in "protect[ing] local residents from fraud,"<sup>47</sup> and in "maximizing local control over locally based financial activities."<sup>48</sup> The Court held, however, that the extent of the burden placed on out-of-state bank holding companies was not justified by these legitimate state interests.<sup>49</sup> According to the Court, Florida could have promoted these interests by less discriminatory means.<sup>50</sup>

Similarly, states may promote their interests in bank regulation by less discriminatory means than regional banking laws. Generally, regional banking laws promote three state interests. First, regional banking laws help to avoid monopolization in the local banking industry.<sup>51</sup> Second, these laws tend to assure that the local banking industry is responsive to local needs.<sup>52</sup> And finally, regional banking laws help to maintain local control over local

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will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

*Id.* at 142 (citation omitted).

43 See *Lewis*, 447 U.S. at 42.

44 447 U.S. 27 (1980).

45 *Id.* at 44.

46 *Id.* at 43.

47 *Id.*

48 *Id.*

49 *Id.*

50 *Id.* The Court stated:

[Florida] has demonstrated no basis for an inference that all out-of-state bank holding companies are likely to possess the evils of monopoly power, that they are more likely to do so than their homegrown counterparts, or that they are any more inclined to engage in sharp practices than bank holding companies that are locally based. Nor is there any reason to conclude that outright prohibition of entry, rather than some intermediate form of regulation, is the only effective method of protecting against the presumed evils, particularly when other out-of-state businesses that may be just as large or far-flung are permitted to compete in the local market.

*Id.* (footnote omitted).

51 The Report to the General Assembly of the State of Connecticut of the Commission to Study Legislation to Limit the Conduct of Business in Connecticut, January 5, 1983, at 8-9.

52 *Id.* at 10.

banks.<sup>53</sup>

Despite these stated concerns, nothing suggests that all bank holding companies located outside a regional banking arrangement are more likely to cause either economic concentration or greater difficulties with respect to local control than bank holding companies located within a regional arrangement.<sup>54</sup> Avoiding monopolization in the banking industry could be accomplished in a nondiscriminatory manner by conditioning acquisitions on a bank holding company's total banking assets or total deposits rather than specifically excluding those located outside of the designated regions.<sup>55</sup> Conditioning the acquisitions in this manner would promote the legitimate state purpose—avoiding economic concentration—without “dividing the common market.”<sup>56</sup> Therefore, because the state interests promoted by regional banking laws could be achieved in a less discriminatory way, regional banking laws result in an impermissible burden on interstate commerce in violation of the commerce clause.<sup>57</sup>

### III. The Douglas Amendment

The commerce clause gives Congress the power to regulate commerce in a manner in which individual states may not.<sup>58</sup> Congress may indirectly exercise this power by authorizing the states to regulate interstate commerce in a manner which would otherwise violate the commerce clause if the states were to act without such authorization.<sup>59</sup> Proponents of regional banking laws contend that the Douglas Amendment<sup>60</sup> is such congressional authorization and that therefore otherwise unconstitutional regional banking laws pass constitutional muster.<sup>61</sup>

But the Supreme Court has stated that “for a state regulation to be removed from the reach of the dormant commerce clause, congressional intent must be unmistakably clear.”<sup>62</sup> The policies underlying the commerce clause require that Congress “affirma-

<sup>53</sup> *Id.*

<sup>54</sup> *See, e.g.,* Lewis v. BT Inv. Managers, 447 U.S. at 43. *See also* Bank of New England Corp., 70 Fed. Res. Bull. 374, 383 (1984).

<sup>55</sup> *See, e.g.,* 447 U.S. at 43. *See also* 70 Fed. Res. Bull. at 383.

<sup>56</sup> *See* notes 25-27 *supra* and accompanying text.

<sup>57</sup> *See* 70 Fed. Res. Bull. at 383.

<sup>58</sup> 447 U.S. at 44.

<sup>59</sup> *Id.* *See also* South-Central Timber Dev. v. Wunnicke, 104 S. Ct. 2237, 2240 (1984); H. P. Hood & Sons v. Du Mond, 336 U.S. at 542-43; Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 423-24 (1946); International Shoe Co. v. Washington, 326 U.S. 310, 315 (1945).

<sup>60</sup> *See* note 13 *supra* and accompanying text.

<sup>61</sup> *See* Northeast Bancorp, Inc. v. Board of Governors, 740 F.2d 203 (2d Cir. 1984), *cert. granted*, 105 S. Ct. 776 (1985).

<sup>62</sup> *South-Central Timber*, 104 S. Ct. at 2242.

tively contemplate otherwise invalid state legislation.”<sup>63</sup> Accordingly, as a general proposition, most courts require at least an “express statement of congressional policy prior to finding that state regulation is permissible.”<sup>64</sup> Neither the plain language of the Douglas Amendment nor its legislative history indicates a congressional intent to authorize the states to discriminate against interstate commerce.

#### A. *The Plain Language of the Douglas Amendment*

The plain language of the Douglas Amendment<sup>65</sup> prohibits the Board from approving any application by a bank holding company to acquire a bank located in another state unless the state in which the bank is located has, by statute, specifically authorized acquisitions.<sup>66</sup> The Douglas Amendment is simply a general grant of authority to the Board to allow such interstate acquisitions.<sup>67</sup> The amendment, however, does not “expressly state”<sup>68</sup> or “affirmatively contemplate”<sup>69</sup> that states may permit interstate acquisitions in a manner which burdens interstate commerce.

The Supreme Court has recognized that:

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63 *Id.*

64 *Id.* In *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), the Court held a Nebraska law which restricted the export of ground water unconstitutional as an impermissible burden on interstate commerce. *Id.* at 958, 960. Despite 37 federal statutes and a number of congressionally approved interstate compacts which indicated Congress’ willingness to defer to state legislatures, the Court did not find sufficient congressional authorization for states to impose unreasonable burdens on interstate commerce. *Id.* at 960. The Court noted that where authorization to discriminate against interstate commerce has been found, it has been “expressly stated.” *Id.* (citing *New England Power Co. v. New Hampshire*, 455 U.S. 331, 343 (1982)) (quoting *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 427 (1946)).

Moreover, in *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982), the Court held that a federal statute which left to the states regional authority over the export of electricity did not constitute congressional authorization to the states to impose impermissible burdens on interstate commerce. *Id.* at 343. The Court noted that there was “[n]othing in the legislative history or the language of the statute evinc[ing] a congressional intent ‘to alter the limits of state power otherwise imposed by the Commerce Clause.’” *Id.* at 341 (quoting *United States v. Public Utils. Comm’n of Cal.*, 345 U.S. 295, 304 (1953)).

Similarly, in *Lewis* the Court held that § 7 of the BHCA, 12 U.S.C. § 1846 (1982), which reserved to the states residual authority over bank holding companies, was not an affirmative grant of power by Congress for states to impermissibly burden interstate commerce. *Id.* at 49. See note 10 *supra*.

*But see* *White v. Massachusetts Council of Const. Employers*, 460 U.S. 204 (1983) (holding that regulations issued by the Department of Housing and Urban Development which affirmatively permitted discrimination by states were sufficient authorization even though the federal statutes did not specifically authorize such regulations).

65 12 U.S.C. § 1842(d) (1982); see note 13 *supra*.

66 See note 13 *supra* and accompanying text.

67 See note 13 *supra* and accompanying text. See also *Bank of New England Corp.*, 70 Fed. Res. Bull. 374, 384 (1984).

68 See note 64 *supra*.

69 See note 63 *supra* and accompanying text.

The language of the statute [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.<sup>70</sup>

The Douglas Amendment speaks in terms of *permitting* states to create exceptions to the general federal prohibition of interstate acquisitions, but it does not "expressly authorize"<sup>71</sup> states to permit exceptions in a manner which burdens interstate commerce.

Therefore, regional banking laws are consistent with the literal terms of the *Douglas Amendment* insofar as they specifically authorize interstate acquisitions. Regional banking laws are not consistent with the *commerce clause*, however, because the laws authorize acquisitions which burden interstate commerce. These violations cannot be excused because the Douglas Amendment is not express congressional authorization for states to allow acquisitions in a manner which violates the commerce clause.<sup>72</sup>

### B. *The Legislative History of the Douglas Amendment*

Since the Douglas Amendment does not, on its face, indicate a congressional intent to authorize states to discriminate against interstate commerce, congressional consent must be discerned from the amendment's legislative history. Unfortunately, the Douglas Amendment was proposed and adopted on the Senate floor. Therefore, neither committee reports nor other significant legislative history sources are available to supplement congressional debate.<sup>73</sup>

During the Senate debate, Congress seemed more concerned with the Douglas Amendment's prohibitory aspects, rather than with the means which states might use to lift the federal ban on interstate acquisitions. Accordingly, there was no discussion of the

<sup>70</sup> Lewis v. BT Inv. Managers, 447 U.S. at 47 (emphasis in original; footnote omitted). See notes 44-50 *supra* and accompanying text.

<sup>71</sup> See note 64 *supra*.

<sup>72</sup> This conclusion is consistent with the Board's finding in approving the application of Bank of New England Corp., 70 Fed. Res. Bull. 374 (1984). The Board stated:

[T]he Douglas Amendment does not appear *on its face* to authorize discrimination by Connecticut in favor of its own residents and those of Massachusetts and other New England states having reciprocal laws, but against all other states. The Douglas Amendment's general authorization to the Board of Governors to permit interstate acquisitions . . . [if authorized by state law] does not appear to meet the stringent test of explicitness laid down by the Supreme Court.

*Id.* at 384 (emphasis in original).

<sup>73</sup> The significant portions of the Senate debate are in 102 CONG. REC. 6750-58, 6854-62 (1956).

states' ability to discriminate among out-of-state bank holding companies.<sup>74</sup> Senator Douglas stated that his amendment would "prevent bank holding companies from expanding across State lines, unless the States gave them explicit permission to do so."<sup>75</sup> The aim of the amendment, Senator Douglas continued, was to "permit out-of-State holding companies to acquire banks in other States only to the degree that State laws expressly permit them."<sup>76</sup>

Further, apart from the unforeseeability of discriminatory legislation, Congress likely did not contemplate that a state would enact *any* legislation which would lift the federal ban on interstate acquisitions. Senator Bricker, during the Senate debate, stated that the amendment, in effect, "constitutes an absolute prohibition against future expansion by bank holding companies."<sup>77</sup> In short, Congress did not "affirmatively contemplate"<sup>78</sup> that the Douglas Amendment was authorization for states to lift the federal ban on interstate acquisitions in a manner which impermissibly burdens interstate commerce.

The Board has argued<sup>79</sup> that several references during the Senate debate to states' rights indicate that Congress intended to grant states plenary power in permitting entry by out-of-state bank holding companies. In discussing the scope of the Douglas Amendment, Senator Douglas referred to the states' ability to allow entry by out-of-state holding companies "only to the degree that State laws expressly permit them."<sup>80</sup> He further stated that "[a]nyone who favors States rights, it seems to me should support my amendment."<sup>81</sup>

As noted, however, the Supreme Court requires an "express statement" by Congress that it is authorizing states to discriminate against interstate commerce.<sup>82</sup> Given this high standard for specificity, it is unlikely that the Supreme Court would find these fragmented references to states' rights to be the requisite congressional

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<sup>74</sup> See *Iowa Indep. Bankers v. Board of Governors*, 511 F.2d 1288 (D.C. Cir. 1975) ("Not once in the entire debate [on the Douglas Amendment] is the discrimination question raised.").

<sup>75</sup> 102 CONG. REC. at 6859 (1956) (statement of Sen. Douglas).

<sup>76</sup> *Id.* at 6858 (statement of Sen. Douglas).

<sup>77</sup> *Id.* at 6861 (statement of Sen. Bricker). Sen. Bricker reiterated his statement, saying "the effect of the Douglas amendment is to absolutely prohibit a bank from crossing State lines." *Id.* Sen. Douglas, earlier in the debate stated that "the immediate practical effect would be to bar the expansion of bank holding companies across State lines." *Id.* at 6860 (statement of Sen. Douglas).

<sup>78</sup> See note 64 *supra* and accompanying text.

<sup>79</sup> See *Bank of New England Corp.*, 70 Fed. Res. Bull. 374, 385 (1984). See also Note, *supra* note 32, at 2038 n.84.

<sup>80</sup> 102 CONG. REC. at 6858 (1956) (statement of Sen. Douglas).

<sup>81</sup> *Id.* at 6860.

<sup>82</sup> See note 64 *supra* and accompanying text.

authorization for states to enact discriminatory regional banking laws.<sup>83</sup> The Court has stated that it has “no authority to rewrite . . . legislation based on mere speculation as to what Congress ‘probably had in mind’ ”<sup>84</sup> Thus, the Douglas Amendment, neither on its face nor in its legislative history, authorizes states to enact discriminatory regional banking laws.<sup>85</sup> Accordingly, regional banking laws are unconstitutional because they impose an impermissible burden on interstate commerce in violation of the commerce clause.

#### IV. Challenges to Regional Banking Laws: *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*

*In Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve*

<sup>83</sup> See 70 Fed. Res. Bull. at 385.

<sup>84</sup> *New England Power Co. v. New Hampshire*, 455 U.S. 331, 343 (1982).

<sup>85</sup> It has been urged that several references in the House Committee report and in the Senate subcommittee hearings to “trade areas” is proof that Congress contemplated and, through the BHCA, authorized states to enact regional banking statutes. The Committee report accompanying the House version of the BHCA stated:

Repeatedly Congress has been urged to break down the restrictions in the national banking law regarding branches of national banks. Congress has been urged to permit branches, regardless of State bank laws, on a *trade area basis*, on an interstate or Federal Reserve district basis, and in fact on a nationwide basis.

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

Moreover, a witness before a Senate hearing on H.R. 6227 stated that “a *trade area* approach such as a Federal Reserve district . . . could be defended quite logically whereas state lines are historical accident. Massachusetts is a little State because it is an old State, and why should that historical accident serve today to penalize them?” *Control of Bank Holding Companies: 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. 140 (1955)* (statement of John T. Noonan, Counsel, Baystate Corp.) (emphasis added).

These references to the establishment of a trade area in banking do not demonstrate that Congress was expressly authorizing regional banking laws. These references merely indicate that Congress was aware of the possibility of regional banking laws. Persuasive evidence of this is found in the fact that the Senate committee considered the Douglas Amendment but voted against adding the amendment to the bill. See 102 CONG. REC. at 6862 (1956). Had the Committee decided to authorize regional banking laws through the Douglas Amendment, they would have voted to include the Douglas Amendment in the bill which they reported to the entire Senate. As noted, the bill was reported to the Senate without the Douglas Amendment—the amendment was proposed on the Senate floor.

Additionally, the committees’ references were not directed to the Douglas Amendment. If the committees were intending to authorize regional banking laws, they had to be doing so through a provision in the BHCA other than the Douglas Amendment. The only other possible provision which was included in both the House bill and the Senate bill was § 7, 12 U.S.C. § 1846 (1982), the non-preemption clause. *Lewis v. BT Inv. Managers*, 447 U.S. 27 (1980), interpreted § 7 of the BHCA to permit states to impose greater restrictions upon bank holding companies than the BHCA requires, see note 10 *supra*, but § 7 was not intended as authorization for states to impermissibly burden interstate commerce. 447 U.S. at 48-49.

Thus, by passing the Douglas Amendment Congress did not intend to specifically authorize states to enact discriminatory regional banking laws.

*System*,<sup>86</sup> the United States Court of Appeals for the Second Circuit held that the Connecticut and Massachusetts regional banking laws did not violate the commerce clause, the compact clause, or the equal protection clause of the United States Constitution.<sup>87</sup> In *Northeast*, three bank holding companies, two based in Massachusetts and one based in Connecticut, sought to acquire companies in the opposite state.<sup>88</sup> Before approving any applications, the Board invited comment on each of the three applications.<sup>89</sup> Northeast Bancorp, Inc. ("Northeast") and Citicorp both filed objections.<sup>90</sup> Despite these objections, the Board approved all three applications.<sup>91</sup> The Board found that the Connecticut and Massachusetts regional banking statutes specifically authorized the acquisitions. Therefore, the Board felt that the acquisitions were permitted by the Douglas Amendment.<sup>92</sup> The Board stated that "the Douglas Amendment should be read as a renunciation of federal interest in regulating the interstate acquisition of banks by bank holding companies"<sup>93</sup> and that there was no "clear and unequivocal" basis for finding either statute unconstitutional.<sup>94</sup>

Pursuant to section 9 of the BHCA,<sup>95</sup> Citicorp and Northeast appealed the Board's decision directly to the court of appeals. First, the court concluded that the Douglas Amendment was specific authorization by Congress for states to enact regional banking laws.<sup>96</sup> The court noted that the Douglas Amendment requires states to specifically authorize interstate acquisitions before the

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86 740 F.2d 203 (2d Cir. 1984), *cert. granted*, 105 S. Ct. 776 (1985). This is the only court challenge to regional banking laws to date. See *Northeast Bancorp, Inc. v. Woolf*, 576 F. Supp. 1225 (D. Conn. 1983), *aff'd mem.*, 742 F.2d 1439 (1984) (dismissing Northeast's challenge to the Connecticut regional banking law because Northeast lacked standing).

87 740 F.2d at 210.

88 *Id.* at 204. Bank of New England Corporation ("BNE"), a Massachusetts bank holding company, sought Board approval to acquire CBT Corporation, a Connecticut bank holding company, *id.* at 205; Hartford National Corporation ("HNC"), a Connecticut bank holding company, sought Board approval to acquire Arltru Bankcorporation, a Massachusetts bank holding company, *id.* at 206; and Bank of Boston Corporation ("BBC"), a Massachusetts bank holding company, sought Board approval to acquire Colonial Bancorp, Inc., a Connecticut bank holding company. *Id.* at 205-06.

89 *Id.* at 205.

90 Because of doubts concerning the constitutionality of regional banking laws, both Northeast and Citicorp opposed the BNE application. *Id.* Citicorp also opposed the HNC application and it filed comments with the Board concerning the BBC application. *Id.* at 206.

91 *Id.* at 205, 206. See also *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).

92 740 F.2d at 205, 206.

93 *Id.* at 205. (citing the Board of Governors in approving all three applications).

94 *Id.* (citing the Board of Governors in approving all three applications).

95 12 U.S.C. § 1848 (1982).

96 740 F.2d at 208.

Board may approve such acquisitions.<sup>97</sup> Accordingly, since the Massachusetts and Connecticut laws were specific authorization for other New England bank holding companies to acquire banks located within Massachusetts and Connecticut,<sup>98</sup> the laws were authorized by the Douglas Amendment. Furthermore, the court determined that because absent these statutes, out-of-state bank holding companies could not acquire Massachusetts or Connecticut banks, the statutes promote interstate commerce rather than restrict it.<sup>99</sup>

Although the court correctly concluded that the Massachusetts and Connecticut statutes specifically authorize interstate acquisitions as required by the Douglas Amendment, the court failed to recognize that even if the statutes promote interstate commerce, they do so in a way which frustrates the purposes underlying the commerce clause.<sup>100</sup> Moreover, the court failed to show that the Douglas Amendment *specifically authorizes* (as the Supreme Court requires) states to violate the commerce clause.

Second, the court held that the Douglas Amendment does not support the argument that to avoid conflicting with federal law, the Massachusetts and Connecticut statutes must permit all bank holding companies throughout the nation to acquire their banks, or they may not permit any.<sup>101</sup> The Douglas Amendment probably does not support such an argument.<sup>102</sup> But the Douglas Amendment does not support the argument that states may permit acquisitions of their banks by bank holding companies in other states pursuant to discriminatory regional banking statutes.<sup>103</sup> As previously noted,<sup>104</sup> a state could achieve those goals<sup>105</sup> advanced by the regional banking laws in other ways. For example, the state could place limits on a bank holding company's total banking assets or total deposits.<sup>106</sup> This is not an all or nothing approach and these less discriminatory restrictions would not violate the commerce clause.

In analyzing the legislative history of the Douglas Amendment, the court referred to Senator Douglas' statement that the amendment allows states to permit entry of out-of-state bank holding

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97 *Id.* at 207.

98 *Id.* at 207-08.

99 *Id.* at 208.

100 See notes 25-27 *supra* and accompanying text.

101 740 F.2d at 208.

102 See *Iowa Indep. Bankers v. Board of Governors*, 511 F.2d at 1296.

103 See notes 58-85 *supra* and accompanying text.

104 See note 55 *supra* and accompanying text.

105 See notes 51-53 *supra* and accompanying text.

106 See note 55 *supra* and accompanying text.



companies.<sup>107</sup> Moreover, the court quoted Senator Douglas as saying that the effect of the amendment would be to "bar the expansion of bank holding companies across State lines. But the amendment would leave the way open for States to make explicit provisions for acquisitions if they so decided."<sup>108</sup> The court recognized that states must have clear congressional authorization before enacting statutes which interfere with interstate commerce. Nevertheless, the court concluded that the Douglas Amendment authorized Massachusetts and Connecticut to enact regional banking laws.<sup>109</sup> The court, however, failed to explain how the fragmented quotations of Senator Douglas amounted to explicit authorization for states to enact regional banking laws.<sup>110</sup> That Congress did not contemplate the type of legislation states might enact to allow out-of-state holding companies to acquire in-state banks, accompanied by Senator Douglas' conclusory statements about the effect of the Douglas Amendment, cannot be read as specific authorization for states to enact regional banking laws. Therefore, based on an erroneous belief that the Douglas Amendment is congressional authorization for states to enact regional banking laws, the court concluded that the Connecticut and Massachusetts statutes did not violate the commerce clause.<sup>111</sup>

## V. Policy Considerations

In addition to this constitutional infirmity, regional banking laws raise important public policy considerations which Congress should carefully consider. Because of both its constitutional offensiveness and its unexplored policy implications, the *Northeast* case should be reversed and regional banking laws therefore disallowed until Congress expressly authorizes them.

One of the purposes of the BHCA was to control the future expansion of bank holding companies.<sup>112</sup> However, the Board has noted that:

The regional interstate banking system developing in New Eng-

<sup>107</sup> 740 F.2d at 207.

<sup>108</sup> *Id.* (quoting Sen. Douglas, 102 CONG. REC. at 6860).

<sup>109</sup> *Id.* at 208.

<sup>110</sup> See notes 77-78 *supra* and accompanying text.

<sup>111</sup> 740 F.2d at 208. The court also found that regional banking laws do not violate the compact clause, *id.* at 209, or the equal protection clause, *id.* at 209-10.

Moreover, perhaps realizing that the Douglas Amendment does not authorize regional banking laws, U.S. Sen. Paul E. Tsongas and U.S. Rep. Barney Frank, both of Massachusetts, jointly sponsored a bill which would have authorized regional banking laws. S. Res. 2851, 98th Cong., 2d Sess., Title X (1984). The bill passed the Senate, but not the House. The fact that the bill was introduced might suggest that Congress doubts that the Douglas Amendment is specific authorization of regional banking laws.

<sup>112</sup> S. REP. No. 1095, *supra* note 9, at 1. See also 70 Stat. 133 (1956).

land raises issues of considerable importance because no fewer than 15 state legislatures are considering proposals that, if enacted, would create regional banking systems in every part of the country. . . . Both the increasing number of states considering such proposals and the progress of the proposed legislation toward enactment suggest that, should the New England interstate banking zone be upheld, a system of regional zones may develop involving major areas of the nation.<sup>113</sup>

Regional banking laws result in state control over the structure of the nation's banking industry. By creating a regional structure, a structure not contemplated by Congress in 1956, regional banking laws defeat the purpose of the BHCA by removing the control of bank holding companies from Congress and placing it with the states.

Moreover, regional banking laws undermine the basic policies established by the BHCA and could effectively destabilize the nation's financial system.<sup>114</sup> Paul Volcker, Chairman of the Board of Governors of the Federal Reserve System, stated that in addition to other changes in the banking industry, regional banking laws "are pushing beyond the basic policies established by the Congress in setting out a broad distinction between banking and commerce."<sup>115</sup> The policies of the BHCA "are now being undermined by a haphazard pattern of . . . interstate acquisitions . . . ." <sup>116</sup> In Volcker's opinion, "the overriding public interest in a strong, stable, and competitive financial system will be lost."<sup>117</sup>

## VI. Conclusion

The banking industry is subject to dual federal and state regulation. The Bank Holding Company Act of 1956 prohibits interstate acquisitions of banks by bank holding companies unless the state specifically authorizes such acquisitions. At least sixteen states have enacted regional banking laws authorizing, on a regional ba-

113 Bank of New England Corp., 70 Fed. Res. Bull. 374, 375-76 (1984).

114 Regional banking laws provide the "worst of both worlds." S. REP. No. 560, *supra* note 36, at 103 (additional views of Senator Proxmire). On the one hand, the laws undermine the BHCA goal of providing for local control of banks, *see* note 9 *supra*, while, on the other hand, they do not provide the benefits of unrestricted national competition. S. REP. No. 560, *supra* note 36, at 103 (additional views of Senator Proxmire).

115 Statement by Paul A. Volcker, Chairman, Board of Governors of the Federal Reserve System, before the Senate Comm. on Banking, Housing, and Urban Affairs, Mar. 27, 1984, *reprinted in* 70 Fed. Res. Bull. 298, 308 (1984).

116 *Id.*

117 *Id.* Regional banking arrangements create a variety of advantages. For example, regional banking arrangements could serve during a transitional period to phase-in interstate banking. *See id.* at 307. This decision, however, should be made by Congress. Leaving the decision on regional banking laws to Congress would give Congress the opportunity to forbid statutes like the Utah statute, *see* note 38 *supra*, and create regional arrangements conforming to natural market areas.

sis, interstate acquisitions. These laws place an impermissible burden on interstate commerce in violation of the commerce clause. Because the Douglas Amendment does not authorize such discriminatory legislation, these regional banking laws are unconstitutional.

Further, Congress has never affirmatively considered either the advantages or disadvantages inherent in regional banking laws. Regional banking laws have the potential to restructure the nation's financial system. The courts should not validate them until Congress expressly approves of their use.

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