

**TOWARD A BASAL TENTH AMENDMENT:  
A RIPOSTE TO NATIONAL BANK PREEMPTION  
OF STATE CONSUMER PROTECTION LAWS**

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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 also to their state-chartered operating subsidiaries. The regulations threaten both 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 reviewing these initiatives have failed to devote any substantial analysis to challenges based on the Tenth Amendment. That failure is likely a consequence of the lack 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 by suggesting a template for doctrinal analysis of Tenth Amendment issues arising from federal administrative action.

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## INTRODUCTION

After a promising start in life with the pedigree of the original Bill of Rights, the Tenth Amendment<sup>1</sup> fell into disrepute because of its role in the legal apparatus of racial discrimination.<sup>2</sup> It has since been alternatively dismissed as constitutional surplusage—a mere “truism”<sup>3</sup>—and honored as an “independent font of sovereignty.”<sup>4</sup> In its periodic bouts with the commerce power, the Tenth Amendment has escaped precise or consistent analysis of its substantive content. It has been characterized as a “flimsy aid in withstanding federal power,”<sup>5</sup> a “limit[] upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce,”<sup>6</sup> a “thinly veiled rationalization” for judicial second-guessing of Congress’s policy choices,<sup>7</sup> a “tautology” (that is, any powers reserved to the States are self-evidently a limitation on Congress’s Article I enumerated powers),<sup>8</sup> a “misguided doctrine,”<sup>9</sup> the basis for a “counter-

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1. “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.

2. In the *Civil Rights Cases*, 109 U.S. 3, 15 (1883), the Supreme Court struck down the Civil Rights Act of 1875 as “repugnant to the Tenth Amendment.” See also Jesse H. Choper, *The Scope of National Power Vis-à-vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1582 (1977). However, the uses to which statutes or constitutional provisions may from time to time be put is not necessarily a fair reflection of the intent of their drafters. The Tenth Amendment was 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. & PUB. POL’Y 501, 524–25 (2003), and by Salmon P. Chase, Secretary of the Treasury and later Chief Justice, against the validity of the Fugitive Slave Act, see HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835–1875*, at 110–11 (1982).

3. *United States v. Darby*, 312 U.S. 100, 124 (1941).

4. Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947, 964 n.92 (2001) (discussing the Supreme Court’s treatment of the Tenth Amendment in *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 COLUM. J. ENVTL. L. 290, 343 (1976).

6. *Nat’l 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. 84, 84 (1985).

insurgency,"<sup>10</sup> playing an "integral role . . . in our constitutional theory,"<sup>11</sup> and a "constitutional frog that turned into a prince . . . [and] back into a frog."<sup>12</sup>

Federal intervention into the domain of commercial activities traditionally regulated by the States poses "perhaps our oldest question of constitutional law,"<sup>13</sup> namely, the appropriate spheres of the sovereign authority of the federal and state governments and the proper relationship between them under our constitutional scheme. It also exposes the uneasy tension between the Commerce Clause<sup>14</sup> and the Tenth Amendment that has persisted for over 200 years of constitutional jurisprudence. Apart from the superficial clarity provided by cases such as *New York v. United States*<sup>15</sup> and *Printz v. United States*,<sup>16</sup> which bar 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 rather rudimentary. It is astonishing that the meaning of a single declarative sentence enshrined in the Bill of Rights has evaded judicial construction establishing, at a minimum, some bedrock level of state sovereignty upon which the federal government cannot impinge.

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10. Jack M. Balkin, *Ideology and Counter-Ideology from Lochner to Garcia*, 54 UMKC L. REV. 175, 193–94 (1986).

11. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 570 (1985) (Powell, J., dissenting).

12. Linda Greenhouse, *Court Takes the Glow off the Tenth Amendment*, N.Y. TIMES, Mar. 13, 1983, § 4, at 9.

13. *New York v. United States*, 505 U.S. 144, 149 (1992). 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 separable spheres of activity for the national and state governments." *Id.* at 655.

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 the expansive understanding of the "Constitutional Revolution of 1937," see *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *United States v. Darby*, 312 U.S. 100 (1941); *Wickard v. Filburn*, 317 U.S. 111 (1942), to what future generations may well call the "Constitutional Revolution of 1995," see *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000).

15. 505 U.S. 144 (1992).

16. 521 U.S. 898 (1997).

In a previous decision, also named *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 state's claim that it was exercising an "essential government function."<sup>17</sup> That line of argument would not come to fruition until thirty years later in *National League of Cities v. Usery*,<sup>18</sup> a decision widely regarded as part of the agenda of a "conservative" jurist, then-Associate Justice William H. Rehnquist.<sup>19</sup> Yet it was Justice William O. Douglas, a liberal progressive, whose strident dissent in *New York* decried the "power to tax is the power to destroy" effect of the majority opinion, like *McCulloch v. Maryland*<sup>20</sup> in reverse, and dismissed the notion that a process-based approach<sup>21</sup> 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 federal government for the privilege of exercising the powers of sovereignty guaranteed them by the Constitution.<sup>22</sup>

The particular federal intervention providing the impetus for this Article is the assertion by the Office of the Comptroller of

17. 326 U.S. 572, 574 (1946).

18. 426 U.S. 833 (1976).

19. See, e.g., Archibald Cox, *Federalism and Individual Rights Under the Burger Court*, 73 NW. U. L. REV. 1, 22–25 (1978); Laurence H. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1072 (1977); Balkin, *supra* note 10, at 193–206; 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* (1992).

20. 17 U.S. (4 Wheat.) 316, 327 (1819) ("an unlimited power to tax involves, necessarily, a power to destroy").

21. Cf. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1984).

22. *New York*, 326 U.S. at 594–95 (Douglas, J., dissenting).

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 banks and coexisted with the provisions of the National Bank Act.<sup>23</sup> Early in 2004, OCC, embroidering rather liberally upon a concept from the Supreme Court's decision in *Barnett Banks of Marion County v. Nelson*,<sup>24</sup> promulgated regulations purporting to preempt all state laws that "obstruct, impair, or condition a national bank's ability to fully exercise" its federally granted powers.<sup>25</sup> Even more controversially, the preemption applies whether a national bank exercises such powers directly or through one or more state-chartered operating subsidiaries.<sup>26</sup>

At the same time, OCC has promulgated regulations giving an expansive interpretation to its visitorial powers under 12 U.S.C. § 484(a).<sup>27</sup> Pursuant to that interpretation, OCC claims exclusive and discretionary authority to investigate potential violations of federal or state law not only by national banks but also by their state-chartered operating subsidiaries and to bring enforcement actions to redress any such violations.<sup>28</sup> OCC con-

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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 codified in scattered sections of 12 and 31 U.S.C.). Although 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*, 52 VA. L. REV. 565, 572 (1966).

24. 517 U.S. 25 (1996). See *infra* notes 87–97 and accompanying text.

25. Office of the Comptroller of the Currency, Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1911–13 (Jan. 13, 2004) (to be codified at 12 C.F.R. pts. 7, 34) [hereinafter Preemption Regulations]. These regulations were originally proposed during the preceding summer. See Notice of Proposed Rulemaking, 68 Fed. Reg. 46,119 (Aug. 5, 2003).

26. See Preemption Regulations, 69 Fed. Reg. at 1913 (relying on a prior interpretation codified at 12 C.F.R. § 7.4006).

27. That section provides in pertinent part, "No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress." 12 U.S.C. § 484(a) (2002).

28. Office of the Comptroller of the Currency, Bank Activities and Operations, 69 Fed. Reg. 1895 (Jan. 13, 2004) (codified at 12 C.F.R. § 7.4000) [hereinafter Visitorial Powers Regulations]. These regulations were originally proposed early in 2003. See Office of the Comptroller of the Currency, Rules, Policies, and

tests the authority of state law enforcement officials to commence litigation to enforce compliance with state laws and with those federal laws that Congress has empowered state officials to enforce, even where OCC itself has declined to act.<sup>29</sup> Thus, even with respect to operating subsidiaries, which are organized solely under state law, OCC denies that state officials may exercise their law enforcement powers or even their subpoena authority.<sup>30</sup>

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 aspects of OCC's Preemption Regulations and Visitorial Pow-

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Procedures for Corporate Activities; Bank Activities and Operations; Real Estate Lending and Appraisals, 68 Fed. Reg. 6363 (Feb. 7, 2003).

29. *Id.* at 6367; Visitorial Powers Regulations, 69 Fed. Reg. at 1904; 12 C.F.R. § 7.4000(a)(3), (b)(2). See generally Office of the Comptroller of the Currency v. Spitzer, 396 F. Supp. 2d 383 (S.D.N.Y. 2005); Clearing House Ass'n v. Spitzer, 394 F. Supp. 2d 620 (S.D.N.Y. 2005).

30. Another recent and highly publicized federal intervention in an area traditionally dominated by state law is the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.) [hereinafter SOXA], and associated Securities and Exchange Commission (SEC) regulations. The SOXA regime differs in two important respects from the national bank preemption regime discussed in this article. First, the SOXA regime was expressly authorized by Congress. Second, although 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 other federal securities laws. Corporate law remains essentially the domain of the States (at least for the present), while corporate governance, which has not been addressed adequately (if at all) by state legislation, is the subject of direct or indirect federal rulemaking—that is, 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.

In a recent article, this author has proposed creating yet another federal intervention into traditional state turf: namely, federal regulation of the rules of legal ethics for business law practice to stem the tide of abuse and predation that has been all too prevalent in the recent major business scandals. See Keith R. Fisher, *The Higher Calling: Regulation of Lawyers Post-Enron*, 37 U. MICH. J.L. REFORM 1017 (2004). Here again the proposed regulatory scheme would not infringe upon the Tenth Amendment prerogatives of the States. It would supplement rather than preempt the authority 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 malfeasance that have resulted in the Savings & Loan crisis in the 1980s, the Bank of Commerce and Credit International scandal of the early 1990s, and the Enron, WorldCom, Global Crossing, and other scandals that continue to grace the headlines of our major newspapers.

ers Regulations, and considers appropriate limitations on the powers of national bank operating subsidiaries.<sup>31</sup> Part II considers the importance of judicial review to the Framers' federalism design and discusses what can be distilled from their views about the substantive content of the Tenth Amendment. Part III presents a modest suggested template for doctrinal analysis of Tenth Amendment issues.

## I

### A. *Predatory Lending and OCC's Inadequate Response*

Predatory lending, a despicable practice usually involving manipulative sales tactics, vulnerable borrowers, high credit costs, and outrageous terms, has become prevalent in the United States. Common lending practices that have come to be characterized as "predatory" include equity stripping,<sup>32</sup> loan flipping,<sup>33</sup> hidden balloon payments,<sup>34</sup> "packing" or "pad-

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31. Obviously, these regulations implicate a wealth of technical, bank regulatory issues that are largely, though not entirely, outside the scope of this discussion. For more detail on those issues, see Point-Counterpoint, *Federal Preemption*, 23 ANN. REV. BANKING & FIN. L. 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. L. 225 (2004); and 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 & C. 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, valuable as they are, devotes any substantial consideration to the role of the Tenth Amendment, though Professor Wilmarth mentions it in passing.

32. Equity stripping involves a loan made solely on the basis of a homeowner's equity in his or her home, regardless of whether the borrower has the financial ability to make payments. Of course, failure to make scheduled payments can lead to foreclosure and loss of the home.

33. In loan flipping, 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 fees).

34. 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, 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. Few borrowers, especially among those low-to-moderate income individuals targeted by predatory lenders, have the financial resources to make the lump sum payment. Refinancing, however,

ding,<sup>35</sup> high-cost payday lending,<sup>36</sup> “back-end” profiteering,<sup>37</sup> and other artifices<sup>38</sup> ranging from common exploitation to outright discrimination.<sup>39</sup> A recent attempt to define predatory

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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 a previous predatory loan that caused delinquencies and marred their credit records. If the borrowers cannot make the balloon payment or refinance on terms they can manage, their loans will go into default.

35. This is the assessment of charges to the consumer for services that were not requested and not needed: for example, single premium credit insurance.

36. Payday loans are small, short-term (usually no more than two weeks, the most common pay period) cash advances, typically in the range of \$100 to \$500 and 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 Jean Ann Fox, *What Does It Take to Be a Loan Shark in 1998? A Report on the Payday Loan Industry*, in PRACTISING LAW INST., CONSUMER FINANCIAL SERVICES LITIGATION 1998, at 987, 990 (1998).

The fees charged can be astonishingly high. See CONSUMER FEDERATION OF AMERICA & U.S. PUBLIC INTEREST RESEARCH GROUP, RENT-A-BANK PAYDAY LENDING: HOW BANKS HELP PAYDAY LENDERS EVADE STATE CONSUMER PROTECTIONS 6 (2001), available at <http://www.consumerfed.org/pdfs/paydayreport.pdf> (stating that fees are 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 (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.”).

37. Examples include (1) late posting of monthly payments received from consumers resulting in the charging of late fees and collection of additional interest; (2) 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; (3) 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; (4) delaying credits and other favorable adjustments to the homeowner’s escrow account; and (5) 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 *In re Maxwell*, 281 B.R. 101 (Bankr. D. Mass. 2002).

38. For a detailed, albeit now slightly outdated, enumeration of such practices, see Patricia Sturdevant & William J. Brennan, Jr., *A Catalogue of Predatory Mortgage Lending Practices*, 5 CONSUMER ADVOC. 3 (1999).

39. 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

lending has characterized it as a congeries of abusive loan terms or practices featuring one or more of the following: “(1) loans structured to result in seriously disproportionate net 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.”<sup>40</sup>

Prominent among the broad spectrum of lenders that engage in these practices are national banks, acting either directly or indirectly (through affiliates or contractual arrangements such as “charter renting”).<sup>41</sup> Three brief examples of predatory lend-

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financing from sub-prime lenders.” *OCC Preemption of State Consumer Protection Laws: Hearing Before the Assembly Standing Comm. on Banks*, 2004 Leg. (N.Y. 2004) (testimony of Eliot Spitzer, Att’y Gen. of N.Y.), available at [http://www.oag.state.ny.us/press/statements/occ\\_testimony.html](http://www.oag.state.ny.us/press/statements/occ_testimony.html); see also Howard Lax et al., *Subprime Lending: An Investigation of Economic Efficiency*, 15 HOUSING POL’Y DEBATE 533, 544–45 (2004), available at [http://www.fanniemaeoundation.org/programs/hpd/pdf/hpd\\_1503\\_Lax.pdf](http://www.fanniemaeoundation.org/programs/hpd/pdf/hpd_1503_Lax.pdf) (stating that “black borrowers account for a disproportionately large share of subprime lending”); DEP’T OF THE TREASURY. & DEP’T OF HOUS. & URBAN DEV., CURBING PREDATORY HOME MORTGAGE LENDING 22–23 (2000), available at <http://www.huduser.org/publications/pdf/treasrpt.pdf> (finding that “subprime loans for refinancing were five times more likely in black neighborhoods than in white neighborhoods,” and that nearly 40% of refinanced 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); Elizabeth Renuart, *Toward One Competitive and Fair Mortgage 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 (2000), available at <http://www.ustreas.gov/press/releases/docs/crareport.pdf> (research revealing ongoing racial discrimination).

40. 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).

41. Charter renting is a contractual arrangement between payday lenders and banks (often national banks) located in states with no usury limits for consumer loans. A national bank can export interest rates from the state in which 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*, 539 U.S. 1 (2003); *Marquette Nat’l Bank of Minneapolis 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. See Barbara A. Rehm, *Tanoue Seeks to Halt “Renting” of Charters to Payday Loan Firms*, AM. BANKER, June 14, 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).

ing should suffice, courtesy of the State of New York. The first involves a seventy-two-year-old woman identified as “Mrs. N.,” who lived in the same residence in Elmhurst, Queens for more than thirty years and who was induced by a broker to refinance her existing 9% mortgage because she had a \$2,200 tax lien on her property. Mrs. N. ended up with a \$105,000 loan from an operating subsidiary of a national bank based in the Midwest that ultimately raised her effective interest rate to 10.5% and increased her monthly payment by nearly \$2,000. Worse, her new loan was no longer a fixed rate mortgage but was instead an adjustable rate mortgage under which her effective interest rate could climb to 16.375%:

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.

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.<sup>42</sup>

The second example involves a sixty-eight-year-old man, identified as “Mr. M.,” who had resided in Brooklyn for more than twenty years and had been forced to retire from the U.S. Postal Service after twenty-five 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 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.

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

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42. *OCC Preemption of State Consumer Protection Laws: Hearing Before the Assembly Standing Comm. on Banks*, 2004 Leg. (N.Y. 2004) (testimony of Diana L. Taylor, N.Y. Superintendent of Banks), available at <http://www.banking.state.ny.us/sp040416.htm>. The practices identified were in violation of New York’s Deceptive Practices Act and anti-predatory lending regulation. *Id.*

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.<sup>43</sup>

The final example involves 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 by \$9,461.57. When the borrower brought this to First Horizon's attention, it only then notified him that an error made by the loan originator 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 had already overpaid, stopped the automatic debits, First Horizon threatened to foreclose on his home if he did not pay \$12,320.49 within thirty days. After unsuccessful attempts by the borrower's attorney to resolve the matter amicably, the Attorney General's office became involved. First Horizon responded 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.<sup>44</sup>

This is not to suggest that OCC encourages or even condones predatory lending. Quite the contrary, OCC has issued two ad-

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43. *Id.*

44. See generally Press Release, Office of N.Y. State Att'y Gen. Eliot Spitzer, NY Sues National Bank Subsidiary for Illegal Practices (Jan. 20, 2004), available at [http://www.oag.state.ny.us/press/2004/jan/jan20a\\_04.html](http://www.oag.state.ny.us/press/2004/jan/jan20a_04.html); Complaint, New York v. First Horizon Home Loan Corp. (filed Jan. 16, 2004), available at <http://www.oag.state.ny.us/press/2004/jan/Horizon5.pdf>.

visory letters, one on loan originations<sup>45</sup> and another on purchased loans,<sup>46</sup> and the former Comptroller delivered several speeches on this and related subjects.<sup>47</sup> All this guidance and exhortation, however, is directed more toward legal, reputational, and other risks, including credit risk in cases where only the liquidation value of the collateral, rather than the borrower's ability to repay, justifies making the loan—in other words, bank safety and soundness issues—than toward consumer protection per se. The only actual regulatory prohibitions that OCC has promulgated are against making real estate loans “based predominantly on the bank's realization of the foreclosure or liquidation value of the borrower's collateral,

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45. OCC Adv. Ltr. AL 2003-2 (Feb. 21, 2003), available at <http://www.occ.treas.gov/ftp/advisory/2003-2.pdf> (setting forth “supervisory guidance concerning lending practices that have been criticized as ‘predatory’ or ‘abusive’”).

46. OCC Adv. Ltr. AL 2003-3 (Feb. 21, 2003), available at <http://www.occ.treas.gov/ftp/advisory/2003-3.pdf> (advising national banks on “the risks they may 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’”).

47. See John D. Hawke, Jr., Comptroller of the Currency, Remarks Before a Conference Sponsored by the Consumer Bankers Association & Robert Morris Associates (June 7, 1999), available at <http://www.occ.treas.gov/ftp/release/99-51a.doc> (warning bankers of the potential costs of ignoring customer service and identifying as potentially “abusive” although not “explicitly illegal” 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 to offer to bank customers “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); John D. Hawke, Jr., Comptroller of the Currency, Remarks Before the National Community Reinvestment Coalition (Mar. 21, 2000), available at <http://www.occ.treas.gov/ftp/release/2000-21a.doc> (deploring predatory lending, lamenting OCC's lack of authority to promulgate regulations defining unfair and deceptive practices, mentioning OCC's commitment to enforcing the federal statutes that is required to enforce (for example, truth in lending and 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); see also *Mortgage Lending Abuses: Hearing Before the H. Comm. on Banking and Fin. Serv.*, 106th Cong. (May 24, 2000) (statement of John D. Hawke, Jr., Comptroller of the Currency), available at <http://www.occ.treas.gov/ftp/release/2000-37a.txt> (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).

without regard to the borrower's ability to repay the loan according to its terms" (that is, prohibiting equity stripping),<sup>48</sup> and 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.<sup>49</sup> 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."<sup>50</sup> Even more disingenuous is OCC's in-

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48. Preemption Regulations, 69 Fed. Reg. at 1917 (amending 12 C.F.R. § 34.3(b)). This newfound 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 section 34.3, which itself had been amended only the year before with an effective date of January 16, 2004, 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." 12 C.F.R. § 34.3.

49. Preemption Regulations, 69 Fed. Reg. at 1917 (adding 12 C.F.R. § 34.3(c)).

50. 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). Williams & Bylsma suggest that the reason for the delay may be that misconduct by banking institutions is a relatively recent phenomenon, but that explanation seems dubious. First, there have been numerous allegations of illegal or abusive subprime lending practices involving major national banks and their affiliates going back more than ten years. See, e.g., U.S. GEN. ACCT'G OFF., GAO-04-280, CONSUMER PROTECTION: FEDERAL AND STATE AGENCIES FACE CHALLENGES IN COMBATING PREDATORY LENDING, 37-38 (2004), available at <http://www.gao.gov/new.items/d04280.pdf> (reporting allegations against Citigroup and Fleet). 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 JOHN FARRIS, MARK PEARCE & CHRIS RICHARDSON, CENTER FOR RESPONSIBLE LENDING, COMMENTS ON OCC WORKING PAPER 7-10 (2003), <http://www.responsiblelending.org/pdfs/cb002-OCCworkingPaper.pdf>; see also Engel & McCoy, *supra* note 39, 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 & nn.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 that, over a 10-year period, Provident Bank, N.A. was "the poster child of abusive consumer practices, . . . [and] was regularly sued in private litigation, subjected to numerous state enforcement proceedings, and commonly criticized in the media." Duncan A. MacDonald, Letter to the Editor, *Comptroller Has Duty to Clean Up Card Pricing Mess*, AM. BANKER, Nov. 21, 2003, at 17

sincere lament that it lacks particularized rulemaking authority to define specific practices as unfair or deceptive<sup>51</sup> and is thus unable to proscribe, under that rubric, notorious practices such as loan flipping or equity stripping.<sup>52</sup> OCC has yet to explain, however, why it could not use its ample enforcement authority under section 8 of the Federal Deposit Insurance Act<sup>53</sup> to proscribe those practices as “unsafe or unsound banking practices”<sup>54</sup> and to work with the FTC and the Federal Reserve Board to develop the requisite interpretations that would identify those practices as “violations of law” sanctionable under the Act.<sup>55</sup>

### B. OCC’s Preemption and Visitorial Powers Regulations

In the Preemption Regulations, OCC takes the position that it may except in two situations proscribe the application of all state laws to national banks. The first exception consists of those relatively few provisions of the National Bank Act<sup>56</sup> or other financial regulatory statutes<sup>57</sup> in which Congress ex-

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(comments by Duncan A. MacDonald, former General Counsel of Citigroup’s European and North American credit card business). It was only after a California state prosecutor embarrassed OCC by moving publicly against Provident (much as Eliot Spitzer has recently caused embarrassment to the SEC for its lackluster enforcement) that OCC took administrative action. *Id.*

51. That authority was given to the Federal Reserve.

52. Preemption Regulations, 69 Fed. Reg. at 1911.

53. 12 U.S.C. § 1818 (2000).

54. For example, Wilmarth cites evidence that, since 1997, the four bank failures costliest to the Federal Deposit Insurance Corporation (FDIC) have all 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 31, at 312–13.

55. OCC’s arsenal of civil administrative enforcement powers includes cease and desist orders, 12 U.S.C. § 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).

56. 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 the Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (1994) (IBBEA).

57. 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, *see infra* note 101, not only preserves, in the insurance arena, the primacy of the reverse preemption regime of the McCarran-Ferguson Act, *see infra* note 91, but also gives the States thirteen areas in which to regulate freely. 15 U.S.C. § 6701(a), (d)(2)(B).

pressly incorporates state law standards. 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.<sup>58</sup> 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 must be part of “the legal infrastructure that makes it practicable” for national banks to conduct their federally authorized activities and “not regulate the manner or content of the business of banking authorized for national banks.”<sup>59</sup>

In a companion rulemaking to the Preemption Regulations, OCC amended its regulations governing the exercise of “visitorial powers” over national banks to prohibit state officials from filing suit (whether in federal or state court) to enjoin national banks to comply with state laws, leaving declaratory relief the only available remedy.<sup>60</sup> Even armed with a court-issued declaratory judgment, state officials may not, OCC maintains, take any action other than notifying OCC, which retains sole discretion over whether to enforce that state law against the national bank.<sup>61</sup>

The new regulations codify positions that OCC has previously taken to preempt state predatory lending laws.<sup>62</sup> For example, the preamble to the Preemption Regulations explains the policy basis for 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 ba-

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58. See *infra* note 86 and accompanying text.

59. Preemption Regulations, 69 Fed. Reg. at 1911–13.

60. Visitorial Powers Regulations, 69 Fed. Reg. at 1895.

61. *Id.* at 1899–1900.

62. 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-1–13, was preempted as to all national banks and their operating subsidiaries. Dep’t of the Treasury, Office of the Comptroller of the Currency, Preemption Determination and Order, 68 Fed. Reg. 46,264 (Aug. 5, 2003).

sis.”<sup>63</sup> 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.”<sup>64</sup>

OCC has enjoyed phenomenal success with these theories in recent litigation. The agency has won or participated successfully in cases brought by national banks in several scenarios: preempting a Texas “par value” statute prohibiting banks in Texas, including national banks, from charging check-cashing fees to non-customers;<sup>65</sup> preempting a similar Georgia check-cashing fee law;<sup>66</sup> preempting a municipal ordinance prohibiting banks from charging ATM fees;<sup>67</sup> and preempting, as to federally chartered credit card issuers, a California law imposing consumer protection disclosure requirements for credit card accounts.<sup>68</sup> Similarly, on the visitorial powers issue, OCC has prevailed as intervenor or amicus curiae in several cases in which state authorities were enjoined from regulating mortgage banking operating subsidiaries of national banks.<sup>69</sup>

In none of these cases was the Tenth Amendment paid more than lip service. Instead, the courts have bought into a simplistic “tautology” approach:<sup>70</sup> because there is no “commandeer-

63. Preemption Regulations, 69 Fed. Reg. at 1907–08.

64. *Id.* at 1908.

65. Wells Fargo Bank of Tex., 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 better be balanced . . . by a national Congress whose commitments 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.

66. Bank of Am., N.A. v. Sorrell, 248 F. Supp. 2d 1196 (N.D. Ga. 2002).

67. Bank of Am. v. City of San Francisco, 309 F.3d 351 (9th Cir. 2002).

68. Am. Bankers Assoc. v. Lockyer, 239 F. Supp. 2d 1000 (E.D. Cal. 2002). OCC filed an amicus brief in this litigation. *Id.* at 1013.

69. See Nat’l City Bank of Ind. v. Turnbaugh, 367 F. Supp. 2d 805 (D. Md. 2005); Wachovia Bank, N.A. v. Watters, 334 F. Supp. 2d 957 (W.D. Mich. 2004). *aff’d*, 431 F.3d 556 (6th Cir. 2005); Wachovia Bank, N.A. v. Burke, 319 F. Supp. 2d 275 (D. Conn. 2004), *aff’d on preemption issue*, 414 F.3d 305 (2d Cir. 2005); Wells Fargo Bank, N.A. v. Boutris, 265 F. Supp. 2d 1162 (E.D. Cal. 2003), *aff’d in part, rev’d in part*, 419 F.3d 949 (9th Cir. 2005); Nat’l City Bank of Ind. v. Boutris, No. Civ. S-03-0655, 2003 WL 21536818 (E.D. Cal. July 2, 2003).

70. One cannot entirely blame the lower federal courts for this. Faced on the one hand with a paucity of guidance from the Supreme Court about the substantive content of the Tenth Amendment and on the other with a crowded docket, they have relied on the analysis set forth in the parties’ submissions. These, in turn,

ing,” and because banking is clearly commerce that falls within the powers granted to Congress, there is no Tenth Amendment interest of the States to protect.<sup>71</sup>

Such an approach glosses over the fact that it is to Congress, and not to a bureau within the Treasury Department, that the Supremacy Clause of the Constitution<sup>72</sup> expressly grants the power to preempt state law. Preemption occurs<sup>73</sup> when Congress, in enacting a federal statute, evinces a clear intent to preempt state law;<sup>74</sup> when there is outright or actual conflict between federal and state law;<sup>75</sup> when compliance with both federal and state law is impossible;<sup>76</sup> when there is implicit in federal law a barrier to state regulation;<sup>77</sup> when Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law;<sup>78</sup> or when state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.<sup>79</sup> None of these is applicable to the situation at hand.

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.<sup>80</sup> There is no reason to believe that is the case here. Even if OCC had authority to act, the critical question in any preemption analysis would still remain whether Congress has unmistakably indicated that federal regulation supersedes state law.<sup>81</sup> This Part will

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suffer from the same lack of 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 the rights reserved to them thereunder.

71. See, e.g., *Watters*, 334 F. Supp. 2d at 966; *Boutris*, 265 F. Supp. 2d at 1170–71.

72. U.S. CONST. art. VI, cl. 2.

73. See generally *La. Pub. Serv. Comm’n v. FCC*, 467 U.S. 355, 368–69 (1986).

74. See *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977).

75. See *Free v. Bland*, 369 U.S. 663 (1962).

76. See *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

77. See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).

78. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

79. See *Hines v. Davidowitz*, 312 U.S. 52 (1941).

80. See *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, 153–54 (1982).

81. 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. Atl. Coast*

demonstrate that Congress has taken a very different position on the dual banking system in general and on state consumer protection laws in particular. However, a few observations about the legal and policy underpinnings of the Preemption Regulations and the Visitorial Powers Regulations are appropriate beforehand.

First, it bears repeating that the initial exception noted by OCC to its regulatory powers 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 with respect to the branching authorization added in 1927 by an amendment to the National Bank Act known as the McFadden Act.<sup>82</sup> 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.<sup>83</sup> OCC’s position was that if 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 violated those conditions.<sup>84</sup> The Court disagreed: “It is a strange argument that permits one to pick and choose what portion of the law binds him.”<sup>85</sup> Only after several more judicial decisions invalidated administrative attempts to make an end-run around state branching restrictions<sup>86</sup> did OCC back down.

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Line R.R. Co., 272 U.S. 605, 611 (1926); *Allen-Bradley Local No. 1111 v. Wis. Employment Relations Bd.*, 315 U.S. 740, 749 (1942)).

82. 12 U.S.C. § 36 (2000).

83. *First Nat’l Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966).

84. OCC has occasionally prevailed with this argument. *See, e.g.*, *Conference of State Bank Supervisors v. Conover*, 715 F.2d 604 (D.C. Cir. 1983) (allowing OCC to trump state restrictions on branching by foreign banks).

85. *Walker Bank & Trust*, 385 U.S. at 261.

86. *See, e.g.*, *First Nat’l 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

Second, the language of the Preemption Regulations, while reminiscent of that used by the Supreme Court in *Barnett Banks of Marion County v. Nelson*,<sup>87</sup> is significantly different and more expansive.<sup>88</sup> In *Barnett*, Florida insurance regulators challenged insurance sales by Barnett Bank, a national bank, pursuant to 12 U.S.C. § 92. The principal legal issue was whether Florida's anti-affiliation law,<sup>89</sup> which prohibited sales of insurance by

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"extension" so that the bank could then open a second branch); *St. Louis City Nat'l Bank v. Mercantile Trust Co. Nat'l Assoc.*, 548 F.2d 716 (8th Cir. 1976) (overruling an 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); *Colorado ex rel. State Banking Bd. v. First Nat'l Bank of Ft. Collins*, 540 F.2d 497 (10th Cir. 1976) (overruling OCC decision that automatic teller machines were not branch banks); *Missouri ex rel. Kostman v. First Nat'l Bank in St. Louis*, 538 F.2d 219 (8th Cir. 1976) (same); *Illinois ex rel. Lignoul v. Cont'l Ill. Nat'l Bank & Trust Co.*, 536 F.2d 176 (7th Cir. 1976) (same); *Indep. Bankers Ass'n of Am. v. Smith*, 534 F.2d 921 (D.C. Cir. 1976) (same); *Nebraskans for Indep. Banking, Inc. v. Omaha Nat'l Bank*, 530 F.2d 755 (8th Cir. 1976) (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).

87. 517 U.S. 25 (1996).

88. The following discussion of *Barnett*, *infra* notes 89–97 and accompanying text, is adapted from Keith R. Fisher, *Orphan of Invention: Why the Gramm-Leach-Bliley Act Was Unnecessary*, 80 OR. L. REV. 1301, 1347–50 (2001).

89. At the time of the *Barnett* litigation, roughly half of the states had anti-affiliation statutes. Compare KAROL K. SPARKS, INSURANCE ACTIVITIES OF BANKS § 5.03 (1998) (identifying twenty states with anti-affiliation provisions and another five 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 D1).

These state anti-affiliation laws had proved remarkably resistant to constitutional challenge. Among the better known anti-affiliation statutes was Pennsylvania's, which prohibited companies selling insurance in that state (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 1994) (repealed 2002). 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. See *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 a Commerce Clause challenge as well. *Id.* at 928. No preemption attack predicated on 12 U.S.C. § 92 was involved in that case, however.

banks and their subsidiaries, affiliates, and employees<sup>90</sup> 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 1940s in the McCarran-Ferguson Act.<sup>91</sup> 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.<sup>92</sup> If, however, the federal statute “specifically relates to the business of insurance,” then the reverse preemption rule is inapplicable and normal preemption analysis applies.<sup>93</sup>

The precise contours of what constitutes the “business of insurance” for McCarran-Ferguson purposes are complex and beyond the scope of this discussion.<sup>94</sup> Nonetheless, if 12 U.S.C. § 92<sup>95</sup> does not “specifically relate[]” to the “business of insurance,” it is difficult to imagine a statute that does. The Supreme Court in *Barnett* reached the same conclusion, found McCarran-Ferguson inapplicable,<sup>96</sup> and concluded that the Florida provision was, in fact, preempted by section 92.

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90. “No [Florida licensed] insurance agent . . . who is associated with . . . owned or controlled by . . . a financial institution shall engage in insurance agency activities.” FLA. STAT. § 626.988(2) (1997) (repealed 1999). The term “financial institution” was defined for 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).

91. 15 U.S.C. §§ 1011–1015.

92. 15 U.S.C. § 1012(b).

93. *Id.*

94. The Supreme Court has developed somewhat inconsistent rules here. *See, e.g.,* Dep’t of the Treasury v. Fabe, 508 U.S. 491 (1993); Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119 (1982); Group Life & Health Ins. Co. v. Royal Drug, 440 U.S. 205 (1979); SEC v. Nat’l Sec., Inc., 393 U.S. 453 (1969).

95. 12 U.S.C. § 92 provides, in pertinent part:

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

96. *Barnett*, 517 U.S. at 38–41.

In so doing, the Court established a standard for assessing the vitality of section 92 vis-à-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.<sup>97</sup>

This language reflects the Court's view that the national banking laws do not create field preemption. Yet a precisely contradictory view underpins the Preemption Regulations,<sup>98</sup> as state bank regulators have observed in testimony before Congress.<sup>99</sup> 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

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97. *Id.* at 33 (emphasis added) (internal citations omitted).

98. When the Preemption Regulations were initially proposed, OCC boldly asserted in the release that it enjoys preemption authority comparable to the field preemption power that has long been enjoyed by its sister agency, the Office of Thrift Supervision (OTS). "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." Notice of Proposal Rulemaking, 68 Fed. Reg. at 46,129 n.91. *See also* Preemption Regulations, 69 Fed. Reg. 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), 560.2(a), date back to its predecessor agency, the Federal Home Loan Bank Board, which embarked on a campaign to occupy the field after the Supreme Court 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 discussion of the OTS field preemption regime and its consequences, see Wilmarth, *supra* note 31, at 280–87.

99. *See* *Congressional Review of OCC Preemption: Hearings Before the Subcomm. on Oversight and Investigations H. Comm. on Financial Services*, 108th Cong. 145, 154 (Jan. 28, 2004) (statement of Diana L. Taylor, New York Superintendent of Banking, on Behalf of the Conference of State Bank Supervisors), available at <http://financialservices.house.gov/media/pdf/108-65.pdf> (prepared written testimony characterizing OCC regulations as "de facto field preemption").

condition a national bank's ability to fully exercise its Federally authorized . . . powers."<sup>100</sup>

As perhaps the only aspect of the pre-1999 bank insurance regime that survived enactment of the Gramm-Leach-Bliley Act (GLEBA),<sup>101</sup> the above-quoted *Barnett* standard will continue to have significant implications for any state law with an impact on small-town insurance marketing activities by national banks.<sup>102</sup> In fact, Congress expressly endorsed this standard in GLEBA's insurance provisions:

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.<sup>103</sup>

In fact, since Congress's abortive, Civil War-era attempt to destroy the state banking system by creating a federal currency and taxing state bank notes,<sup>104</sup> there has been both implicit and explicit congressional endorsement of the dual system of federally and state-chartered banks coexisting in a competitive regulatory framework. National banks are federally created instrumentalities in the sense that they are organized and exist under the laws of the United States, as opposed to the laws of a particular state. Nonetheless, they are privately owned businesses<sup>105</sup> that must be headquartered somewhere and do

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100. Preemption Regulations, 69 Fed. Reg. at 1912, 1916–17.

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

102. 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 87, § 3.03[B][1].

103. 15 U.S.C. § 6701(d)(2)(A) (2000).

104. See *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 534 (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*, at 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 HARV. J.L. & PUB. POL'Y 327, 351 (1993).

105. See 12 U.S.C. §§ 21–24 (2000).

business somewhere, and that somewhere will usually be one of the fifty sovereign states. Though 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, financial or non-financial, located there. As a part of the local economy, it will take actions that implicate a broad array of state laws. When the national bank enters into employment agreements, those agreements are not interpreted under any federal law of contracts but rather under state contract law.<sup>106</sup> 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 enter into them may simultaneously be circumscribed by federal law.<sup>107</sup> 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 be governed by state law.<sup>108</sup> If the national bank is to be held liable for garden-variety negligence, state tort law will govern. If the national bank should engage in fraudulent conduct that violates the state's criminal laws, 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."<sup>109</sup>

National banks can be contrasted with purely federal instrumentalities, such as the Second Bank of the United States,

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106. The National Bank Act simply authorizes national banks "to make contracts" as part of their general corporate powers, without further elaboration. *Id.* § 24 (Third).

107. *See id.* § 29 (establishing limited authority of national banks to own real estate).

108. Although Article 9 of the Uniform Commercial Code generally governs these subjects, U.C.C. § 9 (2003), other statutory schemes may apply depending upon the nature of the collateral. Examples include boats (at least in 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 security 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.,* Nat'l Peregrine, Inc. v. Capitol Fed. Sav. & Loan Assoc. of Denver, 116 B.R. 194, 194 (C.D. Cal. 1990)); and motor vehicles (state certificate of title legislation).

109. *Cf. Younger v. Harris*, 401 U.S. 37, 44 (1971).

which gave rise to seminal opinions by Chief Justice John Marshall in *McCulloch v. Maryland*<sup>110</sup> and *Osborn v. Bank of the United States*.<sup>111</sup> In the latter decision, Chief Justice Marshall pointed out that if the Second Bank had been a “mere private corporation” as opposed to the public corporation that it was, 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.<sup>112</sup>

The same distinction, placing national banks squarely within the ranks of private business enterprises subject to state legislation, was reiterated by the Court fifty years later in *National Bank v. Kentucky*:<sup>113</sup>

[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

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110. 17 U.S. (4 Wheat.) 316 (1819).

111. 22 U.S. (9 Wheat.) 738 (1824).

112. *Id.* at 859–60.

113. 76 U.S. (9 Wall.) 353 (1869). This case, decided a mere six years after enactment of the National Currency Act of 1863 and the creation of the national banking system, represents an essentially contemporaneous construction of that Act.

officers, but no one will contend 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.<sup>114</sup>

In practice, Congress has assiduously maintained competitive parity between the national and state banking systems. For example, a 1978 Supreme Court decision interpreting one of the few provisions of the National Bank Act with explicit preemptive effect<sup>115</sup> gave national banks a significant competitive edge in the credit card business.<sup>116</sup> The Court allowed national banks to use “most favored lender” status to choose the highest interest rate available to all lenders in the state, not just banks, and then to export that status all over the country, preempting the usury laws of all other states. To remedy the resultant competitive imbalance, Congress enacted section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980,<sup>117</sup> which gave to state-chartered banks everything that 12 U.S.C. § 85 gave to national banks.<sup>118</sup>

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114. *Id.* at 361–62.

115. 12 U.S.C. § 85 (prescribing a national usury law for national banks).

116. *Marquette Nat’l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978) (construing 12 U.S.C. § 85).

117. Pub. L. No. 96-221, 94 Stat. 132 (1980) (codified in scattered sections of the U.S. Code).

118. 12 U.S.C. § 1831d 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.

When, in 1994, interstate branching was legalized for the first time in U.S. history,<sup>119</sup> Congress explained 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 intrastate branching.<sup>120</sup> 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. . . .

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.<sup>121</sup>

Congress’s solicitude for the preservation of the dual system of financial services regulation has recently paid unexpected dividends with many state attorneys general proactively enforcing consumer protection statutes and combating financial fraud that federal agencies were either unable or unwilling to detect and punish. New York Attorney General Eliot Spitzer, for example, has brought charges against a variety of large Wall Street investment banking firms, mutual fund com-

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119. This was accomplished with IBBEA. *See supra* note 56.

120. 12 U.S.C. § 36(f).

121. H.R. REP. NO. 103-651, at 53 (1994) (Conf. Rep.), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074.

plexes<sup>122</sup> (including some affiliated with major banks),<sup>123</sup> and insurance companies.<sup>124</sup> 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. Moreover, the combination of congressional emphasis on parity and OCC's attempts to exempt national banks from state regulations threatens to undermine state consumer protection efforts aimed even at state banks. Already, private industry has attempted to extend the OCC regime in this area.<sup>125</sup>

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122. See, e.g., Christopher Oster, *Invesco Charged in Scandal as Strong Quits; Strong Financial's 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.

123. See, e.g., Riva D. Atlas, *Spitzer's Office Prepares for Rare Trial*, N.Y. TIMES, Apr. 19, 2005, at C1.

124. See, e.g., *Excerpts from Complaint Against A.I.G. by New York*, N.Y. TIMES, May 27, 2005, at C6; Jenny Anderson, *Senior A.I.G. Executive Is Said to Be Ready to Cooperate in Inquiry on Accounting Methods*, N.Y. TIMES, May 14, 2005, at C3; Gretchen Morgenson, *U.S. Attorney Subpoenas Chubb over Its Use of Reinsurance*, N.Y. TIMES, May 12, 2005, at C3 (referring to Spitzer's investigation of Chubb as well as to the federal investigation).

125. The Financial Services Roundtable, a trade organization of leading banking and other financial services organizations, has petitioned the FDIC to exercise its preemptive authority to give state-chartered banks immunity from state consumer protection laws comparable to that enjoyed by their federally chartered national bank brethren as a result of OCC's Preemption Regulations and Visitorial Powers Regulations. The FDIC held a public hearing on this proposal. See Federal Deposit Insurance Corporation, *Petition for Rulemaking to Preempt Certain State Laws: Notice of Public Hearing*, 70 Fed. Reg. 13,413 (Mar. 21, 2005); *id.* at 13,417 (reproducing text of Mar. 4, 2005 Financial Services Roundtable petition). In the aftermath of that public hearing, FDIC has issued for notice and comment a proposed rulemaking on the requested preemptive action. Federal Deposit Insurance Corporation, *Interstate Banking; Federal Interest Rate Authority: Notice of Proposed Rulemaking*, 70 Fed. Reg. 60,019 (Oct. 12, 2005).

Although detailed consideration of this petition and the resultant rulemaking proceeding is beyond the scope of this Article, it seems that invalidating (either legislatively or, using the approach to be advocated here, judicially) the more excessive features of the Preemption Regulations and the Visitorial Powers Regulations is, as a matter of public policy, preferable (albeit less profitable for the banking industry) to exacerbating the situation by giving *all* banks and not just national banks a license to run roughshod over state consumer protection laws.

C. *Expanding Preemption to State-Chartered  
Bank Operating Subsidiaries*

In the Preemption Regulations and the Visitorial Powers Regulations, OCC announced that it will, by regulatory fiat, apply the same rules to operating subsidiaries of national banks as it applies to the banks themselves. The rationale is that operating subsidiaries are a convenient organizational alternative to a separate department of a national bank and may only perform the activities that the bank itself is authorized to perform. Nevertheless, this assertion of preemptive power stands the entire operating subsidiary concept on its head.

National bank operating subsidiaries have always been surrounded by controversy.<sup>126</sup> Part of the problem involves the differing interpretations of what constitutes the “business of banking” under the relevant provision of the National Bank Act, which provides, in pertinent part, that a national bank may exercise

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.<sup>127</sup>

The interpretive question is whether the phrases following the italicized language and separated from it by a semicolon delineate what constitutes the “business of banking,” and so indicate, by the principle *expressio unius est exclusio alterius*, that items not mentioned in the statute are not part of said business; or are merely exemplary and indicate, by the principle *ejusdem generis*, 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.”<sup>128</sup>

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126. This discussion, *infra* notes 127–53 and accompanying text, is adapted from Fisher, *supra* note 88, at 1361–66, 1417–18.

127. 12 U.S.C. § 24 (Seventh) (1994) (emphasis added).

128. See Edward L. Symons, Jr., *The “Business of Banking” in Historical Perspective*, 51 GEO. WASH. L. REV. 676, 678–80 (1983).

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.<sup>129</sup> Under this view, national banks are not authorized 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,<sup>130</sup> expressly limits the power of a national bank by forbidding its ownership of stock for its own account.<sup>131</sup> If a national bank cannot own stock for its own account, it cannot possibly own a subsidiary.

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 did not perform any function that the bank could not perform directly. Activities conducted by operating subsidiaries were treated *in pari materia* with those conducted by the bank itself and were subject to the same limitations and restrictions applicable to the bank.<sup>132</sup> These mid-1960s OCC pronouncements on operating subsidiaries engendered public disagreement on the subject between OCC and the Federal Reserve Board, which took the position that section 16 of Glass-Steagall forbade any such subsidiary.<sup>133</sup> Ultimately, however, the Board reached an *entente* with OCC and reversed its position on the subject:

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129. Part II, *infra*, will argue that the Tenth Amendment embodies this view.

130. 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 (1933), particularly sections 16, 20, 21, and 32 (codified as amended, respectively, at 12 U.S.C. § 24 (1994); 12 U.S.C. § 377 (1994) (repealed by GLEBA in 1999); 12 U.S.C. § 378 (1994); and 12 U.S.C. § 78 (1994) (repealed by GLEBA in 1999)).

131. "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 (1994) (Seventh) (emphasis added).

132. This was OCC's approach before it adopted a new position in 1994. See 12 C.F.R. § 5.34 (1993) (former OCC operating subsidiary regulation).

133. See Law Dep't, Fed. Reserve, *Member Bank Purchase of Stock of "Operation Subsidiaries,"* 52 FED. RES. BULL. 1151 (1966).

[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.<sup>134</sup>

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.<sup>135</sup>

Although the House Banking Committee held hearings on this subject,<sup>136</sup> 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 regulatory power under the BHC Act, even where they were second-tier subsidiaries of a Bank Holding Company (BHC).<sup>137</sup> 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 ac-

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134. 12 C.F.R. § 250.141(c) (2001). The Board even opposed legislation that would have prohibited a national bank from engaging directly or indirectly in any activity that the Board 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).

135. See *supra* notes 118–19 and accompanying text.

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

137. 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 BHC, at a time when discount brokerage was not yet clearly a permissible activity under section 4 of the BHC Act, 12 U.S.C. § 1843. In the litigation engendered by the discount brokerage applications, no suggestion arose 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 violate 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).

tivity 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.<sup>138</sup>

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 holding company or any subsidiary thereof (other than a bank or subsidiary of that bank).<sup>139</sup>

Congress was, therefore, apparently satisfied with the operating subsidiary concept as it had been administered by 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.<sup>140</sup>

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 Insurance Co.*,<sup>141</sup> which featured the use of an operating subsidiary to sell annuities and which expressly held that OCC enjoyed

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138. 12 U.S.C. § 1844(e) (emphasis added).

139. *Id.* § 1818(b)(3).

140. See Garn-St Germain Depository Institutions Act of 1982, § 410, Pub. L. No. 97-320, 96 Stat. 1469, 1515–16 (1996) (amending 12 U.S.C. § 371c).

141. 513 U.S. 251 (1995).

significant latitude in determining what sort of activities might be “incidental” to the “business of banking” under section 24 (Seventh),<sup>142</sup> OCC promulgated a revised operating subsidiary regulation,<sup>143</sup> which contemplated authorizing for subsidiaries activities that were not permissible for the parent national bank.<sup>144</sup>

This proposal sent shock waves through the financial services industries and the halls of Congress and was denounced as exceeding the scope of OCC’s statutory authority.<sup>145</sup> Initially promulgated in 1994, the operating subsidiary proposal was shelved in the 104th Congress, 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,<sup>146</sup> the proposed

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142. *Id.* at 258 & n.2.

143. Office of the Comptroller of the Currency, Rules, Policies, and Procedures for Corporate Activities, 59 Fed. Reg. 61,034 (Nov. 29, 1994) [hereinafter OCC Part 5 Amendments]. 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 “modify and streamline” them, pursuant to the mandate of section 303(a) of the Riegle Community Development and Regulatory Improvement Act of 1994, 12 U.S.C. § 4803 (1994).

144. 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 inapplicable to the subsidiaries. OCC Part 5 Amendments, 59 Fed. Reg. at 61,039.

145. The revised Part 5 operating subsidiary regulation was widely viewed as an end-run around Glass-Steagall and insurance restrictions, as well as constraints on other activities (for example, real estate) forbidden to national banks. See generally OCC *Seeks Comment on Easing Bank Rules, Opening Door for New Sub Power Requests*, 63 BANKING REP. (BNA) 815 (1994). Some suggested these rules would permit 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). 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 response from Capitol Hill and various trade associations was decidedly more negative. See *id.* at 653, 673–74 (recounting responses from House Banking Committee Chairman Leach, former House Energy and Commerce Committee Chairman Dingell, and others).

146. 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, 4 (quoting OCC Chief Counsel Julie L. Williams as saying the agency was in a “holding

Financial Services Competitiveness Act of 1995.<sup>147</sup> When, however, banking reform legislation failed to pass with the 104th Congress, the proposal was dusted off and issued as a final regulation.<sup>148</sup>

OCC declared therein that it would entertain 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 his decisions would enjoy thereunder, confining those activities to the “business of banking” and its incidents proved to be only a small limitation, at least with respect to a broad array of securities and insurance products and activities.<sup>149</sup> In short, the new rules governing operating subsidiaries made it easier for banks to enter into the business 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 reaffirmed the primacy of the McCarran-Ferguson Act’s reverse preemption regime,<sup>150</sup> 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

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pattern” on the proposed Part 5 Rules and was “monitoring what Congress [was] doing”).

147. H.R. 18, 104th Cong. (1995). One month after introducing 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 was marked up by both the House Banking Committee and the House Commerce Committee.

148. See Office of the Comptroller of the Currency, Rules, Policies, and Procedures for Corporate Activities, 61 Fed. Reg. 60,342 (Nov. 27, 1996).

149. For example, within a year after the regulation was finalized, OCC relied on it to permit a subsidiary of Zions First National Bank to engage in municipal 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—that is, before GLEBA) be underwritten by national banks, which were limited by 12 U.S.C. § 24 (Seventh) (1994) to underwriting only general obligation state and municipal bonds. Interestingly, GLEBA expressly amended that provision to authorize underwriting, dealing in, and purchasing various state and municipal revenue bonds, limited obligation bonds, and other obligations that satisfy the requirements of section 142(b)(1) of the Internal Revenue Code. GLEBA § 151 (codified at 12 U.S.C. § 24 (Seventh) (1994)).

150. 15 U.S.C. § 6701(a) (1999).

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,<sup>151</sup> seek expedited<sup>152</sup> judicial review in the appropriate federal circuit court. Such review, however, must be “without unequal deference.”<sup>153</sup> Although the deference issue became politically contentious and led to this compromise position—the implementation of a functional regulation regime—the enactment of a federal definition of “insurance” and the reaffirmation of McCarran-Ferguson 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 Regulations appear anomalous at best.

The question then is not whether the putative concerns animating OCC’s recent actions are legitimate, but whether it has authority to act. An agency cannot confer power upon itself and thus 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.”<sup>154</sup> Moreover, for OCC to trespass on the States’ Tenth Amendment authority is equally contrary to our constitutional scheme. 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,

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151. GLEBA § 104(d) (1999), 15 U.S.C. § 6714(d) (1999).

152. GLEBA § 304(b)–(c), 15 U.S.C. § 6714(b)–(c) (1999).

153. GLEBA § 304(e), 15 U.S.C. § 6714(e) (1999). 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.*

154. *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374–75 (1986); *accord*, *Dimension Fin. Corp. v. Bd. of Governors*, 744 F.2d 1402, 1408, 1410 (10th Cir. 1984), *aff’d*, 474 U.S. 361 (1986); *FAIC Sec., Inc. v. United States*, 595 F. Supp. 73, 79 (D.D.C. 1984), *aff’d*, 768 F.2d 352 (D.C. Cir. 1985).

such as national banks, that entity is the United States, but for all affiliates of those institutions, including parent holding companies, sister non-bank subsidiaries of those holding companies, and operating subsidiaries, the chartering authority is a sovereign state. That state has legitimate and compelling interests in preserving those institutions and in ensuring that those institutions serve the purposes for which they were created.

For over seventy years, undue federal interference with this principle of comity has been recognized as a violation of the Tenth Amendment of the United States Constitution.<sup>155</sup> As Justice Cardozo stated,

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.<sup>156</sup>

Cardozo's opinion for the Court in *Hopkins Federal* invalidated an act of Congress as just such an unconstitutional infringement of state sovereignty. Clearly, comparable action by OCC without congressional support, much less an "explicitly conferred" statutory authority, is all the more unconstitutional.

Relying on the Tenth Amendment as an independent source of reserved state power is made difficult by the terse and general nature of the Amendment: "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 peo-

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155. *Hopkins Fed. Sav. & Loan Ass'n v. Cleary*, 296 U.S. 315 (1935).

156. *Id.* at 336-37 (internal citations omitted).

ple.”<sup>157</sup> While recent decisions of the Supreme Court have re-animated its historic role in preserving state sovereignty from excessive federal regulation,<sup>158</sup> they have failed to establish a doctrinal baseline for Tenth Amendment analysis. As a result, the lower federal courts have been chary of relying on what is usually little more than state parties’ bare-bones citation of the Amendment in briefs as a basis for challenging claims of federal preemption. OCC’s record of success on its preemption and visitorial powers claims eloquently attests to this.<sup>159</sup>

Moreover, *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>160</sup> which has never been overruled, raises questions about the independent force of the Tenth Amendment where Congress has explicitly legislated, pursuant to its Commerce Clause authority, in a manner intended to limit the authority of the

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157. U.S. CONST. amend. X.

158. See, e.g., *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (invalidating private suits for damages against states under Title I of the 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. Fla. Bd. 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 the 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 the 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 Fla. 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 the Gun Free School Zones Act as exceeding Congress’s 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 the Age Discrimination in Employment Act’s mandatory retirement provisions inapplicable to state judges).

159. See *supra* notes 29, 65–69, and accompanying text.

160. 469 U.S. 528 (1985).

states over matters of coordinate state and federal concern. Decisions, such as *Garcia*, predicated on the notion that the States' political representation in Congress will adequately protect their interests represent one pole of Tenth Amendment jurisprudence. At the other pole are those decisions that rely on a theory of divided sovereignty between States and the national government.<sup>161</sup> Implicit in these latter decisions is the notion that there are some affirmative restrictions on the power of Congress, even when exercising plenary powers granted under Article I.

D. *Toward Judicial Review as the Ultimate  
Guardian of Reserved Rights*

The original rationale for the dual sovereignty approach—that federal and state governments operate within different spheres of influence<sup>162</sup>—was emasculated by New Deal-era decisions. The Court gradually expanded the concept of “interstate commerce” to encompass what Laurence Tribe has called the “cumulative effect” principle.<sup>163</sup> 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,<sup>164</sup> 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.<sup>165</sup>

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161. See, e.g., *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976).

162. Compare *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (although it is a government of limited powers, the federal government is supreme within its legitimate sphere, as in the chartering of the Second Bank of the United States, and intrusions 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 New York's grant of a steamboat monopoly as inconsistent with federal licensing statute regulating interstate commerce, but excepting commerce “completely internal to a state” as outside the federal sphere).

163. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-4, at 814–15 (3d ed. 2000).

164. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41 (1937).

165. See *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942); *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.”).

Traditionally, the most significant restrictions on the commerce power have been the principles of federalism. Montesquieu, the French political theorist whose writings were well known to the Framers, reasoned that every man invested with power is apt to abuse it and to carry his authority as far as he can.<sup>166</sup> In 1853, John C. Calhoun, an astute lawyer-statesman whatever his politics, accurately predicted this abuse 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 ever greater federal control over the States and the people.<sup>167</sup>

The Framers' own experience anticipated this problem as well and persuaded them that tyranny was not limited to monarchs or their substitutes, but was a mischief that could also infect the legislative branch.<sup>168</sup> They had witnessed first-hand the imperial ambitions of the British Parliament.<sup>169</sup> Originally, the King and Parliament dealt with matters of policy outside the scope of the colonies, which enjoyed considerable autonomy in self-governance.<sup>170</sup> Then Parliament imposed a variety

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166. See generally CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* (Thomas Nugent trans., 6th ed. 1792). The federal banking agencies' efforts to expand their power thus fall neatly within an ancient political precept. See, e.g., *Bd. of Governors v. Dimension Fin. Corp.*, 474 U.S. 361 (1986); *Stoddard v. Bd. 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* and *American Land Title*, as well as holdings to the same effect in *Comm'r v. Morris Trust*, 367 F.2d 794 (4th Cir. 1966), and *First Sec. Bank of Utah, N.A. v. Comm'r*, 436 F.2d 1192 (10th Cir. 1971), *aff'd on other grounds*, 405 U.S. 394 (1972)).

167. 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)).

168. See THE FEDERALIST NO. 47, at 301-03 (James Madison) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 48 (James Madison), *supra*, at 309.

169. 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 A. LOFGREN, *GOVERNMENT FROM REFLECTION AND CHOICE* 70 (1986).

170. See generally BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967).

of taxes on the colonies, including the infamous Stamp Act. The colonists' resistance was predicated in large part on their belief in the authority and autonomy of colonial assemblies,<sup>171</sup> which they regarded as "the primary guardians of both the individual liberties of their constituents and the corporate rights of the colonies."<sup>172</sup> The more Parliament insisted on complete and undivided sovereign power over the colonies, the more the latter pressed the primacy of local governance.<sup>173</sup>

Serious political<sup>174</sup> and economic<sup>175</sup> difficulties plagued the regime of the Articles of Confederation as states faced what contemporary scholars would describe as collective action problems.<sup>176</sup> When dissatisfaction with the weakness of the national government vis-à-vis the States led to proposals to aug-

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171. *Id.* at 198–229.

172. GREENE, *supra* note 169, at 83; *see also* Lofgren, *supra* note 169, at 75.

173. BAILYN, *supra* note 170, at 223–28.

174. These included disputes over compliance with the Treaty of Paris and discriminatory tariff and customs laws, many of which violated the 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*, 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); 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. 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, 1763–89, at 108–12 (Daniel J. Boorstin ed., 1956).

175. *See* Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 SAN DIEGO L. REV. 555, 567 (1994).

176. *See, e.g.*, MANCUR OLSON, JR., 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 30, at 1106–21; Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 41–56 (1998).

ment its authority by granting it the power to levy taxes and duties, conduct foreign relations, raise, operate, and pay an Army and Navy, borrow money, and regulate interstate and foreign commerce,<sup>177</sup> memories of the colonial experience animated the debate between the Federalist and Anti-Federalist camps. 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 the people. As Madison put it, the United States would be 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.<sup>178</sup>

Inherent in this conception is the belief that the political branches of the national government will, to a certain extent, guard state sovereignty against encroachment. Nevertheless, a considerable feeling emerged among the States that these pro-

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177. U.S. CONST. art. I, § 8. The States would be forbidden from interfering in questions of foreign relations and war. U.S. CONST. art. I, § 10. This arrangement was in sharp contrast to the situation that prevailed under the Articles of Confederation. States had repeatedly made war, provided for armies, and carried on their own diplomatic relations with foreign nations, even when such actions were prohibited by the Articles. 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, 1447–48 (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”).

178. THE FEDERALIST NO. 51 (James Madison), *supra* note 168, at 323. The new government, mused Madison, would be neither federal nor national, but a combination of both. See THE FEDERALIST NO. 39 (James Madison), *supra* note 168, at 243–46 (characterizing various elements of the proposed Constitution as either “federal” or “national” in character).

In its foundation, it is federal, not national; in the sources 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 246.

tections would be inadequate to prevent the “annihilation” of the state governments by the federal government.<sup>179</sup>

Important historical scholarship by John Yoo has demonstrated that these concerns, as well as concerns about the government aggrandizing its power at the expense of the governed, made the Anti-Federalists’ arguments increasingly difficult for the Federalists to counter.<sup>180</sup> To describe the concern with a contemporary metaphor,

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.<sup>181</sup>

The impact was to give rise to the emergence of the concept of judicial review as the primary safeguard of the States.<sup>182</sup> If 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 themselves.”<sup>183</sup> In other words, “If Congress were the only judge of its own

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179. See, e.g., *Essays of Brutus I*, N.Y. J., Oct. 18, 1787, reprinted in 2 THE COMPLETE ANTI-FEDERALIST 367 (Herbert J. Storing ed., 1981) (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 VI*, 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”).

180. See John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1381 (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,” and 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”) (citing 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 373, 416 (Merrill Jensen ed., 1976)).

181. *Id.* at 1381–82.

182. *Id.* at 1383–91.

183. *Id.* at 1383 (quoting *Brutus VI*, N.Y. J., 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]).

powers, then the safeguards of a written Constitution would become meaningless."<sup>184</sup>

The structure and phraseology of the Bill of Rights suggests a role for an independent judiciary. None of the first Ten Amendments positively confers individual rights and liberties upon the people. Rather, they prohibit federal trammeling of those rights and liberties and specify limitations on the federal legislative power beyond those articulated in the body of the Constitution,<sup>185</sup> which also limits the powers of the States.<sup>186</sup>

At the 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 reserves to the States and to the people all powers that have neither been explicitly conferred upon the Congress nor forbidden to the States. Thus, rather than being a grant of individual rights and liberties by positive law, the Bill of Rights establishes a structure 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-recent experience with preserving the font of their individual and collective freedoms—the state assemblies—from the depredations of Parliament. If, however, the States should succumb to the power of the federal purse strings and barter their sovereignty for a larger share of federal largesse, or if in some other way the “double security” and elaborate political safeguards of Madison's “compound republic” should fail and the Anti-Federalists' fears about self-arrogation and abuse of power by the Congress come to pass, a backup plan was necessary.

The Framers' solution was review by an independent judiciary. As Professor Yoo observes,

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184. *Id.*

185. *See, e.g.*, U.S. CONST. art. I, § 9 (prohibiting bills of attainder, ex post facto laws, titles of nobility, suspensions of the writ of habeas corpus, and disproportionate taxation).

186. *See, e.g.*, U.S. CONST. art. I, § 10 (prohibiting States from entering into treaties, alliances, or confederations; coining money; granting letters of marque; or passing their own bills of attainder or ex post facto laws).

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. The Framers viewed federalism as a normative good which ought to be promoted despite any state's momentary interest in reducing its rights.

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. . . 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.<sup>187</sup>

For this approach to be effective, however, the judiciary cannot abdicate its role by regarding the Tenth Amendment as a tautology and thus depriving it of substantive content. After more than 200 years of constitutional government, and 75 during which many of the Anti-Federalists' fears have come to pass, the Tenth Amendment must be given some teeth.

#### E. *Toward a Basal Tenth Amendment*<sup>188</sup>

In *National League of Cities v. Usery*,<sup>189</sup> the Supreme Court applied the Tenth Amendment to invalidate amendments to the Fair Labor Standards Act (FLSA), which sought to extend the FLSA's minimum wage and maximum hours provisions to employees of state governments and their political subdivisions. As interpreted by this decision, the Tenth Amendment

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187. Yoo, *supra* note 180, at 1402, 1404–05.

188. Part II.E is adapted from Keith R. Fisher, *Federalism Contra Federal Reservoirism: Bank Holding Companies and State Bank Powers*, 23 U.S.F. L. REV. 317, 367–70 (1989).

189. 426 U.S. 833 (1976).

protects the States from congressional exercise of Commerce Clause authority in a manner that would intrude upon “traditional” or “essential” aspects of state sovereignty, or otherwise interfere with “integral” state functions.<sup>190</sup> 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.”<sup>191</sup>

The purported difficulty with this approach, according to the majority in *Garcia*, was that a rule turning upon judicial assessment of what might constitute “integral” or “traditional” state governmental functions was doctrinally unsound and unworkable in practice. However, the difficulty in identifying such functions is surely exaggerated. The Framers did not attempt exhaustively to catalogue governmental functions reserved to the States,<sup>192</sup> but sources are available that may give us some insight.<sup>193</sup>

John Marshall 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.<sup>194</sup> Another ardent Federalist, Alexander Hamilton,<sup>195</sup> listed areas of state and federal authority:

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190. *Id.* at 849–55.

191. *Id.* at 851.

192. 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 (Alexander Hamilton), *supra* note 168, at 119–20.

193. Many of these sources are collected in Justice Thomas’s separate concurrence in *Lopez*. See *United States v. Lopez*, 514 U.S. 549, 590–93 (Thomas, J., concurring).

194. See John Marshall, *Remarks at the Virginia Ratifying Convention* (Jun. 20, 1788), in 2 DEBATE, *supra* note 182, at 731–32.

195. The conceptual architect of the Bank of the United States (which, as a matter of constitutional law, paved the way for the national banking system, see *McCulloch v. Maryland*, 17 U.S. 316 (1819)), Hamilton was nonetheless

The regulation of the mere domestic police of a State appears to me to hold 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 depository. 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 things, in short, which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction.<sup>196</sup>

In another paper, Hamilton rejected the notion that the Necessary and Proper Clause<sup>197</sup> 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 a State.”<sup>198</sup>

The Supreme Court has also recognized “paradigmatic common-law state crime”<sup>199</sup> as traditionally an area of state authority.<sup>200</sup> This view is by no means limited to so-called “conservatives” on the Court. In *Jones v. United States*, for example,

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scrupulous about balancing the domains of the federal and state governments. With his eighteenth-century sensibilities, however, he could not have predicted the extent of twentieth-century arrogation of political power by the regulatory state: “Allowing the utmost latitude to the love of power which any reasonable man 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].” THE FEDERALIST NO. 17 (Alexander Hamilton), *supra* note 168, at 118.

196. *Id.* Hamilton adds that were anyone at the federal level to succumb to such a temptation, “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 119. 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 the Supreme Court’s endorsement of it in *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942). That said, 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.

197. U.S. CONST. art. I, § 8, cl. 18.

198. THE FEDERALIST NO. 33 (Alexander Hamilton), *supra* note 168, at 204.

199. *Jones v. United States*, 529 U.S. 848, 858 (2000).

200. *Id.* (reversing a federal conviction for arson after reasoning that an owner-occupied dwelling was not “used . . . in activities affecting . . . commerce,” and rejecting the 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).

Justice Ginsburg's opinion for the Court took pains to reiterate established doctrine: "Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes."<sup>201</sup>

Thus, with 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. It must 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 codes), together with the essential sovereign power of defining crimes, form the irreducible minimum content of "traditional" state functions protected by the Tenth Amendment. Other areas of state sovereignty and state law would, of necessity, evolve as the country changed from a predominantly agrarian eighteenth-century society to a predominantly industrial contemporary one. This would include the sovereign power (already enjoyed by the British Crown at the time of the Revolution) of chartering corporate bodies, enacting laws for their governance, and prescribing legal rules for consumer protection.<sup>202</sup>

As such, the "integral" or "traditional" state function approach of *National League of Cities* is neither unworkable nor unsound. In fact, the reverse is true: what the Court in *Garcia* proposed to substitute for those functions is unworkable and unsound. There, the majority 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."<sup>203</sup> To invoke the political process as a

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201. *Id.* at 858 (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971) (internal quotation marks omitted)). Justice Stevens expanded upon this point in his concurrence. *Id.* at 859 (Stevens, J., concurring) (noting the "well established presumption against federal pre-emption of state law" (citing *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 157 (1978))) and suggesting that the disparity between the federal sentence (35 years) and the maximum state sentence (10 years) threatened to displace a state policy choice).

202. For that matter, the Supreme Court has expressly 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*." *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 38 (1980) (emphasis added).

203. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1984).

source of protection of States' rights<sup>204</sup> 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 to ensure that their interests have been adequately identified and protected. That is an outright abdication of the judicial function.<sup>205</sup>

Indeed, as Justice Douglas 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."<sup>206</sup> Moreover, as Laurence Tribe has observed, 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, are no longer available.<sup>207</sup>

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204. 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); Choper, *supra* note 2; Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000).

205. 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, although the Supreme Court has not expressly overruled *Garcia*, it shifted away from the "political safeguards" approach in *United States v. Morrison*, holding that "whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court." 529 U.S. 598, 614 (2000) (quoting *United States v. Lopez*, 514 U.S. 549, 557 n.2 (1994)).

206. *New York v. United States*, 326 U.S. 572, 594 (1946) (Douglas, J., dissenting).

207. See TRIBE, *supra* note 163, at 68–69. Professor Yoo makes a similar point: [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 180, at 1321.

*Garcia* held only that the application to public employees of FLSA's overtime and minimum-wage provisions was not "destructive of state sovereignty or violative of any constitutional provision."<sup>208</sup> *Garcia* did not overrule *Hopkins Federal*,<sup>209</sup> and where, as in the case of the Preemption Regulations and the Visitorial Powers Regulations, 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 is not merely to make the obvious and uncontroversial point that agencies should be reined in when they violate their statutory mandate. Whatever one thinks of *Garcia*, its future prospects, or the Supreme Court's vacillation between championing state sovereignty and championing congressional power under the Commerce Clause, the underlying doctrinal premise of *Garcia's* view of the Tenth Amendment is that political representation in Congress is best suited to protect state sovereign interests.<sup>210</sup> Such a process-oriented doctrine cannot apply, however, to States' dealings with federal 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 *Garcia* analysis's reliance on political process is highlighted, moreover, by the peculiar position of federal administrative agencies within our constitutional form of government. Unlike Congress, federal agencies do not in any sense represent the States. Agency heads, such as the Comptroller of the Currency, are selected by the President, and agency staff are, by design,<sup>211</sup> supposed to be disconnected from the political arena and serve as sources of technical expertise. An administrative agency like OCC is not accountable to the electorate and is sub-

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208. *Garcia*, 469 U.S. at 554.

209. *See id.* at 586–89 (O'Connor, J., dissenting).

210. *Id.* at 551–52 (majority opinion).

211. *See generally* LOUIS FISHER, *THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE* (1981).

ject to institutional pressures and regulatory capture.<sup>212</sup> OCC largely subsists, as do state bank regulators, on fees paid by the institutions they regulate, thereby creating incentives to attract rent-seeking<sup>213</sup> banking organizations to the national charter.<sup>214</sup> Those financial incentives make the agency's decision-making process susceptible to error in ways that are not as likely when the decision maker is an elected body.<sup>215</sup>

In the face of administrative agency preemption, then, the Tenth Amendment retains its vitality, even under the *Garcia* approach. That is axiomatic where, as here, Congress has ex-

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212. 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). Regulatory capture, of course, is not unique to banking regulation but rather is the logical end result of the self-interested maneuvers of any regulated entity interfacing with legislators and the regulating agencies. See, e.g., Croley, *supra* note 176, at 42–45; Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167 (1990); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335 (1974); Robert B. Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 YALE L.J. 1617 (1985); 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).

213. Rent seeking refers to obtaining government intervention for the rent seeker's own benefit—it is “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. 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 unavoidable in a political system such as ours. See Stigler, *supra* note 176, at 3; Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 559–63 (2001).

214. See Jess Bravin & Paul Beckett, *Friendly Watchdog: Federal Regulator Often Helps Banks Fighting Consumers*, WALL ST. J., Jan. 28, 2002, at A1 (noting that former Comptroller Hawke “doesn’t apologize for using the OCC’s power to override state and local laws designed to protect consumers,” but rather admits that the aid OCC provides is “one of the advantages of a national charter [that provides an incentive for banks to sign up with OCC], and I’m not the least bit ashamed to promote it”).

215. Cf. Amy Bizar, Fred H. Miller & 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).

pressed a preference that States be free to exercise their existing regulatory authority over both state and federally chartered banks doing business within their borders.

A potentially useful analogy can be made to the *Burford* abstention doctrine under which, in the interests of comity and federalism, 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 administration of complex state regulatory schemes.<sup>216</sup> Federal bank regulatory agencies, like the federal courts, ought to be wary of disrupting the continuity of comprehensive programs of state regulation. Comity and federalism are especially appropriate because state authorities are at least as well equipped as their federal counterparts to monitor compliance by national banks with state law, and to do so without trammeling OCC's visitorial powers or its independent authority to correct unsafe or unsound practices and bring enforcement actions for violations of law.

The significance of the dual system of 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."<sup>217</sup> Moreover, the dual banking system has fostered competition and healthy advances in the industry. States, as smaller markets in the larger dual scheme, are ideal environments in which to innovate and experiment without putting the entire banking system at risk. The States have historically been responsible for a variety of innovations that are now commonplace, such as

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216. See *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); see also *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 361 (1989) (noting that *Burford* abstention is appropriate where a case presents "difficult questions of state 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 matter of substantial public concern" (quoting *Colo. 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).

217. WILLIAM J. BROWN, *THE DUAL BANKING SYSTEM IN THE UNITED STATES* 64-65 (1968).

branch banking, real estate lending, trust department operations, and transaction accounts. Through experimentation, states can likewise serve—and indeed have served—as the birthplace of effective predatory lending and consumer protection legislation. 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.

. . . 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.<sup>218</sup>

Congress is well aware that the dual banking system is an important source of innovation and progress, and has consistently sought to preserve it.<sup>219</sup> Federal regulators should comply with this intention.

### III

There is evidence to suggest that the federal judiciary is reluctant to interpret 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.<sup>220</sup> In this light, OCC's attempt to shut out state officials

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

219. *See* Bank Holding Company Act of 1956, ch. 240, § 7 (codified at 12 U.S.C. § 1846 (2000)) ("No provision of this chapter shall be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to companies, banks, bank holding companies, and subsidiaries thereof."). A comment in the Senate Report underscores the point. *See* S. REP. NO. 84-1095, pt. 2, at 5 (1956) ("It is always of uppermost importance in legislation of this nature to preserve the dual system of National and State banks."). Congress reiterated its support for a strong state role in the dual banking system when it enacted IBBEA. *See supra* notes 119–21 and accompanying text.

220. *See* Wilmarth, *supra* note 31, at 357–58 (citing *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474–75 (2003); *United States v. Bestfoods*, 524 U.S. 51, 62 (1998); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 85–86 (1987); *Bus. Roundtable v. SEC*, 905 F.2d 406, 412, 415 (D.C. Cir. 1990); *Minnesota v. Fleet Mortgage Corp.*, 181 F. Supp. 2d 995, 1000 n.8 (D. Minn. 2001)).

from regulating state-chartered operating subsidiaries of national banks not only violates basic tenets of corporate law and corporate governance but also infringes upon the States' sovereign interests in violation of the Tenth Amendment. The following flow chart, distilled from the history of the Tenth Amendment summarized in Part II, provides an analytical framework with which to assess such claims.

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?<sup>221</sup> (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?<sup>222</sup> (If so, 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 than with respect to federal lands);
- other property laws;

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221. Cf. *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000); *Jones v. United States*, 529 U.S. 848 (2000).

222. E.g., McCarran-Ferguson Act of 1945, 15 U.S.C. §§ 1011-1015 (2000); Riegle-Neal Interstate Banking and Branching Efficiency Act, Pub. L. No. 103-328, 108 Stat. 2338 (1994); Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified as amended in scattered sections of 12 and 15 U.S.C.).

- contract and commercial laws (other than for contracts with agencies or instrumentalities of the federal government);
- tort law (other than for suits against the federal government, its agencies and instrumentalities, or federal officials acting within the scope of their official duties);
- fiduciary relations (trust) law;
- domestic relations (family) law;
- crimes as defined by the state legislature;<sup>223</sup>
- 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

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223. Here, the dual sovereignty nature of our system is most apparent, as certain conduct may give rise to criminal liability (and separate prosecutions) under both state and federal law. Prosecutions for bank robbery and narcotics offenses are paradigmatic. A decision by a United States Attorney to prosecute does not foreclose state authorities from prosecuting separately, and prosecution by both sovereigns does not violate the Double Jeopardy Clause of the Constitution.

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 OCC's assertion of preemption, but is often overlooked by the courts, is the Tenth Amendment. This Article suggests that the rescue of that Amendment from its current undeserved desuetude is in order. Accomplishing such a resurrection requires an analytical framework, and such a framework can be distilled from the Framers' commentary and debates. It may, particularly in light of the centrality of judicial review to the Framers' federalism design, provide the Tenth Amendment with substantive content that the courts can credibly enforce.