Arming the Gun Industry: A Critique of Proposed Legislation Shielding the Gun Industry from Liability

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Article

The Amazing, Elastic, Ever-Expanding Exportation Doctrine and Its Effect on Predatory Lending Regulation

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INTRODUCTION

The recent dramatic growth in subprime lending has reinvigorated initiatives for more effective consumer credit regulation, giving new urgency to one of the perennial debates of consumer credit regulation: Assuming the consumer credit market requires some statutory regulation, are state or federal laws more effective?


3. The broader issue of whether consumer protection is more effectively legislated at the federal or state level reemerges with each round in the uni-
An important factor in the current debate is the increased participation of mainstream financial institutions, such as banks and savings and loan institutions, in the subprime loan market. Some banks have shaped traditional banking products, such as credit cards, to market them to subprime borrowers. Other banks are offering products that heretofore were the sphere of the "fringe banking system," such as payday loans and tax refund anticipation loans. The encroachment of mainstream financial institutions into the subprime consumer credit process. Most recently, it arose in connection with debate over whether consumer protection provisions should be included in the revisions of the Uniform Commercial Code. See, e.g., Mark E. Budnitz, The Revision of U.C.C. Articles Three and Four: A Process Which Excluded Consumer Protection Requires Federal Action, 43 MERCER L. REV. 827, 827-28, 848-50 (1992) (discussing the need for a federal consumer payments law); Kathleen Patchel, Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code, 78 MINN. L. REV. 83, 146-55 (1993) (discussing the role of the uniform laws process in the dynamics of federalism); Edward Rubin, Efficiency, Equity and the Proposed Revision of Articles 3 and 4, 42 ALA. L. REV. 551, 586-92 (1991) (providing an overview of the legislative process that generated the UCC revisions). In the 1960s, the more specific issue of whether consumer credit regulation is most effectively accomplished at the federal or state level arose in the debates eventually leading to the adoption of federal consumer credit regulation. See infra Part I.B-C. The general issue of what combination of federal and state legislation would be most effective in protecting consumers continues to be of interest to many scholars. See, e.g., Roland E. Brandel & Kathleen M. Danchuk-McKeithen, The Relationship of Federal to State Law in Electronic Fund Transfer and Consumer Credit Regulation, 13 U.S.F. L. REV. 331, 331-32 (1979) (discussing the need to harmonize state and federal law in the context of consumer protection); Thomas D. Crandall, It Is Time for a Comprehensive Federal Consumer Credit Code, 58 N.C. L. REV. 1, 3 (1979) (noting the problems with the combination of state and federal regulations).


6. See infra Part II.B.5.c.iii.

7. See infra Part II.B.5.c.ii.
market shines a bright spotlight on a legal power peculiar to federally regulated banks and savings and loan associations.\(^8\) Under the "Exportation Doctrine," such entities have the power to "export" the consumer credit regulation (or lack thereof) from the state in which they are located to all other states where they have customers.

The Exportation Doctrine has evolved from a discrete statutory privilege allowing national banks to charge the same interest rates as other local lenders, to an expansive legal doctrine allowing almost any corporate entity to establish a nationwide consumer lending program unrestrained by any significant state consumer credit laws. Over the past few years, as states and municipalities have become more aggressive about regulating consumer credit through new legislation or increased enforcement of existing statutes, federal banking regulators have become equally aggressive in asserting the preemptive force of the Exportation Doctrine.

The Exportation Doctrine has come to render ineffective state predatory lending laws to an extent that has not been adequately recognized or analyzed in the existing legal literature.\(^9\) Yet it has profound implications for the pitched battles

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8. A third type of depository institution—the credit union—has powers roughly equivalent to the bank and thrift powers that are the topic of this Article. 12 U.S.C. § 1463(g)(1) (2000); James G. Kreissman, Note, Administrative Preemption in Consumer Banking Law, 73 VA. L. REV. 911, 928 (1987). This Article, however, will not address credit unions, for a number of reasons. First, credit unions represent a small proportion of the consumer credit market. In 1998, only 4.2% of the consumer loans in the United States were issued by credit unions. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2001, at 727 (2001). Second, federal credit unions are legally prohibited from charging over 15% on loans, making the most onerous types of predatory lending difficult. 12 U.S.C. § 1757(5)(A)(vi)(I); Organization and Operation of Federal Credit Unions, 12 C.F.R. § 701.21(c)(7)(ii)(c) (2003). Edward M. Gramlich, a governor of the Federal Reserve Board, has "called credit unions the 'good guys' in the battle against abusive lending," Fed: Credit Unions Lending's "Good Guys," AM. BANKER, Feb. 27, 2001, at 24; see also Scott A. Schaaf, From Checks to Cash: The Regulation of the Payday Lending Industry, 5 N.C. BANKING INST. 339, 369–70 (Apr. 2001) (giving examples of credit unions offering fringe banking services, including payday loans, with less exploitative terms, to meet credit needs of underserved communities). This is not to say that credit union lending practices are entirely free from criticism. See, e.g., Study: Fewer NCUA Loans to Minorities, AM. BANKER, Feb. 4, 2002, at 19 (describing results of study by the National Community Reinvestment Coalition).

9. Although the expansion of the Exportation Doctrine has not gone unnoticed by the legal academy, consumer activists, or the plaintiff's bar, the literature lacks any comprehensive analysis of the complete breadth of its cur-

10. To date, most of the recent state predatory lending laws have dealt with mortgage lending. Mortgage loans are subject to a regulatory scheme that is significantly different from the one addressed in this Article. Two excellent recent articles addressing the federal preemption of state regulatory schemes for subprime real estate secured loans are Kathleen C. Engel & Patricia A. McCoy, \textit{A Tale of Three Markets: The Law and Economics of Predatory Lending}, 80 TEX. L. REV. 1255 (2002); and Cathy Lesser Mansfield, \textit{The Road to Subprime "HEL" Was Paved with Good Congressional Intentions: Usury Deregulation and the Subprime Home Equity Market}, 51 S.C. L. REV. 473 (2000). Although real estate lending is not the topic of this Article, some of the general observations and conclusions concerning the relative role of state and federal legislation in consumer credit issues may be applicable to real estate loans as well. See, e.g., infra notes 462–66 and accompanying text (discussing preemption of state real estate lending laws supported by the Exportation Doctrine). Moreover, federal legislation that would enact a preemption provision similar to the one addressed in this Article for real estate loans is currently being considered by Congress. Kelly K. Spors, \textit{Subprime Bill Aims to Mute State Laws: Republican's Proposal to Police Predatory Lending Would Set Weaker National Standards}, WALL ST. J., Feb. 14, 2003, at A4.
tion Doctrine, does it make sense to continue to enact such laws? If the Doctrine is the most powerful regulatory force in the consumer credit market, what role does it play in combating predatory lending? If the Doctrine is not an adequate substitute for state predatory lending laws, should it be curbed or should it be reformed? All of these questions are crucial to the current debates over predatory lending laws.11

This Article will undertake a historical analysis of the evolution of the Exportation Doctrine, demonstrating that the Doctrine has expanded along three distinct dimensions, shaped by different combinations of policy rationales and precedents. These three dimensions are (1) the Doctrine's geographic reach (from intrastate to interstate); (2) its substantive scope (from numerical interest rate to many additional significant credit terms); and (3) the orbit of its beneficiaries (from national banks to any corporate entity that acquires or contracts with a depository institution). Examining each of these dimensions separately, and then analyzing them together in light of the overall debate over the primacy of federal versus state consumer credit regulation, yields a number of significant insights. First, in its current expanded form, the Exportation Doctrine virtually emasculates individual state predatory lending statutes. Second, although the first two dimensions of the Doctrine's expansion are not vulnerable to judicial challenge, the third is. Finally, even though the Doctrine in its expanded form is not entirely justified under the principles of banking law from which it stems, with a bit of tweaking, it could arguably become an extremely effective mechanism for protecting con-

11. The general preemption issue raised by the Exportation Doctrine—the extent to which states retain power to legislate on consumer credit issues—is currently also at issue in a number of other contexts. Currently, two federal regulators are aggressively asserting in regulatory proceedings that no state consumer credit regulations of any type apply to federally chartered banks or thrifts. See infra Part II.C.2–3. In addition, Congress is considering federal legislation to preempt state mortgage laws, Spors, supra note 10, at A4, and state payday lending laws, S. 884, 108th Cong. § 1018 (2003). Congress recently debated preemption of state privacy laws dealing with sharing customer data, in connection with its reauthorization of federal credit reporting laws. See Michelle Heller, Compromise on ID Theft Clears FCRA Bill's Path, AM. BANKER, Nov. 24, 2003, at 1; see also infra note 78. Congress is also considering legislation providing an optional federal charter for insurance companies, which would create an insurance system similar to the dual banking system described in this Article, see infra note 98 and accompanying text, and raise many of the same issues raised by the Exportation Doctrine. Nicole Duran, States Push an Alternative to a Federal Charter, AM. BANKER, Oct. 1, 2002, at 10A.
sumers against predatory lending.

Part I of this Article briefly describes the complex pattern of state and federal consumer credit regulation in the United States. Part II depicts the historic evolution of the Exportation Doctrine along the three dimensions described above, illustrating the dramatic extent to which the Exportation Doctrine has emasculated state consumer credit laws and analyzing the extent to which the various expansions are justified under principles of banking law. Finally, Part III explores the implications of the expanded Exportation Doctrine for the efficacy of state predatory lending laws, and offers proposals for realizing the potential of the Exportation Doctrine as a powerful vehicle for effective consumer credit regulation.

I. THE CONTEXT: A BRIEF DESCRIPTION OF STATE AND FEDERAL REGULATION OF CONSUMER CREDIT

The plethora of laws governing consumer lending has variously been described as, among other things, "a crazy-quilt pattern,"12 "[a] crazy-quilt, patch-work welter,"13 "a patchwork,"14 a "hodgepodge,"15 "an utter hodgepodge,"16 and "a maze, if not a mess, and probably both."17 Traditionally, consumer protection issues such as consumer credit regulation are considered to be primarily the province of state, rather than federal, law.18 Indeed, every state has its own idiosyncratic consumer credit laws. Efforts to promulgate a uniform state consumer credit code, following the model of the Uniform Commercial Code, were largely unsuccessful. In addition to nonuniform state laws, federal consumer credit laws applicable to consumer lenders in all states emerged in the 1960s. In order to fully appreciate the significance of the Exportation Doctrine and the extent to which it undermines state consumer credit laws, it is

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15. NAT'L COMM'N ON CONSUMER FIN., CONSUMER CREDIT IN THE UNITED STATES 94 (1972); SPANOGLLE ET AL., supra note 12, at 7.
17. COST OF CREDIT, supra note 14, § 2.1.
necessary to have a basic understanding of the existing statutory framework upon which it acts.

A. TYPICAL STATE LAWS GOVERNING CONSUMER CREDIT

The typical state consumer credit law starts with a general usury statute—a law limiting the amount of interest that may be charged on a loan. Every state has a basic statute setting a maximum legal interest rate for any type loan, typically between 6% and 10%. Various other statutes carve out exceptions to the general usury limit for specific types of borrowers, lenders, or credit arrangements. These exception statutes typically include some limitations: in exchange for immunity from the general usury limit, lenders must comply with various types of consumer protection provisions, such as prescribed methodologies for calculating interest charges and prepayment rebates, limits on the types of security that can be taken for such loans, limits on the ways in which security that is
given for such loans can be repossessed,\textsuperscript{23} and prohibitions on obtaining confessions of judgment or powers of attorney.\textsuperscript{24}

These exception statutes were enacted to address specific types of credit arrangements offered by particular types of lenders, as they emerged in the consumer credit market. For example, "small loan laws" or "licensed loan laws" were adopted in the first half of the twentieth century to foster the development of a legitimate consumer finance industry to provide small loans to consumers at a time when most banks provided credit only to commercial enterprises.\textsuperscript{25} "Retail installment sales acts" were adopted in the 1950s and 1960s as retailers began offering more credit to finance the purchase of goods or services.\textsuperscript{26} When credit cards burst onto the consumer credit scene, states enacted "open-end credit laws."\textsuperscript{27} However, as the consumer credit market developed in ways that blurred the distinctions among the types of providers and credit plans, these state laws remained largely unchanged.\textsuperscript{28} In today's credit market, for example, banks are eager to make small consumer loans, and retailers offer credit through both installment loans and credit cards issued by special purpose banks that they own.\textsuperscript{29}

The practical consequence of this accretive process of law-


\textsuperscript{24} Illustrative provisions in licensed lending statutes include, e.g., CAL. FIN. CODE § 22331 (West 1999); N.Y. BANKING LAW § 352 (McKinney 2001).

\textsuperscript{25} See generally F.B. Hubachek, The Development of Regulatory Small Loan Laws, 8 LAW & CONTEMP. PROBS. 108 (1941) (discussing the history of small loan laws).


\textsuperscript{28} BARBARA A. CURRAN, AM. BAR ASS’N, TRENDS IN CONSUMER CREDIT LEGISLATION 3 (1965).

making was that functionally identical loans to consumers in the same state could be subject to dramatically different regulations, depending on the corporate identity of the lender (e.g., bank, retailer, or finance company) or the form of the loan (e.g., credit card advance or one-time closed-end loan).\textsuperscript{30} Growing dissatisfaction with this artificially balkanized framework for regulating the emerging national market for consumer credit prompted reform initiatives on both the state and federal levels in the late 1960s. The state initiative proved to be one of the least successful uniform law efforts of the National Conference of Commissioners on Uniform State Laws (Conference of Commissioners): the Uniform Consumer Credit Code (U3C).\textsuperscript{31} The federal initiative led to the enactment of one of the most significant pieces of federal consumer protection legislation, the Consumer Credit Protection Act of 1968 (CCPA).\textsuperscript{32} Let us examine each of these in turn.

B. THE UNIFORM CONSUMER CREDIT CODE

The U3C was an ambitious undertaking. The Prefatory Note to the U3C proclaims:

> Enactment of the [U3C] would abolish the crazy-quilt, patchwork welter of prior laws on consumer credit and replace them by a single new comprehensive law providing a modern, theoretically and pragmatically consistent structure of legal regulation designed to provide an adequate volume of credit at reasonable cost under conditions fair to both consumers and creditors. Upon its enactment, no longer would credit regulation within a State consist of a number of separate uncoordinated statutes governing the activities of different types of creditors in disparate ways.\textsuperscript{33}

The U3C was not, however, a success. Consumer groups vehemently opposed its procreditor slant and failure to provide meaningful consumer protections.\textsuperscript{34} One consumer advocacy

\textsuperscript{30} For an excellent description of the different regulatory schemes that would govern a hypothetical $300 loan for the purchase of a television made to a consumer in the state of Washington, depending on whether the loan was financed by the retailer, a finance company, a small loan company, or a bank, see Crandall, \textit{supra} note 3, at 8–16.


\textsuperscript{33} 1974 U3C, \textit{supra} note 31, Prefatory Note.

group, the National Consumer Law Center (Consumer Center), published a counterproposal in 1970, the National Consumer Act, which was roundly criticized as unreasonably pro-consumer. Both the Conference of Commissioners and the Consumer Center regrouped in the face of the criticism and drafted revised versions of their model law proposals.

Not a single state adopted any of these proposals (Model Laws) entirely as drafted. Eleven states have enacted comprehensive credit legislation containing elements of the various proposals, each including nonuniform variations. The Conference of Commissioners' revised version was the 1974 U3C, supra note 31. The Consumer Center's revised version was the MODEL CONSUMER CREDIT ACT (1973).
ence of Commissioners is no longer pursuing any uniform consumer credit law initiatives. Nevertheless, the Model Laws are significant for a number of reasons. First, over one-fifth of the states did adopt their "modern, theoretically and pragmatically consistent structure" in preference to the "crazy-quilt, patchwork welter" of the nonuniform consumer credit laws. Second, the Model Laws represent the considered judgment of a body of experts in the area as to how every state should regulate consumer credit.

Both the consumer and the industry representatives agreed on some basic organizational principles for the "ideal" consumer credit law. The Model Laws incorporated the basic quid pro quo of the nonuniform state laws that they sought to replace. In exchange for complying with a set of consumer-oriented restrictions on credit agreements and collection practices, lenders could extend credit at rates higher than the state's basic usury limit. None of the consumer protection provisions found in the Model Laws were very different from those in the nonuniform state laws.


40. 1974 U3C, supra note 31, Prefatory Note.

41. Indeed, proponents of the uniform law process claim that it results in laws that are qualitatively superior to the laws drafted by political bodies, because the persons involved in the drafting process are experts in the topic and because of the more deliberative dialogue made possible outside of the political process. See, e.g., Carlyle C. Ring, Jr., The UCC Process—Consensus and Balance, 28 LOY. L.A. L. REV. 287, 305–07 (1994); James J. White, Ex Proprio Vigore, 89 MICH. L. REV. 2096, 2096–97 (1991).

42. The restrictions imposed by the Model Laws consist predominantly of limitations on creditors' rights and remedies aimed at some of the most abusive practices extant in the consumer credit market, such as excessive late fees, 1968 U3C, supra note 31, §§ 2.203, 3.203; 1974 U3C, supra note 31, §§ 2.502, 2.601; NATIONAL CONSUMER ACT § 2.204 (First Final Draft 1970); MODEL CONSUMER CREDIT ACT § 2.206 (1973); prepayment penalties, 1968 U3C, supra note 31, § 2.209; 1974 U3C, supra note 31, § 2.509; NATIONAL CONSUMER ACT § 2.209 (First Final Draft 1970); MODEL CONSUMER CREDIT ACT § 2.210 (1973); balloon payment terms, 1968 U3C, supra note 31, §§ 2.405, 3.402; 1974 U3C, supra note 31, § 3.308; NATIONAL CONSUMER ACT § 2.402 (First Final Draft 1970); MODEL CONSUMER CREDIT ACT § 2.402 (1973); taking security interests in property other than purchase money security interests, 1968 U3C, supra note 31, § 2.407; 1974 U3C, supra note 31, § 3.301; NATIONAL CONSUMER ACT § 2.416 (First Final Draft 1970); MODEL CONSUMER CREDIT ACT § 2.411 (1973); and garnishing wages, 1968 U3C, supra note 31, §§ 2.410, 3.408, 5.104, 5.105; 1974 U3C, supra note 31, §§ 3.305, 5.104, 5.105; NATIONAL CONSUMER ACT §§ 2.403, 5.106(1)(a) (First Final Draft 1970); MODEL
What was radically different about the Model Laws, though, was their comprehensive scope and universal application. In marked contrast to the nonuniform state laws, the Model Laws provided one coherent set of laws to govern all consumer credit transactions, regardless of the corporate identity of the lender—bank, finance company, or retailer. For the most part, the Model Laws imposed the same restrictions on all consumer loans, defined as extensions of credit under $25,000 to individuals for personal, family, household, or agricultural purposes. Thus, the Model Laws consolidated the regulation of the historically distinct, but functionally converging, types of transactions addressed by the nonuniform consumer credit laws under one statutory umbrella.

The one area where most of the Model Laws did not impose uniformity is the area of usury rates. The U3C provided for a graduated series of permissible interest rates, starting at a base rate of 18% for all consumer loans, with higher rates available for certain types of credit or lenders. The particular usury rates proposed in the U3C were chosen because, at the time, they were considered extremely high. They were in-

CONSUMER CREDIT ACT §§ 2.405, 7.110(1)(a) (1973).

43. The 1974 U3C drafters explained: "In moving away from the segmented controls of particular types of credit grantors in consumer credit laws prior to the U3C to a single comprehensive statute dealing with consumer credit generally, it is believed that competition has been and will be enhanced." 1974 U3C, supra note 31, Prefatory Note.

44. But see Crandall, supra note 3, at 19 (discussing differences in U3C's treatment of credit sales and loans).


46. The one exception is the National Consumer Act, which would subject all forms of consumer credit transactions to the same usury limits. NATIONAL CONSUMER ACT § 2.201, cmt. 2 (First Final Draft 1970).


48. Higher rates were available to sellers of consumer goods offering open-end credit, 1968 U3C, supra note 31, §§ 2.201, 2.207; 1974 U3C, supra note 31, §§ 2.201, 2.202; licensed lenders, 1968 U3C, supra note 31, § 3.506; 1974 U3C, supra note 31, § 2.401(2); and lenders already subject to state or federal supervision, such as banks and savings and loan associations, 1968 U3C, supra note 31, § 3.502; 1974 U3C, supra note 31, § 2.301.

49. See Walter D. Malcolm, The Uniform Consumer Credit Code, 25 BUS. LAW. 937, 946 (1970) (addressing how in the first year after its conception, the U3C's rates "produced cries of outrage"); George W. Stengel, Should States Adopt the Uniform Consumer Credit Code?, 60 KY. L.J. 8, 42 (1971) ("Among
tended to function as ceilings, rather than baseline rates for consumer credit. In theory, these high ceilings would create incentives for reputable lenders willing to comply with the basic consumer protection provisions established in the U3C to enter the consumer lending market, protecting consumers who would otherwise have to resort to more exploitative loan sharks. The competition generated by this attractive free market would cause lenders to charge rates lower than these ceilings. The drafters believed that "the most effective means of limiting prices" would be the comparison shopping of borrowers, as facilitated by the new federal disclosure laws, within this thriving free market.

This reliance on the free market to regulate consumer

the numerous objections to the UCCC, the most frequent was its high interest rates.

50. 1968 U3C, supra note 31, § 2.201, cmt. 1; 1974 U3C, supra note 31, Prefatory Note; Moo, Consumerism, supra note 36, at 960 (arguing against the notion that creditors would charge the ceiling credit rates); Stengel, supra note 49, at 42 (stating that the U3C's rates "were intended merely as ceilings").

51. See 1968 U3C, supra note 31, § 2.201, cmt. 1(3) ("By design the license required to make supervised loans is made readily accessible to those showing financial responsibility, character, and fitness."). But see Harper, supra note 34, at 61–62 ("The code fails to provide necessary assurances for curbing the loan shark or any of his modern counterparts.").

52. See 1968 U3C, supra note 31, § 2.201, cmt. 1; 1974 U3C, supra note 31, Prefatory Note; see also Moo, Consumerism, supra note 36, at 960–61 ("The philosophy of the code provisions is to permit and encourage competition among all kinds of credit granting institutions . . ."); Stengel, supra note 49, at 42 ("[R]ates may be reduced by the competition provided by freedom of entry."). But see Robert L. Jordan & William D. Warren, The Uniform Consumer Credit Code, 68 COLUM. L. REV. 387, 391–92 (1968) (arguing for free market competition, but against the effectiveness of rate ceilings). The drafters of the U3C expected that the uniform rate ceiling for all lenders, regardless of the nature of the creditor, type of item financed, or form of credit granted, would reduce "[s]egmentation of the market for credit by differentiated rate ceilings which tends to reduce competition and introduce rigidities into the market that benefit a few suppliers at the expense of others and work to the disadvantage of consumers." 1968 U3C, supra note 31, § 2.201, cmt. 1(2). Similarly, the lack of barriers to entry into the market was expected to foster rate competition. The drafters noted that

the license required to make supervised loans is made readily accessible to those showing financial responsibility, character, and fitness. Provisions for minimum financial assets and for a showing of convenience and advantage have been deliberately omitted, since their inclusion would tend to restrict competition and require establishment of rates, rather than ceilings.

Id. § 2.201, cmt. 1(3).

53. 1968 U3C, supra note 31, § 2.201, cmt. 1(1). The new federal disclosure law referred to is the Truth in Lending Act, discussed infra Part I.C.
credit rates was one of the most controversial aspects of the U3C. Both of the Consumer Center's proposals rejected this idea. States that adopted the U3C also rejected the idea, uniformly selecting rates lower than those proposed by the U3C.

C. FEDERAL LAW: THE CONSUMER CREDIT PROTECTION ACT

The CCPA, enacted in 1968, was "the first modern consumer protection statute." The centerpiece of the CCPA was the Truth in Lending Act (TILA), which was subsequently supplemented by the Fair Credit Reporting Act in 1970, the Fair Credit Billing Act and the Equal Credit Opportunity Act in 1974, and the Fair Debt Collection Practices Act in 1977.


55. NATIONAL CONSUMER ACT § 2.201, cmt. 2 (First Final Draft 1970); MODEL CONSUMER CREDIT ACT § 2.202 (1973).

56. See Crandall, supra note 3, at 25.


62. In 1978, the CCPA was further amended by addition of Title IX, governing electronic fund transfers—the use of debit cards to access funds depos-
While each of these laws focuses on a particular substantive aspect of consumer protection (respectively, misleading disclosure of credit terms, abuses of consumer credit reports, billing errors, discrimination in lending, and abusive debt collection practices), with minor variations, they all follow the same basic structural “template.” This template is characterized by three features: (1) its universal application to all consumer credit transactions, regardless of the identity of the lender or the type of credit extended; (2) its multilayered enforcement scheme; and (3) its declared deference to more protective state consumer protection laws.

1. Universal Application

The CCPA applies to all consumer credit transactions regardless of the identity of the lender. Any person or entity in the consumer credit business, whether a bank, finance company, retailer, credit reporting agency, or third-party debt collector, is equally subject to the relevant provisions of the CCPA. Consumer credit transactions covered by the CCPA generally include all extensions of credit of $25,000 or less to


63. Rubin, supra note 57, at 234.

64. TILA’s definition of a “creditor” is broadly drafted to include any person who regularly extends consumer credit “which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required.” 15 U.S.C. § 1602(f) (2000). The same definition applies to the Fair Credit Billing Act, which was inserted into TILA. See id. §§ 1666a-j. The Equal Credit Opportunity Act’s definition is even broader, defining as a creditor “any person who regularly extends, renews, or continues credit,” as well as anyone who arranges or is assigned credit. See id. § 1691a(e).

65. The Fair Credit Reporting Act applies to all entities who use or furnish information for “consumer reports.” Id. § 1681t. “Consumer reports” are defined to include:

any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for . . . credit . . . to be used primarily for personal, family, or household purposes. Id. § 1681a(d)(1) (footnote omitted).

66. See id. § 1692a(6). Creditors are subject to the Fair Debt Collection Practices Act if they use a name other than their own, suggesting that a third party is attempting to collect the debt. Id.
individuals for personal, family, or household purposes.\textsuperscript{67}

2. Multi-Layered Enforcement Scheme

The CCPA’s enforcement scheme is complex. The Board of Governors of the Federal Reserve System (Federal Reserve) is designated as the federal agency responsible for drafting the regulations that implement the statute.\textsuperscript{68} Compliance with those regulations, however, is delegated to whatever federal agency has primary enforcement responsibility for the particular type of lender involved. Thus, for example, the CCPA is enforced for national banks by the Office of the Comptroller of the Currency (OCC), and for savings and loan associations by the Office of Thrift Supervision (OTS), both bureaus of the Treasury Department.\textsuperscript{69} If no federal agency has primary enforcement responsibility for any particular type of lender (as is the case with finance companies or retailers), the Federal Trade Commission (FTC) is responsible for enforcing compliance.\textsuperscript{70} The appropriate agency can use whatever general enforcement powers it has over the lender to enforce compliance with the CCPA.\textsuperscript{71} In addition to this administrative enforcement scheme, the CCPA provides a private right of action to consumers.\textsuperscript{72}

3. Deference to State Law

By declining to totally preempt the field of consumer credit

\textsuperscript{67} See id. §§ 1602(h), 1603(1), 1603(3). The Equal Credit Opportunity Act’s definition of “credit” is not limited to consumer loans and includes even incidental loans. See id. § 1691a(d). The Fair Debt Collection Practices Act’s definition of “debt,” while limited to consumer debt, dispenses with the $25,000 limit. See id. § 1692a(5).

\textsuperscript{68} See id. §§ 1604, 1691b. The Fair Credit Reporting Act differs slightly from other sections of the CCPA in that federal banking agencies have authority to jointly prescribe regulations for entities under their respective jurisdictions. See id. § 1681s(e).

\textsuperscript{69} See id. §§ 1607(a), 1681s(b), 1691c(a). The CCPA is enforced for state banks that are members of the Federal Reserve System by the Federal Reserve. See id. §§ 1607(a), 1681s(b), 1691c(a). The Federal Deposit Insurance Corporation enforces the CCPA for state banks that do not belong to the Federal Reserve System. See id. §§ 1607(a), 1681s(b), 1691c(a). With respect to the Fair Credit Reporting Act, state law enforcement officials are also given back-up enforcement authority. See id. § 1681s(c). For a general explanation of the regulatory scheme applicable to the different types of depository institutions, see infra Part II.A.

\textsuperscript{70} See 15 U.S.C. §§ 1607(c), 1681s(a), 1691c(c), 1692l(a).

\textsuperscript{71} See id. §§ 1607(b), 1681s(d), 1691c(b), 1692l(c).

\textsuperscript{72} See id. §§ 1640(a), 1681n, 1691e, 1692k. Some violations of the CCPA are also subject to criminal penalties. Id. §§ 1611, 1681q.
disclosure regulation in enacting the CCPA, Congress at least rhetorically acknowledged the traditional deference to state legislators in matters related to consumer protection. 73 The CCPA provides that lenders must comply with both the CCPA and with any other disclosure requirements imposed by state law, "except to the extent that those laws are inconsistent with [the CCPA], and then only to the extent of the inconsistency." 74 Moreover, the Federal Reserve is given the power to fully exempt from the CCPA "any class of credit transactions within any State if it determines that under the law of that State that class of transactions is subject to requirements substantially similar to those imposed under this part, and that there is adequate provision for enforcement." 75

In practice, states do not retain much power to enact meaningful state laws in areas covered by the CCPA. Determinations by the Federal Reserve that state laws and enforcement provisions are adequate to replace the CCPA are rare. 76 Attempts by states to enact legislation that is more restrictive than the CCPA are rare. 77 Moreover, recent amendments to the CCPA have completely preempted related state laws. 78

73. See supra note 18 and accompanying text.
74. See 15 U.S.C. §§ 1610(a)(1), 1666j(a), 1681t(a), 1691d(f), 1692n.
75. See id. §§ 1633, 1666j(b), 1691d(g), 1692(o). The Fair Credit Reporting Act chapter of the CCPA lacks a similar provision.
76. Only Maine, Connecticut, Massachusetts, Oklahoma, and Wyoming have been granted exemptions from portions of TILA. FRB Reg. § 226.29a, State Exemptions, FRB Official Staff Commentary, 1 Consumer Cred. Guide (CCH) ¶ 3451, at 3451.04 (Oct. 1, 1982) (amended Mar. 31, 1983). These exemptions all exclude federally chartered financial institutions. Since a state does not have authority to examine federally chartered financial institutions, the states obtaining the exemptions cannot establish that there is adequate provision for enforcing state law with respect to such lenders. Rohner, Part II, supra note 9, at 361. Only Maine has been granted an exemption from the Fair Debt Collection Practices Act. FTC Notice of Maine Exemption from the Fair Debt Collection Practices Act, 60 Fed. Reg. 66,972 (Dec. 27, 1995). No exemptions have been granted with respect to the Equal Credit Opportunity Act.
77. One such recent attempt, a California statute requiring credit card issuers to include disclosures about the effect of making only minimum payments on outstanding credit card balances, was successfully challenged in court by a coalition of federal depository institutions. Am. Bankers Ass'n v. Lockyer, 239 F. Supp. 2d 1000, 1022 (E.D. Cal. 2002). The court held that TILA's preservation of a state's right to enact stricter disclosure requirements did not mean such a state law could not be preempted under other federal laws. See id. at 1008–09; see also infra notes 205–15 and accompanying text.
78. A 1988 amendment to TILA, adding significant disclosure requirements with respect to credit card applications, solicitations, and renewal notices, preempts state laws with respect to these new requirements. Fair Credit

An additional layer of regulation affecting consumer credit is based on the general prohibition in section 5 of the Federal Trade Commission Act of 191479 (FTCA) of "unfair or deceptive acts or practices in or affecting commerce."80 To the extent that consumer credit practices involve unfair or deceptive practices, they are subject to the FTCA.

While the same statutory prescription covers all lenders, regardless of corporate identity, the FTCA is administered through the same array of federal agencies that administer the CCPA. The FTCA is administered by the primary federal regulatory agencies of banks and savings and loan associations for such institutions, and by the FTC for other lenders.81

On two occasions, the FTC has determined that particular practices in the consumer credit industry merited regulation as unfair or deceptive practices. First, in 1975, the FTC promulgated its "Holder in Due Course Rule,"82 which protects consumers' rights to assert claims and defenses arising from the transaction underlying a consumer loan when the loan is transferred to or financed by a third party. The Holder in Due Course Rule applies to all sellers of consumer goods who offer
credit either themselves or through arrangements with third parties. The rule does not specifically preempt any state law, but rather prohibits sellers and creditors from using contracts containing language that would deny consumers protections provided under state contract and commercial laws.

Second, in 1984, the FTC promulgated its "Trade Regulation Rule on Credit Practices." The Credit Practices Rule declares specific consumer credit practices—such as confessions of judgment, certain assignments of wages, failure to provide clear disclosures of liability to cosigners, and pyramiding of late charges—to be unfair acts or practices under the FTCA. Federal banking regulators have promulgated substantially similar regulations applicable to banks and savings and loan associations. All of the versions of the Credit Practices Rule promulgated by the various agencies include language from the TILA template providing that the rule can be preempted by state law if the appropriate agency determines that state law "affords a level of protection to consumers that is substantially equivalent to, or greater than, the protection afforded" in the federal rule. Again, following the TILA model, such determinations are rare.

83. 16 C.F.R. §§ 433.1(c), 443.1(e) (2003). The Holder in Due Course Rule does not apply to third-party credit card transactions. Id. § 433.1(c). The CCPA addresses the use of the rule in the credit card context. 15 U.S.C. § 1666(i) (2000).
84. See JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 14-9(a), at 536 (5th ed. 2000).
87. Id. § 444.2(a)(3) (permitting assignments of wages that are revocable at the will of the debtor, pursuant to payroll deduction plans or preauthorized payment plans entered into at the time of the transaction, or applicable only to wages already earned).
88. Id. § 444.3.
89. Id. § 444.4.
91. Id. § 535.5; 16 C.F.R. § 444.5; Unfair or Deceptive Acts or Practices, 12 C.F.R. § 227.16 (2003).
92. Such determinations have been made by the FTC with respect to California (only regarding the cosigner disclosure requirements), New York, and Wisconsin, FTC Credit Practices Rule State Exemptions, FTC Rul. § 444.5, 6 Consumer Cred. Guide (CCH) ¶ 10,475 at 10,475.15, 20, 45, 90 (Feb. 2, 1989); by the Federal Reserve with respect to California, New York, and Wisconsin, FRB Reg. § 227.16, State Exemptions, ¶ 10,516, at 10,516.10, 55, 90 (Mar. 7, 1990); and by the OTS's predecessor, the FHLBB, with respect to Wisconsin, OTS Credit Practices Rule State Exemptions, OTS Reg. § 535.5,
E. SUMMARY OF STATUTORY FRAMEWORK OF CONSUMER CREDIT REGULATION

The existing statutory framework for consumer credit regulation is based on the presumption that consumer protection is the province of states, rather than the federal government. Each state has its own statutory scheme for consumer credit regulation, structured around a blanket statutory prohibition on charging interest above a certain minimal rate, unless the loan qualifies for some exception. The exceptions are typically granted in exchange for regulation of the lender or of the type of loan; they were enacted by states in response to the emergence of certain types of loans or lenders in the market, but they no longer reflect the realities of the current credit market. The efforts of the Conference of Commissioners to replace these historical accretions with a comprehensive statute providing for equal treatment of lenders were largely unsuccessful.

Imposed on this layer of state laws are two federal consumer protection statutes, the CCPA and the FTCA. Both of these statutes apply equally to all lenders, although they are administered by different federal regulatory agencies for different lenders. Both statutes also, at least in theory, evince some degree of respect for the authority of states over consumer protection issues, giving effect to state statutes that provide equal or greater protection to consumers than the federal statutes. In practice, however, state statutes dealing with these topics rarely trump the federal laws.

On top of this already complex statutory structure is perched yet another statutory scheme governing some of the most significant players in the consumer finance market—federally regulated financial institutions. This statutory scheme has had the effect of undermining state consumer credit protection laws that are, at least rhetorically, bastions of consumer protection.

II. THE STORY: THE EXPANSION OF THE EXPORTATION DOCTRINE

Consumer lenders chartered as banks or thrifts93 (referred

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93. The term "thrifts" refers to financial institutions chartered as savings and loan associations or savings banks. Historically, thrifts were distinguished from banks by their more limited focus on accepting savings deposits and mak-
to collectively as "depository institutions") are treated differently from other consumer lenders in significant respects. As a result of the unique role that they play as financial intermediaries, depository institutions are among the most heavily regulated business operations in the country and are subject to a complex array of federal and state laws. A byproduct of the complex interplay of federal and state law is that, owing to the Exportation Doctrine, depository institutions have gradually acquired significant power to ignore many state consumer credit laws. More recently, these same powers have to some degree become available to other types of consumer lenders, such as retailers and check-cashing outlets.

This section will first explain the general framework of laws applicable to depository institutions and then examine the evolution of the Exportation Doctrine within that general framework.

A. BANKING REGULATION 101—WHY ARE DEPOSITORY INSTITUTIONS SPECIAL?

Depository institutions differ from other consumer lenders in that they operate under charters granted by either a state or the federal government. This charter comes with significant privileges—such as the power to accept federally insured deposits, and access to funding through federal reserve banks and federal home loan banks—which are commensurate with the public service role these depository institutions play as financing consumer and mortgage loans. See MICHAEL P. MALLOY, PRINCIPLES OF BANK REGULATION 24–26 (2d ed. 2003). For a general discussion of the difference between bank and thrift powers, see Mark E. Wohar, The Value of a Thrift Charter: An Economic Comparison of Bank and Thrift Powers, 45 CONSUMER FIN. L.Q. REP. 358 (1991). While thrifts have gradually acquired the power to engage in more commercial banking activities, such activities are still subject to limits, ensuring the continued focus of thrifts on consumer, rather than commercial, lending. Michael Roster et al., Commercial Banks vs. Thrift Institutions: A Legal Analysis, 45 CONSUMER FIN. L.Q. REP. 353, 354–55 (1991).

94. The term "depository institution" generally refers to financial institutions that accept federally insured deposits. See MALLOY, supra note 93, at 21–22. This category also includes credit unions. Id.; see also supra note 8. For the purposes of this Article, the term "depository institution" will be used to refer collectively to banks, savings and loan associations, and savings banks.

95. This subsection title is suggested by the former President of the Federal Reserve Bank of Minneapolis, E. Gerald Corrigan, Are Banks Special?, 1982 ANNUAL REPORT OF FEDERAL RESERVE BANK OF MINNEAPOLIS, reprinted in HOWELL E. JACKSON & EDWARD L. SYMONS, JR., REGULATION OF FINANCIAL INSTITUTIONS 27 (1999).
cial intermediaries. However, these privileges have a cost. Depository institutions are subject to extensive regulation of almost every facet of their day-to-day operations.

This comprehensive regulatory scheme is further complicated by the fact that the banking industry consists of two parallel systems of banks and thrifts—those that operate under federal charters, and those that operate under state charters. Under this "dual banking system," depository institutions can choose to be chartered and primarily regulated either by the federal government or by a state government. A state-chartered bank or thrift will receive its charter and be primarily regulated by the appropriate state banking regulator. A federally chartered bank will receive its charter and be primarily regulated by a federal regulatory agency, the OCC. A federally chartered thrift will receive its charter and be primarily regulated by another federal regulatory agency, theOTS.

The choice of one primary regulator does not, however, wholly insulate a depository institution from the jurisdiction of the other. State-chartered depository institutions are subject

96. For general descriptions of the unique functions depository institutions perform as financial intermediaries, see JONATHAN R. MACEY ET AL., BANKING LAW AND REGULATION 48–65 (3d ed. 2001); PATRICIA A. MCCOY, BANKING LAW MANUAL § 1.02 (2d ed. 2002); Corrigan, supra note 95.

97. For a cogent overview of the regulatory burden on depository institutions, see the U.S. General Accounting Office's summary of a flurry of government and industry analyses of this topic in the early 1990s, GEN. ACCOUNTING OFFICE, REGULATORY BURDEN: RECENT STUDIES, INDUSTRY ISSUES, AND AGENCY INITIATIVES (GAO/GGD-94-28, 1993). For an excellent discussion of whether the regulatory burden remains justifiable given changes in the banking industry, see MCCOY, supra note 96, § 1.02, and sources cited therein.


100. Id. § 1463.

101. For an excellent discussion of the labyrinthian complexity of the overlapping jurisdictions of the various banking agencies for the various types of depository institutions (including a diagram), see MALLOY, supra note 93, at 14–20; see also Kenneth E. Scott, The Patchwork Quilt: State and Federal Roles in Bank Regulation, 32 STAN. L. REV. 687, 695–734 (1980) (explaining the regulation of banks).
to some federal laws that are applicable to all depository institutions, regardless of charter. 102 State-chartered banks typically must also maintain federal deposit insurance, 103 and accepting such insurance subjects the depository institution to substantial federal regulation and to the jurisdiction of the Federal Deposit Insurance Corporation (FDIC). 104 State-chartered banks that choose to be members of the Federal Reserve system are subject to the jurisdiction of the Federal Reserve. 105 Similarly, state-chartered thrifts typically must maintain federal deposit insurance, 106 subjecting them to the jurisdiction of the FDIC and the OTS. 107 In addition, some federal laws, like the consumer protection laws discussed in the previous section, apply equally to all consumer lenders regardless of charter.

At the same time, federally chartered depository institutions are subject to some state regulation. Federally chartered depository institutions are "instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States." 108 Through the operation of the Supremacy Clause, 109 the federal

102. For example, the Federal Reserve Act requires all depository institutions to maintain certain levels of reserves against outstanding deposits. 12 U.S.C. § 461(b)(2)(A).

103. Many state chartering laws require banks to maintain federal deposit insurance. Helen A. Garten, Devolution and Deregulation: The Paradox of Financial Reform, 14 YALE L. & POL'Y REV. 65, 79 n.72 (1996). In addition, federal deposit insurance is a requirement for membership in the federal reserve system, 12 U.S.C. § 329, and for state banks organized in holding company structures, 12 U.S.C. § 1842(e). Moreover, as a practical matter, federal deposit insurance is regarded as a competitive necessity. See MALLOY, supra note 93, at 56–57 (describing restrictions on the operations of non-FDIC-insured depository institutions); Garten, supra, at 79 n.72 (stating that federal deposit insurance might be less costly than potential losses).

104. See, e.g., 12 U.S.C. § 1831a (restricting activities of state-chartered, federally insured banks); 12 U.S.C. § 1831m (subjecting operations of all federally insured depository institutions to federal safety and soundness standards).

105. Id. § 1813(q)(2).

106. Again, as a practical matter, federal deposit insurance is a necessity, even if not mandated by a particular state's statutes. MALLOY, supra note 93, at 56–57.


109. U.S. CONST. art. VI, cl. 2. Following general preemption jurisprudence, state law otherwise applicable to federal depository institutions is preempted by federal law if it expressly conflicts with a federal law and either frustrates the purpose for which federal depository institutions were created or impairs the efficiency of federal depository institutions in discharging the
laws creating and regulating these depository institutions provide their fundamental legal framework. These laws, however, leave some regulatory aspects to state law, either because federal law does not address the area or because federal law expressly provides for state governance. To illustrate the former, federal law does not provide a unique system of general contract, tort, or property law; consequently, federal depository institutions for the most part are subject to the laws of the state where they are located with respect to such matters. To illustrate the latter, federal banking law expressly defers to the laws of the state where a national bank is located to determine the extent to which a national bank may establish branches within a state.

As a consumer protection issue, consumer credit regulation traditionally has been considered the province of state law. The fact that there is no comprehensive federal law governing the extension of consumer credit would seem to support that conclusion. Arguably, the areas of consumer credit regulation that are not governed by the CCPA and the FTCA should be left to state law. Under the Exportation Doctrine, however, depository institutions are given the power to select one particular state’s consumer credit regulation and give it preemptive effect over all other state consumer credit laws. Although this preemption power originated with a relatively modest statutory provision setting interest rates for national banks, over the years it has evolved to effectively exempt most depository institutions from the reach of significant state consumer credit laws and to enable corporate entities which are not depository institutions to effectively assert the same powers.

Duties imposed on them by federal law. Davis, 161 U.S. at 283. For a detailed examination of federal preemption of state law in the banking area, including a summary of general federal preemption principles, see Duncan, supra note 9.

110. First Nat'l Bank v. Kentucky, 76 U.S. (9 Wall.) 353, 362 (1869); see also Bank of Am. v. City of San Francisco, 309 F.3d 551, 559 (9th Cir. 2002), cert. denied, 123 S. Ct. 2220 (2003); Kreissman, supra note 8, at 917 (citing Schramm v. Bank of Cal., 20 P.2d 1093 (Or. 1933)).

111. 12 U.S.C. § 36(c) (2000). Fiduciary powers of national banks are also determined by the law of the state where the bank is located. Id. § 92a(a).

112. See supra note 18 and accompanying text.
B. THE DEVELOPMENT OF THE EXPORTATION DOCTRINE

1. Section 85 of the National Bank Act and the "Most Favored Lender Doctrine"

The Exportation Doctrine originated in the National Bank Act (NBA), an 1864 law establishing a national banking system. Congress created the national banking system to effectuate a number of federal policies, most importantly creating a national currency and a national market for federal bonds to finance the Civil War. Congress did not feel it could effectuate these policies through the existing network of state-chartered banks, so it established a competing system of national banks. The success of this national banking system depended on the creation of a national bank charter that provided an attractive alternative to the existing state bank charters.

Among the incentives offered to national banks was the power to charge for loans interest at the rate allowed by the laws of the state or territory where the bank is located, and no more; except that where, by the laws of any state, a different rate is limited for banks of issue, organized under state laws, the rate so limited shall be allowed for [national banks] organized [or existing] in any such state.

The Supreme Court made clear the value of this section 85 of the NBA (12 U.S.C. § 85) as one of the "perks" of a national bank charter the first time it had occasion to examine it, in Tiffany v. National Bank of Missouri. Tiffany considered a Missouri law that established a usury limit of 8% for its state banks; all other lenders in the state were permitted to charge 10%. The National Bank of the State of Missouri relied on

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115. Miller, supra note 98, at 14.
117. 85 U.S. (18 Wall.) 409 (1873).
118. Id. at 411. This was not an uncommon situation at the time. Especially in the western states, where banks were distrusted and disfavored, the law often established lower usury limits for banks. JACKSON & SYMONS, supra
what is now § 85 as its authority to charge 9% interest to its customers. The Supreme Court sanctioned this practice, explaining that in enacting the NBA, Congress intended to bestow upon national banks the status of "national favorites." Section 85 was intended to prevent state interest rate legislation disfavoring banks from forcing national banks out of business. Under what came to be known as the "Most Favored Lender Doctrine," § 85 consistently has been interpreted to permit national banks to make loans at the highest rates permitted any type of lender under the laws of the state in which the bank is located.

To understand how § 85, a statutory provision aimed at preventing states from destroying the national banking system in its infancy, came to justify a legal doctrine preempting virtually all significant state consumer credit laws, we must examine three distinct dimensions of the evolution of the Exportation Doctrine—the expansion of its geographic reach (from intrastate to interstate), the expansion of its substantive scope (from numerical interest rate to many additional significant credit terms), and the expansion of its orbit of beneficiaries (from national banks to any corporate entity that acquires or contracts with any sort of depository institution).

Note 95, at 67.

119. Tiffany, 85 U.S. at 410–11.

120. Id. at 413.

121. Id. at 412–13. The Court explained that if national banks were restricted to the rates allowed by the statutes of the State to banks which might be authorized by the State laws, unfriendly legislation might make their existence in the State impossible. A rate of interest might be prescribed so low that banking could not be carried on, except at a certain loss. The only mode of guarding against such contingencies was that which, we think, Congress adopted. It was to allow to national associations the rate allowed by the State to natural persons generally, and a higher rate, if State banks of issue were authorized to charge a higher rate.

Id.

2. Expanding the Geographic Reach of § 85

a. The Genesis of the Exportation Doctrine—The Marquette Decision

In 1978, the Supreme Court dramatically augmented the power of § 85, articulating what came to be known as the “Exportation Doctrine.” In *Marquette National Bank v. First of Omaha Service Corp.*, the Court held that under § 85, a national bank in Nebraska could “export” the credit card interest rate permitted under Nebraska law to cardholders living in Minnesota, where this rate was usurious. In reaching this decision, the Court focused on the meaning of the term “located” in the part of § 85 authorizing national banks to charge “interest at the rate allowed by the laws of the State, Territory, or District where the bank is located.” Was this Nebraska bank “located” in Nebraska, where it had its physical presence, or in Minnesota, where its customers were using their credit cards?

The Court noted that the bank’s national charter gave its address as Nebraska, and that the bank had no branches in Minnesota. Indeed, under federal banking law at the time, the bank could not legally have had any branches in Minnesota. The Court also noted that the bank conducted most of the significant commercial activity related to the loan in the state of Nebraska—assessment of finance charges, receipt of payments, and credit approvals. The fact that the bank systematically solicited customers in Minnesota did not affect its location for purposes of § 85. Nor did the fact that the bank’s credit cards were being slapped onto counters in stores in Minnesota affect the bank’s location. Indeed, the Court explained:

If the location of the bank were to depend on the whereabouts of each credit card transaction, the meaning of the term “located” would be so stretched as to throw into confusion the complex system of modern interstate banking. A national bank could never be certain whether its contacts with residents of foreign States were sufficient to alter its location for purposes of § 85. We do not choose to invite these difficulties by rendering so elastic the term “located.”

124. *Id.* at 299.
125. *Id.* at 308.
126. *Id.* at 309.
127. *Id.*
128. *Id.* at 311–12.
129. *Id.* at 312.
For the Marquette Court, the bank's unambiguous physical presence in and only in the state of Nebraska was enough to anchor the bank's "location" to the state of Nebraska. The Court focused on what it deemed to be the one inalterable feature of a bank's interstate lending program—the bank's physical location, limited by law at the time to the borders of its state. Marquette was decided, however, at what turned out to be the infancy of interstate banking; since 1978, national banks have acquired the technological and legal capability to maintain physical presences of many types in many states.

The development of computer-generated data management technologies has enabled banks to offer standardized, nationwide credit card programs to consumers across the country. Today, the location of a bank's charter address or main headquarters often bears little relation to the physical location of its customers, the computers generating the data required for making credit decisions, or the legions of employees processing applications, payments, or other mailings. This functional dispersal of bank operations presaged the advent of interstate branching.

b. Interpreting the Exportation Doctrine in the Era of Interstate Banking

In 1994, Congress finally acknowledged the reality of nationwide banking operations by enacting the Riegle-Neal Interstate Banking and Branching Efficiency Act (Riegle-Neal). Riegle-Neal gives national banks the power to branch across state lines. Riegle-Neal's alteration of Marquette's basic assumptions (that the Nebraska bank did not, and legally could not, have a branch in Minnesota) raises questions about the continued vitality of the decision. In enacting Riegle-Neal, how-

130. Id. at 309.
131. Id.
132. See infra notes 150–52 and accompanying text.
ever, Congress declined to address directly the Exportation Doctrine. Instead, Congress stated merely, "No provision of this title . . . shall be construed as affecting in any way . . . the applicability of [§ 85]."135

To what was Congress referring? What was the “applicability” of § 85 in the context of interstate branching? The Supreme Court has not reconsidered the geographic reach of the Exportation Doctrine since Marquette, and thus has not clarified how subsequent changes in technology and legal restrictions affect exportation.136 Since Marquette, the applicability of § 85 has been construed primarily in administrative actions, which courts have occasionally reviewed. The most active agency in this area has been the OCC, whose interpretations have evolved in two distinct stages.

First, when banks could not branch across state borders, the OCC issued a series of interpretations delineating how much of a physical presence a bank could have in a state and still not be considered to have a branch there.137 Although these interpretations were not issued in connection with § 85 issues, they are significant for § 85 analysis. Marquette’s holding that the Nebraska bank was not “located” in Minnesota was based in part on the fact that the Nebraska bank had no branches in Minnesota. For banks exporting rates into states where they had some sort of physical presence, then, it was important to ensure that such presence did not rise to the level of a branch, thereby taking them out of the parameters of Marquette.

Second, after banks were granted the authority to branch across state borders, the OCC issued a series of interpretations articulating the view that a bank could be “located” in more than one state and “export” the rates permitted at any of its locations, provided it “makes” the loan from that location.138 These interpretations permit a bank to choose the most favorable rates available in any of the states where it has banking operations, and to charge those rates to all its customers re-

136. The Court has considered the substantive scope of the Exportation Doctrine, considering the scope of what is exportable as “interest” under § 85. See infra Part II.B.3. However, the Court has declined to reconsider the effect of a significant presence (arguably constituting a branch) in the state into which a bank is exporting rates. Cades v. H&R Block, Inc., 515 U.S. 1103 (1995), denying cert. to 43 F.3d 869 (4th Cir. 1994).
137. See infra notes 139–60 and accompanying text.
138. See infra Part II.B.2.b.ii.
gardless of where they live. Let us examine these two interpretative strands.

i. OCC Branch Interpretations Before Riegle-Neal

In the decades before the enactment of Riegle-Neal, banks were becoming increasingly frustrated by their inability to respond to customers' demands for services commensurate with developing nationwide markets. When banks tried to provide services at locations other than their main offices or permitted branches, they bumped up against the NBA's restrictive approach to bank branching. The NBA permitted a national bank to establish a branch only at locations permitted under the laws of the state where the bank was located. Not only did all state laws prohibit branching across state lines, but many state laws placed extensive restrictions on the number and geographic location of branches within state lines.

Creative bankers began to push the limits of these restrictions by attempting to offer services to customers at facilities carefully structured to avoid the NBA's definition of a "branch." The NBA defines a "branch" to include any "place of business . . . at which deposits are received, or checks paid, or money lent." Banks tested the parameters of this definition by, inter alia, offering limited banking services through ATM machines, setting up offices offering only discount brokerage services, and sending armored cars across state lines to pick up deposits from customers. These experiments were challenged repeatedly in court by competitors and state regulators, resulting in a series of judicial opinions from the 1960s through the 1980s expanding the limits of that statutory definition.

In 1993, the OCC pulled all of these cases together into a three-pronged definition of "branch." Under the OCC's analy-
sis, a bank facility only constitutes a “branch” if the following criteria are met. First, the activities performed at that facility must include at least one of the “core banking functions” delineated in the NBA’s statutory definition: receiving deposits, paying checks, or lending money. Second, the facility must be owned or operated by the bank itself. Third, the facility must be accessible to the public, with this accessibility giving the bank a competitive advantage in serving its customers.

These refinements in the definition of “branch” were prompted primarily by banks eager to find ways to engage in interstate banking despite the restrictions of state banking laws. If interstate facilities were not technically “branches,” they would not be subject to legal restrictions on interstate branching. Under this three-part definition, banks could engage in discount brokerage at locations across the country because discount brokerage was not a “core banking function.” Banks could offer ATMs nationwide, as long as the banks themselves did not own or operate them. Banks could also operate labor-intensive backroom data processing units or customer call centers at locations with cheap and plentiful labor supplies, even outside of the state where the bank was located, as long as they were not open to the public.

As the technology developed for banks to offer large-scale, standardized consumer loan products, economies of scale mandated offering these products to ever-larger pools of custom-

147. The OCC cited Clarke, 479 U.S. at 409 (holding that national banks could offer discount brokerage services at locations other than authorized branches, including locations outside of bank’s home state, because such services were not “core banking functions”). IL 634, supra note 146.

148. The OCC cited Independent Bankers Ass’n v. Smith, 534 F.2d 921, 948 (D.C. Cir. 1976) (holding that “customer-bank communication terminals” established by a bank are branches of that bank) and Independent Bankers Ass’n v. Marine Midland, 757 F.2d 453, 463 (2d Cir. 1985) (holding that nonproprietary ATMs, not owned or operated by the bank, are not branches of that bank). IL 634, supra note 146.

149. The OCC cited Dickinson, 396 U.S. at 136–37 (holding that armored cars and secured receptacles at which bank customers could leave deposits and receive cash in exchange for checks constitute “branches” because they offer customers accessibility equivalent to that of a branch). IL 634, supra note 146.
The geographic location of these customers became irrelevant. Mass mailings of credit card solicitations could reach customers across the country, applications for credit generated by such solicitations could be efficiently processed by pools of data processors inputting data into the bank’s computers from centralized locations having no relation to the bank’s locations, and the dispersal of credit occurred in thousands of stores across the country. Banks relied on the three-pronged “branch” tests to ensure that none of the locations at which increasingly dispersed functions of the lending process took place constituted impermissible branches.

As the lending process became increasingly mechanized and geographically dispersed, banks and the OCC relied on increasingly sophisticated definitions of “lending” as a core banking function. This culminated in another three-part definition, this time parsing the process of lending: “lending money” consisted of origination, approval, and disbursement of funds to the borrower. With respect to disbursal, relying on judicial precedent, the OCC accepted that a loan was clearly “made” at the time and place a borrower actually received the loan proceeds. Under this interpretation, a loan was not “made” at any location where a bank disbursed the borrowed funds to any party other than the borrower, such as the seller of a piece of

151. Id.
153. See supra note 152.
real estate.\textsuperscript{156} With respect to the other two prongs of the lending test, origination\textsuperscript{157} and approval, the OCC took the position that if any two occur at the same location, a loan was made at that location; however, any one of these functions occurring separately did not constitute "lending."\textsuperscript{158}

These odd-sounding distinctions were not the result of academic hairsplitting. To the contrary, they were reactions to efforts by hardheaded business people to take advantage of technological developments that opened the doors to nationwide banking, despite legal barriers. And these distinctions were significant in structuring consumer lending operations. After Marquette, it became clear to banks that it was to their advantage to locate consumer lending operations (particularly nationwide credit card programs) in states with generous (or non-existent) usury laws. Indeed, states such as South Dakota, Delaware, and Utah amended their laws to deregulate interest rates on credit cards for the express purpose of attracting non-polluting, labor-intensive credit card operations to their states.\textsuperscript{159} Large credit card issuers chose such states to charter banks whose activities were largely limited to issuing credit

\textsuperscript{156} IL 818, \textit{supra} note 154.

\textsuperscript{157} The OCC was never clear on what it meant by "origination." The term seemed to be used for some combination of solicitation of loan business and the loan application process. One Interpretative Letter listed four functions as examples of "loan solicitation and origination activities": "1) solicitation of loan business . . . ; 2) providing information as to loans rates and terms; 3) interviewing and counseling of applications regarding loans . . . ; 4) aiding customers in the completion of loan applications." Loan Origination Activities Permissible, Letter No. 88, [1978–1979 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,155 (Jan. 31, 1979).


\textsuperscript{159} For a number of years, DRI/McGraw-Hill published an annual report that ranked states based on factors such as "restrictions on APR," whether late fees and overlimit fees were permitted, and the restrictiveness of their legal environment. DRI/MCGRAW HILL, A STUDY ON THE ATTRACTIVENESS OF STATES TO CREDIT CARD ISSUING FIRMS (1993–1995) (issues on file with author). States continue to consider this strategy. As recently as the spring of 2002, the Illinois Bankers Association was trying to enact legislation increasing the fees that Illinois-chartered state banks could charge on certain loans, arguing that "Illinois is becoming less attractive for headquarters financial institutions" because of the fee restrictions. Ben Jackson, \textit{Illinois Banks Push Loan Fee/Penalty Bill}, AM. BANKER, May 17, 2002, at 5.
cards, and moved all their existing credit card operations from their commercial banks to those credit card banks.\textsuperscript{160} Because the consumer loan programs already established by those banks were conducted in dispersed geographic locations, there often was not much incentive to move all aspects of the credit card operations to the charter location of the new bank. Thus, banks had to consider whether they had enough activity occurring at the charter location to ensure that the bank was "located" in that state in order to use Marquette to export rates from that state. At the same time, banks also had to consider whether any of their disbursed locations constituted "branches" in states where customers lived, potentially undermining their Marquette-based right to export into those states.

ii. OCC Branch Interpretations After Riegle-Neal

As discussed above, in enacting Riegle-Neal, Congress declined to address directly how the presence of a branch in a state into which a bank wishes to export another state's interest rates might affect the Exportation Doctrine. Instead, Congress adopted an oblique clause indicating that nothing in Riegle-Neal should affect the applicability of § 85.\textsuperscript{161} The OCC was quick to jump into the interpretative void left by this vague language, issuing an exhaustive opinion letter explaining exactly what Congress meant by this provision, dubbed the "usury savings clause."

Relying extensively on a statement inserted into the Congressional Record by Delaware Senator William Roth, Jr.,\textsuperscript{162} the
sponsor of the usury savings clause, the OCC concluded this clause was intended to ensure that “the Marquette doctrine, permitting a bank to utilize interest rates allowed by the law of the state where the bank is located regardless of the state of the residence of the borrower, is not defeated simply because a bank has a branch in the state where the borrower resides.”

This much is arguably supported by the plain meaning of the language of the usury savings clause. As discussed above, before Riegle-Neal was enacted, § 85 was interpreted to mean that a bank could export the interest rate of the state where it was chartered (the “home state”) to other states. By its terms, the usury savings clause expresses the intent to preserve that power, allowing a bank to continue to export its home state interest rates to other states, regardless of the now-permitted presence of branches in those other states.

The OCC went further, however, attributing to the usury savings clause additional power not found in the plain meaning of its language. Again relying heavily on Senator Roth’s statement, the OCC asserted that the drafters intended the usury savings clause to give a bank the power to make loans either from the bank’s home state or from any state in which the bank has interstate branches (the “host state”). If the loan is “made” in the home state, the bank can export the home state’s interest rates. If the loan is “made” in the host state, the bank can export the host state’s interest rates.

To determine where a loan is “made,” the OCC suggested a different test from its prior three-pronged test. Again relying on Senator Roth’s testimony, the OCC divided all lending-related activity into either “ministerial” or “non-ministerial” functions. The ministerial functions include acts such as “providing credit card or loan applications or receiving payments,” and are considered irrelevant to the determination of where a loan is “made.” Only three non-ministerial functions—“the decision to extend credit, the extension of credit itself, and

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164. IL 822, supra note 162, ¶ 90,259.

165. The OCC does not clearly state whether it intends the new test to replace the old test, or merely supplement the prior test in cases involving interstate branches. IL 822, supra note 162, at n.27.

166. Id. ¶ 90,260.
the disbursal of the proceeds of a loan—167—are relevant to the “making” of the loan.168 Thus, the “origination” prong of the old test was replaced with “extension of credit,” which the OCC interpreted as “the communication of final approval by the bank to the borrower.”169 The OCC went on to provide remarkably clear guidance as to exactly where each of these functions occurs. Approval occurs wherever the human beings who either make discretionary judgments of approval or establish non-discretionary approval criteria are located.170 Disbursal occurs wherever the customer physically obtains the loan proceeds—either in person or through the crediting of a bank account.171 Extension of credit occurs at the location from which the first communication of final approval comes.172

If all three of these non-ministerial functions occur in a host state, the loan is definitely “made” in that state.173 If fewer than all three of these functions occur in the host state, however, the OCC did not offer any definitive guidance on where the loan is considered to have been “made.”174 Instead, it held that in such situations the bank’s home state rates “may always be applied,”175 but that the old three-pronged test could still be applied to justify charging host state rates instead.176

To sum up, the geographic reach of § 85 has been vastly expanded through aggressive interpretations of the term “located.” Section 85 permits a national bank to charge “interest at the rate allowed by the laws of the state or territory where the bank is located, and no more.” The Supreme Court’s Marquette decision held that a bank was “located” in the state where it had its physical presence, and that a bank could “ex-

167. Id.
168. Id.
169. Id. ¶ 90,263.
170. Id. ¶ 90,262.
171. Id. ¶ 90,263. Consistent with the prior three-pronged test, however, if the funds are disbursed by the bank to an escrow agent or title agent who later disburses them to the customer, the ultimate disbursal to the customer is considered merely the delivery of previously disbursed funds to the customer and therefore ministerial, wherever it occurred. Id.
172. Id.
173. Id. ¶ 90,261.
174. Id.
175. Id. (emphasis added).
176. Id. ¶ 90,262 ("While . . . we conclude that the state rates may be used, the OCC . . . has reviewed the entire transaction to determine whether there was a clear nexus between the host state, the rates of which the bank sought to apply, and the loan to justify imposition of the host state’s rates.").
port” the rates of that state to borrowers in other states. At the time Marquette was decided, banks were not legally permitted to have branches outside their home states. The enactment of Riegle-Neal allowed banks to establish branches in other states, and the Act further contained a provision stating that nothing in the statute should be construed to affect in any way the applicability of § 85. The OCC has interpreted that provision to mean that a bank can be “located” in either its home state or any of its host states, and that the Exportation Doctrine can be used by a bank to export rates from either location, depending on where the loan is “made.” In addition, through its near-Dickensian parsing of the lending process, the OCC has in effect restricted the meaning of “location” for purposes of the Exportation Doctrine—a bank is not necessarily “located” in a state where it has a substantial physical presence, provided certain aspects of the lending process do not take place in that state.

Clearly, the term “location,” as used in § 85 in support of the Exportation Doctrine, bears little relation to its dictionary meaning. The next phase in the transformation in the nationwide banking system—its expansion onto the Internet—provides additional evidence of the increasing strain being placed on the antiquated language of § 85.

c. Further Complications from Internet Banking

In 1996, then Comptroller of the Currency Eugene A. Ludwig noted:

Since our inception, the United States has been committed to a legal infrastructure that ties the activities of all manner of banks closely to state laws. Even national banks draw many of their authorities from state laws. But technology has put this legal infrastructure under increasing strain. For example, who should we say has jurisdiction over a loan issued by a depository institution with offices in State A to a consumer in State B who applies for a loan through a Web site maintained on a server in State C . . . or country C for that matter?177

Over the past few years, a number of national banks have been chartered as “Internet-only” banks, interacting with customers primarily through the Internet rather than through traditional bricks-and-mortar bank offices.178 Each of these

178. See, e.g., OCC Conditional Approval No. 462, http://www.occ.treas.gov/interp/may01/ca462.pdf (Apr. 4, 2001) (approving a national bank charter for Effinity Bank, a full-service Internet bank) [herein-
banks has a specific charter address in the state where its “main office” (typically described as “an office suite [including] a ‘call center’ reached by telephone or computer”)\textsuperscript{179} is located. Although the designation of these sites as the “location” of the bank sometimes appears to be supported by the existing physical presence of corporate affiliates,\textsuperscript{180} it is not clear from the publicly available data how much of a physical presence the banks actually maintain at their designated “locations,” especially since many of the banking functions requiring substantial physical assets or manpower are outsourced to third parties.\textsuperscript{181} While the outsourced functions are well within the range

\textsuperscript{179}. CIBC Approval, \textit{supra} note 178, at 2; see also NextBank Approval, \textit{supra} note 178, at 4 (describing the bank’s main office suite location as the “principal executive offices”); CompuBank Approval, \textit{supra} note 178, at 2 (describing the bank’s main office as a “call center” without frequent walk-in customers).

\textsuperscript{180}. \textit{See, e.g.}, Effinity Approval, \textit{supra} note 178, at 1–2 (stating that the bank’s main office is in the same location as its parent corporation); Hutton Approval, \textit{supra} note 178, at 1 (describing a bank that shares adjacent office space with its corporate affiliate); pointpathbank Approval, \textit{supra} note 178, at 1 n.2 (describing the bank’s offices in a building housing the operational functions of corporate affiliates); AeroBank Approval, \textit{supra} note 178, at 1 (stating that the bank shares adjacent offices with an affiliated company).

\textsuperscript{181}. \textit{See, e.g.}, Effinity Approval, \textit{supra} note 178, at 4 (“The Bank will outsource its Internet banking system, core processing services, check processing, check imaging, financial reporting, and customer scoring.”); Hutton Approval, \textit{supra} note 178, at 3 (“The Bank will likely outsource to a third-party service provider for Web site hosting, data processing, item processing, and customer service.”); pointpathbank Approval, \textit{supra} note 178, at 4 (“The Bank will likely outsource to a third-party service provider for data processing, Internet
of data-processing and servicing functions that have been outsourced by conventional banks for decades with full regulatory approval,\(^{182}\) in the case of an Internet bank, the outsourcing of significant functions further diminishes the already attenuated presence of the bank at its designated "location."

It is not clear from the publicly available approval documents whether the OCC was concerned about how substantial an actual physical presence backed up the applicants' location designation. Recent regulatory pronouncements have done nothing to clarify this issue. The OCC recently promulgated a regulation addressing electronic activities of banks.\(^ {183}\) In its initial request for public comment on the topic, the OCC noted that the concept of "location" was potentially problematic in this context and suggested that it would be willing to take a broad look at the issues raised.\(^ {184}\) The final regulation, however, contains only two provisions dealing with these issues, both of which merely rephrase the positions developed by the OCC in the interstate context in language applicable to the Internet:

> For purposes of [§ 85], the main office of a national bank that operates exclusively through the Internet is the office identified by the bank [in its charter application or through a subsequent relocation].\(^ {185}\)

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184. The OCC stated:

We invite comment on whether new developments in bank technology require the OCC to address how "location" applies in the context of activities conducted via the Internet. Specifically, is the determination of "location" for purposes of the statutes an impediment to national banks conducting all or part of their operations on the Internet? If so, should we further clarify our regulations on this issue?


185. Location Under 12 U.S.C. § 85 of National Banks Operating Exclu-
and

A national bank shall not be considered located in a State solely because it physically maintains technology, such as a server or automated loan center, in that state, or because the bank's products or services are accessed through electronic means by customers located in the state.¹⁸⁶

Whether the mere designation of a headquarters location by these Internet banks in their charter applications will be considered sufficient to support a "location" for purposes of the Exportation Doctrine remains to be seen. The preamble to the new regulation suggests that even the OCC is not certain of the strength of its position. For one thing, the OCC claimed that its position that the physical location of technology in a state is not the sole factor to be considered in determining its "location" is "consistent with evolving case authority," yet it cited only one decision from a federal district court in New Jersey.¹⁸⁷ For another, the OCC rejected one commentator's proposal to eliminate any inference that the location of a bank's technological equipment or customers may ever be considered in the determination of a bank's "location," explaining:

It is not our intent to remove these factors altogether from the determination of where a bank is located since the equipment may be connected to other relevant activities of the bank. Instead, the purpose of this provision is simply to make clear that these factors alone will not determine the bank's location in a State.¹⁸⁸

Internet banks clearly present a vivid canvas for graphically displaying the true scope of the OCC's aggressive interpretations of the geographic reach of the Exportation Doctrine. One Internet-only bank, NextBank, changed its designated "location" from California to Arizona sometime between the date it opened and the date the OCC closed it less than three years later.¹⁸⁹ While the specific reasons for the change in location were not publicized, it is difficult not to suspect that the comparative liberality of interest rate laws in Arizona as opposed to

¹⁸⁸. Id. at 35,002.
¹⁸⁹. Compare NextBank Approval, supra note 178, at 1 (giving San Francisco, California, as the bank's charter address), with OCC News Release No. 2002-09 (Feb. 7, 2002) (giving Phoenix, Arizona, as its charter address).
California was a significant motivation.

In summary, this dimension of the expansion of the Exportation Doctrine demonstrates that "location" has lost any rational connection to the actual physical presence of a bank. As long as a bank puts enough personnel engaged in "non-ministerial" lending functions in a jurisdiction with favorable consumer credit laws, it will be considered "located" in that state. Actual physical presence of other personnel or assets in any other state is irrelevant. As banks get more aggressive in using the Exportation Doctrine to avoid state consumer credit laws, it is likely that the OCC's expansive understanding of what constitutes a bank's "location" for purposes of the Exportation Doctrine will face judicial scrutiny. If, however, these courts follow the precedents established by cases examining the regulatory expansions of the definition of "interest," as discussed in the next section of this Article, it is unlikely that these interpretations will be restrained in any way.

3. Expanding the Substantive Scope of § 85—Defining "Interest"

The second dimension of the Exportation Doctrine that has been the subject of a dramatic expansion is its substantive scope—exactly what credit terms are "exportable" under this Doctrine? The language of § 85 seems clear enough in that regard; on its face, it gives banks the power to charge "interest at the rate allowed by the laws of the State... where the bank is located." Based on this plain language, one would assume that state laws imposing consumer protection features other than interest rate restrictions, such as licensing requirements for certain types of loans, limitations on penalties like late fees or bad check fees, restrictions on the types of security that may be taken for a loan, or unique disclosure requirements, should not be preempted under the Exportation Doctrine.

This has not been the case, however. In 1966, the OCC opened the door to a more expansive interpretation of "interest" as used in § 85 by issuing a ruling clarifying that banks using the Most Favored Lender Doctrine to charge rates permitted to other lenders under state law were not subject to the licensing

requirements of those laws. For example, a national bank using the Most Favored Lender Doctrine to charge customers rates available to licensed lenders in Minnesota would not be required to obtain a license from the state of Minnesota or submit to Minnesota's regulatory scheme for licensed lenders. The OCC was differentiating between two different sources of preemption of state law. The Most Favored Lender Doctrine permits our hypothetical bank to use Minnesota's licensed lender law to preempt other state interest rate restrictions. As a federally chartered depository institution, however, the bank operates under a national bank charter. Through the operation of the Supremacy Clause, the federal regulatory scheme governing national bank charters preempts Minnesota's licensing scheme. Thus, the national bank can use the specific preemptive power of § 85 to disregard state interest restrictions, and can use the more general preemptive power of the Supremacy Clause to disregard Minnesota's licensing requirements.

Navigating between these two sources of preemption authority in its later codification of this ruling, the OCC used the following language: "If State law permits a higher interest rate on a specified class of loans, a national bank making such loans at such higher rate is subject only to the provisions of State law relating to such class of loans that are material to the determination of the interest rate." Provisions of the law such as licensing requirements were not considered to be "material to the determination of the interest rate"; thus, they did not apply to national banks using the Most Favored Lender Doctrine. Provisions that were "material to the determination of the interest rate," such as the numerical rate limitation and methods of calculating interest, did apply to national banks using the Most Favored Lender Doctrine.

193. See supra note 122 and accompanying text.
194. See supra note 99 and accompanying text.
195. See supra note 109 and accompanying text.
197. Id.
In other words, the OCC interpreted the term “interest” in § 85 to mean more than simply the numerical interest rate addressed in a state usury statute. “Interest” was interpreted to include any additional terms that were “material to the determination of the interest rate.” With the subsequent proclamation of the Exportation Doctrine, banks quickly grasped the potential of this regulatory “gloss” on § 85’s straightforward language. They argued that credit terms such as closing costs, compounding laws, annual and cash advance fees on credit cards, bad check fees, and late fees were all “material to the determination of the interest rate,” and thus exportable as “interest” under the Exportation Doctrine. Courts across the country by and large accepted these arguments.

By the time this issue made its way up to the Supreme Court, the question centered on where we look to define “interest”—the laws of the state from which the bank is exporting the rate, the laws of the state into which the rate is being exported, or the regulations of the relevant regulator? With respect to national banks, in *Smiley v. Citibank* the Supreme Court held that the relevant definition is the one promulgated by their primary federal regulator, the OCC.

In the course of the litigation leading up to these decisions, the OCC had amended its definition of “interest” to include a wide variety of fees and charges, over and above the numerical interest rate.

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201. See id. at 744.

202. The OCC's regulation defines interest to include:

any payment compensating a creditor or prospective creditor for an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was ex-
The Supreme Court upheld the OCC's expansive interpretation of "interest" as reasonable. Moreover, the Court rejected the argument that the traditional deference shown to agency interpretations such as this should be "trumped" by the fact that § 85 preempts state law. Thus, in addition to being able to choose among many possible locations for the exportation of favorable interest rates, national banks now have the authority to ignore state laws in the states where their customers reside on a large number of credit terms in addition to the basic usury limits.

More recently, the OCC has used the preemptive authority of § 85 to bolster its argument that a state disclosure law was preempted. In American Bankers Ass' n v. Lockyer, a coalition of federal depository institutions and their trade associations challenged a California statute imposing on credit card issuers disclosure requirements beyond those required under TILA. The statute required specific warnings about the effect of making only minimum payments on credit card accounts. The OCC submitted an amicus curiae brief, arguing that the California statute was preempted because, among other things, it "would encroach directly upon the national bank power to determine the terms and conditions of offers of credit." The OCC pointed first to the two exemptions in this statute for issuers charging no interest and issuers requiring minimum payments of 10%. The OCC argued that the first exemption directly implicated § 85, and the second implicated national banks' "power
to determine the terms and conditions of offers of credit. In addition, the disclosure requirements themselves imposed a significant burden on bank operations. The court deferred to the OCC's finding of such a burden, and accepted the plaintiff's argument that the California statute "interferes with the federal power to lend money through its imposition of costly operational and administrative burdens on national banks' lending activities." In doing so, the court held: "Consumer protection is not reflected in the case law as an area in which states have traditionally been permitted to regulate national banks. Accordingly . . . 'the presumption against preemption of state laws is inapplicable.'

The Lockyer court did not base its preemption decision solely on § 85. The preemptive force of the entire scheme of regulation provided for national banks' lending operations was clearly persuasive to the court. The court did, however, explicitly defer to the OCC's analysis, which expressly included the invocation of § 85. In doing so, the court did not object to the OCC's determination that, because California's disclosure law provided exemptions based on the interest rate charged, the entire law was "material to the determination of the interest rate," and thus preempted under the Exportation Doctrine. If courts continue to accept this argument, there do not appear to be any logical limits to the substantive scope of the Doctrine.

This dimension of the expansion of the Exportation Doctrine is extremely significant for two reasons. First, it is crucial to understanding the substantive scope of the preemptive effect that the Exportation Doctrine has on state consumer credit laws. The Doctrine does not just preempt all state laws establishing usury limits. It also preempts all state laws dealing with everything the OCC declares to be "material to the determination of the interest rate." If the Lockyer ruling holds, there appear to be almost no limits to the sorts of consumer credit statutes that the OCC could hold to be related to interest rates.
Second, Smiley decisively rejects the argument that consumer credit regulation is the primary province of states when the lender is a national bank. This would appear to leave some room for state regulation of consumer credit in situations where the lender is not a national bank. However, the third dimension of the expansion of the Exportation Doctrine further diminishes even that vestige of state power, extending the orbit of the Doctrine’s beneficiaries to many additional lenders.

4. Expanding the Orbit of the Beneficiaries of the Exportation Doctrine to State Banks—Competitive Equality in Action

One of the most important forces in the dynamic of our nation’s distinctive dual banking system is the drive to maintain “competitive equality” among the two banking systems. If a regulatory innovation applicable to one type of depository institution provides a competitive advantage, that innovation is typically made available to the other type of depository institution as well, leveling the playing field, and thus maintaining the crucial “competitive equality” of the dual banking system.\(^{216}\)

The extension of the Exportation Doctrine to state-chartered banks is a vivid demonstration of this dynamic in play.

The Most Favored Lender Doctrine and Exportation Doctrine clearly gave national banks a competitive advantage over state banks. In most states, the legislatures directly addressed this imbalance by abolishing state usury laws disfavoring state banks and sometimes enacting laws favoring banks in their states over other types of lenders.\(^{217}\) However, these accommodations proved inadequate during the inflationary period of the late 1970s. Even the most liberal of the state usury laws proved constrictive when prime rates reached levels of 20% in April 1980.\(^{218}\) Section 85 had been amended in 1933 to give national banks the option of charging either the highest state rate available as Most Favored Lenders, or a rate pegged to federal discount rates.\(^{219}\) In a high interest rate environment, the fed-

\(^{216}\) “Competitive equality” has been characterized as “shorthand in the courts for the complex state-federal balances created by federal banking statutes.” Duncan, supra note 9, at 222.

\(^{217}\) See Rougeau, supra note 54, at 10–11.

\(^{218}\) Ackerman, supra note 26, at 105–07.

\(^{219}\) Act of June 16, 1933, ch. 89, § 25, 48 Stat. 191. This amended § 85 to provide national banks the option of charging interest of “1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located.” Id.
eral discount rate option often exceeded even the most favorable state rates.\textsuperscript{220} State banks did not have that option. In order to maintain the competitive equality of the dual banking system, Congress stepped in and enacted legislation giving federally insured state banks the same advantage.

Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980\textsuperscript{221} (DIDMCA) gave state-chartered, federally insured banks the power to charge interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank . . . is located or at the rate allowed by the laws of the State, territory, or district where the bank is located, whichever may be greater.\textsuperscript{222}

The legislative rationale in enacting section 521 of DIDMCA is expressly included in the language of the statute, which begins: “In order to prevent discrimination against State chartered insured depository institutions . . . .”\textsuperscript{223} Section 521 is equally forthright about its preemptive effect, permitting state-chartered banks to charge its rates “notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section.”\textsuperscript{224}

Section 521 was enacted for the specific purpose of enabling state banks to peg interest rates to federal discount rates. However, Congress accomplished this goal by appropriating all

\begin{itemize}
  \item \textsuperscript{220} See Ackerman, supra note 26, at 105–07.
  \item \textsuperscript{221} Pub. L. No. 96-221, 94 Stat. 132 (1980) (codified as amended in scattered sections of 12 U.S.C.). This Act attempted to address a number of legal restrictions on bank operations that were perceived as hampering the ability of banks to compete against the growing loss of bank deposits to mutual funds. It included liberalization of depository interest rate ceilings, allowing depository institutions to offer negotiable order of withdrawal accounts, and total preemption of state usury ceilings on mortgage loans. See Timothy A. Canova, The Transformation of U.S. Banking and Finance: From Regulated Competition to Free-Market Receivership, 60 BROOK. L. REV. 1295, 1315 (1995); Ackerman, supra note 26, at 106–07.
  \item \textsuperscript{222} 12 U.S.C. § 1831d(a) (2000) (emphasis added).
  \item \textsuperscript{223} Id.; see also Greenwood Trust Co. v. Massachusetts, 971 F.2d 818, 826 (1st Cir. 1992) (discussing legislative history of section 521).
\end{itemize}
of § 85, not just the federal rate language. Pursuant to the "general rule that when Congress borrows language from one statute and incorporates it into a second statute, the language of the two acts should be interpreted the same way," section 521 has been interpreted to extend to state banks all of the powers deriving from § 85 that were extended to national banks, from Most Favored Lender status to the Exportation Doctrine.

The FDIC, as primary federal regulator of state banks, has invariably followed the OCC's lead in providing regulatory support for aggressive expansions of the Exportation Doctrine, and both legislatures and courts have been largely cooperative. A few years after Riegle-Neal was enacted, Congress enacted the Riegle-Neal Amendments Act of 1997, which clarifies the applicable law for state banks engaged in interstate branching. This law generally provides that interstate branches of state banks are subject to the laws of the state where they are located to the same extent as interstate branches of national banks. It also adds the equivalent of the "usury savings clause" for state banks. The FDIC relied on this clause in adopting the OCC's interpretation of the ability of state banks to export rates from either their home states or from states where their branches are located.

Similarly, the FDIC has adopted the OCC's expansive definition of "interest." When the issue of the appropriate definition of "interest" under section 521 reached the Supreme Court, the Court declined to review a First Circuit decision which held that the relevant definition is the one found in the laws of the

225. Greenwood Trust, 971 F.2d at 827.
230. Id. § 1831a(j)(3)(B) ("No provision of this subsection shall be construed as affecting the applicability of ... Federal law to State banks and State bank branches in the home State or the host State.").
state from which the rate is being exported. Not surprisingly, states which host significant credit card banks have enacted extremely generous definitions of “interest.”

Thus, the orbit of the beneficiaries of the Exportation Doctrine has been broadened by federal statute to include state-chartered banks. This extension of the Exportation Doctrine to state-chartered banks does not appear to be susceptible to legal challenge. Congress provided for this extension pursuant to its authority under the Commerce Clause to regulate interstate commerce. The extension of the Exportation Doctrine to state banks has been implicitly affirmed by the Supreme Court. The FDIC’s interpretation of the meaning of the language of section 521 is presumably subject to the same amount of deference as the OCC’s interpretations of the meaning of the language of § 85.

Moreover, as a matter of banking policy, the extension of the Exportation Doctrine to state banks is justified. Although the statutory provision from which the Doctrine was derived, § 85, was enacted for the purpose of fostering national banks as alternatives to state banks, the Exportation Doctrine itself clearly serves a different purpose—that of fostering the development of an interstate banking system. Under the principle of competitive equality, a privilege that fosters the development of interstate banking for national banks ought to be made available to state banks as well. The next stage in the expansion of the orbit of the Exportation Doctrine’s beneficiaries is

234. Delaware’s definition of interest for credit card loans includes, in addition to periodic charges based on the amount of credit outstanding, transaction charges; minimum periodic charges; administrative fees such as commitment, application, and processing fees; official fees and taxes; costs incurred for examinations of title, inspection, appraisal, recording, mortgage satisfaction, and filing fees; returned payment charges; documentary evidence charges; stop payment fees; overlimit charges; ATM charges; and prepayment charges. DEL. CODE ANN. tit. 5, § 945(a) (2001). South Dakota defines interest for credit card loans to include membership fees, transaction fees, overlimit fees, stop payment fees, NSF fees, and “other charges made in connection with the . . . account arrangement.” S.D. CODIFIED LAWS § 51A-12-13 (Michie 1990).
235. U.S. CONST. art I, § 8, cl. 3.
236. See Greenwood Trust, 971 F.2d at 818.
237. See supra Part II.B.3. At the same time, the FDIC’s adoption of the OCC’s interpretation of “location” is presumably subject to the same challenge. See supra Part II.B.2.c.
238. See supra notes 113–15 and accompanying text.
239. See supra note 129 and accompanying text.
not, however, so readily justified by any established principle of banking policy.

5. Expanding the Orbit of Beneficiaries of the Exportation Doctrine to Nonbank Corporate Entities

a. Banking Regulation 102—Why Depository Institutions Are Special, Part Two

The unique charter bestowed on depository institutions as a consequence of their role as financial intermediaries carries with it a heavy regulatory burden. This burden includes the body of activity and ownership restrictions aimed at insulating the financial intermediary from the general stream of commerce in which it functions. This separation of "banking" from "commerce" is grounded in the desire to preserve the stability and impartiality of the nation's financial system, which is dependent on the intermediation performed by depository institutions. Although the exact nature and extent of these restrictions have varied at times, currently a bank is not free to engage in general commercial activity, and, conversely, a commercial enterprise is not free to engage in the business of banking.

These restrictions take on two forms—activities restrictions and affiliation restrictions. The activities restrictions derive from the fact that "a bank is a creature of its enabling statute, so that 'powers not conferred . . . are denied.' The enabling statute for national banks gives them the generic powers required to function as a legal entity—such as the power to make contracts, engage in litigation, appoint officers

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240. See supra note 96 and accompanying text.


and directors, and prescribe bylaws.\textsuperscript{243} In addition to these generic powers, banks are only empowered to exercise "all such incidental powers as shall be necessary to carry on the business of banking."\textsuperscript{244} The powers of state-chartered banks are similarly limited.\textsuperscript{245} Conversely, state statutes typically prohibit entities without either a state or federal bank charter from engaging in the business of banking.\textsuperscript{246} As one commentator explained:

The premise underlying these provisions is that an entity should not be allowed to engage in the business of banking unless the entity complies with the regulatory safeguards designed to restrain the risks associated with depository institutions and also presumably complies with the social obligations and political constraints imposed on the banking industry.\textsuperscript{247}

In other words, banks can only engage in "the business of banking" and only banks can engage in "the business of banking." Although the exact scope of what constitutes the "business of banking" is not always clear,\textsuperscript{248} it is clear that banks are not permitted to engage in general commercial activities such as making cars or selling clothes, and commercial entities such as car manufacturers and retailers are not permitted to engage in general banking business.

In addition to the activities restrictions imposed by the federal and state laws described above, the separation of banking from commerce is accomplished through a number of restrictions on corporate affiliations between banks and general commercial enterprises. These restrictions address situations in which both entities are part of the same corporate structure,

\textsuperscript{244} Id. § 24 (Seventh) (emphasis added). For a comprehensive list of the activities currently permissible for national banks, see OCC, 2002 Activities Permissible for a National Bank (Apr. 2003), http://www.occ.treas.gov/corpapps/bankact.pdf.
\textsuperscript{245} State enabling statutes typically contain the same type of language as the federal banking statutes. See, e.g., N.Y. BANKING LAW § 96 (McKinney 2001); TEX. FIN. CODE ANN. § 32.001 (Vernon 1998); WIS. STAT. ANN. § 221.0301 (West 2001). In addition, the Federal Deposit Insurance Act imposes similar restrictions on the activities of all FDIC-insured state-chartered banks. 12 U.S.C. § 1831a (2000).
\textsuperscript{246} See, e.g., CAL. FIN. CODE § 3390 (West 1999); N.Y. BANKING LAW § 131 (McKinney 2001); TEX. FIN. CODE ANN. § 31.004(a) (Vernon 1998).
\textsuperscript{248} Id. at 368–69 & n.126; Thomas Vartanian & Robert H. Ledig, The Business of Banking in the Age of the Internet: Fortress or Prison?, BANKING POL’Y REP., Mar. 4–18, 1996, WL 15 No. 5 BNKPR 6.
or controlled by the same individuals. Beginning with the Glass-Steagall Act of 1933,249 Congress enacted progressively tighter restrictions on corporate affiliations between banks and commercial enterprises. Glass-Steagall prohibited corporate affiliations between banks and securities companies.250 The Bank Holding Company Act of 1956251 (BHCA) prohibited corporate affiliations between banks and entities engaged in any activities other than banking or activities "so closely related to banking as to be a proper incident thereto."252 With the enactment of the Gramm-Leach-Bliley Act of 1999,253 banks meeting certain financial and regulatory criteria can affiliate with a broader category of entities engaged in activities other than banking, but such activities must still be "financial in nature" or "incidental" or "complementary to" a financial activity.254 Again, while the exact parameters of "financial in nature" have yet to be fleshed out, we are left with a legal structure in which formal corporate affiliations between banks and nonfinancial commercial enterprises, such as car manufacturers and clothing retailers, are generally prohibited.255

While such affiliations are generally prohibited, there are some exceptions. A couple of these exceptions are significant for purposes of our analysis because they enable commercial entities with no interest in becoming full-fledged banks to obtain one particular benefit of a bank charter—the exportation power—in order to offer uniform nationwide lending programs without having to observe nonuniform state consumer credit laws.256 Through these mechanisms, the orbit of beneficiaries of

250. Id.
252. 12 U.S.C. § 1843(a)(2), (c)(8). For a basic description of bank holding company regulation, see MACEY ET AL., supra note 96, at 430–43.
255. State and federal thrifts are subject to an essentially equivalent regulatory scheme, effectuated through an essentially equivalent statutory framework for thrift holding companies. 12 U.S.C. § 1467a(a)(1), (c)(2)(F)(i) (2000). For a general discussion of the regulations applicable to thrift holding companies, see MALLOY, supra note 93, §§ 6.6–6.9, at 244–50.
256. Alvin C. Harrell, Consumer Credit in Review, 51 CONSUMER FIN. L.Q.
the Exportation Doctrine is expanded to include commercial entities. The two primary mechanisms through which commercial enterprises can acquire exportation powers are, first, the remaining "nonbank bank" loopholes in the BHCA, and, second, contractual arrangements falling short of formal corporate affiliations, in which commercial entities essentially "rent" a bank's charter.

b. Nonbank Banks

The BHCA effectuates its prohibition of corporate affiliations between banks and commercial enterprises by subjecting the corporate parents of banks to regulation as "bank holding companies." If a corporation is a bank holding company, it is prohibited from engaging in any activities other than those "closely related to banking" or "financial in nature," or having any corporate or ownership affiliation with any other entity engaged in such activities.

Historically, there have been many exceptions to this general prohibition, deriving from the BHCA's definition of "bank." Originally, a holding company owning only one bank was not considered a bank holding company. When the BHCA was amended in 1970 to extend its reach to include single-bank holding companies, the definition of "bank" was amended to read "any institution . . . which (1) accepts deposits that the depositor has a legal right to withdraw on demand and (2) en-
gages in the business of making commercial loans." This definition became known as the "nonbank bank loophole": Any entity chartered as a bank that did not engage in both of those activities could function as a bank for most practical purposes, yet not be considered a bank for purposes of the BHCA. Thus, the BHCA would not prohibit a commercial entity from owning or having a corporate affiliation with such a "nonbank bank." The most popular use of the nonbank bank loophole was by commercial enterprises desiring to offer consumer banking services, particularly consumer lending.

When Congress addressed this loophole by enacting the Competitive Equality Banking Act of 1987 (CEBA), it failed to close the loophole completely. First, CEBA grandfathered existing nonbank banks, provided they complied with certain restrictions on growth and activities, thus permitting commercial enterprises such as Chrysler Corporation, General Electric Company, and Sears, Roebuck & Company to retain their affiliated banks. Second, at the same time that Congress amended the BHCA's bank definition, it enacted a lengthy list of exceptions to the definition. This list consists of particular banklike institutions that Congress determined should not subject their parents to regulation as bank holding companies, even though they would otherwise fall within the BHCA's bank definition. Thus, commercial enterprises may own these types of banklike institutions. Included on this list are "credit card banks," banks which limit their operations to issuing credit cards, and "industrial loan companies," a unique type of gen-


263. At Last: The Definitive Nonbank Bank List, BANKING EXPANSION REP., June 20, 1988, at 7 (including a comprehensive list of nonbank banks as released by the Federal Reserve Board).


265. Id. § 1841(c)(2)(F). The BHCA credit card bank exception applies to:
An institution, including an institution that accepts collateral for ex-
eral-purpose state-chartered financial institution available only in a few states.\footnote{266}

Commercial enterprises (including companies such as General Electric, Merrill Lynch & Company, Whirlpool Corporation, and Nordstrom) have been aggressive in taking advantage of both of these loopholes to engage in consumer lending.\footnote{267}

\begin{itemize}
  \item[(i)] engages only in credit card operations;
  \item[(ii)] does not accept demand deposits or deposits that the depositor may withdraw by check or similar means for payment to third parties or others;
  \item[(iii)] does not accept any savings or time deposit of less than $100,000;
  \item[(iv)] maintains only one office that accepts deposits; and
  \item[(v)] does not engage in the business of making commercial loans.
\end{itemize}

Id.

\footnote{266} \textit{Id.} § 1841(c)(2)(H). The industrial loan company (ILC) exception applies to:

An industrial loan company, industrial bank, or other similar institution which is—

(i) an institution organized under the laws of a State which, on March 5, 1987, had in effect... a statute which required... such institution to obtain [federal deposit insurance]—

(I) which does not accept demand deposits that the depositor may withdraw by check or similar means for payment to third parties; or

(II) which has total assets of less than $100,000,000...


Thus, through the operation of the nonbank bank exception to the bank holding company, the orbit of the beneficiaries of the Exportation Doctrine has been expanded to include many commercial enterprises.

c. Charter Renting or Attribute Franchising

Another way a commercial enterprise can obtain exportation powers is by entering into a contractual arrangement with a bank pursuant to which the bank extends credit to the customers of the commercial enterprise. Some consumer activists characterize these arrangements as "charter renting," \(^{268}\) the OCC sometimes prefers to characterize them as "franchising the bank's attributes." \(^{269}\) Regardless of the characterization, these arrangements all involve a relationship between a bank and some other entity that does not wish to extend credit itself. For a variety of reasons, this other entity wants to make credit available to its customers, but does not itself want to be the entity extending the credit. For example, it may be that the commercial entity is not interested in acquiring the expertise and infrastructure necessary to administer consumer credit. Or it may be that the commercial entity wants to take advantage of some unique feature of a bank charter, such as particular funding sources, access to existing credit card systems such as Visa and MasterCard, or exportation powers. If the commercial entity is not interested in establishing its own nonbank bank to

\(\text{(which owns Target, Marshall Field's, and Mervyn's), and Federated Department Stores (which owns Macy's, Bloomingdale's, Burdine's, and Stern's) all own credit card banks. Id. While many of these retailers started off using their bank subsidiaries solely to issue private-label cards (cards that could only be used in their stores), many are now successfully issuing general-purpose bank credit cards. Jennifer Kingson Bloom, The Old Store Card Is Making a Comeback, AM. BANKER, Sept. 4, 1998, at 6; W.A. Lee, Sears Is Back as a Player in Cards, AM. BANKER, Feb. 15, 2001, at 1. Some of these retailers are developing into some of the largest general purpose credit card issuers in the country. Sears, Roebuck & Company is among the top twenty-five general purpose credit card issuers; Nordstrom is in the top fifty. Lee, supra; see Coulton, supra.}\)

\(^{268}\) See Payday Lending Report, supra note 9, at 14, 15–23.

\(^{269}\) OCC Bulletin No. 2001-47, supra note 182, ¶ 35-522. This characterization is fleshed out in greater detail in an article written by senior officials of the OCC. See Julie L. Williams & James F.E. Gillespie, Jr., The Impact of Technology on Banking: The Effect and Implications of "Deconstruction" of Banking Functions, 5 N.C. BANKING INST. 135, 160–65 (2001). The OCC, however, sometimes uses the term "chartering" as well, in circumstances involving subprime lending. See infra note 356; see also infra note 343 (illustrating the FDIC's use of the term).
conduct its credit operations, it can enter into a contract (or, more likely, a complex series of contracts) with a bank, whereby the bank issues the credit on behalf of the commercial entity.

While variations of these arrangements have existed for decades, three recent versions are significant for purposes of this Article—cobranded credit cards, refund anticipation loans, and payday loans. In order to fully appreciate the extent to which the Exportation Doctrine has in fact emasculated state consumer credit laws, it is crucial to understand the full extent to which it is being used by nonbanks as well as by banks. Moreover, these arrangements all involve, or have the potential for involving, subprime credit products or products typically associated with predatory lending. The use of the Exportation Doctrine by such lenders dramatically highlights the consequences of its expansion.

i. Cobranded Credit Cards

In the early 1990s, a group of highly visible commercial enterprises launched "cobranded credit card programs." The credit cards issued under these programs were prominently identified with the commercial enterprise launching the program; most of these cards offered rebates on products sold by the commercial enterprise, such as AT&T's 10% discount on long distance calls, Ford Motor Company's rebate on Ford cars based on charge volume, or 10% discounts on World Championship Wrestling merchandise. However, each of these credit cards was issued by an existing conventional bank that had no corporate affiliation with the commercial enterprise—Universal Bank issued AT&T's card. Citibank issued


Ford's card, and Capital One issued the World Championship Wrestling card. Cobranded credit card relationships continue to be established by major commercial entities, including most major airlines, Mercedes-Benz, Walt Disney, Kmart, Wal-Mart, and Amazon.com.

The degree of control that the commercial enterprise in a cobranding relationship retains over the credit extended under this arrangement can vary considerably, ranging from delegating virtually the entire responsibility for the program to the bank issuing the credit, to retaining control over virtually every aspect of the program, including repurchasing the receivables generated through use of the credit cards. Logically, commer-

282. Amazon.com initially partnered with NextBank, NextCard to Cobrand with Amazon.com, AM. BANKER, Nov. 12, 1999, at 29, a now defunct Internet-only bank, see supra note 178 and accompanying text. Amazon.com later established a cobranding arrangement with Citibank for a "virtual cardless credit card," and with Bank One for a more traditional Visa card. Amazon Teams Up with Bank One, BANK MARKETING INT'L, Nov. 19, 2002, 2002 WL 10962762.
283. See Frank Martien, How New Issuers Can Get a Piece of the Action, AM. BANKER, Feb. 15, 2000, at 15. Martien suggests two strategies for entities interested in entering the credit card business: First, entrants can rent a Visa or MasterCard authorization code from a bank. Id. "Under this arrangement, issuance is technically performed by another bank, but branding, program management, funding, processing, and servicing is conducted by the entrant." Id. Alternatively, entrants can "[e]stablish[] an affinity arrangement, in which the company offers its customers branded credit card accounts that are supplied by an existing credit card issuer." Id.; see also Yvette D. Kantrow, MasterCard's GM Card Gambit Rekindles Dispute with Visa, AM. BANKER, Sept. 16, 1992, at 1 (comparing GM's arrangement with Household: "Household will own all of the receivables, make all credit decisions, and carry all of the credit risk," with AT&T's arrangement with Universal Bank: "AT&T owns the bulk of its receivables"). Household is a federal thrift rather than a national bank, but these arrangements raise the same issues for federal thrifts as they do for banks. See infra notes 394–413 and accompanying text. While most cobranding arrangements were traditionally offered to retailers on a fee basis, First National Bank of Omaha recently announced what it called a
cial enterprises that choose to enter into cobranding relationships are probably not terribly interested in maintaining control over their credit operations. If they wished to maintain control over their own credit operations, they could easily have chartered their own credit card banks. Similarly, the opportunity to piggyback on the exportation powers of the chartered bank issuing the credit would likely be of negligible interest, since they could easily acquire such powers themselves by chartering a credit card bank. Their motivation for entering into such a relationship is more likely to be to offer credit to their customers without having to acquire the expertise or infrastructure necessary to manage credit.  

ii. Refund Anticipation Loans

The next significant credit product offered by commercial entities under contractual arrangements with banks is the refund anticipation loan (RAL). RALs are short-term loans extended to consumers "in anticipation" of their tax refunds. They are marketed by commercial tax preparers as quick refunds, enabling taxpayers using the tax preparers to file electronically and obtain their refunds within a day or two. In actuality, RALs are loans extended by banks, through a contractual arrangement with the tax preparer. They typically are structured as follows:


284. When interviewed about this issue, the head of Wal-Mart's card operations said, "We do not want to be managing receivables ourselves. . . . [W]e're merchants and we want to sell goods. . . . That's why we picked a good partner in providing a financial service for the customer." Bloom, supra note 281 (quoting Steve Hunter of Wal-Mart). Subsequent unsuccessful efforts by Wal-Mart to acquire a full-service nonbank subsidiary seem to evidence an evolution in Wal-Mart's opinion on this issue. See supra note 266 and accompanying text; see also W.A. Lee, Citi Challenging Leaders in Private-Label Cards, AM. BANKER, Feb. 1, 2002, at 8 (citing Matthew Fassnacht, a securities analyst who focuses on credit card processing companies: "[M]any retailers do not have the financial skill to make their card programs profitable. . . . Outside financial institutions . . . have technology, risk analysis, marketing, and collections systems in place that most retailers could not afford. . . ."). For an interesting discussion of the motives of banks entering into such arrangements, see Valerie Block, Cobranding a Threat or a Savior? Take Your Pick, AM. BANKER, Jan. 5, 1995, at 16.

285. Two comprehensive sources of general information about RALs are Drysdale & Keest, supra note 4, at 612–14, 634, and RAL Report, supra note 9, at 6.
When the loan is made, the bank prepares to collect on the loan by opening a temporary bank account for the borrower to receive electronic deposit of the refund. The documents signed by the borrower instruct the IRS to direct deposit the refund into that account. The contract usually contains a right of setoff, so the lender is repaid when the refund appears in the bank's account. The consumer is liable for the full amount of the loan if the refund is disallowed in whole or in part. The refund amount would be affected if, for example, (the) IRS disallows a deduction or if there is an intercept of the refund for child support or a student loan debt.

Consumers usually pay three fees in connection with RALs—a tax preparation fee to the tax preparer, an electronic filing fee to the tax preparer, and a loan fee to the bank making the loan, a portion of which is typically paid by the bank to the tax preparer. The loan fees, typically ranging from $29 to $89, are based on the size of the refund, translating into effective annual percentage rates ranging from 67% to 608%. Obviously, such interest rates would typically exceed the legal rate of interest under state law for a tax preparer. Thus, the loans are extended by banks chartered in states with no restrictions on interest charges, such as Delaware. Until quite recently, RALs were offered by the two largest tax preparers, H&R Block and Jackson Hewitt, among others.

286. RAL Report, supra note 9, at 6.
287. Green v. H&R Block, Inc., 735 A.2d 1039, 1045 (Md. 1999); Basile v. H&R Block, Inc., 761 A.2d 1115, 1119 (Pa. 2000); RAL Report, supra note 9, at 5. IRS regulations require the tax preparer to charge the lender a flat fee, rather than a fee based on the amount of the RAL. RAL Report, supra note 9, at 18. However, nothing prohibits the bank from charging the customer a fee based on the amount of the RAL.
288. Drysdale & Keest, supra note 4, at 613 & n.135; RAL Report, supra note 9, at 5.
289. Drysdale & Keest, supra note 4, at 613–14 & n.136.
290. See supra note 19 and accompanying text.
292. H&R Block originally offered its RALs in an arrangement with Beneficial National Bank, which was acquired by Household International in 1998. Thereafter, some of the RAL loans were issued by Beneficial, while others were issued by a thrift subsidiary of Household, Household Bank FSB. RAL Report, supra note 9, at 13 n.61. More recently, H&R Block reduced its direct involvement in these loans, while continuing an arrangement with Household permitting H&R Block customers to get RALs through Block's offices. Gene Meyer, H&R Block Cuts Direct Involvement in Tax Loan Program, KANSAS CITY STAR, Jan. 9, 2003, 2003 WL 4554446. To complicate matters further, Household entered into a contractual arrangement with a state-chartered industrial loan company in the process of converting into a nationally chartered commercial bank, Imperial Bank, to originate RALs that Household will pur-
As with the cobranding arrangements, the motivations of the parties entering into these arrangements, and the degree of control each party retains over the lending involved, vary widely. We can assume that the profit to be made from the various fees charged is a prime motivation for both the tax preparers and the banks. The tax preparers have additional motives, however, since they do not have the legal power to implement two aspects of a RAL program on their own. First, RALs require the taxpayer to have a bank account into which the IRS can directly deposit the refund.9 Offering bank deposits is one of the most straightforward hallmarks of the “business of banking,” and is illegal under most state laws by entities other than chartered depository institutions.294 Second, a bank, of course, has the power under the Exportation Doctrine to construct a nationwide program with standardized terms and high effective interest rates, by “exporting” the law of a jurisdiction with no restrictions on RALs, regardless of any more restrictive consumer protection statutes in the jurisdictions where the taxpayers reside.295 Both the lack of interest rate limits and the lack of a need to continually monitor and comply with consumer protection statutes in fifty states clearly have a major impact on the economics of a national program.

Details about the specific arrangements between the tax preparers and the banks extending the credit have not been as widely covered in the general press as details about the cobranding agreements. The opinions issued in connection with lawsuits challenging these arrangements suggest that the participants are sensitive to issues of control over the credit decision.

293. RAL Report, supra note 9, at 6.
294. See supra note 246 and accompanying text. Even credit card banks are prohibited from offering the types of deposits required for RALs; they are only authorized to offer deposits of $100,000 or more. 12 U.S.C. § 1841(c)(2)(F)(iii) (2000).
295. Cades, 43 F.3d at 873–74; RAL Report, supra note 9, at 18–19.
sions and the tax preparers' operations. They are not apparently as concerned, however, about control over the resulting receivables; for example, H&R Block purchased about one-half of the RALs it generated.

iii. Payday Loans

The third significant type of credit offered by commercial entities under contractual arrangements with banks is the payday loan. Payday loans are short-term cash advances, typically made on the security of postdated personal checks issued by the borrower to the lender. The lender agrees not to deposit this check until some date in the near future, typically two weeks from the date of the advance (in other words, on the next “payday,” when sufficient salary will presumably be deposited in the borrower’s account to repay the loan). Fees charged for such loans, which are deducted by the lender from the cash advanced, typically translate into effective APRs averaging 470%. Although structured as short-term advances, the loans are often renewed when the borrower cannot repay on the due date and are often the subject of abusive collection practices.

Although the payday loan industry emerged only in the early 1990s, it quickly expanded into a multi-billion-dollar in-

296. See Cades, 43 F.3d at 872; Basile, 761 A.2d at 1121 (in declining to find that H&R Block acted as “agent” for taxpayers obtaining RALs, the court characterized Block’s role as “[s]imply introducing appellees to a lender willing to provide a loan”).


299. Drysdale & Keest, supra note 4, at 599–605; Schaaf, supra note 8, at 341–43.

300. Payday Lending Report, supra note 9, at 13. Another article published around the same time reports that the most typical rates range from 200% to 300%. Drysdale & Keest, supra note 4, at 599.

301. Drysdale & Keest, supra note 4, at 605–12; Payday Lending Report, supra note 9, at 8–10, 15.
The industry leaders are commercial entities specializing in this business, check-cashing outlets, and pawn shops. They are organized as national or regional chains, offering loans in their offices, online, and through the telephone. The explosive growth of this industry has attracted the intense scrutiny of consumer activists and state legislatures, and has resulted in state legislation attempting to stem more blatantly abusive features of such loans.

In response to these state efforts, a number of payday lenders teamed up with depository institutions. As with the cobranded credit cards and the RALs, these payday lenders entered into contractual arrangements whereby the bank actually extends the credit to the borrowers. In contrast to the other two types of credit products, however, the motives of the payday lenders entering into these arrangements were simple. They did not need the credit-granting expertise of the banks, since they were already fully engaged in the business of making these loans. Indeed, they almost certainly had more expertise in this particular credit product than any of their bank partners. Nor did they need the unique bank power to accept deposits; anyone can cash a check that is made out to her. The primary motivation of the payday lenders in entering into these arrangements was to obtain the benefit of § 85's exportation powers. This can be evidenced by the reported structures of

302. Drysdale & Keest, supra note 4, at 604–05; Payday Lending Report, supra note 9, at 6.
303. Payday Lending Report, supra note 9, at 6.
304. Id.
305. Id. at app. A (summarizing state legislation regulating payday lending).
306. Some of the more prominent partnerships were between ACE Cash Express and Goleta National Bank, Cash America pawn shops and First National Bank in Brookings, South Dakota, and the multiple partnerships of state-chartered County Bank of Rehoboth Beach, Delaware, with payday lenders such as Check 'n Go, EZPAWN, and various Internet-based payday loan providers. Id. at 20–22.
307. One industry analyst described the advantages to payday lenders of partnering with a national bank to include that the partnership "provides a standardized product, permits companies to enter states that have not enacted safe-harbor legislation, [and] protects storefront owners from changes in local or state legislation." Id. at 16 (citing Jerry L. Robinson, Payday Advance—The Final Innings: Standardizing the Approach 7–8 (Sept. 22, 2000), http://www.stephens.com). Another related motive would be the freedom from state licensing schemes and general regulation afforded through the operation of the Supremacy Clause by the preemptive effect of the national bank chartering scheme. See supra note 109 and accompanying text.
some of these programs, in which little of the control over the lending was surrendered to the bank partner. For example, under the arrangement between Goleta National Bank and ACE Cash Express, ACE purchased a 90% participation in each loan made by the bank, bore 90% of the loss on any loan that defaulted, received the loan payments, paid collection costs, and kept the loan records.\footnote{\textit{Payday Lending Report}, supra note 9, at 24 (citing Ohio Dep't of Commerce, Notice of Intent to Issue Cease and Desist Order, Notice of Opportunity for Hearing (July 16, 2001)); \textit{see also} OCC Stipulation and Consent to the Issuance of a Consent Order, Doc. No. AA-EC-02-18, at 2 (Oct. 28, 2002) (regarding Goleta National Bank; stating that ACE purchased a 90–95% participation in loans originated by Goleta), http://www.occ.treas.gov/ftp/eas/goleta\%20stip.pdf.}

Clearly, the Exportation Doctrine has been dramatically expanded by the extension of the scope of its beneficiaries to nonbank commercial entities. However, federal banking regulators have not been as unequivocal in their support for this dimension of the expansion of the Exportation Doctrine as they were with respect to the expansion of the definitions of “location” and “interest.” At least with respect to nonbanks engaged in subprime lending, regulators have suggested that there are some limits to the use of the Doctrine by nonbanks.

d. Regulatory Reaction to the Extension of the Exportation Doctrine’s Orbit of Beneficiaries to Subprime Lenders

The position that federal bank regulators have taken with respect to the expansion of the orbit of the beneficiaries of the Exportation Doctrine to commercial entities is more nuanced than their whole-hearted support of the other two dimensions of expansion. Regulators have been steadfast in their support of the legal authority of commercial entities interested in exploiting these opportunities to do so—either by chartering nonbank banks or by partnering with banks. Federal bank regulators have, however, demonstrated an increased willingness to use existing discretionary powers to deny or curb particular applications of these powers in cases involving subprime lending.

i. Nonbank Banks

With respect to the first method of extending the Exportation Doctrine to nonbanks—the use of the nonbank bank exceptions to the BHCA—both the OCC and the FDIC have readily approved applications of various commercial enterprises to
So far, courts facing challenges to the legal authority of exportation by credit card banks have not balked at extending the Doctrine, at least to national banks. However, a state-chartered credit card bank is the subject of one of the most significant ongoing legal challenges to the use of the Exportation Doctrine by nonbank banks. In *Heaton v. Monogram Credit Card Bank of Georgia*, Patricia Heaton, a resident of Louisiana, filed a class action lawsuit against Monogram Credit Card Bank of Georgia, a subsidiary of General Electric (Monogram), charging that Monogram had no authority to charge late fees in excess of the amount permitted by Louisiana law. Heaton argued that Monogram was not entitled to export the rates permitted under laws of the state where it was located (Georgia) because Monogram was not a "state bank" for purposes of section 521. The only deposits Monogram accepted were from its parent corporation. Heaton argued that it was therefore not "engaged in the business" of accepting deposits, and was therefore not a "state bank."

Thus far, this argument has been asserted only in preliminary skirmishes involving the removal of the case to federal court; the argument has not been heard or argued on its merits.

309. See supra note 267.
310. In *Krispin v. May Department Stores Co.*, the Eighth Circuit Court of Appeals held that the assignment of credit card accounts from a department store to its newly established credit card bank was sufficient to legally make the bank, rather than the store, the originator of accounts after the date of the transfer, regardless of the fact that the department store purchased the bank’s receivables on a daily basis. 218 F.3d 919, 924 (8th Cir. 2000).
311. 297 F.3d 416 (5th Cir. 2002).
312. Id. at 419.
313. Heaton v. Monogram Credit Card Bank of Ga., No. CIV.A.98-1823, 1998 WL 709808, at *1 (E.D. La. Oct. 7, 1998). 12 U.S.C. § 1813(a)(2) (2000) defines a “state bank” as any bank, banking association, trust company, savings bank, industrial bank (or similar depository institution which the Board of Directors finds to be operating substantially in the same manner as an industrial bank), or other banking institution which—(A) is engaged in the business of receiving deposits, other than trust funds (as defined in this section); and (B) is incorporated under the laws of any State.
315. The issue at stake was whether a usury claim brought in state court under state usury laws could be removed to federal court on the grounds that it was covered by the federal statutes underlying the Exportation Doctrine. The Supreme Court recently resolved this issue in favor of removal, at least
its, as it affects Monogram’s authority to export Georgia’s late fees. However, during these preliminary skirmishes, the FDIC actively supported Monogram’s position. The FDIC issued a General Counsel’s Opinion holding that maintaining one deposit in a minimum amount of $500,000 is enough to be “engaged in the business” of receiving deposits. This opinion letter was quickly promulgated as a regulation. The opinion and regulation merely formalized a long-standing position of the FDIC. Indeed, the FDIC could not have granted Monogram FDIC insurance had it not reached this conclusion at the time the charter was granted. However, the timing of the issuance of the opinion, and the fact that it was apparently drafted by counsel for Monogram for the FDIC’s signature, attracted both the attention of the media and the approbation of at least one of the judges ruling against Monogram in the complicated series of venue skirmishes.

While the federal banking regulators continue to support the legal authority of commercial enterprises to establish nonbank banks to take advantage of the Exportation Doctrine, they are demonstrating an increasing willingness to use their regulatory powers to prevent entities from taking advantage of this power in order to engage in arguably predatory lending practices. Three distinct regulatory initiatives are evident.

with respect to national banks. In Beneficial National Bank v. Anderson, 123 S. Ct. 2058, 2064 (2003), the Court held:

In actions against national banks for usury, these provisions supersede both the substantive and the remedial provisions of state usury laws and create a federal remedy for overcharges that is exclusive, even when a state complainant, as here, relies entirely on state law. Because §§ 85 and 86 provide the exclusive cause of action for such claims, there is, in short, no such thing as a state-law claim of usury against a national bank.

Id.


318. The General Counsel’s opinion refers to the FDIC’s thirty-year history of approving applications for deposit insurance for “nontraditional depository institutions” that accept only one deposit from their parents or affiliates; credit card banks are specifically mentioned as one of these entities. FDIC Op. No. 12, supra note 316, at 14,570.


First, regulators have demonstrated an increasing willingness to withhold approval of expansion or new charter applications involving subprime lenders. Regulators imposed many conditions on Citigroup’s acquisition of Associates First Capital Group, a national subprime mortgage lender and credit card issuer. The OCC also conditioned the acquisition of a check-cashing company by a national bank on the bank’s agreement not to permit the subsidiary to engage in payday lending. The OCC also denied an application by CompuCredit Corporation, a subprime credit card lender, to acquire a credit card bank.

Second, federal banking agencies have issued a number of regulatory guides dealing with subprime lending which, although not exclusively aimed at nonbank bank subsidiaries of

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322. This trend is also apparent at state banking regulatory agencies. Household International, a major subprime lender, apparently yielding to pressure by the New York State Banking Department, is proposing to begin offering prime loans through its branches, in order to obtain approval of its acquisition by a London-based financial services company. Michelle Heller & Robert Julavits, HSBC Takes New York’s Hint; Household to Sell Prime, AM. BANKER, Jan. 29, 2003, at 1.

323. Citigroup was required to commit to making significant changes to Associates’ practices before this acquisition was approved. Erick Bergquist, Judging Citi, a Year Later, AM. BANKER, Sept. 10, 2001, at 1 (describing concessions made by Citigroup); Bill Stoneman, PR Woes Continue to Cloud Citi-Associates Deal, AM. BANKER, Feb. 12, 2001, at 8A (same). Consumer advocates continue to protest acquisitions by Citigroup, based on predatory lending concerns. Rob Blackwell, Fed Asks Citi More on Golden State Deal, AM. BANKER, July 25, 2002, at 20; Rob Garver, Another Fed Probe of Citi Subprime Lending Arm, AM. BANKER, July 12, 2002, at 1. Similarly, when HSBC Holdings plc, an England-based international financial holding company, acquired Household International, a similarly diversified, U.S.-based international financial holding company, the OCC approved the acquisition of Household’s credit card bank subsidiary only after the bank agreed to pay restitution to certain credit card consumers subject to deceptive practices and to ensure that all of its private label credit card programs comply with applicable laws and regulations. OCC Corporate Decision No. 2003-2, at 5 n.6 (Mar. 27, 2003), http://www.occ.treas.gov/interp/cd03-2.pdf; Formal Agreement by and Between Household Bank (SB), National Association Las Vegas, Nevada, and the OCC, No. 2003-17 (Mar. 25, 2003), http://www.occ.treas.gov/ftp/eas/ea2003-17.pdf [hereinafter Household Bank Agreement]. Although the credit card bank subsidiary was not identified as targeting subprime borrowers, the private label program at issue involved financing of door-to-door sales of heating, ventilation, and air conditioning systems. OCC Corporate Decision No. 2003-2, supra, at 5 n.6.


commercial enterprises, contain strong warnings that such entities might be particularly vulnerable to enforcement of these policies. Indeed, the policies have been applied against a number of such subsidiaries.

The four federal financial institution regulators—the OCC, the Federal Reserve, the FDIC, and the OTS—have issued two joint guidances on subprime lending in the past few years, noting the increased involvement of insured depository institutions in subprime lending. While the agencies expressed their support for responsible subprime lending as a way to “expand credit access for consumers and offer attractive returns,” they stressed that it carries elevated levels of risk and demands intensive risk management and additional capital support. The first guide warned, “If the risks associated with this activity are not properly controlled, the agencies consider subprime lending a high-risk activity that is unsafe and unsound.” The second guide was specifically aimed at depository institutions whose subprime activities constitute 25% or more of their business, which would certainly include any nonbank bank chartered by a commercial enterprise engaging heavily in subprime consumer lending. In this guide, the agencies outlined detailed risk management expectations, warning that “[w]hen a primary supervisor determines that an institution’s risk management practices are materially deficient, the primary supervisor may instruct the institution to discontinue its subprime lending programs.”

The agencies have also released a joint guide on account management policies for credit card lending. This guide addressed specific credit card account management, risk management, and loss allowance practices observed in recent examinations that the agencies deem “inappropriate.” The practices identified in this proposed guide are characteristic of

327. 2001 Subprime Lending Guide, supra note 1, ¶ 63-792.
330. Id.
332. Id. at 1.
predatory lending: failing to consider the repayment capacity of individual borrowers when extending new lines of credit or increasing existing lines; lack of prudent over-limit practices, especially with subprime credit accounts; and workout and forbearance programs that make it difficult for the borrower to extinguish the indebtedness. The agencies warned that they would not tolerate accounting practices that do not reflect the true risks and losses of subprime credit card programs. Again, although the scope of this guide was not limited to subsidiaries of commercial enterprises, it addressed the sole business engaged in by many such subsidiaries.

These three guides, taken together, provide a strong warning to commercial enterprises offering consumer lending through nonbank bank subsidiaries that the regulators intend to use their supervisory powers to closely monitor subprime lending and to prevent predatory lending. Moreover, all of the federal banking agencies have taken enforcement actions demonstrating that these warnings are to be taken seriously. Two credit card banks with high concentrations of subprime loans were closed by their respective regulators. A number of finan-

333. See id. at 2–4.
334. See id. at 4–5.
335. BestBank, a state-chartered, FDIC-insured bank in Boulder, Colorado, was closed in July 1998 by the Colorado State Bank Commissioner, and the FDIC was named receiver. FDIC Press Release PR-49-98, FDIC Announces Receivership of BestBank, Boulder, Colorado (July 1, 1998), http://www.fdic.gov/news/news/press/1998/pr9849.html. The FDIC subsequently explained that BestBank's principal assets were subprime credit card accounts, made available to "people with low incomes, no credit history, or bad credit histories," and offered in conjunction with the purchase of a membership in a "travel club." Recent Bank Failures and Regulatory Initiatives: Hearing Before the House Comm. on Banking and Fin. Servs., 106th Cong. 143 (2000) (testimony of Donna Tanoue, Chairman of the FDIC), http://www.fdic.gov/news/news/speeches/archives/2000/sp08Feb00.html (last visited Oct. 4, 2003). The travel club membership fee ($498) and credit card annual fee ($45) were charged to the cardholder's account at the time the card was issued; the credit limit on the card was $600. Id. In February 2002, the OCC closed NextBank, the Internet-only credit card bank that opened with much fanfare in 1999. OCC News Release No. 2002-09, supra note 189. The OCC found that NextBank was "operating in an unsafe and unsound manner and had experienced a substantial dissipation of assets and earnings through unsafe and unsound practices." Id. Although NextBank was not originally chartered as a subprime lender, informal discussions of OCC officials concerning this closure suggest that the credit problems that led to the bank's closure were related to the credit quality of the borrowers who were attracted to the Internet model—people with troubled credit histories. Lavonne Kuykendall, After NextBank, Doubts on Internet-Only Model, AM. BANKER, Feb. 11, 2002, at 1.
cial institutions offering subprime credit cards were subject to regulatory enforcement proceedings resulting in agreements that the banks will conduct such activities in accordance with the newly promulgated credit card account management policies. 336

The third regulatory initiative on this front is the agencies' growing willingness to use their authority under the FTCA 337 to police unfair or deceptive trade practices. 338 The OCC recently settled a number of such enforcement actions involving deceptive marketing practices in credit card programs targeting subprime borrowers. 339 In each case, the bank was either a credit


337. See supra notes 79–81 and accompanying text.


card bank or a full-service national bank specializing in credit cards; in each case, the consent order provided that the bank pay restitution to customers harmed by practices characterized as unlawful, unsafe, or unsound, and reform such practices. The practices at issue included (1) marketing cards requiring the purchase of $156 credit protection plans as “no annual membership fee” credit cards;340 (2) using solicitations suggesting guaranteed approvals of no-fee, unsecured cards, followed by approvals of cards with high fees or requiring security deposits;341 and (3) marketing cards to subprime borrowers as unsecured cards with guaranteed approval, and then charging significant security deposits against the cards when issued—which, together with high, nonrefundable processing fees, left little or no available credit.342

With all three of the initiatives described above, the regulators are clearly warning all of the entities under their respec-

actions were brought by the OCC in connection with credit card programs not obviously targeted at subprime borrowers, but involving similar unfair and deceptive practices for which the banks were required to pay restitution. OCC Consent Order No. 2003-39 (Apr. 5, 2003) (involving annual fees and resulting late charges assessed after First Consumers National Bank of Beaverton, Oregon, knew it had to liquidate credit card portfolio), http://www.occ.treas.gov/ftp/eas/ea2003%2D39.pdf; Household Bank Agreement, supra note 323, at 8–10 (involving installation of substandard HVAC units, overcharges for merchandise and services, finance charges in excess of disclosed rate, and improper late fees in connection with private label cards issued for Hispanic Air Conditioning and Heating, Inc.). In addition, the OCC brought an enforcement action against a full-service national bank regarding loans to subprime borrowers to pay delinquent property taxes. In addition to alleging violations of various real estate lending laws, the OCC alleged that the terms of the loans inherently violated the FTCA. OCC Consent Order No. 2003-135 (Nov. 7, 2003) (regarding Clear Lake National Bank), http://www.occ.treas.gov/ftp/eas/ea2003-135.pdf.


tive jurisdictions—including commercial entities with nonbank bank subsidiaries—that they intend to closely monitor consumer lending practices and aggressively pursue predatory lending practices. Indeed, they have prevented the acquisition of nonbank bank subsidiaries by some commercial entities already engaged in subprime lending. At the same time, the regulators continue to aggressively support both the legal authority of commercial enterprises to make use of the Exportation Doctrine through nonbank bank subsidiaries, and the preemptive power of the Exportation Doctrine being asserted by such subsidiaries. This aggressive support includes intervention in ongoing litigation where the underlying legal principles are being challenged, as in the Heaton case.

ii. Charter Renters

The pattern noted above holds with respect to charter-renting arrangements as well. While the banking regulators are demonstrating an increased willingness to use existing enforcement powers to limit the use of the Exportation Doctrine through partnerships between banks and commercial entities when these ventures involve lending considered predatory, the regulators continue to defend the legal principles underlying the extension of the Exportation Doctrine to nonbanks through such partnerships.343

The emergence of the new partnerships between banks and subprime lenders has prompted a number of regulatory pronouncements that warn in stern, but vague, terms that the benefits of the Exportation Doctrine may not be available to third-party partners of national banks in all circumstances. In a general bulletin on risk management principles applicable to third-party relationships, the OCC distinguished among the various ways in which a bank may use a third party—“[t]o perform functions on the bank’s behalf” (e.g., payroll processing or human resources administration), “[t]o provide products and services that the bank does not originate” (e.g., investment or

343. A pithy recent articulation of this position was in a speech made by the former Chairman of the FDIC, Donna Tanoue, who said, “The practice of renting a charter merely to collect a fee to allow a high-cost payday lender to circumvent state law is inappropriate. It may be legal—but I don’t like it.” FDIC Press Release PR-41-2000, FDIC Chairman Tanoue Denounces “Charter Renting” as a Means of Funding Predatory Payday Lenders (June 14, 2000), http://www.fdic.gov/news/news/press/2000/pr0041.html.
insurance products), or "[t]o 'franchise' the bank's attributes." With respect to that third category, the OCC refrained from giving any specific examples, but instead generally described the activity and provided stern warnings about its potential for "significant reputation, strategic, transaction, and compliance risk to the bank." The OCC cautioned national banks to be wary of any third party "seeking to avail itself of the benefits of a national bank charter":

In some instances, nonbank vendors may target national banks to act as delivery vehicles for certain products and services, or act as the nominal deliverer of products or services actually provided by the third party, in order to avoid state law standards that would otherwise apply to their activities. . . . National banks should be extremely cautious before entering into any third-party relationship in which the third party offers products or services through the bank with fees, interest rates, or other terms that cannot be offered by the third party directly. Such arrangements may constitute an abuse of the national bank charter.

In detailing the specific risks associated with third-party relationships, the OCC included the reputation risk that can result if a third-party partner violates consumer laws, as well as the possible credit risk if the third-party partner solicits customers, conducts underwriting analysis, or offers products (such as payday loans) in ways that increase risks.

While providing this generic warning about the potential for abuse of third-party relationships, the OCC continues to intervene to assert the rights of commercial partners to enter into such arrangements with banks. The OCC recently opined that contractual arrangements between national banks and automobile dealers under which the dealers act as "agents" for the banks by soliciting loans, taking applications, and preparing loan documentation, sufficed to preempt the licensing and interest rate requirements of the Michigan Motor Vehicle Sales Act. The OCC stressed that "[t]he Banks prescribe the terms of the loan, including the minimum interest rate, and fund the loans and issue loan approvals." This ruling specifically dis-

345. "The bank lends its name or regulated entity status to products and services originated by others or activities predominantly conducted by others." Id.
346. Id.
347. Id.
348. Id.
350. Id. at 28,595.
tosphered these programs from situations "where a loan product has been developed by a non-bank vendor that seeks to use a national bank as a delivery vehicle, and where the vendor, rather than the bank, has the preponderant economic interest in the loan." 351

The OCC has targeted third-party relationships between banks and payday lenders for particular scrutiny. In a bulletin directly addressing payday lending, the OCC singled out arrangements in which banks fund loans originated by third-party payday lenders. 352 The OCC expressed concern that in some such arrangements, the third party offers services normally provided by the bank itself, or purchases the loans or their servicing rights. After discussing those possibilities, the OCC sternly warned, "Payday lenders entering into such arrangements with national banks should not assume that the benefits of a bank charter, particularly with respect to the application of state and local law, would be available to them." 353

Shortly thereafter, the OCC began making good on this warning, commencing enforcement proceedings that precipitated the termination of all four of the existing contractual partnerships between national banks and payday lenders. In 2002, the OCC signed Consent Orders with both Goleta National Bank 354 and Eagle National Bank, 355 requiring them to cease payday lending activities they had been conducting through contractual arrangements with ACE and Dollar Financial Group, respectively. In the Eagle case, the OCC alleged that the bank had essentially ceded the entire administration of the program to Dollar. 356 In the Goleta case, the OCC noted

351. Id. at 28,595 n.6.
352. OCC Advisory Letter No. 2000-10 (Nov. 27, 2000), http://www.occ.treas.gov/ftp/advisory/2000-10.txt. This Advisory Letter also addresses guidelines for banks engaging in payday lending directly, aimed at ensuring that all such activities are done in a safe and sound manner, without "engag[ing] in abusive practices that would increase the compliance, legal, and reputation risks associated with payday lending." Id.
353. Id.
356. The OCC even rejected the "attribute franchising" characterization of this relationship, and called it "charter renting." OCC Eagle Press Release, supra note 355 (citing John D. Hawke, Jr., Comptroller of the Currency).
that ACE purchased a 90–95% participation in the loans "shortly after origination," and expressed concerns about Goleta's failure to manage its relationship with ACE in a safe and sound manner.

In January 2003, the OCC entered into similar consent agreements pursuant to which First National Bank in Brookings, South Dakota, agreed to terminate its contractual arrangement with Cash America, and Peoples National Bank in Paris, Texas, agreed to terminate its contractual arrangement with Advance America. In both cases, the OCC stressed that the banks' failure to properly supervise their payday lender partners resulted in both safety and soundness concerns and violations of federal consumer protection laws. The OCC also expressed great concern over "arrangements in which national banks essentially rent out their charters to third parties who want to evade state and local consumer protection laws," warning that "[the preemption privileges of national banks derive from the Constitution and are not a commodity that can be transferred for a fee to nonbank lenders."

The OCC's recent enforcement actions appear to be offering a list of benchmarks for distinguishing partnerships that will permit the use of exportation by the nonbank partner and those that will not. Among the benchmarks being offered are: who sets the terms of the credit, who issues the loan approvals, who funds the loans, and who has the preponderant economic interest in the credit. The exact point in the spectrum where that line is reached will likely be fleshed out over the next couple of years as the many lawsuits challenging various aspects of pro-

357. OCC Stipulation and Consent to the Issuance of a Consent Order, supra note 308, at 2.
grams involving partnerships between banks and nonbanks start producing decisions on the merits.\footnote{364
Indeed, the private bar is clearly heavily engaged in the efforts to identify and influence the resolution of this ambiguity. See, e.g., John L. Doug-
las, Renting the Charter and Other Assorted Sins: Eagle and the Virtual Bank, ELECTRONIC BANKING L. & COM. REP., Mar. 2002, at 13, 14 (offering "some of the guiding principles as to where the line might be drawn"); Darrell L. Dre-
her & Deborah Freye, Continuing Challenges to Interstate Lending by Depository Institutions, 57 BUS. LAW. 1297, 1299–1303 (2002) (describing the prolif-
eration of litigation “attacking exportation rights in interstate lending transactions by alleging . . . that someone other than the depository institution is the actual lender in the transaction”); Payday Lending Report, supra note 9, at 20 & n.35 (describing numerous class action law suits against ACE Cash Express).

365. The OCC asserted its regulatory authority over bank service compan-


367. ACE & Goleta Press Release, supra note 358; Peoples National Press 
Release, supra note 361.

What is clear is that payday lenders are not favored lending partners for national banks. Indeed, the recent enforcement actions in the payday lending cases demonstrate that the OCC's discomfort about payday lenders extends further than simply desiring to exclude them from the orbit of beneficiaries of the Exportation Doctrine. In two of these cases, the OCC asserted its regulatory authority over both the national bank and the nonbank payday lender partner. Asserting the regulatory jurisdiction that the federal banking regulators have over parties with close relations with banks,\footnote{366
Moreover, the OCC charged both the national banks and their nonbank partners with violations of numerous federal consumer protection stat-
utes—the Equal Credit Opportunity Act, TILA, and consumer privacy protections included in Gramm-Leach-Bliley—and assessed civil money penalties for these violations.\footnote{367
The OCC is demonstrating the same readiness to police predatory lending

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through its power to enforce consumer protection statutes in connection with charter-renting arrangements that it is showing in connection with nonbank bank subsidiaries of commercial entities.

In the face of the OCC's clear hostility, some payday lenders have begun to explore similar partnerships with state-chartered banks.\(^{368}\) In contrast to the OCC, the FDIC is at least perceived as evincing some tolerance for relationships between state-chartered banks and payday lenders. The FDIC does consider payday lending activity to involve significant risks, and its aggressively conservative approach to the amount of capital required to support such activity has caused at least one bank to exit the payday lending business.\(^{369}\) While warning banks of the additional risks inherent in engaging in payday lending through third-party relationships, however, its recently published examination guidelines\(^ {370}\) do not forbid such relationships entirely.\(^ {371}\) At least one payday lending executive has stated that he is "encouraged" by the FDIC's recognition of the legitimacy of such third-party relationships.\(^ {372}\) Indeed, one prominent state bank partner to a number of payday lenders recently announced that it was leaving the Federal Reserve System in order to substitute the FDIC for the Federal Reserve as its primary federal regulator.\(^ {373}\) Whereas the Federal Reserve was trying to force the bank out of payday lending, the FDIC has reportedly reached an agreement with the bank permitting it to continue its relationship with the payday lenders.\(^ {374}\) Although the Delaware banking regulators have apparently sanctioned this arrangement as well,\(^ {375}\) whether all state banking regulators will be as accommodating remains to be


\(^{371}\) Id.

\(^{372}\) Jackson, supra note 368 (quoting Billy Webster, chief executive officer of Advance America, the payday lender forced to terminate its relationship with Peoples National Bank, Paris, Texas, as saying, "In contrast to the OCC, [the FDIC] recognizes there is a legitimate role for banks.").

\(^{373}\) Craig Linder, Will Payday Path Draw Heat to FDIC?, AM. BANKER, Nov. 4, 2003, at 1; see supra note 105 and accompanying text.

\(^{374}\) Linder, supra note 373.

\(^{375}\) Id.
Exportation doctrine

Charter-renting arrangements have been subject to varying degrees of judicial challenges. The use of exportation powers by commercial entities in credit card cobranding arrangements has not been subject to any significant legal challenges by private litigants.\(^{377}\) The RAL arrangements have been challenged in court, but the challenges thus far have not focused on the authority of the commercial partners to take advantage of their bank partners’ exportation powers.\(^{378}\) Instead, litigants have challenged (unsuccessfully) the attributed “location” of the loan for exportation and branching purposes,\(^ {379}\) (unsuccessfully) the TILA disclosures associated with such loans,\(^ {380}\) and (largely successfully) whether the tax preparers had violated various consumer protection laws or fiduciary obligations to taxpayers by failing to disclose the financial benefits they received from their bank partners.\(^ {381}\) The litigants in the payday loan suits,

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\(^{376}\) Early indications are not so positive. See Ben Jackson, Payday Plan B May Not Make It Out of the Gate, AM. BANKER, Jan. 24, 2003, at 1 (quoting South Dakota’s banking regulator with decidedly guarded reactions to partnerships with payday lenders); John Reosti & Ben Jackson, Hard Stance of Pennsylvania Regulator Bodes Ill for Payday Lenders, AM. BANKER, Apr. 11, 2003, at 1 (quoting Pennsylvania state banking regulator as vowing to be “as aggressive as the federal banking regulators” in dealing with payday lenders).

\(^{377}\) When AT&T announced the first major cobranding deal in 1990, several major banks raised with the Federal Communications Commission the issue of whether AT&T had the authority to enter in the credit business. Jeffrey Kutler, At AT&T Card Unit, Decision to Sell Strengthens Management’s Resolve, AM. BANKER, Nov. 5, 1997, at 1.

\(^{378}\) One challenge that was brought in Alabama state court appears to be a more broad-based allegation of usury violations, but the only opinions yet issued involve the unsuccessful attempt to remove it to federal court, on the basis of complete preemption by § 85. Anderson v. H&R Block, Inc., 287 F.3d 1038 (11th Cir. 2002), rev’d sub nom. Beneficial Nat’l Bank v. Anderson, 123 S. Ct. 2058 (2003).


\(^{380}\) Cades, 43 F.3d at 874–76.

however, are directly challenging the ability of the nonbank partner to take advantage of their bank partners' exportation powers, and the regulators are, for the first time, signaling some openness to this position. \(^{382}\)

As noted above, the regulators appear to be distinguishing among permissible and impermissible uses of the Exportation Doctrine by nonbanks according to the nature of the lending activity—if the nonbank partner is a payday lender or otherwise engaged in lending that is considered particularly susceptible to being predatory, the partnership is not permitted. \(^{383}\) All three types of arrangements can be, and indeed are, structured with varying degrees of responsibility and authority given to the bank or the nonbank partner. \(^{384}\) Although it is possible that such programs could be distinguished by relative divisions of control over credit decisions, risks, rewards, and ownership of receivables, such distinctions are not being consistently applied by the regulators as justifications for permitting some of these arrangements but not others.

As a practical matter, the sorting mechanism being used by the regulators might be a prudent regulatory approach. However, as a policy matter, there is no functional difference between a cobranded credit card program and the Goleta National Bank's payday lending program with ACE. Both types of programs should be subject to the same analysis of whether it is justifiable under any principles of banking law, or any other legal principle, to permit any nonbank to benefit from the Ex-

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383. Of course, this is not how regulators characterize their actions. In a recent speech, Comptroller of the Currency John D. Hawke, Jr., stated that decisions to assert preemption must be "value-blind" with respect to the value of the state law at issue, depending solely on whether or not the state law impairs or significantly interferes with the powers granted national banks under federal law. However, he also warned:

> The benefit that national banks enjoy by reason of this important constitutional doctrine cannot be treated as a piece of disposable property that a bank may rent out to a third party that is not a bank. Preemption is not like excess office space in a bank-owned building. It is an inalienable right of the bank itself.


portation Doctrine through a nonbank bank subsidiary or a contractual arrangement with a depository institution.

e. Evaluating the Adequacy of the Justifications for Extending the Orbit of Beneficiaries to Nonbank Corporate Entities

Extending the Exportation Doctrine to nonbanks is not justified under the banking law principles from which it was derived. Section 85 was originally enacted to preserve the nascent national banking system from hostile states. The Exportation Doctrine was drawn from § 85 to foster the development of the emerging interstate banking system. Section 85 was then extended to state banks pursuant to the doctrine of competitive equality when it became clear that state banks needed the same powers to be competitive with national banks in the emerging nationwide banking system. Up until this point, the expansion of the Exportation Doctrine served the purpose of supporting developing interstate banking systems. National and state banks are bestowed the privilege of operating under one single state’s interest laws, based on the judgment that the value of a national and a state banking system functioning efficiently on an interstate basis outweighs the value of allowing states to regulate the terms of consumer credit extended to their citizens. The Exportation Doctrine is but one manifestation of the conviction that banks are somehow special, that the role that they play in our economy merits some special legal privileges.

Extending the Exportation Doctrine to nonbank lenders through the nonbank bank exemptions or through charter-renting arrangements is inconsistent with the underlying rationale of the Exportation Doctrine as one of the unique privileges accorded depository institutions. Admittedly, the history of the nonbank bank exemptions demonstrates that Congress is comfortable breaching the wall between banks and commercial enterprises in many consumer lending contexts. However, Congress has never explicitly sanctioned any of the charter-renting arrangements, and has made clear that there are limits to its comfort level with such breaches.

385. See supra Part II.B.1.
386. See supra note 113 and accompanying text.
387. See supra notes 217-27 and accompanying text.
388. See supra Part II.B.5.b.
389. For example, the Gramm-Leach-Bliley Act retained significant limits to commercial activities of banks, see supra note 254 and accompanying text,
There might be other valid policy reasons to maintain the current, expanded scope of the orbit of the beneficiaries of the Exportation Doctrine. From the perspective of the consumer, there is no functional difference between the car loan offered by a national bank and that offered by a consumer finance company, or the credit card loan offered by a retailer and that offered by a retailer's credit card bank subsidiary. Granting all consumer lenders access to the Exportation Doctrine is arguably justifiable as a rational and efficient way to establish a competitive national consumer credit market. It is also arguably justifiable as an efficient way to provide for effective enforcement of predatory lending laws. Moreover, extending the Exportation Doctrine to commercial entities solely to make relatively small consumer loans to individuals scattered across the nation does not raise the specter of harmful concentrations of financial resources or power that could affect the stability or impartiality of the financial system that underlies the statutory restrictions on affiliations between banks and commercial enterprises.

Nevertheless, the extraordinary preemptive force of the Exportation Doctrine requires a powerful justification. Non-banks using the Exportation Doctrine, either through nonbank bank subsidiaries or through charter-renting arrangements, are not justified in relying on the banking law principles that rationalize the broad expansions of the Exportation Doctrine with respect to depository institutions.

C. CODA: BEYOND THE EXPORTATION DOCTRINE—LESSONS FROM THE THRIFTS

When the federal banking regulators began pressuring and closed the unitary thrift holding company loophole, see infra note 404 and accompanying text.


391. Allowing commercial entities to access the Exportation Doctrine arguably makes more consumer credit available to consumers. More sources of credit means more competition in credit; competition should drive down the price of credit for consumers. See supra notes 52–54 and accompanying text for arguments for and against the free market as an adequate mechanism for regulating consumer credit, in the context of the U3C adoption debate.

392. See infra note 488 and accompanying text.

393. See supra note 241 and accompanying text.
banks to end their contractual relationships with payday lenders, one Ohio-based thrift perceived a market opportunity. First Place Bank of Warren, Ohio, a relatively small, federally chartered thrift, entered into a contractual relationship with a national payday lender, Check 'n Go, to offer payday loans in Texas. The president of First Place Bank said he wanted to establish this relationship now in order to get a jump on the bigger institutions that were sure to snap up this business as soon as the regulators finally decide how they intend to regulate such relationships. What is the advantage to thrift charters that would lead him to this conclusion?

Thrifts can also take advantage of the Exportation Doctrine. In addition, thrifts have statutory and regulatory authority to disregard state consumer credit laws that is even broader than that provided by the Exportation Doctrine. If any of the expansions of the Exportation Doctrine described above were to be curbed by legislative or judicial action, thrifts might retain their power to disregard almost all state consumer protection laws. Recently, the OCC has begun to aggressively assert similar preemption powers on behalf of national banks. Since this independent preemption power would significantly bolster any preemptive authority the OCC asserts as a result of the Exportation Doctrine, it is necessary for us to consider yet one more layer of laws and regulations further complicating an already complicated area—the preemption powers of thrifts. I will discuss, first, the application of the Exportation Doctrine to thrifts; second, the broader preemption powers that federal thrifts have; and, third, recent actions by the OCC to assert similar broader preemption powers for national banks.

1. Application of the Exportation Doctrine to Thrifts

State and federal thrifts have virtually the same exportation powers as national banks. Congress extended § 85 powers to state and federal thrifts at the same time that it did so to state banks, in the enactment of DIDMCA. Both the OTS and its predecessor regulatory agency, the Federal Home Loan Bank Board (FHLBB), have ruled that the DIDMCA gives

395. Id.
thrifts both most-favored lender status and *Marquette* exportation powers. The few courts that have considered this issue have generally agreed. The OTS has followed the OCC’s lead in expansively interpreting the meaning of both “interest” and “location” for purposes of the Exportation Doctrine. The concept of “location” is just as problematic for Internet-only thrifts as it is for banks.

397. See Lending and Investment, 12 C.F.R. § 560.110 (2003); FHLBB General Counsel Opinion (Sept. 29, 1980), WL FHLBB 1245; Letter from A. Patrick Doyle, FHLBB Deputy General Counsel (Aug. 6, 1982), 1982 FHLBB LEXIS 65.


399. 12 C.F.R. § 560.110(a)–(b).

400. Federal thrifts have always had the power to branch across state lines. See 12 U.S.C. § 1464(r)(1) (2000). Thus, the FHLBB had to grapple with the limitations of *Marquette*’s “location” analysis immediately after the enactment of DIDMCA section 522, which it did through opinion letters essentially the same as the OCC’s. See Letter from Harry W. Quillian, Acting General Counsel of OTS (June 27, 1986), WL FFIN-OTS; Letter from Norman H. Raiden, General Counsel of FHLBB (Dec. 11, 1984), WL FHLBB 1078; Letter from Norman H. Raiden, General Counsel of FHLBB (July 23, 1984), WL FHLBB 3899. The most recent opinion on this topic seems to take a position that is even more aggressive than the OCC’s, asserting that a federal thrift can always export the most favored lender rate of its home state, even for a loan that is “made” from a branch in another state to a borrower in the branch state. See Letter from Harris Weinstein, Chief Counsel of OTS, [1992–1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 82,645 (Dec. 24, 1993) (permitting exportation of rates from any state where a thrift has a branch). In this opinion, Weinstein supported its conclusion, in part, by the following arguably overly aggressive interpretation of *Marquette*:

[Allowing federal savings associations to export their home state interest rates to loans originated in other states (including other states where the association has an established presence) is consistent with the desire expressed by the Supreme Court in *Marquette* to interpret the statutory most favored lender provisions in a manner that allows federal lenders to establish workable national lending networks that are free from the burden of mandatory compliance with a patchwork of state usury laws.]

Id.

401. The first two Internet-only depository institutions were thrifts, rather than banks. See OTS Approval of Holding Company Acquisition and Purchase of Assets and Assumption of Liabilities, Order No. 97-66 (July 11, 1997) [hereinafter OTS Atlanta Approval] (regarding Atlanta Internet Bank), http://www.ots.treas.gov/docs/67066.pdf; OTS Approval of Purchase of Assets and
Furthermore, the orbit of the beneficiaries of the exportation powers of thrifts is as broad as it is for banks. There is a thrift analogue to the nonbank bank. Until quite recently, commercial enterprises could take advantage of an exception in the thrift holding company regulatory scheme similar to the nonbank bank exception to the bank holding company regulatory scheme—an exception for companies owning only one thrift (commonly called "unitary thrift holding companies").

This loophole was closed in Gramm-Leach-Bliley, although existing unitary thrift holding companies were grandfathered. In the years of congressional debates preceding the enactment of Gramm-Leach-Bliley, as it became clear that the unitary thrift holding company loophole was likely to be closed, there was a surge in applications for thrift charters from commercial enterprises. These new unitary thrift holding companies were grandfathered when Gramm-Leach-Bliley was passed. Among the commercial enterprises joining that surge were State Farm Mutual Automobile Insurance Company; Franklin Resources, a mutual fund company; Excel Communications, a long-


Immediately after the consolidation, the new entity relocated its home office from Acworth, Georgia, to Columbia, South Carolina. Id. Three days after the approval, the OTS approved a modification of the original order, in part to accommodate “a possible change in the proposed Internet service provider of certain financial services to be offered.” OTS Modification of Approval of Holding Company Acquisition and Purchase of Assets and Assumption of Liabilities, Order No. 97-76, at 2 (July 25, 1997), http://www.ots.treas.gov/docs/67076.pdf.

To qualify for this exception, the thrift must maintain at least 70% of its assets in real estate related or other consumer loans. 12 U.S.C. § 1467a(c)(3), (m) (2000).

402. See id. § 1467a(c)(9).


405. David Harrison, A Flurry of Nonbank Filings for Thrift Charters at Yearend, AM. BANKER, Jan. 6, 1999, at 2 (noting that application was to convert the charter of a grandfathered CEBA nonbank bank located in California to a federal thrift to be headquartered in Salt Lake City, “to take advantage of Utah’s favorable usury laws”).
distance phone company; and two of the first retailers to acquire credit card banks: Federated Department Stores and Nordstrom. Wal-Mart also applied to acquire a thrift, but its application arrived after the deadline for closing the unitary thrift loophole set by Gramm-Leach-Bliley.

Commercial enterprises also engage in charter renting with thrifts. The Rolling Stones partnered with Chevy Chase Savings Bank of Maryland to offer a Visa card providing discounts on music products and Rolling Stones catalog merchandise. General Motors MasterCard, offering a rebate on GM car purchases equal to 5% of charge volume, was issued by Household Bank, a federal thrift. Indeed, as one of the nation's largest credit card issuers, Household is involved with numerous highly visible cobranding relationships, and is an active participant in the RAL market. And, as discussed above, at least one federal thrift has entered into a partnership with a payday lender.

2. Broader Thrift Preemption Powers

Beyond these derivative § 85 powers, moreover, federal thrifts have an independent basis for preempting state consumer credit laws that is even more robust than the Exportation Doctrine. This power derives not from one single statutory provision, but rather from the entire scheme of federal statutes and regulations governing the operations of federally chartered thrifts. Federally chartered thrifts were created pursuant to

408. Jacqueline S. Gold, Stocking the Shelves with Financial Services: Target's E-Trade Alliance Just Another Product, AM. BANKER, Dec. 1, 2000, at 1. In a clear indication that at least some of these retailers are making full use of their expanded thrift powers, the author of this Article recently received an unsolicited e-mail from FDS Bank, the new thrift subsidiary of Federated Department Stores, touting its mortgage rates. E-mail from FDS Bank to Elizabeth R. Schiltz (Dec. 10, 2002) (on file with author).
409. Gold, supra note 408.
411. Yvette D. Kantrow, GM to Offer Credit Card Priced Lower than GE's, AM. BANKER, Sept. 9, 1992, at 1.
412. Top 50 Companies in Managed Bank Credit Card Loans, AM. BANKER, Sept. 21, 1999, at 17 (listing Household's corporate parent as the sixth largest credit card issuer as of March 31, 1999).
413. See supra note 292.
414. See supra note 394 and accompanying text.
the Home Owners' Loan Act of 1933 (HOLA).\textsuperscript{415} HOLA was enacted in reaction to the widespread collapse of the state thrift system—the primary source of funding for home mortgages—during the Great Depression. In contrast to the NBA, HOLA evinces no deference to state regulators or state laws. Instead, the perspective suggested by the language and legislative history of HOLA is that the state thrift system had largely failed, necessitating the creation of a "new and improved" federal system. The federal regulators charged with establishing this new system were given explicit authority to dictate every aspect of the operations of thrifts, "giving primary consideration [to] the best practices of thrift institutions in the United States,"\textsuperscript{416} rather than deferring to any existing state laws.

In \textit{Fidelity Federal Savings & Loan Ass'n v. de la Cuesta},\textsuperscript{417} the Supreme Court generously interpreted HOLA's preemptive reach, holding that an FHLBB regulation permitting federally chartered thrifts to freely exercise due-on-sale clauses in mortgages\textsuperscript{418} preempted contrary California law. The Court held that "[f]ederal regulations have no less pre-emptive effect than federal statutes. Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily."\textsuperscript{419} Furthermore, the Court said, "[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law."\textsuperscript{420} The only relevant issues in this case, according to the Court, were, first, whether the FHLBB meant to preempt California's law, and, second, whether such an action was within the scope of the authority Congress delegated to the FHLBB.\textsuperscript{421}

With respect to the first issue, the Court found that the FHLBB unambiguously intended to preempt California law, quoting, among other things, the following language in the preamble to the FHLBB's regulation:

\begin{quote}
[I]t . . . is the Board's intent to have . . . due-on-sale practices of Fed-
\end{quote}

\begin{itemize}
\item 417. 458 U.S. 141 (1982).
\item 418. A due-on-sale clause is "a contractual provision that permits the lender to declare the entire balance of a loan immediately due and payable if the property securing the loan is sold or otherwise transferred." \textit{Id.} at 145.
\item 419. \textit{Id.} at 153–54.
\item 420. \textit{Id.} at 154.
\item 421. \textit{Id.}
\end{itemize}
eral associations governed exclusively by Federal law. . . . Exercise of due-on-sale clauses by Federal associations shall be governed and controlled solely by [the FHLBB regulations]. Federal associations shall not be bound by or subject to any conflicting State law which imposes different . . . due-on-sale requirements . . . .

With respect to the second issue, whether the FHLBB acted within its statutory authority in issuing this preemptive regulation, the Court began by discussing the legislative history of HOLA, stressing Congress's perception of it as "a radical and comprehensive response to the inadequacies of the existing state systems." The Court found confirmation of this perception in two portions of the basic enabling provision of HOLA, section 5(a). First, section 5(a) authorized the FHLBB, "under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation" of federal thrifts. The Court held that this broad language could not possibly be understood to exclude authority to regulate the lending practices of thrifts. Second, section 5(a) stated that, in prescribing such regulations, the FHLBB should "giv[e] primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States." This language, the Court held, is evidence that "Congress plainly envisioned that federal savings and loans would be governed by what the Board—not any particular State—deemed to be the 'best practices.' Thus, the statutory language suggests that Congress expressly contemplated, and approved, the Board's promulgation of regulations superseding state law."

The de la Cuesta Court's generous interpretation of the FHLBB's preemption powers has not gone unchallenged. Indeed, a concurring opinion cautioned that "the authority of the [FHLBB] to pre-empt state laws is not limitless," and a dis-

422. Id. at 158 (quoting 41 Fed. Reg. 18,286, 18,287 (1976) (emphasis added in opinion, but does not appear in original regulation)). This lack of any ambiguity with respect to the FHLBB's intention in this regard created a clear conflict between the federal and the state law, rendering it unnecessary for the Court to rule on whether HOLA or FHLBB regulations occupy the entire field of thrift regulation. Id. at 159 n.14.

423. Id. at 160 (quoting Conference of Fed. Sav. & Loan Ass'ns v. Stein, 604 F.2d 1256, 1257 (9th Cir. 1979), aff'd mem., 445 U.S. 921 (1980)).


425. Id.

426. Id. at 161–62.

427. Id. at 171 (O'Connor, J., concurring). Justice O'Connor issued the fol-
senting opinion argued that the FHLBB exceeded its congressional mandate in enacting its due-on-sale regulation. Commentators have also challenged this decision as an overbroad application of preemption principles. Regardless of these challenges, however, the FHLBB and its successor agency, the OTS, have aggressively exploited the preemptive power bestowed upon them by the Court, and subsequent courts reviewing the actions of these regulators have, for the most part, sanctioned their actions.

In 1986, the OTS undertook to update, reorganize, and streamline its existing lending and investment regulations and policy statements. In doing so, the OTS consolidated all of its prior regulations and opinions on lending activities of federal thrifts, and prefaced them with a preamble clearly written to invite the welcoming embrace of the de la Cuesta ruling:

To enhance safety and soundness and to enable federal savings associations to conduct their operations in accordance with best practices (by efficiently delivering low-cost credit to the public free from undue regulatory duplication and burden), OTS hereby occupies the entire field of lending regulation for federal savings associations. OTS intends to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation. Accordingly, federal savings associations may extend credit as authorized under federal law... without regard to state laws purporting to regulate or otherwise affect their credit activities...

The OTS followed this general preemption proclamation with a list of “illustrative examples” of the types of state laws preempted, including: licensing, registration, and filing requirements; terms of credit, including amortization and deferral and capitalization of interest; loan-related fees, including late charges, prepayment penalties, and overlimit fees; escrow

lowing warning:

[I]t is clear that HOLA does not permit the [FHLBB] to pre-empt the application of all state and local laws to such institutions. Nothing in the language of § 5(a) ... remotely suggests that Congress intended to permit the [FHLBB] to displace local laws, such as tax statutes and zoning ordinances, not directly related to savings and loan practices.

Id. at 172.

428. Id. at 173–74 (Rehnquist, J., dissenting).

429. See Duncan, supra note 9, at 317–18 (criticizing both the de la Cuesta Court’s inference of preemption from agency regulation and “best practices” or “national uniformity” as basis for preemption); Kreissman, supra note 8, at 911 (criticizing administrative preemption as policy matter; critical of de la Cuesta Court’s legislative history analysis).

accounts; access to and use of credit reports; and disclosure and advertising. The OTS did provide some limit to its exercise of preemption. It expressly declined to preempt state laws such as contract and commercial laws, tort laws, or criminal laws, “to the extent that they only incidentally affect the lending operations of Federal savings associations.” And it expressly declined to preempt state laws that might be favorable to a federal thrift exporting such laws under the Most Favored Lender Doctrine.

The OTS justified its regulatory fiat with references to *de la Cuesta* and prior decisions holding that Congress intended federal thrifts to be “uniquely federalized financial institutions—even more so than national banks.” It claimed that freeing federal thrifts from the “hodgepodge of conflicting and overlapping state lending requirements” would further both the “best practices” and the “safety and soundness” objectives of HOLA. Further, the OTS claimed that the interests of borrowers were adequately protected by “the elaborate network of federal borrower-protection statutes applicable to federal thrifts,” as well as additional consumer protection regulations adopted by the OTS when it detects a “gap” in the existing federal protections.

Since then, the OTS has aggressively defended its preemption of state laws affecting consumer lending for federal thrifts, issuing numerous opinions that particular state re-

431. *Id.* § 560.2(b).
432. *Id.* § 560.2(b)(12).
433. *Id.* § 560(c).
434. *Id.* §§ 560(a), 560.110(c).
436. *Id.*
437. *Id.* at 50,965–66. As examples of such regulations, the OTS cites the adoption of the FTC’s Credit Practices Rule, 12 C.F.R. pt. 535; regulations imposing disclosure requirements on late charges and adjustments to terms of home loans, 12 C.F.R. §§ 560.33, 560.35; and a regulation requiring prepayment penalties on home loans to be applied to principal, unless the loan contract provides otherwise, 12 C.F.R. § 560.34. Lending and Investment, 61 Fed. Reg. at 50,965–66.
438. In contrast, the OTS recently announced its intention to *retract* the preemption powers it had previously extended to *nonthrift* mortgage lenders. Alternative Mortgage Transaction Parity Act of 1982, Pub. L. No. 97-320, 96
strictions on various types of loan-related fees are preempted by its lending regulation. 439 The OTS opined that California's unfair and deceptive practices statutes were preempted to the extent they are applied in such a way as to interfere with a federal thrift's ability to advertise its loans, require insurance on security for loans, or limit the amounts of loan-related fees. 440 The OTS's opinion preempting a California law requiring specific disclosures detailing the financial consequences of making only minimum payments on credit card balances was upheld by a district court in the Lockyer case. 441 Even more recently, the OTS has issued legal opinions asserting that its comprehensive regulation of lending by federal thrifts preempted most of the terms of a number of recent state statutes dealing with predatory real estate loans. 442 The breadth of the federal thrift pre-

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441. Am. Bankers Ass'n v. Lockyer, 239 F. Supp. 1000, 1011-12 (E.D. Cal. 2002); see supra notes 205-12 and accompanying text.

emption power has prompted J.P. Morgan Chase & Company, one of the few state-chartered banks operating on a national level, to apply for a federal thrift charter under which it plans to consolidate most of its national consumer credit operations.\[^{443}\]

At the same time that the OTS aggressively defends the preemptive powers of federal thrifts in the abstract, just like the federal banking regulators, it has taken actions to curb subprime lending. The OTS was a party to the joint agency guidances on subprime lending and credit card account management.\[^{444}\] The OTS has also declined to approve applications by a number of subprime lenders to acquire or charter thrift subsidiaries.\[^{445}\] It also closed a federal thrift engaged primarily in subprime lending.\[^{446}\]

3. Recent Assertions of Broader Preemption Powers by OCC

National banks do not have the same unambiguous statutory mandate to operate under a predominantly federal regula-


\[^{444}\] See supra notes 326–34 and accompanying text.

\[^{445}\] Even in the "boom years" of unitary thrift chartering immediately preceding the closing of the unitary thrift holding company loophole, see supra notes 404–09 and accompanying text, the OTS conspicuously declined to approve applications by a number of subprime lenders to charter or acquire thrift subsidiaries. A charter application by Associates First Capital Corporation was suspended by the OTS, a charter application by First Alliance Corporation to acquire Standard Pacific Savings F.A. was withdrawn, Press Release, Consumers Union, Consumers Union Hails Withdrawal of Expansion Plan for First Alliance Lending Company (Feb. 11, 1998), http://www.consumersunion.org/finance/allwc298.htm, and the charter application of GMAC Mortgage for a thrift with a focus on subprime mortgage lending was slowed down, GMAC Mortgage Seeks Thrift Charter, NAT'L MORTGAGE NEWS, Sept. 14, 1998, at 5, 1998 WL 18766950. Another application for a thrift that would focus on the subprime loan market was approved, but only subject to unusually high capital maintenance requirements. S&L Regulator Approves Thrift Charter for Memphis Firm with Subprime Program, 73 BNA'S BANKING REP. 343, 343 (1999). The OTS also gave a "needs to improve" rating on its Community Reinvestment Act examination of Crusader Holding Corporation because of its payday lending activities; the thrift had to stop these activities in order to fulfill a condition of its subsequent acquisition by the Royal Bank of Pennsylvania. Jackson, supra note 369.

tory scheme as federal thrifts have in HOLA. In contrast to HOLA, the NBA evinces some degree of deference to specific state laws. Nor does the OCC have as clear a Supreme Court mandate to preempt state laws through regulations as the OTS has with de la Cuesta. Nevertheless, even though the NBA does not empower the OCC to establish a national banking system on a clean slate, it does charge the OCC with authority to establish and regulate a national banking system, and the OCC has established a comprehensive regulatory scheme for doing so. Under the Supremacy Clause’s general principles of preemption, this pervasive federal regulatory scheme clearly carries much preemptive power. Just as the OTS interprets its general preemption powers to include the power to preempt state consumer credit regulations, so, too, might the OCC’s general preemption powers include the power to preempt state consumer credit regulations. If the more recent expansions of the Exportation Doctrine were held to be excessive under § 85, they arguably might still be justified under the OCC’s general preemption power.

In response to the increasing number of enforcement actions brought against national banks by state authorities (often in response to lending activities perceived as predatory), the OCC has become more aggressive in articulating this independent basis for the preemptive powers of national banks. The first salvo was a recent Advisory Letter to all national banks requesting that they consult with the OCC whenever a state enforcement official seeks any information from a national bank “that may constitute an attempt to exercise visitation or enforcement power over the bank.” This Advisory Letter contained a comprehensive discussion of the statutory and

447. See, e.g., supra note 111 and accompanying text.
448. See supra note 109.
judicial basis for the OCC's broad visitorial powers with respect to national banks.\footnote{452} This discussion of the OCC's visitorial powers, moreover, was placed within the broader context of the general applicability of state laws to national banks. The OCC described the NBA's creation of the national banking scheme as creating a new system of nationally chartered banks operating "independently of state regulation" under "uniform and consistent regulation . . . by federal standards."\footnote{453} The OCC asserted that state law is only applicable to national banks "in limited circumstances when it does not conflict or interfere with the national bank's exercise of its powers."\footnote{454} Indeed, the OCC declared, "Exclusive federal oversight, uniform federal regulation, and state law preemption constitute three essential and distinctive elements of the national bank charter."\footnote{455}

Shortly after sending this Advisory Letter, the OCC published a proposal to amend its regulations to formalize its position that states have no visitorial powers over national banks.\footnote{456} In the preamble to this proposed rule change, the OCC expanded further on its broader argument that the comprehensive federal regulation of national banks essentially preempts

\footnote{452}{This power derives fundamentally from this provision of the NBA:
No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.
}
\footnote{453}{OCC Advisory Letter AL 2002-9, supra note 451, at 2.
}
\footnote{454}{Id.
}
\footnote{455}{Id. at 3.
}
\footnote{456}{The proposed 12 C.F.R. § 7.4000(a)(3) would read:
(i) Unless otherwise provided by Federal law, the OCC has exclusive visitorial authority with respect to activities expressly authorized or recognized as permissible for national banks under Federal law or regulation, or by OCC issuance or interpretation, including the content of those activities and the manner in which, and standards whereby, those activities are conducted.
(ii) The question of whether the OCC possesses the exclusive visitorial authority to assess the applicability of a state law to a national bank, and determine and enforce compliance with that law, shall be determined exclusively by Federal law . . . .
Rules, Policies, and Procedures for Corporate Activities; Bank Activities and Operations; Real Estate Lending and Appraisals, 68 Fed. Reg. 6363, 6376 (proposed Feb. 7, 2003) (to be codified at 12 C.F.R. pt. 7). The regulation would flesh out the three specific exceptions to the OCC's exclusive visitorial powers: five specific exceptions authorized by federal law (such as exceptions for tax enforcement), an exception for courts of justice, and an exception for Congress. Id. (regarding proposed 12 C.F.R. § 7.4000(b)).}
all state laws. The OCC cited the legislative history of the NBA, arguing that "the legislation's objective was to replace state banks with national banks." It also cited Supreme Court opinions supporting the position that Congress intended to fully occupy the field of regulation of national banks, leaving no room for any state regulation. The OCC specifically tied the particular subject of this regulatory proposal, its visitorial powers, with its broader position on federal preemption of state laws, asserting:

The OCC's exclusive visitorial authority complements principles of Federal preemption, to accomplish the objectives of the National Bank Act. The Supremacy Clause... provides that Federal law prevails over any conflicting state law. An extensive body of judicial precedent has developed over the nearly 140 years of existence of the national banking system, explaining and defining the standards of Federal preemption of state laws as applied to national banks. Visitorial power is a closely related authority... Together, Federal preemption and the OCC's exclusive visitorial authority are defining characteristics of the national bank charter, which have fostered the development of the nationwide system of Federally chartered banks envisioned by Congress which now operates as part of the flourishing dual banking system of national and state-chartered banks in the United States.

This proposed rule was met with, in the words of one industry newspaper, "near-unanimous enmity from the states." Undaunted, the OCC proceeded with an even more aggressive double-salvo a few months later. First, the OCC joined the OTS in declaring that Georgia's recent law addressing preda-

457. Id. at 6367.
   It thus appears that Congress has provided a symmetrical and complete scheme for the banks to be organized under the provisions of [the NBA]... [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.
   Rules, Policies, and Procedures for Corporate Activities; Bank Activities and Operations; Real Estate Lending and Appraisals, 68 Fed. Reg. at 6368. The OCC also quotes Farmers' & Mechanics' National Bank v. Dearing, 91 U.S. 29, 34 (1875) ("[T]he States can exercise no control over [national banks], nor in any wise affect their operation, except in so far as Congress may see proper to permit."). Id.
459. Id. at 6368–69 (citations omitted).
460. Todd Davenport, OCC Pushes, States Push Back on Oversight Power, AM. BANKER, Apr. 24, 2003, at 1. The OCC's proposal was opposed by banking commissioners from twenty-three states, by attorneys general from forty-six states, and by officials from Puerto Rico, the Virgin Islands, and Washington, D.C. Id.
461. See OTS Georgia Preemption Opinion, supra note 442, ¶ 83-356.
tory real estate lending was preempted for national banks. The OCC found support for this determination primarily in the federal law authorizing national banks to engage in real estate lending and the comprehensive regulatory framework established by the OCC to implement that statute (including recent supervisory guidelines on predatory real estate lending practices). With respect to the provisions in the Georgia law restricting interest rates, however, the OCC relied on two doctrines derived from § 85. National banks located outside of Georgia were exempt by virtue of the Exportation Doctrine. National banks located in Georgia were exempt by virtue of the Most Favored Lender Doctrine—since the OTS had preempted Georgia’s law for federal thrifts, a parity provision in the state law preempts it for state-chartered thrifts in Georgia; since national banks in Georgia are entitled to the status of the “most favored lender,” they are therefore also exempt.

The OCC also supported its Georgia ruling with a broader preemption argument, which was articulated even more forcefully in the second flank of the OCC’s offensive—a notice of proposed rulemaking announced on the same day as the Georgia ruling. Noting the increasing confusion over the applicability of state laws to national banks, the OCC proposed to amend its regulations to provide a consistent standard for determining when a state law is preempted. The standard that the OCC proposed was quite simple: “Except where made applicable by Federal law, state laws that obstruct, in whole or in part, or condition, a national bank’s exercise of powers authorized under Federal law do not apply to national banks.”

465. With respect to non-interest fees, the OCC found support in 12 U.S.C. § 24 (Seventh), which authorizes national banks to engage in activities that are part of or incidental to the business of banking. The OCC argued that “a bank’s authority to provide products or services authorized by § 24 (Seventh) to its customers necessarily encompasses the ability to charge a fee for the product or service.” Preemption Determination and Order, 68 Fed. Reg. at 46,279.
467. See Bank Activities and Operations, 68 Fed. Reg. 46,119, 46,132 (proposed Aug. 5, 2003) (to be codified at 12 C.F.R. pts. 7, 34) (detailing proposed 12 C.F.R. § 7.4009(b)); see also id. at 46,131 (proposed 12 C.F.R. § 7.4007(b) regarding general principle applied to deposit-taking powers, proposed 12
The OCC's support for this position could almost have been taken straight from the pages of de la Cuesta. The OCC first explained that the national banking system had been created by Congress with the conscious expectation that it would replace the state banking system.\textsuperscript{468} Accordingly, Congress established a comprehensive federal supervisory regime for national banks, administered by the OCC, and gave the OCC "comprehensive authority to examine all the affairs of a national bank and protect national banks from potentially hostile state interference by establishing that the authority to examine, supervise, and regulate national banks is vested only in the OCC, unless otherwise provided by Federal law."\textsuperscript{469} The OCC then referenced the Supremacy Clause and outlined the conditions under which the Supremacy Clause would preempt a state law.\textsuperscript{470} Relying on numerous Supreme Court and federal court decisions recognizing the unique status of the national banking system and preempting various state laws, the OCC concluded that "Federal courts apply no general presumption that state laws are applicable to national banks."\textsuperscript{471} Indeed, the OCC concludes, the comprehensive federal regulatory scheme applicable to national banks justifies a presumption that state laws are preempted if they pose any obstacle to national bank operations.

The only state laws that the OCC conceded do apply to national banks are laws in areas such as "contracts, debt collection, acquisition and transfer of property, and taxation, zoning, criminal, and tort law," all characterized as the types of laws which "typically do not regulate the manner or 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."\textsuperscript{472} In applying this general preemption principle to non-real estate lending by national banks, the OCC elaborated on the types of state laws subject to preemption. State laws on issues like li-

\textsuperscript{468} C.F.R. § 7.4008(c)(1) regarding general principle applied to non-real estate lending powers).
\textsuperscript{469} Id. at 46,120.
\textsuperscript{470} See supra note 109 and accompanying text.
\textsuperscript{471} Bank Activities and Operations, 68 Fed. Reg. at 46,122. Indeed, the OCC argues that even in situations where federal law does expressly provide that state laws apply, the OCC still applies the law that Congress has required. Id.
\textsuperscript{472} Id.
censing requirements, loan-to-value ratios, terms of credit, disclosure requirements, and interest rates are preempted. State laws regarding contracts, torts, criminal law, debt collection, acquisition and transfer of property, taxation, and zoning are not preempted.

As always, however, the OCC accompanied its strong defense of national bank powers with an equally strong signal that it will not tolerate the exercise of those powers for the conduct of predatory lending practices. Included in the proposed regulation was a prohibition on making any non-real estate loan "based predominantly on the foreclosure value of the borrower's collateral, without regard to the borrower's repayment ability, including the borrower's current and expected income, current obligations, employment status, and other relevant financial resources." The OCC characterized this as a "safety and soundness-based anti-predatory lending standard" aimed at what it characterized as the heart of predatory lending—making loans without a reasonable basis for believing that the borrower has the capacity to repay. The OCC also emphasized that national bank lending is subject to the FTCA, as well as other laws enforced by the OCC that provide additional consumer protections. Indeed, the OCC specifically invited "interested parties to suggest other general standards that would be appropriate to apply to national bank lending activities that would further [consumer protection] objectives."

Clearly, the OCC is trying to set the stage for its own de la Cuesta. This Supremacy Clause–based argument for the preemption of essentially all state consumer credit laws certainly supports the OCC's aggressive positions with respect to the expanded Exportation Doctrine. However, the OCC is clearly be-

473. Specifically including "schedule for repayment of principal and interest, amortization of loans, balance, payments due, minimum payments, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan." Id. at 46,131 (detailing proposed 12 C.F.R. § 7.4008(c)(2)(iv)).
474. Id.
475. Id. at 46,131–32 (proposed 12 C.F.R. § 7.4008(d)).
476. Id. (proposed 12 C.F.R. § 7.4008(b)). This same prohibition is applied to real estate loans. Id. at 46,132 (proposed 12 C.F.R. § 34.3(b)).
477. Id. at 46,129.
478. Id. at 46,126, 46,129.
479. Id. at 46,129.
480. Id.
ing extremely aggressive in its arguments and gearing up for legal challenge. Moreover, even if the argument were accepted as a general matter, the existence of § 85—a federal statute expressly deferring to state law with respect to interest rates—complicates the analysis of the preemption of state interest rate regulations. These complications were dodged by the OCC in its proposal, but are certain to be raised by interested parties in the inevitable ensuing legal challenges.

III. ASSESSING THE IMPLICATIONS OF THE EXPANSION OF THE EXPORTATION DOCTRINE

The evolution of the Exportation Doctrine carries important lessons for the perennial debate over whether consumer credit is more effectively regulated through federal or state legislation. To appreciate these lessons, we have to focus once again on the underlying structure of consumer credit regulation upon which the Exportation Doctrine acts.

Recall the old “patchwork quilt,” that complex edifice of state and federal consumer credit legislation. Traditionally, consumer credit was considered the province of state, rather than federal law. Thus, the first layer of regulation is a set of unique, nonuniform state laws permitting certain types of lenders to make certain types of loans at rates higher than the default interest rate, provided they comply with certain restrictions on such loans or licensing and supervision requirements. In the 1960s, the Conference of Commissioners proposed a uniform consumer credit law, the U3C, which could have provided systematic, comprehensive, uniform state consumer credit regulation; hardly any states adopted it. Around the same time, Congress enacted a federal law, the CCPA, which regulates particular aspects of consumer credit, such as disclosure requirements, credit reports, discrimination in lending, and debt collection practices. Another federal law, the FTCA, also affects consumer credit through its prohibition of unfair or deceptive trade practices.

On top of this complex statutory edifice perches the Exportation Doctrine. Section 85 was originally intended to protect the nascent national banking system from hostile state legislatures, by preventing states from disfavoring national banks over other lenders in the state. Over 100 years after its enactment, § 85 was interpreted in Marquette to permit national banks to “export” the interest rates permitted under the laws of their charter states to other states. Since then, the scope of this
Exportation Doctrine has been vastly expanded in three separate dimensions—its geographic reach, its substantive scope, and the orbit of its beneficiaries—as a result of a combination of congressional, regulatory, and judicial actions.

The actions expanding the Exportation Doctrine were taken by various entities faced with the resolution of specific issues raised in the context of particular dimensions of the Exportation Doctrine. In this Article, I have attempted to pull together all of the disparate actions taken by all of those entities. This comprehensive look at all three dimensions of the expansion leads to at least one undeniable conclusion. As a practical matter, as it currently stands, the expanded Exportation Doctrine dramatically undermines the efficacy of the nonuniform state statutes that theoretically provide the foundation for consumer credit regulation. Virtually any lender interested in establishing a nationwide consumer credit program can get access to a depository institution charter, either through a subsidiary nonbank bank or unitary thrift, or through a contractual relationship with a depository institution. Once such a lender has access to a depository institution charter, almost no state consumer credit law is going to pose any serious obstacle to its consumer credit operations. It can choose the jurisdiction from which its loans will be "made." If it chooses a jurisdiction with little or no meaningful restrictions, it can "export" that nonrestrictive regulatory regime to its customers in all other states, even residents of states with more restrictive laws. Although the Exportation Doctrine derives from a statute that addresses only interest rates, it has been interpreted to permit exportation of many additional significant credit terms, such as late fees, overlimit fees, annual fees, and cash advance fees. More recently, the Exportation Doctrine has been used to preempt a state disclosure statute because of the effect the disclosure law would have on banks' decisions concerning interest rates.

As Professor White has written, "the elaborate usury laws on the books of most states are only a trompe l'oeil, a 'visual deception . . . rendered in extremely fine detail . . . .' The presence of these finely detailed laws gives the illusion that local legislatures are guarding their constituents from high rates, but they are not." I believe that my detailed exposition of the extent of the expansion of the Exportation Doctrine provides irrefutable

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481. White, supra note 9, at 445 (footnote omitted).
support for Professor White’s observation.

An accurate perception of the true extent to which the Exportation Doctrine undermines state consumer credit laws is important in its own right. Careful analysis of each dimension of the Doctrine’s expansion yields additional insights about effective consumer credit regulation that might be of more general application to the debate over whether consumer credit should be regulated at the state or federal level.

A. EXPANSION OF THE GEOGRAPHIC REACH OF § 85

The most important lesson to be learned from analyzing the expansion of the geographic reach of § 85 is that the term “location” no longer serves any limiting function. When § 85 was enacted, indeed, even when Marquette was decided, the location of a bank within the borders of a particular state had significance. It imposed an important limitation on the use of the Exportation Doctrine. Banks had to limit their bricks-and-mortar operations to one state, for both practical and legal reasons. This is no longer true, as banks are now practically and legally permitted to operate across state lines. The “location” of a bank, for purposes of the Exportation Doctrine, is a matter of choice, rather than a limitation. A bank can choose to “locate” its credit card bank subsidiary in South Dakota, book its loans out of its branch in South Dakota, or even designate South Dakota as the charter address of its Internet bank subsidiary. Each choice permits the bank to use the Exportation Doctrine to disregard any interest rate legislation of any other state, regardless of that bank’s actual, physical location in any of those other states.

As a consequence, the Exportation Doctrine offers the myriad lenders within its orbit of beneficiaries an extraordinary type of preemption power. It is, in essence, an entirely elective preemption power. The lenders using it have virtually limitless power to choose the regulatory scheme that will preempt all other state interest rate laws. If the chosen regulatory scheme is one of deregulation, the lender can preempt all other state laws with a lack of regulation. This phenomenon gives states such as South Dakota and Delaware incentive to engage in a “race to the bottom” of consumer credit regulatory schemes, in order to attract consumer lending operations to their states. 482

If a lender chooses such a state as its “location” for purposes of

482. See supra notes 159–60, 234 and accompanying text.
exportation, individual state attempts to curb predatory lending are largely irrelevant.

As a practical matter, this extreme elasticity of the concept of "location" in the Exportation Doctrine significantly diminishes the efficacy of state predatory lending laws. A lender's actual, physical presence in any one state does not trump the authority of that lender, through the Exportation Doctrine, to "choose" a different, deregulated state as its "location" for purposes of exportation. There may still be valid reasons for enacting restrictive state legislation. First, not every lender is within the orbit of the beneficiaries of the Exportation Doctrine. Some nondepository institution lenders in every state will be forced to comply with that state's consumer credit restrictions. Second, a critical mass of states expressing concern about particular predatory lending practices could provide the impetus for reform at the federal level. Nevertheless, analysis of this dimension of the expansion of the Exportation Doctrine clearly demonstrates that the ability of lenders to "choose" their "location," with little regard to their actual, physical presence in any state, severely limits the efficacy of state predatory lending laws.

B. EXPANSION OF THE SUBSTANTIVE SCOPE OF § 85

A close analysis of expansion of the substantive scope of the Exportation Doctrine illustrates the vigor of judicial deference to federal agency interpretations in the area of consumer credit regulation. The Supreme Court's rulings in Smiley and de la Cuesta demonstrate that, at least in the consumer credit context, the presumption in favor of upholding a federal agency's interpretation of a law that it is charged with implementing absolutely trumps the presumption against preemption of state laws.


484. This is consistent with the Supreme Court's continued willingness to preempt state law in other areas of law, despite rhetorical pronouncements concerning the presumption against the preemption of state law. See, e.g., Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 570-71 (2001) (regarding regulation of cigarette advertising); Egelhoff v. Egelhoff, 532 U.S. 141, 152 (2001) (regula-
As a consequence, legal challenges to regulatory interpretations of other aspects of § 85 and its progeny are unlikely to succeed. Although much of the expansion described in this Article was accomplished through regulatory action rather than legislation, it is unlikely to be curbed by the courts. Moreover, if the OCC's recent assertion of broader, de la Cuesta-type preemption powers over state laws is upheld, the Exportation Doctrine could be freed entirely from its restriction in scope to state laws limiting "interest." If the OCC were to enact a broad regulation governing consumer lending in general, supported by its statutory authority to regulate generally the lending operations of national banks, the history of judicial reaction to regulatory expansions of § 85 suggests that this probably would suffice to preempt all state consumer credit regulations.

Thus, analysis of the expansion of the substantive scope of § 85 illustrates yet another reason for the limits to the efficacy of state predatory lending laws—the absence of any presumption against the preemption of state consumer credit laws with respect to depository institutions. Again, this does not render state consumer credit laws totally without any effect. They still apply to nondepository consumer lenders and, to a certain extent, to state-chartered banks located in that particular state. Nevertheless, analysis of this dimension of the expansion of the Exportation Doctrine demonstrates that judicial deference to regulatory interpretations of federal laws, even with respect to issues of consumer credit regulation, which have traditionally been considered the province of state legislatures, severely limits the efficacy of state predatory lending laws.

C. EXPANSION OF THE ORBIT OF BENEFICIARIES OF THE EXPORTATION DOCTRINE

Analysis of the third dimension of the expansion of the Exportation Doctrine—the orbit of its beneficiaries—illustrates that even nonbank lenders technically subject to the limited ambit of state predatory lending laws can easily escape the jurisdiction of the states through nonbank bank subsidiaries or charter-renting arrangements.

However, this last expansion of the Doctrine is not justifiable under the principles of banking law from which it origin-
nally derived, or under the principles that justified its expansion along the first two dimensions. The expansion of the orbit of the beneficiaries of the Doctrine to nonbank lenders can only be justified as a way to foster efficient, interstate consumer credit programs. This is the justification that must be weighed against the cost—the inefficacy of state predatory lending laws to nonbank as well as bank lenders—to accurately assess the implications of the expanded Exportation Doctrine.

Furthermore, regardless of whether fostering efficient interstate consumer credit programs is of sufficient value to justify preempting state consumer credit laws, this is not the rationale that underlies the OCC’s attenuated analysis of “location” that renders the use of that term in § 85 a matter of choice rather than a limitation. Nor is it the rationale that justifies the inordinate deference to rulings of the regulatory agencies evidenced in Smiley and de la Cuesta that frees the Exportation Doctrine from the moorings of the word “interest.” Thus, although this dimension of the expansion of the Exportation Doctrine has the potential to utterly eviscerate even the vestigial efficacy of state predatory lending laws, I believe it is vulnerable to legal challenge.

Merely striking down the application of the Exportation Doctrine to nonbank lenders does not, however, necessarily accomplish the goal of providing adequate protection to consumers who borrow from nonbank lenders. As inadequate as the authority of the banking regulators over nonbank partners of banks may be, in the absence of that authority, is there any effective state regulation or enforcement authority over nonbank consumer lenders? The history of consumer credit regulation suggests that the patchwork of nonuniform state laws is not a very efficient, or effective, way to address predatory lending. Adding yet another layer of patches to the already threadbare quilt, as a response to the newest forms of predatory lending, would likely be just as ineffective in the long run as prior efforts. Instead, I would propose attempting to harness the power of the Exportation Doctrine in the ways outlined below.

D. HARNESSING THE POWER OF THE EXPORTATION DOCTRINE

At least with respect to depository institutions, it is unlikely that any legal challenges will effectively curb the preemptive force of the Exportation Doctrine. With respect to nonbanks, it is possible that legal challenges could succeed; however, if such challenges were to succeed, little effective state
predatory lending regulation exists. Instead of challenging the preemptive force of the Exportation Doctrine, I believe that consumer advocates would be better served to concentrate their efforts on giving some content to the Doctrine. There are two ways that some content could be forced into the Exportation Doctrine, potentially providing meaningful protection for consumers against predatory lending.

One way would be to revive the U3C initiative. If all fifty states were to enact the same baseline restrictions on consumer credit, the choice of location would not permit any lender to escape all regulation. Although this endeavor proved fruitless in the 1960s, that was before the confluence of the Marquette decision and the advent of interstate banking which precipitated the "race to the bottom" in consumer credit regulation. I believe that the developments described in this Article provide compelling new arguments for a uniform consumer credit code. Because the Exportation Doctrine does compel deference to state laws, a uniform, nationwide consumer credit law might enable states to assert some continued control over depository institutions, even in the face of the OTS's and OCC's ongoing attempts to assert broader preemption powers over state laws based on their pervasive regulatory authority.

The second way to force some content into the Exportation Doctrine would be to either require or convince the federal banking regulators to accept some baseline restrictions on consumer credit. I do not think it is realistic to expect the enactment of federal legislation explicitly limiting the expansion of the Exportation Doctrine. The experience with Riegle-Neal's usury savings clause seems to indicate that Congress is not particularly interested in tackling this issue head-on. Indeed, if it did, it is not clear that the result would please advocates of strong consumer credit regulation. However, in the past few

485. See supra Part II.B.2.b. But see Payday Lending Report, supra note 9, at 18 (arguing that provisions of Riegle-Neal requiring public notice and comment period before preemption decisions by the regulators evince Congressional support for curbing regulatory preemption of state consumer protection laws); RAL Report, supra note 9, at 19 (arguing that Riegle-Neal attempts to restrain overreaching by banks).

486. The credit industry's lobbying efforts in the current fight for passage of bankruptcy reform legislation provide a strong indication that efforts to rein in exportation powers would be met with strong resistance. Elizabeth Warren, What Is a Women's Issue? Bankruptcy, Commercial Law, and Other Gender-Neutral Topics, 25 HARV. WOMEN'S L.J. 19, 44-46 & nn.85-91 (2002) (noting that, "[i]n 2000... the credit industry was the single largest campaign contributor in Washington," and providing illustrations of lobbying efforts by the
years, the federal banking agencies have demonstrated a growing willingness to curb predatory lending practices by promulgating strong guidelines for subprime lending, instituting enforcement actions against depository institutions and their owners engaged in predatory lending, closing depository institutions engaged in such lending, and preventing acquisitions of or partnerships with depository institutions when the nonbank partners are engaging in predatory lending. Indeed, the OCC's Proposed Preemption Rule does contain a fairly robust antipredatory lending standard, and specifically invites suggestions for additional content for consumer protection standards.

The expressed motive for most of these actions was concern about the continued safety and soundness of operations of the depository institutions involved, either because of the inherent riskiness of the activities involved, or the reputation risk to the institutions associated with arguably predatory activities. However, federal banking agencies are also beginning to be more vocal about their mandate to enforce consumer protection statutes. Concern about the reputation risk raised by involvement in predatory lending is surely consistent with the consumer protection mandate; indeed, it may provide a more powerful incentive for enforcement than consumer protection alone. At least with respect to depository institutions, continued pressure on federal banking agencies to take seriously both the reputational costs of predatory lending on the safety and soundness of the banking system, and their mandates to enforce consumer protection laws, is probably the most promising way to force some content into the Exportation Doctrine.

If the federal banking regulators could be influenced to give the Exportation Doctrine some content, I believe that consumer advocates should further consider the advantages of formally extending the Exportation Doctrine to all consumer lenders, either by requiring or providing some sort of incentive for consumer lenders who wish to operate nationwide credit industry in the fight for passage of bankruptcy reform legislation).

487. See supra notes 479–80 and accompanying text; see also Rob Garver, How Regulatory Actions Breed Class Actions, AM. BANKER, June 20, 2002, at 10 (noting increased aggressiveness of banking regulatory agencies in enforcing consumer statutes).

488. Consumer advocates might even be able to harness the power of the mainstream banking industry for such an initiative. The representative of at least one influential depository institution has suggested that there might be industry support for a regulatory scheme requiring all nationwide lenders to be subject to some sort of regulatory oversight. Luke Hayden, executive vice
credit programs to do so either through or in partnership with a depository institution. The OCC's enforcement action against ACE, which was only possible because of its partnership with Goleta National Bank, shows how efficiently one well-intentioned federal banking regulator can act to curb the excesses of a lender engaged in a nationwide predatory lending scheme—arguably much more efficiently than any one state attorney general, or even any coalition of attorneys general.

In a sense, such a proposal would bring us full circle in consumer lending regulation. The very first state usury laws offered the incentive of higher interest rates for lenders willing to subject themselves to a particular scheme of regulation. Requiring all lenders who wish to engage in nationwide lending programs either to obtain a bank or thrift charter, or to enter into a contractual relationship with a bank or a thrift, would offer the incentive of exportation powers, in exchange for a regulatory scheme that has demonstrated the potential to be extremely effective in curbing predatory lending practices.

president of a subprime mortgage company subsidiary of the national bank conglomerate J.P. Morgan Chase & Company recently proposed that all subprime lenders be subject to periodic examinations by federal banking regulators, in exchange for an exemption of those who pass from compliance with state and local antipredator laws. Rob Garver, Chase Subprime Exec: We'd Swap States for Feds, AM. BANKER, Aug. 24, 2001, at 1. Hayden proposed a higher national standard of operations that a lender could opt into—"some sort of a Good Housekeeping seal of approval for subprime lenders." Id. at 4. Hayden noted:

The upside for the government would be a reduction in predatory lending practices, as borrowers would migrate toward lenders with a government seal of approval... For the lenders, the incentive to submit to further regulation would be the elimination of the cost of complying with the constantly growing number of state and local ordinances.

Id. at 1.

489. As a federally regulated depository institution, a consumer lender would also be subject to the Community Reinvestment Act (CRA), which some consumer advocates are asserting could be used more effectively to curb predatory lending. See, e.g., Anti-Predator Group Gains FTC Support, AM. BANKER, Mar. 27, 2001, at 5 (referring to a suggestion from National People's Action group that all lenders be given CRA ratings and that ratings be tailored to specific markets); John Gamboa & Nativo Lopez, Sarbanes Should Make Regulators Produce Anti-Predator Policies, AM. BANKER, July 20, 2001, at 9 (suggesting that all banking regulators target subprime lending in the merger application process, like CRA review).

490. See supra notes 365–67 and accompanying text.
The seemingly infinite elasticity of the Exportation Doctrine has left us with an extremely powerful federal preemption tool that has no content. It is a tool that can be wielded by almost any type of consumer lender, by choosing to locate in a state with the least restrictive consumer credit regulations. Once a lender does this, more restrictive state consumer credit statutes enacted in the jurisdictions where a borrower lives are essentially meaningless. An appreciation for the true extent of the preemption power of the Exportation Doctrine is essential for purposes of the current debates over predatory lending legislation at the state and federal levels.

However, the federal regulatory agencies that have been aggressively asserting the preemptive force of the Exportation Doctrine have also begun to take seriously their mandate to enforce fundamental consumer protection laws. In doing so, they have exposed the potential of the Exportation Doctrine as a powerful tool for curbing predatory lending, potentially more powerful than anything available at the individual state level. In the end, the amazing, elastic, ever-expanding Exportation Doctrine could perhaps be harnessed to provide meaningful protection against predatory lending to consumers across the nation.