Article

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

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INTRODUCTION

The recent dramatic growth in subprime lending[1] has reinvigorated initiatives for more effective consumer credit regulation,[2] giving new urgency to one of the perennial debates of consumer credit regulation: Assuming the consumer credit market requires some statutory regulation, are state or federal laws more effective?[3]

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1. Subprime lending is generally defined as lending to borrowers with poor or nonexistent credit histories. *See* Expanded Guidance for Subprime Lending Programs, Fed. Banking L. Rep. (CCH) ¶ 63,792 (Feb. 9, 2001) [hereinafter 2001 Subprime Lending Guide]. The growth of such credit is well documented. *See, e.g.*, EDWARD J. BIRD ET AL., CREDIT CARDS AND THE POOR (Inst. for Research on Poverty Discussion Paper No. 1148-97, 1997) (analyzing data from the Survey of Consumer Finances demonstrating a rise in credit card use among the poor); Glenn B. Canner et al., *Household Sector Borrowing and the Burden of Debt*, 81 FED. RES. BULL. 323, 323 (1995) (showing an increase in the percentage of low-income households with consumer debt); Ron Feldman & Jason Schmidt, *Why All Concerns About Subprime Lending Are Not Created Equal*, FEDGAZETTE (Minneapolis), July 1999, at 8 (discussing the difficulty of gauging the size of the subprime credit market and citing estimates of recent growth); Timothy L. O'Brien, *Lowering the Credit Fence: Big Players Are Jumping Into the Risky Loan Business*, N.Y. TIMES, Dec. 13, 1997, at D1; Diane Ellis, FDIC, *The Influence of Legal Factors on Personal Bankruptcy Filings*, BANK TRENDS (Washington, D.C.), Feb. 1998, *at* http://www.fdic.gov/bank/analytical/bank.

2. Federal legislation on the topic of predatory lending has been introduced in Congress. *See, e.g.*, Predatory Lending Consumer Protection Act of 2002, S. 2438, 107th Cong. (2002); Predatory Lending Consumer Protection Act of 2001, H.R. 1051, 107th Cong. (2001); Federal Payday Loan Consumer Protection Amendments of 2001, H.R. 1055, 107th Cong. (2001); Payday Borrower Protection Act of 1999, H.R. 1684, 106th Cong. (1999). A significant number of states and municipalities have enacted or are considering predatory lending laws. *See* Lew Sichelman, *"Anti-Predatory" Bills at 110 and Counting*, ORIGINATION NEWS, June 28, 2002, at 1 (describing recent state and local legislative initiatives).

3. The broader issue of whether consumer protection is more effectively legislated at the federal or state level reemerges with each round in the uni-

An important factor in the current debate is the increased participation of mainstream financial institutions, such as banks and savings and loan institutions, in the subprime loan market.[4] Some banks have shaped traditional banking products, such as credit cards, to market them to subprime borrowers.[5] Other banks are offering products that heretofore were the sphere of the "fringe banking system," such as payday loans[6] and tax refund anticipation loans.[7] The encroachment of mainstream financial institutions into the subprime consumer credit

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form commercial law drafting process. Most recently, it arose in connection with debate over whether consumer protection provisions should be included in the revisions of the Uniform Commercial Code. *See, e.g.*, Mark E. Budnitz, *The Revision of U.C.C. Articles Three and Four: A Process Which Excluded Consumer Protection Requires Federal Action*, 43 MERCER L. REV. 827, 827–28, 848–50 (1992) (discussing the need for a federal consumer payments law); Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83, 146–55 (1993) (discussing the role of the uniform laws process in the dynamics of federalism); Edward Rubin, *Efficiency, Equity and the Proposed Revision of Articles 3 and 4*, 42 ALA. L. REV. 551, 586–92 (1991) (providing an overview of the legislative process that generated the UCC revisions). In the 1960s, the more specific issue of whether consumer *credit* regulation is most effectively accomplished at the federal or state level arose in the debates eventually leading to the adoption of federal consumer credit regulation. *See infra* Part I.B–C. The general issue of what combination of federal and state legislation would be most effective in protecting consumers continues to be of interest to many scholars. *See, e.g.*, Roland E. Brandel & Kathleen M. Danchuk-McKeithen, *The Relationship of Federal to State Law in Electronic Fund Transfer and Consumer Credit Regulation*, 13 U.S.F. L. REV. 331, 331–32 (1979) (discussing the need to harmonize state and federal law in the context of consumer protection); Thomas D. Crandall, *It Is Time for a Comprehensive Federal Consumer Credit Code*, 58 N.C. L. REV. 1, 3 (1979) (noting the problems with the combination of state and federal regulations).

4. Lynn Drysdale & Kathleen E. Keest, *The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and Its Challenge to Current Thinking About the Role of Usury Laws in Today's Society*, 51 S.C. L. REV. 589, 612 (2000) ("The overwhelming majority of [refund anticipation loan] lending is now performed by major depository lending institutions, including bank subsidiaries of major finance companies."); Arthur E. Wilmarth, Jr., *The Transformation of the U.S. Financial Services Industry, 1975–2000: Competition, Consolidation, and Increased Risks*, 2002 U. ILL. L. REV. 215, 393–94 ("By early 2000, big banks controlled eight of the ten largest subprime lending companies in the United States."); Jane Bryant Quinn, *Banks Infringe on "Fringe Bank" Specialties*, CHI. TRIB., June 13, 1999, § 5 at 3 (describing national banks offering payday loans and check-cashing services).

5. Lisa Fickenscher, *Credit Card Issuers Panning for Gold Among Tarnished Credit Histories*, AM. BANKER, Oct. 22, 1998, at 1; Miriam Kreinin Souccar, *Subprime Specialists Break into Bank Card Elite*, AM. BANKER, Sept. 21, 1999, at 1.

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

7. *See infra* Part II.B.5.c.ii.

market shines a bright spotlight on a legal power peculiar to federally regulated banks and savings and loan associations.[8] Under the "Exportation Doctrine," such entities have the power to "export" the consumer credit regulation (or lack thereof) from the state in which they are located to all other states where they have customers.

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

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

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

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

surrounding predatory lending laws that are currently taking place at both the federal and the state level.[10] If state predatory lending laws are indeed ineffective in the face of the Exporta-

rent scope. Among the commentators who have commented on the Exportation Doctrine's preemption of state consumer credit laws are John P.C. Duncan, *The Course of Federal Pre-emption of State Banking Law*, 18 ANN. REV. BANKING L. 221, 314–19 (1999); Ralph J. Rohner, *Problems of Federalism in the Regulation of Consumer Financial Services Offered by Commercial Banks: Part I*, 29 CATH. U. L. REV. 1, 37–38 (1979) [hereinafter Rohner, *Part I*]; Ralph J. Rohner, *Problems of Federalism in the Regulation of Consumer Financial Services Offered by Commercial Banks: Part II*, 29 CATH. U. L. REV. 313, 367 (1980) [hereinafter Rohner, *Part II*]; James J. White, *The Usury* Trompe L'Oeil, 51 S.C. L. REV. 445, 464–65 (2000); Kreissman, *supra* note 8, at 925–39. Various consumer activist publications have also noted this development. *See* Jean Ann Fox & Edmund Mierzwinski, *Rent-A-Bank: How Banks Help Payday Lenders Evade State Consumer Protections, the 2001 Payday Lender Survey and Report*, (CFA & State Pub. Interest Research Groups), *at* http://www.consumerfed.org/paydayreport.pdf (Nov. 2001) [hereinafter *Payday Lending Report*]; KATHLEEN E. KEEST & ELIZABETH RENUART, NAT'L CONSUMER LAW CTR., THE COST OF CREDIT: REGULATION AND LEGAL CHALLENGES § 3.4.5 (2d ed. 2000); Chi Chi Wu, Jean Ann Fox, & Elizabeth Renuart, *Refund Anticipation Loan Report* (CFA & Nat'l Consumer Law Ctr.), *at* http://www.consumerfed.org/taxpreparers.pdf, at 18–19 (Jan. 31, 2002) [hereinafter *RAL Report*]; Drysdale & Keest, *supra* note 4, at 605, 612–14, 646–48 (coauthored by two consumer advocates—one an Assistant Attorney General and Deputy Administrator of the Iowa Consumer Credit Code and the other a staff attorney with Jacksonville Area Legal Aid, Inc., and Florida Legal Services, Inc.). The plaintiff's bar has brought lawsuits challenging the Exportation Doctrine. *See, e.g.*, Alan S. Kaplinsky, *Federal Usury Law Developments*, *in* CONSUMER FINANCIAL SERVICES LITIGATION 1998, 267 (PLI Corporate Law & Practice Course, Handbook Series No. B-1048, 1998); Jeffrey I. Langer et al., *Recent Developments Regarding Interstate Lending and Non-Usury Theories Attacking Loan Charges*, 48 CONSUMER FIN. L.Q. REP. 38 (1994).

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

tion Doctrine, does it make sense to continue to enact such laws? If the Doctrine is the most powerful regulatory force in the consumer credit market, what role does it play in combating predatory lending? If the Doctrine is not an adequate substitute for state predatory lending laws, should it be curbed or should it be reformed? All of these questions are crucial to the current debates over predatory lending laws.[11]

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

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

sumers against predatory lending.

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

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

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

12. JOHN A. SPANOGLE, JR., ET AL., CONSUMER LAW CASES AND MATERIALS 6 (2d ed. 1991).

13. UNIF. CONSUMER CREDIT CODE (1974) Prefatory Note, 7 U.L.A. 88 (2002).

14. NAT'L CONSUMER LAW CTR., THE COST OF CREDIT: REGULATION & LEGAL CHALLENGES § 2.1 (1995) [hereinafter COST OF CREDIT].

15. NAT'L COMM'N ON CONSUMER FIN., CONSUMER CREDIT IN THE UNITED STATES 94 (1972); SPANOGLE ET AL., *supra* note 12, at 7.

16. Rohner, *Part I*, *supra* note 9, at 20.

17. COST OF CREDIT, *supra* note 14, § 2.1.

18. California v. ARC Am. Corp., 490 U.S. 93, 101 (1989); Greenwood Trust Co. v. Massachusetts, 971 F.2d 818, 828 (1st Cir. 1992); Gen. Motors Corp. v. Abrams, 897 F.2d 34, 41–42 (2d Cir. 1990).

CONCLUSION

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

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