OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-363

TITLE NORTHEAST BANCORP, INC., ET AL., Petitioners V. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL.

PLACE Washington, D. C.

DATE April 15, 1985

PAGES 1 - 51

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IN THE SUPREME COURT OF THE UNITED STATES

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NORTHEAST BANCORP, INC., ET AL.,

Petitioners

v. : No. 84-363

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL.

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Washington, D.C.

Monday, April 15, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

STEPHEN M. SHAPIRO, ESQ., Chicago, Illinois; on behalf of the Petitioners.

REX E. LEE, ESQ., Solicitor General of the United States, Department of Justice, Washington, D.C.; on behalf of the federal Respondent.

LAURENCE HENRY TRIBE, ESQ., Cambridge, Massachusetts; on behalf of Respondents Bank of New England Corporation, et al.

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C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Shapiro, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF STEPHEN M. SHAPIRO, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. SHAPIRO: Thank you, Mr. Chief Justice, and may it please the Court:

At issue in this case is the constitutionality of regional banking laws enacted by the states of Connecticut and Massachusetts which permit New England bank holding companies to enter those states and engage in full service commercial banking, but which withhold that same right from bank holding companies located in other sister states.

The first question presented is whether the Douglas Amendment to the Bank Holding Company Act immunizes the statutes from scrutiny under the Commerce Clause of the Constitution.

The second question is whether these laws are part of an agreement among the states which requires Congress' approval under the Compact Clause of the Constitution. And after briefly describing these statutes, I'd like to address all of these questions.

The Massachusetts and Connecticut laws permit companies from six designated New England states to

enter those states and engage in full service commercial banking if the other New England state extends reciprocity to Connecticut and Massachusetts. These regional laws operate in combination with another regional law enacted by the state of Rhode Island, and together they set up a multistate common market which permits some companies to come in and denies that same right to other companies based solely on the location or the state origin of those other companies. Thus, some companies in some states get important competitive benefits which are withheld from other companies based solely on geography or state of origin.

Now, these statutes in New England were designed to permit regional expansion of bank holding companies in New England while excluding companies from the neighboring state of New York, regardless of their proximity to New England and regardless of their size. By the same token, companies that are in New England such as petitioner Northeast Bancorp, are unable to merger with banks located directly across the New York border.

The practical impact of these laws can be illustrated with a simple example. Before passage of these laws, companies in Massachusetts and in New York competed on an equal basis for business in Connecticut.

Each could offer full service commercial banking in its home state, but neither could offer full service commercial banking in the state of Connecticut.

Now, however, Massachusetts companies can have full service banks both in their own home state and in the state of Connecticut, while their direct competitors in the state of New York are still limited to their one home state.

As the Court is aware, these regionally discriminatory laws are not an isolated phenomenon. New York is flanked by the New England laws on the east, and directly to the south its neighbors are in the process of forming another exclusionary market, the Mid-Atlantic market. And there is a similar combination of states in the southeast which also excludes the state of New York. We are thus witnessing a partitioning of the entire East Coast into exclusive banking zones, and as the Court is aware, some other -- some 20 other states are in the process of considering regionally exclusive banking laws which would divide the countries into other regions throughout the entire nation.

Now, as the Solicitor General and the Board have acknowledged and the other respondents do not dispute, these laws would violate the Commerce Clause unless approved by Congress. As this Court stated in

the Eisenberg Farm case, and I quote, "The United States could not exist as a nation if each of them were to have the power to discriminate as against sister states with respect to admitting articles of commerce. And when combinations of states jointly impose this kind of discrimination in unison, the danger of injury and divisiveness and retaliation is even greater.

Now, where there is this kind of a threat to the core purposes of the Commerce Clause, this Court's decisions require proof that Congress unmistakably gave its consent to otherwise invalid state legislation. And that, we say, is a burden which respondents cannot sustain in this proceeding.

The Solicitor General on the one hand has made the argument that the plain language of the Douglas Amendment permits this kind of discrimination among sister states. But all that the Douglas Amendment says is that the Board may not approve an acquisition unless there is a state law in existence which permits the acquisition. It doesn't say a single word about the various kinds of laws which a state might adopt, and it certainly doesn't say that a state in lifting the federal ban is free to pick and choose among sister states or to join into a regional confederation which sets up a preferential trade zone for some states and

excludes the others.

QUESTION: But doesn't the very paucity of language, Mr. Shapiro, suggest that the states were given very wide latitude; that all Congress was interested in was state approval?

MR. SHAPIRO: To the contrary, Your Honor. When Congress defers to the states in this manner with general language of this sort, the Court has made it quite clear that the presumption is that Congress means to defer to constitutionally valid state law; and when it refers to state law in these very general terms, the negative ingredients of the dormant Commerce Clause are part and parcel of the state law to which Congress has deferred.

QUESTION: Well, Mr Shapiro, I suppose the McCarran-Ferguson Act doesn't really make it unmistakably clear that states can adopt reciprocal discriminatory taxes, and yet, the Court upheld that power in cases like Western and Southern.

MR. SHAPIRO: That's a very important question, and the distinction is between night and day; and let me explain that.

In the McCarran-Ferguson Act, the statute explicitly says not only that the states may regulate, but that the silence of Congress shall not be deemed to

be any barrier to regulation or taxation of insurance within the state. And the legislative history, of course, was that this was an area that traditionally had not been treated as part of commerce. And then in 1944 this Court changed the construction on that question, and all of a sudden state laws across the country were exposed to Commerce Clause challenge.

Congress acted within one year to pass this law which expressly stated that it was lifting the negative implications of the dormant Commerce Clause. So you have unmistakable language, and you have unmistakable language in the legislative history. And we say there is nothing remotely resembling that in the Douglas Amendment.

Now, our brothers, the private respondents, have made the somewhat different argument here on the authorization point, that Congress' division of the banking industry along state lines is such a splintering or such a balkanization that the states should be free to pick and choose among sister states and set up their own regional lines. But this also is directly in the teeth of recent decisions of this court.

In the Bacchus case, decided only last term, federal law had balkanized the entire industry along state lines, had given the states plenary power to

permit or not permit the importation of liquor, and yet that was not sufficient to displace the requirements of the Commerce Clause with respect to discriminatory state taxation.

QUESTION: Well, Mr. Shapiro, suppose it were perfectly clear, that the Douglas Amemdment was perfectly clear to the effect that the state may pick and choose? You wouldn't have any constitutional argument then, would you?

MR. SHAPIRO: Well, if the Douglas Amendment such as S. 2851, the bill that was considered by Congress, said that a state may pick and choose among sister states, there would be no Commerce Clause issue. If a group of states tried to do it jointly without Congress' approval, there would be a compact issue.

QUESTION: But that would be only -- that would be the only remaining issue would be --

MR. SHAPIRO: That is correct.

QUESTION: So doesn't this case just turn on what Congress intended?

MR. SHAPIRO: It turns on the specific language of the Douglas Amendment.

QUESTION: How do you ever get to any constitutional issue other than the compact issue?

MR. SHAPIRO: The Commerce Clause issue does

turn on the meaning of the Douglas Amendment, that's quite correct.

QUESTION: And if they intended it to give the states the right to pick and choose, there isn't any Commerce --

MR. SHAPIRO: That's correct. It's an issue of intent.

QUESTION: But if they didn't -- if they didn't intend to reach that, then what?

MR. SHAPIRO: If they didn't intend to permit the states to pick and choose and to gang up against their sister states, then there is a black letter violation of the Commerce Clause.

Now, the reason for not inferring authorization --

QUESTION: Well, I suppose, Mr. Shapiro, you had an equal protection claim below which you dropped.

MR. SHAPIRO: We have reinserted that issue --

QUESTION: After reading Metropolitan Life.

MR. SHAPIRO: That is correct.

(Laughter.)

MR. SHAPIRO: Your Honor is quite right.

QUESTION: I wonder if you think that having read that case that you think the Massachusetts and Connecticut statutes could surive an equal protection

challenge under that doctrine?

MR. SHAPIRO: We think for the reasons that we explained in our supplemental brief that they clearly do not, and we have suggested that the Court may wish to consider this issue. It's, of course, a discretionary proposition. But if the Court agrees with us on either the Commerce Clause or the Compact Clause, there is no reason to reach equal protection. Should it disagree with us on the first two issues, we would suggest that it is appropriate to turn to equal protection, the reason being that states across the country are now considering statutes of this sort, and many, many transactions will turn on the validity of these laws. That is why we've raised this equal protection issue in light of Metropolitan Life as a discretionary matter for the Court.

Now, to return to authorization, the reason for not inferring authorization from Congress' regulatory pattern, the balkanization by Congress, is a compelling one that goes to the very structure of our system of government. When Congress regulates a market, it acts to protect all affected interests and all affected states. But when a group of states imposes its own discriminatory system, there is a real danger that unrepresented interests will suffer serious harm without

any means to protect themselves. And the Court, we say, should be especially cautious about inferring authorization for regional discrimination from this Douglas Amendment.

The Douglas Amendments preserves the equal status of each state, and it rests on historical state boundaries, not on newly conceived regional lines.

QUESTION: Let me go back there. Suppose that we agree that the Douglas Amendment didn't intend to give the states powers to pick and choose. Well, then, the Douglas Amendment said no acquisitions by out-of-state banks; isn't that right?

MR. SHAPIRO: That's correct.

QUESTION: Unless the state agrees.

MR. SHAPIRO: That is correct.

QUESTION: Well, if these agreements by the state are not the kind of agreements the Douglas Amendment purported to permit, then why shouldn't the ban -- why shouldn't the ban against out-of-state acquisitions take over? Neither New York banks nor New England banks could make out-of-state acquisitions.

MR. SHAPIRO: The ban would certainly be back in place unless and until --

QUESTION: How would you ever reach a Commerce Clause issue?

MR. SHAPIRO: Unless and until the state enacted a constitutional statute lifting the ban, there would be no acquisition.

QUESTION: So why wouldn't -- if we agreed with you that Congress didn't intend to let the states pick and choose, then these states have not given the right kind of consent.

MR. SHAPIRO: Well, these states --

QUESTION: They haven't given any consent.

MR. SHAPIRO: These states have enacted laws that purport to give consent, but they're unconstitutional laws that have no blessing from the Douglas Amendment.

QUESTION: Well, they're not the kind that Congress anticipated.

MR. SHAPIRO: That's correct.

QUESTION: They didn't intend to permit states to act in this way, in which event there's no way to avoid the general ban.

MR. SHAPIRO: That's correct. There is --

QUESTION: Well, then how do you ever reach a constitutional issue?

MR. SHAPIRO: Well, the Commerce Clause contains a rule of constitutional law that is of assistance to the Court in construing what the Douglas

Amendment means, what it admits to allow.

QUESTION: If the Douglas Amendment had said bank holding companies may not acquire banks from out of state except that states may consent to do that, but we do not intend to give the states the power to pick and choose, and if they try to pick and choose, it shall not be deemed consent for purposes of this amendment.

MR. SHAPIRO: Well, that's --

QUESTION: Why isn't that really what you're arguing?

MR. SHAPIRO: It's very close to what we're arguing, but our position I suppose is slightly different in this sense. The states are free to enact statutes of any kind that they want to. They have general legislative power. And the question under the Douglas Amendment is if they have enacted a valid statute, that lifts the ban. Now, if these statutes are unconstitutional under Commerce Clause principles, the question is whether Congress has permitted this exceptional result. And we say that --

QUESTION: Well, all right. Assume we agreed with you that they're unconstitutional. They they haven't given the constitutional consent. There is no consent in existence.

MR. SHAPIRO: That is correct.

QUESTION: So neither the New York banks or anybody else could -- may acquire an out-of-state bank.

MR. SHAPIRO: That is quite correct. These orders of the Board would have to be reversed in that instance, and these transactions could not proceed, and my clients would be spared the competitive injury that they now stand to suffer.

QUESTION: Well, I'm suggesting that if we agreed with you, we'd never need to talk about the Commerce Clause.

MR. SHAPIRO: We're not far apart, Your Honor. I believe that the Commerce Clause contains a rule of interpretation that is relevant to the statutory issue. That's the only difference between us. The Wunnicke case and Sporhase and others have said that the Commerce Clause means that you have to have unmistakable evidence of consent to permit this kind of discrimination, and we say that our brothers can't find that unmistakable consent.

Now, they tried to find this unmistakable consent from the legislative history, and the Court has warned against reliance on fragments from the legislative history to reach issues such as consent. But there is no question that this legislative history does refer to state discretion and to state policy and

certainly supports the view that the states may lift the federal ban. But it doesn't say a single word about the right of the states to pick and choose among sister states or to enter into multistate exclusive banking federations, and it doesn't say a single word about relinquishing the protection of the Commerce Clause.

Now, respondents also have made the argument here that the Board was entitled to deference when it addressed the issue of authorization, but the Board made specific findings about its own statute which we say completely undercut respondent's submissions.

The Board found that the Douglas Amendment "does not appear on its face to authorize discrimination based on state location," and that the legislative history contains "no discussion of the power of the states to discriminate against potential out of state interests."

Now, the Board did say, of course, that the Douglas Amendment is a renunciation of all federal interest in the subject of interstate bank acquisitions. But with great respect to my friends at the Board, this is certainly an erroenous overstatement.

Federal law prescribes a host of statutory criteria and policies applicable to interstate bank acquisitions. In this very case the Board had to look

at competition, potential competition, managerial resources, service to the community and other standards prescribed by Congress.

And besides this, even if there were a total retreat from the field by the federal government, which there certainly isn't, it would be beside the point because when Congress retreats and defers to state law, it is deferring to valid state law consistent with the principles of the Commerce Clause, as this Court has said repeatedly in recent terms.

QUESTION: Well, Mr. Shapiro, do you think the statement of the Board that Congress has just been silent with respect to this pick and choose business, that doesn't necessarily destroy the deference that's due the Board, because the Board nevertheless though it was consistent with the statute to do what it did.

MR. SHAPIRO: Well, the Board --

QUESTION: Isn't that right?

MR. SHAPIRO: We don't think so, Your Honor, because --

QUESTION: You mean they said we were acting contrary to the statute?

MR. SHAPIRO: They said they were waiting for judicial clarification. They did not know how to analyze this in light of existing --

QUESTION: But nevertheless, they felt there was room under the statute to do what they did.

MR. SHAPIRO: Yes.

QUESTION: Or they wouldn't have done it.

MR. SHAPIRO: And the rationale was this renunciation theory which, with great respect, is totally in error. There is no renunciation of federal --

QUESTION: Well, I know, but they nevertheless thought that the statute permitted what they were doing.

MR. SHAPIRO: On this theory of renunciation.

QUESTION: Well, I don't -- on the theory of silence. That Congress didn't forbid us, forbid our interpreting the statute in this manner.

MR. SHAPIRO: But silence --

QUESTION: And why shouldn't -- and they left that up to us.

MR. SHAPIRO: Silence, under this Court's opinions, is certainly not sufficient. The unmistakable intent on Congress' part to permit this extraordinary result, a result which this Court has said is destructive to the very fabric of the Union. States picking and choosing among sister states, provoking retaliation --

QUESTION: I would think you'd have to concede that you have the problem of convincing us that there's

only one construction permissible under this statute with respect to picking and choosing.

MR. SHAPIRO: Yes. The silence --

QUESTION: I mean the Board could have decided it the other way, too.

MR. SHAPIRO: The silence of the statute on the issue of picking and choosing means that there is no unmistakable intent that Congress meant to permit something like this, completely destructive of principles that the Founding Fathers were concerned about. This is provocative of trade warfare among states. It is inconsistent with the idea that the states are equals in our sovereign system, sovereign states of equal status.

Now, if Congress meant to permit this extraordinary result, isn't it amazing that it didn't say a word to illuminate this for courts --

QUESTION: Mr. Shapiro, may I question right there?

MR. SHAPIRO: -- and for the other Congressmen who voted on it, and for the President who signed this law.

QUESTION: There are really two conditions in the state statutes here: one, that the other, the acquiring bank be in New England, and secondly that they

have a reciprocal provision.

What if they just had the latter, would that comply with the statute?

MR. SHAPIRO: The reciprocity provision is one of dubious constitutionality, of course, under this Court's decision, its decisions. Reciprocity has to be analyzed under a rule of reason approach, not a per se approach of the sort that we say is applicable here.

Our position about these laws is that they have to stand on their own two feet. They get no blessing from the Douglas Amendment. They have to satisfy all of the traditional requirements of the Commerce Clause. Whether a reciprocity statute would pass constitutional muster is a close question. It would depend on all the circumstances, the purpose of the reciprocity requirement, its effect in the market, and the availability of alternatives.

QUESTION: But your argument would be that if that -- if we thought that violated the Constitution apart from the statute, the statute would not save that either.

MR. SHAPIRO: That's quite correct.

Now, the Government's argument about deference to the Board is especially puzzling here, because the Board declined to sign the Government's brief. And it's

apparent that the Board disagrees with the Government's literal meaning analysis because it said on the face of the statute it sees no such literal meaning.

Now, since the Government thinks that deference to the Board is so important, I'm sure Mr. Lee intends to explain to the Court what the Board's views are, why they disagree with the Government's brief, and wherein the disagreement lies, because after all, one who invokes the rule of deference should at least explain what the agency thinks about the submission presented to this Court.

Now, I have one final point about the authorization issue. In 1983 and in 1984 Congress considered bills that would permit regional banking laws and regional multistate compacts. Those bills were not enacted, and at the end of the last Congress, the House and the Senate disagreed in the most fundamental terms about the shape that legislation should take in this area.

The chairman of the House Judiciary Committee expressed serious reservations about the whole concept of regional banking and its economic implications for the nation. Congress is again considering regional banking proposals and is expected to start hearings this spring.

Now, if the Court were to hold here that Congress approved these state laws sub silentio 30 years ago, that would largely moot the policy debate before Congress. Before Congress would have a chance to finish its hearings on its this subject, numerous acquisitions would be consummated under existing state regional banking laws.

We submit to the Court with great deference that it is the better part of wisdom in this situation to adhere to the established principle that state laws violative of the Commerce Clause are not sustainable unless and until Congress gives its unmistakable intent and its unmistakable approval. Congress has not yet given that unmistakable consent, and it may never do so.

QUESTION: Is this an argument, Mr. Shapiro, that we should do nothing until Congress has acted?

MR. SHAPIRO: It's the reverse, Your Honor. The argument is that the burden of persuading Congress is on those who would impose violations of the Constitution and the harmful effects on our economy. They have to wait for Congress to say yes.

The wisdom of the constitutional scheme is that before potentially harmful arrangements like this are implemented by states, that Congress has to give its approval, not afterwards after the injury has been

done. And we think there is a real risk of substantial injury from these discriminatory state laws in terms of retailiation, discord and divisiveness among the sister states which hitherto have been co-equal sister states in our system.

QUESTION: Well, suppose we don't agree with you?

MR. SHAPIRO: On the Commerce Clause issue?

QUESTION: Yes.

MR. SHAPIRO: The second issue in that event would be the Compact Clause issue, and the question, of course, is whether this amounts to a compact or an agreement among the states which requires Congress' approval.

Now, there is no contention that Congress has given its consent to a multistate compact in this case.

QUESTION: Well, just what is it that you say Connecticut and Massachusetts have agreed to?

MR. SHAPIRO: This Court's opinions establish that reciprocal statutes can constitute compacts or agreements if they have the effects that the Founding Fathers were concerned about. And this, we say, has exactly the effects that the Founding Fathers were concerned about -- the danger of divisiveness, regional combinations oppressing commerce in other parts of the

country. This has precisely the impact that the Constitution --

QUESTION: But there are various kinds of reciprocal statutes on many different subjects on the books, are there not?

MR. SHAPIRO: That's quite true, Your Honor, and what is unique --

QUESTION: And you think all of those are suspect.

MR. SHAPIRO: We do not. What is unique about this multistate arrangement is that it allows some to come in and doesn't allow other sister states to come in. It confers powerful competitive benefits in some states, withholds those same benefits from direct rival institutions in other states just because of where they're located.

Now, there is not a compact like this, to our knowledge, that has ever been considered, and certainly Congress has never approved a compact like this. The closest cousin --

QUESTION: Maybe it isn't a compact. You keep saying this is a compact. Isn't that one of the issues?

MR. SHAPIRO: We say not only is it a compact because of the reciprocal nature of the statutes, but also because of the joint action in adopting these

statutes.

Now, when Senator Brennan proposed this multistate arrangement, he rode circuit in Rhode Island and in Connecticut and urged the establishment of a real New England system, and he thereafter testified before the legislatures.

When the Connecticut bill was prepared, it was submitted to the banking commissioner in the state of Massachusetts for his approval, and when the bill returned to the floor in Connecticut, on seven separate occasions the Connecticut legislators called it a compact or an agreement. These are the words of the legislators who adopted this provision.

QUESTION: Well, what if Connecticut, Mr. Shapiro, had simply adopted a statute that said we will allow out-of-state banks to come in so long as the state in which the bank is incorporated allows our bank to come in -- just simple reciprocity without the New England regional aspect?

MR. SHAPIRO: We say a simple reciprocity statute does not have to go to Congress because it's not -- although it could be characterized as a multistate agreement under the Multistate Tax case, it wouldn't have those deleterious effects on the Union and the equality of the states in the Union that requires

Congress' approval. Only certain compacts have to go to Congress, and the one you've described that would be open to everybody would not have to go to Congress.

Now, of course this is the real question in this case: why is it the kind of compact that has to go to Congress? Now, the test has been articulated in slightly different ways in past decisions of the Court, and ultimately the issue is one of potential impact on our federal structure. And as the Court stated in Florida v. Georgia, the provision is obviously intended to guard the rights and the interests of the other sovereign states and to prevent any compact or agreement between any two states which might affect injuriously the interests of the others.

Now, by setting up a regional common market in which favored states are invited in while disfavored states are kept out, we say that there has been established a treaty of commercial privileges of exactly the kind that this Court is condemned in Virginia v. Tennessee. It said agreements among states that confer special privileges on those states that are withheld from the others have to go to Congress for its approval.

QUESTION: Mr. Shapiro, can I interrupt you? We got a lot of reading material in this case, and I must confess in that which I have been able to read I

didn't find something you mentioned earlier, that the Government brief was not signed by the Federal Reserve Board?

MR. SHAPIRO: That is correct. The Board's --

QUESTION: Where does that appear in the papers?

MR. SHAPIRO: On the face of the paper you'll see the Department of Justice's names, but you'll see no representative from the Board listed.

QUESTION: But there's no comment on that in any of the papers.

MR. SHAPIRO: No comment on that. And I'm sure Mr. Lee will explain the background of that.

QUESTION: Well, doesn't the -- the Solicitor General does have authority to represent the Board.

MR. SHAPIRO: Yes, he does. In every case, to my knowledge, where he's done so, the Board has signed that brief. They didn't do it here.

If the Court please, I'd like to reserve --

QUESTION: Well, you don't suggest that in every case where the Government is up here and there's an agency involved that an agency's name is on the brief?

MR. SHAPIRO: Not in every case, but with the Board that is indeed the practice.

QUESTION: Well, how do we know that?

MR. SHAPIRO: Mr. Lee can confirm this. That is my own experience having worked in that office.

QUESTION: Well, what if he doesn't?

(Laughter.)

MR. SHAPIRO: The Court can see for itself in the disagreement.

CHIEF JUSTICE BURGER: You'll deal with that on rebuttal if we allow you any rebuttal time.

MR. SHAPIRO: Thank you very much.

CHIEF JUSTICE BURGER: Mr. Solicitor General.

ORAL ARGUMENT OF REX E. LEE, ESQ.,

ON BEHALF OF THE FEDERAL RESPONDENT

MR. LEE: Mr. Chief Justice, and may it please the Court:

Let me clarify first of all that this brief I have in my hand is filed on behalf of the federal respondent in this case, the Federal Reserve Board.

There is in this record some indication that the Chairman of the Federal Reserve Board and one other member of the Board have some qualms about the policy, the soundness of the policy that has been reflected in the three orders that are at issue in this case. And also, as the Board's opinion reflects, there is some confusion at the Board concerning the constitutional issue.

We simply submit these things. First of all, the fact that in the face of their policy concerns -- and that's on page A-1-99 of the Appendix to the Certiorari Petition -- and in the face of those constitutional concerns that the Board would still conclude unequivocally that these statutes are covered by the Douglas Amendment, makes all the stronger the conclusion that this is an instance in which the Board has lent its expertise to the particular item, the only item on which the Board's expertise -- on which the Board is entitled to expertise. It is not on the constitutional issue. It is rather on the statutory interpretation issue.

The position of the Government is as stated, and insofar as the position of the Board is concerned, this doesn't need to be stated, but it is in the brief that the three orders of the Federal Reserve Board at issue in this case which set forth its position, and that's the position. What the Board did is what we as the Government are defending in this particular instance.

The only Commerce Clause issue in this case is identical to the statutory question, and the key to decision is how much burden-lifting flexibilty did Congress intend to allow the states and did Congress allow the states to exercise.

Now, the petitioners contend that the states were limited to a choice between two polar extremes. They could either leave this Congress' total ban in place, or they could lift it completely; but they had no middle ground alternative. And we profoundly disagree.

In our view it is very clear that what Congress intended to do and what Congress did do was to permit each individual state to tailor its own commerce-enhancing package to its own needs to identify that point along the regulatory spectrum between complete prohibition, complete permissiveness that best comports with that state's policy.

It is a view that is solidly supported by all three of the traditional guides to statutory interpretation. Most important, that's what the statute says.

Now, the petitioners complain that Congress did not speak with sufficient clarity, but I submit that that argument only confuses clarity with specificity. The Douglas Amendment could not be more clear. It could not be expressed. And within any reasonable view of the ordinary meaning of the language, the applications that the Board approved in this case were specifically authorized by the statute laws of the state in which the bank was located.

What the petitioners are really contending, therefore, is that Congress is constitutionally required not only to speak with clarity, but also to spell out the details of the circumstances under which the states may act.

It is an argument which would interpret the Commerce Clause as a significant limitation on Congress' power to regulate commerce, because Congress really had two policy options available to it. On the one hand, it could have, as it did, delegate to the states the power to do -- enact general -- it could have delegated a rather general power to the states to enact. On the other hand, Congress could have specifically spelled out the details of the kinds of statutory authority that the states were to have. And in choosing between those two, the choice between those two was a significant policy alternative available to Congress.

What the petitioners are really saying is that the Commerce Clause limited Congress limited Congress to only one of those two alternatives. It is an argument that is squarely rejected by the McCarran-Ferguson Act cases. It is true in McCarran-Ferguson that there also Congress dealt in very general language. "The business of insurance shall be subject to the laws of the several states."

And the fact that Congress in another section said and we really mean it, does not alter the fact that Congress did not specifically authorize the states to enact, for example, retaliatory laws such as were involved in Western and Southern. And this Court in Western and Southern specifically noted -- and I quote -- "that the unequivocal language of the Act suggests no exception." And that also specifically describes the circumstance here.

Congress elected to impose the specificity requirement on the states. It was the states that were required to be specific. It did not elect to impose that obligation on itself.

This approach, I submit, of leaving important segments of banking policy for resolution by the states is hardly a new approach to American banking, and the distinctive aspect of American banking is highly relevant to the constitutional issue, because it's relevant to the statutory interpretation issue for at least 150 years. Ever since the death of the Second National Bank in 1836, the cornerstone of American banking, in stark contrast to the rest of the world, has been localized control.

The number of commercial banks in the United States is somewhere between 14,000 and 15,000. The same

number in Canada, by contrast, is 11, and the United Kingdom is 36. It is a tradition that imposes some efficiency costs, but it also provides some benefits. As this Court observed in Philadelphia National Bank and in the Phillipsburg Bank case, that is the cornerstone of American banking tradition. The local banker, the banker who makes the loan decision, is a person who lives in the local community, and as the Court observed in Phillipsburg, often makes loans on the basis of what he knows about the character of the individual.

Many persons' banking needs are best met by a continuation of that kind of a scheme, by a banker who is a member of the local community and who knows local people and local needs and can respond to them on a personal, individualized basis.

Now, by contrast, other persons' needs, to be sure, are best served by the broader range of services that can be offered only by larger banks located in metropolitan areas; and the mix of those needs will necessarily vary from place to place and from state to state.

The central feature of the Douglas Amendment is that it permits each state to work out its own mix; that is, to maintain localized control over banking to the extent that localized control is in that state's

best interest. And in this case Massachusetts and Connecticut have simply exercised that leeway by opting neither for total localized banking, nor for complete, uninhibited interstate banking, but a middle ground alternative between the two.

In the face of interstate banking as a very real possibility as a future prospect, it was certainly rational for these two states to prepare themselves for it by experimenting with a regional banking middle ground, an experiment which would at lesser costs acquaint them with some of the problems associated with departures from the local banking model that they know best, and at the same time would better inform their later decision whether interstate banking or anything other than the local banking approach would best serve their people's needs. That's what the Douglas Amendment provides for the states, and that's what they have -- that's what they have taken advantage of.

The legislative history is brief, and it clearly confirms that Congress meant what it said. I disagree with Mr. Shapiro. These are not just fragments. Well, they're fragments in the sense that they're brief, but they're not fragments in the sense that -- the legislative history here is entitled to a good deal more deference than is usually given to

comments made on the floor, because since the Douglas Amendment was only a floor amendment, the comments made on the floor are the only legislative history. That's all there is. There's only about seven or eight pages of it, and it can be fairly briefly read.

And the overwhelming conclusion that one comes away with when reading that legislative history is that the states were to be in charge and that Senator Douglas and other supporters of the legislation were well aware of this tradition of local banking, and that's what they meant to preserve.

QUESTION: Mr. Lee, I suppose you would agree, though, that a state couldn't attach an unconstitutional condition to the consent. It couldn't say, for example, provided that the bank is owned by Republicans, or Mormons or something like that.

MR. LEE: Of course, of course.

QUESTION: So there is some limit on the state's --

MR. LEE: Of course there is. And that's the distinction that needs to be drawn. This unconstitutional limitation pertains to something other than the Commerce Clause itself, because Congress clearly does have the authority to shape the extent to which the states may enhance commerce -- the movement of

goods and services across interstate commerce.

But insofar as the Commerce Clause is concerned, the argument that what Congress intended to do was to authorize only otherwise valid state laws simply ignores the thrust of the Commerce Clause, and any attempt to structure a separate constitutional argument insofar as the Commerce Clause is concerned from the Douglas Amendment itself is --

QUESTION: What if it said something like provided that the acquiring bank doesn't charge interest rates that are different from those that prevail in our state or something like that? Could there be any condition all that might affect the way the bank did business?

MR. LEE: Well, I think it would once again come back to whether that was or was not a commerce-related concern, and that's also, Justice Stevens, why Mr. Shapiro's attempted distinction between this restriction, this geographic restriction and the reciprocity restriction or the grandfathering provisions or any others just won't wash.

Because in any event what you have when one of the states lifts the burden to an extent but not total, you have left in place a scheme under which there is a segment of state business that is available to

in-staters but is unavailable to out-of-staters, and that's what under this Court's precedents is a per se violation of the Commerce Clause.

Now, finally, Justice White is absolutely right that the petitioners have the burden of showing that their view is the only permissible one, because the agency charged with the implementation of this statute has consistently entered orders approving acquisitions in all cases where state statutes specifically permit the particular type of interstate acquisition before the Board. And that includes not just these geographic limitations but also the substantive limitations where someone can come in from outside but can only engage in the credit card business, for example.

The fact that the members -- that the Board may not have understood that its interpretation of the Douglas Amendment in this unique constitutional setting also determines the constitutional question is immaterial. It has interpreted the Douglas Amendment, and our defense before this Court is a defense of the orders that the Court entered. And the Court not only through it orders but also through its opinions made it very clear that notwithstanding its policy misgivings, notwithstanding its constitutional misgivings, concluded that these orders fell squarely within the scope of what

Congress intended the states to be able to do under the Douglas Amendment.

QUESTION: Well, if they do, they're certainly can't be any Commerce --

MR. LEE: That is absolutely correct, Justice White. And it is equally clear --

QUESTION: How can the Board -- how can the Board have some constitutional doubts; that if it really thinks Congress intended to do this, what's left of the --

MR. LEE: Because they didn't understand this Court's decisions in Western and Southern and in Prudential Insurance v. Benjamin.

If the Court has no further questions, I have nothing further.

CHIEF JUSTICE BURGER: Mr. Tribe.

ORAL ARGUMENT OF LAURENCE HENRY TRIBE, ESQ.,
ON BEHALF OF RESPONDENTS BANK OF NEW ENGLAND CORPORATION, ET AL.

MR. TRIBE: Mr. Chief Justice, and may it please the Court:

I would like, if I might, to first clear away what I think is some confusion about the Compact Clause, because I don't think it really belongs in this case.

When Justice O'Connor asked Mr. Shapiro what

exactly have Massachusetts and Connecticut agreed to, and there was a pause, and then we were told, well, they've agreed to reciprocity.

Notice, this Court has held, of course, in Beaux v. Barrett, 1953 that reciprocity alone doesn't make something the kind of compact Congress need approve.

The key point is they're complaining of the proposed exclusion of New York. There isn't any suggestion in this case that there is a reciprocal agreement to exclude New York. Reciprocity means you let us in, we'll let you in. But there's no basis whatever for arguing that there is an exclusionary agreement in this case, and there's been no response whatever by the petitioners to our argument that indeed as long ago as 1896, this Court expressly ruled that no approval by Congress is needed under the Compact Clause where legislation on the part of two or more states reciprocally permits corporate entities to enter one another.

I think the Compact Clause is a nonissue here, and I think Justice White is surely correct that the whole question is what power did Congress delegate to the states.

Now, as Justice Rehnquist indicates, the

paucity of language about restrictions here cuts only one way, and this Court in Justice Brennan's opinion in Western and Southern I think made clear which way it cuts. When there are no limitations placed in an open-ended grant of authority to the states, that means that Congress meant what it said.

Now, that is absolutely clear here where Congress could readily have imposed limitations and indeed impose one, namely that the burden lifting action by the states, tailoring their own commerce-enhancing package, as General Lee puts it so well, that that step must be taken by state statute. And moreover, quite apart from the unambiguous language here, I would say far clearer and far more explicit than the statement about the implications of silence in the McCarran-Ferguson Act, we have here a case where the legislative history, far from fragmentary, is literally overwhelming.

The sponsors, Douglas and Paine, spoke about leaving it to the states' discretion. The floor manager of the bill, Roberston, said that if you believe in states' rights, you've got to go this way because if you accept the House version of the bill, you don't give the states leeway. The opponents of the bill made the argument that Mr. Shapiro is making here: that it is

discriminatory. Senator Brucher opposed the bill on the grounds that it gave states new powers to restrict bank holding companies that entered. That's on page 674 of the Joint Appendix of the Second Circuit.

It seems to me that in this case in particular, the statements of a legislator who sponsored the bill are entitled to special weight. The petitioners in their brief cite language from this Court's opinion in Chrysler v. Brown, saying that what a legislator says may not be decisive. But more recently, this Court in Northhaven against Bell made quite clear in Justice Blackmun's opinion for the Court that although that's sometimes true, the remarks of a Senator who is the sponsor of the language ultimately enacted are, in this Court's words, "an authoritative guide to the statute's construction" when the matter comes up on the floor.

So it seems to me clear that if, as Justice White asks, there is only one construction permissible, I think I know what it is, and that is Congress meant what it said. The States could lift selectively. And I think, conversely, if more than one construction is permissible, there ought to be deference to the expertise of the Board on the meaning of the statute that it has uniformly administered.

But I do want to turn to the image that petitioners would deploy in this Court to somehow make it appear as though what the states are doing here or what they are authorized to do does entail something like Justice Stevens' concern about an unconstitutional condition, a kind of gerrymander, picking and choosing perhaps among various states, as though Massachusetts and Connecticut through their statutes brandished the slogan "We hate New York."

Nothing of that sort is going on here. There's a decision to respect the historic cultural and economic boundaries of the region, the New England region, hardly an artifact of anyone's imagination.

QUESTION: But, Mr. Tribe, would the case be any different in your view if they thought that there was particularly dangerous competition from, say, California and New York, and so we'll let every state except those two in?

MR. TRIBE: Justice Stevens, I think it would be no different. The question would be this --

QUESTION: Just New York, every state except New York.

MR. TRIBE: I think the question in that case would be is there a rational basis for singling out New York by name or New York and California by name, just as

in --

QUESTION: Well, the reason is we don't like New York.

MR. TRIBE: Well, if the reason is we don't like New Yorkers, pure and simple --

QUESTION: -- in particular.

MR. TRIBE: Then it looks pretty bad. It looks like I guess the Merino case where this Court said that just because you don't like a certain group, that's not a good enough reason.

But here, interestingly, both the Board and the Second Circuit on an ample record found that that was not the reason. The reason rather was a well-calculated decision to foster a limited experiment preserving diversity and stability in a system at one and the same time responsive to local needs and yet likely to build up enough indigenous entities to resist the coming onslaught.

QUESTION: But you seem to be arguing there that the reasons were sufficient; in other words, that there was a justification for discrimination. And I'm asking you, supposing you had a case in which there's no apparent justification, no legislative history. They just took in everybody except New York. Would that be a different case?

MR. TRIBE: I guess, Justice Stevens, that would surely be a harder case, but I would say that it would require new law --

QUESTION: Why would it be harder?

MR. TRIBE: Well, I suppose it would be harder because I can imagine this Court saying that like persons, states are subject to a norm of equality, and that if states by name are treated differently by other states, there must at least be a rational basis for the difference.

QUESTION: Even when Congress says it's okay?

MR. TRIBE: I think when Congress says it's okay, Central Roeig suggests that that's decisive, and I think though harder, we would still win the case.

QUESTION: See, that's what puzzles me. Has Congress said it's okay? If it has, why can't they do it for 49 states and not the last? If they haven't, then don't we have to look at reasons?

MR. TRIBE: Well, if Congress has said it's okay, there still is a Fifth Amendment problem, I suppose, with the validity of what Congress did. But the point is whichever way we go on that, there's no doubt in this record that they had good reasons. The Federal Reserve Board in the Second Circuit found there was a rational relationship, and that's easy to see --

QUESTION: Would there be a potentially bigger problem in the instance posed by virtue of the Equal Protection Clause analysis of Metropolitan Life?

MR. TRIBE: Well, I would think if Metropolitan Life were extended into a truly destructive engine for all laws of this kind, there might be a problem. But if you view Metropolitan Life, as I tend to, just as holding that when your whole purpose is just to benefit the home team at the expense of outsiders, that that is not per se legitimate. Then that would cause no problem here, because if anything, Massachusetts and Connecticut gave up a home team advantage in order to preserve regional benefits.

And it's interesting that even after Metropolitan Life --

QUESTION: In order to preserve a regional home team.

(Laughter.)

MR. TRIBE: Well, I suppose.

QUESTION: IAAA competition, not the major leagues.

MR. TRIBE: They were holding a regional meet, and they weren't ready yet to invite the big leagues in.

QUESTION: Well, Mr. Tribe, could Connecticut say we'll let in New York banks, but only some New York

banks?

MR. TRIBE: And if they picked and choosed in -- picked and chose in a wholly arbitrary, irrational way?

QUESTION: Whatever way they pick --

MR. TRIBE: I guess there would be potential equal protection problems.

QUESTION: Has Congress allowed them to do that?

QUESTION: They couldn't.

MR. TRIBE: I think that under the Equal Protection Clause in Shapiro Congress couldn't delegate to them the power invidiously to pick and choose. But even after Metropolitan Life, which in this twelfth hour attempt they might want to resurrect, even after Metropolitan Life, the point is that there is no challenge whatever by the petitioners to the findings either of the Board or of the Second Circuit that there was a reasonable basis for the line drawn, if that were an issue in the case. And if Justice Stevens' suggestion is right and that is not an issue, then a fortiori theres' no question that need be decided, especially since it is clear that Congress delegated this power.

But there is a question that is raised by

petitioners. They say isn't it amazing that Congress didn't say so if it wanted the states to have this latitude. It's not at all amazing. On the contrary, there are several fundamental answers as to why this Court ought not to depart from its precedents in Prudential v. Benjamin and Western and Southern and demand specificity and a kind of laundry list, as well as clarity of Congress.

For one thing, there's an historical reason. Congress in 1956, as the petitioners have never denied, was expressly told some bankers believe that regional approaches are a good idea. And as we explain in our brief at pages 21 to 22, the only reason Congress then didn't mandate that solution was not disagreement with its potential wisdom, but a sense that it would override state discretion excessively to force that approach upon the states.

In addition, there are practical considerations. As this Court held less than three weeks ago in Town of Halley, the way legislatures work and the way that statutes are written makes it unrealistic to expect a legislature to catalog.

There is finally, and I think most importantly, a reason of principle, and that is this. If Congress is to be the ultimate protector of the

states as autonomous laboratories, especially after this Court's decision in Garcia, we're to look to Congress, then when Congress chooses to protect the autonomy of the states as laboratories, not by telling them which formulas they may experiment with and which they may not, but by leaving it to them subject to an unconstitutional conditions doctrine, for this Court to deny effect to that explicit, substantive congressional judgment would at one and the same time deal a blow to natural legislative supremacy and to the sovereignty and autonomy of the states as laboratories in the interest, so far as I can tell, of an aesthetic concern that all states are created equal, even when, as in this case, limiting the region to New England has the effect of excluding 53 of the nation's 54 largest bank holding companies.

Now, we can imagine no purpose to be served by suddenly declaring this perfectly reasonable step by the states of Massachusetts and Connecticut to be outside the reach of the very broad authorization delegated by Congress. And if there were any doubt about the proper reading of the statute, deferring to the statutory reading that the Board has given in the face of its own policy misgivings is surely the answer. And if one says why shouldn't we let Congress resolve it, I thin the

answer to that is clear. Congress did in 1956.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Shapiro? You have four minutes remaining.

ORAL ARGUMENT OF STEPHEN M. SHAPIRO, ESQ.,

ON BEHALF OF THE PETITIONERS -- REBUTTAL

MR. SHAPIRO: Mr. Chief Justice, and may it please the Court:

Counsel's remark about our position being a mere aesthetic concern about the equal status of the states in the Union ought to be the starting point for my rebuttal. This isn't a mere aesthetic concern. As the Court said in the Eisenberg case, we could not exist as a nation if states could pick and choose among sister states, and a fortiori, when groups of states join together to boycott other states and effectively injure their economies, this goes to the very core of the concerns of the Founding Fathers that made us one nation of co-equal and indestructible states.

Now, respondents' position is that Congress meant to approve this. It meant to approve the ganging up. It meant to approve the picking and choosing. It meant to set aside the protections of the Commerce Clause without a single word to that effect.

The Court should not mistake what's being

asked for here. This is a giant step beyond what Congress ever considered, what Congress ever stated in the history or in the statute. And it is the better part of wisdom, we say, to leave this issue to Congress, which is now considering whether this is good or bad for the United States of America. And if we're all patient, we think Congress will come to a sensible resolution considering the interests of all concerned.

QUESTION: However we decide the case, we're leaving it to Congress.

MR. SHAPIRO: Yes, but in the interim serious harm could be done to commercial interests in boycotted states like the state of New York. That's why this Court's decisions say go to Congress first if you're going to depart from constitutional precepts. And we submit that that is the appropriate course here. Let Congress resolve these policy questions.

QUESTION: You are renewing your Equal Protection Clause argument here.

MR. SHAPIRO: We are, sir. Yes, sir.

QUESTION: Which is wholly aside from Commerce.

MR. SHAPIRO: Wholly aside from Commerce and wholly aside from Compact.

Thank you very much.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:58 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-363 - NORTHEAST BANCORP, INC., ET AL., Petitioners V.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL.

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BY Paul A. Richardson

(REPORTER)