Washington and Lee Law Review

Volume 38 | Issue 1 Article 17

Winter 1-1-1981

Lewis v. BTIM: State Regulation, the Bank Holding Company Act and the Commerce Clause

COMMENTS

LEWIS V. BTIM: STATE REGULATION, THE BANK HOLDING COMPANY ACT AND THE COMMERCE CLAUSE

The federal and state governments traditionally have shared the regulation of banking in the United States.[1] Both sovereignties oversee banking by a coordinated scheme of statutes and regulations under which financial institutions may operate by state charter or as national banks.[2] Under the "dual banking system,"[3] the balance of power between state and federal governments exists within the constitutional restraints of the commerce clause.[4] Recently, the United States Supreme Court in *Lewis v. Bankers Trust Investment Managers, Inc.*[5] determined that a Florida statute prohibiting entry into the state by a bank holding company subsidiary violated the commerce clause.[6]

Florida Statutes section 659.141(1)[7] barred the acquisition or ownership by a bank holding company of any business organization in Florida which furnished investment advisory services.[8] The *Lewis* Court held

---

[1] Hablutzel, *State Regulation of Branch Banking*, 16 DUQ. L. REV. 679, 679 (1977) [hereinafter cited as Hablutzel]; Hackely, *Our Baffling Banking System*, 52 VA. L. REV. 565, 565-80 (1966); *see McCullouch v. Maryland*, 17 U.S. (4 Wheat.) 316, 400-37 (1819).

[2] Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 STAN. L. REV. 1, 3 (1977) [hereinafter cited as Scott]; Hablutzel, *supra* note 1, at 679-80. National banks are organized under the authority of the Comptroller of the Currency. 12 U.S.C. §§ 21-42 (1976). States also have power to create banking institutions. *See, e.g.*, VA. CODE §§ 6.1-5—6.1-15 (1979).

[3] Scott, *supra* note 2, at 1.

[4] U.S. CONST. art. I, § 8, cl. 3. The commerce clause empowers Congress to regulate interstate trade. *Id.*; *see* text accompanying notes 5, 18-33 *infra*; Scott, *supra* note 2, at 15.

[5] 100 S. Ct. 2009 (1980).

[6] *Id.* at 2019. The Bank Holding Company Act of 1956 (BHC Act) defines "banking holding company" as an organization having control over any bank or any other bank holding company. 12 U.S.C. § 1841(a)(1) (1976). "Control" includes ownership or power to vote 35% or more of any class of voting stock, control in any manner of the election of a majority of directors or trustees, or any direct or indirect controlling influence over the management or policies of any bank. 12 U.S.C. § 1841(a)(2)(A)—(C) (1976). Ownership or power to vote less than 5% of any class of voting stock, however, raises a presumption that the organization does not have control. 12 U.S.C. § 1841(a)(3) (1976). Ownership of stock in a bona fide fiduciary capacity is not considered in determining bank holding company status. 12 U.S.C. § 1841(a)(5) (1976). Under the BHC Act, control over a single bank will qualify a company as a bank holding company. 12 U.S.C. § 1841(a).

[7] FLA. STAT. ANN. § 659.141(1) (West Supp. 1980); 1972 FLA. LAWS, c. 72-726, §§ 1-7.

[8] FLA. STAT. ANN. § 659.141(1) (West Supp. 1980). Section 659.141(1) provided that no bank or bank holding company whose operations were principally conducted outside Florida could acquire or control any business organization in Florida which conducted investment advisory services. *Id.* The statute defined investment advisory services as the business of

that section 659.141(1) discriminated against out-of-state bank holding companies,[9] burdened interstate commerce,[10] and was invalid under the commerce clause.[11] In additon, the *Lewis* Court found that the Bank Holding Company Act of 1956 (BHC Act)[12] did not grant states the power to prohibit entry of a bank holding company into the local investment advisory service market.[13]

In 1972, Bankers Trust Investment Managers, Inc., (BTIM) was incorporated in Delaware by Bankers Trust New York Corporation, a bank holding company. BTIM proposed to open an investment advisory service office in Palm Beach, Florida, and petitioned the Federal Reserve Board for permission.[14] The Board denied the request on the ground that BTIM's proposal violated section 659.141(1).[15] In a subsequent federal suit, a three-judge district court granted injunctive relief and declaratory judgment on behalf of BTIM.[16] On appeal by Florida, the United States Supreme Court affirmed.[17]

Florida argued that section 659.141(1) was a legitimate exercise of state power[18] and that BHC Act permitted the state to regulate non-

counselling persons for compensation concerning the value of securities or advisability of investment in securities. "Bank holding company" was defined in § 659.141(2)(a) as any business organization that controlled any bank or trust company and principally conducted its business outside of Florida. *See* note 6 *supra*. During the pendency of *Lewis* on appeal, the Florida legislature repealed § 659.141, effective July 1, 1980. 100 S. Ct. at 2024. The Florida legislature proposed other regulations on bank holding company activities during 1980. *See* Sadler & Walters, *Effects of Competition on Banking Law in the 1980's*, 54 FLA. B.J. 36, 37-38 (1980).

[9] 100 S. Ct. at 2018.

[10] *Id.* at 2019.

[11] *Id.*

[12] Banking Holding Company Act of 1956, 12 U.S.C. §§ 1841-1849 (1976).

[13] 100 S. Ct. at 2021.

[14] Bankers Trust New York Corporation, 59 FED. RES. BULL. 364 (1973) (seeking authorization to conduct non-banking activity of investment advisory services under § 225.4(b)(1) of Federal Reserve Board Regulation 4). Federal Reserve Board regulations specifically define investment services in the context of bank holding company non-banking activities. 12 C.F.R. §§ 225.4(a)(5), 225.125 (1980). Pursuant to the BHC Act, advisory services are included on the Federal Reserve Board's list of permissible non-banking activities. *See* 12 U.S.C. § 1843(c)(8) (1976); 12 C.F.R. §§ 225.4(a)(5), 225.123, 225.125, 225.126 (1980). Congress has statutorily defined investment advisor as any person who, under a contract, furnishes advice with respect to the desirability of investing in, purchasing or selling securities or other property. 15 U.S.C. § 80a-2(a)(20) (1976). Excepted from this definition are advisors writing for uniform publications, fiduciaries and persons providing only statistical or factual information. *Id.*

[15] 59 FED. RES. BULL. 364, 365 (1973).

[16] BT Investment Managers, Inc. v. Lewis, 461 F. Supp. 1187, 1188 (1978).

[17] 100 S. Ct. at 2009. The Supreme Court affirmed the district court's holding that § 659.141(1) violated the commerce clause. *Id.* The Court, however, substituted the *Pike* balancing test for the "*per se* rule of invalidity" which the district court had applied. *Id.* at 2017-19; *see* text accompanying notes 26-33 *infra*.

[18] Congress has power under the commerce clause to regulate banking as an element of interstate commerce. *See* 100 S. Ct. at 2015; McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 424 (1819). The commerce clause limits state power to burden interstate commerce. 100 S. Ct. at 2015; Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 440 (1978). Absent

banking activities of bank holding companies.[19] The Supreme Court first addressed the issue whether the Florida statute acted to discriminate against out-of-state bank holding companies in violation of the commerce clause.[20] The Court then considered whether the BHC Act granted to the states the power to prohibit acquisition of in-state investment advisory services by out-of-state bank holding companies.[21] Applying a two-step approach,[22] the Supreme Court reasoned that even if the Florida statute were invalid under the commerce clause, Florida could regulate out-of-state bank holding companies if Congress had specifically granted this regulatory power to the states in the BHC Act.[23] The Court found section 659.141(1) constitutionally invalid[24] and rested its analysis on the BHC

---

preemptive federal legislation the states may to a limited extent regulate matters of legitimate local concern even though such regulation burdens interstate commerce. H. P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 531-32 (1949). Florida asserted as state concerns an interest in discouraging undue economic concentration in the "arena of high finance", a desire to protect local residents from fraud through regulation of financial practices, and an aim to maximize local control over locally based financial activities. 100 S. Ct. at 2019; *see* text accompanying notes 30-33 *infra.*

[19] 100 S. Ct. at 2020; *see* text accompanying notes 34-36 *infra.*

[20] *Id.* at 2015. At trial, BTIM also claimed that § 659.141(1) violated due process and equal protection. 461 F. Supp. at 1191 n.4 (1978). The district court rejected these contentions and the Supreme Court did not address them on appeal. 100 S.Ct. at 2014-15.

[21] 100 S. Ct. at 2015; *see* notes 42-47 *infra.*

[22] 100 S. Ct. at 2014-15, 2017-22. The *Lewis* Court constructed a two-step analysis of the Florida statute's constitutional validity under the commerce clause. *Id.* at 2015, 2019. In the first step the Court assessed whether § 659.141(1) impermissibly burdened interstate commerce. *Id.* at 2015-19; *see* text accompanying notes 27-30 *infra.* After finding that the state statute imposed an excessive burden on interstate commerce, the Court examined whether the BHC Act specifically granted to the states power to regulate certain nonbanking activities of bank holding companies. *Id.* at 2020. Congress may grant to the states power to regulate matters in interstate commerce. *Id.*; International Shoe Co. v. Washington, 326 U.S. 310, 315 (1945) (federal statute permitted state to require employer contributions to unemployment compensation program). Where Congress has specifically granted regulatory power to the states, the states may regulate elements of interstate commerce to a greater extent than the commerce clause would allow. *See* H. P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 542 (1949) (state milk licensing regulations did not coincide with or supplement federal regulations). Thus, the commerce clause permits Congress both to preempt state legislation involving interstate commerce and to grant the states additional regulatory power. Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 423-25, 427-31 (1946) (federal statute expressly permitted state taxation and regulation of interstate insurance companies); *see* text accompanying notes 55-60 *infra.* The *Lewis* Court's two-step approach combined the grant of power issue with the traditional commerce clause analysis. *See* 100 S. Ct. at 2015-20; Hughes v. Oklahoma, 441 U.S. 322, 335-38 (1979); Hunt v. Washington Apple Advertising Comm'n., 432 U.S. 333, 348-54 (1977); Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 370-77 (1976); *see generally* P. BENSON, *The Supreme Court and the Commerce Clause, 1937-1970,* 277-317 (1970) (discussing the conflict of federal and state regulation under the commerce clause).

[23] 100 S. Ct. at 2019-20. An examination of the validity of a state statute under the commerce clause and of a congressional grant of regulatory power to the states presumes that preemptive federal legislation does not exist. *Id.* at 2015; *see, e.g.,* H. P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 542-45 (1949); Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 423-25, 427-31 (1946); text accompanying note 22 *supra.*

[24] 100 S. Ct. at 2019; *see* text accompanying notes 26-33 *infra.*

Act's regulatory scheme.[25]

In finding that the Florida statute violated the commerce clause, the Court rejected the trial court's use of the "*per se* rule of invalidity."[26] Instead, the Supreme Court applied the balancing test announced in *Pike v. Bruce Church, Inc.*[27] Under the *Pike* balancing test, the Court found that Florida's interest in asserting local control over investment advisory services did not justify the burden placed on out-of-state bank holding companies by the statute.[28] In comparison, the *per se* rule of invalidity provides that a state statute violates the commerce clause where the legislation effects "simple economic protectionism."[29] By substituting the *Pike* standard for the *per se* rule, the Court accepted Florida's assertion that state regulation of out-of-state bank holding companies was not protectionistic.[30] The Court's use of the *Pike* balancing test suggests that the states have legitimate state interests which

---

[25] 100 S. Ct. at 2019-21; *see* text accompanying notes 34-47 *infra*.

[26] 100 S. Ct. at 2016-18; *accord*, Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). A New Jersey statute prohibited importation of most solid and liquid wastes which originated outside the state. *Id.* at 618-19. After finding that garbage was within the meaning of interstate commerce, the *Philadelphia* Court held the New Jersey statute constitutionally invalid. *Id.* at 629. The Supreme Court in *Philadelphia* reasoned that where state legislation affecting interstate commerce was simply economic protectionism, a *per se* rule of constitutional invalidity existed under the commerce clause. *Id.* at 624. The *Philadelphia* Court described the nation as a single economic unit and invalidated state regulation that attempted to place a state in economic isolation. *Id.* at 624-27; *see* H. P. Hood & Sons v. DuMond, Inc., 336 U.S. 525, 537-38 (1949).

[27] 397 U.S. 137, 142 (1970). In *Pike*, a produce company raised cantaloupes in Arizona, but packaged them in a California plant located 31 miles away. *Id.* at 130. The *Pike* Court recognized that an impermissible burden on interstate commerce was a matter of degree and balanced the nature of the local interest concerned against the less burdensome alternatives. *Id.* at 142. The Supreme Court affirmed the district court's permanent injunction against a state order that prohibited transportation of the fruit out-of-state for packaging.

[28] 100 S. Ct. at 2016-19. The *Lewis* Court found that the Florida statute directly burdened interstate commerce. *Id.* at 2019; *see* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (distinguishing between direct and indirect burdens on interstate commerce); Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951); text accompanying note 27 *supra*. The *Pike* standard compares whether the interstate commerce burden is only incidental against whether the state statute even-handedly effects a legitimate local public interest. The question is one of the degree and will depend upon whether the same interest could be promoted as well with less impact on interstate commerce. 397 U.S. at 142.

[29] *See* 100 S. Ct. at 2018-19; notes 8, 15 & 18 *supra*. *See generally* Keeffe & Head, *What Is Wrong With the American Banking System and What To Do About It*, 36 MD. L. REV. 788 (1977).

[30] 100 S. Ct. at 2018-19. The district court's commerce clause analysis rested on a finding that the Florida statute was parochial and intended to erect exclusionary economic barriers. 461 F. Supp. at 1194. The Supreme Court accepted the district court's characterization of § 659.141(1) as "parochial," but refused to apply the *per se* rule. *Id.* at 2017; *see* Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978); notes 31-33 *infra*. The Court applied another established commerce clause standard. 100 S. Ct. at 2015-16; *cf.* Dean Milk Co. v. Madison, 340 U.S. 349, 354-56 (1951) (least restrictive alternative test of commerce clause invalidity); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (balancing test for determining whether state interests justified resulting burden on interstate commerce).

permit some regulation of bank holding companies.[31] Section 659.141(1), however, discriminated among bank holding companies on the basis of their place of origin.[32] The Court concluded that the burden on the free flow of interstate commerce imposed upon out-of-state bank holding companies outweighed the state interests protected by the regulation.[33]

After deciding that the commerce clause invalidated section 659.141(1) under the *Pike* standard, the Court addressed the question whether the BHC Act granted Florida power to regulate a bank holding company's non-banking activities.[34] Section 4 of the BHC Act generally prohibits a bank holding company from acquiring non-banking business enterprises.[35] One exception to the non-banking prohibitions is section 4(c)(8),[36] which permits bank holding company acquisition of business endeavors "closely related to banking."[37] Similarly, section 3 limits the

[31] 100 S. Ct. at 2019. The *Lewis* court acknowledged that discouraging economic concentration and protecting the citizenry against fraud were legitimate state interests. *Id.*; *see* note 18 *supra.*

[32] *Id.* at 2018. Florida argued that Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978), permitted the state indirectly to burden interstate commerce by regulating the organization of out-of-state business entities. *Id.* at 2017. In *Exxon*, the Supreme Court upheld a Maryland statute regulating ownership of retail gasoline outlets by petroleum refiners on the ground that the statute placed a discriminatory burden on interstate commerce. 437 U.S. at 126; *see* 100 S. Ct. at 2018; note 8 *supra.* The *Lewis* court distinguished *Exxon* and found that the Florida statute discriminated against out-of-state bank holding companies on the ground of their place of origin rather than their organizational structure. *Id.* at 2017-18.

[33] 100 S. Ct. at 2019; *see* Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 126 (1978); H. P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 542 (1949); note 32 *supra.* The *Lewis* Court recognized a compelling state concern in banking and similar financial activities but asserted that banking is a matter of interstate commerce within Congress' regulatory power. 100 S. Ct. at 2016-17 n.7; *see* Hughes v. Oklahoma, 441 U.S. 322, 329, 335 (1979) (bait minnows marketed out-of-state are in interstate commerce); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 440 (1978) (double-trailer trucks used to transport goods on highways are in interstate commerce); Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 370 (1976) (milk marketed across state lines is in interstate commerce); Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 441-42 (1960) (cleaning fires of steamships in harbor is within interstate commerce powers of Congress even though such powers not exercised).

[34] 100 S. Ct. at 2019-20. Florida asserted that § 3(d) of the BHC Act granted to the states the power to prohibit acquisition by out-of-state bank holding companies of in-state non-banking activities described under § 4(c)(8). *Id.* at 2020; *see* text accompanying notes 23-25 *supra.*

[35] 12 U.S.C. § 1843 (1976). Section 4(a) prohibits acquisition by a bank holding company of direct or indirect control over any company not a bank. 12 U.S.C. § 1843(a) (1976). The BHC Act controls acquisition of banks and banking interests under § 3. 12 U.S.C. § 1842 (1976); *see* text accompanying note 47 *infra.*

[36] 12 U.S.C. § 1843(c)(8) (1976). Subsection (c)(8) specifically excepts from the general non-banking prohibition of § 4 any bank holding company interest in activities "closely related to banking." *See* 12 C.F.R. § 225.4 (1980); text accompanying note 37 *infra.* Other exceptions to § 4 include activities incident to the operation of a bank, interests in non-banking companies held in good faith in a fiduciary capacity, and interests in investment companies holding no more than 5% of any non-banking company. 12 U.S.C. § 1843(c) (1976).

[37] 12 U.S.C. § 1843(c)(8) (1976); 12 C.F.R. §§ 225.4, 225.123 (1980); *see* P. HELLER, *Handbook of Federal Bank Holding Company Law*, 259-81 (1976) [hereinafter cited as HELLER]; Frey, *Bank Holding Companies and Nonbank Activities*, 1978 ANN. SURVEY AM. L. 209, 221,

organizational and banking activities of bank holding companies.[38] Under section 3(d) a bank holding company may not acquire a bank located outside the state in which the holding company principally conducts business, unless the target state permits such acquisition by statute.[39]

Florida asserted in *Lewis* that the section 3(d) grant of power to permit bank acquisitions, when read with the "closely related to banking" language in section 4(c)(8), constituted a grant of power to the states to prohibit in-state non-banking acquisition by out-of-state holding companies.[40] The Supreme Court rejected Florida's argument and found no congressional authorization to the states in section 4(c)(8) parallel to the power in section 3(d).[41] Furthermore, ordinary canons of interpretation would not permit an inference that the state powers enumerated in

---

225 (1978). Once the Federal Reserve Board has determined that a proposed activity is "closely related to banking," the Board must ascertain whether the activity is for the public benefit. *See, e.g.*, NCNB Corp. v. Board of Govs., 599 F.2d 609 (4th Cir. 1979) (bank holding company appealed Federal Reserve Board's refusal to allow subsidiary to continue insurance activities); Bankamerica Corp. v. Board of Govs., 596 F.2d 1368 (9th Cir. 1979) (bank holding company sought permission to expand non-banking activities of data-processing subsidiary); Citicorp v. Board of Govs., 589 F.2d 1182 (2d Cir. 1979) (bank holding company appealed Federal Reserve Board's refusal to allow continuation of subsidiary's mortgage banking activities, where subsidiary was nation's second largest mortgage banking company); National Courier Ass'n v. Board of Govs., 516 F.2d 1229 (D.C. Cir. 1975) (court reviewed Federal Reserve Board regulation permitting courier transportation services by bank holding company subsidiary); 12 C.F.R. 225.4 (1980).

The *Lewis* Court did not address any of the antitrust issues arising out of federal regulation of interstate bank holding company activities. *See, e.g.*, McHatton, *The Bank Holding Company and the Sherman Act: The Validity of Cooperation Among Commonly Held Banks*, 18 ARIZ. L. REV. 147, 162 (1976).

[38] 12 U.S.C. § 1842 (1976). Section 3 requires Federal Reserve Board approval prior to any bank holding company banking acquisition of more than 5% of a banking institution or any attempted merger. *Id.* Section 3(c) provides standards for approval of each acquisition. *See* Board of Govs. v. First Lincolnwood Corp., 439 U.S. 234, 242-52 (1978); HELLER, *supra* note 37, at 75-153.

[39] 12 U.S.C. § 1842(d) (1976); *see* 100 S. Ct. at 2021; Whitney Nat'l Bank v. Bank of New Orleans, 379 U.S. 411, 419, 424 (1965); HELLER, *supra* note 37, at 272-74.

[40] 100 S. Ct. at 2020-21. Section 3(d) of the BHC Act provides that the Federal Reserve Board may approve acquisition of banks by out-of-state bank holding companies where the target state gives clear, expressed statutory authority for that acquisition. Section 4(c)(8) removes non-banking activities closely related to banking from the general prohibition of § 4. *See* notes 36 & 37 *supra*. Neither party in *Lewis* asserted that § 3 or § 4 preempted state regulation of non-banking activities. *Id.* at 2015. Failure to argue federal preemption suggests that the parties assumed that the states retained power to regulate permissible non-banking activities. The Court stated that § 7 reserves to the states the right to exercise powers and jurisdiction existing at the time the BHC Act became effective. 100 S. Ct. at 2022; 12 U.S.C. § 1846 (1976); *see* notes 45 and 70-72 *infra*.

[41] 100 S. Ct. at 2021. The Court rejected Florida's assertion that non-banking activities excluded from § 4 came within the regulatory scope of any other provisions of the BHC Act. *Id.* Federal regulation of non-banking activities, however, is limited to a determination of their excludability under § 4(c)(8). *See* 12 C.F.R. § 225.4 (1980); text accompanying notes 42-45 *infra*. *See generally* 12 C.F.R. Chapter II, Part 225 (1980).

section 3(d) encompassed non-banking activities under section 4(c)(8).[42] Section 3(d) refers only to banking activities and does not expressly regulate the non-banking activities excluded from section 4.[43] Section 4(c)(8) merely excludes closely related non-banking activities from the section 4 prohibitions.[44] The BHC Act does not appear to regulate the non-banking activities excluded from section 4.[45] The Supreme Court in *Lewis* concluded that section 3(d) of the BHC Act, therefore, did not grant to the states any regulatory power over the non-banking activities of out-of-state bank holding companies.[46]

In determining that section 3(d) of the BHC Act does not apply to closely related non-banking activities, the *Lewis* Court stated that section 4 regulated these activities.[47] Section 4, however, enumerates only those activities specifically prohibited to bank holding companies.[48] Federal Reserve Board regulations promulgated under section 4 merely provide procedures and standards to determine premissible non-banking activities.[49] Non-banking activities excepted under section 4(c)(8) are regulated at the holding company level only under the limited administrative provisions of section 5.[50] During the 1970 hearings to amend

---

[42] 100 S. Ct. at 2021. The Court failed to define the term "ordinary canons of interpretation." *See* text accompanying note 45 *infra*. Under the *Lewis* Court's analysis, the BHC Act creates three categories of bank holding company activities: banking (§ 3), prohibited non-banking (§ 4), and excepted closely-related-to-banking activities (§ 4(c)(8)). The last category logically includes other exceptions to § 4 prohibitions. 12 U.S.C. § 1843(c) (1976). The BHC Act statutory scheme and the Federal Reserve Board regulations suggest only two categories, banking and non-banking activities. 12 U.S.C. §§ 1842 and 1843 (1976); 12 C.F.R. Chapter II, Part 225 (1980); *see* HELLER, *supra* note 37, at 53, 75, 157, 229; note 45 *infra*. The *Lewis* Court's analysis appears to create a gap between the banking and non-banking provisions of the BHC Act. The § 4(c)(8) closely related non-banking activities fall into this gap.

[43] 12 U.S.C. § 1842(d) (1976); 100 S. Ct. at 2021.

[44] 12 U.S.C. § 1843(c) (1976); *see* text accompanying note 42 *supra*, note 45 *infra*.

[45] 12 U.S.C. § 1843 (1976). Florida argued in *Lewis* that state power to regulate bank holding company activities derived from § 3(d) and § 7 of the BHC Act. 100 S. Ct. at 2020; *see also* text accompanying notes 49-55 *infra*. Section 7 reserves to the states a general power to regulate bank holding companies. *Id.* at 2022; 12 U.S.C. § 1846 (1976). The *Lewis* court held that the commerce clause limited any state regulatory power under § 7 and rejected Florida's assertion that the general language of § 7 constituted a Congressional grant of power to the state to regulate non-banking activities under § 4(c)(8). 100 S. Ct. at 2022; *see* note 85 *infra*.

[46] 100 S. Ct. at 2021; *see* 12 C.F.R. § 225.3 (1980); text accompanying notes 42 & 45 *supra*.

[47] 100 S. Ct. at 2021.

[48] 12 U.S.C. § 1843 (1976). Section 4 generally prohibits any non-banking activity of a bank holding company, subject to the exceptions given in § 4(c). *Id.* § 1843(c); *see* text accompanying notes 42 & 45 *sup. a.*

[49] 12 C.F.R. § 225.4 (1980). *See generally* Comment, *Implementation of the Bank Holding Company Act Amendments of 1970: The Scope of Banking Activities*, 71 MICH. L. REV. 1170, 1188-1210 (1973) [hereinafter cited as *Scope of Banking*].

[50] 12 U.S.C. § 1844 (1976 & Supp. II 1978). The Federal Reserve Board derives general regulatory authority from § 5 of the BHC Act. *Id.* Section 5(b) authorizes the Federal

section 4(c)(8), Congress apparently assumed that the Federal Reserve Board regulated the conduct of non-banking activities by bank holding companies.[51] Notwithstanding the Federal Reserve Board's limited regulatory authority, the Supreme Court rested its analysis on sections 3(d) and 4(c)(8) rather than attempting to reconcile concurrent state and federal regulatory interests, as reflected in section 5.[52] Although the Court considered *Lewis* primarily as a commerce clause case,[53] the BHC Act analysis will affect the system of bank holding company regulation.[54]

The Court's narrow interpretation of Florida's regulatory power under section 3(d) contrasts with the less restrictive standard applied to situations where preemption of state law by fedeal statute is at issue.[55] The Supreme Court has stated the principle that federal commercial regulation should not preempt state regulatory power without "persuasive reasons."[56] The Court has recognized the unmistakable intent of Congress as a persuasive reason to permit federal preemption of a state regulation.[57] Where the subject matter of a regulation permits no other solution to the conflict between state and federal authority, federal preemption is also appropriate.[58] The Court seeks to reconcile the operation of conflicting federal and state statutory schemes rather than

---

Reserve Board to issue regulations necessary to enable administration of the BHC Act and prevent evasion of the Act's purposes. *Id.* § 1844(b). Section 5(e)(1) empowers the Federal Reserve Board to order termination of non-banking activities that threaten the financial security of a bank subsidiary. 12 U.S.C. § 1844(e)(1) (1976 & Supp. II 1978) (*as amended by* Act of Nov. 9, 1978, Pub. L. No. 95-630, Title I, § 105(a), 92 Stat. 3646). The Federal Reserve Board's comprehensive regulation of bank holding company organization derives specifically from statutory authority in § 3. *Id.* § 1842. The *Lewis* Court, however, held that § 3 does not apply to non-banking activities. 100 S. Ct. at 2021.

[51] H.R. REP. No. 91-1747, 91st Cong., 2d Sess. 15, 19, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS, 5561, 5564; 12 U.S.C. § 1843(c)(8) (1976). Section 4(e)(8) was amended by Congress to expand the scope of the closely-related-to-banking exception to include most activities closely related to banking. Act of Dec. 31, 1970, Pub. L. No. 91-607, Title I, § 103, 84 Stat. 1763; *see Scope of Banking, supra* note 49, at 1170; text accompanying notes 36, 37 & 43 *supra*.

[52] 100 S. Ct. at 2019-21; *see* Scott, *supra* note 2, at 14-18. The Court's commerce clause analysis balanced federal and state interests in a constitutional context. 100 S. Ct. at 2019. Balancing of federal and state regulatory powers raises the issue of preemption by federal statute, to which different standards apply. *See* text accompanying notes 55-60 *infra*.

[53] 100 S. Ct. at 2015.

[54] *See* text accompanying notes 67-89 *infra*.

[55] *See* 100 S. Ct. at 2015; text accompanying notes 56-61 *infra*.

[56] Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963). Florida challenged a California agricultural regulation which effectively barred the importation of Florida-grown avocadoes. The Supreme Court failed to find the California regulation in violation of the commerce clause and held that federal regulations did not preempt the state statute. *Id.* at 152.

[57] *Id.*; *see* text accompanying note 59 *infra*.

[58] 373 U.S. at 142. During debate on the BHC Act in 1956, Congress added subsection 3(d) to prevent use of the bank holding company structure to avoid state regulation of branch banking. 100 S. Ct. at 2021; H. R. REP. No. 609, 84th Cong., 1st Sess. 2-5 (1955); *see* 12 U.S.C. § 36 (1976).

finding one invalid.[59] Since neither party in *Lewis* claimed that the BHC Act preempted the Florida statute, the Court did not apply the lower preemption standards to the issue of a statutory grant of powers to the states.[60]

When compared to statutes adopted in other states, Florida section 659.141(1) is more discriminatory against out-of-state bank holding companies.[61] Virginia and New York, for example, provide for registration of bank holding companies and permit governmental interference with their operation only in the event of improper activities or financial irresponsibility.[62] California also allows its banking officials to inspect financial records and to require reports of bank holding company organization.[63] Georgia has empowered the Banking Commission to deny registration to bank holding companies whose organization or activities would result in a monopoly of banking business, tend to lessen competition, or be in restraint of trade.[64] In contrast, North Carolina has no specific statutory provisions for bank holding companies.[65] Since section 659.141(1) is unduly discriminatory, the Supreme Court in the future may limit the holding in *Lewis* to its facts. A narrow reading of *Lewis* will enable states to regulate bank holding companies without interfering

---

[59] Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 127, 139 (1973). The Supreme Court enunciated a policy to reconcile the operation of both the federal and state statutory schemes without holding one completely ousted. *See generally* Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963); Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714, 722 (1963).

[60] 100 S. Ct. at 2015; Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 127 (1973). A voluntarily terminated investment counsellor alleged that a California securities regulation was preempted by federal regulation of the New York stock exchange. *Id.* at 119-20. In finding that the federal regulation did not preempt the state regulation, the Court sought to reconcile the operation of the state and federal regulations. *Id.* at 127-39. The policy of reconciliation announced in *Merrill Lynch* suggests that state regulation should remain in force unless clearly preempted by federal statute and policy. *Id.*; Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963); *see* text accompanying notes 56-59 *supra*. The *Lewis* Court did not address the issue whether federal administrative regulations can be preemptive of state statutes.

[61] *See* FLA. STAT. ANN. § 659.141(1) (West Supp. 1980). Pennsylvania and Illinois, for example, prohibit activities by any business organization structured as a bank holding company, although both states permit investment advisory services. PA. STAT. ANN. tit. 7, § 6003 (Purdon) (1967). Similarly, Title 7, § 1-102(j) of the Uniform Securities Act provides for registration of investment advisors. *See* ILL. ANN. STAT. ch. 16½, § 73 (Smith-Hurd 1960 and Supp. 1980). Chapter 121½, § 137.8 A. and D. of the Illinois Code provide for information disclosures and registration of investment advisors.

[62] VA. CODE § 6.1-381 & 6.1-381.3 (1979); N.Y. BANKING LAW §§ 141.5 and 142, 36-6-2 (McKinney Supp. 1979).

[63] CAL. FIN. CODE §§ 3700, 3703, 3704 (West Supp. 1979); CAL. CORP. CODE §§ 25009, 25230, 25232 (West 1968) (regulations of investment advisory services); *see* Title 10, CAL. ADMIN. CODE §§ 260.236 and 260.240 *et seq.* (qualifications and administrative regulations for investment advisors).

[64] GA. CODE ANN. §§ 13-207, 13-207.1(a)(1)-(6), 13-207.1(b)(1)-(2) (Supp. 1980).

[65] *See generally* N.C. GEN. STAT. Chapters 53 (Banks) or 55 (Business Corporations) (1979). Section 72A-2 does not require registration of investment advisors.

with federal regulation under the BHC Act, unless the state statute violates the commerce clause under the *Pike* balancing test.[66]

Lewis was a case of first impression before the Supreme Court on the issue of the states' power to regulate bank holding company activities under sections 3(d) and 4(c)(8) of the BHC Act.[67] The interpretation of the BHC Act in *Lewis* will have considerable impact on the federal-state regulatory scheme if the Court follows *Lewis* literally.[68] The *Lewis* Court held that section 3(d) granted limited power to the states to permit bank holding company expansion into the state only where the BHC Act otherwise prohibits interstate branching.[69] Although recognizing that section 3(d) applies exclusively to banking activities, the Court expressed doubt that the section authorized the states to prohibit any bank holding company activities.[70] The holding in *Lewis* may affect existing state statutes which restrict the banking activities of bank holding companies, such as those that affirmatively prohibit all bank holding company activities.[71] Under a broad reading of *Lewis*, these statutes exceed the power granted to the states by section 3(d).[72]

---

[66] *See* 100 S. Ct. at 2017. The Court's substitution of the *Pike* balancing test for the *per se* rule in determining that Florida's statute violated the commerce clause suggests that legitimate state interests exist in regulating bank holding company activities. *See id.* at 2015. Under *Lewis*, state statutes that do not burden interstate commerce in violation of the *Pike* balancing test are not constitutionally invalid under the commerce clause. *Id.* at 2019. The *Lewis* Court held that state regulation of bank holding companies under § 3(d) of the BHC Act may only create an exception to federal restriction on interstate branching. *Id.* at 2021; *see* 12 U.S.C. § 1842(d) (1976). Similarly, the Court determined that non-banking activities are regulated under § 4 of the BHC Act. *Id.*; *see* text accompanying notes 47 & 48 *supra*. After *Lewis* the Federal Reserve Board may view the Court's interpretation of § 3(d) and § 4 as preemptive of state regulatory power.

[67] Other cases under § 4(c) have considered whether a closely-related-to-banking activity can qualify under § 4(c) to escape the § 4(a) prohibition on non-banking activities. *See* note 37 *supra*. *See generally* 12 C.F.R. § 225.4 (1980).

[68] *See* 100 S. Ct. at 2021. The *Lewis* Court unambiguously interpreted sections 3 and 4 of the BHC Act with respect to powers delegated to the states. *Id.* The Court stated without limitation that § 3(d) authorizes no state restriction of bank holding company activities and that § 4 regulates non-banking activities independently. *Id.*

[69] *Id.* The Court said it is "doubtful" that § 3(d) authorizes state restrictions "of any nature" on bank holding company activities. *Id.*

[70] *Id.* The Court carefully distinguished between the prohibitionary nature of the Florida statute and the "permits" language in § 3(d), which limits the grant of power to expressed prohibition by states of interstate bank branching by bank holding companies. *Id.*; *see* 12 U.S.C. § 1842(d) (1976); FLA. STAT. § 659.141(1) (Supp. 1979). The Florida statute expressed the bank holding company regulation in explicitly prohibitionary language. The *Lewis* Court interpreted "permits" in § 3(d) to authorize the states only to create exceptions to the general federal restriction on interstate bank branching of bank holding companies. *Id.* at 2021; 12 U.S.C. § 1842(d) (1976).

[71] PA. STAT. ANN. tit. 7, § 6003 (Purdon) (1967); ILL. ANN. STAT. ch. 16½, § 73 (Smith-Hurd 1960 & Supp. 1980).

[72] The bank holding company statutes of both Pennsylvania and Illinois prohibited any action by a business organization that would qualify it as a bank holding company or any action to merge or consolidate with a bank holding company. *See* note 71 *supra*. Furthermore,

State statutes that regulate but do not generally prohibit bank holding company activity may also exceed the authority given by section 3(d).[73] Georgia's statute grants the Banking Commission power to prohibit any monopolistic or anticompetitive bank holding company activities.[74] Under the commerce clause analysis in *Lewis*, these restrictions potentially burden interstate commerce even more than a blanket prohibition which applies uniformly to in-state and out-of-state bank holding companies.[75] Read broadly, *Lewis* bars comprehensive state regulation of the banking and non-banking activities of bank holding companies.

If the Supreme Court elects to apply its interpretation of the BHC Act in *Lewis* strictly, the present state-federal balance in banking regulation may change.[76] Federal Reserve Board regulation of bank holding company activities at the holding company organization level is limited[77] and generally has been supplemented by state regulations reflecting the economic and financial climate of the individual states.[78] After *Lewis*, states may not regulate the non-banking activities of bank holding companies in a way that unduly burdens interstate commerce.[79] Comprehensive federal regulation, however, does not yet exist.[80]

In March, 1980, Congress passed the Depository Institutions Deregulation and Monetary Control Act of 1980.[81] The statute relaxed many ex-

---

the purpose of both state statutes is to maintain competitive banking and protect the independence of small banks. *See* PA. STAT. ANN. tit. 7, § 6002 (Purdon) (1967); ILL. ANN. STAT. ch. 16½, § 71 (Smith-Hurd 1960 & Supp. 1980).

[73] The *Lewis* Court first considered whether the state statute unduly burdened interstate commerce in violation of the *Pike* balancing test. 100 S. Ct. at 2015. State restrictions on bank holding company activities that are invalid under *Pike* are not authorized by sections 3(d), 4, or 7 of the BHC Act. *Id.* at 2021-22. Notwithstanding the general reservation of power to the states in § 7, the *Lewis* Court limited state regulation under that section to the boundaries of the commerce clause. *Id.* at 2022; *see* text accompanying notes 34-35, 42-45 *supra*, note 85 *infra*.

[74] GA. CODE ANN. § 13-207.1(b)(1)-(2) (Supp. 1980).

[75] By granting to an executive branch official the power to license bank holding company activities, the Georgia statute risks creating an enforcement system that may be discriminatory in practice. *Cf.* 100 S. Ct. at 2018-19 (Florida regulation found discriminatory). *But see* Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 126 (1978). *See also* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

[76] *See* Scott, *supra* note 2, at 1; text accompanying notes 1-3 *supra*. Comprehensive federal regulation of bank holding company organization does not yet exist to replace state regulations invalidated in light of *Lewis*. *See* text accompanying note 80 *infra*. *See generally* 12 C.F.R. § 225.4 (1980).

[77] *See* 12 C.F.R. § 225.4 (1980).

[78] *See, e.g.*, CAL. FIN. CODE §§ 3700-3704 (West Supp. 1979); GA. CODE ANN. §§ 13-207 & 13-207.1 (Supp. 1980); *see* Hablutzel, *supra* note 1, at 679; Scott, *supra* note 2, at 1.

[79] *See* notes 26-33 *supra*.

[80] Regulation of specific activities of bank holding companies exist under appropriate legislation, such as federal securities and banking laws. *See* 100 S. Ct. at 2016 n.7. There is no present federal regulatory scheme, however, that supervises bank holding company structure and organization. *See id.*; note 76 *supra*.

[81] Pub. L. No. 96-221, 94 Stat. 132 (1980).

isting regulatory controls on the banking industry,[82] and amended the BHC Act to include an eighteen-month prohibition on trust company activities by bank holding companies.[83] The *Lewis* Court interpreted the trust company provision to prohibit any such activity by bank holding companies as a matter of federal law.[84] Thus, in the narrow area of trust company subsidiaries Congress has regulated a specific non-banking activity of bank holding companies and has preempted similar state regulation.[85]

The banking industry is the focus of a variety of economic interests and public policy concerns.[86] State and federal governments often have conflicting regulatory objectives.[87] In addition, bank holding companies operate in a climate of deregulation and economic instability.[88] The Supreme Court's interpretation of the BHC Act in *Lewis* will contribute to the uncertainty in the existing bank holding company regulatory structure.[89]

BEVIN R. ALEXANDER, JR.

---

[82] *See id.* at 142-45, 186-93 (§§ 201-210, 701-806) (amendments to existing banking law include "phase-out" of maximum interest rate regulations (§ 202) and efforts to reduce expensive, paperwork-generating supervisory regulations (§ 802)).

[83] *Id.* at 189 (§ 712). The conference report failed to comment on the legislative purpose in amending § 3(d), rather than placing the amendment in § 4. *See* H. CONF. REP. No. 96-842, 96th Cong., 2d Sess. 83, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 896.

[84] 100 S. Ct. at 2022-24. *See also* note 88 *infra.*

[85] Congress inserted the trust activity moratorium into § 3(d) rather than into § 4(c), even though trust company activities are permissible closely-related non-banking activities. *See* 12 C.F.R. § 225.4(a)(4) (1980); HELLER, *supra* note 37, at 234. The 1980 amendment to § 3(d) suggests that Congress did not intend a gap to exist between § 3(d) and § 4(c). *See* text accompanying notes 42 & 45 *supra.* At the same time, the statutory placement of the trust activity amendment illustrates the narrow distinction between preemption by federal regulation and a grant of federal power to the states. *See* 100 S. Ct. at 2021-22; Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 423-31 (1946); text accompanying note 22 *supra.* Although Congress has not clarified the legislative intent underlying the trust activity restriction, the *Lewis* Court's interpretation of the BHC Act is apparently different from that of Congress. *See* 100 S. Ct. at 2021; H. CONF. REP. No. 96-842, 96th Cong., 2d Sess. 83, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 896; text accompanying notes 35-54 *supra.* Congress may choose to restructure the relationship between § 3 and § 4, as interpreted in *Lewis*, and thereby invalidate the Court's analysis of the BHC Act.

[86] *See* P. Laub, *The Deregulation of Banking*, THE DEREGULATION OF THE BANKING AND SECURITIES INDUSTRIES 201 (L. Goldberg & J. White ed. 1979); M. JESSEE & S. SEELIG, BANK HOLDING COMPANIES AND THE PUBLIC INTEREST 34, 74 (1977); note 88 *infra.*

[87] The Pennsylvania and Illinois legislatures have expressed an interest in preserving the security of unit banking by prohibiting bank holding company organization. *See* text accompanying notes 61 & 72 *supra.* The Congress recognized a divergent national need for the financial power of diversified bank holding company activities. *See* H. CONF. REP. No. 91-1747, 91st Cong., 2d Sess. 15, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5561; Bankamerica Corp. v. Board of Govs., 596 F.2d 1368, 1376 (9th Cir. 1979).

[88] *See* text accompanying notes 85 & 86 *supra. See generally* Bush, *Inflationary Economics*, 119 TR. & EST. 34 (1980); Kreidmann, *Inflation: Quest for Solutions*, 25 N.Y.L. SCH. L. REV. 527 (1980).

[89] *See* text accompanying notes 85-88 *supra.*