TOWARDS A BASAL TENTH AMENDMENT: A RIPOSTE TO NATIONAL BANK PREEMPTION OF STATE CONSUMER PROTECTION LAWS[*/]

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Abstract

Recent regulations promulgated by the Office of the Comptroller of the Currency assert a sweeping authority to preempt a broad array of state laws, including consumer protection laws, applicable not only to national banks but to their state-chartered operating subsidiaries. These regulations threaten to disrupt state efforts to combat predatory lending and other abusive practices and to interfere with a state's sovereign authority over corporations chartered under its laws. Yet federal courts faced with challenges to these initiatives have failed to devote any substantial analysis to claims based on the Tenth Amendment. The problem with such claims is the absence of any substantial doctrinal base in Tenth Amendment jurisprudence.

This article first explores the legal and policy implications of the preemption program and identifies the consumer protection interests at stake and the states' role in vindicating those interests. It then considers the importance of judicial review to the Framers' federalism design and endeavors to distill from their commentary and debates some substantive content for the Tenth Amendment that federal courts could credibly enforce. The article concludes with a modest suggested template for doctrinal analysis of Tenth Amendment issues arising from federal administrative action.

After a promising start in life with the escutcheon of the original Bill of Rights, followed by a period of disrepute owing to misuse as part of the seamy underbelly of racial animus' legal

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apparatus,[1/] the Tenth Amendment[2/] has vacillated between relegation to the scrap heap of constitutional surplusage -- a "mere truism"[3/] -- to an "independent font of sovereignty."[4/] En route, in its periodic bouts with the commerce power, it has encountered various way stations – characterizations, shorthand or otherwise, that eschew any precise analysis of its substantive content: a "flimsy aid in withstanding federal power";[5/] "a limit upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to

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[1/] In the Civil Rights Cases, 109 U.S. 3 (1883), the Supreme Court struck down the Civil Rights Act of 1875 as "repugnant to the Tenth Amendment." *See* Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1582 (1977). If, however, the Devil may quote scripture to his purpose, that is no reflection on its author. The uses to which statutes or constitutional provisions may from time to time be put is thus not a fair reflection on the intent of the drafters or the Framers, respectively: So, too, for the Tenth Amendment, which was, on the one hand, invoked by certain Senators to deny the power of Congress to proscribe slavery in the southern slave states, *see* A. Christopher Bryant, *Stopping Time: The Pro-Slavery and "Irrevocable" Thirteenth Amendment*, 26 HARV. J. L. & POL'Y 501, 524-25 (2003), and, on the other hand, employed by Lincoln's Secretary of the Treasury (and later appointed by him as Chief Justice) Salmon P. Chase, as an argument supporting invalidation of the Fugitive Slave Act. *See* HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1935-1875, at 110-111 (1982).

[2/] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X

[3/] United States v. Darby, 312 U.S. 100, 124 (1941).

[4/] *See* Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures,* 110 YALE L.J. 947, 964 n. 92 (characterizing "the principles of federalism contained in the Tenth Amendment," citing Reno v. Condon, 528 U.S. 141, 149 (2000)).

[5/] David D. Salmon, *The Federalist Principle: The Interaction of the Commerce Clause and the Tenth Amendment in the Clean Air Act*, 2 COL. J. ENVT'L L. 343 (1976).

regulate commerce";[6/] a "thinly veiled rationalization" for judicial second-guessing of Congress' policy choices;[7/] a "tautology" (*i.e.,* any powers reserved to the states are self-evidently a limitation on Congress' Article I powers);[8/] a "misguided doctrine";[9/] a "counter-insurgency";[10/] "an integral role . . . in our constitutional theory";[11/] and, most amusingly, a "constitutional frog turned into a prince . . . [and] back into a frog".[12/]

Recent federal intervention into the domain of commercial activities traditionally regulated by the states call into question, once again, one of the "oldest questions of Constitutional law"[13/] -- namely, the appropriate spheres of sovereign authority of the federal and state governments and the proper relationship between them in our constitutional schema. The

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6/ National League of Cities v. Usery, 426 U.S. 833, 842 (1976).

7/ *Id.* at 876 (Brennan, J., dissenting).

8/ New York v. United States, 505 U.S. 144, 157 (1992).

9/ Martha A. Field, Garcia v. San Antonio Metropolitan Transit Authority: *The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 89 (1985).

10/ Jack M. Balkin, *Ideology and Counter-Ideology from* Lochner *to* Garcia, 54 UMKC L. REV. 175, 194 (1986).

11/ Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 560 (1985) (Powell, J., dissenting).

12/ Linda Greenhouse, *Court Takes the Glow Off the Tenth Amendment*, N.Y. TIMES, Mar. 13, 1983, at § 4, p. 9, col. 1.

13/ New York v. United States, 505 U.S. at 149. *See generally* H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993). Professor Powell's historical analysis of the origins of dual sovereignty demonstrates that even staunch Federalists among the Framers came to accept it as axiomatic that "the Constitution's delegations of power to the federal government were sufficiently precise to demarcate distinct and separate spheres of activity for the national and state governments." *Id.* at 655.

uneasy tension between, together with the protean substantive content ascribed to, the Commerce Clause[14/] and the Tenth Amendment, even after 200 years of constitutional jurisprudence, continue to haunt this *tabiya*.[15/] Apart from some superficial clarity provided by cases, such as the younger *New York v. United States*[16/] and *Printz v. United States*,[17/] that interdict congressional exercise of the commerce power in a manner that would "commandeer" state legislatures or executive branch officials, Tenth Amendment jurisprudence remains chaotic, conflicting, and, when all is said and done, rather rudimentary. How, one wonders, in all this time can the meaning of a single declarative sentence, enshrined in the Bill of Rights, have evaded judicial construal establishing, at a minimum, some fundamental, bedrock level of state sovereignty that the federal government cannot impinge?

In the elder *New York v. United States*, the Court upheld the constitutionality of federal taxes on New York's sale of mineral waters from a spa in Saratoga Springs notwithstanding the

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[14/] U.S. CONST. art. I, § 8, cl.3. Like the Tenth Amendment, the Commerce Clause has enjoyed a somewhat chaotic, though slightly less checkered, career, from the quaint and anachronistic approach of cases such as United States v. E.C. Knight Co., 156 U.S.1 (1895), to that of the "Constitutional Revolution of 1937," NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), United States v. Darby, 312 U.S. 100 (1941), and Wickard v. Filburn, 317 U.S. 111 (1942), to what future generations may well call the "Constitutional Revolution of 1995," United States v. Lopez, 514 U.S. 549 (1995), and United States v. Morrison, 529 U.S. 598 (2000).

[15/] *Tabiya* is a word employed by Russian chess masters to describe frequently encountered, and often paradigmatic, positions that are worthy of intensive study and analysis.

[16/] 505 U.S. 144 (1992). There is an older Supreme Court decision identically denominated, New York v. United States, 326 U.S. 572 (1946). *See* notes 18-21, *infra*, and accompanying text.

[17/] 521 U.S. 898 (1997).

state's claim that it was exercising an "essential government function."[18] Victory based on that concept would have to wait another 30 years, until *National League of Cities*, a case seen by many as central to the agenda of a "conservative" jurist, then Associate Justice William H. Rehnquist.[19] Yet it was perhaps the antithesis of a conservative jurist, the progressive William O. Douglas, whose strident dissent in *New York* the elder decried the application of a "power to tax is the power to destroy," *à la McCulloch v. Maryland*[20] in reverse, and dismissed the notion that a process-based approach (*cf. Garcia*) could ever be adequate to vindicate Tenth Amendment concerns:

> The notion that the sovereign position of the States must find its protection in the will of a transient majority of Congress is foreign to and a negation of our constitutional system. . . . The Constitution is a compact between sovereigns. The power of one sovereign to tax another is an innovation so startling as to require explicit authority if it is to be allowed. If the power of the federal government to tax the States is conceded, the reserved power of the States guaranteed by the Tenth Amendment does not give them the independence which they have always been assumed to have. They are relegated to a more servile status. . . . They must pay the

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[18] 326 U.S. 572, 573 (1946).

[19] *See, e.g.,* Archibald Cox, *Federalism and Individual Rights Under the Burger Court,* 73 NW. U. L. REV. 25 (1978); Laurence H. Tribe, *Unraveling* National League of Cities: *The New Federalism and Affirmative Rights to Essential Government Services,* 90 HARV. L. REV. 1072 (1977); Balkin, *supra* note 10. *See also* STANLEY H. FRIEDELBAUM, THE REHNQUIST COURT: IN PURSUIT OF JUDICIAL CONSERVATISM (1994); DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT (1993).

[20] 17 U.S. (4 Wheat.) 316 (1819).

> federal government for the privilege of exercising the powers of sovereignty guaranteed them by the Constitution. . . . [21]

The particular federal intervention providing the impetus for this article[22] is the assertion by the Office of the Comptroller of the Currency ("OCC") of sweeping authority to preempt a broad array of state laws of the sort that have for 150 years applied to the activities of national

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[21] New York v. United States, 326 U.S. at 594-95 (Douglas, J., dissenting).

[22] Another recent and highly publicized federal intervention affecting an area traditionally dominated by state law is the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.) [hereinafter "SOXA"]. and the manifold regulations of the Securities and Exchange Commission required to be promulgated thereunder. The SOXA regime is different in two very important respects from the national bank preemption regime discussed in this article. First, it was expressly authorized by Congress. Second, while it is layered on top of traditional state corporation law, it does not unduly trammel the prerogatives of the states under the Tenth Amendment, any more than do the federal securities laws; corporate *law* remains essentially the bailiwick of the states (at least for the present), while corporate *governance* – which has not been addressed adequately (or, in most cases, at all) by state legislation – is the subject of direct or indirect federal rulemaking (*i.e.,* by the SEC or by the stock exchanges that are subject to SEC oversight), and even then only with respect to publicly traded companies. Privately held companies, as well as other forms of enterprise, including not-for-profit corporations, trusts, partnerships, and the like, are not subject to SOXA.

A recently published article urges the creation of another federal intervention into traditional state turf, namely the inauguration of federal regulation of the rules of legal ethics for business law practice, in order to stem the tide of abuse and predation that has been all too prevalent in the major business scandals of our time. *See* Keith R. Fisher, *The Higher Calling: Regulation of Lawyers Post-Enron*, 37 UNIV. OF MICH. J. L. REFORM 1017 (2004). Here again, however, the regulatory scheme suggested, even if it were adopted (which seems unlikely), would not trammel the Tenth Amendment prerogatives of the States, as it would supplement, not preempt, the authority (which is all too evidently moribund) of state high courts and state bar associations to discipline business lawyers at elite law firms when they counsel, structure, or aid and abet the kinds of corporate depredations that have given us the S&L crisis, BCCI, as well as the more contemporary Enron, WorldCom, Global Crossing, and other scandals that continue to festoon the headlines of our major newspapers.

banks and coexisted with the provisions of the National Bank Act.[23] Early in 2004, OCC promulgated controversial regulations announcing a broad-based preemption of state laws that affect the activities of national banks.[24] Embroidering rather liberally upon a concept from the Supreme Court's decision in *Barnett Banks of Marion County v. Nelson*,[25] the Preemption Regs purport to preempt all state laws that "obstruct, impair, or condition a national bank's ability to fully [*sic*] exercise" its federally granted powers.[26] Interestingly, and even more controversially, that preemption applies whether a national bank exercises such powers directly or through one or more state-chartered operating subsidiaries.[27]

After briefly summarizing the consumer protection interests at stake and the role of the States in vindicating those interests, Part I of this article highlights some of the more problematic

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[23] The National Currency Act of 1863 provided, *inter alia*, for the creation of entities possessing the authority to issue bank notes secured by United States Government bonds, and for the creation within the Treasury Department of a separate bureau headed by the Comptroller of the Currency. National Currency Act, ch. 58, 12 Stat. 665 (1863) (repealed 1864). The statute was repealed and replaced by similar legislation the following year. Act of June 3, 1864, ch. 106, 13 Stat. 99 (current version in scattered sections of 12 U.S.C. and 31 U.S.C.). While neither was officially titled "National Bank Act," the two acts have come to be known colloquially as such. *See* Howard H. Hackley, *Our Baffling Banking System, Pt. 1*, 52 VA. L. REV. 565, 572 (1966).

[24] Office of the Comptroller of the Currency, Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904 (Jan. 7, 2004) (to be codified at 12 C.F.R. pts. 7, 34) [hereinafter "Preemption Regs"]. These regulations were originally proposed during the preceding summer. *See* 68 Fed. Reg. 46,119 (Aug. 5, 2003).

[25] 517 U.S. 25 (1996). *See* notes 85 - 93, *infra*, and accompanying text.

[26] Preemption Regs, *supra* note 24, at 1911-13.

[27] *Id.* at 1913 (relying on a prior interpretation codified at 12 C.F.R. § 7.4006).

aspects of the OCC's Preemption Regs and Visitorial Powers Regs,[28] including consideration of the proper view to be accorded national bank operating subsidiaries. Part II considers the importance of judicial review to the Framers' federalism design and continues with discussion of what can be distilled from the views of the Framers about the substantive content of the Tenth Amendment. Part III concludes with a modest suggested base line for doctrinal analysis of Tenth Amendment issues.

I

A. State Anti-Predatory Lending Laws and Other Consumer Protection Initiatives

Predatory lending, a heinous but ill-defined practice usually involving manipulative sales tactics; elderly, naive, minority, "subprime" or otherwise vulnerable borrowers; high credit costs; and outrageous terms, has become rampant in America. Common lending practices that have come to be characterized as "predatory" include equity stripping,[29] loan flipping,[30] hidden

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[28] Obviously, these regulations implicate a wealth of technical, bank regulatory issues that are largely (though, as will be seen below, not totally) outside the scope of this discussion. For more detail on those issues, as well as important contributions to the debate thereon, see the mini-symposium "Point-Counterpoint: Federal Preemption," 23 ANN. REV. BANKING & FIN. LAW 225 (2004), which pairs the following articles on the subject: Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 ANN. REV. BANKING & FIN. LAW 225 (2004); Howard N. Cayne & Nancy L. Perkins, *National Bank Act Preemption: The OCC's New Rules Do Not Pose a Threat to Consumer Protection or the Dual Banking System,* 23 ANN. REV. BANKING & FIN. L. 365 (2004). *See also* Robert C. Eager & Cantwell F. Muckenfuss, III, *Federal Preemption and the Challenge to Maintain Balance in the Dual Banking System,* 8 N.C. BANKING INST. 21 (2004). None of these articles, however, valuable as they are, devotes any substantial consideration to the role of the Tenth Amendment (though Professor Wilmarth mentions it in passing).

[29] Equity stripping involves a loan made solely on the basis of a homeowner's equity
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balloon payments,[31] "packing" or "padding,"[32] high-cost payday lending,[33] "back-end"

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[29](...continued)
in his or her home, regardless of whether the borrower has the financial ability to make payments. Of course, failure to make scheduled payments when due can lead to foreclosure and loss of the home.

[30] Here, a borrower having difficulty making loan payments is offered "relief" by refinancing the existing indebtedness with a new, higher interest, longer term, and considerably higher cost loan (together with the payment of points and various and sundry fees).

[31] A balloon payment is a large, lump-sum payment that comes due at the end of a loan that has been structured so as to minimize regular monthly loan payments, which therefore, even when timely and completely paid, fail to retire the loan balance over the term of the loan. When a balloon payment comes due, the borrower must either pay it in full or refinance. Obviously, few borrowers, and fewer still among those low-to-moderate income borrowers that are targeted by predatory lenders, have the financial resources to make the lump sum payment. Refinancing, however, may not only prove onerous if interest rates have risen, but may be problematic for borrowers with late payment histories and other credit problems. (Those credit problems may, of course, be the direct result of an original predatory loan that caused delinquencies and marred their credit records). If the borrowers cannot refinance on terms they can manage or make their balloon payments, their loans will go into default.

[32] This is the assessment of charges to the consumer for services that were not requested and not needed, *e.g.,* for products such as single premium credit insurance.

[33] Payday loans are short-term (usually no more than two weeks, the most common pay period), small cash advances, usually in the range of $100-$500, secured by the borrower's paycheck or, in the high-tech model, by electronic access to the borrower's checking account. Sometimes, the security will be a personal check from the borrower rather than the paycheck. The lender will then deposit the check (or electronically debit the borrower's account) unless the borrower repays the loan in full and reclaims the check, pays a fee to extend the loan's due date for another two weeks (known as a "rollover"), or, in states that prohibit rollovers, refinances the loan by paying another fee. *See, e.g.,* Jean Ann Fox, *What Does It Take to Be a Loan Shark in 1998? A Report on the Payday Loan Industry*, in CONSUMER FINANCIAL SERVICES LITIGATION 1998 at 987, 990 (PLI Corporate Law & Practice Course, Handbook Series No. B-1047, 1998).

The fees charged can be astonishingly high. *See, e.g,* CONSUMER FEDERATION OF AMERICA AND U.S. PUBLIC INTEREST RESEARCH GROUP, PAYDAY LENDING: HOW BANKS HELP PAYDAY LENDERS EVADE STATE CONSUMER PROTECTIONS 6 (Nov. 2001), *available at* http://www.consumerfed.org/paydayreport.pdf (last visited Dec. 23, 2004) (stating that fees are

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profiteering,[34] and other artifices[35] ranging from common exploitation to outright discrimination.[36] A recent attempt at defining predatory lending has characterized it as a

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typically 400% and higher); Elizabeth Renuart & Jean Ann Fox, *Payday Loans: A High Cost for a Small Loan in Low-Income and Working Communities*, 34 CLEARINGHOUSE REV. 589, 589 (2001) ("The typical annual percentage rate is at least 390 and averages close to 500 percent, although advocates and credit code enforcement agencies have noted rates of 1,300 percent to 7,300 percent.").

[34] Examples include (i) late posting of monthly payments received from consumers resulting in the charging of late fees and collection of additional interest; (ii) placing monthly payments in "suspense" accounts, thereby leading to the imposition of unjustifiable late fees and the collection of a larger amount of interest over the life of the loan; (iii) late payment from escrowed funds of homeowner's insurance, leading to cancellation of the borrower's original policy and then ordering by the lender of force-placed insurance at higher rates; (iv) delaying credits and other favorable adjustments to the homeowner's escrow account; and (v) conducting unnecessary "drive-by" property inspections when the homeowner is not in default and then imposing a charge on the customer. For a particularly egregious example, involving outright fabrication of indebtedness figures, *see* Maxwell v. Fairbanks Capital Corp. (In re Maxwell), 281 B.R. 101 (Bankr. D. Mass. 2002).

[35] For a detailed, albeit now slightly outdated, enumeration of such practices, *see* Patricia Sturdevant & William J. Brennan, Jr., *A Catalogue of Predatory Lending Practices*, 5 CONSUMER ADVOC. 4 (1999).

[36] According to the New York Attorney General, "African Americans at all income levels are three times more likely to be denied loans from conventional banks, and Black and Latino neighborhoods are six times more likely to rely on financing from sub-prime lenders." Testimony of Eliot Spitzer, N.Y. Attorney General, Before the Assembly Standing Comm. on Banks Regarding the Office of the Comptroller of the Currency's Preemption of State Consumer Protection Laws (Apr. 16, 2004), *available at* http://www.oag.state.ny.us/press/statements/occ_testimony.html (last visited Dec. 23, 2004). *See also* Howard Lax et al., *Subprime Lending: An Investigation of Economic Efficiency*, 15 HOUSING POLICY DEBATE 533, 544-545 (2004) (stating that "black borrowers account for a disproportionately large share of subprime lending"), *available at* http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd_1503_Lax.pdf (last visited Dec. 23, 2004); DEPARTMENTS OF THE TREASURY AND HOUSING AND URBAN DEVELOPMENT, CURBING PREDATORY HOME MORTGAGE LENDING 22-23 (2000) (finding that subprime loans for
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congeries of abusive loan terms or practices featuring one or more of the following: "(1) loans structured to result in seriously disproportionate harm to borrowers; (2) harmful rent seeking; (3) loans involving fraud or deceptive practices; (4) other forms of lack of transparency . . . that are not actionable as fraud; and (5) loans that require borrowers to waive meaningful legal redress."[37/]

Engaging in these practices is a broad spectrum of lenders, prominent among which are national banks acting either directly or indirectly (through affiliates or contractual arrangements, such as "charter renting").[38/] Three brief examples of predatory lending should suffice, courtesy

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refinancing were five times more likely in black neighborhoods than in white neighborhoods, and that nearly 40% of refinance loans even in upper-income black neighborhoods were subprime, as compared with 5% in upper-income white neighborhoods and 20% in lower-income white neighborhoods), *available at* http:/www.huduser.org/publications/pdf/treasrpt.pdf (last visited Dec. 23, 2004); Elizabeth A. Renuart, *Toward One Competitive and Fair Market: Suggested Reforms in* A Tale of Three Markets *Point in the Right Direction*, 82 TEX. L. REV. 421, 425-26 (2003) (identifying such problems as "steering" minority customers to loans with less favorable terms than their credit histories warrant and "reverse redlining"). *Cf.* ROBERT E. LITAN ET AL., THE COMMUNITY REINVESTMENT ACT AFTER FINANCIAL MODERNIZATION: A BASELINE REPORT 28-29 (2000) (reporting research using mystery shoppers revealed ongoing racial discrimination against blacks).

[37/] Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending,* 80 TEX. L. REV. 1255, 1260 (2002).

[38/] Charter renting is a contractual arrangement between payday lenders and banks (often national banks) located in states with no usury limits for consumer loans. For example, a national bank can export interest rates from the state where it is located to the borrower's home state, the usury laws of which are expressly preempted by 12 U.S.C. § 85. *See* Beneficial Nat'l Bank v. Anderson, 125 U.S. 1 (2003); Marquette Nat'l Bank v. First of Omaha Serv. Corp., 439 U.S. 299 (1978). The bank underwrites the loans, while the payday lender acts as loan originator and collection agent, and the two split the exorbitant profits on the deal. *Cf.* Barbara A. Rehm, *Tanoue Seeks to Halt "Renting" of Charters to Payday Loan Firms,* AM. BANKER, June 14,
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of the State of New York. The first involves a 72-year-old woman identified as "Mrs. N.," who lived in the same residence in Elmhurst, Queens for more than 30 years and who was solicited by a broker to refinance her mortgage because she had a $2,200 tax lien on her property.

> The broker told Mrs. N. that she would be able to get an affordable refinance that would reduce her existing interest rate of 9 percent. She ended up with a $105,000 loan from an operating subsidiary of a Midwest-based national bank that raised her interest rate to 10.5 percent and her monthly payment by nearly $200. Even worse, because her new loan is an Adjustable Rate Mortgage, her interest rate could grow too [*sic*] as high as 16.375 percent.
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> Mrs. N.'s new monthly payments comprise 67 percent of her monthly income from Social Security and pension. Her sole benefit from the refinance was the payoff of the tax lien, which she could have satisfied with direct payments to the New York City Department of Finance through an affordable payment plan.
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> Instead, the refinance cost her nearly $11,000 in closing costs (including more than $4,000 in fees), increased her monthly payments to an unaffordable level, and put her at risk of foreclosure.[39]

The second example involved a 68-year-old man, identified as "Mr. M.,"who had resided in Brooklyn for more than 20 years and had been forced to retire from the U.S. Postal Service

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[38](...continued)
2000, at 4 ("Federal Deposit Insurance Corp. Chairman Donna Tanoue . . . urged Congress to crack down on banks that are so eager for fee income they 'rent' their charters to payday loan companies."). *See generally* Scott Andrew Schaff, Note, *From Checks to Cash: The Regulation of the Payday Lending Industry*, 5 N.C. BANKING INST. 339 (2001).

[39] Testimony of Diana L. Taylor, New York Superintendent of Banks, on OCC Preemption Before the New York State Assembly Banks Committee 1 (Apr. 16, 2004), *available at* http://www.banking.state.ny.us/sp040416.htm (last visited Dec. 23, 2004). The practices identified were in violation of New York's Deceptive Practices Act and anti-predatory lending regulation. *Id.* at 2.

after 25 years. Made desperate when the reduction in income caused him to fall behind in mortgage payments, he sought to refinance with an operating subsidiary of a national bank:

> The op-sub refinanced his $98,000 mortgage balance into a $135,000 loan, which increased his monthly payments by more than $500. They [*sic*] urged him to refinance his [mounting] credit card debt into the new mortgage, telling him that it would decrease his monthly debt. . . .Unknown to Mr. M., the loan also included a broker's fee.
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> Mr. and Mrs. M.'s joint monthly income at the time of the loan was only about $1,800. The lender made them a loan with monthly payments of $1,367, not including taxes and insurance. When Mr. M. expressed concern about the amount of the monthly payments, he was told that he could refinance at a lower rate if he made his payments on time for a year. The op-sub's loan file contained an unverified falsified lease for $900 a month with the name of a nonexistent tenant. Mr. M's signature on the lease had been forged.[40]

The final example involved a lawsuit by the New York Attorney General against the purchaser of a mortgage loan, First Horizon Home Loan Corporation, a Texas-chartered operating subsidiary of First Tennessee Bank, N.A. The loan amount was $27,000 at 8.5% interest, payable over a 25-year term at $201.31 per month. The borrower had made all payments due under the loan, and, after First Horizon acquired the loan, payments were made by automatic debit from his checking account. First Horizon continued to debit the account for nearly four years after the loan was paid in full, thereby overcharging the borrower (who mistakenly thought the mortgage was for 30 years) $9,461.57. When the borrower brought this to the First Horizon's attention, it only then notified him that an error made by the loan originator

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[40] *Id.*

in 1974 had resulted in a $16 per month underpayment and that the maturity date of the mortgage would be unilaterally extended to 2010, thus requiring him to pay an additional $25,163.75. When the borrower (who, as noted, had already overpaid) stopped the automatic debits, First Horizon threatened to foreclose on his home if he did not pay $12,320.49 within 30 days. After unsuccessful attempts by the borrower's attorney to resolve the matter amicably, the Attorney General's office became involved, but was met with a retort from First Horizon that, as an operating subsidiary of a national bank, it could not discuss the matter because its sole regulator was OCC, which had issued a directive advising First Horizon not to talk to state attorneys general.[41/]

This is not to suggest that OCC encourages or even condones predatory lending. Quite the contrary: OCC has issued two advisory letters, one on loan originations[42/] and another on purchased loans,[43/] and the former Comptroller himself delivered several hortatory speeches on

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[41/] See generally Press Release: NY Sues National Bank Subsidiary for Illegal Practices; Illegal Foreclosure Case May Test Feds' New Preemption Rules (Jan. 20, 2004), *available at* http://www.oag.state.ny.us/press/2004/jan/jan20a_04.html (last visited Dec. 23, 2004); People of the State of New York v. First Horizon Home Loan Corp., filed Jan. 16, 2004, *available at* http://www.oag.state.ny.us/press/jan/Horizon5.pdf (last visited Dec. 23, 2004).

[42/] OCC Advisory Letter AL2003-2 (Feb. 21, 2003) (setting forth "supervisory guidance concerning lending practices that have been criticized as 'predatory' or 'abusive'"), *available at* http://www.occ.treas.gov/ftp/advisory/2003-2.pdf (last visited Dec. 23, 2004).

[43/] OCC Advisory Letter AL2003-3 (Feb. 21, 2003) (advising national banks on "the risks they confront if they make loans through brokers or obtain loans through purchase transactions that contain terms or reflect practices that may be characterized as abusive or 'predatory'"), *available at*http://www.occ.treas.gov/ftp/advisory/2003-3.pdf (last visited Dec. 23, 2004).

this and related subjects.[44] However, all this guidance and exhortation is directed more toward "legal, reputational, and other risks, including credit risk assumed in cases where the borrower lacks the ability to repay the loan without resorting to liquidation of the collateral" – in other words, bank safety and soundness issues – than at consumer protection per se. The only actual regulatory prohibitions that OCC has promulgated are (1) against making real estate loans "based predominantly on the bank's realization of the foreclosure or liquidation value of the borrower's collateral, without regard to the borrower's ability to repay the loan according to its terms" (*i.e.*,

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[44] *See* Remarks by John D. Hawke, Jr. Comptroller of the Currency, Before a Conference Sponsored by The Consumer Bankers Association & Robert Morris Associates, San Francisco, California (June 7, 1999) (warning bankers of the potential costs of ignoring customer service and identifying as not illegal, but potentially "abusive," such practices as failure to report to credit bureaus the good credit history of subprime borrowers (in order to avoid having them "picked off by the competition)" and contracting with telemarketers for the offer to bank customers of "trial memberships" that will result in a continuous series of monthly charges to the customers' accounts and will require affirmative action by the customers to opt out), *available at* http://www.occ.treas.gov/ftp/release/99-51a.doc (last visited Dec. 23, 2004); Remarks by John D. Hawke, Jr., Comptroller of the Currency, Before the National Community Reinvestment Coalition, Washington, D.C. (March 21, 2000) (deploring predatory lending, lamenting OCC's lack of authority to promulgate regulations defining unfair and deceptive practices, mentioning OCC's commitment to enforcing federal statutory schemes it is required to enforce (*e.g.,* truth in lending, equal credit opportunity), but concentrating on extolling the advantages of dealing with mainstream depository institutions rather than check cashers, pawn shops, payday lenders, and the like), *available at* http://www.occ.treas.gov/ftp/release/2001-21a.doc (last visited Dec. 23, 2004). *See also* Statement of John D. Hawke, Jr. Comptroller of the Currency, Before the Committee on Banking and Financial Services U.S. House of Representatives (May 24, 2000) (assuring Congress that "OCC is fully prepared to use its authority to combat abusive, unfair and deceptive lending practices if they are engaged in by national banks," that "we plan to issue guidance that directs examiners to carefully review lending policies and practices to ensure that they would not permit loans to be made without a reasonable expectation of repayment without resort to the collateral," and urging Congress to address predatory lending in the context of the Community Reinvestment Act), *available at* http://www.occ.treas.gov/ftp/release/2000-37a.txt (last visited Dec. 23, 2004).

prohibiting equity stripping);[45] and (2) against engaging in "unfair or deceptive trade practices within the meaning of section 5 of the Federal Trade Commission Act" and the implementing regulations of the FTC.[46] Addition of the latter is rather a hollow gesture, given that, as OCC freely admits, it took OCC and the other federal banking agencies "more than twenty-five years to reach consensus on their authority to enforce the FTC Act."[47] The gesture becomes even

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[45] Preemption Regs, *supra* note 24, 69 Fed. Reg. at 1917, amending 12 C.F.R. § 34.3(b) (2004). This new found solicitude for predatory lending problems – a slight doff of the cap to consumer protection coinciding with the assertion of preemptive power that threatens to eviscerate it – is all the more striking since the prior version of § 34.3, which itself had been amended only the year before with a Jan. 16, 2004 effective date, simply authorized secured real estate lending (including making, arranging, purchasing, and selling such loans, or interests therein), subject to the requirements of the Federal Deposit Insurance Act (specifically 12 U.S.C. § 1828(o) prescribing uniform regulations to be promulgated by the various bank regulatory agencies) and "such restrictions or requirements as [OCC] may prescribe by regulation or order."

[46] Preemption Regs, *supra* note 24, 69 Fed. Reg. at 1917, adding 12 C.F.R. § 34.4(c).

[47] Julie L. Williams & Michael S. Bylsma, *On the Same Page: Federal Banking Agency Enforcement of the FTC Act to Address Unfair and Deceptive Practices by Banks*, 58 BUS. LAW. 1243, 1244 (2003). The authors suggest that the reason for the delay may be the absence of the proscribed misconduct by banking institutions until relatively recently, but that explanation seems dubious. First, there have been numerous allegations of illegal or abusive subprime lending practices directed against major national banks and their affiliates, including some against Fleet (later FleetBoston, now part of Bank of America) going back more than 10 years. *See, e.g.*, U.S. GEN. ACCT'G OFF., CONSUMER PROTECTION: FEDERAL AND STATE AGENCIES FACE CHALLENGES IN COMBATING PREDATORY LENDING, GAO-04-280, 37-38 (Jan. 2004) (reporting allegations against Citigroup and Fleet), *available at* http://www.gao.gov/new.items/d04280.pdf (last visited Dec. 1, 2004). Indeed, the GAO notes that "[i]n response to OCC's and OTS's statements that there is no evidence of predatory lending among subsidiaries of federally regulated depository institutions, opponents of preemption noted that there are several cases in which allegations of abusive lending practices involving some of these subsidiaries have been raised." *Id.* at 71, citing Comments on OCC Working Paper, Center for Responsible Lending 7-10, Oct. 6, 2003, *available at* http://www.predatorylending.org (last
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hollower with OCC's lament that it lacks particularized rulemaking authority to define specific practices as unfair or deceptive[48/] and is thus unable to proscribe under that rubric notorious practices such as loan flipping or equity stripping.[49/] OCC has yet to explain, however, why it could not use its ample enforcement authority under Section 8 of the Federal Deposit Insurance Act[50/] to proscribe those practices as "unsafe or unsound banking practices"[51/] and to work with

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[47/](...continued)
visited Dec. 1, 2004). *See also* Engel & McCoy, *supra* note 37, at 1296 (recounting allegations against Citigroup); Kathleen C. Engel & Patricia A. McCoy, *The CRA Implications of Predatory Lending*, 29 FORDHAM URB. L.J. 1571, 1581 & n.47 (2002) (reporting allegations against Fleet); *id.* at 1591 & n.90-92 (reporting press vilification of, and FTC proceeding against, Citigroup, in connection with its acquisition of Associates). Second, it was extraordinarily well-known in the industry over a 10-year period that Providian Bank, N.A. was "the poster child of abusive consumer practices, . . . was regularly sued in private litigation, subjected to numerous state enforcement proceedings, and commonly criticized in the media." Letter to the Editor, *Comptroller Has Duty to Clean Up Card Pricing Mess*, AM. BANKER, Nov. 21, 2003, at 17 (comments by Duncan A. MacDonald, former General Counsel of Citigroup's European and North American credit card business), *available at*2003 WL 61300579. It was only after a California state prosecutor embarrassed OCC by moving publicly against Providian, much as Eliot Spitzer has recently caused embarrassment to the SEC for its lackluster enforcement, that OCC took administrative action.

[48/] That authority was given to the Federal Reserve.

[49/] Preemption Regs, supra note 24, 69 Fed. Reg. at 1911.

[50/] 12 U.S.C. § 1818.

[51/] For example, Wilmarth cites evidence that, since 1997, the four bank failures costliest to the FDIC have been institutions heavily engaged in subprime lending and securitization, and that two of those four were national banks chartered and supervised by OCC. Wilmarth, *supra* note 28, at 312-313.

the FTC and the Federal Reserve Board to develop the requisite interpretations that would tar those practices as "violations of law" sanctionable under the same statute.[52]

B. The OCC's Preemption and Visitorial Powers Regulations

In the Preemption Regs, OCC, a bureau within the Department of the Treasury, takes the position that it may proscribe the application of all state laws to national banks except in two situations. The first exception comprises those (relatively few) provisions of the National Bank Act or other financial regulatory statutes[53] in which Congress expressly incorporates state-law

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[52] OCC's arsenal of civil administrative enforcement powers includes cease and desist orders, *id*. § 1818(b), removal of offending individuals from the banking industry under statutorily specified circumstances, *id*. § 1818(e), and very substantial civil money penalties, *id.*, § 1818(i)(2).

[53] For example, even with respect to diversified financial holding companies that are normally subject to a federal scheme of regulatory oversight, the Gramm-Leach-Bliley Act ("GLEBA" – see *infra* note 87) not only preserves, in the insurance arena, the primacy of the reverse preemption regime of the McCarran-Ferguson Act, *infra* note 87 (*see* GLEBA § 104(a), 15 U.S.C. § 6701(a)), but also, in § 104(d)(2)(B), gives the states thirteen areas in which they enjoy carte blanche to regulate. These include: (i) protecting against rejection of insurance policies required in connection with lending transactions solely because the insurer is not affiliated with the lender; (ii) prohibiting extra charges on such required insurance if purchased from unaffiliated agents; (iii) restricting advertisements or other promotional materials that might misrepresent the status of any insurance product as being federally insured or guaranteed; (iv) imposing licensing requirements on anyone receiving a commission or brokerage fee from the sale of insurance; (v) prohibiting referral fees to unlicensed providers; (vi) regulating the disclosure of insurance information to third parties without the insured's express written consent; (vii) prohibiting the use of health information from the insured's health records without express written consent; (viii) implementing anti-tying regimes; (ix) requiring anti-tying disclosures; (x) requiring disclosure that the product is not a deposit, is not insured or guaranteed by the federal government or by any financial institution or affiliate and, where appropriate, involves investment risk; (xi) mandating separate documentation for credit and insurance transactions; (xii) prohibiting the inclusion of credit insurance premiums in the primary credit transaction without the customer's consent; and (xiii) mandating the maintenance of separate books and records relating to insurance transactions, including consumer complaints, and the availability of

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standards.[54] The statutes comprising this "exception" are more properly categorized as affirmative *reverse preemption* regimes, which OCC has no discretion to alter, though its track record of attempts at creative evasion is well established.[55]. The second exception is for individual state laws (or, where appropriate, types of state laws) that OCC says it may, from time to time, and solely within its own discretion, determine to have only an "incidental" effect on national banks. To be appropriately "incidental," the state laws in question will (1) have to be part of "the legal infrastructure that makes it practicable" for national banks to conduct their federally-authorized activities, so long as (2) they "do not regulate the manner or content of the business of banking authorized for national banks."[56]

In a companion rulemaking of even date,[57] the OCC amended its regulations governing the exercise of "visitorial powers" over national banks in order to prohibit state officials from filing suit (whether in federal or state court) to enjoin national banks to comply with state laws and to remit them to the sole remedy of seeking declaratory relief. Even then, armed with a

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[53](...continued)
such books and records for inspection by state insurance regulators. 15 U.S.C. § 6701(d)(2)(B)

[54] The principal examples in the National Bank Act are those authorizing trust powers pursuant to a separate OCC approval, 12 U.S.C. § 92a, and the branching provisions of the McFadden Act, 12 U.S.C. § 36, as amended by the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (1994) [hereinafter "IBBEA"].

[55] *See infra* note 84.

[56] Preemption Regs, *supra* note 24, at 1911-13.

[57] Office of the Comptroller of the Currency, Bank Activities and Operations, 69 Fed. Reg. 1895 (Jan. 7, 2004) (to be codified at 12 C.F.R. § 7.4000) [hereinafter "Visitorial Powers Regs"].

court-issued declaratory judgment, state officials may not, the OCC maintains, do anything other than notify OCC, which will retain sole discretion whether to enforce that state law against the national bank.[58]

The new regulations codify positions the OCC has previously taken to preempt state predatory lending laws.[59] For example, the preamble to the Preemption Regs explicates OCC's contention that state lending laws should, in general, be preempted. "Markets for credit (both consumer and commercial) . . . are now national, if not international, in scope," and "the elimination of legal and other barriers to interstate banking . . . has led a number of banking organizations to operate . . . on a multi-state or nationwide basis."[60] The agency therefore regards it as imperative that national banks be "enable[d] . . . to operate to the full extent of their powers under Federal law, without interference from inconsistent state laws, consistent with the national character of the national banking system."[61]

It cannot be gainsaid that the success rate of these theories in recent litigation has been phenomenal. OCC has won (or participated successfully in a case brought by a national bank) in several preemption scenarios: preempting a Texas "par value" statute prohibiting banks in Texas,

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[58] *Id.* at 1899-1900.

[59] In 2003, OCC granted the request of National City Bank, N.A., National City Bank of Indiana, N.A. and two operating subsidiaries for a determination that the Georgia Fair Lending Act, GA. CODE ANN. § 7-6A-1 *et seq*., was preempted as to all national banks and their operating subsidiaries. Dept of the Treasury, Office of the Comptroller of the Currency, *Preemption Determination and Order*, 68 Fed. Reg. 46,464 (Aug. 5, 2003).

[60] Preemption Regs, *supra* note 24, at 1907-1908.

[61] *Id*. at 1908.

including national banks, from charging check cashing fees to non-customers;[62/] preempting a similar Georgia check cashing fee law;[63/] preempting a municipal ordinance prohibiting banks from charging ATM fees;[64/] and preempting, as to federally chartered credit card issuers, a California law imposing consumer protection disclosure requirements for credit card accounts.[65/] Similarly, on the visitorial powers issue, OCC has prevailed as intervenor or *amicus curiae* in several cases in which state authorities have been enjoined from regulating mortgage banking operating subsidiaries of national banks.[66/] In none of these cases, however, was the Tenth Amendment paid more than lip service, with the courts buying into a simplistic "tautology" approach[67/] that may be summarized thus: Since we see no "commandeering" going on here,

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[62/] Wells Fargo Bank of Texas, NA v. James, 321 F.3d 488 (5th Cir. 2003). Notably, the Fifth Circuit, while willing to accept OCC's legal position, observed that, as a matter of public policy, "competing interests could be better balanced . . . by a national Congress whose interests are diverse and universal, or even by the people as they are represented in the state legislatures, than by a solitary institution whose focus is a single industry." *Id.* at 494.

[63/] Bank of America NA v. Sorrell, 248 F. Supp. 2d 1196 (N.D. Ga. 2002).

[64/] Bank of America v. City and County of San Francisco, 309 F.3d 351 (9th Cir. 2002).

[65/] American Bankers Assoc. v. Lockyer, 239 F. Supp. 2d 1000 (E.D. Cal. 2002). OCC, as is its wont, filed an amicus brief in this litigation.

[66/] *See* Wachovia Bank, N.A. v. Watters, 334 F. Supp. 2d 957 (W.D. Mich. 2004); Wachovia Bank, N.A. v. Burke, 319 F. Supp. 2d 275 (D. Conn. 2004); Wells Fargo Bank, N.A. v. Boutris, 265 F. Supp. 2d 1162 (E.D. Cal. 2003); National City Bank of Indiana v. Boutris, 2003 WL 21536818 (E.D. Cal. 2003).

[67/] One cannot entirely blame the lower federal courts for this. Faced on the one hand with a paucity of guidance from the Supreme Court on the substantive content of the Tenth Amendment and with a crowded docket on the other hand, the better part of valor is to rely on the analysis set forth in the parties' submissions. These, in turn, suffer from the same lack of

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there is no Tenth Amendment interest of the states to protect, since banking is clearly commerce and commerce falls within the powers granted to Congress.[68]

To *Congress* – aye, there's the rub (or at least a portion of the rub). For it is to Congress, and not to an obscure bureau (obscure, at least, to those who are not banking cognoscenti) within an Executive Department of the United States, that the commerce power has been given. The Supremacy Clause of the Constitution[69] provides *Congress* with the power to preempt state law. This occurs, as is well known, when Congress, in enacting a federal statute, expresses a clear intent to preempt state law;[70] when there is outright or actual conflict between federal and state law;[71] where compliance with both federal and state law is impossible;[72] where there is implicit in federal law a barrier to state regulation;[73] where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states to supplement

[67](...continued)
doctrinal guidance, and even the States that are litigants in this arena have not devoted substantial legal resources to developing a coherent portrait of the Tenth Amendment and what is reserved to them thereunder.

[68] *E.g.,* Watters, 334 F. Supp.2d at 966; Boutris, 265 F. Supp.2d at 1170-1171.

[69] U.S. CONST. art. VI.

[70] Jones v. Rath Packing Co., 430 U.S. 519 (1977).

[71] *E.g.,* Free v. Bland, 369 U.S. 663 (1962).

[72] Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963).

[73] Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983).

federal law;[74] or where state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.[75] None of these is applicable to the situation at hand. Indeed, the Supreme Court has recognized that "as a matter of history and as a matter of present commercial reality, banking and related financial activities are of *profound local concern*."[76]

Preemption may result from action taken by a federal agency, but only where the agency is acting within the scope of its congressionally delegated authority.[77] There is no reason to believe that such is the case here. Even if the OCC had arguable authority to act, the critical question in any preemption analysis would still remain: whether Congress has *unmistakably* indicated that federal regulation supersedes state law.[78] Again, that is not the case here. Indeed, as discussed below, Congress has taken a very different position on the dual banking system in general and on state consumer protection laws in particular. Before discussing those subjects in the next section, however, a few observations about the legal and policy underpinnings of the Preemption Regs and the Visitorial Powers Regs are in order.

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[74] Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947).

[75] Hines v. Davidowitz, 312 U.S. 52 (1941).

[76] Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 38 (1980) (emphasis added).

[77] *See, e.g.,* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699 (1984); Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153-154 (1982).

[78] When Congress legislates in a field the States have traditionally occupied, the Court will "start with the assumption that the historic police powers of the states [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice* 331 U.S. at 230, citing Napier v. Atlantic Coast Line R. Co., 272 U.S. 605, 611 (1926); Allen-Bradley Local v. Wisconsin Employment Relations Board, 315 U.S. 740, 749 (1942).

First, it bears repeating that the initial "exception" noted by OCC is not really an exception at all. It is part of the statutory landscape that created OCC in the first place and by which it is bound. OCC learned this lesson the hard way with respect to the branching authorization added in 1927 by an amendment to the National Bank Act known as the McFadden Act.[79/] That amendment, as part of a congressional policy of "competitive equality," specifically tied the branching power of a national bank in a given state to what state law permitted for state-chartered banks. When OCC nevertheless approved branch applications by two national banks in Utah at locations where state banks were forbidden by state law to branch, the Supreme Court invalidated the approvals in no uncertain terms.[80/] Given the clarity of the statutory language, one might wonder why the lower courts did not excoriate the agency for lawless behavior or why the case was heard by the Supreme Court (unless it was to send a message).[81/] OCC *did* have a colorable legal argument, however. Its position was that so long as Utah authorized banks to branch at all, OCC was free to ignore any statutory conditions imposed by the state legislature and authorize branching by national banks, even in a manner that deliberately flouted those conditions.[82/] The Court's reaction was justifiably sarcastic: "It is a strange argument that

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79/ 12 U.S.C. § 36.

80/ First Nat'l Bank of Logan v. Walker Bank & Trust Co., 385 U.S. 252 (1966).

81/ During that same era, the Court had occasion to invalidate other OCC behavior it found high-handed, such as the agency's failure to provide any reasoned explanation for its decisions. *See, e.g.,* Camp v. Pitts, 411 U.S. 138 (1973); Investment Co. Inst. v. Camp, 401 U.S. 617 (1971).

82/ OCC has learned from experience that if it makes these sorts of arguments often
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permits one to pick and choose what portion of the law binds him."[83] It took several more judicial defeats invalidating administrative attempts to "end run" state restrictions[84] before OCC finally internalized the message and rendered unto Congress that which is its exclusive preserve (by actively lobbying for legislative reform of branch banking).

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[82](...continued)
enough, occasionally it will prevail. *See, e.g.,* Conference of State Bank Supervisors v. Conover, 715 F.2d 604 (D.C. Cir. 1983) (accepting essentially the same argument to trump state restrictions on branching by foreign banks), *cert. denied*, 466 U.S. 927 (1984).

[83] *Walker Bank & Trust*, 385 U.S. at 261.

[84] *See, e.g.,* First National Bank in Plant City v. Dickinson, 396 U.S. 122 (1969) (invalidating armored car deposit pick-up service and shopping center lock box arrangements as incompatible with state prohibitions on branch banking); Brown v. Clarke, 878 F.2d 627 (2d Cir. 1989) (invalidating OCC approval of deposit pick-up service as impermissible branch banking); Dakota Nat'l Bank & Trust Co. v. First Nat'l Bank & Trust of Fargo, 554 F.2d 345 (8th Cir. 1977) (enjoining the Comptroller from issuing a branch certificate after First National successfully petitioned the Comptroller to have its existing branch recharacterized as an "extension" so that the bank could then open a second branch), *cert. denied,* 434 U.S. 877 (1977); St. Louis City Nat'l Bank v. Mercantile Trust Co. Nat'l Assoc., 548 F.2d 716 (8th Cir.1976) (overruling OCC decision that a trust office, which did not accept deposits, make loans, or pay checks, was not a branch and holding that the trust office was operating in violation of state and thus federal law), *cert. denied*, 433 U.S. 909 (1977); State of Colorado *ex rel*. State Banking Board v. First Nat'l Bank of Fort Collins, 540 F.2d 497 (10th Cir. 1976) (overruling OCC decision that automatic teller machines were not branch banks), *cert. denied*, 429 U.S. 1091 (1977); State of Missouri *ex rel*. Kostman v. First Nat'l Bank in St. Louis, 538 F.2d 219 (8th Cir.1976) (overruling OCC decision that automatic teller machines were not branch banks); State of Illinois ex rel. Lignoul v. Continental Illinois Nat'l Bank & Trust Co., 536 F.2d 176 (7th Cir.) (overruling OCC decision that automatic teller machines were not branch banks), *cert. denied,* 429 U.S. 871 (1976); Indep. Bankers Ass'n of Am. v. Smith, 534 F.2d 921 (D.C. Cir.) (overruling OCC decision that automatic teller machines were not branch banks), *cert. denied,* 429 U.S. 862 (1976); Nebraskans for Indep. Banking, Inc. v. Omaha Nat'l Bank, 530 F.2d 755 (8th Cir.) (overruling OCC decision that a facility was not a branch office), *vacated and remanded for reconsideration in light of subsequent state legislation*, 426 U.S. 310 (1976).

Second, the language of the Preemption Regs, while reminiscent of that used by the Supreme Court in *Barnett*, is significantly different and more expansive. In *Barnett,* Florida insurance regulators challenged insurance sales pursuant to 12 U.S.C. § 92 by a national bank, Barnett Bank. Florida had on its statute books an anti-affiliation law,[85/] which prohibited sales of insurance by banks and their subsidiaries, affiliates, and employees,[86/] and the principal legal

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[85/] At the time of the *Barnett* litigation, a significant number (roughly half) of the states had enacted anti-affiliation statutes. *Compare* KAROL K. SPARKS, INSURANCE ACTIVITIES OF BANKS § 5.03 (1998) (identifying twenty states with anti-affiliation provisions (Arkansas, Colorado, Connecticut, Florida, Georgia, Illinois, Kentucky, Louisiana, Maine, Massachusetts, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, Pennsylvania, Rhode Island, Tennessee, Vermont, and West Virginia) and another five (Alaska, Arizona, New York, Ohio, and Texas) with similar statutory limitations on bank insurance activities), *with* Michael P. Malloy, *The Sound of Two Hands Flapping: Insurance-Related Activities of National Banks*, 41 ST. LOUIS L.J. 75, 79 & n.44 (1996) (identifying fifteen states with "statutory provisions that prohibit commercial banks from selling insurance" and another nine with laws that "may be interpreted as imposing similar limitations") (citing Linda Greenhouse, *Ruling Backs Banks' Sales of Insurance*, N.Y. TIMES, Mar. 27, 1996, at D-1).

These state anti-affiliation laws had previously shown themselves to be remarkably impervious to constitutional challenge. Among the better known anti-affiliation statutes was Pennsylvania's, which prohibited companies selling insurance in that state (which was the fourth largest insurance market in the country) from affiliation with a variety of depository institutions and their holding companies, regardless of whether the depository institution existed in, or even did business in, the state. 40 PA. CONS. STAT. ANN. § 281 (West Supp. 1994). Ford Motor Company and United Services Automobile Association, each a savings and loan holding company, challenged the statute on the grounds that it violated the Supremacy Clause and the Commerce Clause of the Constitution. Ford Motor Co. v. Ins. Comm'r, 874 F.2d 926 (3d Cir. 1989). The Third Circuit held that the Pennsylvania statute was preempted only to the extent that it would prohibit acquisitions of failing thrift institutions, but not healthy ones, and sustained the statute against the Commerce Clause challenge as well. *Id.* at 928. No preemption attack predicated on 12 U.S.C. § 92 was involved in that case, however.

[86/] "No [Florida licensed] insurance agent . . . who is associated with, . . . owned or controlled by . . . a financial institution shall engage in insurance agency activities . . . ." FLA. STAT. ANN. § 626.988(2) (West Supp. 1996). The term "financial institution" was defined for
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issue was whether that anti-affiliation statute was preempted by the so-called "town of 5,000" statute, 12 U.S.C. § 92. This was not a typical preemption case, however, as it involved insurance regulation and the special "reverse preemption" regime enacted by Congress in the 1940's and known as the McCarran-Ferguson Act.[87/] Under that regime, general purpose federal statutes that happen to cause or encounter some interference or conflict with state insurance laws do not preempt those laws but are themselves preempted.[88/] If, however, the federal statute "specifically relates to the business of insurance," then the reverse preemption rule is inapplicable and normal preemption analysis applies.[89/]

The precise contours of what constitutes the "business of insurance" for McCarran-Ferguson purposes are complex and beyond the scope of this discussion.[90/] Nonetheless, if 12 U.S.C. § 92 [91/] does not "specifically relate[]" to the "business of insurance," it is difficult to

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[86/](...continued)
this purpose to include "any bank . . . [except a] bank which is not a subsidiary or affiliate of a bank holding company and is located in a city having a population of less than 5,000. . . ." *Id.* § 626.988(1)(a).

[87/] 15 U.S.C. §§ 1011-1015.

[88/] 15 U.S.C. § 1012(b).

[89/] *Id.*

[90/] The Supreme Court has evolved somewhat inconsistent frameworks here. *See, e.g.,* Dept. of Treasury v. Fabe, 508 U.S. 491 (1993); Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119 (1982); Group Life and Health Ins. Co. v. Royal Drug, 440 U.S. 205 (1979); SEC v. Nat'l Sec., Inc., 393 U.S. 453 (1969).

[91/] 12 U.S.C. § 92 provides, in pertinent part:

> In addition to the powers now vested by law in national banking

(continued...)

imagine a statute that does. The Supreme Court in *Barnett* reached the same conclusion, found McCarran-Ferguson inapplicable,[92] and concluded that the Florida provision was, in fact, preempted by § 92.

In so doing, the Court established a standard for assessing the vitality of § 92 vis-a-vis other types of state laws: A state may not

> forbid or impair significantly the exercise of a power that Congress explicitly granted. to national banks. To say this is not to deprive States of the power to regulate national banks, where (unlike here) doing so does not *prevent or significantly interfere with* the national bank's exercise of its powers. . . .[93]

This language makes clear beyond peradventure that the Court emphatically does *not* view the national banking laws as constituting field preemption. Yet that is precisely the suggestion underpinning the Preemption Regs,[94] as state bank regulators have observed in

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[91](...continued)

> associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company . . . .

[92] *Barnett*, 517 U.S. at 39-41.

[93] *Id*. at 33 (emphasis supplied; citations omitted).

[94] The underpinning is explicit, not merely implicit. When the Preemption Regs were initially proposed, OCC boldly asserted in the release that it enjoys preemption authority

(continued...)

testimony before Congress.[95] Worse yet, OCC has paraphrased the *Barnett*standard in a manner that distorts it, substantially expands it, and calls for preemption of myriad state laws that do not "prevent" or "forbid" and do not "impair significantly" or "significantly interfere with" the exercise by a national bank of its congressionally authorized powers. OCC's standard calls for preemption where state laws "obstruct, impair [to any degree, not just significantly], or condition a national bank's ability to fully exercise the powers authorized to it under Federal law."[96]

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[94](...continued)
comparable to the field preemption approach that has long been taken by its sister agency, the Office of Thrift Supervision (OTS), in its regulations. "The extent of Federal regulation and supervision of Federal savings associations under the Home Owners' Loan Act is substantially the same as for national banks under the national banking laws, a fact that warrants similar conclusions about the applicability of state laws to the conduct of the Federally authorized activities of both types of entities." 68 Fed. Reg. at 46,129 n.91. *See also* Preemption Regs, *supra* note 24, at 1914 (asserting that "the preemption regulations adopted by the OCC are substantially identical to the preemption regulations of the OTS"). The "field preemption" regulations by the OTS – 12 C.F.R. §§ 557.11(b) (deposits), 560.2(a) (loans) -- are outside the scope of this paper, but they date back to the predecessor agency, the Federal Home Loan Bank Board, which embarked on a campaign to occupy the field after a poorly reasoned Supreme Court decision upheld the agency's authority to preempt California law regulating "due on sale" clauses in mortgage contracts. *See* Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982).

For a spirited discussion of the OTS field preemption regime and its consequences, see Wilmarth, *supra* note 28, at 280-87.

[95] Statement of Diana L. Taylor, New York Superintendent of Banking, on Behalf of the Conference of State Bank Supervisors, in *Congressional Review of OCC Preemption: Hearings Before the Subcomm. on Oversight and Investigations House Comm. on Financial Services,* 108th Cong., 1st Sess. 145, 155 (Jan. 28, 2004) (prepared written testimony, characterizing OCC regulations as "*de facto* field preemption"), *available at* http://financialservices.house.gov/media/pdf/108-65.pdf (last visited Dec. 20, 2004).

[96] Preemption Regs, *supra* note 24, 69 Fed. Reg. at 1912, 1916-17.

As perhaps the only aspect of the pre-1999 bank-insurance regime that survived enactment of the Gramm-Leach-Bliley Act,[97] the above-quoted *Barnett*standard will, as OCC well knows, continue to have significant implications for any state law with an impact on small town insurance marketing activities by national banks.[98] In fact, Congress expressly endorsed this standard and enshrined it in the insurance provisions of GLEBA in unmistakably clear language:

> In accordance with the legal standards for preemption set forth in the decision of the Supreme Court of the United States in Barnett Bank of Marion County N.A. v. Nelson, 517 U.S. 25 (1996), no State may, by statute, regulation, order, interpretation, or other action, prevent or significantly interfere with the ability of a depository institution, or an affiliate thereof, to engage, directly or indirectly, either by itself or in conjunction with an affiliate or any other person, in any insurance sales, solicitation, or crossmarketing activity.[99]

In fact, since Congress' abortive, Civil-War era attempt to destroy the state banking system by creating a federal currency and taxing state bank notes,[100] there has been both implicit

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[97] Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified, as amended, in scattered sections of 12 and 15 U.S.C.) [hereinafter "GLEBA"].

[98] The implications extend even more broadly in those states that have "wild card" statutes permitting state-chartered banks to exercise the same powers as national banks. *See* SPARKS, *supra* note 85, § 3.03[B][1].

[99] 15 U.S.C. § 6701(d)(2)(A).

[100] *See, e.g.,* Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869); BENJAMIN J. KLEBANER, COMMERCIAL BANKING IN THE UNITED STATES: A HISTORY 54-55 (1974); EUGENE N. WHITE, THE REGULATION AND REFORM OF THE AMERICAN BANKING SYSTEM (1900-1929) 11-15 (1983); Alvin C. Harrell, *Commentary: The Case for Nonuniformity in State Law,* 51 CONSUMER FIN. L. Q. REP. 294, 322 (1997); David G. Oedel, *Private Interbank Discipline*, 16
(continued...)

and explicit congressional recognition and endorsement of the dual system of federally chartered and state-chartered banks coexisting in a competitive regulatory framework. To be sure, national banks are federally created instrumentalities in the sense that they are organized and existing under the laws of the United States, as opposed to the laws of a particular state. Nonetheless they are privately owned businesses[101/] that must be headquartered *somewhere* and do business *somewhere*, and that somewhere is usually in one (or more, since the advent of interstate branching with the IBBEA) of the 50 sovereign states (apart from those few in the District of Columbia and U.S. territories). While not organized under the laws of that state, the national bank will, in the ordinary course of business, be indistinguishable from every other corporate entity (whether chartered in that state or, having been chartered elsewhere, licensed to do business in the state), financial or non-financial, in terms being a part of the local economy and engaging in business and social intercourse implicating a broad array of quintessentially state laws. When the national bank hires executives and enters into employment agreements, those agreements are not interpreted under any federal law of contracts but under state contract law.[102/] When the national bank purchases or leases property for its head office or branches, those transactions are governed by the property laws of the state, even though the bank's authority to

[100/](...continued)
HARV. J. L. & PUB. POL'Y 327, 351 (1993).

[101/] *See, e.g.,* 12 U.S.C. §§ 21-24.

[102/] The National Bank Act simply authorizes national banks "to make contracts" as part of their general corporate powers, without further elaboration. 12 U.S.C. § 24 (Third).

enter into them may simultaneously be circumscribed by federal law.[103] When the national bank engages in asset-based financing and makes loans secured by personal property, questions of enforceability, attachment, perfection, and priority of the security interests will perforce be governed by state law.[104] If the national bank is negligent, for example by failing to shovel snow off its premises, and business invitees are injured as a result of that negligence, state tort law will govern. Finally, if the national bank should engage in fraudulent conduct that violates the state's criminal laws, then the federal charter will be no defense to State criminal liability. No principled basis exists, then, for applying a different approach to state consumer protection statutes. These tenets are fundamental to the notions of comity that underlie "Our Federalism."

Contrast purely federal instrumentalities, such as the Second Bank of the United States, which gave rise to seminal opinions by Chief Justice John Marshall in *McCulloch v. Maryland*,[105] and *Osborn v. Bank of the United States*.[106] In the latter decision, Marshall was at pains to point out that if the Second Bank had been a "mere private corporation" as opposed to

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103/ *See* 12 U.S.C. § 29 (limited authority of national banks to own real estate).

104/ Article 9 of the Uniform Commercial Code generally governs these subjects, though other statutory schemes may apply depending upon the nature of the collateral, *e.g.,* boats (as in such states as California and Michigan, *see, e.g.,* Gallatin Nat'l Bank v. Lockovich, 124 B.R. 660, 663 n.2 (W.D. Pa. 1991)); insurance policies (which are excluded under U.C.C. § 9-109(d)(8) and in which securities interests typically are "perfected" by notification to the insurance company and inclusion of the secured party as a "loss payee"); copyrights (perfected by recording in the United States Copyright Office, *see, e.g.*, National Peregrine, Inc. v. Capitol Fed. Sav.& Loan Assoc. of Denver, 116 B.R. 194 (C.D. Cal. 1990)); and motor vehicles (state certificate of title legislation).

105/ 17 U.S. (4 Wheat.) 316 (1819).

106/ 22 U.S. (9 Wheat.) 738 (1824).

the public corporation that it was, created to further the government's fiscal operations, then it would clearly have been subject to State legislation:

> The argument supposes the corporation to have been originated for the management of an individual concern, to be founded upon contract between individuals, having private trade and private profit for its great end and principal object. If these premises were true, the conclusion drawn from them would be inevitable. This mere private corporation, engaged in its own business, with its own views, would certainly be subject to the taxing power of the State, as any individual would be; and the casual circumstance of its being employed by the government in the transaction of its fiscal affairs, would no more exempt its private business from the operation of that power, than it would exempt the private business of any individual employed in the same manner. But the premises are not true. The Bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connexion with the government, is admitted; but the Bank is not such an individual or company. It was not created for its own sake, or for private purposes.[107/]

The same distinction, placing national banks squarely within the ranks of private business enterprise subject to State legislation, was reiterated by the Court 50 years later – and only six years after the creation of national banks by the National Currency Act of 1863 and the National Bank Act of 1864 – in *National Bank v. Commonwealth of Kentucky*:[108/]

> [I]t certainly cannot be maintained that banks or other corporations or instrumentalities of the government are to be wholly withdrawn from the operation of State legislation. The most important agents of the Federal government are its officers, but no one will contend

107/ *Id.* at 859-60.

108/ 76 U.S. (9 Wall.) 353 (1869).

> that when a man becomes an officer of the government he ceases to be subject to the laws of the State. The principle we are discussing has its limitation,. . . [namely that] the agencies of the Federal government are only exempted from State legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers into an unauthorized and unjustifiable invasion of the rights of the States.[109]

In practice, Congress has been quite assiduous in striving to maintain competitive parity between the national and state banking systems. For example, in 1978 a Supreme Court decision, interpreting one of the few provisions of the National Bank Act having explicit preemptive effect,[110] gave national banks a significant competitive edge in the credit card business by allowing them (A) to use "most favored lender" status to choose the highest interest rate available to lenders (any lenders, not just banks) in the state and then (B) to export that all over the country with preemptive effect over the usury laws of all other states.[111] To remedy the competitive imbalance, Congress enacted Section 521 of the Depository Institutions

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[109] *Id.* at 361-62.

[110] To wit: 12 U.S.C. § 85 (prescribing a national usury law for national banks).

[111] Marquette Nat'l Bank v. First of Omaha Serv. Corp., 439 U.S. 299 (1978) (construing 12 U.S.C. § 85).

Deregulation and Monetary Control Act of 1980,[112] which duplicated for state-chartered banks everything that 12 U.S.C. § 85 gave to national banks.[113]

When, in 1994, interstate branching became the law of the land for the first time in U.S. history, [114]Congress explicated its longstanding adherence to a policy of "maintaining the balance of Federal and State law under the dual banking system" and specified that the application of state laws to national banks in the ordinary course of business is an essential element of that policy. Congress effectuated that policy by subjecting interstate branches of national banks to the laws of their host states in four comprehensive categories: community reinvestment, consumer protection, fair lending, and branching intrastate.[115] The only exception

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[112] Pub. L. No. 96-221, 94 Stat. 132 (1980) (codified in scattered sections of the U.S.C.).

[113] 12 U.S.C. § 1831a provides, in pertinent part:

> In order to prevent discrimination against State-chartered insured depository institutions, including insured savings banks, ... with respect to interest rates, ... such State bank[s] ... may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank ... is located or at the rate allowed by the laws of the State, territory, or district where the bank is located, whichever may be greater.

[114] This was done in the IBBEA, *supra* note 56.

[115] 12 U.S.C. § 36(f).

would be where federal law (*i.e.,* an Act of Congress, not regulatory fiat) preempted the application of such state laws to national banks. As explained in the Conference Report:

> *States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds*. In particular, States have a legitimate interest in protecting the rights of their consumers, businesses, and communities. Federal banking agencies, through their opinion letters and interpretive rules on preemption issues, play an important role in maintaining the balance of Federal and State law under the dual banking system. Congress does not intend that the [IBBEA] alter this balance and thereby weaken States' authority to protect the interests of their consumers, businesses, or communities.
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> *Under well-established judicial principles, national banks are subject to State law in many significant respects*.... Courts generally use a rule of construction that avoids finding a conflict between the Federal and State law where possible. The [IBBEA] does not change these judicially established principles.[116]

Congress' solicitude for the preservation of the dual system of financial services regulation has recently paid unexpected public policy dividends with the proactive posture of many state attorneys general in enforcing consumer protection statutes and combating financial fraud that federal agencies were either unable or unwilling to detect and punish. The New York Attorney General alone, Eliot Spitzer, has brought to justice a variety of large Wall Street investment banking firms, mutual fund complexes[117] (including some affiliated with major

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[116] H.R. Rep. No. 103-651, at 53 (Conf. Rep.) (1994) (emphasis added), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074.

[117] With respect to mutual funds alone, Spitzer earned himself a stream of headlines for uncovering breaches of fiduciary duty and sharp business practices that found the SEC's Division of Investment Management asleep at the switch. *See, e.g.,* Christopher Oster, *Invesco*
(continued...)

banks), and, most recently, insurance companies. OCC's ill-considered preemption initiative threatens to shut down many such proceedings, not merely with respect to national banks but, as discussed in the next section, their state-chartered operating subsidiaries as well.

C. Expanding Preemption to State-Chartered Bank Operating Subsidiaries

In the Preemption Regs and Visitorial Powers Regs, OCC has announced, by regulatory fiat, that it will apply the same rules to operating subsidiaries of national banks as it has to the banks themselves. The rationale is simply that such operating subsidiaries are a convenient organizational alternative to a separate department of a national bank and may only perform those activities that the bank itself is authorized to perform. This assertion of preemptive power – which, sadly, has been uncritically accepted by several courts -- stands the whole operating subsidiary concept on its head.

The concept of subsidiaries of national banks has always been surrounded by controversy. Part of the problem surrounds the differing interpretations of what constitutes the "business of banking" under the relevant provision of the National Bank Act, Section 5136 of the Revised Statutes, which provides, in pertinent part, that a national bank may exercise

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[117/](...continued)
Charged in Scandal as Strong Quits; Strong's Financial Chief Resigns, Plans to Shed Controlling Stake Amid Mutual-Fund Investigation, WALL ST. J., Dec. 3, 2003, at C1; David Reilly, *Regulators Begin to Investigate Funds in Europe,* WALL ST. J., Nov. 28, 2003, at C7; Christopher Oster, *Mutual Funds Under Fire: Details Emerge on Security Trust Role; SEC Files Civil Charges as Bank's Executives Face Criminal Case in New York,* WALL ST. J., Nov. 26, 2003, at C10; Tom Lauricella, *Pilgrim and Baxter Face Charges; Mutual-Fund Firm's Founders Are Accused of Breach of Duty, Civil Fraud, by SEC and Spitzer,* WALL ST. J., Nov. 21, 2003, at C1.

> all such incidental powers as shall be necessary to carry on *the business of banking*; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of title 62 of the Revised Statutes.[118]

The interpretive question is whether the phrases that follow the emphasized language, and that are separated therefrom by a semicolon, constitute a delineation of what constitutes the "business of banking," indicating (under an *expressio unius est exclusio alterius* approach) that items not mentioned in the statute are not part of that business, or are merely exemplary, indicating (under an *ejusdem generis* approach) that omitted items may nonetheless be considered part of that business. The former represents the so-called "narrow view" of the business of banking, the latter the so-called "broad view."[119]

The narrow view, that national banks are statutory creatures of limited powers and can exercise only those powers expressly granted them in the National Bank Act, is analogous to the Framers' view that, under our Constitution, the federal government is a government of limited powers and that those powers not expressly granted to the federal government in the Constitution are reserved to the States and the people.[120] Under this view, national banks are not authorized

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[118] 12 U.S.C. § 24 (Seventh) (emphasis added).

[119] *See* Edward L. Symons, Jr., *The "Business of Banking" in Historical Perspective*, 51 GEO. WASH. L. REV. 676, 678-80 (1983).

[120] As will be apparent from the discussion in Part II, *infra*, the Tenth Amendment either guaranteed this view (from the point of view of the Anti-Federalists) or (from that of the Federalists) underscored it.

to have subsidiaries absent a specific statutory authorization. Far from providing such an authorization, Section 5136, as amended by section 16 of the Glass-Steagall Act,[121/] expressly limits the power of a national bank by forbidding its ownership of stock for its own account.[122/] If a national bank cannot own stock for its own account, how, then, can it possibly own a subsidiary?

The OCC has traditionally taken a more expansive view. Beginning in 1964, OCC permitted a national bank to own the stock of a subsidiary, variously known as an "operations subsidiary" or "operating subsidiary," provided that it would not perform any function that the bank could not perform directly. In other words, activities conducted by operating subsidiaries were treated the same as those conducted directly by the bank itself, subject to the same limitations and restrictions as were applicable to the bank.[123/] These mid-1960s OCC pronouncements on operating subsidiaries engendered public disagreement on the subject between OCC and the Federal Reserve Board (the "Board"), which took the position that section

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[121/] The Glass-Steagall Act is the name commonly used to refer to certain sections of the Banking Act of 1933, ch. 89, 48 Stat. 162, particularly sections 16, 20, 21, and 32 (codified as amended, respectively, at 12 U.S.C. § 24 (Seventh); 12 U.S.C. § 377 (1994) (repealed by GLEBA in1999); 12 U.S.C. § 378; 12 U.S.C. § 78 (1994) (repealed by GLEBA in 1999)).

[122/] "The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, *and in no case for its own account*. . . ." 12 U.S.C. § 24 (Seventh) (emphasis added). This language immediately follows the language quoted *supra* in the text accompanying note 120, *supra*.

[123/] This, at least, was OCC's approach prior to the revisionist history position it adopted in 1994. *See, e.g.,* 12 C.F.R. § 5.34 (1993) (former OCC operating subsidiary regulation).

16 of Glass-Steagall forbade any such subsidiary.[124] Ultimately, however, the Board reached an entente with OCC and reversed its position on the subject:

> [A] bank [is permitted] to organize its operations in the manner that it believes best facilitates the performance thereof. One method of organization is through departments; another is through separate incorporation of particular operations. In other words, a wholly owned subsidiary corporation engaged in activities that the bank itself may perform is simply a convenient alternative organizational arrangement.[125]

Consistent with the competition in regulation process that has long been a hallmark of the dual banking system, similar powers were granted to subsidiaries of state banks under state law.[126]

Although the House Banking Committee held hearings on this subject,[127] Congress never took action to alter OCC's position through legislation. To the contrary, in the 1978 amendments to the Bank Holding Company Act ("BHC Act"), when operating subsidiaries were already a common organizational device, Congress acknowledged the existence of operating subsidiaries and provided that they were definitely not within the purview of the Board's

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[124] *See Member Bank Purchase of Stock of "Operation Subsidiaries",* 52 FED. RES. BULL. 1151 (1966).

[125] Fed. Res. Sys. Miscellaneous Interpretations, 12 C.F.R. § 250.141(c) (2001). The Board even went so far as to oppose legislation that would have prohibited a national bank from engaging directly or indirectly in any activity that the Board had determined by regulation or order to be an improper activity for bank holding companies. *See Competition in Banking Act of 1980: Hearings Before the S. Comm. on Banking, Housing and Urban Affairs*, 96th Cong. 14 (1980).

[126] *See supra* notes 114 - 116 and accompanying text.

[127] *See generally Federal Reserve Rules Regarding Loan Production Offices and Purchases of Operating Subsidiaries: Hearings Before the House Comm. on Banking and Currency,* 90th Cong. (1968).

regulatory power under the BHC Act, even where they were second-tier subsidiaries of a BHC.[128] Those amendments added a new section 5(e) to the BHC Act:

> [T]he Board may, whenever it has reasonable cause to believe that the continuation by a bank holding company of any activity or of ownership or control of any of its nonbank subsidiaries, *other than a nonbank subsidiary of a bank*, constitutes a serious risk to the financial safety, soundness, or stability of a bank holding company subsidiary bank and is inconsistent with sound banking principles . . ., order the bank holding company or any such nonbank subsidiaries . . . to terminate such activities or to terminate . . . its ownership or control of any such subsidiary . . . .[129]

Similarly, Congress excluded banks and their subsidiaries from the cease-and-desist authority granted to the Board under section 8(b) of the Federal Deposit Insurance Act, as also amended in 1978:

> Nothing in this subsection [cease-and-desist proceedings] or in subsection (c) of this section [temporary cease-and-desist proceedings] shall authorize any Federal banking agency, other than the Board of Governors of the Federal Reserve System, to issue a notice of charges or cease-and-desist order against a bank

[128] An interesting parallel may be drawn with OCC's approval of the establishment of a discount brokerage subsidiary by a national bank, which was itself a subsidiary of a bank holding company (BHC), at a time when discount brokerage had not yet been determined to be a permissible activity under section 4 of the Bank Holding Company Act, 12 U.S.C. § 1843. In the litigation engendered by the discount brokerage applications, it was never suggested that a BHC-owned bank, which in turn established a subsidiary to conduct an activity that OCC had determined the bank itself could conduct, would cause the parent BHC to be in violation of the BHC Act. *See* Sec. Indus. Ass'n v. Comptroller of the Currency, 577 F. Supp. 252 (D.D.C. 1983), *aff'd*, 758 F.2d 739 (D.C. Cir. 1985).

[129] 12 U.S.C. § 1844(e) (emphasis added).

> holding company or any subsidiary thereof (other than a bank or subsidiary of that bank).[130]

Congress was therefore satisfied with the operating subsidiary concept as it had been administered by the OCC under the National Bank Act and by the state bank supervisors under state law. Central to that concept was the treatment of the operating subsidiary as simply a convenient organizational alternative to a department of the bank. Indeed, in the Garn-St Germain amendments to section 23A of the Federal Reserve Act, Congress created the express statutory distinction between loans by a bank to a subsidiary, which are not treated as loans to an affiliate, and loans by a bank's subsidiary to an affiliate of the bank, which *are* treated as loans by the bank to that affiliate.[131]

In the mid-1990s, however, OCC announced an expansion on its already expansive view. Emboldened by its victory in *Nationsbank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*,[132] which featured the use of an operating subsidiary to sell annuities and which expressly held that OCC enjoyed significant latitude in determining what sort of activities might be "incidental" to the "business of banking" under § 24 (Seventh),[133] OCC promulgated a revised

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[130] Id. § 1818(b)(3) (emphasis added).

[131] *See* Garn-St Germain Depository Institutions Act of 1982, § 410, Pub. L. No. 97-320, 96 Stat. 1469, 1515-16 (amending 12 U.S.C. § 371c).

[132] 513 U.S. 251 (1995).

[133] *Id*. at 258, n.2.

operating subsidiary regulation[134/] that contemplated authorizing activities for such subsidiaries that were *not* permissible for the parent national bank.[135/]

This proposal sent shock waves[136/] through the financial services industries and the halls of Congress and was denounced as exceeding the scope of OCC's statutory authority.[137/] Initially promulgated in 1994, the operating subsidiary proposal was shelved in the 104th Congress,

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[134/] Rules, Policies, and Procedures for Corporate Activities, 59 Fed. Reg. 61,034 (Nov. 29, 1994). The revisions to Part 5 of OCC's regulations originated in 1994 as part of a comprehensive overhaul of the agency's regulations in an effort to "update and streamline" them, pursuant to the mandate of section 303 of the Riegle Community Development and Regulatory Improvement Act of 1994, 12 U.S.C. § 4803 (1994).

[135/] OCC proposed to exempt operating subsidiaries from statutory restrictions on the conduct of certain activities by the parent national bank where the agency believed the restriction to be not necessarily applicable to the subsidiaries. Rules, Policies, and Procedures for Corporate Activities, 59 Fed. Reg. at 61,039.

[136/] The revised Part 5 operating subsidiary regulation was widely seen to be an end-run around Glass-Steagall and insurance restrictions, as well as other activities (*e.g.,* real estate) forbidden to national banks themselves. *See generally OCC Seeks Comment on Easing Bank Rules, Opening Door for New Sub Power Requests*, 63 BANKING REP. (BNA) 815 (Dec. 5, 1994). It was even suggested that these rules would open the door to European-style "universal banking" in the United States. Robert M. Garsson, *OCC's Paperwork Rewrite Paves the Way for Banks To Expand Their Powers*, AM. BANKER, Jan. 20, 1995, at 3. These impressions of the potential breadth and significance of the operating subsidiary proposal persisted even two years later, when the regulation was ultimately finalized. *See* Olaf de Senerpont Domis, *Banks Rush To Embrace New Freedoms*, AM. BANKER, Nov. 25, 1996, at 1-2 (describing how, availing themselves of new Part 5 Rules, national banks plan to propose new or expanded activities involving insurance, equipment leasing, municipal revenue bond underwriting, real estate brokerage, and management and information processing).

[137/] For a more sympathetic view, *see* James R. Smoot, *Bank Operating Subsidiaries: Free at Last or More of the Same?*, 46 DEPAUL L. REV. 651 (1997). The rhetoric from Capitol Hill and various trade associations was decidedly more negative, however. *See id.* at 653, 673-74 (recounting responses from House Banking Committee Chairman Leach, former House Energy and Commerce Committee Chairman Dingell, and others).

partly in response to the wave of critical reaction and partly in the hopes that it would be mooted by enactment of a precursor to GLEBA,[138] the proposed Financial Services Competitiveness Act of 1995.[139] However, when banking reform legislation failed to pass with the 104th Congress,[140] the proposal was dusted off and issued as a final regulation.[141]

There, OCC declared that it would entertain, on a case-by-case basis, proposals for operating subsidiaries to engage in activities that, while part of the "business of banking" or "incidental" thereto, were nonetheless beyond the authority of the parent banks themselves. In light of the breadth of the Comptroller's discretion after *NationsBank* and the judicial deference it would enjoy thereunder, confining those activities to what constitutes the "business of banking" and its incidents was no limitation at all -- at least with respect to a broad array of securities and insurance products and activities.[142] The newly constituted operating subsidiary thus represented

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[138] *See* Olaf de Senerpont Domis, *OCC May Get Upper Hand in Bid To Expand Activities Allowed in Bank Subsidiaries*, AM. BANKER, Feb. 12, 1996, at 4 (reporting OCC Chief Counsel Julie L. Williams as saying the agency was in a "holding pattern" on the proposed Part 5 Rules and was "monitoring what Congress [was] doing").

[139] *See* H.R. 18, 104th Cong. (1995). One month after his introduction of this legislation, House Banking Committee Chairman Leach introduced a second version of the same bill, H.R. 1062, 104th Cong. (1995), which became the principal vehicle for banking reform legislation during that session of Congress and the bill that was marked up by both the House Banking Committee and the House Commerce Committee.

[140] *See* Justin Fox, *Hopes for Wider Powers Now Pinned on Courts, Regulators--Not Congress,* AM. BANKER, Jan. 2, 1996, at 1.

[141] Rules, Policies, and Procedures for Corporate Activities, 61 Fed. Reg. 60,342 (Nov. 26, 1996).

[142] For example, within a year after the regulation was finalized, OCC relied on it to permit a subsidiary of Zions First National Bank, Salt Lake City, Utah, to engage in municipal (continued...)

yet another, and potentially awesome, weapon in the OCC's arsenal in aid of moving banks into the realm of insurance.

All that changed, however, with GLEBA, which represented the first true *statutory* acknowledgment of national bank authority to have operating subsidiaries. GLEBA not only preserved – indeed, reaffirmed – the primacy of the McCarran-Ferguson Act reverse preemption regime[143/] but also largely eliminated the possibility that banks could rely on judicial deference to federal banking agency interpretations in this area. Thus, in the case of a regulatory conflict over insurance and reverse preemption issues between a state insurance regulator and a federal regulator, either side may, subject to a special statute of limitations,[144/] seek expedited[145/] judicial

[142/](...continued)
revenue bond underwriting. OCC Conditional Approval No. 262 (Dec. 11, 1997), *available at* 1997 OCC Ltr. LEXIS 127. Municipal revenue bonds are state or local bonds not backed by the full faith and credit of the issuing authority, and as such could not (at that time, *i.e.,* prior to GLEBA) be underwritten by national banks, which were limited by § 24 (Seventh) to underwriting only general obligation state and municipal bonds. Interestingly, GLEBA expressly amended that provision to authorize underwriting, dealing in, and purchasing (*i.e.,* for the bank's own account: purchases as agent were already permitted) various state and municipal revenue bonds, limited obligation bonds, and other obligations that satisfy the requirements of § 142(b)(1) of the Internal Revenue Code. GLEBA § 151 (codified at 12 U.S.C. § 24 (Seventh)).

[143/] 15 U.S.C. § 6701(a).

[144/] A special, and rather abbreviated, limitations period is provided for. No challenge to an order, ruling, determination, or other action of a state insurance regulator or a federal regulator may be filed after the later of the end of (i) the twelve-month period beginning on the date the first public notice of such order, ruling, determination, or other action is made in its final form, or (ii) the six-month period beginning on the date when such order, ruling, determination, or other action becomes effective. GLEBA § 104(d), 15 U.S.C. § 6714(d).

[145/] The court of appeals has no more than sixty days to render its judgment, unless all parties stipulate to an enlargement. GLEBA § 304(b), 15 U.S.C. § 6714(b). Any petition for
(continued...)

review in the appropriate federal circuit court, but such review must be "*without unequal deference*."[146] In general, the deference issue was a political "hot button" and led to this compromise position, though the implementation of a functional regulation regime, the enactment of a federal definition of "insurance," and the reaffirmation of McCarran-Ferguson already made it clear that OCC would have a much more difficult time approving bank entry into insurance without the regulatory input of state insurance commissioners. In such circumstances, the Visitorial Powers Regs appear anomalous at best and blatantly lawless at worst.

*   *   *

Whether the putative concerns animating OCC's recent actions are legitimate is not the question, only its authority to act as it is. Axiomatic to our constitutional allocation of power is that an agency cannot confer power upon itself. That would usurp authority constitutionally committed to the Congress. "To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do."[147]

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[145](...continued)
Supreme Court review of the appellate court's judgment "shall be filed . . . as soon as practicable after such judgment is issued." GLEBA § 304(c), 15 U.S.C. § 6714(c).

[146] GLEBA § 304(e), 15 U.S.C. § 6714(e) (emphasis added). The court must decide the matter "based on its review on the merits of all questions presented under State and Federal law, including the nature of the product or activity and the history and purpose of its regulation under State and Federal law." *Id.*

[147] Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, 374-75 (1986). *Accord*, Dimension Fin. Corp. v. Board of Governors, 744 F.2d 1402, 1408, 1410 (10th Cir. 1984) *aff'd*, 474 U.S. 361 (1986).FAIC Securities, Inc. v. United States, 595 F. Supp. 73, 79
(continued...)

Separation of powers also has a federalism aspect in the proper allocation of powers between the national government and the States. For OCC to trespass on the States' Tenth Amendment-protected turf is equally as inimical to our constitutional scheme as its usurpation of congressional prerogatives. Part II will consider the importance of judicial review to the Framers' federalism design and then explore what constitutes the irreducible content of the powers reserved under the Tenth Amendment.

II

The primary regulator of any corporate entity is its chartering authority. For federally chartered depository institutions, such as national banks, that entity is the United States, but for all of the affiliates of those institutions – including their parent holding companies, their sister nonbank subsidiaries of those holding companies, and their operating subsidiaries – the chartering authority is a sovereign state (as it is for state-chartered banks as well). That state, which brings such institutions into existence, has a legitimate and compelling interest in preserving that existence in the current competitive realities of the financial services industry, and in ensuring that those institutions serve the purposes for which they have been created.

For over seventy years, it has been recognized that undue federal interference with this principle of comity is a violation of the Tenth Amendment of the United States Constitution.[148] As Justice Cardozo stated:

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[147](...continued)
(D.D.C. 1984), *aff'd,* 768 F.2d 352 (D.C. Cir. 1985).

[148] Hopkins Federal Savings & Loan Ass'n v. Cleary, 296 U.S. 315 (1935).

> A corporation is a juristic person organized by government to accomplish certain ends, which may be public or quasi-public, though for other purposes of classification the corporation is described as private. This is true of building and loan associations in Wisconsin and in other states. They have been given corporate capacity in the belief that their creation will advance the common weal. The state, which brings them into being, has an interest in preserving their existence, for only thus can they attain the ends of their creation. They are more than business corporations. They have been organized and nurtured as quasi public instruments . . . . How they shall be formed, how maintained and supervised, and how and when dissolved, are matters of governmental policy, which it would be an intrusion for another government to regulate by statute or decision, except when reasonably necessary for the fair and effective exercise of some other and cognate power explicitly conferred.[149/]

The court in *Hopkins Federal* invalidated an act of Congress as just such an unconstitutional infringement of state sovereignty. Clearly, comparable action by the OCC – bereft of congressional support, much less an "explicitly conferred" statutory authority – presents an *a fortiori* case.

Relying on the Tenth Amendment as an independent source of reserved State power is made difficult by the terse and general nature of a Constitutional one-liner: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[150/] While recent decisions of the Supreme Court have reanimated its historic role as preserving the states from the abuses of excessive federal

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[149/] *Id*. at 336-37 (citation omitted) (emphasis added).

[150/] U.S. CONST. amend. X.

regulation,[151] the majority of these have not done much to establish a doctrinal base line for Tenth Amendment analysis. As a result, the lower federal courts have been chary of using what is usually little more than "bare bones" citation of the Amendment in briefs by State parties as a basis for challenging claims of federal preemption. OCC's success record on its preemption and visitorial powers claims eloquently attests to that conclusion.[152]

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[151] *See, e.g.,* Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (invalidating private suits for damages against states under Title I of Americans with Disabilities Act); Jones v. United States, 529 U.S. 848 (2000) (reversing federal conviction for arson, a "paradigmatic common-law state crime," on the ground that the commerce power does not reach an owner-occupied dwelling used for no other purpose); Kimel v. Florida Board of Regents, 528 U.S. 62 (2000) (holding that the Age Discrimination in Employment Act was not a valid exercise of congressional authority under Section 5 of the Fourteenth Amendment to abrogate states' sovereign immunity); United States v. Morrison, 529 U.S. 598 (2000) (invalidating portions of Violence Against Women Act as exceeding congressional authority under the Commerce Clause and Section 5 of the Fourteenth Amendment); Alden v. Maine, 527 U.S. 706 (1999) (holding, in a case of first impression, that Congress lacks the power to subject a nonconsenting state to a private suit for damages in the state's own courts); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (holding that federal trademark laws did not validly abrogate states' sovereign immunity); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (holding that federal patent laws did not validly abrogate states' sovereign immunity); City of Boerne v. Flores, 521 U.S 507 (1997) (holding that Religious Freedom Restoration Act exceeded congressional authority under Section 5 of the Fourteenth Amendment); Printz v. United States, 521 U.S. 898 (1997) (holding that Congress had no authority to compel state executive branch officials to enforce a federal regulatory program); Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (holding that Congress has no power to abrogate the states' Eleventh Amendment immunity pursuant to the Indian Commerce Clause); United States v. Lopez, 514 U.S. 549 (1995) (invalidating Gun Free School Zones Act as exceeding Congress' commerce power); New York v. United States, 505 U.S. 144 (1992) (holding that Congress has no authority to compel state legislatures to enact a federal regulatory regime); Gregory v. Ashcroft, 501 U.S. 452 (1991) (holding Age Discrimination in Employment Act's mandatory retirement provisions inapplicable to state judges).

[152] *See* notes 64-70, *supra*, and accompanying text.

Garcia v. San Antonio Metropolitan Transit Authority,[153/] which – *New York* and *Printz* notwithstanding, has never been overruled -- raises questions about the independent force of the Tenth Amendment but only under circumstances where Congress has explicitly legislated, pursuant to its Commerce Clause authority, in a manner intended to limit the authority of the states over matters of coordinate state and federal concern. *Garcia* thus continues to represent a part of the pendulum swing of Tenth Amendment jurisprudence in the Supreme Court. At one end of the pendulum's arc are decisions, such as *Garcia*, predicated on the notion that the states' political representation in the Congress will adequately protect their interests *qua* states. At the other end of the pendulum's arc are those decisions based upon a theory of dual sovereignty of state governments and the national government.[154/] Implicit in these is the notion that there must be some affirmative restrictions on the power of Congress, even when exercising plenary powers granted under Article I.

[153/] 469 U.S. 528 (1985).

[154/] *E.g.,* National League of Cities v. Usery, 426 U.S. 833 (1976).

A. Toward Judicial Review as the Ultimate Guardian of Reserved Rights

The initial rationale for the dual sovereignty approach – that federal and state governments operated within different spheres of influence[155/] -- was emasculated in the New Deal-era decisions. They used the simple expedient of expanding what was understood by "interstate commerce" to encompass what Lawrence Tribe has called the "cumulative effect" principle:[156/] Congress has the power to regulate activities conducted wholly within one state not only where the activities, in and of themselves, would have a substantial economic effect on interstate commerce,[157/] but even where the activities are insignificant in themselves, so long as the class of such activities, taken in the aggregate, would have an impact across state lines.[158/]

The most significant restrictions on this power have traditionally been the principles of federalism. Montesquieu, the French political theorist whose writings were well known to the Framers of the Constitution, proceeded from the premise that every man invested with power is

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155/ *Compare* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (although a government of limited powers, federal government is supreme within its legitimate sphere, as in the chartering of the Second Bank of the United States, and intrusion into that sphere by the states, as with Maryland's attempt to impose a tax upon that bank, are invalid) *with* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (invalidating grant of steamboat monopoly by State of New York as inconsistent with federal licensing statute regulating interstate commerce, but excepting commerce "completely internal to a state" as outside the federal sphere).

156/ *See* 1 LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-4 at 814-815 (3d ed. 2000).

157/ NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41 (1937).

158/ Wickard v. Filburn, 317 U.S. 111, 127-28 (1942). *Cf.* Perez v. United States, 402 U.S. 146, 154 (1971) ("Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class.").

apt to abuse it and to carry his authority as far as he can.[159/] In 1853, John C. Calhoun, an astute lawyer-statesman whatever one may think of his politics, accurately predicted this would occur at the hands of a self-aggrandizing super-faction he called the "federal majority," which would work at cross purposes to the will of the people and would endeavor, regardless of which political party was in control of Congress, to dictate by fiat more and more federal control over the states and the people.[160/]

The Framers' own experience in the colonial era anticipated this problem as well and persuaded them that tyranny was not limited to monarchs or their substitutes, but was a mischief that could infect the legislative branch as well.[161/] They had witnessed this first-hand through the

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[159/] *See generally* CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS (Thomas Nugent trans. 6th ed. 1792). The federal banking agencies' more notorious efforts to expand their power fall neatly within an ancient political precept. *See, e.g.,* Board of Governors v. Dimension Fin. Corp., 474 U.S. 361 (1986); Stoddard v. Board of Governors, 868 F.2d 1308 (D.C. Cir. 1989); Saxon v. Ass'n of Indep. Ins. Agents, Inc., 399 F.2d 1010 (5th Cir. 1968); Am. Land Title Ass'n v. Clarke, 968 F.2d 150 (2d Cir. 1992); Indep. Ins. Agents of Am., Inc. v. Hawke, 211 F.3d 638, 643 (D.C. Cir. 2000). *See also id.* at 642 ("Though the OCC is surely familiar with its past defeats, it seems determined to repeat them," referring to *Saxon*, *American Land Title*, as well as holdings to the same effect in Commissioner v. Morris Trust, 367 F.2d 794 (4th Cir. 1966), and First Security Bank of Utah, N.A. v. Commissioner, 436 F.2d 1192 (10th Cir. 1971), *aff'd on other grounds*, 405 U.S. 394 (1972)).

[160/] William T. Mayton, *"The Fate of Lesser Voices": Calhoun v. Wechsler on Federalism,* 32 WAKE FOREST L. REV. 1083, 1089-90 (1997), citing JOHN C. CALHOUN, A DISQUISITION ON GOVERNMENT (1853), *reprinted in* UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN CALHOUN 15 (Ross M. Lence, ed., 1992).

[161/] *See* THE FEDERALIST NO. 47, at 269-71 (J. Madison) (Clinton Rossiter & Charles R. Kessler, eds., 1999); THE FEDERALIST NO. 48, at 277-78 (J.Madison) (Clinton Rossiter & Charles R. Kessler, eds., 1999).

imperial ambitions of the British Parliament.[162/] Originally, the King and Parliament dealt at a sovereign level with matters of policy outside the scope of the colonies, which enjoyed considerable autonomy in self-governance (in fact if not in name).[163/] Then, rather like Darth Vader in the film *The Empire Strikes Back*, Parliament decided to "change the deal" and impose on the colonies the financial burden of Britain's imperial ambitions through a variety of taxation schemes, including the infamous Stamp Act. The colonists' resistance was predicated not just on their standing on their rights as Englishmen but in large part on their belief in the authority and autonomy of colonial assemblies,[164/] which they regarded as "the primary guardians of both the individual liberties of their constituents and the corporate rights of the colonies."[165/] The more Parliament insisted on complete and undivided sovereign power over the colonies, the more the latter pressed the primacy of local governance.[166/]

[162/] *See generally* JACK P. GREENE, PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITIES OF THE BRITISH EMPIRE AND THE UNITED STATES, 1607-1788 (1986); Charles Lofgren, *The Origins of the Tenth Amendment: History, Sovereignty, and the Problem of Constitutional Intention*, *in* CHARLES LOFGREN, GOVERNMENT FROM REFLECTION AND CHOICE 70 (1986).

[163/] *See generally* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967).

[164/] *Id.* at 198-229.

[165/] GREENE, *supra* note 164, at 83; Lofgren, *supra* note 164, at 75.

[166/] BAILYN, *supra* note 165, at 223-28.

After the Revolution, the regime of the Articles of Confederation led to serious political[167/] and economic difficulties[168/] as states faced what 20th century economists would describe as collective action problems.[169/] When dissatisfaction with the weakness of the national government vis-à-vis the states led to proposals to augment the authority of the former (which

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[167/] These included, *inter alia,* disputes over obedience to the 1783 Treaty of Paris that had ended the Revolutionary War and discriminatory tariff and customs laws, many of which violated free trade provisions in the Articles of Confederation. *See* Articles of Confederation arts. IV, VI (1781). *See generally Proceedings of the Committee of the Whole House, The New Jersey Plan, Tuesday, June 19, 1787* (James Madison), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 312, 318-19 (Max Farrand ed., rev. ed. 1937); LANCE BANNING, THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC 76-107 (1995) (noting Madison's "alarm about abuses in the states... traced to the debilities of the Confederation"); RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW – SUBSTANCE AND PROCEDURE § 3.1 (3d ed. 1999); Thomas H. Lee, *The Supreme Court of the United States as Quasi-International Tribunal: Reclaiming the Court's Original and Exclusive Jurisdiction Over Treaty-Based Suits by Foreign States Against States,* 104 COLUM. L. REV. 1765, 1830 (2004); Harry N. Scheiber, *Federalism and the Constitution: The Original Understanding*, *in* AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES 85, 86-88 (Lawrence M. Friedman & Harry N. Scheiber eds., 1978). *See also* Brannon P. Denning, Correspondence, *The Dormant Commerce Clause Doctrine: Prolegomenon to a Defense*, 88 MINN. L. REV. 1801, 1805-06 (2004). Furthermore, many states had competing claims to what were then known as the western territories, *id.*, with Virginia enjoying perhaps the best legal claim; a debilitating and possibly ruinous controversy was averted by agreement to cede these lands to the Articles of Confederation Congress, though bickering over them apparently persisted. *See generally* EDMUND S. MORGAN, THE BIRTH OF THE REPUBLIC, 1763-1789, at 108 -112 (Daniel J. Boorstin ed., 1956).

[168/] *See, e.g.,* Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power,* 31 SAN DIEGO L. REV. 555, 567 (1994).

[169/] *See, e.g.,* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965); RUSSELL HARDIN, COLLECTIVE ACTION (1982); George J. Stigler, *The Theory of Economic Regulation,* 2 BELL J. ECON. & MGMT. SCI. 3 (1971). For more recent synopses of the literature of collective action problems and regulatory capture, see Fisher, *supra* note 24, at 1106-1121; Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 41-56 (1998).

would now have the power, *inter alia*, to levy taxes and duties, conduct foreign relations, raise, operate, and pay an Army and Navy independent of State control, borrow money, and regulate interstate and foreign commerce)[170/] at the expense of the sovereignty of the latter,[171/] memories of the colonial experience were relatively fresh and animated the spirited debate between the Federalist and Anti-Federalist camps.

Based on this experience, the Framers' ultimate solution was to diffuse power among the various governmental entities, to limit the powers of the federal government, and to leave the undefined remainder to the states and to the people: in short, as Madison put it, a

> compound republic . . .[in which] the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.[172/]

[170/] U.S. CONST. art. I, § 8.

[171/] For example, the states would now be forbidden from interfering in questions of foreign relations and war, U.S. CONST. art. I, § 10, in sharp contrast to the situation that obtained under the Articles regime. For example, several states attempted to carry on their own diplomatic relations with foreign nations, even though such actions were prohibited by the Articles of Confederation. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 356-57 (1969). *See also* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1448 (1987) (arguing that in practice the United States under the Articles of Confederation "was not much more than the 'United Nations' is in 1987: a mutual treaty conveniently dishonored on all sides").

[172/] THE FEDERALIST NO. 51, at 291 (J. Madison) (Clinton Rossiter & Charles R. Kessler, eds., 1999). *Cf.* THE FEDERALIST NO. 39, at 211-14 (J. Madison) (Clinton Rossiter & Charles R. Kessler, eds., 1999) (characterizing various elements of the proposed Constitution as either "*federal*" or "*national*" in character). In sum, mused Madison, it would be neither one nor the other, but a combination of both. "In its foundation, it is federal, not national; in the sources
(continued...)

While inherent in this conception is a belief that the political branches of the national government would, to a certain extent, guard state sovereignty against encroachment, a considerable feeling emerged among the states that these protections would be adequate to stop the "annihilation" of the state governments by the federal government.[173/]

Important historical scholarship by John Choon Yoo has demonstrated that these concerns, as well as concerns about the government aggrandizing its power at the expense of the governed[174/] – concerns redolent, once again, of collective action problems involving self-interested groups[175/] – made the arguments of the Anti-Federalists increasingly difficult for the

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[172/](...continued)
from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national; and, finally in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national." *Id.* at 214.

[173/] *See, e.g.,* Essays of Brutus (No. 1), N.Y. J., Oct. 18, 1787, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 367 (Herbert J. Storing ed., 1981) [hereinafter THE COMPLETE ANTI-FEDERALIST] (expressing concern that the central government would exercise its commerce power "as entirely to annihilate all the state governments, and reduce this country to one single government"); Essays of An Old Whig (No. 6), Indep. Gazetter, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST, *supra*, at 43 (arguing that the moment the power of taxation is given to Congress, "we ought by consent to annihilate the individual states").

[174/] *See* John Choon Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1381 & n.301 (1997) (quoting an Anti-Federalist: "[T]he records of all ages and of all nations [showed] that the liberties and the rights of the people have been always encroached on, and finally destroyed by those, whom they had entrusted with the power of government . . . ."); *id.* & n. 302 (quoting Brutus: "[I]t is a truth confirmed by the unerring experience of ages, that every man, and every body of men, invested with power, are ever disposed to increase it, and to acquire a superiority over every thing that stands in their way.").

[175/] In seeking legislation or regulation advantageous to their position, groups can deflect the ultimate outcome away from the public good, in a way one commentator has
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Federalists to counter. As Professor Yoo trenchantly summarizes the concern: "In modern parlance, an 'inside-the-beltway' mentality would seize the minds of members of Congress, with the result that accountability and responsibility between representative and the represented would dissipate. As the links of representation between constituent and official disappeared, the new government would find it easy to rule by corruption and force."[176/] The impact, he demonstrates persuasively, was ineluctably to give rise to emergence of the concept of judicial review as the primary safeguard of the states.[177/] If, instead, as Brutus observed, the national legislature were the sole arbiter of the extent of its own power, "[t]he government would always say, their measures were designed and calculated to promote the public good; and there being no judge between them and the people, the rulers themselves must, and would always, judge for

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[175/](...continued)
analogized to a form of "'legislative auction' where the special interest group with the highest 'bid' wins . . . ." Dorothy A. Brown, *The Invisibility Factor: The Limits of Public Choice Theory and Public Institutions,* 74 WASH. U. L.Q. 179, 182 (1996). The interest groups "with the most at stake in a regulatory decision will work most aggressively to influence that decision and are likely to succeed in doing so." Andrew Guzman, *Choice of Law: New Foundations,* 90 GEO. L.J. 883, 902 (2002). Indeed, the theory suggests that self-interest utterly permeates the process: "Citizens act to acquire the biggest piece of the collective resource pie at the lowest cost to themselves; legislators act to acquire reelection; bureaucrats act to acquire more power (bigger budget, wider authority, and so on) while in government and lucrative opportunities via the revolving door when they leave." Cynthia R. Farina, *Faith, Hope, and Rationality or Public Choice and the Perils of Occam's Razor,* 28 FLA. ST. U. L. REV. 109, 110 (2000).

[176/] Yoo, *supra* note 176, at 1381-82.

[177/] *Id.* at 1383-1391.

themselves."[178] In other words, as paraphrased by Yoo, "If Congress were the only judge of its own powers, then the safeguards of a written Constitution would become meaningless."[179]

Likewise, the structure and phraseology of the Bill of Rights highlights the necessity for protection by an independent judiciary. None of the first ten amendments positively confers individual rights and liberties upon the people. Rather, they assert prohibitions against federal trammeling of those rights and liberties and provide some specificity of what those limitations on the federal legislative power are, beyond that articulated in the body of the Constitution,[180] which also prescribes limitations on the powers of the States.[181] Ensconced at the very end of this group of amendments is the Tenth, which serves a very lawyerly drafting function; it negates any *expressio unius est exclusio alterius* construction by making the list of proscriptions exemplary rather than inclusive, and vouchsafes all powers to the States and to the people that have neither been explicitly conferred upon the Congress nor proscribed to the States. Thus, rather than being a grant of individual rights and liberties by positive law, the Bill of Rights establishes a structure

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[178] *Id.* at 1383 & n. 308 (citing Brutus VI, NEW YORK JOURNAL, Dec. 27, 1787, *reprinted in* 1 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 619 (Bernard Bailyn, ed., 1993) [hereinafter "DEBATE"].

[179] Yoo, *supra* note 176, at 1383.

[180] *E.g.,* the prohibitions against bills of attainder, ex post facto laws, conferring title of nobility, suspending the writ of habeas corpus, disproportionate taxation, etc., as set forth in Article I, § 9.

[181] *E.g.,* proscriptions against States entering into treaties, alliances, or confederations, coining money, granting letters of marque, passing their own bills of attainder or ex post facto laws, etc., as set forth in Article I, § 10.

whereby congressional abridgment of those rights and liberties is interdicted, thereby giving the *primary* (though not necessarily the exclusive) role in protection and vindication of those rights to the States.

This is certainly consistent with the Framers' then all-too-fresh experience with preserving the fonts of their individual and collective freedom – the State assemblies – from the tyranny of Parliament. What happens, however, if the States should succumb to the power of the federal purse strings and prostitute their sovereignty for a larger share of the federal pie? What if the "double security" and fancy political safeguards of Madison's "compound republic" should fail and all the Anti-Federalists' concerns about self-arrogation of power by the Congress and abuses of that federal power should come home to roost? The ultimate solution in the case of Parliament and the British Crown was rebellion and armed conflict, but that is scarcely a framework to be contemplated during a process of nation building.

The Framers' answer was, of course, review by an independent judiciary. As Professor Yoo observes:

> Judicial review provides an important check on the temptation to surrender state sovereignty voluntarily. . . or the possibility of unconstitutional actions taken in the states in the heat of emotion. Just as importantly, however, judicial review prevents states that are fully informed from sacrificing their sovereignty for some greater financial gain. Put in public choice terms, federalism and the maintenance of a federal government of limited, enumerated powers may be a positive externality that no individual state acting individually or collectively fully internalizes. In this sense, the Framers viewed federalism as a normative good that ought to be promoted despite any state's momentary interest in reducing its rights.

> . . . The Framers created judicial review in order to prevent any of the branches or levels of government from exceeding the written limitations on their powers. The federal courts would prevent the states from frustrating the legitimate exercise of national power, and, on the flip side of the coin, they would block the national government from infringing upon the independent sovereignty of the states. From this clashing of institutional interests, of government competition, and of governmental power, the Framers hoped that liberty would result. . . . [182/]

For this to work, however, the judiciary cannot, in effect, abdicate its role of protecting the sovereignty of the states from congressional trespass by unilaterally deciding to regard the Tenth Amendment lynchpin as a tautology and ignore it. After more than 200 years of constitutional government, during the last 75 years of which many of the Anti-Federalists' worst fears have come to pass, the Tenth Amendment must be given some teeth.

B. Toward Defining a Basal Tenth Amendment

In *National League of Cities v. Usery*,[183/] the Supreme Court applied the Tenth Amendment to invalidate amendments to the Fair Labor Standards Act, which sought to extend the minimum wage and maximum hours provisions thereof to employees of state governments and their political subdivisions. As formulated in this decision, the Tenth Amendment protected the states from congressional exercise of commerce clause authority in a manner that would

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[182/] Yoo, *supra* note 176, at 1402, 1404-1405..

[183/] 426 U.S. 833 (1976).

impair "traditional state functions" or "integral state operations" or otherwise intrude upon "essential attributes of state sovereignty."[184] In the Court's words:

> [I]t is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens. If Congress may withdraw from the States the authority to make those fundamental . . . decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' "separate and independent existence."[185]

The purported difficulty with this approach, posited by the majority in *Garcia*, was that a rule turning upon judicial assessment of what might constitute "integral" or "traditional" state governmental functions was, in their view, doctrinally unsound and unworkable in practice. However, the difficulty in identifying such functions is surely exaggerated. While it never would have occurred to those with the Framers' mindset to essay a *comprehensive* catalogue of areas reserved to the states, not merely because it all seemed self-evident to them but also because such an undertaking would have been simultaneously onerous and unenlightening,[186] a variety of

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[184] *Id.* at 849, 851-52.

[185] *Id.* at 851.

[186] As Hamilton put it, "The variety of more minute interests, which will necessarily fall under the superintendence of the local administrations and which will form so many rivulets of influence, running through every part of the society, cannot be particularized without involving a detail too tedious and uninteresting to compensate for the instruction it might afford." THE FEDERALIST NO. 17, at 88 (A. Hamilton) (Clinton Rossiter & Charles R. Kessler, eds., 1999).

insights may be gleaned from various sources, most of which are collected in Justice Thomas's separate concurrence in *Lopez*.[187]

No less a personage than John Marshall himself, at the Virginia Ratifying Convention, readily identified areas such as "laws affecting the mode of transferring property, or contracts, or claims between citizens of the same state" as outside the delegated powers of Congress and, therefore, the preserve of the states.[188] Another ardent Federalist, Alexander Hamilton (the architect of the Bank of the United States), whose 18th century sensibilities obviously could not predict 20th century political trends ("Allowing the utmost latitude to the love of power which any reasonable man may require, I confess I am at a loss to discover what temptation the persons intrusted with the administration of the general government could ever feel to divest the States of [their residuary authority],"[189] nevertheless compiled a cogent catalogue on both sides of the ledger:

> "The *regulation of the mere domestic police* of a State to me holds out slender allurements to ambition. Commerce, finance, negotiation, and war seem to comprehend all the objects which have charms for minds governed by that passion; and all the powers necessary to those objects ought in the first instance to be lodged in the national repository. The *administration of private justice between the citizens of the same State, the supervision of agriculture, and of other concerns of a similar nature*, all those

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[187] *See* United States v. Lopez, 514 U.S. at 590-91 (Thomas, J., concurring).

[188] John Marshall, Virginia Ratifying Convention, June 20, 1788, *in* 2 DEBATE, *supra* note 177, at 731-32.

[189] THE FEDERALIST NO. 17, at 86 (A. Hamilton) (Clinton Rossiter & Charles R. Kessler, eds., 1999).

> things, in short, which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction.[190]

In another paper, Hamilton stops just short of ridiculing the notion that the "necessary and proper" clause[191] could be used to "vary the law of descent in any State" or, "upon the pretense of an interference with [the national government's] revenues, abrogate a land tax imposed by the authority of the State . . . ."[192]

"Paradigmatic common-law state crime" is another such area, as the Court recognized in *Jones v. United States*.[193] While the case seems predominantly an exercise in statutory construction, Justice Ginsburg's opinion for the Court does take the opportunity to reiterate that "'unless Congress conveys its purpose clearly, it will not be deemed to have significantly

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[190] *Id.* (emphasis added). Hamilton adds that were anyone at the federal level to succumb to such a usurpation, "the attempt to exercise those powers would be as troublesome as it would be nugatory" and "the constituent body of the national representatives, or, in other words, the people of the several States, would control the indulgence of so extravagant an appetite." *Id.* at 17. From these passages, one can but imagine the shock with which Hamilton would have witnessed the "extravagant appetite" of the federal government in the post-New Deal era, and particularly a case such as Wickard v. Filburn, 317 U.S. 111, 127-28 (1942). That said, clearly Hamilton's identification of domestic police power and the intra-state administration of private justice is as sensible today as it was in 1787 and would likely appeal to a majority of the current Supreme Court.

[191] U.S. CONST. art. I, § 8, cl. 18.

[192] THE FEDERALIST NO. 33, at 172 (A. Hamilton) (Clinton Rossiter & Charles R. Kessler, eds., 1999).

[193] 529 U.S. 848 (2000) (reversing conviction under federal arson statute on the ground that owner-occupied dwelling was not "used . . . in activities affecting . . . commerce" and rejecting Government's argument that purchase of natural gas from an out-of-state provider, obtaining a homeowner's policy from an out-of-state insurer, and obtaining a mortgage loan constitute "use" of the property in commerce).

changed the federal-state balance' in the prosecution of crimes,"[194] a point upon which Justice Stevens expanded in concurrence.[195]

Thus, with comparatively little effort, one can identify contracts, property, torts, trusts and estates, family law, and criminal law as fundamental to the Tenth Amendment's reservoir of state sovereignty. In short, it would have seemed uncontroversial to the Framers that basic elements of the common law that the colonies had inherited from England (and that the states, by statute, have incorporated into their legal regimes), together with the essential sovereign power of defining what conduct is inimical to the public weal and subject to punishment as a crime, form the irreducible minimum content of "traditional" state functions in the Tenth Amendment vessel. Other areas of law would, of necessity, evolve with the move from a predominantly agrarian, 18th century society to a predominantly industrial contemporary one, including the sovereign power (already enjoyed by the British Crown at the time of the Revolution) of chartering bodies corporate, enacting laws for their governance, and prescribing legal rules (both civil and criminal) to protect consumers from their predations.

So much for the assertion in *Garcia* that the "integral" or "traditional" state function approach is unworkable and unsound. In fact, the converse is true: What the Court in *Garcia* proposed to substitute for those functions is unworkable and unsound. There, the majority

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[194] *Id.* at 858, (quoting United States v. Bass, 404 U.S. 336, 349 (1971)).

[195] *Id.* at 859 (Stevens, J., with Thomas, J., concurring) (noting "well established presumption against federal pre-emption of state law," citing Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978), and highlighting disparity between federal sentence (35 years) and maximum state sentence (10 years) as threatening to displace State policy choice).

opinion concluded that "the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result."[196/] To invoke the political process as a source of protection of states' rights[197/] is at best an open invitation to the federal courts to scrutinize congressional procedures for enacting, pursuant to the commerce power, legislation that burdens the states, simply in order to ensure that their interests have been adequately identified and protected. That is an outright abdication of the judicial function.[198/] Today, the cynical among us, having viewed the spectacle provided by our elected officials in confirmation hearings, in the election process, and in the omnipresent scandals involving their personal peccadilloes, might justly doubt the ability of individual members of Congress or the Executive branch to look after anything competently.

[196/] *Garcia*, 469 U.S. at 554.

[197/] For representative literature by proponents of the political safeguards view, *see, e.g.,* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); Jesse H. Choper, *The Scope of National Power Vis-à-vis the States: The Dispensability of Judicial Review,* 86 YALE L.J. 1552 (1977); Larry Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism,* 100 COLUM. L. REV. 215 (2000).

[198/] *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Interestingly, while the Court has not expressly overruled *Garcia*, cases such as *Morrison* appear to indicate a resounding rejection of the "political safeguards" approach. The Court contrasted the lack of any congressional findings in the Gun Free School Zones legislation (invalidated as outside the commerce power in *Lopez*) with the numerous findings on the serious impact that gender-motivated violence had (albeit indirectly) on interstate commerce. United States v. Morrison, 529 U.S. at 614. Then, however, the Court simply rejected those findings and emphasized, as it had in *Lopez*, that this was "ultimately a judicial rather than a legislative question, and can be settled finally only by this Court." *Id.* (quoting *Lopez*, 514 U.S. at 557 n.2).

Indeed, as Justices Douglas and Black observed over forty years ago, "The notion that the sovereign position of the States must find its protection in the will of a transient majority of Congress is foreign to and a negation of our constitutional system."[199] Moreover, as even so staunch an advocate of national power as Lawrence Tribe has noted, many of the political means by which states were formerly able to make their presence felt on Capitol Hill -- such as the appointment of United States Senators by state legislatures prior to adoption of the Seventeenth Amendment – are no longer available.[200]

Garcia was concerned with the overtime and minimum-wage provisions of the Fair Labor Standards Act and held only that nothing about those provisions, as applied to public employees,

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[199] New York v. United States, 326 U.S. 572, 594 (1946) (Douglas, J., with Black, J., dissenting).

[200] *See* TRIBE, *supra* note 158. A similar point is made by Yoo:

> [T]he political science underlying the idea that the interests of the states were well represented in the national government was probably outdated in 1954, and certainly was by 1980. Ratification of the Seventeenth Amendment appears to have severed any institutional link between a state government and its senators. Changes in culture, technology, and the economy have diluted regional and local identities in favor of politics that are national in scope and in focus. If there ever was a political culture that emphasized reliance upon the states for the solution to social and economic problems, the sweeping federal environmental, economic, welfare, and entitlement laws of the 1960s and 1970s replaced it with a mindset that seeks federal answers first. The Supreme Court in the same period federalized control over the composition of the electorate, and presidential elections evolved into a plebiscitary primary system."

Yoo, *supra* note 176, at 1321.

was "destructive of state sovereignty or violative of any constitutional provision."[201] *Garcia* did not overrule *Hopkins Federal*,[202] and where, as in the case of the Preemption Reg and the Visitorial Powers Regs, federal intrusion into the domain of state regulation is undertaken by an agency not only in the absence, as Justice Cardozo put it, of authority "explicitly conferred" by Congress but even in the face of clear congressional intent that such authority *not* be conferred, then both state sovereignty and Tenth Amendment principles are violated and the agency action must be deemed invalid.

This last point cannot be overemphasized. For whatever one thinks of the *Garcia* decision,[203] the prospects for its resuscitation, or the Supreme Court's vacillation between championing state sovereignty and championing congressional power under the Commerce Clause, the underlying doctrinal premise of the majority opinion in *Garcia* and its restrictive view of the Tenth Amendment is the implicit protection of state interests via their political representation in the Congress.[204] Such a process-oriented doctrine of constitutional law has no applicability, however, to the dealings of state legislatures and state agencies with federal

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[201] *Garcia*, 469 U.S. at 554.

[202] *See id.* at 586-89 (O'Connor, J., with Powell, J. and Rehnquist, J., dissenting).

[203] In its aftermath, the *Garcia* decision provoked, as might be expected, an enormous outpouring of scholarly discussion and debate. *See, e.g.,* Jack M. Balkin, *Federalism and the Conservative Ideology*, 19 URB. L. 459 (1987); Field, *supra* note 11; Andrzej Rapaczynski; *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 8 SUP. CT. REV. 341 (1986); David M. Skover, *"Phoenix Rising" and Federalism Analysis*, 13 HASTINGS CONST. L.Q. 271 (1986); William L. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985).

[204] *Garcia*, 469 U.S. at 551-52.

agencies, where there can be no question of protection through political representation, other than, perhaps, the usually fruitless tactic of appealing to one's senator or congressman to intercede.

The political process aspect of this analysis is highlighted, moreover, by the peculiar position of federal administrative agencies within our constitutional form of government. An administrative agency like the OCC is not accountable to the electorate and is subject to institutional pressures largely indistinguishable from regulatory capture,[205] because the OCC largely subsists, as do state bank regulators, on fees paid by the institutions they regulate, thereby creating incentives to attract rent-seeking[206] banking organizations to the national charter.[207]

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[205] Regulatory capture describes the process by which regulated entities achieve favorable rulemaking and enforcement results via the influence they wield over the regulators. *See, e.g.,* Cass R. Sunstein, *Constitutionalism After the New Deal,* 101 HARV. L. REV. 421, 448-49 (1987); John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism,* 99 HARV. L. REV. 713, 723-26 (1986). Such capture is not unique to banking regulation, of course, but is, in fact, the rational end result of the self-interest of any regulated entity and its interplay with both legislators and administrative agencies tasked with the regulation in question. Stigler's pathbreaking work has engendered additional scholarship and insights, some supportive of public choice theory, some critical. *See, e.g.,*Richard A. Posner, *Theories of Economic Regulation,* 5 BELL J. ECON. & MGMT. SCI. 335 (1974);Sam Peltzman, *Toward A More General Theory of Regulation,* 19 J. L. & ECON. 211 (1976); Robert B. Reich, *Public Administration and Public Deliberation: An Interpretive Essay,* 94 YALE L.J. 1617 (1985); Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest and the Public Agenda: Toward a Synthesis,* 7 J. L. ECON. & ORG. 167 (1990); Croley, *supra* note 168, at 42-45. *See also* MANUEL F. COHEN & GEORGE J. STIGLER, CAN REGULATORY AGENCIES PROTECT CONSUMERS? (1971); JERRY L. MASHAW, GREED, CHAOS AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997).

[206] Rent-seeking refers to obtaining government intervention for one's own benefit -- garnering the gains and limiting the losses that invariably flow from governmental acts. It has also been defined as "the attempt to obtain economic rents (payments for the use of an economic asset in excess of the market price) through government intervention in the market." Jonathan R.
(continued...)

Those financial incentives make the agency's decision-making process susceptible to error in ways that are not implicated when the decisionmaker is an elected body.[208] Under these circumstances, the Tenth Amendment retains its vitality even under the *Garcia* approach. This is especially the case where, as here, the elected body has expressed its will that states be free to exercise their existing regulatory authority across a broad array of substantive areas of law over all banks doing business within their borders, whether federally chartered or state-chartered.

A potentially useful analogy can be made to the *Burford* abstention doctrine, under which federal courts will decline to adjudicate matters that, though properly within their jurisdiction, would intrude unnecessarily into matters of importance to the states and disrupt the

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[206] (...continued)
Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model,* 86 COLUM. L. REV. 223, 224 n.6 (1986). Stigler and others have argued that rent-seeking via government regulation is immanent in a political system such as ours. *See* Stigler, *supra* note 168, at 3; Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis,* 115 HARV. L. REV. 553, 559-63 (2002).

[207] *See* Jess Bravin & Paul Beckett, *Friendly Watchdog: Federal Regulator Often Helps Banks Fighting Consumers*, WALL ST. J., Jan. 28, 2002, at A1 (quoting former Comptroller Hawke, who "doesn't apologize for using the OCC's power to override state and local laws designed to protect consumers. Enjoying this aid provides an incentive for banks to sign up with the OCC, he says. 'It is one of the advantages of a national charter, and I'm not the least bit ashamed to promote it.'").

[208] *Cf.* Amy Bizar, Fred H. Miller, and Alvin C. Harrell, *Introduction to the 2000 Annual Survey of Consumer Financial Services Law*, 55 BUS. LAW. 1255, 1259 (2000) (observing that unlike federal agencies that may view preemption of state laws as an integral part of an empire-building strategy to expand their clout and jurisdiction, there is no centralized regulatory constituency at the state level that inherently benefits from federalizing consumer law as opposed to considering alternatives such as the Uniform Consumer Credit Code).

administration of complex state regulatory schemes.[209] Proceeding from the *Burford* doctrine, it may not be amiss, then, to suggest that, as a matter of comity and federalism, federal bank regulatory agencies, like the federal courts, ought to be chary of entering into this arena and disrupting the continuity of comprehensive programs of state regulation. This is true especially where there is every indication that state authorities are as well equipped as their federal counterparts to monitor compliance by national banks with state law and to do so without trammeling the OCC's visitorial powers and its independent authority to correct unsafe or unsound practices and bring enforcement actions for violations of law.

The significance of the dual system regulation in the evolution of the financial services industry in the United States can scarcely be overstated. It has been noted that "one of the historic objectives of dual banking has been to provide alternative supervisory frameworks under which commercial banks may choose to operate, thereby safeguarding against the extension of harsh, oppressive, and discriminatory supervision to institutions without recourse to alternative arrangements."[210] Moreover, the dual banking system has fostered competition and healthy advances in the industry, and the states have historically been responsible for a variety of

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[209] *See* Burford v. Sun Oil Co., 319 U.S. 315 (1943). *See also* New Orleans Public Service, Inc. v. Council of the City of New Orleans, 491 U.S. 350, 361 (1989) (*Burford* abstention appropriate where case "presents difficult questions of law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar" or if its adjudication in a federal forum "would be disruptive of state efforts to establish a coherent policy with respect to a mater of substantial public concern.") (quoting Colorado R. Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976)) *Accord*, Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 726-27 (1996).

[210] WILLIAM J. BROWN, THE DUAL BANKING SYSTEM IN THE UNITED STATES 64-65 (1968).

innovations which are now commonplace: branch banking, real estate lending, trust department operations, and transaction accounts.

States, as smaller markets, are ideal environments in which to innovate and experiment without putting the entire banking system at risk. That is just as true for state predatory lending and consumer protection legislation as it is for any other area. Federal regulators should therefore support this effort. Indeed, as Justice Brandeis recognized over seventy years ago:

> There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs . . . .
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> * * * *
>
> Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.[211/]

211/ New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Congress, of course, is well aware that the dual banking system is an important source of innovation and progress and has consistently sought to preserve it, as is clear from Section 7 of the BHC Act[212/] and from the IBBEA.[213/]

III

Professor Wilmarth's article cites case law for the proposition that the federal judiciary is chary of interpreting federal statutes in a manner that would do violence to longstanding principles of state corporate law, absent some affirmative indication to the contrary from Congress.[214/] Thus OCC's attempt to shut out state officials from regulating state-chartered operating subsidiaries of national banks not only violates basic tenets of corporate law and corporate governance but infringes upon the states' sovereign interests in violation of the Tenth Amendment. In order to provide reviewing courts – in this and other areas – with an analytical framework with which to assess such claims, the following modest flow chart, distilled from the history of the Tenth Amendment summarized in Part II, is offered.

[212/] "The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof." 12 U.S.C. § 1846. A comment in the Senate Report underscores the point: "It is always of uppermost importance in legislation of this nature to preserve the dual system of National and State banks . . . ." S. REP. NO. 1095, 84th Cong. 2d Sess., pt. 2, at 5 (1956).

[213/] See text accompanying notes 115 - 117, *supra*.

[214/] Wilmarth, *supra* note 28, at 357, citing Dole Food Co. v. Patrickson, 538 U.S. 468, 474-75 (2003); United States v. Bestfoods, 524 U.S. 51, 61 (1998); CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 85, 86 (1987); Business Roundtable v. SEC, 905 F.2d 406, 412, 415 (D.C. Cir. 1990); Minnesota v. Fleet Mortgage Corp., 181 F. Supp. 2d 995, 1000 (D. Minn. 2001).

When confronted with the question whether a regulation or similar pronouncement of a federal administrative agency is consistent with the requirements of the Tenth Amendment, consider the following set of indicators:

1 Is the federal regulation authorized pursuant to an express grant of power to Congress under Article I? (If not, go directly to item 7, below).

2 If so, is the object of the federal regulation properly within the scope of such power?[215/] (If not, go directly to item 7, below).

3 If so, does the federal regulation fall squarely within an area in which Congress has expressly legislated to grant or preserve regulatory authority for the states?[216/] (If the answer is "Yes," go directly to item 7, below).

4 If not, does the federal regulation "commandeer" the State legislature or officials of the State's executive branch? (If so, go directly to item 7, below).

5. If not, does the federal regulation seek to invalidate, or have the effect of invalidating (as opposed to merely supplementing), State laws in any of the following areas:

- land use;
- other property laws;
- contract and commercial laws (other than for contracts with agencies or instrumentalities of the federal government);

[215/] *Cf.* United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 508 (2000); Jones v. United States, 529 U.S. 848 (2000).

[216/] *E.g.*, the McCarran-Ferguson Act, *supra* note 89; IBBEA, *supra* note 56; GLEBA, *supra* note 99.

- tort law;
- fiduciary relations (trust) law;
- domestic relations (family) law;
- crimes as defined by the State legislature;
- corporation, agency, or partnership law; or
- consumer protection law?

If not, the federal regulation likely does not abridge the Tenth Amendment and, if otherwise meeting constitutional muster, constitutes a valid exercise of federal administrative authority.

6. If so, does the federal regulation seek to invalidate that law on the grounds that it impinges individual rights and liberties guaranteed under the Bill of Rights and made applicable to the States under the Fourteenth Amendment? If so, there are constitutional issues to be litigated, and the State law in question may well be invalidated upon judicial review. If not, go to item 7.

7. The regulation is presumptively an unconstitutional interference with State sovereignty under the Tenth Amendment.

CONCLUSION

The sweeping authority asserted by the Office of the Comptroller of the Currency in recent years to preempt a broad array of state laws, including consumer protection laws, when these are applied not only to national banks but even to their state-chartered operating subsidiaries, raises troubling questions about the proper allocation of regulatory authority between the federal government and the several states. One fundamental source of authority that in theory would vitiate the OCC's assertion of preemption but that is often overlooked by the courts, and, in their desultory consideration thereof, occasionally treated dismissively, is the Tenth Amendment. This article suggests that rescue and resuscitation of that Amendment from its undeserved desuetude are in order. What is needed for that revival is an analytical framework. Such a framework can be distilled from the Framers' commentary and debates and, particularly in light of the centrality of judicial review to the Framer's federalism design, can provide the Tenth Amendment with substantive content that the courts can credibly enforce.