

national banks is vested *only* in the OCC, unless otherwise provided by Federal law.⁹

2. The Supremacy Clause and the Federal Preemption Standards Articulated by the Supreme Court

A state law may be preempted by Federal law and thus rendered invalid by operation of the Supremacy Clause of the Constitution.¹⁰ The Supreme Court has identified three ways in which this may occur. First, Congress can adopt express language setting forth the existence and scope of preemption.¹¹ Second, Congress can adopt a framework for regulation that “occupies the field” and leaves no room for states to adopt supplemental laws.¹² Third, preemption may be found when state law actually conflicts with Federal law. Conflict will be found when either: (i) compliance with both laws is a “physical impossibility;”¹³ or (ii) when the state law stands “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁴

Because the origins of Federal preemption are Constitutional, the underlying purpose of the state legislation, no matter how salutary, does not determine the essential issue of preemption. As explained in *Association of Banks in Insurance, Inc. v. Duryee*,¹⁵ “[w]here state and federal laws are inconsistent, the state law is pre-empted even if it was enacted by the state to protect its citizens or consumers.”¹⁶

⁹ Writing shortly after the Currency Act and the National Bank Act were enacted, then-Secretary of the Treasury, and formerly the first Comptroller of the Currency, Hugh McCulloch observed that “Congress has 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.” Cong. Globe, 39th Cong., 1st Sess., Misc. Doc. No. 100, at 2 (Apr. 23, 1866).

¹⁰ “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. Art. VI, cl. 2.

¹¹ See *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

¹² See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

¹³ *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963).

¹⁴ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 31 (1996) (quoting *Hines*).

¹⁵ 55 F. Supp. 2d 799 (S.D. Ohio 1999).

¹⁶ *Id.* at 802. Agreeing with this conclusion, the Sixth Circuit stated that “the fact that the state legislature enacted the [state law at issue] to protect general insurance agents and consumers does not, for that reason alone, preclude federal preemption.” *Ass’n of Banks in Ins., Inc. v. Duryee*, 270 F.3d 397, 408 (6th Cir. 2001); see also *Franklin Nat’l Bank of*

3. Supreme Court Precedents Leading to Barnett

From the earliest years of the national banking system, up to and including a decision rendered just months ago, the Supreme Court has consistently recognized the unique status of the national banking system and the limits placed on states by the National Bank Act.¹⁷ In one of the first cases to address the role of the national banking system, the Supreme Court stated that “[t]he national banks organized under the [National Bank Act] are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end.”¹⁸

Subsequent opinions of the Supreme Court have been equally clear about national banks’ unique role and status. See *Marquette Nat’l Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299, 314–315 (1978) (“Close examination of the National Bank Act of 1864, its legislative history, and its historical context makes clear that, . . . Congress intended to facilitate . . . a ‘national banking system.’”) (citation omitted); *Franklin Nat’l Bank*, 347 U.S. at 375 (“The United States has set up a system of national banks as Federal instrumentalities to perform various functions such as providing circulating medium and government credit, as well as financing commerce and acting as private depositories.”); *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896) (“National banks are instrumentalities of the federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States.”); *Guthrie v. Harkness*, 199 U.S. 148, 159 (1905) (“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.”).

The Supreme Court also has recognized the clear intent on the part of Congress to limit the authority of states over national banks precisely so that the nationwide system of banking that was created in the Currency Act could develop and flourish. For instance, in *Easton v. Iowa*,¹⁹ the Court stated that Federal legislation affecting national banks—

Franklin Square v. New York, 347 U.S. 373, 378 (1954).

¹⁷ See *Beneficial Nat’l Bank*, 123 S.Ct. at 2064.

¹⁸ *Farmers’ & Mechanics’ Nat’l Bank v. Dearing*, 91 U.S. 29, 33 (1875).

¹⁹ 188 U.S. 220 (1903).

has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the States. * * * It thus appears that Congress has provided a symmetrical and complete scheme for the banks to be organized under the provisions of the statute. * * * [W]e are unable to perceive that Congress intended to leave the field open for the States to attempt to promote the welfare and stability of national banks by direct legislation. If they had such power it would have to be exercised and limited by their own discretion, and *confusion would necessarily result from control possessed and exercised by two independent authorities.*²⁰

The Court in *Farmers’ & Mechanics’ National Bank*, after observing that national banks are means to aid the government, stated—

Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit. Any thing beyond this is “an abuse, because it is the usurpation of power which a single State cannot give.”²¹

Thus, as recognized by the Supreme Court in *Barnett*, the history of national bank powers 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.”²² “[W]here Congress has not expressly conditioned the grant of ‘power’ upon a grant of state permission, the Court has ordinarily found that no such condition applies.”²³

4. Recent Lower Federal Court Decisions Concluding that State Laws Are Preempted

These principles have been recognized and applied in a series of recent cases invalidating state and local restrictions upon national bank activities that are authorized under Federal law. In each case, the court determined that the state or local restriction obstructed, in whole or in part, the exercise of an authorized

²⁰ *Id.* at 229, 231–232 (emphasis added).

²¹ *Farmers’ & Mechanics’ Nat’l Bank*, 91 U.S. at 34 (citation omitted).

²² *Barnett*, 517 U.S. at 32 (1996). The Supreme Court has recognized that the “business of banking” is not limited to the powers enumerated in section 24 (Seventh). See *NationsBank v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 258 n.2 (1995). As the scope of the underlying national bank power may evolve, the OCC “may authorize additional activities if encompassed by a reasonable interpretation of § 24 (Seventh).” *Indep. Ins. Agents of Am., Inc. v. Hawke*, 211 F.3d 638, 640 (D.C. Cir. 2000). Thus, the effect of a state law on the exercise of a Federal power may change as the character of the power changes.

²³ *Barnett*, 517 U.S. at 34.