

anticipated impact on state banks and the resulting diminution of control by the states over banking in general,³⁶ proponents of the national banking system were concerned that states would attempt to undermine it. Remarks of Senator Sumner illustrate the sentiment of many legislators of the time: "Clearly, the [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."³⁷

The allocation of any supervisory responsibility for the new national banking system to the states would have been inconsistent with this need to protect national banks from state interference. Congress, accordingly, established a Federal supervisory regime and created a Federal agency within the Department of Treasury—the OCC—to carry it out. Congress granted the OCC the broad authority "to make a thorough examination of all the affairs of [a national bank],"³⁸ and solidified

banking from the states to the Federal government. Given the legislation's objective, its passage would, in Rep. Brooks' opinion, mean that there would be no state banks left over which the states would have authority. Thus, by observing that the legislation was intended to take authority over state banks from the states, Rep. Brooks was not suggesting that the Federal government would have authority over state banks; rather, he was explaining the bill in a context that assumed the demise of state banks. Rep. Pruyn opposed the bill stating that the legislation would "be the greatest blow yet inflicted upon the States." Cong. Globe, 38th Cong., 1st Sess. 1271 (Mar. 24, 1864). See also John Wilson Million, *The Debate on the National Bank Act of 1863*, 2 J. Pol. Econ. 251, 267 (1893–94) regarding the Currency Act ("Nothing can be more obvious from the debates than that the national system was to supersede the system of state banks.").

³⁶ See, e.g., *Tiffany v. Nat'l Bank of Missouri*, 85 U.S. 409, 412–413 (1874) ("It cannot be doubted, in view of the purpose of Congress in providing for the organization of National banking associations, that it was intended to give them a firm footing in the different States where they might be located. It was expected they would come into competition with State banks, and it was intended to give them at least equal advantages in such competition. * * * National banks have been National favorites. They were established for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the General government. It could not have been intended, therefore, to expose them to the hazard of unfriendly legislation by the States, or to ruinous competition with State banks."). See also B. Hammond, *Banks and Politics in America from the Revolution to the Civil War 725–34* (1957); P. Studenski & H. Krooss, *Financial History of the United States* 155 (1st ed. 1952).

³⁷ Cong. Globe, 38th Cong., 1st Sess., at 1893 (Apr. 27, 1864). See also *Beneficial Nat'l Bank*, 123 S.Ct. at 2064 ("[T]his Court has also recognized the special nature of federally chartered banks. Uniform rules limiting the liability of national banks and prescribing exclusive remedies for their overcharges are an integral part of a banking system that needed protection from possible unfriendly State legislation.") (citations omitted).

³⁸ Act of June 3, 1864, c. 106, § 54, 13 Stat. 116, codified at 12 U.S.C. 481.

this Federal supervisory authority by vesting the OCC with exclusive visitorial powers over national banks. These provisions assure, among other things, that the OCC will have comprehensive authority to examine all the affairs of a national bank and protect national banks from potential state hostility by establishing that the authority to examine, supervise, and regulate national banks is vested only in the OCC, unless otherwise provided by Federal law.³⁹

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

In certain circumstances, a state law may be preempted by Federal law and thus rendered invalid by reason of the Supremacy Clause of the Constitution.⁴⁰ The Supreme Court has identified three ways in which Congress can displace state law. First, Congress can adopt express language setting forth the existence and scope of preemption.⁴¹ Second, Congress can adopt a scheme of regulation that "occupies the field" and leaves no room for states to adopt supplemental laws.⁴² Third, Congress can adopt a statute that is in "irreconcilable conflict" with state law.⁴³ Irreconcilable conflict will be found when either: (i) Compliance with both laws is a "physical impossibility,"⁴⁴ or (as noted by National City in its request) (ii) when the state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁴⁵

As noted above, many commenters pointed to the consumer protective nature of the GFLA in support of their position that preemption of the statute

³⁹ Writing shortly after the Currency Act and 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).

⁴⁰ "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.

⁴¹ See *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

⁴² See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

⁴³ *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982).

⁴⁴ *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963).

⁴⁵ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Barnett*, 517 U.S. at 31 (quoting *Hines*).

would be inappropriate. Because the origins of Federal preemption are Constitutional, however, the underlying purpose of the state legislation, *albeit* salutary, is not relevant to determining whether the law applies. As explained in *Association of Banks in Insurance, Inc. v. Duryee*,⁴⁶ "[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."⁴⁷

C. Supreme Court Precedents Leading to Barnett

From the earliest years of the national banking system, up to and including a decision rendered only 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.⁴⁸ The Supreme Court stated in one of the first cases to address the role of the national banking system 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."⁴⁹ Subsequent opinions of the Supreme Court have been equally clear about national banks' unique role and status.⁵⁰

The Supreme Court also has recognized the clear intent on the part of Congress to limit the authority of

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

⁴⁷ *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 Franklin Square v. New York*, 347 U.S. 373, 378 (1954).

⁴⁸ See *Beneficial Nat'l Bank*, 123 S.Ct. at 2064.

⁴⁹ *Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 33 (1875).

⁵⁰ See *Marquette Nat'l Bank 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 (1954) ("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.").