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Are Credit-Card Late Fees "Interest"? Delineating the Preemptive Reach of Section 85 of the National Bank Act of 1864 and Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980

Kevin G. Toh

INTRODUCTION

After the expiration of the Second Bank of the United States in 1836, for nearly three decades, only the states were in the business of chartering and regulating banks. The need to finance the Civil War revived the interest in national banks and prompted Congress in 1863 to pass a bill to create a national banking system. Congress extensively revised and re-enacted the measure in June of the following year.1

Section 85 of the resulting National Bank Act of 1864 (NBA)2 sought to protect the newly established national banks from the state legislatures’ probable discrimination by conferring on national banks the so-called most favored lender status. According to the "most favored lender" doctrine, NBA section 85 gives a distinct advantage to national banks over their state-chartered counterparts by enabling national banks located3 in any state to charge the highest rate that any state-chartered lender in that state may charge for the same class of loans.4 By allowing national banks sitting in any

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2. Ch. 106, 13 Stat. 99 (codified as amended at 12 U.S.C. § 21 et seq. (1994)). Section 85 of the NBA, as originally worded, read:
   [E]very association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange or other evidences of debt, 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 associations organized in any such state under this act.
   Ch. 106, § 30, 13 Stat. 108 (1864) (codified as amended at 12 U.S.C. § 85 (1994)) (emphasis added). This provision was originally § 30 of the NBA. For simplicity's sake, it is referred to as § 85 throughout this Note.
3. For purposes of NBA § 85, a bank is "located" either in the place designated in its "organizational certificate" or in the places in which it has established authorized branches. See Marquette Natl. Bank v. First of Omaha Serv. Corp., 439 U.S. 299, 309 n.21 (1978) (citing Citizens & S. Natl. Bank v. Bougas, 434 U.S. 35 (1977)).
4. The nature of national banks’ special status was not initially obvious. The confusion stemmed mainly from the “except” clause in § 85. For the original text of § 85, see supra note 2. It was unclear whether national banks located in a state were limited to charging interest only at the rates that state banks were allowed to charge under the laws of that state
state to “borrow” the interest rates that the most favored lenders of that state are allowed to charge, Congress, in effect, preempted state interest-rate laws that otherwise would apply to credit transactions of national banks.

The enactment in 1980 of the Depository Institutions Deregulation and Monetary Control Act (DIDA) extended the scope of the most favored lender doctrine. Section 521 of the DIDA was aimed at creating a competitive, level playing field between national banks and state banks insured by the Federal Deposit Insurance Corp. (FDIC). To achieve this end, Congress duplicated the language of NBA section 85 in wording DIDA section 521 and thus extended the most favored lender status to FDIC-insured state banks.

In Marquette National Bank v. First of Omaha Service Corp., a case decided two years prior to the passage of the DIDA, the Supreme Court unanimously held that, under section 85 of the NBA, national banks located in one state may charge interest at the rate authorized by the laws of that state even on transactions with residents of another state. In addition, although it did not directly consider the issue of the most favored lender doctrine, the Court implicitly reaffirmed the doctrine. The net result of the decision or at higher rates if the laws of that state allowed other nonbank lenders to charge higher rates.

The Supreme Court opted for the latter interpretation in Tiffany v. National Bank, 85 U.S. (18 Wall.) 409 (1873). The Tiffany Court stated that § 85 of the NBA “gives advantages to National banks over their State competitors. It allows such banks to charge such interest as State banks may charge, and more, if by the laws of the State more may be charged by natural persons.” 85 U.S. (18 Wall.) at 413. Tiffany thus established the “most favored lender” doctrine. For other, equally plausible, interpretations of § 85, see Coreen S. Arnold & Ralph J. Rohmer, The “Most Favored Lender” Doctrine for Federally Insured Financial Institutions — What are its Boundaries?, 31 Cath. U. L. Rev. 1, 5-8 (1981).

7. DIDA § 521 “inherited” from NBA § 85 the judicial interpretation of the language of § 85, including Tiffany and its progeny. When a statute adopts language from an older statute, the judicial interpretation of that language is also transplanted to the new statute. See Carolene Prods. Co. v. United States, 323 U.S. 18, 26 (1944).

Although its language otherwise closely tracks that of NBA § 85, § 521 of the DIDA does not duplicate the “except” clause of NBA § 85 which originally led the Supreme Court to formulate the most favored lender doctrine in Tiffany. See supra note 2. However, § 521 begins with the words, “In order to prevent discrimination against State-chartered insured depository institutions,” 12 U.S.C. § 1831d(a) (1994), and the goal of DIDA § 521 to achieve a competitive, level playing field between national and FDIC-insured state banks could not be achieved without conferring on the latter banks the most favored lender status.

9. See 439 U.S. at 313.
10. See 439 U.S. at 314 & n.26. The Marquette Court cited Tiffany with approval and also noted that the most favored lender doctrine had been incorporated into the regulations of the Office of the Comptroller of the Currency (OCC), see 12 C.F.R. § 7.7310(a) (1995). Congress created the OCC to oversee the enforcement of the NBA. See ch. 106, § 1, 13 Stat. 99-100 (1864) (codified as amended at 12 U.S.C. § 1 (1994)).
in Marquette is that national banks sitting in one state may “export”\textsuperscript{11} the most favored lender rates allowed by the laws of that state to residents of other states. Furthermore, Congress’s duplication of the language of NBA section 85 in DIDA section 521 means that the Marquette holding gives the same privilege to FDIC-insured state banks.

Taking their cue from Marquette, many banks in the early 1980s moved their credit-card operations to a few states — such as Delaware, Nebraska, and South Dakota — that had raised or removed interest-rate ceilings and relaxed other consumer-credit-protection laws in order to attract banks and thereby generate revenues. Marquette thus has enabled banks to conduct their nationwide consumer-credit transactions from very favorable environments. The decision also has put pressure on legislatures in other, less accommodating states to repeal or relax their own interest-rate limits in response to threats by banks to move their credit-card operations elsewhere.\textsuperscript{12}

From their protected environments, the credit-card-issuing banks have aggressively conducted their nationwide consumer-credit transactions. These banks, in the process, have been ignoring not only the laws of various states dealing specifically with interest rates — laws that have been preempted expressly by NBA section 85 and DIDA section 521 — but also other state consumer-credit-protection laws. Marquette thus has created a regulatory scheme in which a few states with the weakest consumer-protection laws can veto the consumer-protection laws of other states and dictate the terms by which consumers in all fifty states buy credit. This is a troubling result given that consumers in Massachusetts or Colorado are unable to lobby in the legislative halls of Delaware or South Dakota.

A series of class-action suits in recent years has challenged the assumption, widely held by banks, that the preemptive reach of NBA section 85 and DIDA section 521 extend beyond state interest-rate laws, to various state consumer-credit-protection laws. In Greenwood Trust Co. v. Massachusetts,\textsuperscript{13} a federal district court in Massachusetts ruled that an FDIC-insured, Delaware-chartered bank cannot impose late fees\textsuperscript{14} as permitted by Delaware law on

\begin{itemize}
  \item \textsuperscript{11}See, e.g., Tony Munroe, Virginia Law Change Attracts Credit Card Companies, WASH. TIMES, Mar. 4, 1993, at C1; see also David Conn, Key Federal Shifting Credit Card Unit to Delaware Official Blames Md. Restrictions, BALTIMORE SUN, Nov. 16, 1993, at 9C.
  \item \textsuperscript{13}Cardmember agreements usually stipulate that the card holder must make a minimum monthly payment, calculated from time to time by reference to the balance outstanding. Failure to make this payment in a timely fashion constitutes default. A late fee is
credit-card transactions with residents of Massachusetts because of a Massachusetts usury-law provision prohibiting such fees. A year later, the First Circuit reversed the district court's decision, holding that section 521 of the DIDA preempted the Massachusetts usury law regulating late fees as well as Massachusetts's cap on numerical percentage rates of interest.\(^\text{15}\) The First Circuit's decision, however, did not stem the tide of state-law-based consumer class-action suits filed across the country against both national and FDIC-insured state banks issuing credit cards.\(^\text{16}\) As the First Circuit recognized,\(^\text{17}\) the ultimate issue at stake in these lawsuits is the delicate and increasingly uncertain balance between the regulatory powers of the federal government and the states in our dual banking system.\(^\text{18}\)

This Note argues that neither section 85 of the NBA nor section 521 of the DIDA preempts state consumer-credit-protection laws regulating late fees on credit-card transactions. Part I discusses the three approaches that the Supreme Court has devised and used over the years to determine when a federal law preempts state law: express preemption, implied preemption, and conflict preemption. Part II applies express preemption analysis and asserts that the ordinary meaning of DIDA section 521's express preemption language does not evince Congress's intent to preempt state prohibitions of late fees. Part III applies implied preemption analysis and argues that neither NBA section 85 nor DIDA section 521 impliedly preempts state laws regulating late fees because Congress did not indicate a clear and manifest purpose to preempt the entire field of consumer-credit protection. Finally, Part IV applies conflict

\^\text{15}. See Greenwood Trust Co. v. Massachusetts, 971 F.2d 818 (1st Cir. 1992), cert. denied, 506 U.S. 1052 (1993).


\^\text{17}. See Greenwood, 971 F.2d at 821.

\^\text{18}. For a discussion of the "dual banking system," see \textit{infra} Part III.
preemption analysis and argues that sustaining state law provisions governing late fees, which are imposed only on contingent occasions of borrower default, does not conflict with the congressional objective in enacting NBA section 85 and DIDA section 521 — achieving lender parity.

I. THREE TYPES OF PREEMPTION ANALYSES: AN OVERVIEW

Under the Supremacy Clause of Article VI, Congress can preempt state laws when acting within its delegated powers. The Supreme Court, over the years, has devised and used three types of preemption analysis. First, a federal law expressly preempts a state law when Congress has expressed unmistakably its intent to occupy an entire field of regulation by explicit preemptive language. A federal law impliedly preempts a state law when Congress's intent to occupy an entire subject area can be inferred from the character and objective of the federal law. Finally, even when a federal statute does not occupy an entire field of regulation, a particular state law is supplanted by a conflict preemption when the state law stands as an obstacle to the full execution of the objectives of the federal law.

19. The Supremacy Clause provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CoNsr. art. VI, cl. 2.

20. See Gade v. National Solid Wastes Management Assn., 505 U.S. 88, 108 (1992) ("[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, 'any state law ... which interferes with or is contrary to federal law, must yield.' " (citations omitted)); see also GERALD GUNTHER, CONSTITUTIONAL LAW 291 (12th ed. 1991) ("When Congress exercises a granted power, the federal law may supersed[e] state laws and preempt state authority, because of the operation of the supremacy clause of Art. VI.").


22. See, e.g., Morales v. Trans World Airlines, 504 U.S. 374 (1992). Morales involved § 1305(a)(1) of the Airline Deregulation Act of 1978 which expressly prohibited states from "enact[ing] or enforc[ing] any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier." 504 U.S. at 383 (quoting § 1305(a)(1)). The Court's construction of the phrase "relating to" led it to conclude that § 1305(a)(1) preempted state guidelines regarding airline-fare advertising. See 504 U.S. at 384.

23. See, e.g., City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973). Burbank involved a city ordinance that imposed a curfew on jet flights from the Hollywood-Burbank Airport. The Court held that the ordinance was preempted impliedly because the "pervasive control vested in EPA and in FAA under the [Noise Control Act of 1972] ... leave[s] no room for local curfews or other local controls." 411 U.S. at 638.

24. See, e.g., Gade, 505 U.S. at 88. The Gade Court observed that, in enacting the Occupational Safety and Health Act, Congress intended to subject employers and employees to only one set of regulations. See 505 U.S. at 102-03. The Court therefore held that Illinois's laws regulating training, testing, and licensing of hazardous-waste-site workers were preempted because they conflicted with the objectives of the federal law. See 505 U.S. at 103.
In all three cases, whether a federal law preempts a state law is a question of congressional intent and hence largely a matter of statutory construction. The particulars of each case determine which of the three types of preemption analysis provides the best means to fathom the congressional intent. It follows that a state law does not escape the full preemptive reach of a federal law by surviving any one type of preemption analysis. In the following Parts, the preemptive scopes of NBA section 85 and DIDA section 521 are examined under each type of preemption analysis.

II. EXPRESS PREEMPTION

This Part argues that the express preemption provision of DIDA section 521 does not indicate a congressional intent to displace state laws prohibiting credit-card late fees. DIDA section 521, unlike section 85 of the NBA, contains an express preemption provision. The relevant portion of section 521, as amended, states:

In order to prevent discrimination against State-chartered insured depository institutions ... with respect to interest rates, if the applicable rate prescribed in this subsection exceeds the rate such State bank ... would be permitted to charge in the absence of this subsection, such State bank . . . may, notwithstanding any State constitution or statute which is hereby preempted for the purpose of this section . . . charge on any loan . . . interest . . . at the rate . . . allowed by the laws of the State, territory, or district where the bank is located . . .


27. The Court's usual reference to three different types of preemption analyses does not mean that the categories are mutually exclusive. See English, 496 U.S. at 79 n.5 ("By referring to these three categories, we should not be taken to mean that they are rigidly distinct."). As one commentator has stated, "[E]ven when Congress declares its preemptive intent in express language, deciding exactly what it meant to preempt often resembles an exercise in implied preemption analysis." TRIBE, supra note 26, at 481 n.14. For example, Justice Stevens's appeal to legislative history and statutory structure to divine the meaning of an express preemption provision in his dissenting opinion in Morales, see, 504 U.S. at 419-24, essentially amounts to an implied preemption analysis. Also, in the last term, the Court explicitly declared that express and implied preemption analyses are not mutually exclusive; even if Congress includes an express preemption provision in a federal statute, courts may engage in implied preemption analysis. See Freightliner Corp. v. Myrick, 115 S. Ct. 1483 (1995). Furthermore, a clear distinction between implied and conflict preemption analyses cannot be drawn. The Court, on a number of occasions, has observed that implied preemption can be understood as a species of conflict preemption. See Gade, 505 U.S. at 104; English, 496 U.S. at 79-80 n.5.

In order to prevent discrimination against State-chartered insured depository institutions, including savings banks, or insured branches of foreign banks with respect to inter-
The question is whether the above express preemption provision clearly manifests Congress's intention to preclude state prohibitions of late fees on credit-card transactions.

Section II.A summarizes two different approaches that the Supreme Court has used recently to analyze an express preemption provision. This Part then uses the approach that presents a lower barrier to finding preemption. Section II.B argues that the preemption of state usury laws prohibiting credit-card late fees cannot be inferred from the ordinary meanings of the terms interest and interest rate, as they are used in section 521. Section II.C demonstrates that the sparse legislative history of section 521 does not permit a departure from the ordinary meaning of the language of section 521. Similarly, section II.D contends that the case law under NBA section 85 fails to support such a departure.

A. Two Approaches To Analyzing an Express Preemption Provision

The Supreme Court's recent preemption jurisprudence reveals two competing approaches to analyzing express preemption provisions. The point of contention between the two approaches is the applicability of the presumption against displacement of states' historic police powers.29

According to one approach, although the presumption against displacement of states' traditional police powers is applicable in implied preemption cases, it is inappropriate once Congress has indicated unmistakably its intent to preempt state laws by an express

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29. See Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (noting that states' traditional police powers are not to be superseded unless that was the "clear and manifest purpose" of Congress).
Note — Credit-Card Late Fees

provision. In express preemption cases, courts must apply the "ordinary" principles of statutory construction to ascertain the boundaries of the preemptive scope. Courts must defer to the "ordinary" meaning of the statutory language even when a narrower construction of the statutory language can plausibly be given.

According to the second approach, the presumption against displacement of states' traditional police powers applies in express preemption analyses as well as in implied preemption analyses. This second approach demands the narrowest possible construction of the statutory language or at least one narrower than what the ordinary-principles approach requires.

Obviously, the ordinary-principles approach establishes a lower threshold than the narrow-construction approach for finding an express preemption. If an analysis relying on the ordinary principles of statutory construction fails to yield a finding of preemption, then it follows that a narrower construction of the same statute will fail as well. The initial question, then, is whether the above-cited language of DIDA section 521 displaces state laws prohibiting late fees on credit-card transactions under the "ordinary" principles of statutory construction.


31. See Morales, 504 U.S. at 383 ("The question, at bottom, is one of statutory intent, and we accordingly 'begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.' " (quoting FMC, 498 U.S. at 57) (emphasis added)); see also Cipollone, 505 U.S. at 545 (Scalia, J., dissenting).

32. See Cipollone, 505 U.S. at 544 (Scalia, J., concurring in judgment in part and dissenting in part) ("Under the Supremacy Clause . . . our job is to interpret Congress's decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning."). The Court's analysis in Norfolk & Western Railway Co. v. American Train Dispatchers' Assn., 499 U.S. 117 (1991), provides a clear example of this first approach at work. In that case, the Court interpreted an express preemption provision broadly (relatively speaking) despite the fact that a canon of statutory construction made a narrower construction available. See 499 U.S. at 129.

33. See New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 115 S. Ct. 1671, 1676 (1995); American Airlines v. Wolens, 115 S. Ct. 817, 828 (1995) (Stevens, J., concurring in part and dissenting in part); Cipollone, 505 U.S. at 518 (Stevens, J., plurality opinion); Morales, 504 U.S. at 420 (Stevens, J., dissenting); FMC, 498 U.S. at 67 (Stevens, J., dissenting). In his dissenting opinion in Cipollone, Justice Scalia complained that the second approach relies on an "extraordinary and unprecedented principle of federal statutory construction." 505 U.S. at 544.

34. This is Justice Scalia's characterization of the second approach. See Cipollone, 505 U.S. at 545.

35. Although the rest of this Part relies on the ordinary-principles approach, there is much to be said for the second, stricter approach given the concerns of federalism. Cf. Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 780 (1946) (Frankfurter, J.) ("Congress needs no help from generous judicial implications to achieve the supersession of State authority . . . . Any indulgence in construction should be in favor of the
B. Ordinary Meanings of Interest and Interest Rate

Under the ordinary principles of statutory construction, the key inquiry is whether state law provisions regulating credit-card late fees are encompassed by the terms interest and interest rate, as those terms are ordinarily understood. This section argues that late fees are not within the ordinary meaning of interest or interest rate and that therefore DIDA section 521 does not preempt state laws regulating late fees.

It is unlikely that Congress, in drafting section 521, departed radically from the meanings of interest and interest rate that lexicographers employ. The 1981 edition of Webster's New Collegiate Dictionary defines interest as "a charge for borrowed money[,] generally a percentage of the amount borrowed." Perhaps more importantly, Black's Law Dictionary defines interest rate as "[t]he percentage of an amount of money which is paid for its use for a specified time." The definition of interest rate is more significant here than that of interest because section 521 begins by stating explicitly that the purpose of the section is to "prevent discrimination against [FDIC-insured state banks] . . . with respect to interest rates." Moreover, section 521 mentions the word rate six times, while using interest only twice; both times, the word interest is accompanied by rate.

One naturally infers from these definitions that, although interest can mean a charge other than a numerical percentage of the sum originally borrowed, the most "ordinary" meaning of the term refers to a numerical percentage of the borrowed sum. Furthermore, it violates the ordinary meaning of the term to suggest that interest rate signifies anything other than a numerical percentage...
rate of the sum originally borrowed.\textsuperscript{41} Therefore, late fees do not constitute a part of \textit{interest} or \textit{interest rate} as those terms are ordinarily used.\textsuperscript{42}

In \textit{Greenwood Trust Co. v. Massachusetts},\textsuperscript{43} the First Circuit held that the meaning of the term \textit{interest} is not limited to a numerical percentage of a borrowed sum.\textsuperscript{44} After citing the dictionary definitions to show that \textit{interest} is not \textit{necessarily} a numerical percentage of the borrowed sum, the court went on to quote statements from two nineteenth-century Supreme Court opinions to the same effect.\textsuperscript{45} "Thus," the First Circuit's argument continued, "the door is open" to construing the term \textit{interest} expansively.\textsuperscript{46}

The First Circuit's approach, however, ignores the fact that the "ordinary" meaning of the statutory language delineates the proper scope of preemption. This reliance on the ordinary meaning cannot be overcome by merely taking note of a handful of instances when the Supreme Court, in using the word \textit{interest}, meant something more than a numerical percentage of a borrowed sum. The ordinary meaning of a word used by Congress "is not determined by reference to variations on its ordinary meaning, but by the ordinary meaning itself, \textit{i.e.}, the way it is \textit{generally} used."\textsuperscript{47}

The \textit{Greenwood} court also opined that the meaning of \textit{interest rate}, as that term is used in DIDA section 521, is not limited to the

\textsuperscript{41} Cf. Jones v. Rath Packing Co., 430 U.S. 519, 532 (1976) ("It twists the language beyond the breaking point to say that a law mandating that labeling contain certain information is not a 'labeling requirement' [as that term is used in § 408 of the Federal Meat Inspection Act.").

\textsuperscript{42} One court stated: "Similarly, in common parlance, 'interest rate' or 'rate of interest' has a very narrow meaning. For example, when one is asked what interest rate he or she is paying on a loan, the response is, 'eleven and one-half percent' or 'ten and three-eights percent.' If it is a real estate loan, the response may be, 'nine and one-half percent, and two points.' Conversely, lay persons are not likely to associate 'interest rate' with late payment fees, return check fees, etc., because those fees are usually contingent upon the borrower's default, and are not part of the 'interest' paid to obtain the funds." Mazaika v. Bank One, Columbus, N.A., 653 A.2d 640, 654 (Pa. Super. Ct. 1994).

\textsuperscript{43} 971 F.2d 818 (1st Cir. 1992), cert. denied, 506 U.S. 1052 (1993).

\textsuperscript{44} See \textit{supra} note 37.

\textsuperscript{45} See \textit{supra} note 37.

\textsuperscript{46} Greenwood, 971 F.2d at 825.

Numerical percentage rate of a sum borrowed. In effect, the First Circuit read the word rate out of section 521. In Fort Halifax Packing Co. v. Coyne, an express preemption case, the Supreme Court disapproved of reading a term out of a statute. Here, as in Fort Halifax Packing, the statutory language presents a formidable obstacle to an expansive reading of section 521.

C. Legislative History of DIDA Section 521

In principle, the assumption that the ordinary meaning of an express preemption provision delineates the proper scope of preemption can be overcome. An examination of a statute's legislative history may furnish reasons to set aside the presumption. Nothing, however, can be found in the legislative history of DIDA section 521 to justify a departure from the ordinary meaning of that provision's preemptive language.

In order to displace the initial assumption, the DIDA's legislative history must clearly evince a legislative intent contrary to the ordinary meaning of section 521. Section 521, however, was an emergency measure enacted with very little congressional debate. 48. See Greenwood, 971 F.2d at 825-26. The First Circuit cited a variety of cases to buttress its claim that "[t]erms in an act whose meaning may appear plain outside the scheme of the statute can take on a different meaning when read in their proper context." 971 F.2d at 825 (citations omitted). Yet, the court failed to cite any instances when the term interest rate was interpreted to mean anything other than a numerical percentage rate of a borrowed sum.

50. In Fort Halifax Packing, employers who had not provided severance payments to employees as required by a Maine law argued that any state laws pertaining to "employee benefits" were preempted by the preemption provision of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1144(a) (1994). The Court rejected this argument by pointing out that the preemption provision of ERISA specifically states that any state laws relating to "employment benefit plans" are preempted. See Fort Halifax Packing, 482 U.S. at 7-8.

51. Justice Frankfurter once remarked that the foremost duty of courts in interpreting a statute is not to do violence to the statutory language. See Frankfurter, supra note 35, at 543.

52. The Supreme Court's recent decision in American Airlines v. Wolens, 115 S. Ct. 817 (1995), provides an example. In that case, the Court held that whereas the Airline Deregulation Act of 1978 preempts any consumer claims against airlines based on statutory consumer-protection laws, the federal law does not preempt any claims based on breach of contracts. See 115 S. Ct. at 824 & n.5 (1995). The Court thus drew a distinction between claims based on laws enacted by states and common law claims despite the fact that the relevant express preemption provision simply provided that "a state... may not enact or enforce a law... related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1) (1994), quoted in American Airlines, 115 S. Ct. at 821 n.1. This departure from the statutory language, however, drew spirited criticisms from Justices Stevens and O'Connor. See 115 S. Ct. at 827-28 (Stevens, J., dissenting); 115 S. Ct. at 828-34 (O'Connor, J., dissenting); see also Campbell v. Hussey, 368 U.S. 297, 301-02 (1961).

53. The original bills that developed into House Bill 4986, the omnibus bill that became the DIDA, did not contain anything corresponding to §§ 521-523. See H.R. 4986, 96th Cong., 1st Sess. (1979). It was only in 1979, when the Senate was considering House Bill 4986, that two Senators introduced a bill, Senate Bill 1986, and a representative introduced a companion bill, House Bill 6503, in the House. See S. 1986, 96th Cong., 1st Sess. (1979); H.R. 6503, 96th Cong., 1st Sess. (1979). These two bills, the contents of which closely resemble those of
For this reason, only a very meager legislative history for section 521 remains, and what little remains does not support any departure from the ordinary meaning of the statutory language. The Greenwood court itself ultimately conceded that the DIDA's legislative history yielded no definitive answer as to the preemptive scope of section 521.54

D. Case Law Under NBA Section 85 and the Distinction Between Interest and Penalties

Available case law is an equally insecure support for an expansive reading of DIDA section 521. In principle, an examination of a statute's case law may defeat the assumption that the ordinary meaning delineates the scope of preemption.55 DIDA section 521 lacks any such case law, but the case law under NBA section 85 may appear to offer some hope to those who ignore the ordinary meaning of DIDA section 521. As observed in the Introduction, the language of DIDA section 521 closely mirrors that of NBA section 85. When a statute adopts words from an older statute, the judicial interpretation of those words in the older statute is also transplanted to the new statute.56 It is then necessary to ask whether credit-card late fees should be considered interest or interest rate under the case law of NBA section 85. If so, the same fees ought to be considered interest or interest rate under DIDA section 521 as well.

In a series of cases, most decided prior to the enactment of the DIDA, courts ruled that various flat fees that national banks charge are interest and hence governed by section 85 of the NBA. So far, credit-card cash-advance fees,57 charges incurred by way of compensating balance requirements,58 closing fees,59 bonuses and com-

55. The history of NBA § 85 itself offers an example. The most favored lender doctrine could not be inferred from the ordinary meaning of the language of § 85. It was the Supreme Court, in Tiffany v. National Bank of Missouri, 85 U.S. (18 Wall.) 409 (1873), that ushered in this doctrine. See generally supra note 4. Yet, the most favored lender doctrine has been so firmly established by Tiffany and its progeny that no recent court interpreting § 85 has questioned it. See Arnold & Rohner, supra note 4, at 8 (“Despite its convoluted language, section 85 continues to be interpreted by the courts as it was in Tiffany — that national banks are on a par with the most favored lender in the state.”).
56. See Carolene Prods. Co. v. United States, 323 U.S. 18, 26 (1944); see also Frankfurter, supra note 35, at 537.
58. See American Timber & Trading Co. v. First Natl. Bank, 690 F.2d 781, 787-88 (9th Cir. 1982); McAdoo v. Union Natl. Bank, 335 F.2d 1050, 1056 (8th Cir. 1976).
missions, mortgage taxes and recording fees, brokerage charges, and charges for insurance on loan collateral have been judged to be *interest* under NBA section 85. The case law under NBA section 85 then arguably justifies an expansive reading of the word *interest* as used in DIDA section 521. The *Greenwood* court ultimately relied on this case law in reaching its conclusion that DIDA section 521 preempted the Massachusetts law prohibiting credit-card late fees.

It is incorrect to infer from these decisions that credit-card late fees also should be considered *interest* under NBA section 85 and therefore also under DIDA section 521. A crucial conceptual distinction exists between credit-card late fees and the flat fees at issue in the above-mentioned decisions. Whereas payments of flat fees at issue in those decisions are *preconditions* for credit extensions, payments of late fees are not. Late fees are penalties, and they are charged only on contingent events of borrower default. Although agreeing to terms governing late-fee payments is a prerequisite for loan extensions, actual *payment* of such contingent default charges is not.

This is not merely an armchair distinction. In *Lorillard v. Pons*, the Supreme Court stated that "where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country[, they are presumed to have been used in that sense unless the context compels to the contrary." Both prior to and after the passage of the NBA, in other contexts, the Supreme Court has distinguished *interest*, as that term is normally understood, from fees charged as penalties. Notably, in *Spain v. Hamilton’s Administrator*, a case decided one year before

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61. See Panos v. Smith, 116 F.2d 445 (6th Cir. 1940); Schumacher v. Lawrence, 108 F.2d 576 (6th Cir. 1940).
64. A district court in North Carolina also entered a declaratory judgment to the effect that annual membership fees for credit-card holders constitute *interest* under NBA § 85. The Fourth Circuit, however, held that the case did not arise under that federal statute and hence denied jurisdiction. See *City Natl. Bank v. Edmisten*, 681 F.2d 942 (4th Cir. 1982).
68. 434 U.S. at 583 (quoting Standard Oil v. United States, 224 U.S. 1, 59 (1911)).
69. 68 U.S. 604 (1863).
the passage of the NBA, the Court stated: "The payment of anything additional depends also upon a contingency, and not upon any happenings of a certain event, which of itself would be deemed insufficient to make a loan usurious." Most recently, in 1993, the Court once again recognized the distinction between interest and penalties charged only on contingent occasions of default. In construing section 3717 of the Debt Collection Act of 1982, the Court stated:

Our conclusion [is] that the States remain subject to common law prejudgment interest liability . . . . [T]he district courts retain discretion to choose the appropriate rate in a given case. Unlike the common law, § 3717 also imposes processing fees [for late payments] and penalty charges.

The connection between the numerical percentage of the borrowed sum, which forms the core of interest, and late fees is far more tenuous than the connection between the numerical percentage and other flat fees. The above judicial statements indicate that some lower courts' treatment of various preconditional flat fees as interest provides a poor basis from which to infer that late fees also must be considered interest.

III. IMPLIED PREEMPTION

Although DIDA section 521 does not explicitly preempt state laws regulating credit-card late fees, both NBA section 85 and

70. 68 U.S. at 626; see also Lloyd v. Scott, 29 U.S. (4 Pet.) 205, 226 (1830) ("If a party agree[s] to pay a specific sum exceeding the lawful interest, provided he do[es] not pay the principal by a day certain, it is not usury. By a punctual payment of the principal he may avoid the payment of the sum stated, which is considered as a penalty.").


72. United States v. Texas, 113 S. Ct. 1631, 1635-36 (1993) (citation omitted). Congress also has distinguished interest from penalties. Both the Truth in Lending Act, 15 U.S.C. § 1605 (1994), and its implementing regulation, commonly known as "Regulation Z," 12 C.F.R. § 226.4 (1995), define finance charge as including interest, service charges, and other fees but not including late fees or other such penalties. Neither the Truth in Lending Act nor Regulation Z is authoritative in construing NBA § 85 or DIDA § 521. Yet, the two laws further confirm one's initial intuition that interest is conceptually distinct from penalties and hence does not include late fees.

73. NBA § 85, as amended and codified, reads:

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate 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, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under title 62 of the Revised Statutes.

12 U.S.C. § 85 (1994). Section 85, as modified by the Banking Act of 1933, Pub. L. No. 66, ch. 89, § 25, 48 Stat. 162, 191 (1933), gives national banks, not only the option of charging interest at the most favored lender rate, but also the option of charging interest at one per-
DIDA section 521 may *impliedly* preempt such state laws. When Congress's command is not unmistakably clear, a federal occupation of an entire subject area can be found only when the nature of the federal regulatory scheme permits no other conclusion.\(^74\) Furthermore, when Congress legislates in a field that the states traditionally have occupied, courts must start with "the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."\(^75\)

Congress has not preempted the entire field of bank regulation.\(^76\) The so-called dual banking system, in which both the federal and state governments exercise regulatory authority over both national and state banks, came into full being with the enactment of the NBA and has persisted to the present time.\(^77\) Even national banks "are governed in their daily course of business far more by the laws of the State than of the nation."\(^78\) In general, states regulate national banks unless the pervasive nature of the federal regulatory scheme leaves no room for state regulations, or the effectiveness of national banks is impaired by the state regulation.\(^79\)

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\(^75\) See supra note 28, in connection with DIDA § 521, the latter option is irrelevant for purposes of this Note.


\(^78\) McClellan v. Chipman, 164 U.S. 347, 356-57 (1896); National Bank v. Commonwealth, 76 U.S. 353, 362 (1869) ("All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when the State law incapacitates the banks from discharging their duties to the [federal] government that it becomes unconstitutional."); see also Robert A. Burgess & Monica A. Ciolfi, *Exportation or Exploitation? A State Regulator's View of Interstate Credit Card Transactions*, 42 BUS. LAW. 929, 938-39 (1987).

\(^79\) See Anderson Natl. Bank v. Luckett, 321 U.S. 233, 248 (1944) ("This Court has often pointed out that national banks are subject to state laws, unless those laws infringe the na-
In enacting NBA section 85 and DIDA section 521, Congress sought to increase its regulatory domain within the dual banking system, but it clearly did not intend to regulate all aspects of bank regulation. Therefore, the question arises as to what aspects of state bank-regulation laws, besides those regulating interest rates, NBA section 85 and DIDA section 521 preempted. Because NBA section 85 and DIDA section 521 deal specifically with interest rates, it is possible that the two federal statutes evince congressional intent to occupy the entire field of consumer-credit protection.

This Part argues that neither NBA section 85 nor DIDA section 521 indicates a clear and manifest purpose of Congress to preempt the entire field of consumer-credit protection. Section III.A points out that state laws regulating late fees fall within the field of consumer-credit protection, which is a field traditionally governed by the states. Therefore, the Supreme Court's usual presumption against displacement of states' traditional police powers applies to any implied preemption analysis relating to state laws regulating credit-card late fees. Section III.B shows that no "clear and manifest purpose of Congress" exists to surmount this presumption.

A. Presumption Against Displacement of States' Traditional Police Powers

Do state laws regulating credit-card late fees constitute exercises of states' traditional police powers? In the past, the Supreme Court has refused to supplant state laws — even when those laws significantly affected the workings of federal laws — if the states were exercising their traditional police powers. Justice Frankfurter, writing in 1947, used police power as an example of the most vague of legal terms. See Frankfurter, supra note 35, at 534.

80. Over the years, the Court has given very broad readings to the term "traditional police powers of the states." The following statement in 1882 is not atypical: "[T]he State have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people." Escanaba Co. v. Chicago, 107 U.S. 678, 683 (1882); see also Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991) ("The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals . . ."); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 181-82 (1972) (Rehnquist, J., dissenting) ("The traditional police power of the States has been deemed to embrace any measure thought to further the well-being of the State in question, subject only to the specific prohibitions contained in the Federal Constitution.").
State laws that regulate credit-card late fees are laws governing bank operations. But they also can be classified as consumer-protection provisions. As such, these state laws constitute exercises of state police powers aimed at the promotion of the “peace, comfort, convenience, and prosperity” of citizens.

Consumer protection is an area traditionally occupied by the states. Admittedly, it is not possible to draw a clear line between usury laws and consumer-protection laws. Usury laws or consumer-credit-protection laws are the oldest and longest-surviving species of consumer-protection laws. Yet, except in the area of interest-rate regulation, consumer-credit protection has been the concern of and is increasingly becoming the exclusive concern of the states as state legislatures fill the vacuum left by the federal government’s gradual withdrawal from the field since 1980.

In sum, states’ regulation of credit-card late fees constitutes an exercise of their traditional police powers. It follows that the presumption against displacement of such laws applies.

B. “Clear and Manifest Purpose of Congress”

The fact that the presumption against displacement of states’ traditional police powers applies does not automatically rule out a


83. Escanaba, 107 U.S. at 683.

84. See California v. ARC Am. Corp., 490 U.S. 93, 101 (1989); General Motors Corp. v. Abrams, 897 F.2d 34, 41-42 (2d Cir. 1990) (“Because consumer protection is a field traditionally regulated by the states, compelling evidence of an intention to preempt is required in this area.”). Even the First Circuit, in Greenwood, admitted that consumer protection falls within the domain of states’ traditional police powers. See Greenwood Trust Co. v. Massachusetts, 971 F.2d 818, 828 (1st Cir. 1992), cert. denied, 506 U.S. 1052 (1993).


86. See Susan Bartlett Foote, Administrative Preemption: An Experiment in Regulatory Federalism, 70 VA. L. REV. 1429, 1450-31 (1984) (pointing out that the states have become more protective in reaction to the federal government’s withdrawal from the field in the 1980’s). As two commentators stated, “Federal involvement in modern day consumer credit regulation has been precise, limited, and very deferential to state interests even when there has been express preemption.” Burgess & Ciolfi, supra note 78, at 937.

87. See Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443 (1960) (“In determining whether state regulation has been preempted by federal action, ‘the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field.’” (quoting Savage v. Jones, 225 U.S. 501, 533 (1911))).
finding of implied preemption. A "clear and manifest purpose of Congress" can surmount a state's exercise of its traditional police powers.\textsuperscript{88} The Supreme Court's past decisions, however, demonstrate that this is an extremely high standard to meet, and it is not met by NBA section 85 and DIDA section 521.

In the cases in which the Supreme Court sustained a finding of implied preemption in a field traditionally occupied by the states, the pervasive nature of the federal regulation left no room for parallel or supplementary state regulations.\textsuperscript{89} As argued in the previous section, Congress has not made plain its intent to occupy the entire field of consumer-credit protection by a pervasive scheme of regulation.\textsuperscript{90} Far from it, states' traditional powers in this area remain largely intact. The enactment in 1994 of the Riegle-Neal Interstate Banking and Branching Act\textsuperscript{91} is the latest indication that Congress will defer to the states in the field of consumer-credit protection. Section 102(b)(1)(B) of that legislation states:

The laws of the host State regarding . . . consumer protection . . . shall apply to any branch in the host State of an out-of-State national bank to the same extent as such State laws apply to a branch of a bank chartered by that State. . . .\textsuperscript{92}

It follows that state laws regulating credit-card late fees are preempted only if they actually conflict with the objectives of the NBA and the DIDA.

\section*{IV. CONFLICT PREEMPTION}

Even when a federal statute does not occupy an entire field of regulation, it displaces a state law if that law stands as an obstacle to the full execution of the objectives of the federal law.\textsuperscript{93} It then must be asked whether a state law provision prohibiting or otherwise regulating late fees on credit-card transactions actually "stands as an obstacle to the accomplishment and execution"\textsuperscript{94} of the objectives of NBA section 85 and DIDA section 521.

\textsuperscript{89} See 331 U.S. at 230 ("The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.").
\textsuperscript{90} See supra section III.A.
\textsuperscript{93} See Hines v. Davidowitz, 312 U.S. 52, 67 (1941).
\textsuperscript{94} 312 U.S. at 67.
Congress's purpose in enacting NBA section 85 and DIDA section 521 was to establish a competitive, level playing field among national banks, FDIC-insured state banks, and the most favored state lenders. The initial purpose of section 85 was to protect national banks from probable discrimination by the state legislatures. Congress sought to accomplish this goal by instituting parity between national and state lenders with respect to the charging of interest. Yet, the Supreme Court's subsequent construction of the NBA has established that section 85 does not exactly demand lender parity between national banks and state banks but rather lender parity between national banks and the "most favored lenders" of each state. This is the most favored lender doctrine. Congress, however, did not confer upon national banks a position superior to that of the most favored state lenders.

Likewise, it is clear from the language and history of DIDA section 521 that Congress's purpose in enacting this section was to achieve parity between national and FDIC-insured state banks. Section 521 begins with the words "In order to prevent discrimination against State-chartered [banks] . . . with respect to interest rates." Two bills, the contents of which eventually were absorbed into the DIDA to become sections 521 through 523, have the subtitle "To equalize competition between State and national banks." Records of congressional debates on the DIDA also refer to the aim of achieving parity between national and FDIC-insured state banks. As in the case of NBA section 85 and national banks, however, there is no evidence that, by enacting DIDA section 521,

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95. See supra text accompanying notes 2-4.
97. See supra note 96.
99. See Union National Bank, 163 U.S. at 331 ("[W]hile the right of the national bank springs from the act of Congress, yet it is only a right to have an equal administration of the rule established by state law."); see also Edward L. Symons & James J. White, Banking Law 250 (3d ed. 1991) ("The primary purpose of the section is to preserve competitive equality between national banks and other lenders."); Burke & Kaplinsky, supra note 96, at 1102 ("Congress intended to place national banks on an equal footing with competing institutions and individuals in their states of location . . . . However, there is no indication that Congress intended that the economic benefit to the national banks on such loans be greater than that enjoyed by others.").
100. See 126 Cong. Rec. 6900 (1980) ("Title V [of the DIDA] also contains a provision which provides parity, or competitive equality, between national banks and State chartered depository institutions on lending limits." (remarks of Sen. Bumpers)); id. at 6894 ("[T]he legislation removes many competitive inequities between different types of financial institutions. It seeks to create a level playing field so that all institutions may compete on the same terms." (remarks of Sen. Bumpers)); 125 Cong. Rec. 30,655 (1979) ("The bill my colleague (Mr. Bumpers) and I shall introduce would merely allow State chartered, federally insured banks . . . . to charge the same interest rate as national banks." (remarks of Sen. Pryor)).
Congress meant to confer upon FDIC-insured state banks any privileges over and above those enjoyed by the most favored state lenders.

This Part argues that state laws regulating late fees on credit-card transactions do not conflict with the objective of either NBA section 85 or DIDA section 521. Section IV.A observes that the objective of lender parity demands a scope of preemption greater than that of state laws governing interest rates alone. Section IV.B demonstrates that placing all state law provisions having some implications for creditors’ aggregate yields and borrowers’ aggregate costs — including those having the most tenuous link to interest rates — within the preemptive scope yields a result that neither banks nor consumers can accept. Therefore, what is needed is a scope of preemption greater than that of interest rates alone yet smaller than that of all state laws affecting creditors’ yields and borrowers’ costs. Section IV.C recommends drawing the line between state law provisions governing requirements preconditional to credit extensions and state law provisions regulating contingent occasions of default. The former type of provisions should be considered preempted by NBA section 85 and DIDA section 521. Section IV.C thus argues that the fact that state laws regulating credit-card late fees come into effect only on contingent occasions of default should be a sufficient condition for such laws to escape preemption. Finally, section IV.D responds to two possible objections to the solution proposed in section IV.C.

A. The Need for a Scope of Preemption Greater Than That of Interest Rates Alone

NBA section 85 and DIDA section 521 demand a scope of preemption greater than that of interest rates alone given that some state laws regulating nonrate aspects of credit transactions stand in the way of achieving lender parity. This conclusion follows from how the two statutes operate in the intrastate loan-transaction setting. An example illustrates this point. Assume that the State of Hutchins allows small loan companies chartered by that state to charge interest at twelve percent for a particular class of loans and allows banks to charge only nine percent for the same class of loans. NBA section 85 and DIDA section 521 preempt the Hutchins law imposing the nine-percent ceiling for banks by permitting a national or FDIC-insured state bank located in Hutchins to "borrow" the twelve-percent rate for transactions involving the same class of loans. Often, however, the privilege of charging the higher rate of interest is accompanied by strict state law provisions ranging from those governing methods of rate computation to those aimed at
consumer protection.\textsuperscript{101} NBA section 85 and DIDA section 521, therefore, mandate a scope of preemption greater than that of interest rates. If national or FDIC-insured state banks located in Hutchins were allowed to lend at the most favored lender rate but were excused from such other provisions accompanying that rate, then the result would not be lender parity but a special advantage for those banks over the most favored state lenders. It follows that at least some state provisions accompanying the most favored lender rate must apply to credit transactions of national and FDIC-insured state banks, and such provisions must be considered within the preemptive scope of NBA section 85 and DIDA section 521.

The need for a preemptive scope greater than that of interest rates was recognized also by the Office of the Comptroller of the Currency (OCC)\textsuperscript{102} in a 1936 interpretive ruling, which has been codified as a federal regulation.\textsuperscript{103} That ruling stated that “[i]f 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 . . . to the provisions of State law relating to such class of loans that are material to the determination of the interest rate.”\textsuperscript{104}

The OCC’s words themselves do not provide any independent guidance in determining which nonrate state provisions are preempted by NBA section 85 and DIDA section 521. But the OCC’s words furnish convenient labels that are used in the following paragraphs. Hereinafter, the word \textit{material} is used as a convenient label to designate all state law provisions that need to be preempted along with the interest-rate provisions to achieve the objective of lender parity. Its opposite, \textit{immaterial}, is used to designate all state law provisions that need not be preempted to achieve lender parity and those provisions whose preemption threaten lender parity by providing national and FDIC-insured state banks with privileges over and above those enjoyed by the most favored state lenders. To make a tautological statement then, to achieve full lender parity as NBA section 85 and DIDA section 521 demand, a national or FDIC-insured bank charging the most favored lender rate must abide by \textit{material} state law provisions that accompany that rate.

\begin{itemize}
\item \textsuperscript{102} See supra note 10.
\item \textsuperscript{103} This interpretive ruling deserves more deference than the OCC’s interpretive letters, some of which are criticized \textit{infra} in section IV.D. First, as said in the text above, this interpretive ruling has been codified as a federal regulation. \textit{See} \textsc{12 C.F.R.} § 7.7310(a) (1995). In addition, the Supreme Court, in Marquette National Bank v. First of Omaha Service Corp., 439 U.S. 299, 314 n.26 (1978), implicitly affirmed the content of this interpretive ruling. \textit{See supra} note 10 and accompanying text.
\item \textsuperscript{104} \textsc{12 C.F.R.} § 7.7310(a) (1995) (emphasis added).\end{itemize}
The determination of whether NBA section 85 and DIDA section 521 preempt states' credit-card late-fee provisions depends on where the line between material and immaterial state law provisions is drawn. It is far from clear exactly what type of state law provisions should be considered material to the determination of the interest rate.105 The OCC itself has done much groping but has not ventured to articulate a standard.106

B. The All-or-Nothing Approach: An Impractical Option

One possible position to take is to refuse to draw the line at all and to consider all state law provisions having some implications for creditors' aggregate yields and borrowers' aggregate costs in credit transactions — including those having only the most tenuous connection to interest rates — material.107 Although this standard ultimately proves to be impractical, it is difficult to deny its initial intuitive appeal. True lender parity seems to demand completely equal treatment under state law. State law provisions regulating

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105. As can be seen, the OCC interpretive ruling states that only those provisions "material to the determination of the interest rate," see 12 C.F.R. § 7.7310(a) (1995) (emphasis added), are binding on the banks charging the most favored lender rate. A late-fee provision, as pointed out in section II.B of this Note, is not in any way determinative of the interest rate. Yet, this fact cannot be used to dispose hastily of the materiality issue. Even if a late-fee provision is not material to the determination of the interest rate, if it conflicts with the objective of either NBA § 85 or DIDA § 521, it must give way. Therefore, the above-quoted language must be treated as being equivalent to "material to the pursuit of lender parity."

106. In an interpretive letter, the OCC stated that a state law provision enumerating a number of notification requirements that lenders must comply with prior to the commencement of a retail-charge agreement is not material to the determination of the interest rate. OCC Staff Interpretation Letter No. 178, 5 Consumer Cred. Guide (CCH) § 97,239 (Jan. 12, 1981). In the same letter, the OCC also stated that, if state law authorizes an interest rate for a loan of up to a certain amount, then the cap is material, and hence a bank borrowing the interest rate may not ignore the cap. See id. ("I can think of nothing more 'material' to the determination of an interest rate than the amount of the loan."); see also Kathleen E. Keest et al., Recent Developments Regarding Interest Rate Regulation, 48 BUS. LAW. 1085, 1088-90 (1993) (summarizing an unpublished OCC interpretive letter which opined that state law provisions setting forth the size and maturity of loans and the classes of borrowers to whom a given category of loans may be made are material, while opining that certain Texas credit-union regulations aimed at protecting the safety and soundness of credit unions are immaterial). But the OCC did not articulate a standard that others can appeal to in making reasoned distinctions between material and immaterial state law provisions.

On at least one occasion, the OCC confessed its inability to provide a general standard for determining which state law provisions are material. See Gregory J. Pulles, Exporting Non-Interest-Rate Provisions, 39 BUS. LAW. 1251, 1271-73 (1984) (summarizing an unpublished OCC interpretive letter that acknowledged the OCC's inability to provide the "general answer" to the materiality question and displaying a "mild surprise" at the OCC's timidity in articulating a standard).

107. A Maryland trial court, in Equitable Trust Co. v. Sachs, took just such a position. See Equitable Trust Co. v. Sachs, 60063/120-1/Fol.713 (Cir. Ct. of Baltimore City, Md. Sept. 16, 1981) (holding that national and FDIC-insured state banks borrowing the higher rates allowed by the Maryland Consumer Loan Law also must abide by all substantive provisions of that law), affd. in part, revd. in part sub nom. Attorney Gen. v. Equitable Co., 450 A.2d 1273 (Md. 1982), cited in Arnold & Rohner, supra note 4, 11 at n.35.
credit-card late fees are clearly material and hence preempted, according to this very inclusive standard.

As two commentators have pointed out, however, this "all-or-nothing" approach gives rise to some grave problems. The approach, in many instances, would result in "artificial substitutions" of a set of provisions designed for one type of loan transaction for another set suitable for a quite different type of transaction. For example, assume that the State of Hutchins allows banks to charge interest at fifteen percent for open-end credit-card transactions and allows some nonbank state-licensed lenders to charge twenty percent for closed-end consumer loans with stated maturity dates. The fifteen-percent open-end credit-card rate may be accompanied by a provision allowing banks to charge annual fees and another requiring banks to give consumers thirty-day grace periods before interest on their purchases starts to accrue. The twenty-percent consumer rate, on the other hand, may be accompanied by a provision prohibiting the charging of annual fees and no provision requiring grace periods. Under NBA section 85 and DIDA section 521, a national or FDIC-insured state bank located in Hutchins, for its open-end credit-card transactions, may borrow the higher closed-end consumer-loan rate. But for the privilege of charging a higher rate, the bank may be barred from charging annual fees. At the same time, consumers, when using credit cards issued by that bank, would be deprived of the usual grace period before interest begins to accrue. The banks borrowing the most favored lender rate, as well as consumers, must consider this result highly undesirable.

Even more undesirable and absurd results would obtain if nonfinancial provisions of state laws were considered material. For example, the State of Hutchins may allow its small loan companies to charge a higher rate of interest for a particular type of loan than the rate that its banks are allowed to charge. Hutchins, however, may require the small loan companies also to comply with some strict nonfinancial provisions — such as those dealing with licensing, examination, and disclosure requirements. Whether creditors are required to comply with such nonfinancial requirements often has significant implications for creditors' aggregate yields and borrow-

108. See Arnold & Rohner, supra note 4, at 25-30.
109. See id. at 30.
110. This is a modified version of an example given by Arnold and Rohner, see id. at 27-28, 30.
111. In Equitable, the plaintiff banks argued that compliance with some of the provisions of the Maryland Consumer Loan Law would be "impracticable, undesirable, and in effect, prevent their credit card operations" and would "unlawfully vitiate their most favored lender status." Equitable, A-60063/120-1/Fol. 713, at 32, cited in Arnold & Rohner, supra note 4, at 27 n.105.
ers' aggregate costs in loan transactions. Under the most favored lender doctrine, a national or FDIC-insured state bank located in Hutchins may borrow the higher small-loan-company rate on credit-card transactions. It, however, would be irrational to require these banks also to comply with the licensing, examination, and disclosure requirements that are designed specially for small-loan-company transactions.\textsuperscript{112}

Furthermore, state law provisions that ultimately affect creditors’ total yields may range far beyond those contained in the state usury or loan laws.\textsuperscript{113} Even a state’s capitalization requirements and tax laws often has significant implications for creditors’ aggregate yields.\textsuperscript{114} It would be absurd to think, however, as the logic of the all-or-nothing approach demands, that NBA section 85 and DIDA section 521 preempted state capitalization requirements and tax laws having significant implications for creditors’ ultimate yields.\textsuperscript{115}

C. Interest-Penalty Distinction Redux

Therefore, what is needed is a scope of preemption greater than that of interest rates yet smaller than that of all state laws affecting creditors’ yields and borrowers’ costs. Once again, the distinction between interest and penalty can be appealed to. The line between material and immaterial state law provisions should be drawn between state laws governing requirements preconditional to credit extensions, on the one hand, and state laws regulating contingent occasions of default, on the other. The Supreme Court’s conflict preemption jurisprudence justifies this distinction.

The Supreme Court, in conflict preemption cases, repeatedly has pointed out that a mere possibility of conflict between federal and state laws is insufficient to warrant a finding of preemption;

\textsuperscript{112} See Howard J. Finkelstein, Most Favored Lender Status for Insured Banks, 42 Bus. LAW. 915, 918-19 (1987). A Minnesota appeals court decided in 1986 that certain disclosure requirements were immaterial but did not offer a rationale for this decision. See First Bank E. v. Bobeldyk, 391 N.W.2d 17, 20 (Minn. Ct. App. 1986).

\textsuperscript{113} See Arnold & Rohner, supra note 4, at 27.

\textsuperscript{114} See id.

\textsuperscript{115} In his dissenting opinion in Smiley v. Citibank, N.A., Justice George pointed out that, although state law provisions governing building permits, minimum wages, and health-and-safety requirements, in principle, could be used to discriminate against out-of-state banks, it would be absurd to treat them as regulating interest within the meaning of NBA § 85. See Smiley v. Citibank, 900 P.2d 690, 719 (Cal. 1995) (George, J. dissenting).

During the 1980's, loan products proliferated, see Ralph P. DeSanto, Note, Product Expansion in the Banking Industry: An Analysis and Revision of Section 4(c)(8) of the Bank Holding Company Act, 53 FORDHAM L. REV. 1127, 1127-29 (1985), and the states reacted by enacting detailed consumer-protection laws to safeguard their citizens, see Burgess & Ciolfi, supra note 78, at 935. The resulting complexity adds to the potential for absurd substitutions of one set of state law provisions for another.
only an obvious or imminent conflict will do.  

In *Huron Cement Co. v. City of Detroit*, the Court warned against "seeking out conflicts between state and federal regulation where none clearly exists." Furthermore, in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, the Court opined that the proper approach in conflict preemption cases is an analysis that reconciles "the operation of both statutory schemes with one another rather than holding one completely ousted."  

When an artificial substitution of one set of state law provisions for another occurs, even in purely intrastate transactions, consumers are deprived of the consumer protection their state legislature devised for them. The same occurs in interstate transactions, when a national or FDIC-insured state bank exports the most favored lender rate to customers residing in other states. Because the bank thereby would be exporting the material provisions of its home-state law along with the rate, the corresponding state law provisions of the importing state would be preempted. Such an occurrence denies consumers of the importing state the protection their elected legislators devised for them.  

An attempt to reconcile the operations of NBA section 85 and DIDA section 521 and those of state consumer-credit-protection laws must be made. One means of reconciliation is to reinvoke the distinction between state laws regulating interest rates and fees, payment of which is a precondition for loan extensions, on the one hand, and those laws coming into play only on contingent occasions.

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118. 362 U.S. at 446.


120. 414 U.S. at 127 (quoting *Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1962)); see 414 U.S. at 127 n.8 ("[The Silver] approach is supported by decisions extending back to the turn of the century." (citations omitted)); see also *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 183 (1978) (Marshall, J., dissenting) (citing the *Silver* decision with approval).

121. According to Burgess and Ciolfi, see supra note 78, at 936-41, this result is untenable. The authors of that article try to drive a wedge between the most favored lender doctrine and the exportation doctrine by pointing out that *Marquette* did not involve a borrowing and exporting of the most favored lender rate. The authors' efforts seem ineffective in the end, however. It is true that in *Marquette* a bank located in Nebraska simply exported the rate that banks in Nebraska were authorized by Nebraska law to charge to residents in Minnesota. Yet, as pointed out in the Introduction, the *Marquette* Court implicitly approved of the most favored lender doctrine, and the net result of the decision seems to be that a national bank and now an FDIC-insured state bank may export the most favored lender rate authorized by the laws of the state in which the bank is located.
of default, on the other. Classifying only those state laws that address various preconditions for an extension of credit as preempted by NBA section 85 and DIDA section 521 provides a reasonable accommodation of the federal interest in equalizing competition among different types of lenders and states' interests in protecting credit consumers.

According to this approach, rate-related state law provisions, such as those governing the frequency of compounding, and those dealing with required fees, such as annual fees and cash-advance fees, would be considered material to the determination of the interest rate. On the other hand, state law provisions dealing with, for example, creditor remedies and grace periods for debtors would be considered immaterial. Consequently, state law provisions dealing with late fees on credit-card transactions would be considered immaterial and hence escape the preemptive reach of the NBA and the DIDA.

Admittedly, drawing the line between material and immaterial provisions to coincide with the line between preconditional and contingent charges does not result in complete parity between national and FDIC-insured state banks, on the one hand, and the most favored state lenders, on the other. If state laws allowed the most favored state lenders to charge certain contingent fees while prohibiting all banks from charging the same fees, then the national and FDIC-insured state banks would suffer from a competitive disadvantage. On the other hand, if state laws allowed only banks to charge certain contingent fees, then national and FDIC-insured banks would have an advantage over the most favored state lenders. The ideal of complete lender parity would not be achieved in either instance.

122. Section II.D appealed to this distinction to show that the case law under NBA § 85 does not demand treating credit-card late fees as interest under DIDA § 521.

123. A clarification must be made. While only those state laws that deal with preconditions for extension of credit should be considered material, not all such provisions should be considered material. State law provisions governing specific application procedures, building licenses, taxation, the minimum wage, and other disparate aspects of bank operation all significantly affect creditors' ultimate yields on credit-card transactions. They are preconditional provisions given that they come into play even when a default does not occur. But maintaining that all such state law provisions deal with interest, no matter how slight the nexus between such provisions and interest rates, could not have been the intent of Congress in enacting the NBA or the DIDA. Therefore, although all state law provisions dealing with contingent occasions of default should be considered immaterial, it must be left as an open question which individual state law provisions dealing with preconditional aspects of credit transactions are material. In sum, what is recommended is treating the fact that a state law provision comes into effect only on contingent occasions of default as a sufficient, though not a necessary, condition for that provision to escape preemption.

This means that the interest-penalty distinction approach does not provide a complete solution to the problem of delineating the proper preemptive scope of NBA § 85 and DIDA § 521. The distinction, however, does provide the courts, the OCC, banks, and consumers with an initial and firm foothold in dealing with the issue.
This failure to eliminate every conceivable obstacle to achieving lender parity, however, does not mean that drawing the line between preconditional and contingent charges poses an illegitimate obstacle to the accomplishment and execution of the objectives of the NBA and the DIDA. First, complete lender parity can be achieved only if national and FDIC-insured state banks are governed by exactly the same set of regulations as the most favored state lenders. Yet, as arguments in the preceding section showed, the all-or-nothing approach is simply unacceptable. The line-drawing problem cannot be avoided.

Second, any conflict that might be implicated by the interest-penalty distinction would be very slight. With respect to all state consumer-credit-protection provisions governing the terms, compliance with which is preconditional to credit extensions, the interest-penalty distinction approach allows complete lender parity between national and FDIC-insured banks, on the one hand, and the most favored state lenders on the other. State consumer-credit-protection laws are left intact and may create lender disparity only on contingent occasions of borrower default. Given that complete lender parity cannot be achieved and that there is no evidence to suggest that Congress meant to preempt all state banking or consumer-credit-protection laws, it follows that Congress was willing to tolerate and even anticipated such minimal amounts of conflict.

The Supreme Court's conflict preemption jurisprudence buttresses this conclusion. The Court in the past has sustained state laws erecting slight barriers to the full efficacy of federal statutes when those state laws were aimed at promoting genuine and substantial interests of the states. For example, in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, the Court found that California's moratorium on construction of new nuclear-power plants conflicted with the Atomic Energy Act's intent to promote commercial uses of nuclear energy. Yet, judging the California moratorium as based on economic rather than safety reasons, the Court went on to hold that Congress did not intend to promote nuclear power "at all costs." In this and other cases, the Supreme Court has displayed its will-

124. See supra section IV.B.

125. See supra Part III; see also Arnold & Rohner, supra note 4, at 29 ("There is no evidence that Congress meant to displace all the protective aspects of state rate laws when it provided for the extension of most favored lender status.").


127. 461 U.S. at 222.

128. Similarly, in *New York Telephone Co. v. New York State Department of Labor*, 440 U.S. 519 (1978), the Court sustained the New York strike-insurance program that paid unemployment compensation to striking employees and imposed the costs for financing such bene-
In sum, the possibility of minimal conflicts implicated by the proposed solution based on the interest-penalty distinction should be tolerated given states' genuine and substantial interests in protecting credit consumers. In fact, it can be inferred from the unacceptability of the all-or-nothing approach that Congress did not intend to achieve complete lender parity "at all costs."

D. Two Possible Objections to the Interest-Penalty Distinction

Two possible objections should be addressed briefly. First, one may object that the interest-penalty distinction approach would enable a state to discriminate against national and "foreign" — meaning, "out-of-state" — banks by artfully labeling certain fees as "contingent" and allowing only the banks chartered by it to charge such fees. The original intent of Congress in enacting the NBA thereby would be frustrated. Recently, the California Supreme Court accepted this line of argument in holding that section 85 of the NBA preempted state law provisions prohibiting credit-card late fees.130

This worry, however, is an idle one. A state in fact can treat its most favored lenders and banks in general differently with respect to contingent fees. A state, however, cannot favor banks chartered by it over banks chartered by the federal government or another state. Any state law that favored its own banks and discriminated
against national or foreign banks would be a paradigm example of state behavior proscribed by the Dormant Commerce Clause.131 A state law's escape from the clutches of preemption does not guarantee its safety from other constitutional constraints.

Second, one may object to the interest-penalty distinction by appealing to the OCC's interpretive letters. In occasional interpretive letters, the OCC has stated that NBA section 85 preempted state laws regulating late fees on credit-card transactions.132 Many courts have relied on these and other OCC interpretive letters in deciding the preemption issue.133 It then may be argued that the OCC's declaring credit-card late fees to be material to the determination of the interest rate indicates that state law provisions prohibiting credit-card late fees conflict with the national policy regarding interest-rate regulation.

The OCC's interpretive letters, however, merit very little weight on the issue of preemption. In I.N.S. v. Cardoza-Fonseca,134 the Supreme Court held that deference to or reliance on an administrative agency's interpretation is misplaced when "a pure question of statutory construction" is involved.135 The Cardoza-Fonseca Court drew a distinction between the narrow issue of ascertaining congressional intent and the broader issue of how the statute should be


As part of its attempt to revise and reorganize 12 C.F.R. pt. 7, the OCC recently has proposed an interpretive ruling to include late fees and other default charges in the definition of interest under NBA § 83. The proposed § 7.4001(a) states:

The word "interest" as used in 12 U.S.C. 85 includes any payment compensating a creditor or prospective creditor for any extension of credit, the making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended. It includes, among other things, the following fees . . . numerical periodic rates, late fees, not sufficient funds (NSF) fees, overlimit fees, annual fees, cash advance fees, and membership fees.


135. See 480 U.S. at 446-48.
applied and held that the former issue falls "well within the province of the Judiciary."136

The issue at stake here is the narrow one of determining what Congress meant in NBA section 85 by employing the terms interest and interest rate. It is therefore safe to conclude that the OCC’s interpretive letters are of very limited authoritative value and that they are, as two commentators have said, "at best informal agency staff advice [that] . . . [is] not binding on courts."137

CONCLUSION

Taking advantage of the environment created by the most favored lender doctrine and the exportation doctrine of Marquette, credit-card-issuing banks have aggressively conducted their nationwide consumer-credit transactions from a few states — such as Delaware, Nebraska, and South Dakota — that have raised or removed interest-rate and fee ceilings. In doing so, many banks have ignored the consumer-credit-protection laws of other states, and consumers have been denied the protection that their elected legislators have seen fit to confer on them. The foregoing analysis, however, shows that such disregard of state consumer-credit-protection laws, at least with respect to the charging of late fees on credit-card transactions, is unjustified. Neither NBA section 85 nor DIDA section 521 preempts state law provisions regulating late fees on credit-card transactions.

Perhaps the best justification for the present regulatory scheme can be found in the idea that consumers, in the long run, will benefit from a truly national banking system and open competition among banks unhindered by local and anachronistic constraints.138

136. 480 U.S. at 448.
137. Arnold & Rohner, supra note 4, at 8 n.22.
138. Recently, there indeed has been a growing trend toward the nationalization of banking law. As one commentator has pointed out, a competitively restricted and geographically limited banking system is giving way to one marked by intense competition and interstate banking. See generally Geoffrey P. Miller, The Future of the Dual Banking System, 53 Brook. L. Rev. 1 (1987).

The DIDA, after all, is a step contributing to that trend. See, e.g., 126 Cong. Rec. 6894 (1980) ("On the competition theme, [the DIDA] marks an historic turn . . . . It relies more on the forces of the marketplace and less on the forces of regulation in shaping the structure of our financial system." (statement of Sen. Proxmire)). In 1994, Congress enacted the Riegle-Neal Interstate Banking and Branching Act, Pub. L. No. 103-328, 108 Stat. 2338 (1994) (amending 12 U.S.C. § 36 (1994)), signed by President Clinton on September 29, 1994; it aimed to facilitate interstate branching. By doing away with the last arcane barriers that had been posed by the Bank Holding Company Act of 1956, the new law enables healthy banks to acquire branches in other states and thus create truly multistate operations. Moreover, the President, the Comptroller, and many in the banking industry have suggested that the new law is only the first sign of the things to come. See Robert M. Garsson, President Clinton Signs Interstate Bill into Law, Saying It's a First Step, AM. BANKER, Sept. 30, 1994, available in LEXIS, News Library, ASAPII File; Robyn Meredith, Comptroller Vows Close Watch on Local Needs Under Interstate, AM. BANKER, Sept. 29, 1994, available in LEXIS, News Li-
Yet, some studies indicate that the bank-credit-card industry has not been a paradigm of the free market at work. The bank-credit-card market has all the attributes that usually lead to the creation of a perfectly competitive market. For example, there are many sellers and buyers; there are no significant sunk costs or barriers to entry; and there is no evidence of any collusion on price or quantity.\textsuperscript{139} Despite these facts, credit-card interest rates have proved to be remarkably "sticky" and banks continue to reap "supranormal" profits from their credit-card operations — three to five times the overall profit rate in banking.\textsuperscript{140} In 1994, for example, eight of the top nine commercial banks, ranked by the return on their assets, specialized in credit-card loans.\textsuperscript{141} One economist has suggested that wishful thinking and self-deception on the part of consumers chiefly explain the high level and "stickiness" of credit-card interest rates.\textsuperscript{142}

One very clear indication of widespread consumer irrationality is the fact that consumers are much more sensitive to increases in annual fees than to similar increases in the interest rates.\textsuperscript{143} This fact has not escaped commercial banks. Taking notice of consumer resistance to annual fees and even some recent resistance to high interest rates, banks have turned to other, subtler, methods of generating revenue.\textsuperscript{144} Charging late fees has been the most obvious and widespread of the new methods.\textsuperscript{145} Banks also have resorted to changing interest-calculation methods to charge interest as of the date a purchase is made, rather than as of the date a purchase is charged to a customer’s account for payment, increasing over-the-


\textsuperscript{140} See id. at 56-64.


\textsuperscript{142} See Ausubel, supra note 139, at 69-72. Ausubel’s study shows that a sizeable percentage of consumers who borrow on credit cards are unaware of how often they do it and that many do not even admit, to others and themselves, when they do it. See id. at 72.

\textsuperscript{143} Id.


\textsuperscript{145} According to one set of data, between 1987 and 1992, the percentage of commercial banks charging late fees increased from 50 to 80%. See Gilgoff, supra note 144, at 49.
credit-limit fees, and adding fees to customers' balances for interest calculation.\textsuperscript{146} Credit-card-issuing banks thus have sought to circumvent what little benefit consumers have derived from competition. It must be questioned whether competition alone can provide effective checks on such subtle methods of revenue generation.\textsuperscript{147} In the foregoing Parts, this Note argued that Congress, neither in enacting NBA section 85 nor in enacting DIDA section 521, intended competition to be the only source of checks on such methods.

\textsuperscript{146} See Harrigan, \textit{supra} note 144, at 82.

\textsuperscript{147} Some studies by psychologists suggest that people generally evaluate their prospective actions in terms of a "minimal account," which includes only the direct consequences of the considered actions. Such a simplified method of evaluation has the advantage of reducing cognitive strain. Amos Tversky & Daniel Kahneman, \textit{The Framing of Decisions and the Psychology of Choice}, 211 \textit{Science} 453, 456-57 (1981). This paradigm would mean that consumers, in evaluating different credit-card programs, generally would compare them based on annual fees and interest rates but not on fees they would be liable for in contingent occasions of default.