National Bank Act Preemption: The OCC's New Rules Do Not Pose a Threat to Consumer Protection or the Dual Banking System

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In his article *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*,[1] Professor Arthur Wilmarth criticizes the Office of the Comptroller of the Currency ("OCC") for adopting regulatory amendments on preemption (the "Preemption Rule") and visitorial powers (the "Visitorial Rule") that he believes are unauthorized and unsound.[2] Professor Wilmarth's criticisms suggest a fundamental misunderstanding of the actual nature of the OCC's new rules and the implications of the underlying law and policy supporting them. Professor Wilmarth characterizes the OCC's new rules as effecting a radical change in the law, which he argues is contrary to congressional intent and judicial precedent. However, as this article explains, the OCC's new rules do not, in fact, represent the revolutionary step perceived by Professor Wilmarth, and the OCC had ample authority to adopt them.

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[1] 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) (immediately previous to this article in this volume).

[2] The OCC's new preemption rule is Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904 (Jan. 13, 2004) (to be codified at 12 C.F.R. pts. 7 & 34) [hereinafter Preemption Rule]. The OCC's new rule on visitorial powers is Bank Activities and Operations, 69 Fed. Reg. 1895 (Jan. 13, 2004) (to be codified at 12 C.F.R. § 7.4000) [hereinafter Visitorial Rule].

Part I of this article addresses the purpose and practical implications of the OCC's new preemption and visitorial powers rules. It demonstrates that the new rules serve to clarify the law, not to revamp it in any substantive way. By providing increased clarity, the rules address the needs of banks, the consumers they serve, and the federal and state officials charged with enforcing applicable law against national and state banks, respectively. In particular, the OCC's new rules promise to help substantially reduce the extent of litigation regarding preemption and to rechannel the resources expended on it to more productive purposes, including enabling national banks to serve their customers most efficiently and effectively.

Part II of this article contests Professor Wilmarth's contention that the OCC lacked authority to adopt the new rules. As this Part explains, in enacting the National Bank Act ("NBA") in 1864, Congress created an entirely new, uniform national system of banking, with the express intent that the newly formed national banks operate free from state regulation that would impair the efficiency of the exercise of their federally authorized powers. To effectuate this intent, Congress extended plenary authority to the OCC to issue all regulations necessary to ensure the proper functioning of national banks, including their activities as affected by state law. The text, legislative history, and entire context surrounding the NBA demonstrate that Congress intended the OCC to exercise the full range of this authority, including by identifying, as the OCC has in its new rules, the limits of state authority with respect to federally authorized activities of national banks.

Professor Wilmarth also criticizes the OCC for having, in his view, exceeded its authority by extending the preemptive scope of its regulations to the operating subsidiaries of national banks. Part III below addresses Professor Wilmarth's contentions on this issue by explaining the source of national bank powers to conduct activities through operating subsidiaries and the judicial decisions upholding NBA/OCC preemption of state laws with respect to such subsidiaries. It demonstrates that the OCC's approach to regulation of such entities is well within the agency's mandate and serves the goals of Congress and the interest of the public in preserving the proper balance of federal and state control over activities specifically designated by federal law as within the scope of national bank powers.

In conclusion, Part IV describes some of the benefits that the OCC's new rules provide. Although the OCC has not declared field preemption with respect to national banks and their operating subsidiaries,

its clarification of the traditional conflict preemption analysis applied by the courts to specific types of state laws offers similarly straightforward categorical guidance. As the OCC notes and the courts have observed, the label of "field preemption" is not necessary to establish clear preemption parameters.[3] The delineation of those parameters in the OCC's new Preemption Rule, together with the clarifications regarding the scope of the OCC's exclusive visitorial powers in the new Visitorial Rule, should help eliminate the confusion regarding the application of state law to, or the enforcement of state law against, national banks.

I. Scope and Purpose of the OCC's New Rules

A. The Preemption Rule Clarifies the Practical Application of Existing Law

Professor Wilmarth premises his article on the contention that the OCC's new rules threaten to destroy the dual banking system by "disrupt[ing] the competitive balance that has long existed between national and state banks."[4] According to Professor Wilmarth, the OCC's rules will accomplish this by exempting "national banks . . . from a broad range of state laws," which will eviscerate the benefits of state banking charters and, ultimately, "the dual banking system's current incentives for regulatory innovation, responsiveness, and flexibility."[5]

Actually, what the OCC has done is to *clarify existing law* by prescribing in specific regulations the standards implicit in the NBA as applied by the U.S. Supreme Court and lower courts over the past 140 years.[6] As the OCC's Preemption Rule explains at the outset, it "does not entail any new powers for national banks or any expansion of their existing powers." Rather, it is designed to help "ensure the soundness and efficiencies of national banks' operations by making clear the standards under which they do business."[7] The OCC aptly

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[3] *See* Preemption Rule, *supra* note 2, at 1911.

[4] Wilmarth, *supra* note 1, at 230.

[5] *Id.* at 230, 231.

[6] *See* News Release 2004-08, OCC, OCC First Senior Deputy Comptroller Julie L. Williams Tells House Panel New Regulations Grounded in Federal Law, Court Precedent and Constitution (Jan. 28, 2004), at 10, *available at* http://www.occ.treas.gov/scripts/newsrelease.aspx?Doc=EZQS7L0H.xml.

[7] Preemption Rule, *supra* note 2, at 1908.

observed that the unpredictability of applications of state law to national banks "is costly and burdensome" and seriously interferes with national banks' "ability to plan their business and manage their risks, and subjects them to uncertain liabilities and potential exposure."[8] In turn, the uncertainty national banks have faced has "[i]n some cases, . . . deter[red] them from making certain products available in certain jurisdictions."[9]

It is to help reduce, if not eliminate, such uncertainty—not to create new agency powers or exercise new authority—and thereby facilitate the proper fulfillment by national banks of their authorized functions, that the OCC promulgated its new regulatory amendments.

The fact that the OCC's Preemption Rule clarifies, rather than changes, prevailing law is underscored by the case law discussed at length in the notice containing the final rule, as well as in the previously published notice of proposed rulemaking.[10] First, both notices explain at some length the legislative history of the NBA, the general standards for federal preemption under the Supremacy Clause of the Constitution, and the long line of Supreme Court decisions culminating in the landmark decision in *Barnett Bank of Marion County, N.A. v. Nelson*.[11] Second, the notices cite lower court cases interpreting and applying the NBA in relation to state law and catalog the various types of state laws the courts have found preempted by the NBA.[12] Third, with respect to real estate lending in particular, the notices describe the congressional and judicial actions that have informed preemption of state law in that specific area of national bank authority.[13] All of this extensive background regarding the standards that have emerged through legislative and judicial declarations plainly confirms that the OCC's new preemption rule is fully consistent with existing law. As the OCC expressly states, the rule is "drawn directly

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[8] *Id.*

[9] *Id.* (citing Letter of February 28, 2003, from Alan Greenspan, Chairman, Board of Governors of the Federal Reserve System, to the Honorable Ruben Hinojosa (Feb. 28, 2003)).

[10] *See* Bank Activities and Operations; Real Estate Lending and Appraisals, 68 Fed. Reg. 46,119-02 (Aug. 5, 2003) (to be codified at 12 C.F.R. pts. 7 & 34) [hereinafter Notice of Proposed Rulemaking].

[11] *See id.* at 46,120–21 (discussing, for example, Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25 (1996)).

[12] *See id.* at 46,121–22.

[13] Preemption Rule, *supra* note 2, at 1909–10; Notice of Proposed Rulemaking, *supra* note 10, at 46,124–28.

from applicable Supreme Court precedents" (as discussed in Part I.A.1 below) and its language constitutes "the distillation of the various preemption constructs articulated by the Supreme Court."[14] The rule is *not* "a replacement construct that is in any way inconsistent with those standards"[15] and does not create any radical new law such as Professor Wilmarth suggests.

1. The Preemption Rule Is Fully Consistent with *Barnett Bank*

The key purpose and value of the Preemption Rule is to codify, in a meaningful way for purposes of practical application to various circumstances, the standard for preemption of state law set forth in *Barnett Bank* and its case law progeny. Contrary to Professor Wilmarth's contentions, the new rule is in no way inconsistent with the Supreme Court's ruling in *Barnett Bank*.[16] Rather, the OCC has explicated the guidelines established in *Barnett Bank* by delineating their application to specific types of state laws.

Professor Wilmarth's discussion of *Barnett Bank* distorts key aspects of the opinion. While accurately quoting the Court's statement that, as established in a series of prior Supreme Court cases, Congress intended that the NBA and the regulations promulgated thereunder to preempt state law the effect of which is to "prevent or significantly interfere with [a] national bank's exercise of its powers,"[17] Professor Wilmarth erroneously reads that statement as establishing a presumption *against* preemption of state law as applied to national banks. But such a reading effectively turns *Barnett Bank* on its proverbial head. In fact, the Court repeatedly emphasized in *Barnett Bank* that the history of national bank legislation "is one of interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority *not normally limited by, but rather ordinarily pre-empting*, contrary state law."[18] Consistent with longstanding precedent, the

[14] Preemption Rule, *supra* note 2, at 1910.

[15] *Id.*

[16] *See* Wilmarth, *supra* note 1, at 248 (characterizing the OCC's proposed preemption standard as "self-created," "newly-invented," and at odds with *Barnett Bank*).

[17] As the Court in *Barnett Bank* made clear, the "prevent or significantly interfere" test for NBA preemption is by no means the sole or exclusive test for such preemption. *See* Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 31 (1996). The NBA preempts a state law that would " 'stan[d] as an obstacle to the accomplishment' of one of the Federal Statute's purposes." *Id.* (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

[18] *Barnett Bank*, 517 U.S. at 32 (emphasis supplied).

Court reiterated that the "national banking system [is] normally 'independent, so far as powers conferred are concerned, of state legislation.' "[19] Thus, in the area of national bank regulation, in contrast to most other regulatory contexts, there is a presumption *in favor* of federal preemption of state law: "normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted."[20] Professor Wilmarth, however, effectively reads out of *Barnett Bank* the key message that state law is *generally* deemed preempted by the NBA, because with respect to federally authorized powers of national banks, there is "no 'indication' that Congress intended to subject that power to local restriction."[21]

Professor Wilmarth also erroneously characterizes, in the context of *Barnett Bank*, the preemption standard that "[e]xcept where made applicable by Federal law, state laws that obstruct, impair, or condition," a national bank's ability to exercise its federally authorized powers do not apply to national banks.[22] According to Professor Wilmarth, this standard "will obviously have a far greater impact in preempting state laws than the 'prevent or significantly interfere' rule" set forth in *Barnett Bank*.[23] But under the "conflict" preemption standard that Professor Wilmarth so vigorously insists is applicable in the NBA context[24] (and with which the OCC's new rule is expressly consistent),[25] state laws are preempted if they "stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[26] A state law that "obstructs" or "conditions" a national bank's exercise of its congressionally granted powers can only reasonably be understood as creating "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

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[19] *Id.* (quoting Easton v. Iowa, 188 U.S. 220, 229–30 (1923)).

[20] *Id.* at 33.

[21] *Id.* at 34–35 (citing Franklin Nat'l Bank v. New York, 347 U.S. 373, 378 (1954)). The Ninth Circuit has clearly articulated the proper interpretation of *Barnett Bank* in stating that, "because there has been a 'history of significant federal presence' in national banking, the presumption against preemption of state law is inapplicable." Bank of Am. v. City & County of San Francisco, 309 F.3d 551, 559 (9th Cir. 2002) (quoting United States v. Locke, 529 U.S. 89, 108 (2000)).

[22] Preemption Rule, *supra* note 2, at 1916–17.

[23] Wilmarth, *supra* note 1, at 248.

[24] *See, e.g.*, *id.* at 246, 250–51.

[25] *See* Preemption Rule, *supra* note 2, at 1910.

[26] *Barnett Bank*, 517 U.S. at 31 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

In *Barnett Bank*, in the same paragraph in which the Court identified as preempted state laws those that "prevent or significantly interfere with" the exercise of national bank powers, it also reiterated that state laws are preempted if they " 'encroac[h] on the rights and privileges of national banks,' . . . 'hamper national banks' functions,' or 'interfere with or impair [national banks'] efficiency in performing the functions by which they are designed to serve [the Federal] Government.' "[27] All of these various articulations of ways in which state laws may be so intrusive on national bank activities as to be preempted by federal law are consistent with the OCC's standard for preemption of state laws that "obstruct, impair, or condition" a national bank's ability to exercise its federally authorized powers. Accordingly, a proper reading of *Barnett Bank* definitively supports the OCC's preemption standard and confirms that, contrary to Professor Wilmarth's contention, the preemption rule is fully consistent with governing case law.

2. The Preemption Rule Affirms, and in No Way Undermines, the Dual Banking System

Professor Wilmarth also criticizes the OCC's Preemption Rule on the ground that it "threaten[s] the viability of the dual banking system."[28] Professor Wilmarth argues that the new rule will encourage state-chartered banks to "migrate" to the national banking system and thereby "destroy the competitive equilibrium that currently exists within the dual banking system."[29] But none of his dire predictions have any credible foundation, because they all are premised on the erroneous interpretation of the OCC's rule as effecting a radical change in existing law, when in fact, as emphasized above and in the rule itself, the standards now provided by the OCC are inherent in the NBA and prevailing case law.

Professor Wilmarth's allegation that "the OCC is clearly encouraging large multistate banks to select national charters for the purpose

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[27] *Id.* at 33–34 (quoting Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 247–52 (1944); McClellan v. Chipman, 164 U.S. 347, 358 (1896); Nat'l Bank v. Kentucky, 76 U.S. (9 Wall.) 353, 362 (1869)).

[28] Wilmarth, *supra* note 1, at 229.

[29] *Id.* at 287. There is, in fact, healthy competition between the state and federal banking systems, which works to the benefit of both banks and their customers by pressuring federal and state regulators to administer their respective systems in a manner that supports and promotes bank innovation and efficiency. *See, e.g.*, Christian A. Johnson, *Wild Card Statutes, Parity, and National Banks—The Renascence of State Banking Powers*, 26 LOY. U. CHI. L.J. 351, 363–67 (1995).

of avoiding the application of state laws" undermines the OCC's express clarification that state laws *do indeed* apply to national banks in a variety of contexts, so long as they only "incidentally affect" the exercise of national banks' federally authorized power.[30] The Preemption Rule expressly lists examples of specific types of state laws that thereby generally apply, including laws regarding contracts, torts, criminal law, debt collection, acquisition and transfer of property, taxation and zoning, and then includes "any other law the effect of which the OCC determines to be incidental to" the operations of national banks or otherwise consistent with such banks' federally authorized powers.[31] To contend, as Professor Wilmarth does, that this language represents an "attempt to provide national banks with a blanket exemption from state laws,"[32] is specious.

It merits note (as Professor Wilmarth himself has acknowledged)[33] that the OCC recently issued a comprehensive document entitled "National Banks and the Dual Banking System," which expressly confirms the agency's strong support for a continued, healthy coexistence of federal and state banking regulation.[34] In that document, as echoed in the preambles to both the final Preemption Rule and the Visitorial Rule,[35] the OCC explains that "[e]ach component of the dual banking system makes different, positive contributions to the overall strength of the U.S. banking system, and efforts to dilute the unique characteristics of one component of the system undermine the collective strength that comes from the diverse contributions of the two systems."[36] Unique to the national banking system is the preemption of state laws that would "retard, impede, burden, or in any manner control" national banks' ability to exercise their federally authorized powers.[37] Federal preemption of state law for national banks but not state-chartered banks is one of the key distinctions between the two

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[30] Wilmarth, *supra* note 1, at 276–77.

[31] *Id.*; *see also, e.g.*, Bank of Am. v. City and County of San Francisco, 309 F.3d 551, 559 (9th Cir. 2002).

[32] Wilmarth, *supra* note 1, at 277–78.

[33] *See id.*

[34] *See* OCC, National Banks and The Dual Banking System (Sept. 2003) [hereinafter Dual Banking System], *available at* http://www.occ.treas.gov/ftp/release/2003%2D83a.pdf.

[35] *See* Preemption Rule, *supra* note 2, at 1915; Visitorial Rule, *supra* note 2, at 1896.

[36] Dual Banking System, *supra* note 34, at 8.

[37] *Id.*

systems, and, as the OCC has pointed out, these distinctions "*are not inconsistent with the dual banking system; they are the defining characteristics of it.*"[38]

It is, ironically, the scenario that Professor Wilmarth advocates—one involving the most narrow possible preemption of state laws—that would threaten the dual banking system. In effect, Professor Wilmarth's preferred scenario is one in which the distinctions between national and state-chartered banks would be largely eliminated, as both types of institutions would be subject to virtually the full panoply of state laws and the enforcement of those laws by state authorities. The suggestion that this elimination of fundamental distinctions could strengthen, rather than destroy, the dual nature of our current banking system, which Professor Wilmarth appears to vigorously endorse, is wholly implausible.

In short, the Preemption Rule's clarification of unique characteristics of national banks with respect to applicable state law in no way undermines the benefits of the dual banking system; rather, it enables the banking institutions and regulators within both the federal and state systems to understand, implement, and operate more consistently, efficiently, and effectively within the distinct parameters, and subject to the distinct rules, of the two systems.[39]

B. The Visitorial Powers Regulation Clarifies Congress's Purpose To Vest the OCC with Exclusive Enforcement Authority over National Banks.

In addition to attacking the OCC's new Preemption Rule, Professor Wilmarth argues that the OCC had no authority to adopt the new visitorial powers regulation, which, he contends, will deprive state regulators of their rightful role in enforcing state laws against national banks. But Professor Wilmarth's arguments on this issue misconstrue the meaning of the visitorial powers provision of the NBA and are contradicted by both the legislative history and the later judicial authority regarding that provision.

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[38] *Id.* at 9 (emphasis supplied).

[39] *See generally* John J. Schroeder, Note, "*Duel*" *Banking System? State Bank Parity Laws: An Examination of Regulatory Practice, Constitutional Issues, and Philosophical Questions*, 36 IND. L. REV. 197, 200–02 (2003).

1. The Visitorial Powers Rule Is Fully Supported by Existing Law.

The OCC's amendment to its prior regulation on visitorial powers[40] is specifically designed to clarify the scope and exclusivity of the OCC's supervisory, enforcement, and regulatory authority under the NBA. The NBA's provision on visitorial powers, codified at 12 U.S.C. § 484, states that "[n]o 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."[41]

According to Professor Wilmarth, this language does not grant the OCC exclusive visitorial powers over national banks because: (i) it does not explicitly refer to the OCC as the exclusive regulator of or enforcement authority with respect to national banks; (ii) other provisions of federal law grant other federal agencies certain enforcement authority with respect to national banks; and (iii) it expressly authorizes "the courts of justice" to exercise visitorial powers over national banks.[42] But, as discussed below, none of these three arguments are persuasive.

First, the absence of the words "OCC" or "Office of the Comptroller of the Currency" in § 484 is hardly a basis for concluding that Congress did not grant the OCC exclusive enforcement authority over national banks. Professor Wilmarth apparently ignores the fact that § 484 is a current codification of section 54 of the NBA, which as enacted in 1864, expressly stated:

> That the comptroller of the currency . . . shall appoint a suitable person or persons to make an examination of the affairs of every banking association. . . . And the association shall not be subject to any other visitorial powers than such as are authorized by this act, except such as are vested in the general courts of law and chancery.[43]

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[40] *See* Visitorial Rule, *supra* note 2.

[41] 12 U.S.C. § 484(a) (2002). Congress prescribed only a narrow exception to this visitorial exclusivity, authorizing "lawfully authorized State auditors and examiners" to review a national bank's records "solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws." *Id.* § 484(b). Notably, in 1982, Congress added the word "Federal" into this provision to clarify that only Congress, and not the states, could create exceptions to the OCC's exclusive visitorial powers over national banks.

[42] Wilmarth, *supra* note 1, at 328–29.

[43] NBA, ch. 106, § 54, 13 Stat. 116 (1864) (the reference to "courts of law and chancery" was amended to read "courts of justice" in 1913).

These provisions, which in 1875 were codified in § 5240 of the Revised Statutes of the United States, were subsequently recodified a number of times, including into their current placement at 12 U.S.C. §§ 481 and 484. Those recodifications did nothing to alter the provisions' substance: Section 484 today, just as plainly as did section 54 of the NBA in 1864, embodies Congress's directive "to take from the States . . . all authority whatsoever over . . . banks and to vest that authority [in the OCC]."[44] Through what is now § 484, the NBA "place[d] in the hands of one individual, who, at the time, for one or many generations, shall be the Comptroller of the Currency [and gave] him the custody and control of the securities for all the banking capital in the country, and consequently of all its business of every form and character in all its varied and minute ramifications throughout the length and breadth of the land."[45] Accordingly, "[a national] bank must not be subjected to any local government, State or municipal; it must be kept absolutely and exclusively under that Government from which it derives its functions."[46]

Not only does the legislative history of the NBA plainly document the exclusivity of the OCC's enforcement authority over national banks, but in addition, Congress recently reaffirmed that exclusivity in the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 ("Riegle-Neal").[47] Pursuant to Riegle-Neal, to the extent that federal law is not preemptive, state law may apply to interstate branches of national banks, but *only as enforced by the OCC*. As Riegle-Neal states, "The provisions of any State law to which a branch of a national bank is subject under this paragraph shall be enforced, with respect to such branch, by the Comptroller of the Currency."[48] This statement expressly underscores that Congress granted the OCC—to the exclusion of any other person or entity—the full power to enforce national banks' compliance with *both* federal and applicable state laws.[49]

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[44] CONG. GLOBE, 38th Cong., 1st Sess. 1267 (Mar. 24, 1864) (statement of Sen. Brooks); *see also* Visitorial Rule, *supra* note 2, at 1897.

[45] CONG. GLOBE, 37th Cong., 3d Sess. 1142 (Feb. 20, 1863) (remarks of Rep. Baker).

[46] CONG. GLOBE, 38th Cong., 1st Sess. 1893 (Apr. 27, 1864); *see also* Visitorial Rule, *supra* note 2, at 1897–98 (citing NBA language and legislative history).

[47] Pub. L. No. 103-328, 108 Stat. 2338 (1994).

[48] 12 U.S.C. § 36(f)(1)(B) (2002).

[49] The scope of the OCC's visitorial powers is extremely broad, encompassing not only powers of examination, inspection, and supervision, but also including the power

There is also a wealth of judicial authority confirming that OCC's visitorial powers are exclusive of state enforcement. In particular, the courts have upheld the OCC's exclusive enforcement authority in cases where state Attorneys General have sought remedial action on the part of national banks. As far back as 1903, the Supreme Court held that state Attorneys General may not use state courts even indirectly to regulate national banks. In *Easton v. Iowa*, a state criminal prosecution of bank officers for illegally accepting deposits while their bank was insolvent, the Court held that a state cannot "interfere, whether with hostile or friendly intentions, with national banks or their officers in the exercise of the powers bestowed upon them by the general government."[50] Two years later, in *Guthrie v. Harkness*,[51] the Court further explained Congress's intent with respect to exclusive OCC jurisdiction:

> Congress had in mind, in passing [section 484 of the NBA] that in other sections of the law it had made full and complete provision for investigation by the Comptroller of the Currency and examiners appointed by him . . . . It was the intention that this statute should contain a full code of provisions upon the subject, and that *no state law or enactment should undertake to exercise the right of visitation over a national corporation*. Except in so far as such corporation was liable to control in the courts of justice, this act was to be the full measure of visitorial power.[52]

Nearly a century after *Guthrie*, the courts continue to recognize that Congress intended the OCC's authority to extend to a broad preemption of state agency proceedings against national banks. In *National State Bank v. Long*,[53] a case Professor Wilmarth cites in the preemption context,[54] the New Jersey Banking Commissioner sought to

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to regulate or control the operations of a national bank. "Visitation, in law, is the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations." Guthrie v. Harkness, 199 U.S. 148, 158 (1905) (citations omitted). "Visitors" of corporations "have power to keep them within the legitimate sphere of their operations, and to correct all abuses of authority, and to nullify all irregular proceedings," including by bringing "judicial proceedings" against a corporation to enforce compliance with applicable law. *See id.*; *see also* Bank of Am. Nat'l Trust & Sav. Ass'n v. Douglas, 105 F.2d 100, 105 (D.C. Cir. 1939) (citations omitted).

[50] 188 U.S. 220, 238 (1903).

[51] 199 U.S. 148 (1905).

[52] *Id.* at 159 (emphasis supplied).

[53] 630 F.2d 981, 988 (3d Cir. 1980).

[54] *See* Wilmarth, *supra* note 1, at 267.

enforce a New Jersey statute prohibiting "redlining" against a national bank. The Court held that:

> Congress has delegated enforcement of statutes and regulations against national banks to the Comptroller of the Currency. . . . The legislative history of [12 U.S.C. § 1818(b)(1)] indicates that *Congress was concerned not only with federal but with state law as well*, particularly as it might bear on corruption of bank officials or the financial stability of the institution. It may be that the word "law" as used in the statute is not all encompassing and may exclude matters of purely local concern. However, when *state law prohibits the practice of redlining, its enforcement so directly implicates concerns in the banking field that the appropriate federal regulatory agency has jurisdiction.*[55]

Likewise, in *In re Franklin National Bank Securities Litigation*, the court held that the OCC's extensive visitorial authority includes the power to "stop violations of *any* 'law, rule, or regulation'. . . . Cease and desist orders have been used to regulate *all aspects* of a bank's operations."[56] And very recently, the District Court for the Central District of California held that even a private party, to the extent that such party assumes an "enforcement" role similar to that of a state, is precluded from proceeding in an action against a national bank:

> A private party acting in the capacity of a "private attorney general" under a state statute conferring such power may not enforce state or federal laws against banks concerning core banking activities such as lending. The enforcement of such laws may be undertaken solely by the OCC or its authorized representatives.[57]

The NBA's legislative history and its proper interpretation by the courts belie Professor Wilmarth's contention that § 484, because its current codification does not contain an *explicit* reference to the OCC, demonstrates that Congress did not intend such a grant.

Second, with respect to Professor Wilmarth's claim that "other provisions of federal law make clear that the OCC does *not* enjoy

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[55] *Long*, 630 F.2d at 988 (emphasis supplied).

[56] 478 F. Supp. 210, 218 (E.D.N.Y. 1979) (quoting 12 U.S.C. § 1818(b)(1)) (emphasis supplied); *see also* Mayor of New York v. Council of New York, Index No. 4000583/03, 2004 WL 235043, at *4 (N.Y. Sup. Ct. Jan. 26, 2004) (holding that "[n]o national bank may be subjected to visitorial powers except as authorized by federal law").

[57] Bank One Delaware v. Wilens, No. SACV 03-274-JVS ANX, 2003 WL 21703629, at *2 (C.D. Cal. July 7, 2003).

exclusive visitorial powers over national banks,"[58] § 484 expressly provides that the visitorial powers over national banks are exclusive "as authorized by federal law." Thus, the fact that Congress authorized the Federal Deposit Insurance Corporation ("FDIC") to take action against national banks with respect to their federally insured status, and granted the Federal Reserve Board ("FRB") authority to obtain certain information from national banks that are bank holding company subsidiaries,[59] says nothing about the exclusivity of the OCC's powers in relation to state enforcement authority against national banks, or indeed any other enforcement authority that has not been "authorized by federal law."

Finally, Professor Wilmarth's reading of the "vested in the courts of justice" reference in § 484 is misguided. Professor Wilmarth argues that, by virtue of its reference to visitorial powers "vested in the courts of justice," § 484 unquestionably allows state officials and private parties to institute judicial proceedings in either federal or state courts to enforce state laws against national banks.[60] This contention is wholly at odds with the meaning of the "vested in the courts of justice" clause in the context of the NBA.

A proper understanding of the "vested in the courts of justice" phrase in § 484 requires a review of the historical framework in which the statute was enacted in 1864.[61] At that time, judicial enforcement actions were the primary administrative enforcement tool available to the OCC or to any other government agency—administrative enforcement actions outside the courts, such as cease-and-desist proceedings, did not exist to any meaningful degree.[62] It was not until the turn

[58] Wilmarth, *supra* note 1, at 328 (emphasis supplied).

[59] *Id.* (citing 12 U.S.C. §§ 1820(b)(3), 1818(a), 1818(t) & 1844(c)(1) & (2)).

[60] *See* Wilmarth, *supra* note 1, at 328–34.

[61] The legislative history of the NBA reveals that the "vested in the courts of justice" language came into the NBA as section 54 of the 1864 legislation. It was originally included in section 51 of the Act to Provide a National Currency, the 1863 act that formed the basis for the 1864 act known today as the NBA. The relevant provisions in both the 1863 and 1864 acts originally read "except as vested in the several courts of law and chancery." Act to Provide a National Currency, ch. 58, 12 Stat. 665, 678–80 (1863); Act to Provide a National Currency, ch. 106, 13 Stat. 99, 116 (1864). The legislative history does not discuss the meaning of the phrase "vested in the courts of justice," suggesting that the phrase was then well understood and did not require explanation.

[62] *See, e.g.*, Guthrie v. Harkness, 199 U.S. 148, 157 (1905) ("The visitation of civil corporations is by the government itself, through the medium of courts of justice.") (citing various 19th century sources); *see also* HOWARD BODENHORN, STATE BANKING

of the century that nonjudicial administrative enforcement mechanisms began to be used.

Because in 1864 a sovereign's primary means of exercising visitorial powers to enforce bank compliance was through the courts, enforcement "visitations" and judicial action were at that time inextricably linked. Thus, when Congress enacted § 484, and thereby prohibited state governments from exercising visitorial powers over a national bank, it necessarily intended, *inter alia*, to bar state authorities from prosecuting judicial enforcement actions against national banks. In that context, the purpose of the "vested in the courts of justice" exception was certainly not to nullify the very prohibition on state enforcement against national banks that Congress was enacting, but rather to preserve the constitutionally reserved powers of courts, in *otherwise authorized* judicial proceedings brought against national banks, to discipline, and in particular to hold in contempt, a bank that appeared in court and violated the court's procedural rules and conventions.

This conclusion is reinforced by several 19th century judicial opinions. One of the earliest decisions using the phrase "vested the courts of justice" was *Anderson v. Dunn*, in which the Court observed that, "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates."[63] In another case, *United States v. Hudson and Goodwin*, the Court further emphasized that the powers vested or "inherent" in the courts include the power to hold parties in contempt.[64] In *Hudson*, the government brought criminal charges against certain newspaper reporters for having made statements critical of the President and Congress, relying on the common law of libel. At that time, there apparently was no statute making libel against the Government a criminal offense, and the Supreme Court therefore ruled that the federal courts had no jurisdiction to hear the case.[65] The Court noted, however, that there were certain powers inherently vested in courts

IN EARLY AMERICA, A NEW ECONOMIC HISTORY 23 (2002) (explaining that under early 19th century law in New York, for example, if a bank violated its charter, the state commissioner was required to seek an injunction for immediate suspension of the bank's operation).

[63] 19 U.S. (6 Wheat.) 204, 227 (1821).

[64] 11 U.S. (7 Cranch) 32 (1812).

[65] *See id.* at 34.

of justice, which did not flow from, and thus could not be taken away by, acts of Congress:

> Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. . . . To fine for contempt—imprison for contumacy—inforce the observance of order, &c., are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others: and so far our Courts no doubt possess powers not immediately derived from statute . . . .[66]

As this statement indicates, powers "vested in the courts of justice" were understood to be powers *inherent* in judicial tribunals, including the power to issue writs and subpoenas and to punish for contempt.

A similar understanding is expressed in the decision of the Arkansas Supreme Court in *State v. Morrill*.[67] There, in holding an individual in criminal contempt, the court "conceded that the act charged against the defendant in this case, is not embraced within" the Arkansas contempt statute, but rejected the argument that it "must look to the statute for its powers to punish contempt[]," or that its power to punish for contempt "is controlled by the statute and cannot go beyond its provisions."[68] The court stated: "The right to punish for contempt[], in a summary manner, has been long admitted as *inherent in all courts of justice*."[69] Numerous other cases reinforce the same point.[70]

As these cases reveal, at the time Congress enacted § 484, powers "vested in the courts of justice" were understood to mean those limited visitorial powers *of the courts themselves* to enforce their own procedural rules through contempt proceedings and other disciplinary

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[66] *Id.*

[67] 16 Ark. 384 (1855).

[68] *Id.* at 388.

[69] *Id.* at 388 (emphasis in original) (quoting Neel v. State, 9 Ark. 263 (1849)). The court further stated: "The power of punishing summarily and upon its own motion, contempt[] offered to its dignity and lawful authority, is one *inherent in every court of judicature*. The offense is against the court itself, and if the tribunal have no power to punish in such case, in order to protect itself against insult, it becomes contemptible and powerless. . . . [T]he power to punish for contempt[] is *inherent in courts of justice*, springing into existence upon their creation, as a necessary incident to the exercise of the powers conferred upon them." *Id.* at 389 (emphasis added) (internal quotation marks and citation omitted).

[70] *See, e.g.*, *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1873) (mem.) (holding that "the power to punish for contempts is inherent in all courts"); *Ex parte* Burr, 22 U.S. (9 Wheat.) 529, 531 (1824) (mem.) (finding the power to discipline an attorney's practice to be "incidental to all Courts").

actions. Absent any reference to such inherent judicial powers, § 484 could have been construed as depriving the courts of the power to, for example, compel a national bank to produce books and records in connection with statutorily *authorized* litigation against the bank, because a court order to this effect could otherwise have been viewed to effect a "visitation" with respect to the bank. By including the reference to powers "vested in the courts of justice" in § 484, Congress intended to forestall any argument that the statute precluded the courts from enforcing their own procedural rules in *federally authorized* actions against national banks.[71]

Contrary to Professor Wilmarth's contentions, therefore, the "vested in the courts of justice" clause of § 484 does not serve to permit *any* party—public or private—to sue a national bank, but rather operates solely to permit the *courts* to exercise their inherent powers in suits properly brought before them. Whether a lawsuit is properly brought against a national bank is determined wholly independent of, and is not affected by, the "vested in the courts of justice" provision.[72]

2. The Visitorial Powers Regulation Does Not Deprive State Officials of a Role with Respect to Disciplining National Bank Conduct

In addition to his arguments disputing the legal authority for the OCC's new Visitorial Rule, Professor Wilmarth raises policy arguments as a purported basis for condemning the rule. Among other things, he contends that the Visitorial Rule would bar state officials from continuing to play their traditional, supplementary role in "protect[ing] consumers against unlawful practices committed by national banks or their operating subsidiaries."[73] This contention is

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[71] *See* Guthrie v. Harkness, 199 U.S. 148, 156–58 (1905).

[72] None of the cases cited by Professor Wilmarth serves as a foundation for his argument about the "vested in the courts of justice" clause in § 484. For example, in *Best v. U.S. Nat'l Bank*, a case involving certain contract and fraud claims against a national bank, the only contention regarding visitorial powers was whether discovery would involve inspection of the bank's records in violation of § 484. 739 P.2d 554, 572 (Or. 1987). The court found that any such inspections "would not be an exercise of visitorial powers because these actions would not be for the purpose of regulation." *Id.* Such a finding says nothing about state authority to sue national banks in order to force compliance with state law.

[73] Wilmarth, *supra* note 1, at 356.

contradicted by the OCC's pronouncements, its policy, and its practice.[74]

In fact, the OCC has affirmatively reached out to state officials in an effort to engage them in a cooperative role with respect to enforcement of state law against national banks. Exemplary of these efforts is an advisory letter issued on November 25, 2002 ("Advisory Letter"), which provides specific "guidance on the role of state officials in the enforcement of state laws that may affect national bank operations."[75] The Advisory Letter discusses in detail the applicability and enforcement of state laws with respect to a national bank, including by reviewing the rules for federal preemption and the OCC's exclusive authority under federal law to supervise and regulate authority of national banks. First, it explains that Congress, in recognition that "[e]ssential to the character of national banks and the national banking system is the uniform and consistent regulation of national banks by *federal* standards," prescribed that "the uniform federal standards that would govern national banks—and state laws, where federal law makes them applicable—would be enforced by a single, federal supervisor, the OCC."[76] Accordingly, "except in specialized instances where federal law makes provision for another regulator to have a role, the OCC's visitorial powers are exclusive with respect to activities that are authorized or permitted for national banks under federal law or regulation."[77] One of the "specialized instances" in which Congress has granted specific enforcement authority to non-OCC officials, as the Advisory Letter specifically notes, is in the Fair Credit Reporting Act, which specifically gives enforcement authority to state attorneys general.[78]

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[74] Indeed, the OCC proposal on visitorial powers expressly confirms that "states remain free to seek a declaratory judgment from a court as to whether a particular state law applies to the federally-authorized business of a national bank or is preempted. However, if a court rules that a state law is not preempted, enforcement of a national bank's compliance with that law is within the OCC's exclusive purview." Rules, Policies, and Procedures for Corporate Activities; Bank Activities and Operations; Real Estate Lending and Appraisals, 68 Fed. Reg. 6363, 6370 (Feb. 7, 2003) (to be codified at 12 C.F.R. pts. 3, 5, 6, 7, 9, 28 and 34) (citing Nat'l State Bank v. Long, 630 F.2d 981, 988 (3d Cir. 1980)).

[75] OCC Advisory Letter 2002-9, Questions Concerning Applicability and Enforcement of State Laws; Contacts from State Officials (Nov. 25, 2002) [hereinafter Advisory Letter], *available at* http://www.occ.treas.gov/ftp/advisory/2002-9.txt.

[76] *Id.* at 3–4 (emphasis supplied).

[77] *Id.* at 4.

[78] *See id.* at 1 (citing 15 U.S.C. § 1681s(c)).

In the Advisory Letter the OCC affirmatively "encourages state officials to contact the OCC when they have information that would be relevant to the OCC in its supervision of national banks and their compliance with applicable laws, or if they seek information from national banks."[79] Thus, "[s]tate officials are urged to contact the OCC if they have any information to indicate that a national bank may be violating federal or an applicable state law."[80] In response, the OCC will review the information and take all appropriate supervisory and enforcement action with respect to such a violation. Further, to support the states with respect to concerns about national bank activities, "[n]ational banks should contact the OCC if they are contacted by a state official seeking information from the bank that may constitute an attempt to exercise visitation or enforcement power over the bank."[81] Following consultation with a national bank regarding such a state official's action, the OCC may "contact the state official directly to discuss the state's inquiry and to obtain any information that the state might possess that may be relevant to the OCC's supervision of the bank."[82]

The OCC expressly reconfirmed its commitment to working with the states on enforcement of applicable law against national banks when it issued the Visitorial Rule in final form. In the notice containing the rule itself, the OCC states:

> [W]e stand ready to work with the states in the enforcement of applicable laws. The OCC has extended invitations to state Attorneys General and state banking departments to enter into discussions that would lead to a memorandum of understanding about the handling

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[79] *Id.*

[80] *Id.* at 5.

[81] *Id.*

[82] *Id.* at 6. These procedures complement the policy previously established by the OCC for processing referrals received from state attorneys general and other state officials of potential violations of consumer laws by national banks. That policy, set forth in an OCC memorandum distributed to state attorneys general in August 2001, is "intended to recognize the necessity for greater communication between State Officials [including state attorneys general] and the OCC in situations of mutual concern regarding national bank compliance with consumer laws." Memorandum from Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, Referrals from State Attorneys General and Other State Officials, at 1 (Aug. 13, 2001). It prescribes a series of specific steps to be taken by the OCC upon receipt of a referral by state officials of potential national bank violations of federal or state law, all in recognition of the exclusive authority of the OCC to take enforcement action to redress any such violations.

> of consumer complaints and the pursuit of remedies, and we remain eager to do so.[83]

In addition, in a document providing guidance regarding the Visitorial Rule issued simultaneously with the rule, the OCC specifically emphasized that:

> [I]t is our hope that states will cooperate with the OCC to try to maximize the protection of consumers. We have encouraged states to work with us to expedite referrals of consumer complaints regarding national banks from state Attorneys General and state banking departments, and we have offered to enter into formal information-sharing agreements with states to formalize these arrangements.[84]

And, most recently, in a new document supplementing the Advisory Letter discussed above, the OCC reiterated that:

> The OCC has . . . encouraged state officials to bring to its attention any complaints that allege that national banks are engaging in any illegal, predatory, unfair or deceptive practices, so that the OCC may take appropriate action. To the extent that the matter involves an individual customer grievance, state officials should send the complaint to the [OCC's Customer Assistance Group] . . . . In the case of broader issues, such as the applicability of a particular state law to national banks generally, or where a state official has information that an individual national bank is engaged in a particular practice affecting multiple customers that is alleged to be predatory, unfair or deceptive, this information should be communicated to the OCC's Office of Chief Counsel.[85]

The OCC's repeated express statements of its commitment to cooperative enforcement efforts with state officials belie Professor Wilmarth's contentions that the OCC's Visitorial Rule will deprive states of their "traditional role" in deterring anticonsumer practices of national banks. Moreover, all of Professor Wilmarth's dire forecasts for enforcement activities against national banks under the new OCC Visitorial Rule are belied by the extremely aggressive enforcement activities of the OCC regarding consumer protection, as discussed below.

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83 Preemption Rule, *supra* note 2, at 1915.

84 OCC, Visitorial Powers Final Rule: Questions and Answers 5–6 (Jan. 7, 2004), *available at* http://www.occ.treas.gov/2004-3eVisitorialruleQNAs.pdf.

85 OCC Advisory Letter 2004-2, Consumer Complaints Referred to National Banks From State Officials, at 2 (Feb. 26, 2004), *available at* http://www.occ.treas.gov/ftp/advisory/2004-2.doc.

3. The OCC Vigorously Enforces Both Federal and State Laws Against National Banks in Order To Protect Consumers

The OCC actively pursues various types of enforcement actions against national banks, both informal and formal, to protect both individual consumers and groups of consumers, as well as to ensure national bank compliance with applicable law and principles of safe and sound banking. As one court recently observed: "Drawing on its power to obtain compliance with any 'law, rule, or regulation,' under 12 U.S.C. § 1818, the OCC has routinely taken steps to enforce various state and federal statutes" against national banks.[86] Overall, the OCC employs nearly 1,700 bank examiners who spend all or part of their time enforcing compliance with consumer protection laws,[87] in addition to dozens of attorneys and consumer complaint specialists.[88] The OCC's consumer compliance examiners have plenary authority to investigate national bank activities, to determine their compliance with consumer protection laws, and to pursue strict and meaningful enforcement actions against national banks and their directors and officers.

There are multiple channels through which the OCC becomes aware of potential violations. The OCC monitors conditions and trends in individual banks and groups of banks through its nationwide network of examiners.[89] As part of their ongoing supervision of national banks, the examiners review all bank policies and procedures, including those impacting consumers most directly. The OCC also may become aware of questionable practices of a national bank through referrals from state authorities or reports from competing banks. And the OCC has a comprehensive network for receiving complaints from community or consumer groups and directly from individual consumers. The OCC,

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86 Chavers v. Fleet Bank, No. 2002-201-Appeal, 2004 WL 249605, at *6 (R.I. Feb. 11, 2004) (citing various OCC enforcement actions).

87 More than 100 of these examiners work "exclusively on compliance supervision." Julie L. Williams, OCC Chief Counsel and First Senior Deputy Comptroller, Remarks before America's Community Bankers Government Affairs Conference, at 4 (Mar. 9, 2004), *available at* http://www.occ.treas.gov/ftp/release/2004-18a.pdf.

88 *See* Julie L. Williams, OCC Chief Counsel and First Senior Deputy Comptroller, Remarks before the Annual Legal Conference of the Independent Bankers Association of Texas and Texas Savings and Community Bankers Association (Feb. 12, 2004), *available at* http://www.occ.treas.gov/ftp/release/2004-13a.pdf.

89 *See* Release, OCC, Preemption Determination and Order Concerning the Georgia Fair Lending Act: Questions and Answers, at 2 (July 31, 2003), *available at* http://www.occ.treas.gov/gflaqas.pdf.

in fact, provides through its website, under the heading "Filing a Formal Complaint," the following instructions: "You can file a formal written complaint with the OCC about a national bank or its operating subsidiary. You may mail or fax a letter—no special forms are required—to the Customer Assistance Group."[90]

The OCC's Customer Assistance Group ("CAG") plays a particularly important role in helping to identify potentially unfair and deceptive practices.[91] In addition to providing immediate assistance to consumers, the CAG collates and disseminates complaint data that help point field examiners toward banks, activities, and products that require further investigation. In each of the past two years, the CAG has answered approximately 78,000 telephone calls from consumers and is receiving a growing number of consumer inquiries and complaints via e-mail.[92] Through the CAG and complementary channels, the OCC ensures that national banks' compliance with applicable laws is subject to comprehensive—and in the case of the largest national banks, *continuous*—supervision and enforcement.

Based upon information and complaints it receives, the OCC may commence enforcement proceedings against a national bank under either federal or applicable state law. Illustrative of the OCC's aggressive consumer protection enforcement activities is the agency's action in 2000 against Providian National Bank ("Providian"). In that case, following a year-long investigation, the OCC found the bank liable for having engaged in a pattern of deceptive practices in connection with marketing subprime credit cards. The OCC entered into a settlement with Providian that directed the bank to cease a number of unfair and deceptive practices and to pay at least $300 million in restitution to consumers harmed by those practices.[93] That amount, however, is the minimum required under the settlement. If the required restitution calculated under the methodology mandated in the settlement exceeds $300 million, the bank is required to pay the additional amount.

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[90] OCC, Customer Assistance, *available at* http://www.occ.treas.gov/customer.htm.

[91] *See* OCC, The OCC Customer Assistance Group, *available at* http://www.occ.treas.gov/customer1.htm.

[92] *See id.*

[93] *See In re* Providian Nat'l Bank, OCC Consent Order 2000-53 (June 28, 2000) (ordering bank to comply with California state unfair business practices laws and Federal Trade Commission Act in connection with consumer lending program), *available at* http://www.occ.treas.gov/ftp/release/2000%2D49b.pdf.

In announcing the settlement with Providian, the OCC stated that its agreement with the bank "ensures that, going forward, Providian will conduct its business in a way that both respects the interests of its customers and protects the safety and soundness of the bank."[94] Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, further observed that "[b]ecause of this settlement, every consumer who does business with Providian will receive complete and understandable explanations of the bank's products and will therefore be able to make an informed choice about their financial dealings." She added that "[w]e intend to monitor the terms of this consent order very closely to make sure that happens."[95]

In another recent action concluded on January 21, 2003, the OCC found that First National Bank of Brookings had failed to make certain disclosures to its credit card customers as part of its marketing activities, and thereby caused consumer confusion and deception.[96] To provide compensation to the affected consumers, the OCC ordered the bank to establish a $6 million reserve to fund restitution payments to each customer who was deceived by the bank's challenged practices.[97] Not only must the bank reimburse credit card customers for fees paid in connection with four of the bank's credit card programs, but, in addition, it must alter its marketing practices and disclosures for credit cards. Comptroller of the Currency John D. Hawke, Jr., when announcing the enforcement action, pointedly emphasized the fundamental principles underlying the OCC's actions in such a case:

> Trust is the foundation of the relationship between national banks and their customers. . . . When a bank violates that sense of trust by engaging in unfair or deceptive practices, [the OCC] will take action—not only to correct the abuses, but to require compensation for customers harmed by those practices.[98]

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[94] News Release 2000-49, OCC, Providian to Cease Unfair Practices, Pay Consumers Minimum of $300 Million Under Settlement with OCC and San Francisco District Attorney (June 28, 2000), *available at* http://www.occ.treas.gov/ftp/release/2000%2D49.txt.

[95] *Id.*

[96] *See* OCC Consent Order, No. 2003-1, *In re* First Nat'l Bank, 2003 WL 251934 (Jan. 17, 2003) (enforcement action and $6 million restitution order addressing violation of federal Truth in Lending Act and other laws).

[97] *See id.*

[98] News Release, OCC, OCC Concludes Case Against First National Bank in Brookings Involving Payday Lending, Unsafe Merchant Processing, and Deceptive Marketing of Credit Cards (Jan. 21, 2003) (quoting John D. Hawke, Comptroller of the Currency), *available at* http://www.occ.treas.gov/scripts/newsrelease.aspx?Doc=C4GDHG41.xml.

Even more recently, the OCC took action against First Consumers National Bank, Beaverton, Oregon, also for failures by the bank to make certain disclosures to credit card customers.[99] In this case, the OCC entered into a formal administrative enforcement agreement with the bank that requires the bank to refund to its customers approximately $1.65 million in annual fees on bank-issued credit cards.[100] The formal agreement also directs the bank to refund "overlimit" fees charged to customers, amounting to approximately $255,685 in additional refunds.[101]

These cases and others demonstrate the OCC's aggressive posture with respect to national bank violations of law, including nonbanking laws of general applicability.[102]

The courts have recognized the comprehensive nature of the OCC's enforcement actions, and that the authority for those actions is exclusively vested in the OCC. For example, a state court in Arizona recently denied claims brought against Household National Bank for alleged violations of certain Arizona consumer protection statutes in light of the OCC's independent proceedings against the bank.[103] In that case, *Arizona v. Hispanic Air Conditioning & Heating*,[104] the OCC was investigating the allegedly illegal practices of the bank at the same time as the state plaintiffs were pursuing their litigation. Following an extensive two-year investigation, the OCC entered into a formal agreement with the bank under 12 U.S.C. § 1818.[105] Under the terms of that formal agreement, the bank is required to provide restitutionary relief to each complaining customer who was injured by the bank's challenged practices.[106] Specifically, consumers who

99 *See* OCC Enforcement Decision, No. 2003-100, Agreement by & Between First Consumers Nat'l Bank & OCC, 2003 WL 22120799 (July 31, 2003).

100 *See id.* at *1.

101 *See id.* at *2.

102 *See, e.g.*, OCC Enforcement Decision, No. 2000-88, *In re* Net First Nat'l Bank, 2000 WL 1616993 (Sept. 25, 2000) (ordering bank to comply with Florida state unfair trade practices laws while marketing and operating credit card program); OCC Enforcement Decision, No. 376, *In re* First Bank, 1991 WL 536800 (Aug. 19, 1991) (ordering bank to cease violation of antifraud provisions of general securities laws).

103 Arizona v. Hispanic Air Conditioning & Heating, CV 2000-003625 (Ariz. Super. Ct., Maricopa Cty., Aug. 25, 2003).

104 *Id.*

105 *See* OCC Enforcement Decision, No. 2003-17, Formal Agreement by and Between Household Bank (SB), Nat'l Ass'n, Las Vegas, Nevada & Office of the Comptroller of the Currency, 2003 WL 21206984, at *1 (Mar. 25, 2003).

106 *See id.* at **3–5.

used a private label credit card issued by the bank to pay for certain goods and services and who demonstrate a reasonable basis for their complaint must be reimbursed or credited for any money lost and any other adverse action must be corrected. In any instance where the bank determines that relief should be denied to a particular complainant, the bank must forward all materials relevant to the complaint to the Assistant Deputy Comptroller for final determination as to whether relief is to be granted.[107]

The Arizona state court adjudicating the litigation against the bank found that the practices investigated and subject to enforcement action by the OCC were within the agency's *exclusive* visitorial powers. Specifically, the court held that "Household Bank's private label credit cards are authorized by federal law and are subject to a comprehensive federal regulatory framework," and that "[t]he violations of the consumer fraud act that are attributable to Household Bank relate directly to its banking practices."[108] In light of the dictates of 12 U.S.C. § 484 and the provisions of 12 U.S.C. § 1818(i)(1), the court concluded that "[o]rdering the remedies requested [in the litigation] would impermissibly affect the exercise of the OCC's administrative enforcement powers."[109] Accordingly, the court denied any of the relief requested with respect to the bank. Notably, as the OCC pointed out in its preamble to the Visitorial Rule,[110] the court found that, in fact, the restitution and remedial action ordered by the court was "comprehensive and significantly broader in scope than that available through [the] state court proceedings."[111]

The *Household* case and the other above-referenced examples of the OCC's enforcement actions are just a few of the numerous instances in which the OCC has aggressively exercised its authority over national banks to protect consumers.[112]

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[107] *See id.* at *5.

[108] *Hispanic Air*, CV 2000-003625, Conclusions of Law ¶¶ 47–48, at 27 (Aug. 25, 2003).

[109] *Id.*, Conclusions of Law ¶ 53. The court's conclusion to this effect is not surprising in light of Congress's dictate in § 1818i(1) that "no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice [OCC complaint] or order under any such section, or to review, modify, suspend, terminate, or set aside any such notice or order."

[110] *See* Visitorial Rule, *supra* note 2, at 1900 n.41.

[111] *Id.*; *Hispanic Air*, Conclusions of Law ¶ 50, at 27.

[112] *See, e.g.*, News Release 2002-85, OCC, OCC Takes Action Against ACE Cash Express, Inc. and Goleta National Bank (Oct. 29, 2002), *available at* http://

In addition to the restitution provided through the OCC's settlements with national banks, the OCC's CAG returned nearly $6 million in fees and charges to national bank customers in 2002 alone.[113] A graphic depiction of the amount of national bank fees and charges returned through the efforts of the CAG within the past five years shows that consumers have recovered between approximately $2 million and $7 million annually in such monetary relief. This total amount "represents tens of thousands of cases in which the fees of $25 and $30 and $50 were returned to national bank customers."[114] The OCC's enforcement actions and procedures consequently benefit and protect individual consumers and large groups of consumers.

All of these examples of the OCC's broad remedial powers and the agency's demonstrated vigorous use of those powers to vindicate consumer rights refute any contentions such as Professor Wilmarth's that "[u]nless the OCC's position is overturned, the frequency and effectiveness of government enforcement measures will undoubtedly decline with regard to national banks and their subsidiaries."[115]

II. The OCC's Authority to Adopt the New Rules

A. The History of the NBA and Subsequent Acts of Congress Confirm That the OCC Has Ample Authority To Declare Preemption of State Law

Professor Wilmarth argues throughout his article that the OCC lacks authority to issue the new Preemption and Visitorial Rules.[116] But the entire history of the NBA, as well as expressions of congressional intent from the date of the NBA's enactment to the present, leads to

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www.occ.treas.gov/ftp/release/2002%2D85.doc (announcing cease-and-desist orders for violation of applicable laws, including Truth in Lending Act and Equal Credit Opportunity Act and related civil money penalties); News Release 2003-27, OCC, Bankers Assessed Civil Money Penalties and Barred from Banking After Compromising Confidential Customer Financial Information (Apr. 7, 2003), *available at* http://www.occ.treas.gov/scripts/newsrelease.aspx?DOC=LIR2FVQ3.xml (barring former bank employees from the industry and stating that "[t]he OCC will respond aggressively if we find that bank employees are misusing [confidential consumer] information, or placing it at risk of unauthorized disclosure") (quoting John D. Hawke, Comptroller of the Currency).

[113] *See* OCC, The OCC Customer Assistance Group, *available at* http://www.occ.treas.gov/customer.htm.

[114] *Id.*

[115] Wilmarth, *supra* note 1, at 348.

[116] *E.g.*, *id.* at 316–24.

a contrary conclusion. To fully appreciate the expansiveness of Congress's grant of authority to the OCC with respect to preemption of state law and state enforcement actions against national banks, it is necessary to examine the NBA's origins in context, dating back to the mid-1800s.

In the middle of the 19th century, there was no federal involvement in banking. State regulation and state banking systems controlled the issuance of bank notes. The First and Second Banks of the United States, which had been established in 1791 and 1816, respectively, as a means to create reliable currency that would allow the expansion of interstate commerce, were short-lived.[117] As a result, bank note values were uncertain and varied unpredictably, impeding the development of an interstate economic system.[118]

The advent of the Civil War triggered new pressure for the creation of a centralized federal financial system. As the war escalated, the "country [became] involved in the expenditures of a contest for national existence."[119] By the winter of 1862–1863, the Union was perceived to be losing the war and the government in Washington felt itself under political and economic siege. As one Senator expressed it: "[S]urrounded by difficulties, surrounded by war, and in the midst of great troubles, [Congress] was compelled to resort to some scheme by which to nationalize and arrange upon a secure and firm basis a national currency."[120] The solution was a national banking system

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[117] *See* ALEXANDER HAMILTON, *Treasury Report on a National Bank, December 13, 1790*, *in* 1 DOCUMENTARY HISTORY OF BANKING AND CURRENCY IN THE UNITED STATES 230, 233–34 (Herman E. Krooss ed., 1969) [hereinafter KROOSS]; *Opinion of Alexander Hamilton, on the Constitutionality of a National Bank*, *in* LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 95, 108 (M. St. Clair Clarke & D.A. Hall eds., 1967); *Recommendations from Secretary of the Treasury Alexander Dallas on a National Bank*, *The Second Bank of the United States* (Oct. 17, 1814) (*reprinted in* KROOSS at 396–97).

[118] *See* David M. Gische, *The New York City Banks and the Development of the National Banking System*, 23 AM. J. LEGAL HIST. 21, 24–25 (1979).

[119] *Letter to Congress From the Sec'y of the Treas*. (Apr. 11, 1862) (*reprinted in* the CONG. GLOBE, 37th Cong., 2d Sess., Misc. Doc. No. 81, at 3 (June 11, 1862)).

[120] CONG. GLOBE, 37th Cong., 3d Sess. 844 (Feb. 11, 1863) (remarks of Sen. Sherman); *see also* BRAY HAMMOND, SOVEREIGNTY AND AN EMPTY PURSE: BANKS AND POLITICS IN THE CIVIL WAR 314 (1970) (discussing the NBA's key objective to "provid[e] at once a permanent system better than any the country had ever had. It would set up banks in which the interests of capital would be associated with the interests of the federal government. Those banks would serve the Treasury as its fiscal agents.").

independent of state impediments. In the words of President Lincoln: "[There was] no other mode by which 'the great advantages of a safe and uniform currency' could be achieved so promisingly and unobjectionably as by the organization of banking associations under a general act of Congress."[121]

The NBA was that general act. Through the NBA, Congress created a new institution, the national bank, which "must not be subjected to any local government, State or municipal; it must be kept absolutely and exclusively under the Government from which it derives its functions."[122] Because Congress's key objective was to insulate the new national banking system from the diverse and frequently fractious interests of the states,[123] it was imperative that Congress "take from States . . . all authority whatsoever over . . . [national] banks and . . . vest that authority [in the OCC]."[124] In so doing, the federal government "assumed entire control of the currency of the country, and, to a very considerable extent, of its banking interests, prohibiting the interference of State governments."[125]

The OCC's exclusive authority to regulate, supervise, and enforce *all* laws against national banks was an essential element of the new federal banking system. As discussed in Part I.B.1 above, Congress vested in the OCC *all authority* over national banks to the exclusion of impeding state regulation. Throughout the 140 years of the NBA's existence, the OCC has continued, consistent with the unaltered intent of Congress, to ensure that national banks may exercise their federally authorized powers free from state interference. Of course, as Professor Wilmarth points out, national banks no longer serve in the currency-issuing role that they did at the outset of their establishment.[126]

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[121] HAMMOND, *supra* note 120, at 290.

[122] CONG. GLOBE, 38th Cong., 1st Sess. 1893 (Apr. 27, 1864).

[123] As explained by Senator Sumner, in addressing the independence of the proposed national banks from state taxation: "Now, sir, we are proposing to create a vast system of national banks, an immense instrument for national credit . . . and yet Senators gravely propose on this floor to allow States to interfere by local taxation to impede and clog its operations. . . . [T]he very measure under consideration seeks to create a new currency by a system of national banks which shall supersede the existing State banks as agents of currency." CONG. GLOBE, 38th Cong., 1st Sess. 1894 (Apr. 27, 1864).

[124] CONG. GLOBE, 38th Cong., 1st Sess. 1267 (Mar. 24, 1864) (statement of Sen. Brooks).

[125] Letter from the Secretary of the Treasury to the Senate (Apr. 12, 1866) (*reprinted in* CONG. GLOBE, 39th Cong., 1st Sess., Misc. Doc. No. 81, at 2 (Apr. 23, 1866)).

[126] *See* Wilmarth, *supra* note 1, at 242.

However, contrary to Professor Wilmarth's suggestion, the transfer of that function to the Federal Reserve System in 1913 in no way altered the status of national banks in the U.S. financial system and their intended operation independent of state regulatory and enforcement authority.[127] National banks continue to fulfill Congress's fundamental objective to facilitate interstate commerce through an effective and efficient national banking system. And, as discussed in Part I.B.1 above, Congress has never retracted its express dictate for exclusive federal regulation of national banks or its grant of plenary authority to the OCC. Accordingly, the courts—including the Supreme Court—continue to rely on early NBA preemption case law as authority for the understanding that—irrespective of their evolution from the original currency-issuing role—national banks can properly serve Congress's objectives only if they function free from state impediments to their federally authorized activities.[128]

Indeed, far from altering the original intention that national banks function free of state regulation and that the OCC be empowered to ensure this by defining the preemptive scope of the NBA, Congress has explicitly reaffirmed these key legislative goals. For example, as previously noted, in the Riegle-Neal Act passed in 1994, Congress expressly codified the OCC's exclusive enforcement authority over branches of national banks,[129] and simultaneously, as Professor Wilmarth himself highlights,[130] Congress confirmed the OCC's authority to declare preemption of state law.[131] In the Conference

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[127] Professor Wilmarth cites two cases as support for his theory that the Federal Reserve Act of 1913 effectively stripped national banks of their "public" nature and in so doing effectively wiped out the well-established understanding that national banks are the exclusive creation of federal law and are exclusively subject to federal authority, *see id.* at 243–44 (citing dissenting opinion in First Agric. Nat'l Bank v. State Tax Comm'n, 392 U.S. 339, 354 (1968) (Marshall, J., dissenting); United States v. State Bd. of Equalization, 639 F.2d 458 (9th Cir. 1980) (discussing 1969 amendment to 12 U.S.C. § 548)), but neither of those cases bears out his theory. Both cases dealt solely with the discrete question of state powers of taxation with respect to national banks, which are powers the OCC has expressly identified in its new preemption rule as generally *not* subject to federal preemption. *See* Preemption Rule, *supra* note 2, at 1916–17.

[128] *See, e.g.*, Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 10–11 (2003); Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 32–34 (1996).

[129] *See* Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2328 (1994) (discussing 12 U.S.C. § 36).

[130] *See* Wilmarth, *supra* note 1, at 269.

[131] *See* H.R. REP. NO. 103-651, at 53–56 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074–77.

Report on the Riegle-Neal Act ("Conference Report"), Congress discussed at some length federal banking agency determinations of preemption, particularly with respect to state law in four specific areas: community reinvestment, consumer protection, fair lending, and the establishment of interstate branches.[132] As the Conference Report states:

> In view of the Congressional concern regarding preemption of State law regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches, the Conferees concluded that a more open process for reaching preemption conclusions in these areas, with a clearly structured, meaningful opportunity for interested parties to communicate their views to the agency, was warranted. Also, it is important that the agencies make their determinations on Federal preemption of State law available to the public in a timely and accessible manner. Accordingly, the title imposes certain procedural requirements on agency preemption opinion letters and interpretive rules in connection with State laws regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches, whether or not related to interstate branching. The Conferees believe that the public notice and openness provided by the new process will be a vital safeguard to ensure that an agency applies the recognized principles of preemption, discussed above, in a balanced fashion.[133]

The Conference Report then goes on to set forth specific procedures for the agencies to follow in making preemption decisions with respect to state laws in the four specified areas—most importantly, publication in the Federal Register of the agency's intent to make such a decision and the invitation and consideration of comments from the public on the preemption under consideration.[134] The Conference Report further explains: "The Federal Register publication requirement is intended to provide readily available and widespread notice to interested parties of the opportunity to comment on preemption matters that have not

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[132] *Id.*

[133] *Id.* at 2075.

[134] *See id.* at 2075–76. Notably, these procedures are not required with respect to any preemption issues "essentially identical to those previously resolved by the agency or the courts," or with respect to materials prepared for use in judicial proceedings, for submission to Congress or a Member of Congress, or for intragovernmental use (e.g., agency memoranda, letters, advisory opinions, etc.), or when an agency determines in writing that following the procedures would pose a serious and imminent threat to the safety and soundness of a national bank. *Id.*

been previously resolved by the courts."[135] Each agency is required "to take the public comments into account in reaching its decision, even though each particular comment need not be specifically discussed in the final product.[136] The purpose of this procedural mandate *was not* to either expand or retract the agencies' existing authority to actually make preemption decisions, and to make those decisions independently.[137] Rather, as Congress expressly explained, it was "to help focus any administrative preemption analysis and to help ensure that an agency only makes a preemption determination when the legal basis is compelling and the Federal policy interest is clear."[138]

Thus, Congress has affirmatively underscored the OCC's authority to make preemption decisions. That authority certainly is not limited to case-by-case decisionmaking of the type addressed in the Riegle-Neal Conference Report, but rather includes "legislative" rulemaking pursuant to the broad regulatory authority vested in the OCC under the NBA.[139] If Congress had sought to retract or diminish the OCC's authority to declare preemption of state law as applied to national banks, it certainly could have done so, either in the context of Riegle-Neal or at any time before then or thereafter. But it has not.

B. The OCC's Authority to Preempt Is Underscored by a Comparison to OTS Authority Under HOLA

Professor Wilmarth also argues that certain court opinions indicating a different scope of federal preemption under the NBA than under the Home Owners' Loan Act of 1933 ("HOLA") suggest that the OCC lacks authority to issue regulations defining the preemptive scope of the NBA.[140] These cases, which note that there are differences between national banks and federal thrifts and that Congress left open a field for the application of state laws to national banks, in no way suggest that the OCC lacks authority to clarify what the boundaries of that "open field" are. Indeed, the references in these cases to the

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[135] *Id.* at 2076.

[136] *Id.*

[137] *See id.*

[138] *Id.*

[139] *See* 12 U.S.C. §§ 93a, 371(a) (2002); *cf.* Conference of State Bank Supervisors v. Conover, 710 F.2d 878 (D.C. Cir. 1983) (upholding preemption by OCC regulations).

[140] *See* Wilmarth, *supra* note 1, at 322–24 (citing People v. Coast Fed. Sav. & Loan Ass'n, 98 F. Supp. 311 (S.D. Cal. 1951); North Arlington Nat'l Bank v. Kearny Fed. Sav. & Loan Ass'n, 187 F.2d 564 (3d Cir. 1951)).

regulatory authority of the Office of Thrift Supervision ("OTS") actually highlight the OCC's authority to provide such clarification, because the two agencies have parallel statutory grants of regulatory authority. As observed by the Ninth Circuit in *Bank of America v. City and County of San Francisco*, HOLA authorizes the OTS, "under such rules and regulations as [it] may prescribe . . . to provide for the organization, incorporation, examination, operation, and regulation of . . . Federal savings associations . . . , giving primary consideration of the best practices of thrift institutions in the United States."[141]

The NBA grants the OCC the same basic powers to regulate national banks, including the organization,[142] incorporation,[143] examination,[144] operation,[145] regulation,[146] and dissolution[147] of national banks. Indeed, the statutory authorizations for the two agencies to regulate in their respective areas of jurisdiction are remarkably similar. Although structured somewhat differently, the enabling statutes of the OCC and the OTS cover the same ground and are similarly broad.[148]

As part of their authorized regulatory functions, both the OTS and the OCC have included in their respective rules governing federal thrifts and national banks declarations of the extent to which those rules (and the statutes underlying them) preempt state law.[149] As Professor Wilmarth notes,[150] the courts have repeatedly upheld the OTS regulations.[151] In so doing, the courts have rejected arguments

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[141] 309 F.3d 551, 559 (9th Cir. 2002) (quoting 12 U.S.C. § 1464(a)) (alterations in original).

[142] *See* 12 U.S.C. §§ 21, 26.

[143] *See id.*

[144] *See* 12 U.S.C. § 481.

[145] *See, e.g.*, 12 U.S.C. §§ 81–92a.

[146] *See* 12 U.S.C. §§ 93a, 371(a).

[147] *See, e.g.*, 12 U.S.C. §§ 181–200.

[148] The structural differences between the NBA and HOLA (i.e., the differential placement of particular clauses, etc., within the statutes as a whole) are largely attributable to the evolution in statutory drafting during the seventy years between the dates of enactment of the two statutes.

[149] The OTS preemption regulations are codified at 12 C.F.R. §§ 560.2, 557.11–.13, and 545.2 (2004). Much like the OCC's new preemption rule, the OTS rules specify which types of state laws are preempted, and which are not. *See id.* §§ 560.2(b)–(c) and 557.12–.13.

[150] *See* Wilmarth, *supra* note 1, at 285.

[151] *See, e.g.*, *Bank of Am.*, 309 F.3d at 560; Lopez v. World Sav. & Loan Ass'n, 105 Cal. App. 4th 729, 745 (Ct. App. 2003); Wash. Mut. Bank v. Superior Court, 95 Cal. App. 4th 606, 617–19 (Ct. App. 2002).

that regulations declaring the preemptive scope of federal law, as opposed to "substantive" regulations that preempt state law governing the same areas they address, require any special statutory grant of authority. As the court in *Lopez v. World Savings & Loan Ass'n* stated in response to such arguments with respect to the OTS preemption rules:

> Both Lopez and the [California] Attorney General argue that OTS has been authorized only to adopt regulations specifying acceptable or unacceptable practices of federal savings associations—which admittedly have preemptive effect—but that it has not been authorized to preempt state laws with respect to lending practices for which it provides no alternative substantive regulation. But neither the language of HOLA nor any of the decisions that have interpreted it impose such a limitation on OTS's rule-making authority.[152]

The court then quoted the HOLA provision cited above, i.e., the language granting the OTS authority, "under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation" of federal thrifts.[153] The court found that this "statutory authorization to adopt regulations governing the operations of federal savings associations is broad enough to encompass a regulation prohibiting state limitations on [thrift] practices . . . even if the federal agency does not consider it necessary to impose limitations of its own."[154]

This confirmation that the broad grant of regulatory authority to the OTS encompasses authority to issue regulations defining the scope of federal preemption applies with equal force to the NBA's grant of regulatory authority to the OCC. As noted, the NBA authorizes the OCC to regulate the organization, incorporation, examination, and operation of national banks, and expressly directs the OCC to "prescribe rules and regulations to carry out the responsibility of the office."[155] There simply is no persuasive evidence that Congress granted the OCC in the NBA any lesser authority than HOLA gave to the OTS with respect to promulgating regulations that define the scope of federal preemption of state law.

Moreover, as the federal agency responsible for interpreting the NBA and administering the national bank charter, including

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[152] *Lopez*, 105 Cal. App. 4th at 743.

[153] *Id.* at 744 (quoting 12 U.S.C. § 1464(a)(1)).

[154] *Id.*

[155] 12 U.S.C. § 93a.

determining the scope of permissible national bank activities and assessing the burden placed on those activities by state restrictions, the OCC plainly has unique expertise to determine the extent to which the NBA preempts state law. In recognition of this expertise, the courts have found OCC interpretations of the NBA's preemptive effect to be reasonable and reliable.[156] Particularly in light of the OCC's broad authority and responsibility to define the scope of national bank powers,[157] it is wholly appropriate for the OCC to identify, consistent with applicable judicial precedent, the circumstances in which the application of state law to national banks will conflict with, obstruct, or otherwise frustrate Congress's objectives with respect to the exercise of those powers.[158]

In light of both the relevant legislative and judicial precedent, there simply is no foundation for concluding that the OCC lacks authority to define the preemptive scope of the NBA, particularly through a formally adopted regulation such as the Preemption Rule.

C. Specific State Law "Savings" Clauses in Other Statutes Do Not Limit Preemption Under the NBA

Professor Wilmarth also argues that the OCC lacks authority to adopt its new Preemption Rule because certain federal laws other than the NBA expressly preserve a role for state regulation of specific banking activities.[159] Professor Wilmarth observes that the Home Ownership and Equity Protection Act ("HOEPA"), for example, "preserves the right of each state to enact supplemental laws governing fees, charges, and other terms of home mortgages as long as such laws do not conflict with HOEPA's provisions."[160] Professor Wilmarth argues that state law that is preserved from HOEPA preemption is

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[156] *See Bank of Am.*, 309 F.3d at 563–64; Bank One, Utah, N.A. v. Guttau, 190 F.3d 844, 850–51 (8th Cir. 1999); Am. Bankers Ass'n v. Lockyer, 239 F. Supp. 2d 1000, 1017–18 (E.D. Cal. 2002).

[157] *See, e.g.*, Smiley v. Citibank, 517 U.S. 735, 741–45 (1996); Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 36–37 (1996); NationsBank v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256–57 (1995); Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 403–04 (1987); *Bank of Am.*, 309 F.3d at 563.

[158] *Cf.* Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861, 885 (2000) (agency regulations implicitly preempt where state law would otherwise "frustrate" Congress's purposes).

[159] *See* Wilmarth, *supra* note 1, at 291.

[160] *Id.* at 311 (citing 15 U.S.C. § 1610(b)).

likewise insulated from preemption by the NBA.[161] This line of argument, however, has repeatedly been rejected by the courts.[162]

In essence, the theory espoused by Professor Wilmarth is that, by preserving state law in a given area from preemption under a particular federal statute, Congress intended to preclude preemption of that state law by *any* federal statute. This theory, if applied by the courts, would seriously undermine congressional intent with respect to enforcement of federal law. When Congress determines that one of its enactments should not disturb state law, Congress generally does not—and may not reasonably be presumed to—simultaneously address the preemptive effect of any of its other enactments, either prior or future. Rather, congressional anti-preemption declarations—frequently referred to as state law "savings" clauses—apply only to the federal statutes in which they are contained (or specifically cited portions thereof), unless they *expressly* mention preemption under other federal laws as well.[163]

The relationship between the NBA and the Truth in Lending Act ("TILA") (the statute that incorporates the later-enacted HOEPA) provides a good illustration of the error in Professor Wilmarth's theory on this point. TILA contains a variety of preemption provisions, including a state law "savings clause" that provides, in pertinent part:

> Except as provided in subsection (e) of this section [which is not relevant to § 1748.13], *this part and parts B and C of this subchapter* do not annul, alter, or affect the laws of any State relating to the disclosure of information in connection with credit transactions, except to the extent that those laws are inconsistent with the provisions of *this subchapter* and then only to the extent of the inconsistency.[164]

Along the same lines as Professor Wilmarth's argument, the State of California recently argued that this TILA provision precluded preemption of the California credit card statement disclosure requirements at issue in *American Bankers Ass'n v. Lockyer*.[165] However,

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[161] *See id.*

[162] *See, e.g.*, *Bank of Am.*, 309 F.3d at 565 (rejecting claim that the federal Electronic Fund Transfer Act ("EFTA") precluded NBA preemption of state law); Bank One, Utah, N.A. v. Guttau, 190 F.3d 844, 850 (8th Cir. 1999) (same).

[163] One of the rare instances in which Congress did extend a savings clause beyond the scope of the statute containing the clause was in the Expedited Funds Availability Act, which provides that any state law that it preserves shall "apply to all federally insured depository institutions located within such State." 12 U.S.C. § 4007(a) (2002). Clearly, Congress knows how to extend the reach of a statute's savings clause beyond the scope of that statute when it so intends.

[164] 15 U.S.C. § 1610(a)(1) (2002) (emphasis supplied).

[165] *See* 239 F. Supp. 2d 1000, 1008–09 (E.D. Cal. 2002).

as the court in *Lockyer* found, contrary to the state's theory, the express reference in the savings clause to "this part and parts B and C of this subchapter" (i.e., TILA's subchapter dealing with consumer credit cost disclosure) clearly shows that the savings clause was intended to save state laws only from preemption by *those* TILA provisions (i.e., TILA parts A–C), and not by any other federal laws—or even by any other provisions of TILA itself.[166]

If the courts were to apply California and Professor Wilmarth's "universal savings clause" theory in cases involving claims against national banks, they would effectively be rewriting the NBA in a manner unauthorized by Congress and inconsistent with congressional intent. As discussed above, Congress designed the NBA as a means of effecting uniform federal control over national banks free from state interference. TILA, however, served a specific and distinct purpose: to prescribe a new uniform set of requirements applicable both to all federally chartered financial institutions, *as well as to state-chartered financial institutions*, without altering the preexisting regulatory schemes applicable to each.[167] In order to achieve this result with respect to state-chartered institutions, Congress included in TILA the above-cited savings clause, thereby ensuring that the mandates contained in TILA parts A–C would not supplant any inconsistent state regulations not inconsistent with *those parts of TILA*. Congress said nothing in TILA, or in TILA's legislative history, to suggest that it intended the savings clause to have any impact whatsoever on the preemptive effect of the NBA, HOLA, or any other federal statute (or other sections of TILA) with respect to the application of state law to federally chartered institutions.[168]

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166 Indeed, elsewhere in TILA, Congress prescribed that *specific sections of TILA* outside of Parts A–C *should* preempt state law. *See, e.g.*, 15 U.S.C. § 1610(e) (express preemption by TILA's provisions governing credit card solicitations), § 1633 (preemption by direction of the Board of Governors of the Federal Reserve).

167 *See* 15 U.S.C. §§ 1610(a), 1602(f) (defining "creditor" broadly to include any issuer of credit, including state-chartered banks).

168 As Professor Wilmarth himself notes in another context in his article, Congress is *not* to be presumed to have amended or repealed federal statutes by implication. *See* Wilmarth, *supra* note 1, at 334 (citing Watt v. Alaska, 451 U.S. 259, 267 (1981) (holding that "repeals by implication are not favored . . . [and t]he intention of the legislature to repeal must be clear and manifest")); Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 424–29 (1995) (same); *see also* Posadas v. Nat'l City Bank, 296 U.S. 497, 503 (1936); Reg'l Rail Reorganization Act Cases, 419 U.S. 102, 134 (1974) (" 'A new statute will not be read as wholly or even partially amending a prior one unless there exists a "positive repugnancy" between the provisions of the new and those of the old that cannot be reconciled.' ") (internal citation omitted).

The OTS expressly confirmed this very understanding of savings clauses when adopting regulations governing lending-related activities of federal thrifts in 1996. In order to clarify the relationship between the broad preemption effected by HOLA and the OTS's implementing regulations, on the one hand, and the limited "anti-preemption" clauses in other federal statutes like TILA, on the other, the OTS explained that:

> The fact that one or several federal statutes do not preempt certain types of state laws, however, does not preclude the possibility that other federal statutes or regulations might do so . . . . [These] federal statutes that contain preemption disclaimers apply to all types of lenders (including state-chartered lenders), not just federal savings associations. The fact that Congress did not wish to preempt the application of state laws to this general universe of lenders (including lenders chartered and regulated by the very states whose laws would be preempted), does not preclude the possibility that Congress may have elsewhere evidenced a specific intent to preempt, or permit a federal regulator to preempt, the application of state laws to a particular category of lender—in this case, federal savings associations.[169]

Notably, the Seventh Circuit reached the same conclusion regarding a state law "savings clause" enacted as part of HOEPA.[170] In *Illinois Ass'n of Mortgage Brokers v. Office of Banks and Real Estate*,[171] the court rejected the argument that this savings clause amended the preexisting scope of preemption under the Alternative Mortgage Transaction Parity Act of 1982 ("Parity Act"). The court found that, although the Parity Act and HOEPA concern the same subject matter," an overlap in subject matter "is not, and never has been, enough to show that the most recent statute repeals its predecessors."[172] Further, the court found the anti-preemptive reach of HOEPA's savings clause—like the TILA savings clause discussed above—was limited by its own terms: it specifically "deals with 'this subchapter' of Title 15, while the [Parity] Act is codified in Title 12."[173] Thus, the court

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[169] Lending and Investment, 61 Fed. Reg. 50,951, 50,966 (Sept. 30, 1996) (to be codified at 12 C.F.R. pts. 545, 556, 560, 563, 566, 571 & 590) (noting that "[t]his is precisely the conclusion reached by the court in *First Federal Savings Loan Association v. Greenwald*, 591 F.2d 417 (1st Cir. 1979)").

[170] *See* 15 U.S.C. § 1610(b).

[171] 308 F.3d 762 (7th Cir. 2002).

[172] *Id.* at 764.

[173] *Id.* at 766.

concluded, HOEPA's savings clause "does not foreclose the possibility that some other federal law," including the Parity Act, independently preempts state law.[174]

In short, the theory that the savings clauses of federal statutes other than the NBA effectively immunize from the NBA preemption any state law within the scope of such savings clauses is clearly contradicted by prevailing case law.[175]

III. OCC Regulation of National Bank Operating Subsidiaries

Pursuant to their federal authority under 12 U.S.C. § 24 (Seventh), national banks have long used state-incorporated operating subsidiaries to conduct banking activities that the bank itself could conduct directly.[176] Since 2001, OCC regulations have specifically provided

[174] *Id.*; *see also* Bank of Am. v. City of Daly City, 279 F. Supp. 2d 1118, 1125–26 (N.D. Cal. 2003) (finding that state law savings clause in the Gramm-Leach-Bliley Act of 1999 did not save certain municipal ordinances from preemption by the federal Fair Credit Reporting Act).

[175] For the same reasons, there is no basis for Professor Wilmarth's argument that the OCC lacks authority for its amendment regarding preemption with respect to bank real estate lending activities. *See* Wilmarth, *supra* note 1, at 298–306. Professor Wilmarth argues that the OCC is not authorized to preempt state laws governing real estate lending because its authority to issue rules on that subject is constrained by 12 U.S.C. § 1828(o), a provision that requires the bank regulatory agencies to issue uniform rules governing real estate lending. Those Uniform Rules, however, simply require financial institutions to establish policies and procedures for engaging in real estate lending activities in accordance with agency guidelines. The Guidelines issued under the Uniform Rules, in turn, state that the institution should consider certain factors in formulating its loan policies, including "Compliance with all real estate related laws and regulations, including the Community Reinvestment Act, anti-discrimination laws, and for savings associations, the Qualified Thrift Lender test." While Professor Wilmarth argues that this statement precludes the OCC from adopting rules that permit national banks to disregard applicable state law related to real estate transactions, the statement in fact says nothing about which particular laws apply to the real estate activities of national banks, which are essentially the same laws that applied to their real estate lending transactions prior to enactment of 12 U.S.C. § 1828(o). The Guidelines simply prescribe uniform standards to be applied with respect to the various types of real estate lenders, under the particular real estate lending laws that are otherwise applicable to that entity's conduct of that business. Neither 12 U.S.C. § 1828(o) nor the Guidelines in any way expanded the scope of such applicable laws beyond the limits otherwise imposed by federal preemption.

[176] *See* SEC Clarification of Prospectuses, 31 Fed. Reg. 11,459, 11,459–60 (Aug. 31, 1966) (OCC operating subsidiary regulation, currently set forth in 12 C.F.R. § 5.34). The use of operating subsidiaries by national banks has thus been long known

that "[u]nless otherwise provided by *Federal* law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank."[177] Nothing in the OCC's Preemption Rule changes the text of § 5.34 or § 7.4006 or the OCC's underlying policy with respect to operating subsidiaries, which, as discussed in Part III.C below, has been repeatedly upheld by the courts. Thus, Professor Wilmarth's claim that the OCC has unlawfully attempted to bar the states from regulating operating subsidiaries is in fact incorrect.

A. National Banks' Use of Operating Subsidiaries That Benefit from Federal Preemption Is Wholly Appropriate, and the OCC's Regulations Governing Operating Subsidiaries Are Eminently Reasonable

Under 12 U.S.C. § 24 (Seventh), national banks may exercise "all such incidental powers as shall be necessary to carry on the business of banking." A national bank's incidental powers "include activities that are 'convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act.'"[178] A national bank may find it convenient or useful to organize a separate operating entity for a line of business for a variety of reasons, such as to create a separate entity for accounting purposes, and thus future disposition, or to limit the subsidiary's liability to its contributed capital. (In the latter example, the federal deposit insurance funds will be indirect beneficiaries of the practice, because the limitation of liability enhances the safety and soundness of the national bank and hence the deposit insurance system overall.) In order to obtain the benefits of incorporation, such as the limitation of liability inherent to corporations, national banks can and do comply with the ministerial provisions of state law that provide for the incorporation and governance of state-chartered corporations. As a regulatory matter, however, operating subsidiaries are viewed as mere divisions of the bank. OCC regulations at 12 C.F.R. § 5.34, which govern the licensing, activities, and supervision of operating

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and accepted by Congress. *See, e.g.*, S. REP. NO. 106-44, at 8 (1999) (asserting that "for at least 30 years, national banks have been authorized to invest in operating subsidiaries that are engaged only in activities that national banks may engage in directly").

[177] 12 C.F.R. § 7.4006 (emphasis supplied).

[178] Bank of Am. v. City & County of San Francisco, 309 F.3d 551, 562 (9th Cir. 2002) (citing and quoting cases).

subsidiaries, expressly provide that operating subsidiaries may engage only in activities that are permissible for the national bank itself, and that operating subsidiaries are subject to examination and supervision by the OCC to the same extent as the national bank.[179] Where Congress has desired an exception to this general rule, it has specifically provided for it.[180] Thus, because operating subsidiaries can engage only in those activities that are within the area of the OCC's regulatory expertise, there is no reason why a state or any other regulator should supervise the activities of a national bank's operating subsidiaries.

Moreover, given the benefits of operating subsidiaries to the national banking system and the restrictions on their activities (i.e., being limited to those of their parent banks), the OCC's ability to include the supervision of operating subsidiaries under its exclusive visitorial powers under 12 U.S.C. § 484 is eminently reasonable and hence within its discretion as the agency responsible for administering the NBA. The U.S. Supreme Court has found the OCC's interpretations of the NBA as worthy of "great weight," even where those interpretations were not issued pursuant to any formal administrative procedure, such as the notice-and-comment process dictated by the Administrative Procedure Act.[181]

Because operating subsidiaries of national banks are the functional equivalent of bank departments or divisions, the federal authority of national banks to operate nationwide independent of differing state laws includes the use of operating subsidiaries to conduct those operations subject to uniform federal standards.

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[179] *See* OCC Expansion of Activities, 12 C.F.R. § 5.34(e) (2004).

[180] *See, e.g.*, 12 U.S.C. § 24a (defining "financial subsidiaries," which are subject to enhanced "functional" state regulation, as entities "*other* than a[n] [operating] subsidiary that . . . engages solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that govern the conduct of such activities by national banks") (emphasis added).

[181] United States v. Mead Corp., 533 U.S. 218, 230–31 & n.4 (2001) ("[W]e have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.") (citing NationsBank of N.C. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256–57 (1995)); *see also* Smiley v. Citibank, 517 U.S. 735 (1996) (deferring to OCC's interpretation of NBA with regard to credit card offerings by an operating subsidiary); Clarke v. Sec. Indus. Ass'n, 479 U.S. 388 (1987) (deferring to the OCC's interpretation of the NBA with regard to securities sold through operating subsidiaries).

B. The Courts Have Consistently and Recently Affirmed the OCC's View of Operating Subsidiaries

Courts, including the U.S. Supreme Court, have consistently treated operating subsidiaries as the equivalent to national banks with respect to their powers and status under federal law.[182] The most recent cases have addressed the issue of state-licensing and regulation of operating subsidiaries head-on and have agreed with the OCC's interpretations and regulations. For example, the U.S. District Court for the Eastern District of California twice held recently that the State of California has no authority to license and supervise mortgage-lending subsidiaries of national banks; that court has applied the OCC's pronouncements and found no ambiguity or problems with its reasoning.[183] And the U.S. District Court for the Northern District of Illinois, relying on the *Boutris* decisions, reached the same conclusion in December 2003.[184]

It should be noted that the OTS has taken the same approach and interpretation with respect to operating subsidiaries of federal thrifts,[185] and that the courts have likewise agreed that the operating subsidiaries of federal thrifts are tantamount to the thrifts themselves for bank regulatory purposes.[186]

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[182] *See, e.g.*, *NationsBank*, 513 U.S. 251 (operating subsidiary could sell annuities to the same extent as national bank); *Clarke*, 479 U.S. 388 (securities brokerage operating subsidiary); Marquette Nat'l Bank First of Omaha Serv. Corp., 439 U.S. 299 (1978) (credit card subsidiary); Am. Ins. Ass'n v. Clarke, 865 F.2d 278 (D.C. Cir. 1988) (national bank could establish municipal bond insurance subsidiary because such establishment was the functional equivalent of the issuance of standby letter of credit by the bank itself); M & M Leasing Corp. v. Seattle First Nat'l Bank, 563 F.2d 1377 (9th Cir. 1977) (national banks may engage in auto leasing through an operating subsidiary); Valley Nat'l Bank v. Lavecchia, 59 F. Supp. 2d 432 (D.N.J. 1999) (title insurance subsidiary).

[183] *See* Wells Fargo Bank v. Boutris, 265 F. Supp. 2d 1162, 1170 (E.D. Cal. 2003) ("Because [the subsidiary] 'is treated as a department or division of its parent [national bank] for regulatory purposes,' the Commissioner lacks visitorial power over [the subsidiary] just as it lacks visitorial power over [the subsidiary's] national bank parent.") (quoting WFS Fin., Inc. v. Dean, 79 F. Supp. 2d 1024, 1026 (W.D. Wis. 1999)); Nat'l City Bank v. Boutris, No. Civ. S-03-0655 GEBJ, 2003 WL 21536818, at *3 (E.D. Cal. July 2, 2003) (same).

[184] *See* Budnick v. Bank of Am. Mortgage, No. 03C 6116, 2003 WL 22964372, at *2 (N.D. Ill. Dec. 16, 2003) ("Courts have uniformly treated the activities of an operating subsidiary as being equivalent to the activities of the national bank.") (citations and internal quotations omitted).

[185] *See* 12 C.F.R. § 559.3 (2004).

[186] *See* Chaires v. Chevy Chase Bank, F.S.B., 748 A.2d 34, 44 (Md. Ct. Spec. App. 2000); *WFS Fin.*, 79 F. Supp. 2d at 1028.

C. Professor Wilmarth's Other Arguments Are Unsupported by the Statutes or Case Law

Professor Wilmarth buttresses his theories about the OCC and national bank operating subsidiaries with arguments based on the Bank Holding Company Act ("BHCA") and the Tenth Amendment. For example, Professor Wilmarth cites *Lewis v. BT Investment Managers, Inc.*[187] for the proposition that the BHCA reserves to the states a general power to enact regulations applicable to bank holding companies and their subsidiaries. This is true only in the context of bank holding companies and subsidiaries of bank holding companies that are not banks or operating subsidiaries of national banks. For national banks and their operating subsidiaries, the BHCA is not the relevant statute; rather, the NBA is the relevant statute and the source of preemption for national bank operating subsidiaries and OCC regulation 12 C.F.R. § 7.4006. There is nothing to suggest that the BHCA somehow nullifies the preemptive effect of the NBA. In the case of national bank operating subsidiaries, the OCC operating subsidiary rule is the relevant source of preemption.[188]

Second, the courts have confirmed in recent case law that OCC regulations do not conflict with the Tenth Amendment's preservation of states' rights. In the *Boutris* cases, the State of California twice argued that the OCC's regulations would unduly interfere with the state's sovereignty under the Tenth Amendment by limiting the state's power to regulate and enforce laws against state-chartered operating subsidiaries.[189] The district court, however, twice held that the OCC properly exercised its federal authority in licensing the operating subsidiaries of national banks, and by such action properly assumed the exclusive responsibility for supervising the subsidiaries' banking activities.[190] Thus, there was no violation of the Tenth Amendment.[191]

Accordingly, the new OCC preemption regulations have no direct effect on the operating subsidiary preemption rules of 12 C.F.R.

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[187] 447 U.S. 27 (1980).

[188] *See* Citicorp v. Bd. of Governors of the Fed. Reserve Sys., 936 F.2d 66 (2d Cir. 1991), *cert. denied*, 502 U.S. 1031 (1992).

[189] Wells Fargo Bank v. Boutris, 265 F. Supp. 2d at 1171; Nat'l City Bank v. Boutris, 2003 WL 21536818, at *4; First Union Nat'l Bank v. Burke, 48 F. Supp. 2d 132 (D. Conn. 1999).

[190] *Id.*

[191] *Id.*

§ 7.4006 that were adopted in 2001. To the extent the new preemption rules adopted in 2004 clarify the application of state laws to national banks, those new rules, in turn, clarify the application of state laws to the operating subsidiaries of national banks. Operating subsidiaries serve useful and convenient purposes for national banks that strengthen the national banking system, and there is no reason for regulatory purposes to distinguish between a national bank and its operating subsidiaries, because operating subsidiaries can only exercise the powers of their national bank parents and are subject to same level of regulatory supervision by the OCC.

IV. Conclusion: Benefits of the OCC's New Rules

Professor Wilmarth's overarching objection to the OCC's new rules is that they "create a regime of de facto field preemption."[192] To the extent that the OCC has established such a "regime," it has done so based on its plenary power to regulate national banks, and to the benefit of the dual banking system.

The OCC's new rules provide explicit guidance on the scope—including the limits—of NBA/OCC preemption of state law and the extent to which the OCC exercises exclusive regulation over national banks. Contrary to Professor Wilmarth's suggestion, the rules' clarification of the scope of that field is not a detriment, but rather a benefit, to state authorities and consumers, as well as to national banks. The new rules plainly and expressly do *not* preclude the application of all state legal restrictions to national banks. What the new rules *do* accomplish is to eliminate confusion and uncertainty, promising to relieve banks, their customers, and state regulators of the unnecessary burdens of questioning when particular state law restrictions may properly be applied with respect to (or enforced by the states against) national banks.

As emphasized in the Preemption Preamble, the comments that the OCC received on the proposed preemption rule documented significant and unwarranted costs and related burdens associated with national banks' attempts to comply with a myriad of differing laws and regulations of individual states and localities.[193] To date, national banks have often been forced to craft different products and services (with associated procedures and policies, and their attendant additional costs) for each state in which they do business, or elect not to provide

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[192] Wilmarth, *supra* note 1, at 363.

[193] *See* Preemption Rule, *supra* note 2, 69 Fed. Reg. at 1908.

all of their products or services (to the detriment of bank customers) in one or more states. These consequences, as well as the costs of litigating disputes over whether certain state laws do or do not apply, have been a significant diversion of and drain on the resources with which national banks provide services to customers nationwide. The adverse effects of uncertainty in this area also have infected the secondary market for national bank loans, to the serious detriment of consumers. In several instances, concern about the application of certain state restrictions to national bank mortgage lending has led securities rating services to cease rating residential mortgage loans.[194] This in turn has threatened to halt purchases of the loans by secondary market institutions (to whom most lenders sell their residential secured loans in order to maintain liquidity and continue providing new loans), thereby making affordable credit unavailable or less available to many, if not most, residents and potential residents in the state.[195] Consumers are the ultimate victims in this context.

The OCC's new rules promise to help prevent such adverse consequences by providing significant clarification of when state law does or does not apply to activities of a national bank and its operating subsidiaries. In particular, the Preemption Rule may help avoid litigation by providing express reference to types of state laws that are, or are not, preempted—in the same manner as the OTS preemption

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194 *See* Press Release, Mortgage Bankers Association, Fitch Addresses Predatory Lending Legislation of Oakland, CA (Oct. 24, 2003), *at* http://www.mbaa.org/industry/news/03/1024b.html; Testimony of Frank Raiter, Managing Director, Standard & Poor's Credit Market Services, *Hearing on Protecting Homeowners: Preventing Abusive Lending While Preserving Access to Credit: Before the House Subcomm. on Housing and Community Opportunity and the Subcomm. on Financial Institutions and Consumer Credit* at 4 (Nov. 5, 2003), *at* http://financialservices.house.gov/media/pdf/110503fr.pdf; AGNES T. CRANE, *S&P Won't Rate Some Mortgages*, WALL ST. J., Jan. 20, 2003, 2003 WL-WSJ 3956880 (reporting on Standard & Poor's refusal to rate loans subject to unlimited assignee liability under Georgia's anti-predatory lending statute and stating that "Fannie Mae, the largest provider of home financing, hasn't purchased home loans covered by the new law since Jan. 1."); KAREN SIBAYAN & KEVIN DONOVAN, *After S&P announcement mortgage lenders have "Georgia On My Mind,"* ASSET SECURITIZATION REP., Jan. 27, 2003, *available at* 2003 WL 7469012 ("In the week since the S&P announcement [not to rate loans originating in Georgia], more than several of the largest mortgage lenders have publicly announced that they would close their lending operations in Georgia.").

195 *See* ROBERT E. LITAN, UNINTENDED CONSEQUENCES: THE RISKS OF PREMATURE STATE REGULATION OF PREDATORY LENDING, *at* http://www.aba.com/NR/rdonlyres/D881716A-1C75-11D5-AB7B-00508B95258D/28871/PredReport200991.pdf (last visited Mar. 18, 2004).

rules. This will undoubtedly aid the courts, which to date have encountered some difficulty in applying the *Barnett Bank* standard in deciding preemption cases involving national banks.[196] Given the ambiguity regarding the proper means for assessing when a state law "only incidentally affects" a national bank's exercise of its federally authorized powers, the categorization of specific types of state laws as either preempted or not preempted will importantly serve both to guide the courts in future cases and, presumably, to guide private parties and the states so as to avoid litigation in the first instance.

Whether the OCC's new rules can be characterized as establishing de facto field preemption or not is really a question of semantics. With respect to national bank lending, deposit taking, and operations, the OCC has specified where its authority is exclusive of state law, without declaring "field preemption." The OTS has likewise delineated the scope of its exclusive authority, but expressed that authority by use of the term "field preemption." In practice, the express use of that term may rarely be material. What matters is that there be a clear understanding of the types of state laws that obstruct the exercise of national bank powers granted by Congress, and that such laws may not, consistent with congressional intent, be applied to or enforced against these federally created and regulated banking institutions. It is in helping to ensure such clarity that the OCC's new rules are so valuable.

Finally, it should be emphasized that while Professor Wilmarth premises his article in large part on the theory that the OCC's new rules will undermine consumer protection, he presents no actual evidence to this effect. Indeed, the evidence is quite to the contrary: the avoidance of confusion and attendant market uncertainties and litigation plainly will benefit consumers by ensuring stability of the financial institutions they depend on, not only for credit, but also for the wide range of services national banks have developed, through innovation subject to close scrutiny and control by the OCC, over the course of their more than 140-year history.

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[196] *See, e.g.*, Am. Bankers Ass'n v. Lockyer, 239 F. Supp. 2d at 1017 ("There is . . . no authority that provides a yardstick for measuring when a state law 'significantly interferes with,' 'impairs the efficiency of,' 'encroaches on,' or 'hampers' the exercise of national banks' powers.") (citing Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 33–34 (1996)).