

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X
DIRECTOR OF REVENUE OF :
MISSOURI, :
Petitioner :
v. : No. 99-1792
CoBANK ACB, AS SUCCESSOR TO :
THE NATIONAL BANK FOR :
COOPERATIVES :

- - - - -X
Washington, D.C.
Tuesday, November 28, 2000

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:13 a.m.

APPEARANCES:
JAMES R. LAYTON, ESQ., State Solicitor, Jefferson City, Missouri; on behalf of the Petitioner.
DAVID C. FREDERICK, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the petitioner.
RICHARD A. HANSON, ESQ., Chicago, Illinois; on behalf of the Respondent.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

	PAGE
ORAL ARGUMENT OF JAMES R. LAYTON, ESQ. On behalf of the Petitioner	3
ORAL ARGUMENT OF DAVID C. FREDERICK, ESQ. On behalf of the United States, as amicus curiae, supporting the petitioner	14
ORAL ARGUMENT OF RICHARD A. HANSON, ESQ. On behalf of the Respondent	19
REBUTTAL ARGUMENT OF JAMES R. LAYTON, ESQ. On behalf of the Petitioner	43

1 P R O C E E D I N G S

2 (11:13 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 99-1792, the Director of Revenue of
5 Missouri v. CoBank ACB.

6 Mr. Layton.

7 ORAL ARGUMENT OF JAMES R. LAYTON

8 ON BEHALF OF THE PETITIONER

9 MR. LAYTON: Mr. Chief Justice and may it please
10 the Court:

11 In 1933, when Congress authorized the
12 organization of banks for cooperatives, it implicitly
13 authorized the States to tax them. That authority became
14 effective for each bank when it retired the Government
15 shares. The National Bank for Cooperatives paid taxes to
16 Missouri until 1995, but according to the Missouri supreme
17 court the bank's tax liability ended in 1985. That court
18 failed to recognize the bank's exemption from taxes is and
19 always has been provided by statute, and that statute, now
20 12 U.S.C. 2134, exempts from taxation only the bank's
21 notes, debentures, and other obligations, not its income.

22 In deciding what section 2134 means, the
23 Missouri supreme court erred in three respects. It
24 transformed a technical and conforming amendment into a
25 significant change in the Farm Credit Act, it made that

1 transformation by adding to the plain language of the
2 statute, and it turned the statute into something that is
3 incongruous to the rest of the Farm Credit Act.

4 Before 1985, the statute provided that CoBank
5 and its predecessors would always pay taxes on real and
6 tangible personal property and, at any time when the
7 Government did not own shares, they would pay other taxes
8 to State and local governments and perhaps even to the
9 Federal Government. The question arises here as to what
10 happened in 1985, and the position being taken by CoBank
11 is that in 1985 suddenly they were freed from all taxes,
12 and yet that is not what the statute said in 1985.

13 There was a technical and conforming amendment
14 that appeared in title 2 of the 1984 -- 5 act. Title 2
15 was the part of the act that was dedicated to making the
16 Farm Credit Administration an arm's length regulator for
17 the farm credit system, something more akin to what we see
18 at the FDIC and other bank regulators in the Federal
19 system. Title 1 of that act also included conforming
20 amendments. Title 1 dealt with the credit corporation
21 which CoBank cites here as a new vehicle for investment
22 into the farm credit system.

23 The second point that the Missouri court erred
24 on is transforming the plain language by adding to it.
25 The plain language of the statute is simply that this

1 entity is exempt from taxation as to its notes, debentures
2 and other obligations. Ever since 1933, the entire scope
3 of the exemption given to the banks for cooperatives has
4 been contained in statutes.

5 The only thing that anyone can point to in the
6 statute today that goes beyond notes, debentures, and
7 obligations is the reference to this entity as a Federal
8 instrumentality, but this Court has at various times
9 suggested or, in fact, held that Federal instrumentality
10 does not have the kind of meaning that CoBank ascribes to
11 it.

12 QUESTION: It has, I take it, been described as
13 such by statute from the very beginning.

14 MR. LAYTON: From the very beginning, Your
15 Honor, and that's significant, because even in 1933, what
16 rights or abilities a Federal instrumentality had was
17 unclear. Certainly --

18 QUESTION: But don't we have -- isn't the
19 statute -- as I understand the statute, it used to say,
20 your bonds are exempt and your income is exempt as long as
21 the stock's being held by the Board of Governors.

22 MR. LAYTON: That's right.

23 QUESTION: All right. Now, they get rid of the
24 second part because nobody holds the stock any more.

25 MR. LAYTON: That's right.

1 QUESTION: All right. So we're left with the
2 first part.

3 MR. LAYTON: That's right.

4 QUESTION: And what you rather brilliantly say
5 is, ha-ha, that means McCulloch clicks in.

6 MR. LAYTON: Well --

7 QUESTION: And since McCulloch clicks in, since
8 it doesn't say it doesn't, they're exempt anyway as a
9 Federal instrumentality.

10 MR. LAYTON: Well, I think that's what they say.
11 That isn't what we would say.

12 QUESTION: Right. Right. That's what they say.

13 MR. LAYTON: We would say that they're not --

14 QUESTION: Exactly, right.

15 MR. LAYTON: That's right, and this Court, and
16 in fact Congress has never suggested that there could be
17 this kind of a hybrid provision for exemption. In each of
18 the instances where we have a financial institution that
19 seeks an exemption from taxes, Congress has either defined
20 the whole scope of that exemption, or left it blank.

21 QUESTION: All right. Now, given that's their
22 argument, and given we're left with the remnant, why
23 doesn't McCulloch click in?

24 MR. LAYTON: Well, first off that -- the
25 McCulloch -- well, McCulloch holds that a Federal

1 instrumentality cannot be taxed discriminatorily and in
2 fact goes beyond that to say you can't import -- impose
3 certain kinds of taxes. McCulloch, however, does not
4 suggest that anything that might be labeled a Federal
5 instrumentality qualifies.

6 QUESTION: One obvious reason -- one obvious
7 reason would be because they're not a Federal
8 instrumentality. That's A.

9 MR. LAYTON: That's A.

10 QUESTION: Now, is there a second argument
11 lurking here, that --

12 MR. LAYTON: Yes.

13 QUESTION: That's what I'm --

14 MR. LAYTON: That McCulloch is restricted to an
15 instrumentality of the type that this Court addressed in
16 the New Mexico case, and we can see the comparison fairly
17 bluntly here.

18 The Second Bank of the United States was run by
19 presidential appointees. The Federal Government owned 20
20 percent of the shares in that bank, and that bank
21 performed governmental functions, not just functions in
22 which the Government had an interest, but it actually
23 issued currency. It did things that the Government itself
24 must do. In that sense, the Second Bank of the United
25 States was a little like the Red Cross that this Court

1 addressed in the Department of Employment case. Again,
2 presidential appointees run the Red Cross, and that entity
3 fulfills treaty obligations that the United States assumed
4 under the Geneva Convention.

5 The -- CoBank mentions the Rural Telephone Bank
6 in their brief. Well, the Rural Telephone Bank has a 13-
7 member board of directors. Seven of them are appointed by
8 the President of the United States. The Governor of the
9 Rural Telephone Bank is appointed by the Secretary of
10 Agriculture, and there is a direct appropriation from
11 Congress in a -- over a 10-year period of -- or 20-year
12 period of \$600 billion for the Rural Telephone Bank.

13 By contrast, here we have an entity that from
14 the beginning has been controlled by a board of directors
15 that is appointed by its voting shareholders, which did
16 not include the United States. That is, by the borrowers.
17 It has always been a private entity, quite distinct from
18 the things that we see in McCulloch.

19 So what's the distinction from McCulloch?
20 McCulloch holds that if you have something that is an
21 instrumentality of the type that is the Second Bank of the
22 United States, then in fact there is, absent any
23 congressional language, immunity.

24 QUESTION: Well, I guess on the side of your
25 opponent is the fact that these banks were created to

1 perform an important governmental function by extending
2 reliable credit to farmers at the lowest possible cost.

3 MR. LAYTON: And that's certainly true.

4 QUESTION: Right? I mean, that was an important
5 governmental interest.

6 MR. LAYTON: Yes.

7 QUESTION: And by subjecting them to taxation,
8 it's going to drive up that cost.

9 MR. LAYTON: Well, it may or may not drive up
10 that cost. It's interesting to look a little at the
11 history of what happened here. In 1933 --

12 QUESTION: Assuming it does --

13 MR. LAYTON: Assuming it does, assuming that it
14 does drive up the cost, then that would certainly affect
15 the ability of these entities to fulfill that interest in
16 which the Government has an interest, yes, it would.

17 QUESTION: Is that enough, then, to exempt them
18 from that interest?

19 MR. LAYTON: No, it is not. It is not. If that
20 were enough, then anything that Congress creates within
21 its power and says it has a governmental interest could be
22 exempted, or inherently exempted from State tax.

23 QUESTION: Would you amend your answer to say,
24 anything the Government calls an instrumentality?

25 MR. LAYTON: Well, no. I don't know that the

1 Government has to call something an instrumentality in
2 order to give it the exemption under that approach.
3 Again, instrumentality doesn't have a meaning that is
4 precise as CoBank wishes that it did.

5 QUESTION: Did the statute in McCulloch say --
6 use the term, instrumentality of the United States?

7 MR. LAYTON: No. There was no statute in
8 McCulloch that referred to a tax exemption, and that is
9 one of the distinctions.

10 QUESTION: No, I mean, but the statute creating
11 the Bank of the United States.

12 MR. LAYTON: As far as I know, it did not.

13 QUESTION: Did it call it an instrumentality of
14 the United States?

15 MR. LAYTON: No.

16 QUESTION: My recollection is that it didn't.

17 MR. LAYTON: I -- there's no mention in the case
18 suggesting that it did, and that matters in the sense
19 that -- well, not just that it didn't use that phrase, but
20 there's no exemption statute at issue in McCulloch. That
21 is, Congress, when it created the Second Bank of the
22 United States, didn't say, okay, you have the following
23 exemptions from State and local taxes, but that's what
24 Congress at least since 1916, when it started the farm
25 credit system, has done consistently for the financial

1 entities within the farm credit system.

2 QUESTION: Mr. Layton, there's a reason that the
3 other side gives for the exemption of the debt
4 obligations, because, they say, those obligations are held
5 not in the hands of CoBank but in the hands of the
6 lenders, so you need an exemption so that those lenders,
7 who are private and not government instrumentalities,
8 won't be taxed.

9 MR. LAYTON: Well, it's curious that they make
10 that claim in a brief where they also cite the Memphis
11 case in section 742 of, I believe it's title 31, which, if
12 this entity is part of the United States, that is, if this
13 bank of cooperatives has the inherent authority that they
14 ascribe to it, then 742 would cover them, and this
15 provision would be superfluous in 2134. But it doesn't
16 cover them, because they are not an instrumentality of
17 this sort, and Congress has defined the scope of their
18 authority.

19 In 1928, this Court in the Shaw v. Gibson-
20 Zahniser Oil case, just a few years before the 1933 act
21 that created the Bank for Cooperatives, pointed out that
22 there are instrumentalities of the United States that do
23 not have exemptions unless Congress gives them an
24 exemption, and then 5 years later Congress in this
25 instance defines what the exemption is, and what CoBank

1 and what the Missouri supreme court have done is to say,
2 well, that definition by Congress doesn't really matter.

3 The third point that I mentioned was that it
4 turns the statute into something in Congress with the rest
5 of the Farm Credit Act. That is, in each instance in the
6 Farm Credit Act, where Congress has created an entity that
7 is even -- that is analogous to this particular one,
8 Congress has said, okay, here is the kind of exemption
9 that you have from State and local taxes. It always is a
10 comprehensive statement, and does not leave room for some
11 kind of an argument that there is an additional exemption
12 based on some kind of inherent immunity, and in each
13 instance it permits taxation of real property and in many
14 instances taxation of tangible personal property.

15 And one of the differences that occurred in
16 1985, according to CoBank, is all of a sudden the statute
17 changed from allowing State and local governments to tax
18 tangible personal property to including only a real
19 property exemption which they ascribe back to the dicta in
20 McCulloch.

21 In fact, there may be a problem with tangible
22 personal property. I'm not sure how much of that CoBank
23 would be likely to foreclose upon, but the same statutory
24 language is used for the production credit associations,
25 and it is easily understood that there would be tractors

1 and other equipment that they would foreclose upon that
2 would justify the need for a provision for taxation on
3 tangible local -- tangible personal property.

4 QUESTION: Do we have some cases that say that
5 if you call it a technical amendment, then we can go back
6 behind the intention of the Congress as, treat it as
7 something of a different order than a straight-out
8 repealer?

9 MR. LAYTON: No. There are a couple of cases
10 cited in our brief that stand for the proposition that we
11 don't expect Congress to use technical amendments to make
12 this kind of a change, but neither of them actually says,
13 yes, we can then go back behind the language to determine
14 what Congress did.

15 But here you don't have to go behind the
16 language to committee reports or something like that.
17 Just look at what the language was. If Congress wanted to
18 do what CoBank now says they did, all they had to do was
19 eliminate the last sentence in the prior statute. That
20 is, the sentence that said, okay, here's the point at
21 which the State's authority to tax begins.

22 If that had been the scope of the -- of
23 Congress' action, just eliminating that last sentence,
24 then except for the tangible personal property question
25 CoBank would have today exactly what they wanted, but that

1 sentence says, okay, the exemption that we are giving you
2 in the prior sentence -- that is, you don't have one until
3 we give it to you. The exemption we are giving you in the
4 prior sentence is going to apply only to a certain point.

5 And when Congress acted here, they took out not
6 just the, okay, it applies at a certain point, but
7 exemption that they had given, and so today there is no
8 exemption in the statute, and the banks for cooperatives
9 are responsible for paying taxes to State and local
10 governments.

11 If there are no further questions, I'll reserve
12 the rest of my time for rebuttal.

13 QUESTION: We'll hear from you now, Mr.
14 Frederick.

15 ORAL ARGUMENT OF DAVID C. FREDERICK
16 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
17 SUPPORTING THE PETITIONER

18 MR. FREDERICK: Thank you, Mr. Chief Justice,
19 and may it please the Court:

20 Our position is that banks for cooperatives
21 under the Farm Credit Act are not exempt from State income
22 taxes for two reasons. We think the Court should confine
23 its decision to an analysis of the text of the Farm Credit
24 Act, and not go beyond it to discuss or address the
25 constitutional issues relating to Federal

1 instrumentalities.

2 Under the text of the act itself there are two
3 reasons why banks for cooperatives are not exempt from
4 State income taxes. First, as the State counsel noted, at
5 section 2134, the first sentence itself just addresses an
6 exemption for notes, debentures, and obligations. That
7 provision contrasts with two other provisions of the Farm
8 Credit Act that specifically give State income tax
9 exemptions for other entities of the farm credit system.
10 12 U.S.C. 2023 provides an exemption from State income
11 taxes for farm credit banks and provides expressly that
12 Congress intended for those entities to be exempt from
13 State income taxes.

14 Moreover, 12 U.S.C. 2098 provides an express
15 exemption from State income taxes for Federal land bank
16 associations. It's clear, therefore, that when Congress
17 enacted this statute, and it amended it over a 50-year
18 period, it knew precisely how to give the kind of
19 exemption from State income taxes being asserted by
20 respondents in this case and chose not to do so.

21 Secondly, the history behind this provision, as
22 the Stte counsel made perfectly clear, does not support
23 respondent's position. Between 1933 and 1985, the text
24 itself provided for the exemption from State income taxes
25 only in any part of a year in which the Government owned

1 stock. That ended in 1968. From a period between 1965
2 and 1968, the Government retired all of its shares of
3 stock in banks for cooperatives.

4 So as of 1968, and this is reflected in the Farm
5 Credit Administration's annual report, banks for
6 cooperatives were not exempt from Federal and State income
7 taxes. When Congress made its amendment nearly two
8 decades later, in the 1985 Farm Credit Amendments Act,
9 there was no Government ownership in any banks for
10 cooperatives. These were completely privately owned for-
11 profit entities and, as such, would have been subject to
12 State income taxes throughout the entire period.

13 Now, the last point that I'd like to make is
14 that the Court should not reach out to opine about
15 instrumentality status generally. This -- the Court
16 consistently under the Farm Credit Act has looked at the
17 text of the act to determine the scope of exemptions from
18 taxation, and that's true in all of the cases that have
19 been cited by the parties under the Farm Credit Act. It
20 should not use this case to opine broadly about what
21 instrumentality status means for several reasons.

22 First, Congress uses the term, instrumentality,
23 in a broader range of contexts, and even in this case and
24 in this statute itself, has used it to describe not only
25 the organizations that are being used to facilitate

1 Congress' purpose, but also the financial instruments
2 themselves. Section 2023, which is the Farm Credit Bank
3 tax exemption provision, describes the notes themselves as
4 the instrumentalities of the United States, and so by
5 making a decision about what instrumentality status means,
6 the Court could end up having -- could create unintended
7 consequences that would affect the taxable status of
8 instrumentalities throughout the Government.

9 QUESTION: Well, maybe Congress has already
10 created that confusion by using the term inconsistently.

11 MR. FREDERICK: Mr. Chief Justice, that is
12 certainly an area that Congress would certainly want to
13 address. The question, though, is, by using that term,
14 and I would give a second reason, and that's that Congress
15 imposes certain obligations on agencies and
16 instrumentalities that are apart from tax questions,
17 reporting obligations for data to the Secretary of
18 Commerce, encouraging --

19 QUESTION: Yes, but Mr. Frederick, isn't it true
20 that for purposes of deciding this case, if we have to
21 -- if we rule in your favor and the favor of the
22 petitioner, we must decide that the mere fact that it's
23 labeled an instrumentality is not sufficient to give a tax
24 exemption?

25 MR. FREDERICK: No, Justice Stevens. What the

1 Court would say is that use of the instrumentality
2 language by itself would not render the rest of the tax
3 exemption language in the Farm Credit Act surplusage, and
4 the Court would say that Congress defined the scope of the
5 tax exempt status of these particular instrumentalities by
6 expressly dealing with tax exempt status, and that's how
7 the court did it in the First Agricultural Bank case in
8 1968, when it addressed a very similar question for the
9 national banks, and there the Court said, we're going to
10 look at the text of the statute to determine the scope of
11 the exemption and not reach --

12 QUESTION: Well, we would at least have to say
13 that the mere fact they have used the term instrumentality
14 is not sufficient to overcome the statutory argument.

15 MR. FREDERICK: That's correct, where there is
16 express tax-exempt language given by Congress. I mean,
17 even in McCulloch itself the Court said that it was up to
18 Congress to decide how it wanted to exercise its powers
19 under the Necessary and Proper Clause.

20 QUESTION: So is it your principal submission
21 that we should look at the act in its pre-1985 status?

22 MR. FREDERICK: Well, we think that the '85
23 language which is present here is, in and of itself,
24 sufficient, but it is also supported by the history of the
25 statutory evolution from 1933, which makes perfectly clear

1 Congress did not intend for these entities to be tax-
2 exempt when the Government did not own shares in them.

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

5 QUESTION: Thank you, Mr. Frederick.

6 Mr. Hanson, we'll hear from you.

7 ORAL ARGUMENT OF RICHARD A. HANSON

8 ON BEHALF OF THE RESPONDENT

9 QUESTION: Your opponent said that your client
10 continued to pay taxes to the State of Missouri from,
11 what, 1985 to 1995, is that correct?

12 MR. HANSON: Perhaps I could clear that up, Your
13 Honor. In the first place, the bank was not formed until
14 1989, so that we obviously didn't have any liability prior
15 to that date.

16 QUESTION: How about from 1989 to 1995?

17 MR. HANSON: The bank did, in fact, pay tax, and
18 fairly promptly, beginning with the year 1991 filed refund
19 claims to recover that tax. I would submit that to the
20 extent that they were slow in making those claims, it
21 might have had something to do with the fact that the
22 entire farm credit system had more serious problems to
23 worry about in the late 1980's which was, frankly, its
24 survival.

25 One point that all parties seem to agree upon,

1 and certainly the Court's opinions make this clear, is
2 that the question of whether or not an entity is entitled
3 to immunity as a Federal instrumentality is up to
4 Congress. The Court said that in the New Mexico, the --
5 Missouri said that in their briefs, the Solicitor General,
6 of course, said the same thing.

7 What we now have here, we would submit, is a
8 case where congressional designation as a Federal
9 instrumentality somehow carries less weight than a
10 judicial determination of Federal instrumentality.

11 QUESTION: Well, the question is was there
12 really any congressional determination, considering that
13 when one thing we know for sure from '68 to '85, Congress
14 meant these entities to be subject to income tax, and they
15 were. What happened in '85? What Congress meant is far
16 from clear.

17 MR. HANSON: Well, let me go through the history
18 briefly of the banks for cooperatives, because I think
19 that answers your question. They were formed in 1933. At
20 that time, if you look at decisions like James v. Dravo
21 Corporation, to be a Federal instrumentality meant -- and
22 I don't think there would have been any dispute, that you
23 were exempt from Federal income tax absent an affirmative
24 authorization. The banks were, and the Farm Credit Act
25 was then in 1971 completely recodified and Congress again

1 affirmatively, not merely carry-over, but affirmatively
2 said, the banks for cooperatives are -- continue to be
3 federally-chartered instrumentalities of the United
4 States. That's 1971. They did that at a time when the
5 Federal Government owned no stock in that entity, and they
6 said the reason --

7 QUESTION: But there was still a provision for
8 the Government to come back and use --

9 MR. HANSON: To invest in the stock.

10 QUESTION: Yes.

11 MR. HANSON: What changed in 1985 is that the
12 form of potential Government investment changed, and it
13 changed not because of some sense of a difference in the
14 structure of these entities, it changed because Congress
15 determined that a centralized entity, the Farm Credit
16 Capital Corporation, could serve a number of warehousing
17 and centralized financing functions, and it would then
18 become the entry point for Federal investment.

19 So what we have is, in effect, instead of the
20 money going directly to the bank for cooperatives, it
21 would go to the Capital Corporation, which would then
22 provide it to the banks for cooperatives, and I would
23 submit that that's --

24 QUESTION: The infusion would be a loan type --

25 MR. HANSON: It would be a loan, and if you look

1 at the statute, it's a subordinated loan. It's
2 subordinated to all of the debt of the system. It's
3 subordinated to the capital provided by the members.

4 QUESTION: It's still not up --

5 MR. HANSON: It's still not equity, I would
6 agree, but if you -- I mean, if you were trying to value
7 the debt versus the equity and compare their security and
8 their claims on the assets, I think you would find that
9 there very little distinction.

10 QUESTION: You only tax the income-earned
11 equity, don't you? I mean, basically the income of the
12 bank is -- the income goes to the equity holder, doesn't
13 it?

14 MR. HANSON: The income goes -- the income of
15 the bank is used for four purposes, and these are provided
16 in the statute. The first purpose is to -- and I'll do
17 this in the context of 1991, which is the first year
18 before the Court. The first use is to rebuild the capital
19 of the bank, because you can't function as a lender
20 without capital to provide security to your bond holders.

21 The second use -- and this is all set out in
22 section 2132 with respect to BC's. The second use is to
23 rebuild loss reserves, or to make sure that loss reserves
24 are adequate. These are both things that are necessary
25 for the bank to function.

1 The third use, of course, in these years is to
2 pay back the Government loan and, as we indicated in our
3 brief, the Bank for Cooperatives National Bank and its
4 successor, CoBank, paid back something like \$300 million.

5 None of those things actually affect earnings.

6 QUESTION: No, but I mean, my point is simply,
7 if I own your bank -- you might be very nice -- I would
8 expect the State to tax the income, but if the Government
9 owns the bank, probably it wouldn't, and that's what the
10 statute seemed to say. And then in '85 the Government
11 doesn't own the bank any more. It lends money to the
12 bank. Well, so, why would you expect the State not to be
13 able to tax the income? It isn't the Government's any
14 more.

15 MR. HANSON: But it's not the bank's income,
16 either.

17 QUESTION: Whose is it?

18 MR. HANSON: It is the members' income.

19 QUESTION: All right.

20 MR. HANSON: That's the very nature of a
21 cooperative. I mean, a cooperative is --

22 QUESTION: What was the fourth purpose? You
23 said there were four -- four things that --

24 MR. HANSON: The fourth would be, and this is
25 because we are a cooperative, would be a distribution to

1 our member borrowers according to the business they did
2 with the bank, not according to their capital, and as this
3 Court pointed out in Kiowa County, the purpose for that
4 distribution is not a purpose to return an investment to
5 the borrower. It's to reduce the cost of his loan,
6 because one of the fundamental missions of the farm credit
7 system, again as this Court has recognized, is to provide
8 loans for farmers at the lowest possible cost.

9 QUESTION: If your client had never been
10 financed by the Federal Government, the fact that it had
11 those priorities for distribution wouldn't entitle it to
12 any sort of a tax exemption, would it?

13 MR. HANSON: No, but I think they make the point
14 that the bank itself is not a for-profit entity. It is a
15 cooperative.

16 QUESTION: Why does that bear on its tax
17 immunity?

18 MR. HANSON: Well, it bears on why Congress
19 would give the bank a designation as a federally-chartered
20 instrumentality of the United States. The mission of the
21 farm credit system -- it's set out in the statute, it's
22 been recognized in your cases, is to provide secure and
23 adequate lending to agricultural borrowers at the lowest
24 possible cost.

25 QUESTION: All right, but the lowest possible

1 cost argument would not have washed before the '85
2 amendment, because before the '85 amendment it was very --
3 as I understand the statute it was very explicit. That
4 even though you could reduce the cost by rendering the
5 bank nontaxable, you would only -- or the bank's income,
6 you would only do that if the United States was in part an
7 owner.

8 MR. HANSON: Right.

9 QUESTION: And once the United States dropped
10 out, we didn't care whether it made the loans more
11 expensive. Why would there be a different policy in
12 effect now from the policy in effect then? Why did we
13 become -- why did Congress become more sensitive to cheap
14 loans after '85 than before?

15 MR. HANSON: Well, I don't think Congress was
16 any less sensitive. If you go back to 1933, when the
17 banks were formed, it was obviously the Depression, and
18 Congress did what the Court acknowledges that it does. It
19 balanced the interests of a Federal program to provide
20 secure and adequate and inexpensive financing to farmers
21 with the fact that the States were also suffering from the
22 Depression, and so the compromise that was struck in
23 Depression conditions was, you can't tax these entities as
24 long as there's a Federal investment, but we will let you
25 tax them when that investment is retired.

1 As Missouri itself put it in its brief, they
2 said, you know, if the Federal Government has an
3 investment in the bank -- an investment here cannot
4 realistically turn on whether it is equity or debt. I
5 mean, in either case, as I suggested earlier, the terms
6 are such that it's a Federal claim. They said the States
7 ought to be understood to have to stand aside until that's
8 paid back.

9 What changed in 1985 is, Congress recapitalized
10 the system.

11 QUESTION: Okay, but Congress was saying before
12 1985, as long as we are an owner, our interest comes
13 before the State interest.

14 MR. HANSON: Yes.

15 QUESTION: That isn't necessarily a cheap loan
16 policy. It's a favor-the-United States policy.

17 After 1985, the United States says, we're not
18 going to be owners any more. Therefore, there's no need
19 to favor the United States, and therefore there's no need
20 to provide a nontaxable policy. At each time, before '85
21 and after '85, the United States' policy with respect to
22 the effect of the cost of borrowing on borrowers, on this
23 analysis, would be exactly the same.

24 MR. HANSON: Right.

25 QUESTION: The only thing that's changed is, we

1 don't have the United States in an equity position to
2 favor any more, therefore there's no need to provide for
3 nontaxability.

4 MR. HANSON: Well, I mean, certainly there's
5 nothing in the legislative history that suggests that that
6 analysis was undertaken. I'm not saying that Congress
7 might not have thought it through that way, but going back
8 to what Justice Breyer was asking me about the profits and
9 income of a bank, there is no source to pay back the
10 United States, except the income.

11 QUESTION: No, my question is actually the same
12 as Justice Souter's, that --

13 QUESTION: No, go ahead.

14 QUESTION: I'm probably just going to put it in
15 a slightly different way, but -- you have three sentences
16 in this statute.

17 MR. HANSON: Right.

18 QUESTION: The first sentence that says no, no
19 tax on bonds, all right. The second said, no tax on
20 income, and the third one said, sentence 2 applies only
21 when we're -- the Government's an investor.

22 MR. HANSON: Right.

23 QUESTION: All right. Now, just out of
24 curiosity, let's suppose that was still the statute.
25 We're back in '84. Why can the State tax a bank's income

1 even where the Government doesn't have an investment?

2 MR. HANSON: They clearly could under the
3 statute, because --

4 QUESTION: No. What do you mean, it clearly
5 could -- wait --

6 MR. HANSON: I apologize, Your Honor.

7 QUESTION: That's -- the point is, the statute
8 doesn't say, it can't. The statute nowhere says that it
9 can or it can't. What the statute says is, it can't as
10 long as the Government has an interest. It doesn't say
11 what happens when the Government interest disappears. All
12 it says is that the preceding sentence exemption doesn't
13 apply when the Government interest disappears. That's
14 what my version says. It says, the exemption provided in
15 the preceding sentence shall apply only when the
16 Government is an owner.

17 MR. HANSON: That's correct. That's what it
18 says.

19 QUESTION: All right. Now the Government isn't
20 an owner. Therefore the preceding sentence doesn't apply.
21 Why doesn't McCulloch apply?

22 MR. HANSON: Well, and the answer is that the
23 legislative history from 1933 --

24 QUESTION: Fine.

25 MR. HANSON: -- makes it very clear.

1 QUESTION: What you're saying, there's a
2 negative implication.

3 MR. HANSON: That Congress was very clear about
4 that.

5 QUESTION: Fine. Now, once you say there was a
6 negative implication before, why doesn't that same
7 negative implication exist after '85, from the first
8 sentence, unless there's something in that '85 history
9 that shows that what they wanted to do was restore
10 McCulloch, and my reading is there isn't a word on that,
11 but you're prepared to say it wasn't the statute before
12 that wiped out McCulloch.

13 You're saying what wiped out McCulloch before
14 was a negative implication from the statute, and so my
15 question is simply, why isn't that negative implication
16 still there, just as strong as it ever was, unless, of
17 course, you can point to a reason? Now do you see my --
18 you see where I'm going?

19 MR. HANSON: I understand where you're going.

20 QUESTION: Yes. That's what I'd like the answer
21 to.

22 MR. HANSON: Well, and let me qualify part of my
23 answer, is that the statute has been understood by -- it's
24 never been construed by this Court, but it's been
25 understood by a number of State courts and -- consistent

1 with what Congress said. They said, what we are writing
2 with that third sentence is, not that we -- we won't tell
3 you what happens when there's no ownership, but we are
4 telling you affirmatively that you become taxable.

5 Now, was it artful language? Perhaps not. So I
6 don't think it's fair to say that the exemption -- that
7 the taxability previously existed by negative implication.
8 I think it was statutory and, of course, the answer, what
9 happened in 1985 was, the statute was repealed. Now, both
10 the exemption, I agree, and the negative implication.

11 One thing here that I think the Court needs to
12 focus on, and it's a major point made by the State and by
13 the Solicitor General, is they -- citing Rosello and cases
14 like that, they say, well, the farm credit banks have an
15 exemption, and the farm -- the Federal land bank
16 associations have an exemption, and you don't have an
17 exemption therefore, and I grant that that's a perfectly
18 valid rule of statutory construction.

19 But I think it's fair to say that someone ought
20 to at least offer a reason why it makes sense that
21 Congress would discriminate against -- differentiate.
22 They're not discriminating -- differentiate between a bank
23 for cooperatives which makes loans to an agricultural
24 cooperative or production credit association which makes a
25 loan to a farmer. It's also a property, but it's

1 otherwise identical, and a Federal land bank association
2 makes the same loan, and they've clearly granted a
3 statutory exemption in the one case but not the other.

4 Now, you know --

5 QUESTION: Well, why doesn't that text take care
6 of it? If you take the position that there's no inherent
7 exemption for this kind of organization, that you have
8 three organizations, and for two of them Congress has
9 provided expressly your income is exempt, and for one of
10 them it hasn't, so why isn't the assumption just from the
11 text that two of them have it and one of them doesn't?

12 MR. HANSON: Well, I mean, I think Congress is
13 normally presumed to legislate on a rational basis and
14 have a reason for what it's doing. My point is, and
15 particularly from --

16 QUESTION: I thought in the tax area Congress
17 could shed its grace where it will.

18 (Laughter.)

19 MR. HANSON: Well, I certainly agree with Your
20 Honor on that point, but 1985 -- and there is this change,
21 and we pointed it out in our brief, that when the banks
22 formed in 1933 and through 1971, in effect they were a
23 stand-alone element in the farm credit system. They
24 issued their own bonds. They made their own loans. They
25 were liable only for their own bonds and for their own

1 operations.

2 From 1975 through 1985 the entire system became
3 interlocking in terms of issuance of bonds and liability
4 therefore, and the operation of all the banks, so --

5 QUESTION: You say the entire system. What are
6 you referring to?

7 MR. HANSON: Well, I'm talking about the major
8 legs of the farm credit system, the -- what were
9 originally the Federal land banks and are now the farm
10 credit banks, the production credit associations, and the
11 banks for cooperatives. Those have always been the three
12 lenders.

13 But in 1985 CoBank is -- or, National Bank for
14 Cooperatives -- I'm sorry, 1989 -- is no longer simply
15 liable for its own operations. It doesn't issue its own
16 bonds. Its taxability doesn't affect only it. Now it
17 affects everybody else, because if Missouri can tax it, it
18 has less income to put into the pool to pay back the
19 Government.

20 QUESTION: That's all true, but are there some
21 other kinds of banks that are very similar that Missouri
22 can't tax? You're not saying there's some other very
23 related kind of bank that Missouri cannot tax?

24 MR. HANSON: I don't believe so.

25 QUESTION: No.

1 MR. HANSON: I mean, the national banks, which,
2 of course, have always been viewed and designated as
3 Federal instrumentalities, the statute now tells you what
4 to do. The other types of lending institutions, you know,
5 in the first place they're not designated as federally-
6 chartered instrumentalities. Again --

7 QUESTION: Well, isn't the obvious answer to
8 your question, what -- you say, well, the Government's
9 thought was, while we're the owner, Missouri can't tax us,
10 but once we're no longer the owner, because we don't own
11 stock, then it can, and if that raises the price of
12 credit, so be it. I mean, isn't -- that's what it seems
13 to say.

14 MR. HANSON: Well, then I guess I would --
15 that's one way of looking at it, but it seems frankly
16 implausible to me. I mean --

17 QUESTION: What about the other two --

18 MR. HANSON: -- because the Government -- I'm
19 sorry, Justice Scalia.

20 QUESTION: I thought you were done. Finish it.

21 MR. HANSON: The Government -- and again,
22 this -- part of the problem that we have with this is, we
23 recognize that there were distinctions made between the
24 banks. The Federal land banks, which were originally
25 capitalized --

1 QUESTION: It seems implausible -- you were
2 finishing your answer. It seems implausible to you
3 because?

4 MR. HANSON: That Congress would make that
5 determination with respect to the banks for cooperatives,
6 but it wouldn't make that determination with respect to
7 the other banks.

8 QUESTION: Are the other banks -- this was my
9 question. Does the Government own stock in the other
10 ones?

11 MR. HANSON: It does not own stock in the other
12 banks. It originally capitalized the Federal land banks,
13 which had been before this Court numerous times. But --

14 QUESTION: So you could not explain the
15 difference on the ground that the Government is a
16 participating investor in the others --

17 MR. HANSON: No, and --

18 QUESTION: -- in a formal sense, whereas it is
19 not here.

20 MR. HANSON: Those statutes -- their statutory
21 exemption continued after the Government's stock was
22 retired. It was not made conditional, as the banks for
23 cooperatives exemption was, as it appears to us, because
24 when the banks were formed in 1933, that was a political
25 calculation that Congress made. They said, the States are

1 desperate for revenue, and while we need to accomplish
2 this program, we're willing to make this accommodation.

3 QUESTION: But the accommodation didn't kick in
4 for 35 years.

5 MR. HANSON: That's right. It did not kick in
6 until the late 1960's, and that accommodation --

7 QUESTION: Kind of one-sided compromise.

8 MR. HANSON: Well -- I mean, partly that goes to
9 the nature of farming. You offered to buy the bank, and I
10 suspect I have members who would happily sell it to you.
11 But --

12 QUESTION: But it does show the Government was
13 willing to treat CoBank differently then, and there's no
14 reason to believe tht Government isn't willing to treat it
15 differently now, just as then you say the other
16 instrumentalities, even though the Government was no
17 longer a participating investor, would continue to have
18 their exemption, that was not the case for CoBank.

19 MR. HANSON: That's correct.

20 QUESTION: So it's always been treated
21 differently for --

22 MR. HANSON: There is that differentiation. But
23 it comes -- it all comes down to 1985, and did Congress
24 change the rules, and we suggest that the law before 1985
25 was, we are exempt as long as the Federal Government has

1 an investment, and technically in the stock of the bank,
2 and I understand that.

3 In 1985, Congress says, we have to provide a
4 line of credit to this entire system to keep it from
5 falling. It managed in 2 years to lose 40 percent of the
6 capital it had accumulated over 7 years.

7 And not only are we going to do that, but we're
8 going to make the whole thing interlocking in terms of how
9 it functions, and we're doing all of this because the bank
10 is critical, because the commercial banks will not lend to
11 agriculture in times of stress -- Congress said that in
12 1633 in '87 -- and because the farmers are suffering from
13 interest rates that they have to pay to the farm credit
14 system, which in large part was a function of the cost of
15 borrowing in the capital markets, because the capital
16 markets had lost confidence in the banks, so we had --

17 QUESTION: Congress said all this in a technical
18 and conforming amendment, but nothing to suggest that they
19 meant to do anything more than get rid of the obsolete
20 provision that referred to the Government's ownership.

21 MR. HANSON: Well, you know, the State has
22 suggested that that is the reference in the committee
23 report which describes this change, and we would submit
24 that's not true for two reasons.

25 First, as we pointed out in our brief, the

1 committee report refers to a version of the bill which did
2 not, in fact, establish -- it did not, in fact, repeal the
3 second sentence. It repealed only the third. I
4 understand that's a two-edged sword, but they say it's
5 only a technical and conforming amendment when what
6 Congress was doing was repealing only the third sentence
7 of the act, which would leave us with a complete
8 exemption, so I don't know that you can prove too much --
9 I don't know if I'm being clear about that.

10 QUESTION: But what puzzles me is if the tax,
11 the State tax was on from '68 to '85. If Congress was
12 saying, stop, States, you would expect that to be
13 something that people would stand up and take notice of,
14 and yet there's not anything explicit to suggest that
15 Congress meant to take away from the States the tax
16 authority that they had for this and the -- what is it,
17 the PCA's as well?

18 MR. HANSON: Yes, it was, basically.

19 QUESTION: That it meant to take that away from
20 the States.

21 MR. HANSON: Well, I think there are two answers
22 to that, and first is, as we've pointed out, you know,
23 this legislation started out, as legislation does, with
24 hearings and worrying about governmental regulation, and
25 farmers complaining about the cost of borrowing, and by

1 the time it got into the system in November, the question
2 was whether or not you could save the farm credit system,
3 because it turned out that it was basically hemorrhaging
4 money.

5 And Congress, the bill was introduced on, I
6 think, the 20th of November, and it was signed by the
7 President on the 18th of December. I mean, this went,
8 bang, bang, bang. It was described in the Wall Street
9 Journal as legislating on the fly. They were, you know,
10 as the Wall Street Journal would be very offended by that.

11 But -- so you have -- you have a lot of very
12 high priority concerns that Congress was trying to deal
13 with and articulate and explain, and then you've got this
14 State tax exemption which I'm -- and liability, which is
15 clearly important to Missouri, I've no doubt about that,
16 but on a list of priorities, I doubt that it was very high
17 when Congress was concerned -- as the comments on the
18 floor indicate, they're worried about losing the entire
19 system, and -- but I think the second point, and again, in
20 19 -- I know I'm repeating about this point, but in 19 --
21 prior to the change, the statute said that the bank was
22 exempt as long as the Federal Government owned stock in
23 the bank.

24 After 1985, if you accept our interpretation, we
25 are saying that the bank is exempt because the Federal

1 Government has reinfused capital, admittedly in a
2 different form, but certainly not financially,
3 economically different, and in a form for which the banks
4 were liable, so that I would submit that the only
5 difference between the circumstances in 1984 and 1986, if
6 you will, is that in the first place Congress was being
7 explicit, and in the second place Congress was relying
8 upon --

9 QUESTION: If you look at --

10 MR. HANSON: -- that designation.

11 QUESTION: I mean, that's why -- not everyone
12 agrees, but I like to look at legislative history, and you
13 would have expected, given -- even cooperative banks at
14 that time, they'd have lawyers who were doing this, and if
15 they thought that in removing words that grant an
16 exemption the intent was to give an even bigger exemption,
17 I would certainly think somewhere somebody would have said
18 something.

19 MR. HANSON: Well, I don't understand, and
20 I've -- we've never accepted this notion that somehow we
21 have a bigger exemption.

22 QUESTION: No, equal to.

23 MR. HANSON: I'm sorry, Your Honor, but -- well,
24 not even equal, because previously we were exempt from
25 Federal income tax. Subsequently we're not exempt from

1 Federal income taxes, and in -- I mean, and that's fairly
2 significant.

3 Now, you can say, well, doesn't that undercut
4 the notion of lending at the lowest possible cost? The
5 answer is, I think the Government is sort of indifferent
6 whether it gets its money -- in paying back the loan
7 whether it gets its money from taxes or gets a loan
8 repayment, and in fact the banks were never truly exempt
9 from Federal tax because they were -- even when they were
10 exempt from Federal income tax the statute imposed a
11 franchise tax based on net earnings, which is functionally
12 equivalent, so in that sense the status quo was
13 maintained, and I think that's our argument.

14 The status quo was maintained. The design was
15 maintained. The facts changed, and under the
16 circumstances, and given the pressure Congress was under,
17 I think it's entirely rational that they would look at
18 this -- I mean, the bill came out of the House on the 6th
19 of December. It was passed, completely changed and passed
20 by both Houses on the 10th.

21 I think it's -- you know, it's asking a bit much
22 to expect a nice, detailed explication of all the
23 provisions.

24 QUESTION: Could you go to the reason for the
25 tax, the Federal income taxability? Is it taxable under a

1 special statute that says, CoBank, pay Federal income
2 taxes now, or is it taxable simply because there's no
3 express exemption for CoBank?

4 MR. HANSON: It is -- it's taxable because the
5 Internal Revenue Code provides that it would be taxable
6 absent an express exemption, and there is none, so it's --
7 entities have always been subject to --

8 QUESTION: Does the code refer specifically to
9 this bank?

10 MR. HANSON: No. The code refers to Federal
11 instrumentalities and tells you how to --

12 QUESTION: Okay.

13 MR. HANSON: -- that they are exempt -- I'm
14 sorry, that they are taxable absent an express exemption
15 in the income tax law. It's 501(c)(1).

16 So -- you know, so the presumption, the pattern
17 is opposite for a Federal tax. You're taxable unless
18 there's a statutory exemption.

19 Here, and I'd like to simply conclude by where I
20 started. If you look at the New Mexico decision which
21 Missouri relies upon at length, and you go to page 736,
22 and I pick this out -- this is illustrative. You were
23 talking about whether those particular Federal contractors
24 were exempt from State tax, and you said, the Court's
25 other cases describing the nature of a, quote, Federal

1 instrumentality.

2 That is a term of art. It's been a term of art
3 since Justice Marshall first coined it in McCulloch v.
4 Maryland, and the one attribute that's always been
5 associated with a Federal instrumentality in this Court's
6 cases is an exemption from State taxation absent a waiver.
7 I mean, I've looked -- I can't claim that I -- this is
8 complete.

9 The Court has never held that an entity which is
10 a Federal instrumentality is taxable in the absence of an
11 affirmative congressional authorization, whether you're
12 talking about the Department of Employment, you're talking
13 about New Mexico, you're talking about Graves, you're
14 talking about James v. Dravo, never, at least not that we
15 can find.

16 That term carries with it that attribute, and we
17 submit that Congress, in designating us a federally-
18 chartered instrumentality, consistent with what we do --
19 they didn't do it haphazardly -- intended precisely the
20 same designation, and we would suggest that that also fits
21 with the overall goals of Congress in passing the 1985 act
22 and rescuing the farm credit system and trying to give the
23 agricultural borrowers some relief from high interest
24 rates.

25 It seems to us it all fits together, and what

1 the State is literally saying is, well, we want to act
2 like the law didn't change, that there was no repeal.
3 Well, there was a repeal. The law did change, and the
4 question is, did Congress intend that we become taxable
5 without regard to the Federal investment, or did they
6 intend that we become exempt under the McCulloch rule, and
7 those are basically the choices facing the Court.

8 If there are no further questions --

9 QUESTION: Thank you, Mr. Hanson.

10 MR. HANSON: Thank you, Your Honor.

11 QUESTION: Mr. Layton, you have 7 minutes
12 remaining.

13 REBUTTAL ARGUMENT OF JAMES R. LAYTON

14 ON BEHALF OF THE PETITIONER

15 MR. LAYTON: I'll note first that I believe that
16 the banks for cooperatives were subject to Federal income
17 tax prior to 1985, but I'd also note the franchise tax
18 that counsel referred to.

19 In the 1971 act in section 4 it sets out a
20 franchise act that could be as high as 25 percent of net
21 income for the banks, but interestingly, that franchise
22 tax applied so long as the Government holds shares in the
23 bank, and that the Government didn't hold any shares at
24 that point, and there was obviously an incentive, given
25 that franchise tax, not to allow the Government to pick up

1 any shares in your particular bank.

2 I should note also that although the National
3 Bank for Cooperatives was formed in 1989, it was the
4 merger of other banks for cooperatives, and there have
5 been banks for cooperatives operating in Missouri for
6 many, many years prior to 1989.

7 Turning to the legislative history, if, indeed,
8 we have to get to the legislative history, the history
9 does talk about the reasons for the 1985 act, and one of
10 the things that's there is a note that the banks for
11 cooperatives themselves were healthy. This was not
12 prompted by a problem with the banks for cooperatives. It
13 was prompted, as Mr. Hanson accurately said, by a system-
14 wide problem.

15 That is, there may have been -- there were other
16 entities within the bank, the farm credit system that were
17 having enough problem that it was bringing down the
18 ability of the entire system to sell bonds, and yet the
19 argument being made here is that because some other entity
20 had a problem and Congress created a system-wide remedy,
21 that is a remedy that would provide Federal financing to
22 the system as a whole, and never to particular
23 institutions, that somehow these banks for cooperatives
24 attained a new exemption.

25 Before, they only had an exemption when they had

1 Federal investment. Afterward, according to CoBank, they
2 all have an exemption even if no one has a Federal
3 investment, and the most that's likely is that some
4 production credit association or someone else would have
5 an investment, and yet somehow they get this exemption
6 back. They also -- the --

7 QUESTION: Mr. Frederick, what is the effect of
8 Congress' calling an institution a Federal
9 instrumentality? I'd always thought that the primary
10 reason they do that is precisely to exempt it from State
11 income tax.

12 MR. LAYTON: Well --

13 QUESTION: What other effect does it have? Why
14 would you enact a statute that says, you know, the Red
15 Cross, or whatever it is, is a Federal instrumentality?

16 MR. LAYTON: I think one reason is to ensure
17 that that entity -- in the tax context one reason is to
18 ensure that that entity cannot be subjected to
19 discriminatory taxation.

20 Missouri, for example, could not pass a tax that
21 was restricted to the income of federally charter -- or,
22 excuse me, of cooperative banks that serve cooperatives,
23 farm cooperatives. Because the only one that exists is
24 this instrumentality, that would be aimed at a Federal
25 instrumentality and would be a discriminatory tax and it

1 would be illegal, because that is a Federal
2 instrumentality. There may be other reasons as well, but
3 certainly that is one impact of use of that term.

4 The change that is alleged to have come about in
5 1985 is not just to remove the connection between the
6 Federal investment and the bank that is asserting the
7 exemption, but also to remove the temporal aspect. That
8 is, before, the exemption only was in place while the
9 Federal investment was in place.

10 At the time in 1985 there was 5-year sunset
11 provision on the credit corporation through which the
12 funds that Mr. Hanson spoke of would be channeled, and yet
13 the exemption that he asserts is one that would exist
14 indefinitely. That's inconsistent with the legislative
15 history and with the language of the statute.

16 CoBank poses the question as to why
17 differentiate between production credit associations and
18 banks for cooperatives on the one hand and other
19 institutions such as land banks on the other, and we
20 shouldn't have to ask that question, because Congress made
21 that determination in 1933. There has always been a
22 distinction. We're just discussing today what the
23 distinction now is.

24 But there are a couple of possible reasons for
25 Congress to have made that distinction. One is simply

1 temporal. In 1933 we were in the Depression era, and not
2 only was there a problem with the farm credit, with credit
3 for farmers, but there was a problem with banks generally,
4 and so here Congress was setting up some institutions that
5 would compete with commercial banks that themselves were
6 failing throughout rural areas in the United States, and
7 Congress set up a system that said, okay, for the time
8 being, we will give you an advantage over your commercial
9 competitors, but only for the time being. At some point
10 it's going to go back to where you do not have that extent
11 of commercial advantage. Sure, you can still issue
12 obligations that will be tax-free, but you won't be able
13 to avoid tax entirely.

14 Another reason that there may be a distinction
15 is that the land banks that Mr. Hanson referred to lend,
16 as I understand it, based on the farmer's land as
17 collateral, and there has always been a feeling in
18 Congress that we don't want to take the land away from the
19 farmers. That is distinguishable from the question of
20 lending based on their crops, which is what a production
21 credit association would do, or based on the equipment and
22 land that is held by a cooperative that may be producing
23 or processing the crops or otherwise providing services
24 for the farmers. There is a distinction.

25 It's worth noting that today between two-thirds

1 and three-quarters of agricultural lending in the United
2 States is done by entities outside of the farm credit
3 system, and those entities must compete on the grounds
4 that Congress set forth, and not on the grounds that can
5 be divined by some reference to past history.

6 If there are no further questions, I thank the
7 Court.

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Layton.
9 The case is submitted.

10 (Whereupon, at 12:07 p.m., the case in the
11 above-entitled matter was submitted.)

12

13

14

15

16

17

18

19

20

21

22

23

24

25