

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*,⁵¹ the Court stated that Federal legislation affecting national banks—

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.⁵² The Court in *Farmers' & Mechanics' 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.”⁵³

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 preempting, contrary state law.”⁵⁴ “[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.”⁵⁵

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

This principle has been recognized and applied in a series of recent cases invalidating state and local restrictions upon national bank practices 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 national bank power and therefore was preempted by operation of the Supremacy Clause.

For example, ordinances passed by four municipalities in California and New Jersey specifically to prohibit ATM access fees were promptly enjoined by district court order on grounds that included National Bank Act preemption. In California, the district court entered a preliminary injunction against the fee prohibition ordinances adopted by San Francisco and Santa Monica, and the Ninth Circuit affirmed. On remand, the district court entered a permanent injunction against the ordinances, and the Ninth Circuit once again affirmed.⁵⁶ Similarly, a Federal district court in New Jersey entered temporary restraining orders preventing fee prohibition ordinances adopted by Newark and Woodbridge from becoming effective. The combined case was ultimately settled by each city's consent to a permanent injunction against its ordinance.⁵⁷ A Federal district court in Des Moines declared a longstanding Iowa prohibition on ATM access fees to be in conflict with the national bank power to charge fees and therefore preempted.⁵⁸ For similar reasons, the Fifth Circuit upheld a Federal district court ruling that Federal law displaced a Texas statute that prohibited the charging of fees for cashing checks drawn upon accounts at the payor bank.⁵⁹ A Federal district court in Georgia reached the same conclusion with respect to a Georgia law that similarly attempted to restrict the authority of national banks under Federal law to charge such fees.⁶⁰

Restrictions on national bank activities other than the charging of fees have also been held preempted. Deferring to the OCC's interpretations of the National Bank Act, the Eighth Circuit held that Federal law preempted Iowa restrictions on ATM location, operation, and advertising as applied to national banks.⁶¹ More recently, a Federal district court in California permanently enjoined the California Attorney General and Director of the Department of Consumer Affairs from enforcing a California statute requiring that certain language and information be placed on the billing statements credit card issuers provide their cardholders.⁶² In so doing, the court held that there is “no indication in the NBA that Congress intended to subject that power [to loan money on personal security] to local restriction.”⁶³ Thus, the court applied “the ordinary rule . . . of preemption of contrary state law.”⁶⁴ Contrary state law may be preempted by Federal regulation. “Federal regulations have no less pre-emptive effect than federal statutes.”⁶⁵

E. The Limited Circumstances Under Which State Laws Apply to National Banks

State laws apply to national banks' activities under circumstances that have been described variously by the courts as not altering or conditioning a national bank's ability to exercise a power that Federal law grants to it.⁶⁶ “Thus, states retain some power to regulate national banks in areas such as contracts, debt collection, acquisition and transfer of property, and taxation, zoning, criminal, and tort law.”⁶⁷ Notably, these types of laws do not actually regulate the manner and content of the business of banking authorized for national banks under Federal law, but rather establish the legal infrastructure that surrounds and supports the conduct of that business. They promote a national bank's ability to conduct business; they do not

⁵¹ See *Bank One, Utah, v. Gutttau*, 190 F.3d 844 (8th Cir. 1999), cert. denied sub nom *Foster v. Bank One, Utah*, 529 U.S. 1087 (2000).

⁵² See *Lockyer*, 239 F. Supp. 2d 1000.

⁵³ *Id.* at 1016; see also *Wells Fargo Bank, N.A. v. Boutris*, 252 F. Supp. 2d 1065, 1069 (E.D. Cal. 2003) (“The National Bank Act was enacted to “facilitate * * * “a national banking system,” and “to protect national banks against intrusive regulation by the States.””) (citations omitted).

⁵⁴ *Lockyer*, 239 F. Supp. 2d at 1016.

⁵⁵ *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

⁵⁶ See *Barnett*, 517 U.S. at 33.

⁵⁷ *Bank of America*, 309 F.3d at 559. Notably, “[c]onsumer protection is not reflected in the case law as an area in which the states have traditionally been permitted to regulate national banks.” *Lockyer*, 239 F. Supp. 2d at 1016.

⁵¹ 188 U.S. 220 (1903).

⁵² *Id.* at 229, 231–232 (emphasis added).

⁵³ *Farmers' & Mechanics' Bank*, 91 U.S. at 34 (citation omitted).

⁵⁴ *Barnett*, 517 U.S. at 32. The Supreme Court has recognized that the “business of banking” is not limited to the powers enumerated in section 24(Seventh). *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 America, 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.

⁵⁵ *Barnett*, 517 U.S. at 34.

⁵⁶ See *Bank of America, N.A. v. City & County of San Francisco*, 2000 WL 33376673 (N.D. Cal. June 30, 2000), *aff'd*, *Bank of America*, 309 F.3d 551.

⁵⁷ See *New Jersey Bankers Ass'n v. Township of Woodbridge*, No. CV-00-702 (JAG) (D.N.J. Nov. 8, 2000).

⁵⁸ See *Metrobank v. Foster*, 193 F. Supp. 2d 1156 (S.D. Iowa 2002).

⁵⁹ See *Wells Fargo Bank of Texas, N.A. v. James*, 321 F.3d 488 (5th Cir. 2003).

⁶⁰ See *Bank of America, N.A. v. Sorrell*, 248 F. Supp. 2d 1196 (N.D. Ga. 2002).