NOTES

THE LEGALITY OF LOCAL ATM SURCHARGE BANS: THE CASE FOR THE CITIES OF SANTA MONICA AND SAN FRANCISCO

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I. INTRODUCTION

Automated Teller Machines ("ATMs") have become quite commonplace and can be found readily in front of bank branches and in supermarkets, shopping centers, restaurants, bars, amusement parks, movie theaters and casinos. Since their inception in the 1970s,[1] ATMs have virtually replaced in-bank withdrawals and have become a primary method by which bank customers access their cash. Consumers are not limited to using only their banks' ATM, but also can access their money for a fee through ATM network terminals owned by other banks or private entities.[2] These ATM network terminals (bank owned or otherwise) serve as conduits between consumers and computer networks, connecting customers to their accounts in their card-issuing banks.[3]

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* Class of 2001, University of Southern California Law School. This publication is dedicated to my confidant and guide, Mr. Atiyeh Abdo. I would like to thank my mother, father, and sister, Shamse, Nasser, and Azadeh Famili, for their continued support, love, and inspiration. I also would like to extend my gratitude to my note advisor, Professor Erwin Chemerinsky, for his direction and insight.

1. *See CNN Crossfire*, (CNN television broadcast, Nov. 16, 1999) (stating that banks operated ATMs for 30 years) *available at* LEXIS, News Library, Transcripts File, transcript no. 99111600V20.

2. *See* Valley Bank of Nev. v. Plus Sys., Inc., 914 F.2d 1186, 1189 (9th Cir. 1990).

3. *See id.*

The cities of Santa Monica and San Francisco, California, recently passed ordinances that prohibit banks operating in their jurisdictions from assessing ATM surcharges to non-customers.[4] The purpose of the ordinances is two-fold: First, these ordinances protect consumers from exorbitant and unfair fees; second, they eliminate anticompetitive business practices.[5] The cities believe that eliminating the surcharge will allow consumers to choose freely what banks to patronize since ATM surcharges will no pressure them.[6] In addition, the cities maintain that the ban will protect consumers from unconscionable business practices.[7] Other major cities also are considering instituting similar ordinances,[8] while a few states and one other city have in fact enacted similar measures.[9]

Bank of America, Wells Fargo Bank, and the California Bankers Association have sought and successfully secured a preliminary injunction preventing Santa Monica and San Francisco from enforcing their ordinances.[10] In coming to its conclusion, the district court likely relied heavily on an amicus brief offered by the Office of the Comptroller of the

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4. The purpose of the Santa Monica ordinance is evident from its language: "Local Legislation is therefore essential to safeguard the general welfare in Santa Monica by protecting consumers from exorbitant and unfair fees and protecting smaller financial institutions from anticompetitive business practices." Santa Monica, Cal., Ordinance Prohibiting Surcharges to Non–Customers at Automated Teller Machines in Santa Monica, § 1(G)(Oct. 12, 1999) [hereinafter Santa Monica ordinance]. The goal of the San Francisco ordinance is likewise clear from its language: "The purpose of the prohibition is to protect consumers from exorbitant and unfair fees and to protect smaller financial institutions from anticompetitive business tactics." San Francisco, Cal., ATM fees; Ordinance, § 1 (Nov. 3, 1999) [hereinafter SF ordinance].

5. Santa Monica ordinance, *supra* note 4; SF ordinance, *supra* note 4.

6. *See* San Francisco Appellants' Opening Brief, Bank of Am. v. San Francisco 215 F.3d 1332 (9th Cir. 2000) (No. 99-17590, 99-17591) at 7 [hereinafter SF Appellant's Opening Brief] (quoting the language of the ordinance that its express purpose is to "protect smaller financial institutions from anticompetitive business tactics").

7. *See id*. (quoting language stating that the purpose of the ordinance is to "protect consumers from exorbitant and unfair fees").

8. Sam Zuckerman, *Banks Win Reprieve on ATM Fee Ban: Judge Bars S.F., Santa Monica from Enforcing New Measures*, S.F. CHRON., Nov. 16, 1999, at A1; Thomas E. McCullough, *Commentary: No Lemonade From ATMs: Offering a Service at No Charge to Competitors' Customers Is Both Bad Business and Too Good to Be True*, L.A. TIMES, Nov. 8, 1999, at B7; *Surcharging vs. Loyalty*, DISTRIBUTION MGMT. BRIEFING, Dec. 14, 1999, at 12 (listing Berkeley, Los Angeles, San Diego, New Orleans, Louisville, Chicago, Kentucky, and New York as the cities considering ordinances similar to those in Santa Monica and San Francisco).

9. Iowa, Connecticut, and Woodbridge, N.J. have all passed similar initiatives that face litigation challenges. Helen Stock, *Federal Judge Tells N.J. Town It Can't Ban ATM Surcharges*, AM. BANKER, Feb. 22, 2000, at 14; *Connecticut Ban on ATM Fees Rejected*, L.A. TIMES, Dec. 21, 1999, at 9. The scope of this Note is limited to the California litigation for pragmatic reasons.

10. Bank of Am. v. City of San Francisco, 2000 U.S. Dist. LEXIS 12587 (N.D. Cal. 1999).

Currency ("OCC") that opposed the cities' laws.[11] The matter is on appeal before the Ninth Circuit Court of Appeals.[12] The Attorney General of California has filed an amicus brief in support of the cities along with the State Attorneys General of Connecticut, Iowa, Minnesota, Nevada, New York, Oregon, Washington, West Virginia, and the Attorneys General of the Commonwealth of the Northern Mariana Islands and the Virgin Islands.[13] Given the divergent opinions regarding the matter and the current state of the law, the ability of the states and municipalities to regulate surcharges remains unclear and in dispute.

The primary disagreement between the cities and the banking industry concerns the legality of such bans. The banking industry argues that pursuant to the National Bank Act and OCC regulations, the cities are preempted from regulating national bank ATM surcharges.[14] The cities maintain that federal law does not preempt them from regulating national bank ATM activities, but rather the Electronic Funds Transfer Act ("EFTA") and established federal common law explicitly give them authority to do so.[15]

This Note considers the legality of local regulation of national bank ATM activities and concludes that federal law does not preempt cities, states, or municipalities from regulating national bank ATM activities. In fact, congressional intent, the relevant statutes, and common law principles all indicate that the EFTA is the binding authority on the matter and that the EFTA unequivocally empowers local governments to regulate national bank ATM activities. Thus, the cities of Santa Monica and San Francisco are authorized to regulate national bank ATM activities.

11. Sam Zuckerman, *Government Backs Attack on ATM Law: Brief Says Federal Statutes Preempt Local Fee Bans*, S.F. CHRON., Nov. 6, 1999, at A1 (quoting a banking attorney stating the OCC's brief should be given considerable weight). *See also* Brief *Amicus Curiae* of the Office of the Comptroller of the Currency in Support of National Bank Plaintiffs, Bank of Am. v. City of San Francisco, 2000 U.S. Dist. LEXIS 12587 (N. D. Cal. 1999) (No. C-99-4817 VRW) [hereinafter OCC Amicus Brief]. The OCC has also presented courts in Iowa and Connecticut with amicus briefs in opposition to similar ATM laws passed in those states and plans to file one in support of the banks in the New Jersey case. Stock, *supra* note 9.

12. Bank of Am. v. City of San Francisco, 215 F.3d 1332 (9th Cir. 2000).

13. *See* Brief of Amici Curiae States of California, Connecticut, Iowa, Minnesota, Nevada, New York, Oregon, Washington, West Virginia, and Commonwealth of Northern Mariana Islands and Virgin Islands in Support of Defendants City and County of San Francisco and City of Santa Monica, Bank of Am. v. City of San Francisco, 215 F.3d 1332 (9th Cir. 2000) (Nos. 99-17590, 99-17591).

14. *See Bank of America, Wells Fargo Sue Cities Over ATM Fees*, DALLAS MORNING NEWS, Nov. 4, 1999, at 7C (quoting banks' attorney stating, "[t]here is a single legal issue here and that is federal preemption"); George Raine, *Banks Move to Block Prop. F: They're Asking Court to Declare That Federal Law Preempts Local Ban on Extra Fees*, S.F. EXAMINER, Nov. 4, 1999, at A22.

15. *See* SF Appellant's Opening Brief, *supra* note 6.

A. WHY ATM SURCHARGES ARE SOCIALLY AND ECONOMICALLY UNDESIRABLE

Locally promulgated ATM surcharge bans, such as those adopted by Santa Monica and San Francisco, are socially and economically desirable. This is because common bank procedures have shifted from charging *one* fee for non-customer[16] withdrawals[17] to charging non-customers two fees for the same transaction.[18] Thus, this system implicitly informs ATM users who wish to avoid the double transaction fees that they must make their ATM withdrawals at their own banks' terminals.

However, the system has far greater implications than tacitly educating users about how to evade transaction fees altogether. ATM surcharges are financially and strategically significant for large commercial banks. Banks profit immensely from ATM surcharges[19] because the surcharge is in addition to the fee that the non-customer bank already collects.[20] The first fee a non-customer bank collects not only covers its transaction costs but also provides the non-customer bank with a sizable profit of nearly one hundred percent.[21] Thus, the surcharge is purely an additional profit.

The more non-customers who use ATM terminals, the more pure profit the bank that owns the ATM earns. Hence, large commercial banks enjoy great financial benefits from ATM surcharges. Wells Fargo Bank, for example, is the seventh largest U.S. bank and collects $50 million a year in ATM surcharges.[22] ATM surcharges probably have contributed to record profits in the banking industry.[23]

16. "Non-customer" is used to denote a person who accesses money through an ATM not owned by the bank that services the account. For a thorough discussion of the ATM network, see *infra* Part II.A.

17. Maxine Waters, *On Surcharging, Democracy Should Trump Economics*, AM. BANKER, Jan. 7, 2000, at 6.

18. *Id*.

19. *See id.*

20. *See* Valley Bank of Nev. v. Plus Sys., Inc., 914 F.2d 1186, 1188 (9th Cir. 1990); Waters, *supra* note 17 (stating that card-issuing banks pay a fee to the ATM owner).

21. Handling a non-customer's ATM transaction only costs the non-customer bank twenty-seven cents while it receives fifty cents for the transaction from the card-issuing bank. Valley Bank, 914 F.2d at 1188; *CNN Crossfire*, *supra* note 1; Mike Pramik, *Banks Keep Close Eye on Vote to End ATM Fees*, COLUMBUS DISPATCH, Aug. 13, 1999, at 1A.

22. *See* Larry D. Hatfield, George Raine, & Ryan Kim, *Banks Play ATM Hardball*, S.F. EXAMINER, Nov. 10, 1999, at A1; Julie Hyman, *ATM Cutoffs Loom Large for Non-Customers: California Banks Angered by New Bans on Surcharges*, WASH. TIMES, Nov. 11, 1999, at B9.

23. According to the FDIC, commercial banks earned $54.3 billion in the first eight months of 1999 alone, up by $7.2 billion over the same time period a year before. ATM surcharges may have provided at least some of these increased earnings. *See* Waters, *supra* note 17.

Strategically, large commercial banks with nearly ubiquitous ATM locations offer their customers the ability to avoid ATM surcharges. Non-customers are implicitly reminded of this whenever they must use a large bank's ATM.[24] As a result, large banks draw customers away from small banks that cannot offer their customers as many chances to avoid ATM surcharges.[25] ATM surcharges, in this sense, operate as a strategic tool benefiting big banks by promising their customers that they will always have a surcharge-free ATM terminal at their disposal. For large commercial banks, therefore, the practice of ATM surcharges means big business.

Many people do not perceive ATM surcharges as an innocuous, fair business practice. Public sentiment towards ATM surcharges is increasingly unfavorable.[26] For example, an overwhelming sixty-six percent of San Francisco's voters approved their city's 1999 Proposition F measure that would ban non-user ATM surcharges altogether.[27] Many consumers throughout the country feel duped and angered. During a recent episode of *CNN Crossfire*, for example, an ATM-user commented that "[w]hat the banks did was they decided to save money on tellers and they got us all used to using these machines. Once we became totally dependent on them, now they impose fees. They suckered us in."[28] Another consumer characterized the imposition of ATM surcharges as the old bait and switch trick.[29]

Although much of the public opposition to ATM surcharges fails to articulate the legal bases for opposition, these consumers recognize the

24. One ATM user, who was upset with Bank of America's and Wells Fargo's new policies prohibiting non-customer access to their ATMs in Santa Monica, commented that her "bank is a small bank, and it doesn't have many ATMs." *Banks' Reply to Rage Against the Machines*, NEWS & OBSERVER (Raleigh, N.C.), Nov. 11, 1999, at D1.

25. An analyst with A.G. Edwards & Sons noted the leverage that ATM surcharges give large banks: "Over time it makes that competitive advantage of the bigger bank more apparent to potential customers. . . . 'If you want . . . however many hundred ATMs, you need to open an account with us.'" *Banks' Reply to Rage Against the Machines*, *supra* note 24.

26. *See* Olaf de Senerpont Domis, *Opposition to ATM Fees Spreading Coast to Coast*, AM. BANKER, Nov. 17, 1999, at 4 (identifying consumer advocates opposed to ATM surcharges in New York, New Orleans, and Los Angeles).

27. Rob Garver & Helen Stock, *OCC to Support California Bankers' Lawsuit Against ATM Surcharge Ban*, AM. BANKER, Nov. 5, 1999, at 1.

28. *CNN Crossfire*, *supra* note 1.

29. George Raine, *Renne Rips U.S. Siding with Banks*, S.F. EXAMINER, Nov. 9, 1999, at C1. Santa Monica City Council Member Kevin McKeown expressed his distrust by analogizing the ATM surcharge practice to crossing the Bay Bridge: "I pay a toll to get across the bridge, but I don't expect to see another toll booth at the other end of the bridge." Ryan Kim, *Santa Monica Bans Second Fee at ATMs*, S.F. EXAMINER, Oct. 22, 1999, at D12.

flaw of current ATM bank practices.[30] Yet public dissatisfaction with ATM surcharges alone does not elevate ATM bank fees to the level of legal impropriety. In order to necessitate state or municipal regulation, ATM surcharges, at a minimum, must pose a threat to the economic or social stability of a community.[31]

Some states and cities have concluded correctly that ATM surcharges are undesirable to their social and economic systems.[32] They believe that such banking practices create an anticompetitive climate in the banking industry for the following reasons.[33] Given that consumers frequently rely on ATMs to access their cash, they are forced to consider the prevalence of banks' ATMs when choosing where to bank.[34] Only those banks with many ATMs can guarantee consumers that they will likely escape ATM surcharges.[35] Naturally consumers seeking to save themselves from this fee will transfer their accounts to banks that can offer this type of guarantee.[36] Consequently, small banks with fewer ATMs cannot compete with large banks in an environment where consumers are effectively left without options.[37] Such unfair competition is neither healthy nor an intended component of a free market.[38]

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30. *See, e.g.,* David Lefer, *ATM Double Dip: Backlash Grows*, DAILY NEWS (New York), Nov. 21, 1999, at 24 (quoting a consumer as stating, "It's one thing to make money. It's another to gouge people."); Edmund Sanders, *2 Banks to Limit ATM Access in Santa Monica*, L.A. TIMES, Nov. 11, 1999, at A1 (indicating consumers' discontent with excessive and unfair fees and consumers' concern about ubiquitous Bank of America ATMs); *Connecticut Ban on ATM Fees Rejected*, *supra* note 9 (documenting that consumer groups believe that bank mergers give customers of smaller banks "little choice but to use ATMs of larger banks").

31. Certainly states have the ability to widely regulate *state* banking institutions, but states (and municipalities) may only regulate national banks' ATM activities under the EFTA for consumer protection purposes. *See infra* Part III.B. Indeed, there are other mechanisms that a state may use to regulate national banks' ATM activities, such as state antitrust laws, but regulations can neither be arbitrary, nor unsupported by a state congressional grant. *See infra* Part III.B. *See, e.g.*, Cartwright Act, CAL. BUS. & PROF. CODE § 16720-28 (West 1998) (California state equivalent of the Sherman Antitrust Act).

32. The states of Iowa and Connecticut, as well as the cities of Santa Monica, CA, San Francisco, CA, and Woodbridge, NJ have all enacted legislation banning ATM surcharges that they deem unsafe. *See* Stock, *infra* note 9; *Connecticut Ban on ATM Fees Rejected*, *supra* note 30. A dozen other cities nationwide, including New York, New Orleans, and Los Angeles, are considering similar ATM surcharge bans. Zuckerman, *supra* note 8.

33. *See, e.g.*, S.F. Appellant's Opening Brief, *supra* note 6, at 17; Dean Anason, *Iowa Takes Battle Over ATM Fees to High Court*, AM. BANKER, Feb. 4, 2000, at 1 (quoting Iowa State Attorney General stating that Iowa's ATM surcharge ban was motivated by a belief that "there should be competitive equality between all financial institutions"); Waters, *supra* note 17.

34. *See* Anason, *supra* note 33.

35. *See Banks' Reply to Rage Against the Machines*, *supra* note 24.

36. *See id.*

37. *See id.*; *Cf.* Kim, *supra* note 29 (indicating that smaller banks disagree with the reasoning).

38. *See Banks' Reply to Rage Against the Machines*, *supra* note 24.

Not only are surcharges potentially anticompetitive, these lawmakers appropriately point out that they constitute double-dipping.[39] Surcharges assessed to non-customers by non-consumer banks constitute double-dipping because they are the second ATM fee assessed for each ATM transaction.[40] Lawmakers and consumers are also concerned that ATM surcharges help perpetuate socioeconomic class disparity by uniformly charging the same amount for all withdrawals, thereby charging a higher percentage fee for smaller transactions, something that adversely and uniquely affects persons of lower socioeconomic classes who hold smaller account funds.[41] Consumer advocates argue against such practices as unconscionable and encourage cities and states to intervene and protect consumers.[42]

B. THE LEGALITY OF SANTA MONICA'S AND SAN FRANCISCO'S ATM SURCHARGE BANS

In an effort to address consumer advocates and curb the anticompetitive edge of banking (and subsequently balance the playing field), Santa Monica and San Francisco have adopted ATM surcharge bans.[43] A group of banks has secured preliminary injunctions against the bans, but, as of the time of this writing, the matter is on appeal before the Ninth Circuit.[44]

The Supreme Court has yet to review such a case. However, given that Iowa, Connecticut, New Jersey, and California are all involved in ATM-related litigation, the issue will likely reach the Court. One attorney specializing in ATM law admitted, "[t]he law is a mess and needs to be clarified."[45] Given the importance of this issue to the banking industry and its customers, the significance of its resolution is great.

This Note will focus on two questions. These two questions are then divided into five parts. First, this Note questions whether states and cities

39. *See* Waters, *supra* note 17 (noting that double-dipping is a double charge imposed on consumers for one service).

40. *See CNN Crossfire*, *supra* note 1; Waters, *supra* note 17.

41. *See* Waters, *supra* note 17 (discussing adverse affects ATM surcharges have on "low-income people"); Morning Edition, *Santa Monica's Decision to Abolish ATM Transaction Fees* (National Public Radio broadcast, Oct. 13, 1999) *available at* Westlaw, MORNED, 1999 WL 32936336.

42. In fact, San Francisco voters adopted this position when they passed Proposition F, a referendum that would ban all ATM surcharges in the city. *See* Pramik, *supra* note 21. *See, e.g.*, *CNN Crossfire*, *supra* note 1.

43. *See* Santa Monica Ordinance, *supra* note 4; S.F. Ordinance, *supra* note 4.

44. *See* S.F. Appellants' Opening Brief, *supra* note 6.

45. Zuckerman, *supra* note 8.

have the power to regulate national bank ATM surcharges in general—in particular whether the statute states and cities are preempted from regulating national bank ATM activities. The overwhelming evidence illustrates that states and cities have the power to regulate national bank ATM surcharges in general. Second, this Note considers whether Santa Monica and San Francisco have nonetheless overstepped their authority by banning national bank ATM surcharges altogether—whether the ordinances are preempted by way of conflict with federal law. This Note concludes that the ordinances are proper as drafted and not conflict preempted. Because the moving parties in the current litigation have not challenged the ordinances on other constitutional grounds such as equal protection or takings, these issues will not be addressed.[46]

Part II introduces the federal law and other issues animating the California ATM dispute.[47] Building on the introduction, Part II begins by briefly explaining the current ATM system. It considers the different ATM surcharges, the ATM networks in which banks operate, and the fees exchanged between the banks and the network. More specifically, it addresses why ATM surcharges are particularly problematic in Santa Monica and San Francisco, where two major banks own and operate more than 70% and 50% of ATMs respectively.[48] Part II then presents the pertinent federal laws, including the National Bank Act (NBA), the EFTA, various OCC regulations, and common law. Part II concludes by examining the ordinances recently passed in Santa Monica and San Francisco.

Part III is devoted to assessing question one: Do states and cities have the power to regulate national bank ATM activities in general? Part III interprets the complex and multiple federal laws governing the regulation of national banks. After dissecting the overlapping laws, Part III concludes that cities and states are authorized to regulate national bank ATM activities, thus making an express or field preemption challenge unsustainable.

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46. The only colorable constitutional argument other than federal preemption is a Dormant Commerce Clause challenge. However, a Ninth Circuit case upholding a state statute concerning ATM surcharge fees against a Commerce Clause challenge may thwart such an argument's momentum. Valley Bank of Nev. v. Plus Sys., Inc., 914 F.2d 1186 (9th Cir. 1990).

47. "California ATM dispute" and variations of this term are used throughout this Note to refer to the suit against Santa Monica's and San Francisco's ordinances.

48. *Hyman*, *supra* note 22 (stating that the two banks control more than 50% of San Francisco ATMs); Telephone Interview with Adam Radinsky, Santa Monica Deputy City Attorney (Nov. 25, 1999) (stating that the two banks control more than 70% of Santa Monica ATMs).

Part IV considers question two: Are the Santa Monica and San Francisco ordinances federally preempted for overstepping the cities' regulatory authority by banning national bank surcharges altogether? Part IV ponders the arguments for and against each type of preemption and concludes that the ordinances are not federally preempted.

Part V concludes that although the Court should uphold local legislation that bans all bank ATM surcharges within its jurisdiction, the law governing the issue is murky, with few precedents to provide the Court direct guidance. Therefore, it is conceivable that the Court may find the ordinances preempted by federal law.

PART II. FEDERAL LAW GOVERNING NATIONAL BANK ATM REGULATIONS

A. THE ATM SYSTEM

ATMs are linked worldwide through national computer networks.[49] The computer networks are owned and managed by private companies such as Plus System, Inc.; Cirrus, Inc.; and Start, Inc.[50] The computer networks allow account holders to access their cash from any network connected ATM terminal, whether owned by the account holder's bank or not.[51]

The estimated cost to an ATM terminal owner of conducting an ATM transaction is twenty-seven cents.[52] The card-issuing bank pays an interchange fee to the ATM terminal owner of fifty cents.[53] The interchange fee allows the ATM owner to recover 100% of the cost as well as nearly an additional 100% profit.[54] The card-issuing bank pays an additional switch fee ranging from five to ten cents to the ATM network.[55] Most banks pass both of these costs on to the account holder in the form of a foreign fee.[56] The foreign fee ranges from one to two dollars, leaving the card-issuing bank with a nice profit after paying the interchange fee and the switch fee.[57]

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49. *See* S.F. Appellants' Opening Brief, *supra* note 6, at 4.
50. *See id*. at 6.
51. *See* Valley Bank of Nev., 914 F.2d at 1188.
52. S.F. Appellants' Opening Brief, *supra* note 6, at 6; Pramik, *supra* note 21.
53. S.F. Appellants' Opening Brief, *supra* note 6, at 6; *Valley Bank*, 914 F.2d at 1188.
54. *See* San Francisco Appellants' Opening Brief, *supra* note 6, at 6.
55. *See id.*; *Valley Bank*, 914 F.2d at 1188.
56. *See id*.
57. *See* Kim, *supra* note 29.

All banks profit further from customer use of ATM terminals in lieu of in-bank teller transactions.[58] A consumer advocate from the U.S. Public Interest Research Group reports that in-bank teller transactions cost banks about three dollars each.[59] Basic mathematics reveals that banks save two dollars and seventy-three cents for each customer's ATM transaction conducted at its own terminal. When a customer uses another bank's ATM terminal, the card-issuing bank saves the entire three dollars since it already passed the ATM transaction cost onto the customer as a foreign fee.[60] This savings is in addition to the profit gained from the foreign fee.[61] Therefore, the ATMs prove quite profitable for banks.

Before April 1996, the foreign fee was the only charge imposed on a customer who withdrew money from an ATM terminal owned by another bank.[62] ATM network rules banned ATM owners from charging additional fees.[63] The prohibition's purpose was to prevent larger banks that owned most ATM terminals from using the additional fees to gain a competitive advantage over smaller financial institutions.[64] Lobbying and threats of suit by larger banks pressured the two largest networks to lift their bans.[65]

Since the fee prohibition was lifted, the imposition of ATM surcharges has become common practice for large banks.[66] Lawmakers believe that "[s]urcharges have been out of control ever since."[67] According to a report by the Congressional Budget Office, the first surcharges amounted to twenty-five cents per transaction.[68] Banks then increased the fee to fifty cents.[69] Surcharge fees now range from one to two dollars.[70] This surcharge is in addition to the foreign fee the card-issuing bank charges its customers and then divides among the network, the ATM owner, and itself.

Banks presently enjoy record profits with the addition of ATM surcharges on top of profits gained from fewer in-bank teller transactions and foreign fees.[71] According to the Federal Deposit Insurance

58. *See CNN Crossfire*, *supra* note 1.
59. *See id*.
60. *See supra* text accompanying note 56.
61. *See id.*
62. *See* S.F. Appellants' Opening Brief, *supra* note 6, at 6; Waters, *supra* note 17.
63. Waters, *supra* note 17.
64. S.F. Appellants' Opening Brief, *supra* note 6, at 7.
65. *Id.* at 6; Waters, *supra* note 17.
66. S.F. Appellants' Opening Brief, *supra* note 6, at 6.
67. Waters, *supra* note 17.
68. *Id*.
69. *Id*.
70. Hyman, *supra* note 22.
71. *See* Waters, *supra* note 17.

Corporation, commercial banks earned a record $19.4 billion in the third quarter of 1999.[72] Bank earnings in 1999 were 29.1% higher than in the previous year.[73] Congresswoman Maxine Waters notes, "Despite record bank profits—and despite pressure from consumer groups and certain legislators—the problem of more and higher bank fees continues to spiral."[74]

With the spiraling of ATM surcharges logically comes the potential realization of the consequences lawmakers and consumer advocates fear, namely, an anticompetitive banking market and unconscionable banking practices.[75] ATM surcharges are particularly problematic for the cities of Santa Monica and San Francisco where two banks, Wells Fargo Bank and Bank of America (the same two banks involved in the California ATM litigation), together control more than 70% and 50% of the ATM market in those cities respectively.[76] Furthermore, Bank of America is one of the country's largest bank and owns more than 4,000 ATMs in California alone.[77] Wells Fargo is the seventh-largest U.S. bank and has nearly 2,900 ATMs in California.[78] The great leverage these banks hold in the local ATM market has prompted the cities to act.

B. Relevant Banking Law and the States' Role

The power to regulate banks is shared by states and the federal government via the dual banking system. Federal power is concentrated in several congressionally created banking agencies.[79] Although state power similarly manifests in multiple regulatory entities,[80] the bulk of state power rests with the state legislature.[81] Despite the dual banking system,

72. *See id*.

73. *Id*.

74. *Id*.

75. *See* discussion *supra* Part I.

76. *See supra* note 48 and accompanying text.

77. *See Bank of America, Wells Fargo Sue Cities Over ATM Fees*, *supra* note 14.

78. *See id*.

79. The OCC, the National Credit Union Administration, the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board, and the Federal Reserve System each regulate various aspects of the banking system.

80. State legislatures regulate the establishment and operation of state banks at the state level, while cities further regulate bank activities at the municipal level. *See, e.g.*, ARK. CODE ANN. § 23-32-208 (1987); MISS. CODE ANN. § 81-5-100 (1972); WYO. STAT. ANN. § 13-1-502; Santa Monica Ordinance, *supra* note 4; S.F. Ordinance, *supra* note 4; THOMAS J. ANDERSON, JR., FEDERAL AND STATE CONTROL OF BANKING (1934). *See also* 15 U.S.C. § 1693(q)(1999) (reserving states and municipalities' rights to promulgate electronic fund transfer laws).

81. *See, e.g.*, CAL. FIN. CODE § 13000 (preempting any municipal or agency regulation, rule, or similar law dealing with ATM customer safety).

Congress clearly has the authority to preempt state banking law by invalidating its application to national banks or the entire banking system.[82] Even though Congress has the clear authority to preempt state banking law, much ambiguity arises as to where Congress has expressed such authority. Such uncertainty is the very topic of debate in the current California ATM litigation.

1. Dual Banking System

In order to accurately assess when federal preemption of this type has occurred within the context of ATM regulation, it is important to consider the rudiments of the dual banking system. Since 1789, problems related to the coexistence of state and federal regulatory authority and the parallel existence of state and national banks have arisen.[83] Throughout its evolution, the dual banking system has attempted to balance competing state and federal interests, while, at the same time, define the rights and roles of each sovereign. Although the balance has shifted over the years, states traditionally have been accorded an important role in regulating the banking industry.[84] Federal statutes[85] explicitly acknowledge, and common law affirms, states' roles in regulating national bank activities.[86] The extent of that role in regulating national banks' ATM activities is the crux of the California ATM controversy. The following sections will identify and define relevant banking law that will guide the controversy's resolution.

2. National Bank Act

The National Bank Act of 1864 (NBA) marked the beginning of the dual banking system.[87] It authorized the establishment of private national banks under federal charters rather than state charters.[88] Pragmatically, it articulates the guidelines for the creation, regulation, and operation of

82. *See, e.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947) (stating that Congress may create law that unequivocally preempts all relevant regulations that are not its own).

83. *See* ANDERSON, *supra* note 80; EDWARD L. SYMONS, JR. & JAMES J. WHITE, BANKING LAW 1–47 (2d ed. 1984); T. THOMPSON, CHECKS AND BALANCES: A STUDY OF THE DUAL BANKING SYSTEM IN AMERICA (1962).

84. *See* THOMPSON, *supra* note 83.

85. *See* 12 USC § 36(c) (1994) (restricting national bank establishments to state requirements); 15 USC § 1693(q) (1994) (granting states the power to regulate national banks' ATM activities for consumer protection purposes); Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (1994) (limiting certain national bank activities to state law and granting States the ability to tax national banks in the absence of expressed federal preemption).

86. *See infra* notes 138–143, 147–50 and accompanying text.

87. *See* 12 U.S.C. § 38 (1994).

88. 12 U.S.C. § 24 (1994).

national banks. The scope of banking powers is defined by five express powers articulating traditional banking functions[89] and one umbrella phrase: "all such incidental powers as shall be necessary to carry on the business of banking."[90] The NBA neither expressly preempts state regulations of national banks[91] nor indicates that the statute occupies the field.[92] Thus, states not only continue to establish state banks under state charters and pursuant to state regulations, but also regulate national banks in ways that do not conflict with the NBA.[93]

The NBA specifically grants the OCC general regulatory and enforcement powers over national banks.[94] The OCC enjoys the explicit authority to promulgate regulations governing national banks at a general level. This authority is not unconstrained, however, for it is subject to other limitations imposed by subsequent statutes[95] and state sovereignty.[96] One primary area of contention in the current California ATM controversy is the degree of substantive applicability of the NBA (i.e., does it sufficiently and solely apply to ATM surcharges) and the scope of the OCC's authority to regulate national bank ATM activities.

3. OCC Regulations

The OCC has created two federal regulations relevant to the California ATM litigation: 12 C.F.R. § 7.4002(a) and 12 C.F.R. § 7.1019. Under 12 C.F.R. § 7.4002(a), "a national bank may charge its customers non-interest charges and fees." Under 12 C.F.R. 7.4002(b), a national bank is free to set its own fees but the fees should be established "according to sound banking judgment and safe and sound banking principles" while considering "the cost incurred by the bank, plus a profit margin." This provision includes a federal preemption procedure to be administered and followed by the OCC

89. These functions include the following abilities: 1) to discount and negotiate promissory notes or other evidence of debt; 2) to receive deposits; 3) to buy and sell exchange, coin, and bullion; 4) to loan money; and 5) to obtain, issue, and circulate notes. *See* 12 U.S.C. § 24 (1994).

90. *Id*.

91. *See id*.

92. If the NBA intended and served to occupy the field, subsequent legislative banking laws, such as the Electronic Fund Transfer Act, 15 U.S.C. § 1693 (1994), would be surplusage. For a thorough explanation of express and field preemption, see the discussion in Part IV.

93. *See, e.g.*, Anderson Nat'l Bank v. Luckett, 321 U.S. 233 (1944); Perdue v. Crocker Nat'l Bank, 702 P.2d 503 (Cal. Sup. Ct. 1985).

94. 12 U.S.C. § 24 (1994).

95. An explicit grant of statutory authority only extends to the degree that it is not modified or revoked by subsequent statutes.

96. This principle is explicated in Section 3 of this Part. In sum, courts have consistently held that states continue to enjoy regulatory power over national banks in the face of the NBA so long as a given state statute does not conflict with a federal provision.

on a case-by-case basis in situations where state law purports to limit or prohibit non-interest fees authorized under the regulation.[97] Under 12 C.F.R. § 7.1019, the OCC recognizes a national bank's ability to electronically complete those tasks that it may otherwise perform through traditional means.

The OCC argues that 12 C.F.R. § 7.4002 empowers a national bank to charge a non-interest fee for a service and that 12 C.F.R. § 7.1019 extends that power to ATM services conducted by national banks.[98] The cities argue that these administrative regulations do not automatically displace local ATM activity legislation.[99] The applicability of these OCC promulgated rules to national bank ATM activities is a central issue in the California ATM litigation and will be considered in Part III.

4. Electronic Fund Transfer Act

A more recent statute governing national banks is the Electronic Fund Transfer Act of 1978.[100] Congress adopted the EFTA in response to changes in banking technology with the express "primary objective" of protecting the "individual consumer rights" of "participants in electronic fund transfer systems."[101] To this end, it was designed to provide "a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems."[102]

The EFTA applies to any electronic fund transfer, other than a transaction originated by check, draft, or similar paper instrument, that orders, instructs, or authorizes a financial institution to debit or credit an account.[103] The EFTA defines the term "electronic fund transfer" to include "automated teller machine transactions."[104] It further applies to all financial institutions, including national banks.[105]

97. 12 C.F.R. § 7.4002(d) (2000).

98. *See* Letter from Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, Office of the Comptroller of the Currency, to Gerald P. Hurst, Esq., Deputy General Counsel, Bank of America, National Association 2 (Oct. 25, 1999) (on file with author) [hereinafter Letter to Bank of America]; Letter from Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, Office of the Comptroller of the Currency, to John D. Wright, Esq., Vice President and Assistant General Counsel, Wells Fargo Bank, National Association 2 (Oct. 27, 1999) (on file with author) [hereinafter Letter to Wells Fargo Bank].

99. *See* S.F Appellants' Opening Brief, *supra* note 6, at 20–21.

100. 15 U.S.C. § 1693 (1994).

101. *Id.* § 1693b.

102. *Id.*

103. *Id.* § 1693a(6).

104. *Id*.

105. *Id.* § 1693a(8).

The EFTA attempts to achieve its goal of protecting consumers engaging in electronic fund transfers in two ways. First, the EFTA sets basic standards governing electronic fund transfers.[106] Second, the EFTA expressly endows state and local governments with the power to adopt stricter consumer protections than those set forth in the statute.[107] This power is safeguarded through an express antipreemption provision in the EFTA:

> This subchapter does not annul, alter, or affect the laws of any State relating to electronic fund transfers, except to the extent that those laws are inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency. A State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection afforded by this subchapter.[108]

In addition, the EFTA empowers the Federal Reserve Board (FRB) with regulatory authority in all matters concerning the statute. The EFTA accomplishes this in two provisions. First, the EFTA designates that the FRB, not the OCC, will have the power to promulgate regulations governing the EFTA, including ATM regulation.[109] Although the EFTA recognizes the general enforcement authority of the OCC over national banks (i.e., "to prescribe regulations [solely] to carry out [and enforce] the purposes of this title"),[110] it empowers the FRB with the ultimate regulatory power over all electronic fund transfers, including ATMs.[111] Second, the EFTA reserves sole authority in the FRB, not the OCC, to decide issues of federal preemption concerning electronic fund transfer.[112]

Recently, the EFTA has been amended to include the direct regulation of all bank ATM surcharges. The ATM Fee Reform Act of 1999 requires full disclosure of all fees at all ATM terminals, including surcharges, on

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106. *See, e.g.*, *id.* § 1693c (defining the terms and conditions of transfers including disclosures and consumers' rights to receive documentation).

107. The relevant section reads as follows: "A State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection afforded by this subchapter." *Id.* § 1693q. Moreover, "State" is defined as including "any State, territory, or possession of the United States . . . or any political subdivision of any of the foregoing," making the EFTA applicable to municipalities as well as states. *Id.* § 1693a(10).

108. *Id.* § 1693q. For a more thorough discussion of the federal preemption issue, see *infra* Part IV.

109. *See id.* § 1693b(a).

110. *See id.* § 1693o(a)(1)(A).

111. *Cf. id.* § 1693b(a).

112. *Id.* § 1693q (stating that the FRB "shall . . . determine whether a State requirement is inconsistent or affords greater protection").

both the machine itself and its screen.[113] This amendment specifically places national bank ATM surcharge regulation under the auspices of the EFTA.

Although the EFTA appears quite lucid facially, much of the California ATM controversy involves disagreements about the reach of the statute. Particularly, the opposing banks argue that the EFTA does not regulate the substance of ATM surcharges, and thus its provisions and attached grants of power to states do not apply to ATM surcharge regulation.[114] This area of dissonance, along with conflicting interpretations of the scope of the NBA, comprise the first layer of controversy in the California ATM litigation: whether states have the power to regulate national bank ATM activities in general.[115]

III. DO STATES HAVE THE POWER TO REGULATE NATIONAL BANK ATM ACTIVITIES?

This part of the Note will consider whether states and municipalities have the authority to regulate national banks' ATM activities generally, in light of pending California litigation.

With such explicit declarations of power to states and the FRB in the EFTA, one wonders how the litigious banks and the OCC could deny a state's or municipality's right to regulate national ATM bank surcharges. These parties maintain, however, that the NBA "statutorily authorizes [a bank], as an element of the authority to conduct the business of banking, to exercise its discretion to charge access fees to non-accountholders using its ATMs."[116] Astonishingly enough, the OCC in its amicus brief to the district court hearing the California ATM litigation, completely failed to

113. *See Id.* § 1693b(d) (1999), *amended by* § 1693b(d), §§ 701, 702 (ATM Fee Reform Act of 1999).

114. There is no indication that the OCC agrees with the banks on this point, as the OCC ignores consideration of the EFTA altogether in its analysis presented separately to the attending District Court and to two of the involved banks. *See infra* text accompanying note 116.

115. The second layer of controversy involves the federal preemption issue—i.e. even if states and municipalities have the general authority to regulate national bank ATM activities (including surcharges), does federal law, nonetheless, preempt state and municipal laws that regulate national bank ATM surcharges? *See* discussion *infra* Part IV.

116. Brief of Amicus Curie, *supra* note 11, at 3–4. Although the OCC made this statement, it was in response to an inquiry on the matter from and in "concurr[ence]" with the involved banks (namely, Wells Fargo Bank and Bank of America). S*ee also* Letter to Bank of America, *supra* note 98, at 1; Letter to Wells Fargo Bank, *supra* note 98, at 1 (identical letters from the OCC responding to requests for concurrence that the national banks are "authorized to charge certain . . . ATM access fees to non-accountholders under . . . [the NBA]").

even address the EFTA.[117] Thus, how the OCC reconciles the NBA with the EFTA and maintains its conclusion is unclear.

A. THE FRB, RATHER THAN THE OCC, IS THE PROPER REGULATORY AUTHORITY OVER NATIONAL BANK ATM ACTIVITIES

Why the OCC has intervened in the California ATM litigation as *the purported authority* is not apparent.[118] Although, the NBA rests regulatory authority with the OCC,[119] the EFTA, the statute that relates specifically to most electronic fund transfers involving national banks, including ATMs, unequivocally bestows the FRB with exclusive regulatory power over electronic fund transfers.[120] The OCC's only role regarding the EFTA is to enforce its provisions as interpreted by the FRB and subsequently adopted FRB regulations.[121] Interestingly enough, the OCC has yet to issue a regulation governing ATMs. This is consistent with the congressional mandate that the FRB have sole regulatory authority over national bank ATMs.

Although the EFTA acknowledges the general regulatory authority of the OCC over national banks, it gives the ultimate regulatory power over all ATM bank activities, including those of national banks, to the FRB.[122] This delegation of power shows that Congress consciously and clearly decided to leave ATM regulation to the FRB, and not the OCC, despite the OCC's other general authority over national banks.

More importantly, Congress vested *sole* federal preemption interpretive authority with the FRB.[123] The FRB has recognized its authority and has established a detailed process for preemption inquiries in

117. *See* Brief of Amicus Curie, *supra* note 11, at 3–4.

118. "Intervene" means that the OCC's advocation of the bankers' claims by way of its amicus brief to the deciding district court as well as informal letters to Bank of America and Wells Fargo Bank serve as implicit exertions of regulatory power over ATM national bank activities. The OCC has explicitly asserted that national banks are subject only to the OCC's supervisory authority. *See id.* at 7.

119. *See* 12 U.S.C. § 24 (1994).

120. The Senate reports further communicate that Congress perceived "this delegation of authority to the [federal reserve] board . . . an important aspect of the legislation as it would . . . contribute substantially to the act's overall effectiveness." S. REP. NO. 95-915, at 9 (1978). This should dismiss any doubt about the primacy Congress intended the FRB to assume in the regulation of national ATM banking activities.

121. *See* 15 U.S.C. § 1693o(a)(1)(A)(1994).

122. The EFTA requires that the FRB consult with the OCC and other agencies. *See id.* § 1693b(a)(1).

123. The EFTA states that the FRB "shall . . . determine whether a State requirement is inconsistent or affords greater protection." *Id.* § 1693q.

its regulations.[124] The FRB also has used its authority to promulgate a series of regulations that speak directly to the issue of ATM surcharges.[125] The FRB's regulations not only reemphasize the EFTA's primary objective to "[protect] . . . individual consumers engaging in electronic fund transfers,"[126] but it also specifically regulates the content of ATM fee disclosures, including surcharge fees.[127] Thus, the FRB has acknowledged and asserted its regulatory power over ATM surcharges.

The FRB's codes also define certain rules and liabilities for electronic fund service providers towards non-account holders.[128] These regulations indicate that the scope of the FRB's authority in ATM activities extends to transactions involving non-accountholders. All of these FRB regulations contradict the allegation that the OCC has primary interpretive power over local ATM regulations affecting national banks.

Thus, it appears from the overwhelming evidence and through the plain language of the EFTA, the OCC's inactivity and the proactive work of the FRB, that the FRB is properly the *sole* regulatory authority over all national ATM bank activities, including surcharges. Hence, any OCC informal interpretations in this case (i.e., the OCC's amicus brief) should not be accorded much probative value.[129]

B. THE EFTA IS THE CONTROLLING LAW REGARDING NATIONAL BANK ATM ACTIVITIES AND GRANTS CITIES AND STATES AUTHORITY TO REGULATE NATIONAL BANK ATM ACTIVITIES IN GENERAL

This section demonstrates why the EFTA is the controlling law regarding national bank ATM activities. It further illustrates that the EFTA empowers local governments to regulate national bank ATM activities in general, including surcharges. Moreover, this section explains that the FRB, not the OCC, is the proper regulatory authority over the EFTA.

124. *See* 12 C.F.R. § 205.12(b) (2000).

125. *See id.* §§ 205, 205.1, 205.12, 205.14, 205.7, 205.9.

126. *Id.* § 205.1(b).

127. *See id.* § 205.7.

128. *See id.* § 205.14.

129. This is not to say that the court should dismiss the OCC's formal interpretations entirely. *Cf.* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (upholding OCC promulgated regulations as formal and reasonable interpretations of the applicability of a federal statute about which congressional intent is unclear).

1. Congressional Intent

Looking to legislative intent, it is clear from Senate reports that Congress created the EFTA to serve consumer rights not covered by existing state and federal law.[130] Thus, Congress drafted the EFTA as a supplement to underdeveloped state and federal law. Given this objective, it is reasonable to conclude that Congress believed that the NBA did not sufficiently address national ATM banking consumers and enacted the EFTA to fill the gaps. Since Congress itself did not believe that the NBA appropriately applied to national ATM banking activities, the NBA cannot be the dispositive authority on national ATM banking law. Rather, it appears that Congress intended the EFTA to encompass the defining law concerning the regulation of national ATM banking activities.

Furthermore, an examination of legislative intent reveals that Congress intended the EFTA to serve as the floor of ATM national banking activity regulation. In a Senate report, Congress stated that it intended the EFTA to set "only minimum national standards" for electronic funds transactions and to "permit the States to move forward with experimentation in the area."[131] Thus, Congress envisioned the EFTA as a beginning point for electronic fund regulation that permits each state to supplement and mold the rules according to its need.[132]

It is also evident from the EFTA's legislative history that Congress has categorically declined to restrict state regulation in the ATM context because it intended the EFTA, "to eliminate minute deviations in State EFT [electronic funds transfer] laws and thereby foster the development of national standards, while also permitting the States to enact legislation affording greater consumer protection."[133] The same Senate committee report elaborates on the rationale employed to arrive at its resolution. It states, "[w]hile annulling all State EFT laws would produce the benefit of uniform EFT standards in all 50 states, the committee rejected this approach because it would contravene Congress' longstanding policy of *deferring* to those States which choose to provide more stringent consumer

130. S. REP. NO. 95-915, at 2–3 (1978) (stating that questions of consumer protection with regards to electronic fund transfers "are particularly acute because existing state law . . . and Federal consumer protection laws . . . were not drafted with the EFT in mind, leaving the rights of consumers . . . undetermined in the law").

131. *Id.* at 18, 21.

132. One can even go so far as to say that the EFTA allows a state's regulations to replace the protections provided under the EFTA in some instances. *See* 15 U.S.C. § 1693r (allowing for the substitution of state electronic funds transfer laws if "substantially similar to those imposed" under EFTA).

133. S. REP. NO. 95-915, at 18.

safeguards."[134] It has been noted that "[a] bill proposing to preempt state regulation of shared ATMs [has] never reached the floor."[135] This confirms that Congress does not wish to interfere with states' ability to regulate national bank ATM activities.

2. Common Law Principles

Given the dual and often overlapping structure of the American banking system, courts inevitably have been summoned, since the inception of the dual banking system, to articulate the extent to which states may regulate national banks.[136] Many early courts recognized states' expansive authority to regulate national banks. In *National Bank v. Commonwealth*,[137] the court acknowledged, "[national banks] are governed in their daily course of business far more by the laws of the State than of the nation." More recently, the Court has reaffirmed this long-held rule in *Atherton v. FDIC*, stating that national banks:

> are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation . . . . It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.[138]

Courts have held that the power of the state over national banks is far-reaching and includes the following: the limitation of processing charges,[139] the right to sue and be sued,[140] the regulation of lost and unclaimed property,[141] the administration of probate and trusts,[142] and the application of state redlining statutes.[143] Clearly, these regulations are not

134. *Id.* (emphasis added).

135. *See* Valley Bank of Nev. v. Plus Sys., Inc., 914 F.2d 1186, 1195 (9th Cir. 1990) (citing S.2293, 95th Cong., 1st Sess., 123 Cong. Rec. 37, 234–36 (1977)).

136. *E.g.*, McCulloch v. Maryland, 17 U.S. 316 (1819) (striking down states' power to tax the Second National Bank).

137. 76 U.S. 353, 362 (1869).

138. 519 U.S. 213, 222–23 (1997) (quoting Nat'l Bank v. Commonwealth, 9 Wall. 353, 362 (1869)).

139. *See* Perdue v. Crocker Nat'l Bank, 38 Cal. 3d 913 (Cal. Sup. Ct. 1985) (upholding state statute that permits banks to charge customers' accounts for overdrafts and rejecting federal preemption claim since relevant state law does not interfere with federal law).

140. *See* Sneeden v. Indus. Comm'n, 10 N.E. 2d 327, 329 (Ill. 1937).

141. *See* Anderson Nat'l Bank v. Luckett, 321 U.S. 233 (1944); Clovis Nat'l Bank v. Callaway, 364 P.2d 748, 755–56 (N.M. 1961).

142. Jenckes v. Deitrick, 27 F. Supp. 408, 410 (D. Mass. 1939).

143. Redlining statutes are designed to prevent discriminatory lending that perpetuates racially segregated housing. National State Bank, Elizabeth, N.J. v. Long, 630 F.2d 981 (3d Cir. 1980); Conference of Fed. Sav. & Loan Ass'ns v. Stein, 604 F.2d 1256 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 921 (1980).

concerned purely with traditional banking concerns.[144] Thus, state power over national banks is not limited to traditional banking matters.[145]

Many states, in fact, have been active in adopting statutes equally applicable to state and national banks that are designed to protect consumer bank customers. Most courts have found that states possess broad authority of this type.[146] For example, in *Bullis v. Security Pacific National Bank*, the California Supreme Court applied the California Uniform Commercial Code regarding reasonableness and general bank practices to find the bank negligent for failing to follow accepted bank practice.[147] The Oregon Supreme Court has even proclaimed that "[a]s an instrumentality of the federal government, a national bank, like federal officials, is subject to the state's general laws which are intended to promote honesty and fairness in business transactions."[148] In addition, the United States Court of Appeals has applied California unfair business practices law to a national bank.[149] The United States Supreme Court itself has unequivocally stated that "a national bank is subject to state law unless that law interferes with the purposes of its creation, or destroys its efficiency, or is in conflict with some paramount federal law."[150] The Court continues to reaffirm this interpretation.[151]

Today, federal statutes often clearly define which areas of banking law are to be regulated by federal officials and which areas will remain under state control. However, where federal statutes are silent or unclear, the courts must resolve the extent of states' regulatory power over national banks.

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144. Redlining statutes are a perfect example of states regulating banks for purpose other than routine bank regulations.

145. In fact, the NBA largely covers traditional banking concerns. 12 U.S.C. § 24 (1994) (defining stringent requirements that must be fulfilled in order to acquire federal bank charter).

146. *See* Sec. Pac. Nat'l Bank v. Associated Motor Sales, 106 Cal. App. 3d 171(Ct. App. 1980) (applying California Commercial Code to national banks); Fireman's Fund Ins. Co. v. Sec. Pac. Nat'l Bank, 85 Ct. App. 3d 797 (Ct. App. 1978) (applying California Commercial Code to national banks); Bank of America v. Sec. Pac. Nat'l Bank, 23 Cal. App. 3d 638 (Ct. App. 1972) (applying California Commercial Code to national banks); S*ee also infra* text accompanying notes 147–50.

147. 21 Cal. 3d 801 (1978).

148. Schramm v. Bank of California, 20 P.2d 1093, 1103 (Or. 1933).

149. *See* Kates v. Crocker Nat'l Bank, 776 F.2d 1396, 1398 (9th Cir. 1985).

150. Lewis v. Fidelity & Deposit Co., 292 U.S. 559, 566 (1934). *See also* Jennings v. United States Fidelity & Guar. Co., 294 U.S. 216, 219 (1935) (finding that an Indiana statute is applicable to national banks "in so far as it is consistent with the policy or provisions, express or reasonably implied, of the National Bank Act or of other federal acts of paramount authority"); First Nat'l Bank v. Missouri *ex rel*. Barrett, 263 U.S. 640, 656 (1924) (holding that "national banks are subject to the laws of a State in respect of their affairs unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as federal agencies or conflict with the paramount law of the United States").

151. *E.g.*, Atherton v. FDIC, 519 U.S. 213 (1997).

With technological advances that change the way banks and consumers conduct business come related state consumer protection and safety concerns as well as parallel ambiguities regarding the scope of state power. The role of the courts in defining the relationship between state and federal power is thus becoming increasingly important.

In fact, the courts have been confronted with issues involving state action and national bank ATM activities. In *First Union National Bank v. Burke*,[152] a federal court temporarily enjoined Connecticut from enforcing national banks' compliance with a state ATM surcharge ban. The court reasoned that the EFTA designates the OCC as responsible for *enforcing* national bank compliance with ATM laws.[153] The court expressly noted, however, that "[t]his order in no way precludes . . . the [state] from seeking enforcement of this state banking statute against the plaintiff national banks through the courts."[154]

This case, therefore, reaffirms the language of the EFTA that identifies the OCC as the proper enforcer of national bank compliance with ATM laws. It does not invalidate the underlying state ATM surcharge ban, but rather explicitly recognizes the state's ability to seek enforcement of the ban through other means. Because the court did not address the issue of the legality of the state ATM surcharge bans, however, this case is not useful in this analysis.

In *Bank One, Utah v. Guttau*,[155] the court dealt with another issue involving state action and national bank ATM activities. In a 2-1 panel decision, the court held that the NBA preempts an Iowa law restricting the physical attachment of ATMs to banks with branches in state and prohibiting certain advertisements on ATM terminals.[156] Analogizing to a Supreme Court case that invalidated a state law limiting permissible national bank advertising, the court properly annulled the state advertisement prohibition on national bank ATM terminals.[157] The court also held that a federal statute that requires national bank branches to comply with state regulations did not authorize the state to regulate the geographic location of national bank ATMs because Congress had amended the statute to explain that an ATM is not a "branch."[158]

152. 48 F. Supp. 2d 132 (D. Conn. 1999).
153. *See id.* at 147.
154. *Id.* at 150–51.
155. 190 F.3d 844 (8th Cir. 1999).
156. *See id.*
157. *See id.* at 850.
158. *See id.* at 849.

Congress' intent to preempt state regulation of national bank ATM locations is justifiably clear in this case and is likely sufficient to satisfy the EFTA's antipreemption provision.[159]

However, the court did not limit its analysis to the facts of the case and, without elaboration, stated that the antipreemption provision of the EFTA is "specifically limited to the provision of the federal EFTA, and nothing therein grants the states any additional authority to regulate national banks." The court continued its analysis by acknowledging that state regulations of national banks are proper where "doing so does not prevent or significantly interfere with the national bank's exercise of its powers," but then added, "Congress has made clear in the NBA its intent that ATMs are not to be subject to state regulation."[160] This conclusion is misguided and is based on the unfounded presumption that the NBA is the controlling federal law, rather than the EFTA, regarding national bank ATMs.

The Eighth Circuit fails to offer a logical basis for its interpretation. Rather, it makes a conclusory and plainly erroneous statement regarding the interrelationship between the NBA and the EFTA: that the NBA preempts all state laws regulating ATMs because the EFTA does not empower or protect state ATM regulations. By its terms, the EFTA expressly saves states the right to promulgate its own "consumer protection" laws applicable to "automated teller machine transactions" and to any "National bank."[161]

Moreover, the Supreme Court systematically has held that where two federal statutes conflict, the more specific statute controls.[162] Not only does the EFTA directly and specifically speak to the issue of national bank ATM regulation,[163] as opposed to the NBA, which is silent on the

159. Recall that the EFTA grants states the power to regulate national bank ATM activities for consumer protection purposes in the absence of federal preemption. If this state's ATM law was aimed at consumer protection and thus authorized under the EFTA, a showing of federal preemption is necessary to defeat it. In this case, given that Congress specifically amended another statute to minimize a state's power over the establishment of ATM terminals, Congress' intent to preempt such state laws is clear, thereby satisfying the EFTA antipreemption provision.

160. *Bank One, Utah*, 190 F.3d at 850.

161. 15 U.S.C. § 1693a(6)(8) (1994).

162. *See* Crawford Fitting Co. v. Gibbons Inc., 482 U.S. 437, 445 (1987); Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976). *See also*, American Land Title Assoc. v. Clarke, 968 F.2d 150, 157 (2d Cir. 1992) (finding that where two federal statutes governing national banking conflict, the statute that addresses the matter under consideration in specific terms controls over the one that does so in general terms absent a manifested and clear Congressional intent to the contrary).

163. The EFTA is a much more recent statute, enacted in 1978, created specifically to address a particular, modern consumer issue: electronic fund transfers (including ATMs).

matter,[164] the 1999 amendment to the EFTA specifically addresses ATM surcharges.[165] Recall that the ATM Fee Reform Act of 1999 places national bank ATM surcharge regulation within the auspices of the EFTA.[166] This amendment certainly qualifies the EFTA as the more specific statute regarding national bank ATM regulation.

The court ignored the common law tradition of yielding to the more specific statute, and in doing so, mistakenly concluded that the EFTA and its antipreemption provision do not apply to national bank ATM activities. Had the court applied this basic principle, it would have correctly concluded (before it had the opportunity to reach the NBA preemption allegation) that the EFTA is the controlling federal law regarding national bank ATM regulation and not the NBA. The NBA would thus be inapplicable to the case, but the state statute would still be subject to preemption review under the EFTA. Although the court's holding regarding the particular facts of the case (i.e., state regulation of ATM geographic locations and terminal advertising) was likely supported by case law and evidence of congressional intent, its sweeping conclusion that the NBA preempts all state laws regulating ATMs clearly was misplaced.

Because the court's reasoning in *Bank One* is remarkably faulty, the Court[167] should not rely upon it in the California ATM litigation.[168] Instead, the Court should be guided by sound common law principles (i.e., a state may and is expected to regulate national banks in its borders), the language of relevant federal statutes, and evidence of Congressional intent.

More particularized common law supports the conclusion that the EFTA is only a starting point to consumer protection that allocates additional power to regulate national ATM bank activities to each state. In *City of New York v. Department of Transportation*, the court recognized that the EFTA "*supplements* laws of any state relating to electronic fund transfers, except to [the] extent that those laws are inconsistent with [the] EFTA".[169] In *Valley Bank of Nevada v. Plus System, Inc.*, the court of

164. In contrast to the specificity of the EFTA, the NBA was enacted in 1863 to "provide the nation with a stable system of currency . . . and to provide a ready market for the new bonds that the federal government was issuing to finance the Civil War." Henry N. Butler & Jonathan R. Macey, *The Myth of Competition in the Dual Banking System*, 73 CORNELL L. REV. 677, 681 (1988).

165. *See* 15 U.S.C. § 1693b(d), *amended by* 15 U.S.C. § 1693b(d), §§ 701, 702 (ATM Fee Reform Act of 1999).

166. *Id.*

167. Assuming, of course, that the case reaches the Supreme Court for resolution.

168. Moreover, the case in question is arguably distinguishable since *Bank One* concerned state laws regulating geographic locations of ATMs.

169. 539 F.Supp. 1237, 1256 (S.D.N.Y. 1982) (emphasis added).

appeals recognized Congress' clear and manifest intent to maintain state and local governments' ability to regulate ATM surcharges under the EFTA.[170] The court in *Valley Bank* rejected a Commerce Clause challenge to a Nevada ATM statute that prohibited ATM networks from denying banks the ability to charge ATM fees.[171]

In doing so, the court thereby acknowledged Nevada's legitimate state interest in regulating national banks and ATM fees.[172] Most significant was the court's recognition that "Congress specifically has declined to restrict state regulation in the ATM context."[173] Thus, the overwhelming evidence demonstrates that the EFTA empowers states to regulate national bank ATM activities, including surcharges. The language of the EFTA expressly bestows this right, the history of legislative intent supports this proposition, and courts have widely interpreted the EFTA in this manner.

3. The OCC Wrongfully Has Invaded the FRB's Regulatory Territory over National Bank ATM Activities

Notwithstanding the vast evidence that indicates the EFTA properly authorizes states and cities to regulate national bank ATM activities and that the FRB is authorized to regulate the EFTA's implementation, the OCC and banks litigating this issue continue to protest state exercise of these rights[174] and insist that the NBA governs ATM surcharges.[175] They

170. 914 F.2d 1186, 1195 (9th Cir. 1990).

171. *Id.* at 1190.

172. *Id.* at 1195.

173. *Id.*

174. The OCC has presented courts with amicus briefs supporting banks' contention over local ATM surcharge bans and repeatedly advertised its position in the form of interviews with press agents. Stock, *supra* note 9 (stating that OCC plans to file amicus brief in the New Jersey case and documenting the OCC amicus brief in Iowa and Connecticut litigation); Zuckerman, *supra* note 11; *Bank of America, Wells Fargo Sue Cities Over ATM Fees*, *supra* note 14; de Senerpont Domis, *supra* note 26; Garver & Stock, *supra* note 27. The banks' fight against surcharge bans extends beyond filing suit against the cities and routinely advocating their position to the news media. For example, in response to the Santa Monica ordinance, Wells Fargo and Bank of America have reprogrammed their ATMs in the city to block non-customer use. Sanders, *supra* note 30.

175. Bank of Am. v. San Francisco, 2000 U.S. Dist. LEXIS 12587 (N. D. Cal. 1999) (order granting preliminary injunction against municipal ordinances regulating ATM surcharges); *See* OCC Amicus Brief, *supra* note 11, at 4–9 (arguing that municipal ordinances regulating ATM surcharges are preempted by the NBA); Raine, *supra* note 14 (quoting a spokesperson for the California Bankers Association as stating, "The National Bank Act says national banks . . . may charge for their services."); Julie Hyman, *Banks Fight San Francisco's ATM Surcharge Ban, Jilting Non-Customers*, KNIGHT RIDDER, TRIBUNE BUSINESS NEWS, Nov. 11, 1999 (referring to the California Bankers Association's claims that federal law should prevail over local law) [hereinafter *Banks Fight*]; Hyman, *supra* note 22 (quoting a Los Angeles spokesperson for Wells Fargo as stating, "National banks are regulated by federal law and a city lacks legal jurisdiction."). To reiterate, the OCC has offered amicus briefs in the

further claim that the NBA authorizes national banks to set and charge fees for services (including ATM services).[176] The OCC argues that charging fees is an activity that is "part of or incidental to the 'business of banking' . . . . [And a]ny contrary rule would render national bank powers meaningless."[177] The argument continues that since federal statutes do not prohibit or limit how much a national bank may charge, national banks are "free to set the prices for their services, subject only to the OCC's supervisory oversight."[178] Moreover, because national bank powers to set and charge fees are "inherent elements" of their authority under the NBA, "no prior approval from the OCC is required."[179]

However, there is no specific provision of the NBA or statement in the legislative record to indicate that Congress meant "incidental powers" to include the ability to charge fees for ATM services. Rather, the OCC makes this inference completely without legislative base. In defense to its inference, the OCC cites to a Supreme Court case that holds that "the 'business of banking' is not limited to the list of powers enumerated in [the NBA]."[180] However, the OCC fails to mention that the courts likewise have critically limited the OCC's ability to add to the list of enumerated incidental powers. In *Nationsbank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.*, the Court admonished that the OCC may only expand the list of enumerated incidental powers by formal determination and "within reasonable bounds."[181] The OCC has not even attempted to issue a regulation governing national ATMs. This fact undermines the OCC's assertion that regulation of national bank ATM fees falls under the NBA and, by default, its jurisdiction.

The banks' and the OCC's arguments thus far do not invalidate a state's authority to regulate national bank ATM activities. Their allegations, rather, cite general provisions of the NBA and then make conclusory inferences relating the general provisions to national bank ATM activities. Courts have been wary of the OCC's interpretive judgments and

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Connecticut and Iowa cases, and plans to file one in the New Jersey case. *See* Stock, *supra* note 9; Zuckerman, *supra* note 11.

176. Bank of Am. v. San Francisco, 2000 U.S. Dist. LEXIS 12587 (N. D. Cal. 1999); OCC Amicus Brief, *supra* note 11, at 5–6.

177. OCC Amicus Brief, *supra* note 11, at 6.

178. *Id*. at 7.

179. *Id*. at 8.

180. *See* Letter to Bank of America, *supra* note 98, at 1 n.1; Letter to Wells Fargo Bank, *supra* note 98, at 1 n.1.

181. 513 U.S. 251, 258 n.2 (1995).

have criticized its lack of restraint in making such inferences.[182] The courts' hesitation to defer to OCC interpretations further subverts the OCC's and banks' position.

In its response letters to Bank of America and Wells Fargo Bank, the OCC references a Supreme Court case, *Franklin Nat'l Bank v. New York*,[183] to corroborate its argument that a national bank's authority to offer services naturally includes the ability to charge for its services. However, the applicability of the case to the issue at bar is tenuous at best. The case involves a New York statute that limited the use of the word "savings" or its variants by state financial institutions that were mutual in character versus stockholder-owned.[184] The New York legislature enacted the statute to prevent consumer misunderstandings over which banks were chartered savings banks and which were just borrowing the advertising term.[185] The Court held that such restrictions were in conflict with federal statutes that clearly authorized national banks to receive savings deposits, and, by implication, to advertise that fact.[186] Although this case indicates that states cannot restrict a clearly articulated national bank power, it is silent on whether states may limit a non-expressed power. Thus, it is a misplaced analogy with no bearing on the analysis at hand.

The OCC has additionally attempted to substantiate the claim that national banks may impose ATM surcharges by citing to a series of federal regulations it has promulgated.[187] The OCC advances that 12 C.F.R. § 7.4002 coupled with 12 C.F.R. § 7.1019 authorizes national banks to provide services electronically and to set and charge fees for those services.[188]

At first glance, it may seem obvious from these provisions that national banks may set and charge fees, including fees for electronic services. Such a conclusion, however is based on a critical assumption: that 12 C.F.R. §§ 7.4002 and 7.1019 are appropriate exertions of the OCC's

182. *Id. See also* Blackfeet Nat'l Bank v. Nelson, 171 F.3d 1237, 1249 (11th Cir. 1999) (finding unreasonable an OCC inference of the existence of an additional incidental power from the general language of section 24 (Seventh) of the NBA). *Cf.* Zuckerman, *supra* note 11 (quoting consumer program director as characterizing the OCC's involvement in the California ATM dispute as its "latest [attempt] in a series of power grabs").

183. 347 U.S. 373, 377 (1954).

184. *Id.* at 374.

185. *Id.*

186. *See id.* at 378.

187. *See* Letter to Bank of America, *supra* note 98, at 2 & n.2; Letter to Wells Fargo Bank, *supra* note 98, at 2 & n.2.

188. *See* Part II.B.3.

regulatory power. Reliance on this assumption may elicit a misleading conclusion.

The regulations are only authoritative if their adoption was authorized by prevailing laws governing national bank ATM regulation. That is, they have efficacy if they conform to the boundaries of authority bestowed upon the OCC and do not conflict with other federal statutes afforded greater deference. The Supreme Court has commented, "[w]hen Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted."[189] Courts are to determine the scope of an administrative agency's authority.[190] Thus, the OCC's regulatory provisions may constitute an abuse of regulatory power and thus may be erroneous.

In making this determination in the California ATM litigation, the Court will have to consider whether the OCC exceeded its authoritative reach as well as whether independent federal statutes exist that conflict with the OCC's regulation. Courts have imparted some guidance, namely that if Congress has not articulated its specific intent and an agency's policy is reasonable, the policy will be upheld.[191] However, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[192]

As discussed in above, courts have been critical of attempts by the OCC to expand to the list of national banks' enumerated incidental powers.[193] Since 12 C.F.R § 7.4002 adds the ability to set and collect fees, the courts will likely scrutinize the regulation with care. In order for the court to find that the regulation is a proper exertion of the OCC's regulatory authority, it must conclude that setting and charging fees falls within a national bank's incidental powers.

In *M & M Leasing Corporation v. Seattle First National Bank*, the court of appeals articulated a test to determine which national bank functions constitute incidental powers "necessary to carry on the business of banking."[194] The court defined such an activity as one that "must be

189. Stark v. Wickard, 321 U.S. 288, 309 (1944).

190. *See id*. at 309–10; Dimension Fin. Corp. v. Bd. of Governors of the Fed. Reserve Sys., Inc., 744 F.2d 1402, 1409 (10th Cir. 1984).

191. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

192. *Id.*

193. *See supra* text accompanying notes 181–82.

194. 563 F.2d 1377, 1382 (9th Cir. 1977).

'convenient or useful in connection'" to one of the established powers of national banks enumerated in the NBA.[195]

Since national banks are private enterprises, one may conclude swiftly that they operate by and for the main purpose of generating revenue, collected from interest on loans and various fees associated with banking. One may then infer that given the OCC's express authority over general national bank activities, the Court should find that 12 C.F.R. § 7.4002 (establishing national bank powers to set and charge fees) falls within the realm of the NBA and, consequently, the OCC's power. If the NBA defined national banks' purpose as such or included "generating revenue" in the list of national banks' enumerated powers, this inference may pass muster under the *M & M Leasing Corporation* test.[196] Yet the NBA defines "generating revenue" as neither a national bank's purpose, nor as an enumerated power.[197]

In fact, national banks were created for more public-oriented purposes. The Supreme Court articulated early on in *Davis v. Elmira Savings Bank*[198] that "the national bank system was devised to provide a national currency secured by a pledge of United States bonds, and national banks are agencies or instruments of the government for that purpose." More recently, one member of Congress has expressed her disapproval of national bank ATM surcharges:

> For more than 100 years it has been a well-understood principle in American democracy that banks have a public responsibility. They are private businesses, but they have a public charter. They are capitalist enterprises, but they benefit from the full faith and credit of the federal government through deposit insurance.
>
> As a senior member of the House Banking and Financial Services Committee and the ranking member of the Domestic and International Monetary Policy subcommittee, it is my responsibility to ensure that [national] banks fulfill their responsibility to their customers.[199]

Neither the enumerated powers nor the underlying purpose of national banks expressly authorize national banks to set and charge fees. This basic interpretation of the NBA does not appear to support the OCC's promulgation of 12 C.F.R. § 7.4002. A more pragmatic reading of the NBA reveals that a national bank's ability to charge fees likely does fulfill

195. *Id.* (quoting Arnold Tours, Inc. v. Camp, 472 F.2d 427, 432 (1st Cir. 1972)).
196. 563 F.2d at 1382. *See also supra* text accompanying note 194.
197. 12 U.S.C. § 24.
198. 161 U.S. 275 (1896).
199. Waters, *supra* note 17.

the *M & M Leasing Corporation* test.[200] The NBA does grant national banks the power to loan money on personal security and to receive deposits.[201] To conduct these functions, national banks reasonably rely on an operating income. Thus, their imposition of fees for the fulfillment of these powers appears "convenient or useful" to loaning money and receiving deposits. The Court will thus likely uphold 12 C.F.R. § 7.4002, and thereby recognize national banks' powers to establish and impose fees for traditional banking activities and the OCC's attached authority to review conflicting state laws that forbid such fees for potential federal preemption.

Such a finding *does not* necessarily mean that national banks may set and impose surcharges for serving as a conduit in ATM transactions notwithstanding local prohibitions. It must be emphasized that 12 C.F.R. § 7.4002 clearly states that questions of preemption must be resolved on a case-by-case basis.[202] In other words, where a state prohibits a type of national bank fee, the question of preemption turns on the specific facts of the type of fee and on evidence of congressional intent to displace the local law. Given the extensive discussion above evidencing Congress' intent to give states great latitude in formulating more protective ATM consumer protections,[203] passing this threshold likely will be a difficult task.[204]

Although national banks likely have the power to set and collect fees in general under 12 C.F.R. § 7.4002, the regulation alone does not immunize all national bank fees (including ATM surcharges) from proper local regulation. Pursuant to the regulation itself, an official pronouncement by the OCC is necessary to preempt a particular type of local regulation affecting national banks' power to charge fees. No such official conclusion exists. In the absence of a formal OCC finding, the Court in the California ATM dispute will likely find 12 C.F.R. § 7.4002 insufficient to specifically empower national banks to collect surcharges notwithstanding local regulation.

The OCC and involved banks claim that 12 C.F.R. § 7.1019 (permitting national banks to do whatever they would otherwise do via electronic means) logically extends a national banks power to collect ATM surcharges.[205] There are two defects in this reasoning.

200. 563 F.2d at 1382. *See also supra* text accompanying note 194.
201. 12 U.S.C. § 24.
202. *See* 12 C.F.R. § 7.4002(d).
203. *See supra* text accompanying notes 130–73.
204. For a more detailed discussion on the preemption issue, see *infra* Part IV.
205. *See* OCC Amicus Brief, *supra* note 11 at 82.

First, even if 12 C.F.R. § 7.1019, in conjunction with 12 C.F.R. § 7.4002, authorizes national banks to collect fees for services rendered via the ATM terminal, that power is limited, by the language of 12 C.F.R. § 7.1019, to fees that national banks would otherwise collect without the ATM terminal (i.e., fees already authorized under 12 C.F.R. § 7.4002, such as charges associated with loans and account maintenance). ATM surcharges are imposed on and unique to non-customer transactions. There is no non-ATM counterpart that falls within the realm of traditional banking fees; a non-customer cannot withdraw cash from other banks via teller transactions, nor can they be charged for such transactions. Hence, surcharges for non-customer transactions are not incidental to traditional national banking activities[206] authorized by 12 C.F.R. § 7.4002 and extended to ATM withdrawals by 12 C.F.R. § 7.1019. Since 12 C.F.R. § 7.4002 does not validate national banks power to collect surcharges for non-customer transactions on a general level, the Court will likely hold that 12 C.F.R § 7.1019 cannot extend that non-existent power to ATM surcharges.

Further, a finding that 12 C.F.R. § 7.4002 does empower national banks to collect surcharges would still render the OCC's and the banks' reliance on 12 C.F.R. § 7.1019 to supersede the Santa Monica and San Francisco city ordinances misplaced. Even if the Court concludes that 12 C.F.R. §§ 7.1019 and 7.4002 collectively permit national banks to set and collect fees for ATM transactions, that holding does not mean that national banks are authorized specifically to impose ATM surcharges *notwithstanding* local regulation. Under such circumstances, since 12 C.F.R. § 7.1019 would be interpreted as extending 12 C.F.R. § 7.4002 national bank powers to ATM activities, those activities would be subject to the parameters of 12 C.F.R. § 7.4002. For the reasons articulated above,[207] a finding that national banks may collect ATM surcharges regardless of local or state regulation requires an OCC formal declaration.[208] Given that the OCC has not published an interpretive holding on the matter, the Court will probably find 12 C.F.R. § 7.1019, like 12 C.F.R. § 7.4002, unhelpful for the case made by the OCC and involved banks.

206. That is, a national bank's performance of its pertinent enumerated powers (issuing loans and receiving deposits) is not contingent upon collecting surcharges for non-customer transactions.

207. *See supra* text accompanying notes 202–04.

208. Recall, the OCC can only resolve issues of preemption on a case-by-case basis. 12 C.F.R. § 7.4002(d).

Even if the OCC successfully conducts a formal hearing declaring that 12 C.F.R. §§ 7.4002 and 7.1019 preempt local regulations banning ATM surcharges, its findings remain subject to judicial review. Although the courts often have deferred to administrative agencies' interpretive policies, most cases do not involve overlapping statutes (as does the California ATM case with the overlapping of the EFTA and NBA).

Although the Court upheld challenged administrative policies in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*; *Clarke, Comptroller of the Currency v. Security Industrial Association;* and *Smiley v. Citibank*,[209] each of those cases involved simplified circumstances. In *Chevron*, the Court acknowledged that it relied on lack of specific congressional intent on the issue, and thus, the administrative agency's policy easily could be accepted as reasonable.[210] Where Congress' intent is readily discernible, the Court must defer to it over an administrative agency's ruling.[211] In *Clarke*, the Court did not have to consider opposing governing bodies, and thus, easily could accept the administrative agency's interpretation of the ambiguous congressional status as reasonable.[212] In *Smiley*, the Court accepted the OCC's regulation as reasonable because: 1) most legal dictionaries in print at the time the NBA was enacted did not limit the term as the plaintiff attempted to; and 2) common usage at the time the NBA was enacted supported the OCC's interpretive policy.[213]

The circumstances surrounding 12 C.F.R. § 7.1019 are not as simple. The OCC created 12 C.F.R. § 7.1019 based on its alleged power under the NBA. In doing so, the OCC likely intended to help facilitate the various banking transactions that occur through electronic means innocently. The OCC acted, however, despite clear, contrary congressional *intent*. As mentioned above, where Congress' specific intent is known, the courts must give deference to it.[214]

There is ample documentation to support the notion that Congress intended that neither the NBA nor the OCC would regulate all national bank ATM activities, including surcharges. One, an opposing statutory grant, specifically regulating national bank ATM activities, namely the EFTA, rests sole regulatory authority with the FRB.[215] If 12 C.F.R.

209. 467 U.S. at 842; 517 U.S. 735, 394 (1987); 517 U.S. 735, 747 (1996).
210. 467 U.S. at 845–51.
211. *See id.* at 842–43.
212. *See* 517 U.S. 735.
213. *Id.* at 745–47.
214. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842–43 (1984).
215. *See supra* text accompanying notes 120–28.

§ 7.1019 were judicially approved in spite of the EFTA, Congress' declarations of law in the EFTA would be negatively relegated.

Arguably, the EFTA by itself, not to mention the extensive congressional history on record, demonstrates Congress' specific intent that the EFTA and FRB regulations prevail as the ATM governing authority.[216] This distinguishes the *Chevron* court's analysis, which stressed that a regulatory body's interpretive regulation will be upheld only in the absence of a specific, incompatible congressional intent.[217] In addition, common usage and law dictionaries in print at the time the NBA was drafted clearly did not conceive of, nor do they support the OCC's interpretation of the scope of its administrative powers. In contrast, the *Smiley* court found the OCC's interpretation to be reasonable largely based on these factors.[218]

Other evidence illustrates Congress' specific intent to reserve all national bank ATM regulation, including surcharges, for the FRB pursuant to the EFTA guidelines and not the NBA and the OCC. To begin with, the NBA does not mention ATMs whatsoever. Nor do the OCC's regulations discuss ATMs or ATM fees. In fact, the only mention of ATMs in the entire NBA is at 12 U.S.C. § 36(j), where ATMs are categorically excluded from the definition of bank branches.

If, arguendo, no clear congressional intent as to which statute should govern national ATM surcharges can be identified, the Court is bound to its precedent that holds "[w]here there is no clear intention otherwise, a specific [federal] statute will not be controlled or nullified by a general one."[219] To this end, the EFTA is without a doubt the more particularized statute regarding ATM regulation. Thus, according to the Court, the more vague statute, the NBA, should not negate the EFTA's authority when deciding whether states have the power to regulate national bank ATM activities.

Even if "*clear* intention otherwise" exists, common law principles state that where two statues conflict, the more specific statute controls.[220] Not only does the EFTA directly and specifically address national bank

216. *See supra* text accompanying notes 131–78.

217. 467 U.S. at 845–51.

218. 517 U.S. 735.

219. *See* Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 445 (1987) (quoting Morton v. Mancari, 417 U.S. 535, 550–51 (1974) (emphasis added)).

220. *See id.* Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976) (quoting *Morton*, 417 U.S. at 550–51) (emphasis added). *See also*, Am. Land Title Ass'n v. Clarke, 968 F.2d 150 (2d Cir. 1992) (finding that where two federal statutes governing national banking conflict, the statute that addresses the matter under consideration in specific terms controls over the one that does so in general terms absent a manifested and clear congressional intent to the contrary).

ATM regulation,[221] as opposed to the NBA, which is silent on the subject,[222] the 1999 EFTA amendment undeniably expands the EFTA's scope to more specifically include ATM surcharge regulation.[223] This addition to the EFTA evidences that it is the appropriate and more particularized statute regarding national bank ATM surcharges. The EFTA should prevail in the California ATM controversy as the governing law regarding the first question in this analysis.

The fact that Congress promulgated a distinct statute addressing national bank ATM activities, including surcharges, indicates that OCC administrative authority does not include the power to interpret national bank electronic activity laws. This analysis strongly suggests that the OCC would exceed its delegated power by drafting a regulation that places national bank ATM regulation within its realm. To find otherwise would render the EFTA's regulatory grant of authority to the FRB meaningless. In such an instance, the OCC effectively would secure regulatory authority over national banks' ATM activities via 12 C.F.R. § 7.1019, which would conflict with the EFTA's explicit grant of *sole* regulatory authority over national bank ATM activities to the FRB.

This scenario is exactly how one court of appeals described what would happen if it upheld the OCC's interpretive ruling in *American Land Title Association v. Clarke*.[224] In *American Land Title Association*, the plaintiffs challenged an OCC interpretive ruling that permitted banks to issue title insurance in cities with populations greater than 5,000 in spite of a congressional provision to the contrary.[225] The court overruled the OCC's interpretive ruling, finding that the OCC's interpretation would make Congress' provision "superfluous."[226] This case illustrates another example of the OCC exceeding the scope of its power, despite clear contrary statutory provisions.

Other courts have recognized and suspended OCC attempts to transgress its regulatory limits. In *National Retailers Corporation of Arizona v. Valley National Bank*,[227] the court of appeals overruled an OCC interpretive ruling, finding that the "[OCC] exceeded [its] authority in rendering the interpretive ruling." These cases, illustrate other instances in

221. *See supra* note163 and accompanying text.
222. *See* sources cited *supra* note 164.
223. *See supra* note 113 and accompanying text.
224. 968 F.2d 150, 155 (2d Cir. 1992).
225. *Id.*
226. *Id.*
227. 604 F.2d 32, 34 (9th Cir. 1979).

which the OCC has abused its powers in contravention of other congressional statutes. The OCC and banks seem to intend to repeat these transgressions by pointing to the OCC's promulgated regulations as evidence its allegations.

As the above analysis demands, the Court should not follow the OCC's and involved banks' assertion that national banks can set and charge fees for electronic services pursuant to 12 C.F.R. § 7.1019. Administrative provisions only have authority to the degree that they respect proper reflections of statutory grants of authority. The assumption that 12 C.F.R. § 7.1019 is an appropriate exertion of administrative authority is unfounded and erroneous. As has been illustrated, 12 C.F.R. § 7.1019 attempts to regulate an area clearly delegated to a different administrative agency through an explicit statute.

The Court should find that 12 C.F.R. § 7.1019 is an unacceptable exertion of the OCC's regulatory authority and thus has no bearing on the California ATM litigation. The Court should therefore find the 12 C.F.R. § 7.1019 an invalid exercise of the OCC's power or, more practically,[228] limit its application to all electronic activities other than ATM surcharge regulation.[229] The Court likewise should find that although 12 C.F.R. § 7.4002 is a proper display of the OCC's regulatory authority, it is not the controlling law governing national bank ATM activities, given the much more specific statutory grant resting regulatory authority with the FRB.

4. A Local Government's Power To Regulate National Bank ATM Activities Is Broad Pursuant To The EFTA

As the above analysis shows, the EFTA is the principal authority regarding national bank ATM activities, including surcharges, and should be referred to by the Court in resolving the California ATM litigation. In determining whether the Santa Monica and San Francisco ordinances are properly authorized under the EFTA, the Court needs to consider the character of the power endowed the states.

The delegation of power to the states is not nominal, but rather, quite expansive. It not only allows states to adopt stricter consumer protections

228. Although a strict interpretation suggests that the OCC has exceeded its authority in creating 12 C.F.R. § 7.1019, policy considerations suggest that the regulation should not be completely nullified. Because it has pragmatic and necessary applications outside of consumer protection-oriented ATM regulation, the type of regulation provided under the EFTA should be limited in scope so that § 7.1019 no longer offends the EFTA.

229. The extent of such a limitation is certainly up for debate. A cursory description has been included to facilitate this analysis, but further examination is beyond the scope of this Note.

than those set forth in the statute,[230] it also allows the states to supplant the substantive provisions of the federal EFTA if consumers are assured proper enforcement:

> The [FRB] shall by regulation exempt from the requirements of this title any class of electronic fund transfers within any State if the [FRB] determines that under the law of that State that class of electronic fund transfers is subject to requirements substantially similar to those imposed by this title, and that there is adequate provision for enforcement.[231]

This provision exemplifies the latitude that the EFTA gives the states to promulgate ATM regulations affecting national banks. The EFTA also includes an express antipreemption provision.[232] This provision arguably provides plain evidence of congressional desire to promote local, consumer-oriented regulation of national bank ATM activities. The EFTA makes quite clear that state ATM consumer protection regulations will be honored absent conflict preemption. This, in essence, defines the criterion for determining federal preemption cases.[233]

The extent and type of power granted states in national bank ATM regulation appears quite broad and generally nonrestrictive. The only visible limitation imposed on states when regulating national banks is that they must do so for the express purpose of advancing consumer protections, left undefined, allowing states and municipalities to adopt protections reflective of their communities' needs.

Had Congress intended to define the scope of "consumer protections," it would not have remained silent on the subject. Rather, as the court of appeals noted in reviewing the legislative history of the EFTA, "Congress specifically has declined to restrict state regulation in the ATM context. Congress intended the [EFTA] 'to eliminate minute deviations in State EFT [electronic funds transfer] laws and thereby foster the development of national standards, while also permitting the States to enact legislation affording greater consumer protection.'"[234]

Moreover, the scope of power given the states through the EFTA to regulate national bank ATM activities clearly includes the power to regulate national bank ATM surcharges. This is evident from the 1999

230. *See* 15 U.S.C. § 1693q.
231. *Id.* § 1693r.
232. *See supra* note 107 and accompanying text.
233. The question of federal preemption will be discussed in Part IV.
234. Valley Bank of Nev. v. Plus Sys., Inc., 914 F.2d 1186, 1195 (9th Cir. 1990) (quoting S. REP. NO. 95-915 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9273, 9403, 9420).

amendment to the EFTA regulating ATM surcharge notice requirements.[235] As has been discussed, the EFTA authorizes states to enact more restrictive ATM legislation than defined in the statute. By extending the reach of the EFTA to include ATM surcharge regulation, Congress effectively gave local governments permission to enact more stringent consumer legislation in the area of ATM surcharges. The amendment, moreover, does not include any indication that states are limited in their ability to regulate ATM surcharges.

Many states have taken the lead in exercising this power and promulgating consumer protection laws for ATMs. At least three states have already imposed statutory caps on the amount a national bank may collect as an ATM surcharge.[236] California has enacted a number of ATM consumer protection laws, requiring fee disclosures at all ATMs[237] and governing location, installation, and lighting at ATMs.[238] Each of these codes directly regulates national bank ATM activities. Many also regulate national bank ATM surcharges.

These state regulations illustrate the broad range of ATM consumer protections authorized by the EFTA. The Santa Monica and San Francisco ordinances achieve the same kind of consumer protection by prohibiting a category of ATM charge.[239] They seek to address two grave consumer issues: unreasonable and deceptive double fees, and anticompetitive business practices.[240] If the Court finds that this is a rational basis for instituting the prohibition, it must uphold the ordinances absent federal preemption.

IV. FEDERAL PREEMPTION OF LOCAL REGULATIONS

Since a rational basis for adopting restrictive ATM surcharge ordinances likely can be established, the Court probably will proceed to the next layer of review of the San Francisco and Santa Monica ordinances. This Part examines the various arguments involved in the federal preemption debate. Naturally, an overlap exists between the first layer of

235. *See* 15 U.S.C. § 1693b(d), *amended by* 15 U.S.C. § 1693b(d), §§ 701, 702 (ATM Fee Reform Act of 1999).

236. *See* ARK. CODE ANN. § 23-32-208 (2000); MISS. CODE ANN. § 81-5-100 (1996); WYO. STAT. ANN. § 13-1-502 (1999).

237. *See* CAL. FIN. CODE § 13080 (1998).

238. *See id.* § 13000–13070 (1998).

239. Santa Monica Ordinance, *supra* note 4; S.F. Ordinance, *supra* note 4.

240. The prohibition of a *type* of unfair fee has traditionally been considered a consumer protection law. *See, e.g.*, CAL. CIV. CODE § 1748.1 (1998) (banning retail businesses from assessing surcharges for payments made with credit cards).

analysis and this layer (i.e., establishing state power and checking for federal preemption). Consequently, this Part presumes, as argued above, that the EFTA is the relevant federal law governing local ATM regulations of national banks.

A. REVIEW OF THE LAW OF FEDERAL PREEMPTION

Inquiries into federal preemption of legislation traditionally occupied by the state begin with a heavy presumption of non-preemption that the OCC and banks must overcome.[241] More acutely, "[c]onsideration of issues arising under . . . police powers of the States [are] not to be superseded by . . . [a] Federal Act unless that [is] the clear and manifest purpose of Congress."[242] When the inquiry is based on an allegation of federal preemption by an administrative agency, the Court is even more reluctant to find preemption.[243] States and cities are treated identically for the purposes of preemption analysis.[244]

By imposing a heavy presumption against preemption, the Court guarantees states and local governments the ability to identify and institute resolutions tailored for its particular public problems. The Court has announced that it will refrain from "imposing a single solution on the States from the top down."[245] The Court's strict standard of review derives from concerns of federalism.[246]

This is not to say the Court will never recognize federal preemption of local public protection ordinances. Rather, the weight of evidence needed to successfully implicate preemption is greater in such instances. As with all considerations of federal preemption, the Court must look to Congress' intent.

Absent an explicit expression by Congress that state laws are preempted, the Court may imply Congress' preemptive intent in two ways. First, state law is preempted if it actually conflicts with federal law.[247] Second, even if a state law does not conflict with a federal law, Congress

241. *See* Cippollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992); Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991); California v. ARC America Corp., 490 U.S. 93, 101 (1989).

242. Cippollone, 505 U.S. at 516 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

243. *See* Hillsborough County v. Automated Med. Lab., Inc., 471 U.S. 707, 717 (1985).

244. *See id.* at 713.

245. Smith v. Robbins, 528 U.S. 259, 275 (2000).

246. Addington v. Texas, 441 U.S. 418, 431 (1979). *See also*, Harmelin v. Michigan, 501 U.S. 957, 990 (1991).

247. *Cippollone*, 505 U.S. at 516 (citations omitted). *See also*, Cal. v. ARC Am. Corp., 490 U.S. 93, 101 (1989); Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963).

may completely occupy the field of state regulation, leaving absolutely no room for additional state laws.[248] Although implied preemption is possible, the Court disfavors it.[249]

While considering issues of preemption, many courts have recognized the historic police powers states and municipalities have to regulate consumer protection and banking.[250] The Supreme Court has even commented that because "consumer protection law is a field traditionally regulated by the states, *compelling evidence* of an intention to preempt is required in this area."[251]

B. ARE THE CITY ORDINANCES FEDERALLY PREEMPTED?

The presumption against preemption should be implicated in the California ATM litigation because not only do they qualify as consumer protection regulations, the regulations also police local banking activities.[252] Thus, these ordinances fit within the domain of traditional police powers afforded a presumption against preemption.

1. Express Preemption

The EFTA has endowed states with the power to regulate national bank ATM-related activities, including surcharges, for consumer protection purposes.[253] To reiterate, the EFTA's antipreemption provision declares that state laws applicable to electronic fund transactions are not preempted as applied if they provide greater consumer protection than the EFTA does.[254]

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248. *See Hillsborough*, 471 U.S. at 714; *Cippollone*, 505 U.S. at 516; Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

249. Penn Dairies, Inc. v. Milk Control Comm'n, 318 U.S. 261, 275 (1943). "An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred." *Id.*

250. *See* Comm. of Dental Amalgam Mfrs. & Distribs. v. Stratton, 92 F.3d 807, 811 (9th Cir. 1996) (consumer protection); Valley Bank of Nev. v. Plus Sys., Inc., 914 F.2d 1186 (9th Cir. 1990) (banking); Greenwood Trust Co. v. Mass., 971 F.2d 818, 828 (1st Cir. 1992) (consumer protection and banking).

251. General Motors Corp. v. Abrams, 897 F.2d 34, 41–42 (2d Cir. 1990) (citation omitted) (emphasis added); *see also* Berman v. Parker, 348 U.S. 26, 33 (1954) (defining the concept of public welfare, an area of traditional municipal police powers, as broad and inclusive, implying that consumer protection falls within its auspices).

252. Their express purpose is to "protect consumers" from "unfair fees" and prevent "anticompetitive business tactics" in the local banking industry. Santa Monica Ordinance, *supra* note 4; S.F. Ordinance, *supra* note 4.

253. *See supra* text accompanying notes 107, 130–73.

254. *See* 15 U.S.C. § 1693q.

The plain language of the EFTA's antipreemption provision also indicates that Congress did *not* preempt state laws applicable to national bank ATM activities by a clear and manifest expression of its intent. To the contrary, Congress has provided a format whereby states may adopt more restrictive standards than those found in federal law for the benefit of its local consumers. Categorically, Congress has chosen to defer to state laws, except where those laws are "inconsistent" with the EFTA. Moreover, Congress emphasized in the statute that state laws are not inconsistent with the EFTA if they afford greater consumer protection. Hence, the EFTA does not expressly preempt state-enacted national bank ATM surcharge laws.

2. Field Preemption

A statement of congressional purpose included in the EFTA explains that due to the "unique characteristics" of electronic fund transfers, "the rights and liabilities of consumers, financial institutions, and intermediaries" in such transactions were "undefined."[255] In turn, the EFTA was adopted "to provide a *basic* framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems," particularly where "individual consumer rights" are concerned.[256]

In fact, the EFTA's antipreemption provision establishes a national floor of protection, empowering states to set the ceiling of protection. This exemplifies Congress' respect for and policy of not infringing upon a state's traditional police power. The Court should hold that the EFTA does not cover the field of electronic fund transfers exclusively, but rather allows state and local ordinances to prohibit national bank AMT surcharge fees.

3. Conflict Preemption

The Santa Monica and San Francisco ordinances were created to protect consumers from being charged two times for the same ATM transaction (i.e., double-dipping). By its express terms, the EFTA does not preempt these ordinances, but rather explicitly authorizes their institution. Moreover, the EFTA gives the FRB the responsibility for resolving disputes over whether state laws are properly authorized by the EFTA; that is the FRB decides whether state laws are inconsistent with the EFTA or

255. 15 U.S.C. § 1693(a).
256. *Id.* § 1693(b)(emphasis added).

whether state consumer protections are greater than those provided in the EFTA.[257] As explained above, the FRB has formulated procedures for making these determinations.[258] In this regard, Congress has instituted an administrative method to resolve preemption disputes. The Court should recognize this method as the proper course to follow and defer review regarding this matter to the FRB.

V. CONCLUSION

The case of the California ATM litigation will likely reach the Supreme Court in the near future. As demonstrated above, the Court should uphold local legislation banning all bank ATM surcharges within its jurisdiction. To find otherwise would not only interrupt the balance of federalism and disregard Congress' intent as well as the plain language of the EFTA, it would also enable large national banks to maintain an anticompetitive edge over the consumer banking market and to continue to collect unconscionable ATM fees.

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257. *See id.*

258. 12 C.F.R. § 205.12(b). *See also* Part III.A.