

SUPREMACY CLAUSE LIMITATIONS ON FEDERAL
REGULATORY PREEMPTION

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I. INTRODUCTION

This coming Term, the Supreme Court of the United States will hear arguments in and resolve a case that raises one of the more troubling questions of administrative law, if not of federalism as a whole: Whether and when a federal administrative agency can preempt state law by regulation without any evidence that Congress contemplated and authorized the preemption. The answer may have sweeping national implications, especially in light of recent efforts by federal administrative agencies to pursue “preemption by regulation” in the areas of product liability for FDA-approved drugs,¹ banking,² and automobile safety standards.³

The case at issue is *Watters v. Wachovia Bank, N.A.*, on review from the United States Court of Appeals for the Sixth Circuit.⁴ That the Supreme Court decided to grant a petition for certiorari in the case at all is telling: The Sixth Circuit’s decision does not conflict with the decision of any other court; it follows the decisions of two other United States Courts of Appeals (the Second and Ninth);⁵ and the Solicitor General of the United States asked the Court *not* to review these cases because they were—in the Solicitor General’s view—correctly decided and perfectly consistent with each other.⁶ None of these factors,

1. See Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. 3922, 3967 (Jan. 24, 2006) (to be codified at 21 C.F.R. pts. 201, 314, 601) (recognizing that agencies are to construe a federal statute to preempt state law “where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute” and asserting that preemption is warranted in this case because the “FDA has determined that the exercise of State authority conflicts with the exercise of Federal authority under the act”).

2. See, e.g., 12 C.F.R. § 7.4006 (2006) (“Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank.”).

3. See Federal Motor Vehicle Safety Standards; Roof Crush Resistance, 70 Fed. Reg. 49,223, 49,245 (Aug. 23, 2005) (to be codified at 49 C.F.R. pt. 571) (outlining proposed regulations for increasing vehicle safety in rollover crashes and noting that these regulations neither have an impact sufficient enough to warrant consultation with the states nor do they substantially impact the “current Federal-State relationship”).

4. *Wachovia Bank, N.A. v. Watters*, 431 F.3d 556 (6th Cir. 2005), *cert. granted*, 126 S.Ct. 2900 (June 19, 2006) (No. 05-1342).

5. *Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949 (9th Cir. 2005); *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir. 2005).

6. See Brief for the United States as Amicus Curiae at 7, *Burke v. Wachovia Bank, N.A.*, No. 05-431 (U.S. May 11, 2006) [hereinafter Brief for the United States] (“The

however, could mask the fact that *Watters* merits the Supreme Court's examination because of its fundamental significance to the balance of power between states and federal administrative agencies.

II. *WATTERS V. WACHOVIA BANK, N.A.*

The National Bank Act was enacted in 1864 to further the development of a national banking system.⁷ Among its original provisions were a grant of various powers to national banks, including “all such incidental powers as shall be *necessary* to carry on the business of banking,”⁸ and a prohibition against national banks being “subject to any visitorial powers” except as permitted by federal law.⁹ Whatever Congress thought the powers of national banks should be in 1864, there is no indication that Congress envisioned or intended that those powers could be exercised by an entity other than a national bank, even if that entity was controlled by a national bank. In fact, this was the state of federal banking regulation for roughly 100 years after the National Bank Act came into effect: only national banks exercised the powers—including the “incidental powers”—of national banks.

All of this changed in the mid-1960s, when the Office of the Comptroller of the Currency (OCC)—the federal regulatory agency charged with enforcing the National Bank Act¹⁰—determined that the “incidental powers” of a national bank should include the power to conduct “the business of banking” through an operating subsidiary incorporated under state law.¹¹

decision of the court of appeals is correct, and it does not conflict with the decisions of any other courts. Indeed, every lower court to consider the question presented has upheld the validity of the Comptroller's regulations governing the applicability of state laws to operating subsidiaries of national banks.”)

7. 12 U.S.C. § 38 (2000).

8. This provision is currently codified at 12 U.S.C. § 24 (Seventh) (2000) (emphasis added).

9. This provision is currently codified at 12 U.S.C. § 484 (2000).

10. See 12 U.S.C. § 93a (2000) (authorizing the Comptroller of the Currency to prescribe rules and regulations to execute the responsibilities of the office); *Nationsbank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995) (stating that as the administrator supervising the National Bank Act, the “Comptroller [of the Currency] bears primary responsibility for surveillance of the ‘business of banking’” as authorized by 12 U.S.C. § 24 (Seventh)).

11. See *Acquisition of Controlling Stock Interest in Subsidiary Operations Corporation*, 31 Fed. Reg. 11,459, 11,460 (Aug. 31, 1966) (declaring that national banks have the authority to “purchase or otherwise acquire and hold stock of a subsidiary operations corporation” among its “incidental powers”).

Over time, this new power and the OCC's role in overseeing operating subsidiaries evolved substantially. First, numerous national banks began conducting banking activities through state-law-created operating subsidiaries, which OCC regulations did not require be wholly owned—or even 50% owned—by the national banks.¹² Second, the OCC eventually decided that state regulation of these state-law-created subsidiaries should be severely limited, so it promulgated a regulation in 2001 freeing the subsidiaries from state law except “to the same extent that those laws apply to the parent national bank[s]” of the subsidiaries.¹³ Among other things, this meant that national banks' operating subsidiaries—even though incorporated under state law—were, like national banks chartered under federal law, no longer subject to any “visitorial powers” of a state.¹⁴ Not surprisingly, this last step by the OCC was poorly received by a substantial number of states, which believed that Congress only authorized “national banks,” as creatures of federal law, to be exempted from state “visitorial powers.” In the view of these states, the National Bank Act still left national banks' affiliates, which are created under and exist by operation of state law, open to state examination and regulation.

For years, Wachovia Mortgage Corporation was an affiliate, but not a subsidiary, of Wachovia Bank, N.A.¹⁵ Wachovia Mortgage was incorporated under North Carolina law and provided mortgage lending services in various states, including Michigan.¹⁶ From 1984 to 2002, it complied with Michigan statutory and regulatory requirements, including registering

12. See 12 C.F.R. § 5.34 (2006) (defining the scope of authorized powers and requirements for operating subsidiaries). This regulation was revised in 1996, see Rules, Policies, and Procedures for Corporate Activities, 61 Fed. Reg. 60,342, 60,346 (Nov. 27, 1996) (to be codified at 12 C.F.R. pts. 3, 5, 7, 16, 28) (clarifying procedures for an institution converting to a national bank charter and requiring that such institutions identify all subsidiaries desired to be retained under the national charter), and 2000, see Financial and Operating Subsidiaries, 65 Fed. Reg. 12,905, 12,905 (Mar. 10, 2000) (to be codified at 12 C.F.R. pt. 5) (streamlining procedures for banks conducting business through operating subsidiaries).

13. 12 C.F.R. § 7.4006 (2006). This regulation was promulgated in 2001. See Investment Securities; Bank Activities and Operations; Leasing, 66 Fed. Reg. 34,784, 34,792 (July 2, 2001) (to be codified at 12 C.F.R. pts. 1, 7, 23) (promulgating the final regulation).

14. 12 U.S.C. § 484 (2000). The OCC defines the visitorial powers to include the power to inspect a bank's records, examine a bank, supervise and regulate banking activities, and enforce compliance with relevant laws. 12 C.F.R. § 7.4000(a) (2006).

15. Petition for Writ of Certiorari at 5, *Watters v. Wachovia Bank, N.A.*, No. 05-1342 (U.S. Apr. 18, 2006) [hereinafter *Watters Certiorari Petition*].

16. *Id.*

under Michigan's Mortgage Brokers, Lenders and Servicers Licensing Act (Mortgage Act).¹⁷ On January 1, 2003, however, Wachovia Mortgage was transformed into a subsidiary of Wachovia Bank.¹⁸ While this change did not materially alter Wachovia Mortgage's operations in Michigan or transform it into a federally created entity, Wachovia Mortgage informed the State of Michigan that it was no longer bound by Michigan lending laws, including the registration requirement of the Mortgage Act.¹⁹ More specifically, Wachovia Mortgage informed the Commissioner of the Michigan Office of Financial and Insurance Services (the Commissioner) that, because the Mortgage Act's registration requirement "would not apply to a national bank," it "cannot be applied" any longer to Wachovia Mortgage now that it was "an operating subsidiary of a national bank."²⁰

After the Commissioner disagreed with Wachovia Mortgage's interpretation of its obligation to comply with state law, Wachovia Bank and Wachovia Mortgage filed suit in federal court for a declaration that Wachovia Mortgage no longer had to comply with Michigan's mortgage-lending laws.²¹ The United States District Court for the Western District of Michigan, and then on appeal the United States Court of Appeals for the Sixth Circuit, agreed.²² Like the Second and Ninth Circuits, the Sixth Circuit recognized that Congress has not spoken to the questions of whether national banks could own operating subsidiaries that engage in "the business of banking" or, more importantly, whether the OCC could shield such operating subsidiaries from states' "visitorial powers."²³ The Sixth Circuit,

17. See MICH. COMP. LAWS ANN. § 445.1651-1684 (2002 & Supp. 2006); Watters Certiorari Petition, *supra* note 15, at 6.

18. Watters Certiorari Petition, *supra* note 15, at 7.

19. *Id.*

20. *Id.*

21. Complaint at 1, Wachovia Bank, N.A. v. Watters, 334 F.Supp.2d 957 (W.D. Mich. 2003) (No. 5:03 CV0105).

22. *Watters*, 334 F. Supp. 2d at 966; Wachovia Bank, N.A. v. Watters, 431 F.3d 556, 563 (6th Cir. 2005).

23. *Watters*, 431 F.3d at 561. See also Wells Fargo Bank N.A. v. Boutris, 419 F.3d 949, 960 (9th Cir. 2005) (holding that in the absence of congressional direction on the issue, the OCC had the authority to permit federally regulated operating subsidiaries to engage in the "business of banking"); Wachovia Bank, N.A. v. Burke, 414 F.3d 305, 321 (2d Cir. 2005) (same). The Solicitor General on behalf of the Executive Branch has also admitted to this congressional silence: "The threshold question . . . is whether Congress has spoken directly to the issue addressed by the agency interpretation—here, the extent to which state laws are applicable to an operating subsidiary's activities. Congress, as the

however, rejected the Commissioner's argument that the lack of congressional intent to empower the OCC to exempt operating subsidiaries from state lending regulations meant that the OCC's preemption regulation for operating subsidiaries was void. Joining the Second and Ninth Circuits, the Sixth Circuit instead held that in the face of congressional silence, the OCC preemption regulation was valid because, under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*,²⁴ it was at least a reasonable construction of the National Bank Act: The regulation was based on the OCC's statutory authority to define what a national bank's "incidental [banking] powers" are under 12 U.S.C. § 24 (Seventh)—i.e., a national bank has the "incidental power[]" to carry on "the business of banking" through subsidiaries—and the regulation did not plainly conflict with any other provision of the National Bank Act.²⁵

On June 19, 2006, the Supreme Court granted the Commissioner's petition for certiorari to decide whether the OCC's preemption regulation is entitled to judicial deference under *Chevron* and valid as a reasonable construction of the National Bank Act or, instead, invalid because Congress did not express an intent in the Act to empower the OCC to preempt state law as applied to any entity other than a national bank.²⁶

III. FEDERAL REGULATORY PREEMPTION AND THE CONSTITUTION

court of appeals determined, has not spoken to that issue" Brief for the United States, *supra* note 6, at 12. Even Wachovia Bank agrees: "[I]t is obvious that congressional silence in [12 U.S.C.] §§ 221a(b) and 484 about operating subsidiaries signifies not intent but unawareness." Brief in Opposition at 11, *Watters v. Wachovia Bank, N.A.*, No 05-1342 (U.S. May 19, 2006).

24. 467 U.S. 837, 842–43 (1984) (outlining the two-prong analysis under which, in reviewing an agency's construction of a statute, a court must first ask whether Congress has directly spoken to the issue, and if it has not, a court must then determine whether the agency's interpretation is a permissible construction warranting judicial deference).

25. *Watters*, 431 F.3d at 561–62.

26. *Watters v. Wachovia Bank, N.A.*, 126 S. Ct. 2900 (2006). The Supreme Court granted certiorari on two questions, the first of which subsumes the issue of whether the OCC's preemptive regulation is a valid exercise of its authority: "Is the interpretation of the Comptroller of the Currency that 12 CFR 7.4006 [(the OCC's preemptive regulation)] preempts Michigan's laws regulating mortgage lending as applied to State chartered nonbank operating subsidiaries, entitled to judicial deference under *Chevron USA, Inc v Natural Resources Defense Council*?" *Watters* Certiorari Petition, *supra* note 15, at i. The second question asks whether the OCC's preemptive regulation, "by equating a State-chartered nonbank operating subsidiary with a national bank for purposes of federal preemption of State regulation, violate[s] the Tenth Amendment to the United States Constitution." *Id.*

A. Supremacy Under the Constitution

In assessing the authority of a federal administrative agency to preempt state law, the natural starting point is, or at least should be, the text of the United States Constitution—the one document that defines the core relationship between federal and state sovereigns. That document, not surprisingly, provides a relatively direct answer. Per the Supremacy Clause, the “supreme Law of the Land” is defined as (a) the Constitution, (b) treaties, and (c) “the *Laws* of the United States which shall be *made* in Pursuance” of the Constitution.²⁷ The original Constitution contains only one other reference to the “making” of federal law, and it is clearly in reference only to *Congress’s* authority: “The Congress shall have Power . . . [t]o *make all Laws* which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”²⁸

Throughout the rest of the Constitution, moreover, references to the creation of federal “Law” are tied together by a simple, common thread. To the extent that these references can be linked to a specific branch of the federal government, that branch is *always* Congress:

- Article I, Section 4: “Congress may at any time by Law make or alter” regulations on elections, and Congress may “by Law appoint a different Day” for assembling other than the first Monday in December.²⁹
- Article I, Section 7: A bill shall “become a Law” only after having passed the House and Senate and been either signed by the President or vetoed by the President and

27. U.S. CONST. art. VI, cl. 2 (emphasis added). The full text of the Supremacy Clause states:

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.

Id.

28. *Id.* art. I, § 8, cls. 1, 18 (emphasis added).

29. *Id.* § 4, cls. 1, 2. The beginning of the congressional session was changed from the first Monday in December to the third day of January by the Twentieth Amendment. *See id.* amend. XX, § 1.

subsequently passed by two-thirds of the House and Senate.³⁰

- Article II, Section 1: “Congress may by Law provide for” who would take over the Office of the Presidency in the event neither the President nor the Vice President can continue to hold or perform the Office.³¹
- Article II, Section 2: “Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”³²
- Article III, Section 2: When a federal crime is not committed within any State, the trial for that crime “shall be at such Place or Places as the Congress may by Law have directed.”³³
- Article IV, Section 1: “Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings [of a State] shall be proved, and the Effect thereof.”³⁴

Other provisions of the Constitution provide additional, albeit indirect, support for the conclusion that “Laws . . . made in Pursuance”³⁵ of the Constitution cover only Acts of Congress. First, the idea that parallel construction should be given to words in the Supremacy Clause and the rest of the Constitution is supported by the treatment of treaties under the Constitution. The Supremacy Clause affords “Treaties *made, or which shall be made*, under the Authority of the United States”³⁶ precedence over state laws, which parallels the language of the treaty power contained in Article II, Section 2: The President “shall have Power, by and with the Advice and Consent of the Senate, to

30. *Id.* § 7, cl. 2.

31. *Id.* art. II, § 1, cl. 6. The Succession Clause of the Constitution was modified by the Twentieth and Twenty-Fifth Amendments. *See id.* at amends. XX, XXV (altering the original provisions of the Constitution to provide for succession to the Presidency and Vice Presidency upon the office-holder’s death or inability to execute the functions of the office).

32. *Id.* art. II, § 2, cl. 2.

33. *Id.* art. III, § 2, cl. 3.

34. *Id.* art. IV, § 1. The same correlation between Congress and the making or creation of law exists in various amendments to the Constitution, most famously the First Amendment (“Congress shall make no law . . .”). *Id.* amend. I. How terms are used in constitutional amendments, however, does little to illuminate the meaning of the terms in the original text of the Constitution.

35. *Id.* art. VI, cl.2.

36. *Id.* (emphasis added).

make Treaties, provided two thirds of the Senators present concur.”³⁷ No one would claim that “Treaties made” by the House and Senate in tandem, or by the Supreme Court of the United States, are the “supreme Law of the Land.” It is unclear why a “Law . . . made” by the executive branch should be afforded different and more preferential treatment.

Second, the Constitution declares that “*All* legislative Powers herein granted shall be vested in a Congress of the United States.”³⁸ That power is and has been commonly understood to embody at its core the power to make laws. As Alexander Hamilton acknowledged in advocating ratification of the Constitution to the people of New York in 1787, “What is a LEGISLATIVE power but a power of making LAWS? What are the *means* to execute a LEGISLATIVE power but LAWS?”³⁹ Or, as categorically asserted by the United States Supreme Court on two more recent occasions: “[T]he Constitution is neither silent nor equivocal about *who shall make laws* which the President is to execute. The first section of the first article says that ‘All legislative Powers herein granted shall be vested in a *Congress of the United States . . .*’”⁴⁰

Third, the Constitution does expressly “guarantee to every State in this Union a Republican Form of Government”⁴¹ While the focus of this provision seems to be more on ensuring that the United States assists states in maintaining democratic systems of government and preventing states from devolving into monarchies, it is not beyond the scope of this guarantee to make certain that the federal government does not conduct itself in such a manner as to effectively eviscerate the democratic functioning of states. When the democratically elected members of Congress enact measures that preempt a state’s law, this process merely replaces one republican form of government (officials elected from the state) with another (officials elected from across all the states).⁴² When an appointed official of the

37. *Id.* art. II, § 2, cl. 2 (emphasis added).

38. *Id.* art. I, § 1 (emphasis added).

39. THE FEDERALIST NO. 33, at 224 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

40. *Buckley v. Valeo*, 424 U.S. 1, 123 (1976) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–88 (1952)) (emphasis added).

41. U.S. CONST. art. IV, § 4.

42. In fact, prior to the passage of the Seventeenth Amendment, Senators were not elected by the people but were appointed by state legislatures. *Id.* art. I, § 3, cl. 1, *amended by id.* amend. XVII, cl. 1. This ensured that at least one house of Congress was sensitive to

Executive Branch preempts state law without direction from Congress or at least an indication of endorsing congressional intent, however, the states' republican form of government is usurped by what resembles more of a monarchical than democratic power.

Fourth, the Executive Branch is not without any role in connection with "Laws" under the Constitution, for it is the President that "shall take Care that the Laws be faithfully executed."⁴³ The Constitution, however, gives no indication that this power of execution bestows on the Executive Branch the authority to override state law without congressional direction and outside the special domains of foreign affairs and national security. Indeed, the only other reference to executing federal law in the Constitution clearly does not envision preemptive lawmaking authority: it is the militia power of Congress, which provides that Congress shall have the power "[t]o provide for calling forth *the Militia to execute the Laws of the Union . . .*"⁴⁴ As the Supreme Court declared in *Youngstown Sheet & Tube Co. v. Sawyer*, "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."⁴⁵

A plain reading of the Constitution that envisions only Congress having the authority to preempt state law by the making of federal law, at least outside the spheres of foreign affairs (including treaties) and national security, certainly accords well with the intent of the Framers, to the extent that intent is ascertainable. Little, if anything, was written around the time of the Constitution's adoption regarding the authority of the Executive to preempt state law by regulation without congressional direction or guidance for a very simple reason: no one at the time of the Founding appeared to contemplate the administrative state that exists today. Even without direct guidance from the time period, however, there are signs that certainly counsel against the notion that those who ratified the Constitution contemplated that the Executive could fashion pronouncements on domestic matters that were "supreme" to

the desires and expectations of state legislatures—the hallmark of the states' republican forms of government.

43. *Id.* art. II, § 3.

44. *Id.* art. I, § 8, cl. 15 (emphasis added).

45. 343 U.S. at 587.

state laws without a clear mandate from Congress.⁴⁶ For example, both proponents and opponents of the Constitution consistently identified the “Laws” made supreme by the Supremacy Clause as the laws of *Congress*, with no reference to the “Laws” of the Executive.⁴⁷ More generally, it is clear that the Constitution’s

46. It is certainly debatable whether the Framers’ early drafts of the Constitution and deliberations over the Constitution during the Constitutional Convention should be employed to attribute a meaning to words in the Constitution that do not flow from a plain reading of those words as they would be understood by those who actually ratified the Constitution. The early drafts and deliberations, after all, were not readily available to those voting on ratification of the Constitution. Nevertheless, it is worth noting that the original proposal for a Supremacy Clause is clearly consistent with the view that the “Laws . . . made” language in the final version of the Supremacy Clause is referring to acts of Congress. U.S. CONST. art. VI, cl. 2. The original proposal stated:

6. Resd. that *all Acts of the U. States in Congs. made by virtue & in pursuance of the powers hereby* & by the articles of confederation vested in them, and all Treaties made & ratified under the authority of the U. States shall be the supreme law of the respective States

1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 245 (Max Farrand ed., 1937) (emphasis added). This proposal, offered by William Patterson, was modified by Luther Martin, who offered the language that eventually evolved into the Supremacy Clause. As with Patterson’s proposal, Martin’s proposal made it clear that the “supreme law” was, in addition to treaties, the legislative enactments of Congress:

[T]he *Legislative acts of the U. S. made by virtue & in pursuance of the articles of Union*, and all treaties made & ratified under the authority of the U. S. shall be the supreme law of the respective States, as far as those acts or treaties shall relate to the said States, or their Citizens and inhabitants—& that the Judiciaries of the several States shall be bound thereby in their decisions, any thing in the respective laws of the individual States to the contrary notwithstanding.

2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 28–29 (emphasis added).

47. See, e.g., James Iredell & Timothy Bloodworth, *James Iredell & Timothy Bloodworth Debate the Supremacy of the Constitution and of Federal Law*, reprinted in II THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 899 (1993) (defending the Supremacy Clause, Iredell reasoned, “It is saying no more than that when we adopt the government we will maintain and obey it; in the same manner as if the Constitution of this state had said, that when a law is passed in conformity to it we must obey that law. Would this be objected to? Then when *the Congress passes a law* consistent with the Constitution, it is to be binding on the people *Every power delegated to Congress, is to be executed by laws* made for that purpose [The Supremacy Clause] appears to me merely a general clause, the amount of which is, that when *they pass an act*, if it be in the execution of a power given by the Constitution, it shall be binding on the people, otherwise not.”) (emphasis added); *Letters of Centinel I*, INDEPENDENT GAZETTEER (Philadelphia), Oct. 5, 1787, reprinted in 2 THE COMPLETE ANTI-FEDERALIST 140 (Herbert J. Storing ed., 1981) (“To put *the omnipotency of Congress* over the state government and judicatories out of all doubt, the 6th article [of the Constitution] ordains that ‘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.’”) (emphasis added; emphasis in original omitted); *Letters of Centinel II*, FREEMAN’S JOURNAL (Philadelphia), Oct. 24, 1787, reprinted in 2 COMPLETE ANTI-FEDERALIST 147 (Herbert J. Storing ed., 1981) (arguing that under the proposed Constitution, “the *laws of Congress* are to be ‘the supreme law of the land, any thing in the Constitutions or laws of any State to the contrary notwithstanding;’ and consequently, would be paramount to all State authorities”) (emphasis added; emphasis in original omitted); *Letters from the Federal*

leading advocates promoted as among its virtues that (a) the President would lack the lawmaking authority of a king, (b) the division of power among the branches of the federal government would operate as a check on each branch, and (c) states would be protected from undue encroachment by the federal government because members of Congress would be elected or appointed on a state-by-state basis and thus would be sensitive to state-level concerns.⁴⁸ All of these virtues are called into serious question when an unelected official appointed by the President has the power, without direction from Congress, *both to create and then to enforce* a federal regulation that preempts state law.⁴⁹

Farmer IV, POUGHKEEPSIE COUNTY JOURNAL (New York), Nov. 1787–Jan. 1788, *reprinted in* 2 COMPLETE ANTI-FEDERALIST 247 (Herbert J. Storing ed., 1981) (describing the Supremacy Clause as meaning that “[t]he federal constitution, the laws of congress made in pursuance of the constitution, and all treaties must have full force and effect in all parts of the United States; and all other laws, rights and constitutions which stand in their way must yield”) (emphasis added); *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania To Their Constituents*, PENNSYLVANIA PACKET (Philadelphia) and DAILY ADVERTISER (New York), Dec. 18, 1787, *reprinted in* 3 COMPLETE ANTI-FEDERALIST 155 (Herbert J. Storing ed., 1981) (“And the supremacy of the laws of the United States is established by article 6th, viz. ‘That this constitution and the laws of the United States, which shall be made in pursuance thereof . . . shall be the supreme law of the land . . .’ It has been alleged that the words ‘pursuant to the constitution,’ are a restriction upon the authority of Congress . . . In our opinion, ‘pursuant to the constitution,’ will be co-extensive with the will and pleasure of Congress, which, indeed, will be the only limitation of their powers.”) (emphasis added; emphasis in original omitted); THE FEDERALIST NO. 33, at 224 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (stating, in discussing the Necessary and Proper and Supremacy Clauses, “What is a LEGISLATIVE power but a power of making LAWS? What are the means to execute a LEGISLATIVE power but LAWS?”); George Lee Turberville, *George Lee Turberville to James Madison*, *reprinted in* I THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 477, 479 (1993) (“May not the powers of the Congress from the clause which enables them to pass all Laws necessary to carry this system into effect—& that clause also which declares *their Laws* to be paramount to the Constitutions of the states—be so operated upon as to annihilate the state Governments?”) (emphasis added); Noah Webster, *America*, DAILY ADVERTISER (New York), Dec. 31, 1787, *reprinted in* 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION, PUBLIC AND PRIVATE 200 (John P. Kaminski & Gaspare J. Saladino eds., 1984) (“You harp upon that clause of the New Constitution, which declares that the laws of the United States, &c. shall be the supreme law of the land; when you know that the powers of the Congress are defined, to extend only to those matters which are in their nature and effects, general. You know, the Congress cannot meddle with the internal police of any State, or abridge its Sovereignty. And you know, at the same time, that in all general concerns, the laws of Congress must be supreme, or they must be nothing.”) (emphasis added; emphasis in original omitted).

48. See generally THE FEDERALIST NO. 46 (James Madison), NOS. 69, 71, 73, 77 (Alexander Hamilton).

49. The Supreme Court has frequently extolled the virtues of separation of powers as a means of protecting citizens’ freedoms. See *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) (“Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a

B. Regulatory Preemption Absent Congressional Direction

The foregoing analysis should not be mistaken as suggesting that regulations from federal administrative agencies are forbidden by the Constitution and that pronouncements on the law by executive agencies, or even by the Judicial Branch for that matter, are subordinate—or at best only on par—with state law. Indeed, simply to state this far-reaching conclusion is almost enough to refute it: the Constitution surely cannot mean that most of our modern federal legal regime is unconstitutional. Of course, this is not the case under the Constitution. “The judicial Power”⁵⁰ includes the power to interpret authoritatively both the Constitution and the laws and treaties of the United States.⁵¹ At least as to Acts of Congress, those interpretations are “supreme” simply because they are just that—interpretations. Judicial constructions of Acts of Congress do not “make” law, but simply inform others of what “Laws . . . made” by Congress mean. The same holds true for regulations from the Executive Branch that carry into effect Acts of Congress. While it would certainly be a laudable goal, no one imagines that Congress can consistently draft legislation that is free from ambiguities and that accounts for all possible factual scenarios that may be touched by the legislation. It thus falls upon the Executive, obligated to “take Care that the Laws be faithfully executed,” to fill in the gaps and “faithfully” determine how Congress wanted its laws to be applied in given circumstances.⁵² In so doing, the Executive is not “making” law, but interpreting the “Laws . . . made” by Congress. Just as with the courts, the Executive Branch’s interpretations are “supreme” as against state law because they

threat to liberty.”); *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (“[W]ithin our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.”); *INS v. Chadha*, 462 U.S. 919, 959 (1983) (“[W]e have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.”).

50. U.S. CONST. art. III, § 1, cl. 1.

51. See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (arguing that the Court has the authority to interpret Acts of Congress and stating, “It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”).

52. U.S. CONST. art. II, § 3. Arguably, the very existence of federal administrative regulations furthers the Executive Branch’s role in faithfully executing an Act of Congress because they promote a uniform, rather than ad hoc, interpretation of that Act and clearly inform Congress of how the Executive Branch understands the Act, which can lead (but not compel) Congress to alter the Act if it disagrees with the interpretation.

are simple refinements and applications of Congress-made laws, not new and independent laws.

A very different situation arises when one considers a federal administrative regulation that extends the reach of federal authority beyond the parameters outlined by Congress with any clarity or ascertainability. Such a regulation is not merely carrying into effect the will of Congress, but going beyond that will. This does not render the regulation unwise, unreasonable, or inefficient, but it does push it outside the realm of interpreting “Laws . . . made” by Congress and into the realm of original lawmaking. This original lawmaking *may* be binding on the citizenry of the United States, but it does not perforce displace state law under the Supremacy Clause.⁵³

Requiring federal regulations preempting contrary state law to be sourced to a clear statement of congressional intent carries a number of salutary benefits, at least from the perspective of the Constitution’s federalism framework.⁵⁴ To start, it does not allow Congress to avoid the politically difficult or awkward questions of how regulatory authority should be allocated between the federal government and the states. Congress can still assign to the Executive Branch the responsibility for fleshing out its legislative pronouncements through regulations, but it must at least provide the Executive Branch with meaningful guidance as to how far it can intrude on legitimate state interests in

53. Whether such regulations are even enforceable against the residents of the United States is beyond the scope of this article.

54. Admittedly, how clear Congress’s intent to allow a regulatory agency to preempt state law in a particular area must be—a “clear statement,” “strong evidence,” or merely “any sign”—is not expressly dictated by the Constitution. This article proposes the “clear statement of congressional intent” standard because the United States Supreme Court has frequently employed that standard in cases involving federal constraints on the rights or authority of States. *See, e.g.*, *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (requiring clear statement of congressional intent to displace state law in areas of traditional state regulation); *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991) (requiring clear statement of congressional intent to alter traditional balance of power between federal and state governments); *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989) (requiring clear statement of congressional intent to abrogate state immunity from suit in federal court). In fact, the Supreme Court often requires clear statements of congressional intent whenever the federal government acts in sensitive areas. *See, e.g.*, *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 129–30 (2005) (requiring clear statement of congressional intent to apply a general statute to the internal affairs and operations of foreign flag vessels); *Rutledge v. United States*, 517 U.S. 292, 304 n.14 (1996) (requiring clear statement of congressional intent to allow multiple punishments for same activity); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994) (requiring clear statement of congressional intent to make civil legislation retroactive); *Ex parte Yerger*, 75 U.S. 85, 106 (1869) (requiring clear statement of congressional intent to restrict Supreme Court’s jurisdiction to consider writ of habeas corpus).

regulating the conduct of or protecting their citizenry. According to *Garcia v. San Antonio Metropolitan Transit Authority*, federalism is guaranteed and protected primarily through the national political process.⁵⁵ If that is the case, exercises of preemption should at least have an ascertainable mooring to an outcome of that political process (i.e., an Act of Congress) rather than be left to the unguided discretion of an Executive Branch official.

Furthermore, tying federal regulatory preemption to a clear congressional intent to displace, or allow the displacement of, state law allows states better to understand how proposed national legislation will affect the states' regulatory ability. This, in turn, enables the states more effectively to avail themselves of whatever protection they can obtain from or through the national political process. More specifically, if all preemption of state law must be rooted in clear signs of congressional intent, states can determine what risks of preemption they face from the language of a proposed Act of Congress and if those risks are unacceptable, lobby for the defeat or amendment of the proposed Act. Absent such a safeguard, states are subject to unforeseen regulatory preemptions of the type promulgated by the OCC in the *Watters* case—a preemption that was born well over a century after the National Bank Act was passed and that was neither debated nor weighed before that Act was passed.⁵⁶

55. 469 U.S. 528, 550–55 (1985).

56. Nothing in this article is intended to assert that the Sixth Circuit's *Watters* decision was a renegade ruling or a complete aberration: The Sixth Circuit derived its holding—that a federal regulatory agency can preempt state law even if Congress never envisioned such preemption—from the United States Supreme Court's 1982 opinion in *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, which noted that “[a] pre-emptive regulation’s force does not depend on express congressional authorization to displace state law,” so that a “narrow focus on Congress’s intent to supersede state law” in construing regulatory preemption is “misdirected.” 458 U.S. 141, 154 (1982), *excerpted in Watters*, 431 F.3d at 560. But *de la Cuesta* also confirmed that “[t]he pre-emption doctrine, which has its roots in the Supremacy Clause, U.S. CONST., art. VI, cl. 2, requires us to examine congressional intent” and that “the statutory language [at issue there] suggest[ed] that Congress expressly contemplated, and approved, the [administrative agency’s] promulgation of regulations superseding state law.” *de la Cuesta*, 458 U.S. at 152, 162 (emphasis added). Indeed, the regulation at issue in *de la Cuesta* simply made “due on sale” clauses in home mortgages of federal savings and loan associations (federal S&Ls) enforceable notwithstanding contrary state law, which was well within Congress’s contemplation when it delegated to the relevant agency the authority to promulgate regulations governing the “operation, and regulation” of federal S&Ls “in order to provide for the financing of homes.” *Id.* at 160 (quoting 12 U.S.C. §1464(a)(1) (1976 ed., Supp. IV)) (emphasis in original omitted). *See also de la Cuesta*, 458 U.S. at 164–66 (offering examples from legislative history of the relevant statute—the Home Owners’ Loan Act of 1933—where members of Congress discussed the authority of the relevant

Finally, mandating that federal preemptive regulations are grounded in congressional intent facilitates both the Executive and Judicial Branches in performing their roles in the constitutional structure. The Executive Branch can more “faithfully execute[],”⁵⁷ and the Judiciary more readily interpret, “Laws . . . made” by Congress when those laws must clarify their intended preemptive reach rather than be silent or hopelessly ambiguous on this significant attribute of federal legislation.

IV. CONCLUSION

The Supremacy Clause requires that federal mandates on domestic matters can preempt contrary state laws only when they flow directly from “Laws . . . made” by the United States Congress; federal regulations purporting to displace state law without a clear direction from Congress authorizing the preemption simply are not “the supreme Law of the Land” overriding state laws. As with most governing principles derived from the Constitution, enforcing this restriction will require, at times, difficult exercises in line-drawing to decide what statements of congressional intent are sufficiently clear to justify regulatory preemption and whether a specific regulation preempting state law is within the scope of that clear statement. *Watters*, however, presents the Supreme Court of the United States with no such dilemma: even the Executive Branch agrees that “Congress . . . has not spoken to th[e] issue” of the OCC’s attempted preemption of state regulation over state-incorporated operating subsidiaries,⁵⁸ and the very statute the

agency to promulgate regulations governing federal S&Ls’ mortgage/loan agreements). In short, *de la Cuesta* is at best unclear—if not silent—on the *Watters* question of whether a federal regulation can preempt state law in a manner never contemplated by Congress. Since *de la Cuesta*, moreover, the Supreme Court has expressed an increasing reluctance to allow the federal government to displace state law “unless that was the clear and manifest purpose of Congress.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). *See also* *Cipollone v. Liggett Group*, 505 U.S. 504, 518 (1992) (employing a presumption against the preemption of state regulations issued under police powers); *Hillsborough County, Fla. v. Automated Medical Labs., Inc.*, 471 U.S. 707, 715–16 (1985) (stating that the “historic police powers of the States” are not to be preempted in the absence of a expression of Congress’s clear intent). This “manifest purpose” was definitely present in *de la Cuesta* as to federal savings and loan mortgages, but is noticeably absent in *Watters* as to state-incorporated operating subsidiaries.

57. U.S. CONST. art. II, § 3.

58. *See* Brief for the United States, *supra* note 6, at 12 (“The threshold question . . . is whether Congress has spoken directly to the issue addressed by the agency

OCC was purporting to enforce when it promulgated its preemptive regulation (i.e., the National Bank Act) expressly displaces state law *only as to national banks chartered under federal law*, not affiliated entities chartered under state law.⁵⁹ *Watters*, therefore, presents the Supreme Court with a straightforward opportunity “to say what the law is”⁶⁰—that the OCC has overstepped its constitutional bounds in claiming to preempt state laws regulating state-incorporated subsidiaries of national banks.

interpretation—here, the extent to which state laws are applicable to an operating subsidiary’s activities. Congress, as the court of appeals determined, has not spoken to that issue . . .”).

59. 12 U.S.C. § 484. Defenders of the OCC’s regulation argue that its displacement of state law over operating subsidiaries is not based on Congress’s limitation on state regulation of national banks under § 484, but on Congress granting national banks “all such incidental powers” for carrying on the “business of banking” under 12 U.S.C. § 24 (Seventh). *See* Brief for the United States, *supra* note 6, at 15 (arguing that the OCC did not claim to interpret “national bank” in § 484(a) to include an operating subsidiary, but rather it construed “incidental powers” in § 24 (Seventh) to include the activities of an operating subsidiary). The generality of this grant is not a clear statement of congressional intent to allow the OCC to preempt state regulation of entities other than national banks. In addition, § 24 (Seventh) actually states that national banks have “such incidental powers as shall be *necessary* to carry on the business of banking” (emphasis added). In authorizing national banks to have operating subsidiaries, however, the OCC’s reasoning has always been simply that it is *convenient* to allow national banks to conduct some of their operations through external subsidiaries rather than through internal departments or divisions. *See* Acquisition of Controlling Stock Interest in Subsidiary Operations Corporation, 31 Fed. Reg. 11,459, 11,460 (Aug. 31, 1966) (“The use of controlled subsidiary corporations provides national banks with additional options in structuring their businesses.”); Investment Securities; Bank Activities and Operations; Leasing, 66 Fed. Reg. 34,784, 34,788 (July 2, 2001) (to be codified at 12 C.F.R. pts. 1, 7, 23) (“For decades national banks have been authorized [by the OCC] to use the operating subsidiary as a convenient and useful corporate form for conducting activities that the parent bank could conduct directly. Operating subsidiaries often have been described as the equivalent of departments or divisions of their parent banks.”). The OCC has never come close to demonstrating that it is *necessary* for national banks to be able to have operating subsidiaries to carry on the business of banking. Finally, the very reason that these operating subsidiaries are incorporated under state law is because Congress did not provide in the National Bank Act for creating federally chartered affiliates of national banks. Had Congress intended national banks to be able to operate through subsidiaries that would be as immune from state regulation as national banks themselves, one would have expected Congress to provide for the federal chartering of such subsidiaries.

60. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).