Interstate Banking Developments in Florida: Pushing Through Legal Barriers and Toward a Level Playing Field

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Abstract

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KEYWORDS: Banking, Florida, Legal Barriers
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I. Introduction

The Florida banking market is one of the most coveted in the country.¹ The Sunshine State is one of the fastest growing states in the nation,² and this growth provides increased deposits in the State’s banks. As long as this growth continues, new businesses which need funds to begin operations will be attracted to Florida. In short, the influx of people and businesses into the state insure that Florida will remain a deposit-rich state, requiring large amounts of capital to fund its continued growth. Because banks depend on both obtaining deposits and making loans for their existence, the Florida banking market is quite attractive.

Until recently, Florida excluded out-of-state banks and bank holding companies³ from its retail banking market.⁴ This did not mean that

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2. From the previous census count, April 1, 1980, to July 1, 1982, Florida’s population is estimated to have climbed from approximately 9,746,000 to 10,416,000, for a percentage change of 6.9. These increases, when compared to the other states, rank Florida third in population increase and fourth in percentage increase. United States Bureau of the Census 1983 Florida Statistical Abstract 4 (F. Terhune ed.).

3. A bank holding company is presently defined 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 Act.” 12 U.S.C. § 1841 (1983). Control is characterized by direct or indirect control or twenty-five percent or more of any class of voting securities of the bank or company, or controlling the election of a majority of directors or trustees.

such companies were prohibited from providing other financial services. ⁵ Out-of-state companies have employed trust companies, investment advisory offices, loan production offices, EPT facilities, and other methods to establish their physical presence in Florida and other states. ⁶ Financial giants such as Citicorp and Chemical Bank, two New York based banks, continue to expand their Florida financial operations. ⁷ By expanding their Florida wholesale operations, these two banks, and many other out-of-state banks alike, hope to have established a foothold in Florida when national interstate banking is allowed. ⁸

Two recent developments, however, have opened the Florida retail banking market for a select group of banks. North Carolina National Bank Corporation (NCNB), the largest bank holding company in the Southeast, ⁹ aggressively entered the Florida banking market in 1981. ¹⁰

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6. *Id.*

7. *Id.* at 53.


10. *Am. Banker*, June 19, 1981, at 23. Chairman Thomas Storrs warned that banks must take advantage of every opportunity to broaden their market and fit their products to their customers' needs, or they will find themselves in a bad way in the next
NCNB capitalized upon a "grandfather" clause contained in a Florida statute\(^\text{11}\) that was interpreted as an authorization for NCNB to acquire commercial banks in Florida.\(^\text{12}\) Since NCNB's initial acquisition, the company has acquired many other banks, the most recent being one of Florida's largest holding companies.\(^\text{13}\)

The second development is the Florida legislature's passage of the "Regional Reciprocal Banking Act of 1984."\(^\text{14}\) This new law authorizes bank holding companies in other southeastern states\(^\text{15}\) that pass similar reciprocal legislation to acquire or merge with Florida banks or bank holding companies. When the law takes effect,\(^\text{16}\) regional bank holding companies will eagerly enter the Florida market.\(^\text{17}\)

Both of these changes illustrate problems that arise when Board or State action is taken that allows conditional, or limited, interstate banking. After outlining the regulatory background of geographic bank restrictions, this article will first examine the interpretive issues created by Florida's grandfather statute and then analyze the equal protection issues emanating from the State's new regional banking law. The problems underlying these legal issues will also be noted. Finally, this article will explain that while limited interstate banking will be allowed for the present, and the underlying problems will be ignored, nationwide interstate banking is the inevitable level playing field.

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11. *FLA. STAT.* § 658.29(3)(d) (1983). Generally, a grandfather clause is a provision in a new law or regulation exempting those already in, or part of, the existing system which is being regulated, or an exception to a restriction that allows all those already doing something to continue doing it even if they would be stopped by the new regulation. *BLACK'S LAW DICTIONARY* 629 (rev. 5th ed. 1979).


15. The states in the "region" are Alabama, Arkansas, Florida, Georgia, Louisiana, Maryland, Mississippi, North Carolina, South Carolina, Tennessee, Virginia, West Virginia, and the District of Columbia. *Id.* § 1.

16. The Act takes effect on July 1, 1985, or the date on which regional states having twenty percent or more of the total regional banks deposits, excluding Florida, have enacted and have in effect reciprocal statutes, whichever occurs sooner. *Id.*

17. Sun Banks and Trust Company of Georgia have announced a merger effective July 1, 1985. The banks will be run independently at first, but plans call for the merged holding company to be based in Atlanta. Other likely combinations are First Atlanta and Southeast, and Citizens and Southern Georgia. *Talks and Predictions*, *FLA. TREND*, Aug. 1984, at 24.
II. Regulatory Background

A fear of too few banks having too much power permeates American banking regulation. A fear of too few banks having too much power permeates American banking regulation. Geographic limitations on bank operations and expansions reflect this concern. Such limitations on bank holding companies were specifically addressed in the Bank Holding Company Act of 1956. Section 3(d) of the Act, commonly referred to as the Douglas Amendment, prohibits Federal Reserve Board approval of an application for an interstate bank acquisition unless the acquisition of such shares of a state bank by an out-of-state bank holding company is specifically authorized by the state in which such a bank is located. The authorization cannot be implicit. This exemption recognizes the historically weighty state interest in whether or not to allow local banks to be controlled by out-of-state bank holding companies. Expansion across state lines is permitted only if the host state expressly agrees by statute.

The Florida legislature, in 1972, supplemented the Douglas Amendment prohibitions by enacting section 649.141 of the Florida Statutes. This legislation provided that no out-of-state bank holding company, bank, or trust company shall acquire, retain, or own the control over any Florida bank or trust company. The legislature made several exceptions to this prohibition. In particular, subsection (3) excepts from the statute's restrictions any bank, trust company, or bank holding company, the operations of which are principally conducted outside this state, which, on December 20, 1972, owned all the assets of or control over a bank or trust company located within and doing business within this state. NCB based its effort to enter the Florida banking market on the effect and scope of this subsection.

18. See Haywood, Trade Groups Choose Sides, ECON. REV., May 1983, at 66, 66 (the three specific goals of banking regulation are: to insure market stability, to prevent undue concentration of market power, and to guard against unfair dealing).

19. See supra note 3.


22. Lewis, 447 U.S. at 38. The Court accepted the submission that as a matter of history and as a matter of present commercial reality, banking is a profound local concern.


III. Board Action and Interpretive Issues

NCNB applied to purchase the First National Bank of Lake City, Florida, on June 24, 1981.25 The Federal Reserve Board first considered the legality of the proposed acquisition under state and federal law before the proposal was evaluated based on the statutory factors contained in section 3(c) of the Bank Holding Company Act.26 Because the Board received comments questioning NCNB's authority under section 658.29 and under the Douglas Amendment to acquire First National Bank of Lake City, the proper interpretation of section 658.29 was put at issue.27 In approving NCNB's application, the Board interpreted section 658.29 to specifically authorize NCNB's acquisition of Florida banks.28 The history and purpose of section 658.29 provides a starting point for evaluating this administrative decision.

A. Legislative History of Section 658.29

The Florida financial market remained relatively free from out-of-state holding companies until 1971. As the desirability of the Florida market increased, ways to avoid the Douglas Amendment's prohibition surfaced. Northern Trust Company, an Illinois-based bank holding company, acquired Security Trust Company of Miami.29 Because interstate acquisitions of trust companies are not prohibited by the Douglas Amendment, this acquisition was lawful.30 The legislature responded in 1972 by enacting section 659.141 of

25. AM. BANKER, June 26, 1981, at 3. The application was delivered to the Fifth District Federal Reserve Bank in Richmond, where the validity was to be checked. The application would then be sent to Washington for a judgment on the merits by the Board.


27. In fact, the original idea for, and basic outline of, the following argument comes from the comments received from the Florida Bankers Association, State Exchange Bank and Columbia County Bank. See Comments of Florida Bankers Association, The State Exchange Bank, NCNB, 68 Fed. Res. Bull. 54 (1982).


30. See 12 U.S.C. § 1842(d) (1983). The Douglas Amendment only prohibited the acquisitions of banks, and Florida has no further prohibitions at this time.
the Florida Statutes.\textsuperscript{31} This statute prohibited out-of-state banking organizations from owning or acquiring Florida trust companies or investment advisory businesses providing such services to banks or trust companies.\textsuperscript{32} This legislation attempted to close a loophole in federal banking law\textsuperscript{33} and keep large, out-of-state banks from entering the lucrative trust business.\textsuperscript{34} For equitable\textsuperscript{35} and legal reasons,\textsuperscript{36} "grandfather" exemptions were added to the new law. In this manner Nortrust was grandfathered in by virtue of its ownership of Security Trust, and NCNB was grandfathered in because of its pending application to buy the Northern Trust Company of Florida.

An increase in pressure on the Florida financial market opened up loopholes in the newly enacted section 659.141. The Royal Trust Company, a Canadian bank holding company, sought and received the Board's approval to acquire Inter National Bank of Miami.\textsuperscript{37} The Douglas Amendment was inapplicable because Royal Trust was neither a bank nor a bank holding company under the Bank Holding Company

\begin{itemize}
\item \textsuperscript{31} \textit{Fla. Stat.} § 659.141 (Supp. 1971).
\item \textsuperscript{32} \textit{Id.}
\item \textsuperscript{33} \textit{Hearings on H.B. 3784 Held Before the House Business Regulation Committee} 1 (Mar. 2, 1972) (reference to transcriptions of the tapes of the hearings on Florida House of Representatives Bill 3874, which became Fla. Laws ch. 72-96 (1970) (codified at \textit{Fla. Stat.} § 659.141 (1971), and of which original tapes can be found in the State of Florida Archives) [hereinafter cited as \textit{State House Hearings}]. Representative Culbreath, the primary sponsor of the House bill related that the House wanted to keep the trust business in the State, without having the money siphoned off by out-of-state trust companies. This prohibition was designed to accomplish that purpose by closing the gap in federal law. \textit{Id.}
\item \textsuperscript{34} \textit{Hearings on S.B. 916 Held Before the Senate Commerce Committee}, 2-3 (Mar. 2, 1972) (reference to transcripts of tapes of hearings on Florida Senate Bill 916). [hereinafter cited as \textit{State Senate Hearings}]. Bruce Culpepper of the Florida Association of Bank Holding Companies explained that the loopholes in the law were allowing out-of-state banks to do indirectly what they were prohibited from doing directly. \textit{Id.}
\item \textsuperscript{35} \textit{See Whitehead, Interstate Banking: Taking Inventory}, \textit{ECON. REV.}, May 1983, at 4, 5. Because legislatures are usually faced with restricting activities after innovative organizations have engaged in the activity, in some cases it would be detrimental or impossible to require the organization to cease the activity, even though a general prohibition is desirable. In these cases, the equitable approach is to allow the innovative organization to continue, but not expand the questioned activity. \textit{Id.}
\item \textsuperscript{36} \textit{See State Senate Hearings}, supra note 34, at 5. Requiring divesture might have made the statute illegal.
\end{itemize}
Interstate Banking Developments

The Board also ruled that the Royal Trust acquisition did not violate Florida law because “the State’s laws did not forbid a foreign trust company from acquiring control of a national bank operating a trust department.”

Bankers Trust New York Corporation also sought access to the Florida financial market. Bankers Trust applied to the Board for approval to establish an investment advisory business in Florida. There was no violation of federal law because an advisory business is not a bank, but rather, a permitted related activity under the Bank Holding Company Act. Florida prohibitions were avoided because section 659.141 only forbade out-of-state holding companies from acquiring such businesses that provide service to Florida banks or trust companies, and Bankers Trust planned to provide investment advice to individuals.

Before the approval of the Bankers Trust application, however, the Florida Legislature amended section 649.141 to further prohibit out-of-state organizations from acquiring Florida holding companies, banks, or any type of investment advisory business. The definition of “holding company” was also broadened so that foreign banks could be stopped from entering the Florida market. Again, as with the original enactment of section 659.141, the purpose of the law was to close loopholes in the state’s ban on out-of-state entry into the Florida banking industry. In addition to noting that the new bill would close the Bankers Trust loophole, Representative Hartnett explained during the

38. The term “bank,” as defined in section 2 of the Bank Holding Company Act, does not include banks in foreign countries. 12 U.S.C. § 1841(c) (1983).
44. See Fla. Stat. § 659.141 (1973) (a version of § 659.141 as amended by Fla. Laws ch. 72-726 (1972)).
45. Id.
47. Proceedings of the House of Representatives Concerning H.B. 25-A, 4 (Nov. 30, 1972) (transcripts of Florida House floor debate concerning eventual amendment to Fla. Stat. § 659.141, available in State of Florida Archives) [hereinafter cited as Florida House Debate]. Hartnett observed that the legislators did not foresee the possibility of out-of-state organizations establishing investment advisory services. This amendment would prevent future entities from entering Florida in the same manner as
House debate that the new bill would still prohibit out-of-state financial institutions from purchasing Florida banking institutions. 48

The critical change in section 659.1412 came with the amendment of the section’s exceptions. The legislature added subsection (3)(g) to provide that the prohibitions and restrictions of the section shall not apply to any bank, trust, company, or holding company, the operations of which are principally conducted outside this state, who, upon the effective date of this act owned all the assets of, or control over, a bank or trust company located within and doing business within the state. 49 The purpose of this subsection, the current subsection (3)(d) of section 658.29, is to prevent the bill from being unconstitutional because of its retroactive effect on existing contracts. 50

B. Authorization Under Florida and Federal Law

Substantively, the Board’s ruling that Florida law allowed NCNB to buy a Florida bank may be lacking in several respects. The Board ruled that since section 658.29 was clear and unambiguous on its face, legislative intent must be derived from the words. 51 However, there is case law holding that legislative intent must guide the court and be given effect, even though that intent may contradict the strict letter of the statute. 52 Whenever possible, the court’s construction of a statute should include the statute’s legislative history, the evil to be corrected, an indication of the intent of the legislature, the nature of the subject regulated, and the object sought to be obtained. 53

The history of section 658.29 reveals that Florida desired to fill in the gaps of the Douglas Amendment’s prohibitions and not to enlarge

did Bankers Trust. Id.

48. Id. at 5-6. Representative Hartnett explained that out-of-state organizations “cannot now, purchase a banking institution, in the stock exchange or any other form like that [sic].” Id.


52. See State v. Webb, 398 So. 2d 820 (Fla. 1981) (legislative intent is the polestar by which court must be guided, and this intent must be given effect even though it may contradict strict letter of statute).

out-of-state banking companies' rights. Legislators were forced to let in Royal Trust because it was already operating in Florida, but wanted to put a stop to such future acquisitions. To accomplish this, the grandfather clause, or current section 658.29(3)(d), had to parallel the expanded prohibitions in the main statute. The clear intent was to allow these organizations to continue to conduct business that was now unlawful under Florida law. Florida had approved ten previous acquisitions by the two other grandfathered organizations. However, each of these acquisitions involved the same type of Florida organization as the acquiring institution had owned prior to the grandfather date. Nothing in the legislative history evinces an intent to allow the grandfathered organizations to expand into businesses in which they were not then engaged.

The other half of the interpretive issue is whether section 658.29 suffices under federal law as a specific authorization for out-of-state bank holding companies to acquire Florida banks. In answering this question affirmatively, the Board relied on a Court of Appeals interpretation of a similar Iowa statute. In that case, the reviewing court agreed with a Board’s ruling which implicitly accepted the sufficiency of the authorization under the Douglas Amendment of an Iowa statute. The Iowa statute provided that nothing in the statutes should be construed to authorize an out-of-state bank holding company to acquire any interest in any Iowa bank, unless such bank holding company was,

54. See supra notes 31-50 and accompanying text. See also BT Investment Managers, Inc. v. Lewis, 559 F.2d 950, 954 n.13 (5th Cir. 1977) (characterized Fla. Stat. § 659.141 as a brazen attempt to stop out-of-state competition).

55. See supra notes 37-39 and accompanying text. See also AM. BANKER, Dec. 8, 1972, at 2. The bill was an outgrowth of unsuccessful efforts to keep the $1.9 billion-asset Royal Trust Company of Montreal from acquiring Inter National Bank of Miami.

56. State Senate Hearings, supra note 34, at 5. Culpepper voiced his concern that requiring divesture of something already approved is legally questionable. He felt an amendment grandfathering in the organizations would be an acceptable solution. Id.


58. Id. at 56-57 n.10. The Board also noted that nothing in the statute restricts a grandfathered company's acquisitions to the grandfathered activity. Because the statute refers to “bank and trust company” in the alternative, the Board concluded that the grandfathered company can acquire banks and trust companies. Id.


on January 1, 1971, registered with the Federal Reserve Board as a bank holding company, and on that date owned at least two banks in the state. 62

The Board relied on the fact that the Florida statute was couched in the same language as the Iowa statute, which is an exception to a prohibition on interstate banking acquisitions. 63 But this does not necessarily mean that the Florida statute is a specific authorization. The Iowa statute states that if certain grandfathering criteria were met, then the statute specifically authorized that qualifying out-of-state holding companies could acquire Iowa banks. The legislative history of the Iowa statute makes this intent to authorize an acquisition clear. 64 It is questionable, indeed unlikely, that section 658.29 can be read the same way. A logical reading of section 648.29(3)(2) would mean removing NCNB from the section’s prohibitions, but leaving no authorization. 65 The federal prohibitions would, therefore, still bar NCNB from acquiring Florida banks.

C. Continuing Problems from Such Board Actions

Although NCNB probably should not have been initially allowed to expand into the Florida commercial banking market, that expansion is a fact. 66 However, the NCNB decision, as well as subsequent decisions, illustrates that problems arise from these Board actions. Board decisions on interstate bank expansion may not always be consistent with the relevant state policy on interstate banking. In some cases, the Board may even believe they are constrained by the Act to approve a proposal that potentially may undermine the Act’s policies. 67 In addi-

64. See Iowa Independent Bankers, 511 F.2d at 1294-95.
65. The Board also relied on the fact that Florida had treated the language in FLA. STAT. § 658.29 as a specific authorization. NCNB, 68 Fed. Res. Bull. at 59. But the Board is confusing issues, because this question was not raised by the expansion within Florida of Nortrust or of Royal Trust. Royal Trust was a foreign bank company and not subject to the Douglas Amendment. Northern Trust’s acquisitions were not subject to Douglas because Northern acquired trust companies.
66. Laches would bar a suit if there is unreasonable delay in bringing suit, and prejudice is caused by the delay. Independent Bankers Association of America v. Heimann, 627 F.2d 486 (D.C. Cir. 1980). More important, however, is the nature of this ruling and others like it.
tion to *NCNB, U.S. Trust* illustrates these problems.

U.S. Trust Corporation, a New York bank holding company, applied for Board approval to add the acceptance of time and demand deposits and the making of consumer loans to the activities of its Palm Beach subsidiary, U.S. Trust Company. This proposal was not prohibited by the Douglas Amendment because the Florida subsidiary would not be a bank as defined in section 2(c) of the Bank Holding Company Act. No commercial loans would be made by U.S. Trust Company. The Board recognized the possibility of abuse of the Act’s policies, but nevertheless approved the application. The dissent stated that approval would have the practical effect of allowing interstate banking without the express authorization of the state law. Therefore, the dissent viewed the Board as not being limited by the technical “bank” definition, but rather as possessing authority to deny the application by using its broad discretionary powers to prevent evasions of the Act.

Agreement or disagreement with the *NCNB* and *U.S. Trust* rulings is not the end of the problem. Inherent in these Board rulings is the decision to allow interstate banking for certain bank holding companies. These rulings are not always in accord with state policy and may threaten the efficacy of the Douglas Amendment. Additionally, banks that remain excluded from a state market, as they are from Florida’s will begin to question the legitimacy of this piecemeal approach.

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68. *Id.*
69. *Id.* at 371.
70. *Id.* at 372.
71. *Id.* The Board reaffirmed its views that an institution that is chartered as a bank and accepts transaction accounts from the public should be subject to the Act’s policies.
72. *Id.* at 373. Approval was subject to three conditions that the Board felt would ensure U.S. Trust’s compliance with § 3(d).
73. *Id.* at 374 (dissenting statement of Governor Rice).
74. *Id.*
75. In addition to U.S. Trust, four more bank holding companies have received permission to operate Florida “no-bank banks,” and several hundred such applications are pending nationwide. Regulators deplore the trend of this de facto interstate banking, but believe present law provides no hurdles to the developments. State legislators are beginning to fear that, in this manner, money center banks will have dominance before a substantial number of regional banks can be established. Magnusson, *Lawmakers Gingerly Circle the Hot Non-Bank Bank Issue*, FLA. TREND, July 1984, at 23.
76. Bank of New York (BNY) applied to acquire a Connecticut bank, using
IV. State Action and the Regional Reciprocal Banking Act

Florida recently chose to expressly allow certain bank holding companies in the Southeast to enter the Florida banking market. Entry for the privileged states was provided by the passage of the Regional Reciprocal Banking Act of 1984. The Regional Act authorizes the acquisition or merger of a Florida bank or bank holding company by or with a bank holding company whose principal place of business is within the region, but only if the laws of the other state permit the reciprocal acquisition of banks or bank holding companies in that state by Florida bank holding companies. The Regional Act is similar to the regional legislation previously passed by several New England states. The relevant New England statutes have already been used to support a few New England interstate transactions, and at least one southeastern merger that will become effective on the Regional Act's effective date has been announced.

The rationale for the Regional Act is that it will enable banks in the Southeast to merge and strengthen themselves against takeover attempts by money-center banks when nationwide interstate banking is

Connecticut's enactment of a regional statute as authority. BNY argued that by this enactment, the Douglas Amendment's prohibitions were lifted, and therefore that all bank holding companies could now enter Connecticut. The Board rejected this argument, saying that BNY's position was based almost entirely on a textual analysis of the Douglas Amendment that, if accepted, would undermine state policies. See Bank of New York Co., Inc., 70 Fed. Reg. Bull. 527 (1984). But query, why other applications based on a textual analysis, such as NCNB and U.S. Trust, have succeeded.

77. See supra notes 14-17 and accompanying text.
79. This Act expressly overrides Florida's prohibition on interstate banking for the regional status. An "anti-leapfrogging" provision is included that requires divesture of any Florida bank or bank holding company by any other bank holding company that ceases to be a regional bank.
82. See supra note 16.
83. See supra note 17.
inevitably permitted. The effect of the Act, however, is that southeastern banks may now compete in Florida to the exclusion of banks in all of the other states. Constitutional guarantees arise, given the discriminatory nature of such a law. The issue is whether these state laws limiting entry into the states to "regional" bank holding companies are permissible under the United States Constitution. Although the issue raises questions under the Commerce Clause and the Compact Clause, this article will test the Regional Act against the Equal Protection Clause.

A. The Traditional Test for Economic Regulation

The fourteenth amendment commands that no state shall deny a person within its jurisdiction equal protection of the law. This doctrine prohibits a state's unequal treatment of persons, absent adequate justification. Courts have articulated three justification standards: the two traditional tiers of the rational relation test, the compelling interest

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84. See Graham Leads the Interstate Charge, FLA. TREND, Oct. 1983, at 26. Florida does not view the markets in those states as presenting big banking opportunities, but rather, as a chance to promote regional mergers that will strengthen their Southeast's banks.

85. The constitutionality of the New England regional reciprocal laws is presently being litigated. See infra notes 130-36 and accompanying text.

86. U.S. CONST. art. I, § 8, cl. 3. The legal evaluation under the commerce clause turns on whether the Douglas Amendment allows a state to discriminate against out-of-state bank holding companies on the basis of their location. One view is that the Douglas Amendment eliminates any commerce clause problems. See, e.g., Hawke, Are State Laws Permitting Interstate Banking Constitutional? AM. BANKER, Dec. 15, 1982, at 4, col. 1. Another view suggests that the Douglas Amendment cannot support the right of a state to burden interstate commerce by deciding which states may enter its territory. See Golembe, Massachusetts and Interstate Banking, 2 BANKING EXPANSION REP., 1, 1 (No. 2 1983).

87. U.S. CONST. art. I, § 10, cl. 3. A compact clause violation would be found if the scheme would have a tendency to increase the political power of the states in a way that would encroach upon federal supremacy. United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 471 (1978) (quoting Virginia v. Tennessee, 148 U.S. 503, 519 (1893); New Hampshire v. Maine, 426 U.S. 363, 369 (1976). However, Congress could consent to the legislation.


89. Id.

test, and the sliding scale of strictness test. The rational relation test is applied in the area of economic regulation when no fundamental right or suspect classification is involved. The test has been stated to mean that the statute must reasonably relate to a valid state purpose and will only be held unconstitutional in violation of the equal protection clause when the classification results in arbitrarily disparate treatment. The Supreme Court took such a deferential approach in City of New Orleans v. Duke. The Court upheld the grandfather clause to a New Orleans ordinance which excepted from the ordinance's prohibition against street vendors in the French Quarter those vendors who had continuously worked in the Quarter for eight years. The Court characterized the ordinance and its grandfather clause as solely an economic regulation, and then stated that in this area, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations. The Court then applied the rationality test to the grandfather clause and found that the city's objective was legitimate, and that the city's classification rationally furthered that objective. Therefore, the ordinance was not a constitutionally impermissible denial of equal protection. 

City of New Orleans illustrates the doctrine that courts will give only cursory scrutiny to purely economic regulations attacked under


93. In re Estate of Greenberg, 390 So. 2d 40, 42 (Fla. 1980).


95. Id. at 304. The two vendors who qualified under the grandfather clause had operated in the area for over 20 years, rather than eight. Id. at 305. The appellee had operated in the French Quarter for two years before the ordinance was amended. Id. at 298.

96. Id. at 303. Wide latitude is given states in the regulation of their local economies under their police powers, and rational distinctions may be made with less than mathematical exactitude. Id.

97. Id. at 304. The objective of the provision was to “preserve the appearance and custom valued by the Quarter’s residents and attractive to tourists.” Id.

98. Id. at 304-05. The Court held that the ends to the City’s means were rational: banning all vendors who had not become part of the distinctive charm of the Quarter and who had not built up substantial reliance interests in continued operation. A step by step approach, such as this, to solving problems will be upheld. Id.

99. Id. at 305. Note, also, that the Court overruled Morey v. Doud, 354 U.S. 457 (1957) because of that case’s testing a statute's potential irrationality. Id. at 306.
the equal protection clause. But a rational relation to a legitimate governmental object must still exist. Although testing the constitutionality of state laws which discriminate in favor of a region is a novel issue, reasoning in other cases is useful to hypothesize how courts would apply the rational relation test to Florida’s Regional Act.

B. Florida’s Regional Act

In *Iowa Independent Bankers v. Board of Governors of the Federal Reserve System*, the District of Columbia Court of Appeals evaluated an equal protection claim somewhat similar to the instant issue. *Iowa Independent Bankers* involved a petition by an association of over four hundred Iowa banks to set aside a Federal Reserve Board order approving the acquisition of two Iowa banks by Northwest Bancorporation. The basis of Northwest’s acquisition, as well as the lawsuit, was the previously mentioned Iowa statute. This statute prohibited out-of-state holding companies from acquiring Iowa banks unless such companies had owned, since 1971, at least two Iowa banks. When the statute was raised and passed in 1972, only Northwest qualified for this exception. No other out-of-state holding company owned any Iowa banks. The Iowa association first objected to the proposed Northwest acquisition, and upon Board approval appealed, arguing that the statute violated the equal protection clause of the fourteenth amendment. The court rejected the association’s argument and found

100. *See id.* The Court acknowledged, however, that different principles govern even economic regulations when constitutional provisions such as the commerce clause are implicated. As to what principles apply, the Court does not say, but it seems an intermediate standard would be applied because the regulation still falls short of affecting a fundamental right or a suspect class. *Id.* at 304 n.5.


102. 511 F.2d 1288 (D.C. Cir. 1975).

103. *Id.* at 1291. Some of the Association’s members were new competitors of Northwest after the Board’s ruling.


105. *Id.*

106. *Iowa Independent Bankers*, 511 F.2d at 1292.

107. *Id.*

108. *Id.* at 1292-94. The legality of the statute, then, was the basic issue. The Board refused to rule on the constitutionality of the statute under the authority of Whitney National Bank in Jefferson Parish v. Bank of New Orleans & Trust Co., 379 U.S. 411 (1965). *Whitney* allows the Board to consider the applicability and effect of State legislation, but the constitutional validity of that legislation is presumed. Objec-
The appeals court agreed with Iowa that the state had a legitimate interest in protecting its banking structure from outside bank holding companies. The question was whether Northwest could be excepted from the general prohibition of out-of-state bank holding companies without violating the equal protection clause. The crux of the court's decision was the finding that the Iowa legislature intended Northwest be allowed to compete in the Iowa market on the same basis as other Iowa banks. This allowance was due to Northwest's pre-existing stake in the Iowa banking system. Thus, the court adopted two classifications: (1) those bank holding companies with an existing stake in Iowa banking and (2) those companies with no stake in Iowa banking. Such a classification was supported by a rational basis, and is the type of grandfathering that has been repeatedly approved by the Supreme Court. City of New Orleans also recognized the validity of such reasoning when it stated that the city could validly grandfather in vendors who had become part of the distinctive character and charm that distinguishes the Vieux Carré.
The foregoing rulings sustain the power of the states to be reasonably selective in permitting out-of-state bank holding company entry. But using this rationale to support the Regional Act is difficult, if not impossible. Regional reciprocal legislation, unlike the common custom of grandfathering, discriminates on a novel basis. The concept of reciprocity connotes some feeling of fairness, but the relationship between a state's interest in controlling its banking structure and a state's securing of reciprocal entry rights is not entirely clear. Reciprocity, as a basis for excluding some out-of-state banks, becomes even less credible when a state imposes further conditions, such as location within a particular region, which effectively preclude many states from eligibility.

Similar problems exist with the regional concept. In Lewis v. BT Investment Managers, Inc., the Supreme Court struck down a Florida law which contained language that prohibited out-of-state acquisitions of trust companies and investment advisory businesses. The Court reasoned that, although states are permitted to regulate matters of legitimate local concern, states may not promote economic protectionism. Furthermore, the Court observed that the power given to the states under the Bank Holding Company Act applied only to legisla-

NCNB ruling could have been susceptible to an equal protection attack. NCNB only owned one trust company in Florida; NCNB had no pre-existing stake in Florida's banking market and was neither a positive nor a negative force in that market. Hence, allowing NCNB to compete in the Florida banking market to the exclusion of other out-of-state bank holding companies was not supported by a rational basis.

116. See Hawke, supra note 86, at 18, col. 3.


118. Hawke, supra note 86, at 18 col. 3. Reciprocity has been accepted as a legitimate state interest, however, in cases involving professional licensing requirements. See, e.g. Hawkins v. Moss, 503 F.2d 1171 (4th Cir. 1974) (lawyers); Fales v. Commissioner on Licensure to Prac. Heal. Art, 275 A.2d 238 (D.C. 1971) (doctors); Mercer v. Hemmings, 194 So. 2d 579 (Fla. 1967) (accountants).

119. Hawke, supra note 86.

120. 447 U.S. 27 (1980).

121. Id. (quoting Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)). Whatever the test for commerce clause limitations upon the states, the Court has consistently distinguished between outright protectionism, and more indirect burdens of trade. Id.

tion operating within the commerce clause.\textsuperscript{123} Therefore, it is questionable whether a decision by a state as to which among the fifty states it shall allow to enter its territory is a legitimate state interest at all.\textsuperscript{124} Short of this stance, one could argue that a regional approach is legitimate because such an approach will maintain a responsive, local banking system. But the legitimacy of the regional approach does not seem to depend on the rational choosing of the region.\textsuperscript{125} The New England regional grouping illustrates that the probable result will be the careful exclusion of states, such as New York, with money-center banks.\textsuperscript{126} That the regions being created are based on protectionist fears and not on natural market areas is illustrated by the fact that Utah has adopted a bill creating a Western region excluding California — but including Alaska and Hawaii.\textsuperscript{127}

C. Continuing Problems from Regional Reciprocal Acts

The legal resolution of the constitutional questions raised by Florida's Regional Reciprocal Act will not end the issue.\textsuperscript{128} The underlying issue is discrimination against certain out-of-state bank holding companies. This problem will continue even if courts decide that Congress, by passing the Douglas Amendment in 1956, has cloaked state efforts to discriminate against non-regional banks with constitutional

\textsuperscript{123} Id. at 49. The Court found that although the BHC Act does reserve to the states a general power to enact banking regulations, nothing suggests the states were extended powers beyond federal law. \textit{Id.} at 48-49.

\textsuperscript{124} Cf. Golembe, \textit{supra} note 86, at 13 (nothing in the Douglas Amendment or the "states rights" provision of the Bank Holding Company Act supports the right of a state to burden interstate commerce by such a decision).

\textsuperscript{125} But cf. \textit{FLORIDA BANKING STUDY, supra} note 117, at 197-98, 209 n.38. Professor Davis feels that the identity of the region must be chosen rationally, but that it would be difficult to show that the states were selected so irrationally as to violate the equal protection clause.

\textsuperscript{126} See Golembe, \textit{supra} note 86, at 13. New York was excluded from the New England region, and the guess is that other states with money-center banks, such as Illinois and California, will be carefully excluded. \textit{Id.}


\textsuperscript{128} See Golembe, \textit{supra} note 86, at 11. Argumentation and litigation of the issue under any of the constitutional theories ultimately will be of little import, although resolution may have some impact on the timing of change.
A recent United States Court of Appeals decision has, in fact, upheld the New England regional scheme against constitutional attack. In *Northwest Bancorp. v. Board of Governors of the Federal Reserve System*, the petitioners appealed from three Federal Reserve Board orders that approved mergers pursuant to sections 3 and 4(c)(8) of the Bank Holding Company Act. The petitioners charged that the Massachusetts and Connecticut regional statutes impermissibly discriminated against non-New England bank holding companies, thereby violating the equal protection clause. The court held that the two states may be concerned that local banks could become dominated by New York or Chicago banks, cited *Iowa Independent Bankers*, and found no equal protection clause violation.

This decision will not be the end of the legal issue. It will be interesting to note whether future court decisions will give more than cursory attention to the underlying problem of such blatant state discrimination against certain out-of-state bank holding companies. If courts choose to address this problem, the equal protection clause is probably the best constitutional argument available to strike regional reciprocal legislation.

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129. *Id.*
131. *Id.*
132. The petitioners in this consolidated action are Citicorp, Northeast Bancorp, and Northeast's subsidiary bank, Union Trust Company. *Id.* at 3.
133. *See supra* note 81.
135. *Northeast Bancorp*, 740 F.2d at 210. Petitioners also alleged violations of the commerce and compact clauses. *Id.*
136. *Id.* at 13.
137. A petition for certiorari has been filed in the *Northeast Bancorp* case. *See supra* note 130. Also, other regional schemes may be challenged after they are passed.
138. The standard for permissible, discriminatory state action under the equal protection clause is less stringent than that under the commerce clause. *Bank of New England Corp.*, 70 Fed. Res. Bull. app. 385 (1984). However, finding a commerce clause violation would probably mean that no conditions at all would be tolerated. Also, any compact clause violations could be remedied by Congressional approval. The equal protection clause would be more flexible in that some entry conditions could be found rationally related to a legitimate state interest, while other conditions could be struck.
V. Toward a Level Playing Field

Apart from the legal issues raised by recent interstate banking developments in Florida, there exists the idea of a level playing field. A level playing field, as used in banking regulation, means having the same rules for all financial regulations so that competition on an equal footing exists. The level playing field concept explains why the legal and underlying problems involved with Florida's interstate banking developments have been given little thought and; therefore, why present developments will be tolerated for a time. However, the concept also commands that, ultimately, action must be taken to recognize full-scale interstate banking and to remove the discrimination against excluded out-of-state bank holding companies.

A. The Short-Term Field

Market pressures have made interstate banking substantively a reality. This de facto interstate banking has been forced by regulatory loopholes, unregulated competition, and technical innovations. Important regulatory loopholes include a bank holding company's permission to acquire no-bank subsidiaries, and the existence of loan production offices and Edge Act Corporations. Imaginative thinking, spurred largely by market pressures, will continue to uncover new ways to sidestep outdated legal barriers. Non-bank financial institutions are offering a growing array of services to their customers and are competing directly with banks in many areas. But these organizations are "unregulated" and can compete nationwide. Finally, new technologi-
cal forces are changing the public's banking habits and rendering ge- 
ographic expansion restrictions archaic. 147

These outside forces indicate that existing geographic restrictions 
on banks are ineffective and, more importantly, that banks are suffer- 
ing from these restrictions. 148 In addition, studies show that the re-
 laxing of interstate barriers is independently desirable in terms of public 
policy. 149 Considerations such as convenience and needs, quantity and 
quality of service, small bank viability, safety and soundness, and com-
 petition and concentration will be positively influenced by interstate 
banking. 150

Internal and external pressures, therefore, indicate that interstate 
banking is both inevitable and preferable. The two interstate banking 
developments in Florida are recognitions of this fact. The Board ex-
 pressly acknowledged the pressures and realities involved by stating in 
U.S. Trust that "it would be ineffective and inequitable to impose a 
competitive limitation only on bank holding companies by denying this 
proposal." 151 Such actions relax interstate prohibitions, thereby pushing 
banks in the right direction. 152

Board and State actions encouraging limited interstate banking 
seem to be the accepted short-run path to a geographically level field. 
Eventually, congressional consent to state laws that permit limited in-

financial service suppliers effectively constrained geographically today.

147. An interstate retail electronic banking system is still being put together, 
despite the legal interpretation that an automated teller machine is a branch. Other 
technological developments continue to erode geographical barriers. FLORIDA BANKING 
STUDY, supra note 117, at 159.

148. The geographic restrictions today adversely affect banks in that the rules no 
 longer protect banks from outside competition, but instead prevent them from following 
 their customers or attracting new customers over the geographic range of their compet-
 itors. Eisenbeis, Regional Forces for Interstate Banking, ECON. REV., May 1983, at 
24, 28.

149. See, e.g., FLORIDA BANKING STUDY, supra note 117 at 211-36.

150. See id. at 160, 222; See also Rhoades and Savage, Can Small Banks Com-
 pete?, BANKERS MAG., Jan.-Feb. 1981, at 59 (the study analyzed the ability of small 
 banks to compete with large banks by reviewing four crucial areas: growth, profitability, 
economies of scale, and EFT; the evidence and actual performance of small banks 
indicate small banks are viable competitors).


152. Since non-bank financial institutions have no geographic limitations, the 
"right" direction required is facing market realities and easing geographic restrictions 
on banks. Reversing the trend of deregulation by placing restrictions on institutions 
such as Merrill Lynch and Sears is not feasible. Edwards, Commercial Banking Re-
terstate expansion may be forthcoming. But the very nature of these two regulators suggests that the discrimination from such action will continue. Congressional action is needed.

B. The Eventual Level Field

Congressional inaction to date has been evident. The Depository Institutions Act of 1982, heralded as the most far-reaching federal banking law in fifty years, did almost nothing for interstate banking. Such inaction cannot continue much longer. Recent Board orders show the inadequacies of interstate banking decisions that must turn on the technical language and intent of the Douglas Amendment. Regional Acts are particularly troublesome because of their increasing acceptance and pure discriminatory effort. Congressional action would provide guidance to the Board and states that wish to allow interstate banking.

The Chairman of the Board of Governors of the Federal Reserve System has called for a fresh congressional review of interstate banking policy. The Chairman cited problems with the developing de facto interstate banking system and the movement towards regional arrangements as the major reasons a new look is needed. Other authority believes that the emerging regional systems will deliver the final shock to the nation's banking system that will rouse Congress from its advanced state of paralysis. Congress will not stand by and see the states carve up the banking system into dukedoms, all in the name of states rights and the Douglas Amendment.

153. See Competitive Equity Act Report, supra note 127, at 48. The Committee recognized that while legal arguments are not frivolous, they believe regional statutes are consistent with the constitution. Id.


155. See Hawke, supra note 86, at 4, col. 2. The only interstate provision was the one for the extraordinary acquisitions of failing banks in very limited circumstances. Id.

156. See supra notes 51-76 and accompanying text.


158. Id.

159. Golembe, supra note 86, at 11. In this sense, the author applauds the Massachusetts action.

160. Id. at 14.
Congressional action will make possible the eventual level playing field. Congress may choose to recognize regional banking as a transitional step in the right direction, but it must ultimately recognize interstate banking as the level playing field. The realities of interstate banking cannot be avoided, delayed, or arrested by action or inaction.\footnote{See supra notes 140-152 and accompanying text.} Regional configurations are inadequate for the same economic reasons that state barriers are now undesirable.\footnote{See supra note 86, at 14. The inadequacies of the regional approach should be revealed after a thorough look by Congress and the banking industry.} Today's financial world dictates that the answer must be nationwide banking.\footnote{Florida Banking Study, supra note 117, at 215.} Additionally, only when nationwide banking is permitted will the underlying discrimination against the excluded bank holding companies be removed.

VI. Conclusion

Interstate banking developments in Florida illustrate both the trends of geographic deregulation and the problems associated with these trends. Board decisions will continue to open up state banking markets to those imaginative out-of-state bank holding companies that discover loopholes in existing state and federal law. Also, states dissatisfied with the pace or direction of these Board decisions will continue to enact laws that permit their own desired form of limited interstate banking. Both actions raise legitimate legal objections. However, developments will be permitted for a time because of increasing market pressures for interstate banking and congressional inaction.

Nevertheless, the underlying problems of a lack of a current national banking policy and the increasing discrimination against states with money-center banks must eventually be addressed. Ideally, the developing economic balkanization will shock Congress into a fresh review of its interstate banking policy, causing Congress to act quickly to remove the underlying discrimination by mandating nationwide banking. It is only a matter of time before the ultimate level playing field of nationwide commercial reached.