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ANTI-FEDERALIST BANKING POLICY UNDER DODD-FRANK: THE CASE FOR THE LIBERAL PRE-EMPTION OF STATE BANKING LAW

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INTRODUCTION

Federal preemption of state law is often considered to come at the cost of Federalism values. Where some national interest is deemed important enough, policymakers and scholars reason that state law and Federalism principles like local democratic control or localized policy innovation must give way to that overriding federal interest.[1] However, the federal judiciary and Congress are also sensitive to the dramatic consequences of preemption of state law, and this sensitivity has led to numerous carve-outs in federal legislation[2] as well as a canon of clear statement rules and presumptions against preemption[3] recognized in order to protect Federalism values.

Section 1044 of the 2011 Dodd-Frank Wall Street Reform and Consumer Protection Act[4] is a creature of this historical suspicion of federal preemption. It purports to weaken the powers of federal regulators to preempt state law affecting national banks in an attempt to improve the rigor of financial regulation in the wake of the 2008 financial crisis, especially with respect to consumer debt origination. While some have argued that Section 1044 plays an important role in protecting state consumer finance protection

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[1] *See generally* Air Quality Act of 1967, Pub. L. No. 90-148, § 208, 81 Stat. 485, 501 (codified as amended at 42 U.S.C. § 7543) (preempting state motor vehicle emissions and fuel standards where less stringent than the federal standard so as to benefit the environment); Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 514(a), 88 Stat. 829, 897 (codified as amended at 29 U.S.C. § 1144(a)) (establishing field preemption over "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" so as to create a uniform set of rules for retirement plans nationwide); Bankruptcy Act of 1898, Pub. L. No. 55-541, 30 Stat. 544 (current version at 11 U.S.C.) (using federal preemption to establish a uniform bankruptcy court system for the entire country, which, unlike other instances of broad preemption commands, stems from the Constitution's text itself per U.S. CONST. art. I, § 8, cl. 4 ("The Congress shall have Power To . . . establish . . . uniform Laws on the subject of Bankruptcies throughout the United States . . . .")).

[2] *See e.g.*, 29 U.S.C. § 1056(d)(3)(B) (defining "qualified domestic relations order"); I.R.C. § 414(p)(1)(A) (establishing qualified domestic relations orders as not preempted by ERISA's anti-assignment provisions); 42 U.S.C. § 7543(e)(2) (establishing special exemptions for California in light of its history of aggressive environmental protection through strict fuel and emissions standards).

[3] *See e.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) ("Congress legislated here in a field which the States have traditionally occupied. So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.") (citations omitted); Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 740 (1985) ("We also must presume that Congress did not intend to pre-empt areas of traditional state regulation.") (citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)); Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 518 (1992) ("[W]e must construe these provisions in light of the presumption against the pre-emption of state police power regulations.").

[4] 12 U.S.C. § 25b.

laws from wanton federal preemption, in reality Section 1044 upsets the careful balance of state and federal interests within our Dual Banking system, in which state and nationally chartered banks compete within their own distinct regulatory environments.

The Federalism problems inherent to Section 1044 stem from its deviations from our Dual Banking system—a system that inverts many of our traditional assumptions about the supposed antagonism between preemption and Federalism values. Instead of inherently threatening state interests, federal preemption within the realm of Dual Banking maintains our distinct federal and state banking regimes, as well as the Federalism values that Dual Banking serves.

Viewed from this perspective, Section 1044 represents an unwise, perhaps even reactionary turn towards the supremacy of state bank regulators reminiscent of early constitutional disputes which led to cases like *McCulloch v. Maryland*.[5] This historical legacy is a far cry from the progressive aspirations of Dodd-Frank as a whole, which speaks to the wandering development of American banking law and the troubling implications of Section 1044. From the very structure of our banking system, which has often been described as "balkanized,"[6] to shifting policy preferences expressed by Congress,[7] the principles that undergird our federal banking regime often seem to be anything but consistent or logical.

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[5] *See* 17 U.S. (4 Wheat.) 316, 317–19 (1819) (detailing Maryland's attempt to tax a federal bank, which the Court ultimately found unconstitutional).

[6] *See e.g.*, Louise Bennetts, *Regulatory Fragmentation, the Balkanization of Financial Markets and the Competitiveness of the American Financial Services Sector,* CATO INST., (Mar. 4, 2014), https://www.cato.org/publications/testimony/regulatory-fragmentation-balkanization-financial-markets-competitiveness [https://perma.cc/GBV6-U6VE] (discussing "[t]he Costs of Regulatory Fragmentation within the United States" and "The Dangers of Financial Sector 'Balkanization'"); Jana Kasperkevic, *Does the U.S. Have Too Many Financial Regulators?,* MARKETPLACE (Mar. 19, 2018), https://www.marketplace.org/ 2018/03/19/what-balkanization-fragmented-financial-regulatory-system/ [https://perma.cc/G98V-6SYD] ("This 'relative balkanization of the authorities was a major factor in why this crisis was so bad and why the damage to the economy was so great,' said Timothy Geithner, who was the president of the New York Fed when the financial crisis began, and who later became President Obama's first Treasury secretary."); Carter H. Golembe, *Our Remarkable Banking System*, 53 VA. L. REV. 1091, 1091 (1967) (identifying the challenge "jurisdictional conflicts" pose to both banks and regulators).

[7] *See e.g.*, Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (codified as amended in scattered sections of 12 U.S.C.) (reversing the long-held trend of prohibiting interstate bank branching, a policy that befuddles modern banking experts); Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 (codified as amended in scattered sections of 12 U.S.C.) (expanding the power of thrifts to engage in general banking after the failure of thrifts during the savings and loans crisis); Federal Reserve Act of 1913, Pub. L. No. 63-43, § 1, 38 Stat. 251, 251 (codified as amended at 12 U.S.C. § 221) (establishing a mixed private-public hybrid

History suggests that this fragmented structure is the consequence of the patchwork nature of federal banking legislation. Whereas most of the rest of the world has opted for a unified structure for banking regulation with one agency in charge,[8] the United States relies on a number of agencies, established primarily through individual organic statutes, to implement cohesive financial policy by consensus.[9] This picture is complicated by the fact that banking and financial regulation is also a state affair. Each state has its own unique system of bank chartering, regulation, and supervision which may or may not resemble the federal scheme.[10] This Dual Banking system[11] is a unique part of "our Federalism,"[12] and it is threatened by Section 1044.

By hampering the ability of federal regulators to preempt state law affecting the operation of national banks, Section 1044 allows state regulators to break down the Dual Banking system by enforcing state banking policy on national banks, and, to a lesser extent, on banks chartered by other states. In the process, Section 1044 threatens to deprive us of Federalism benefits secured by our Dual Banking system such as policy innovation, democratic

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structure for the Federal Reserve System). For the contradictory and confused reasoning that motivated the structure of the federal reserve, see generally PETER CONTI-BROWN, THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE 23–24, 103–26 (2016).

[8] Kasperkevic, *supra* note 6 ("'I don't know of another major country that has anything close to it,' Scott said. 'For instance, to take England by comparison, they have a bank regulator and one market regulator. That's it. Japan, they have actually a single regulator of everything.'").

[9] *E.g.*, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Consumer Financial Protection Bureau, the Federal Reserve, the Treasury Department, the Financial Stability Oversight Council, the National Credit Union Share Insurance Fund, and the Securities and Exchange Commission.

[10] *See State-Chartered Banks by State*, CONF. ST. BANK SUPERVISORS, (Sept. 13, 2019), https://www.csbs.org/state-chartered-banks-state [https://perma.cc/ZZ7J-97U8] (suggesting that some states may offer thrift or credit union charters in addition to bank charters, some may offer only bank charters, some may centralize bank supervision in one entity or not, et cetera).

[11] For an explanation of the Dual Banking system, see generally Julia Stackhouse, *Why America's Dual Banking System Matters*, FED. RSRV. BANK ST. LOUIS, Sept. 19, 2017, https://www.stlouisfed.org/on-the-economy/2017/september/americas-dual-banking-system-matters [https://perma.cc/UG9F-6BSB].

[12] One of the more timeless explanations of "Our Federalism" can be found in Justice Black's opinion in *Younger v. Harris*, which stresses that Federalism is more than just a state affair:

> "Our Federalism" . . . does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

401 U.S. 37, 44 (1971).

accountability, and political transparency.[13] However, the anti-federal instincts behind Section 1044 are hardly a recent development, and in fact date back to the early Republic. The classic example of skepticism toward national banking is President Andrew Jackson's message to the Senate upon his veto of the bill that would have re-chartered the Second Bank of the United States in July of 1832.[14] Putting aside his arguments that the bank was blatantly unconstitutional, Jackson specifically argued that the bank was controlled by and primarily benefited foreigners and foreign governments, that it favored Eastern states over Western states, and that it was otherwise corrupt and mismanaged.[15] None of these criticisms made much sense on the merits, especially given that Jackson's veto left bank chartering entirely up to the states, who were no less likely to have foreign investors, and did not have a reputation for good management or clean books.[16] Jackson's veto was in fact a manifestation of his distrust of federal banking institutions, a reactionary turn against national "monied interests" and towards state institutions.[17]

A parallel can be drawn between Jackson's sentiments and those which motivated the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act[18] in 2010. While Dodd-Frank has experienced intense scrutiny from conservative figures, some of whom have argued that it is unconstitutional,[19] some of its provisions are startlingly conservative by objective standards. It is not immediately clear how ending bailouts would serve the goals of financial stability or aggressive, sound federal banking regulation.[20] Similarly, it is unclear how Dodd-Frank's curtailment of federal

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[13] *See infra* Part III.

[14] 8 REG. DEB. app. 73–79 (1832).

[15] *Id.* at 74–75.

[16] The period which followed Jackson's veto is fondly referred to as the years of "Wild Cat Banking," in which fraud seemed to be part and parcel of operating a state-chartered bank. Arthur J. Rolnick & Warren E. Weber, *Free Banking, Wildcat Banking, and Shinplasters*, FED. RSRV. BANK MINNEAPOLIS Q. REV., Fall 1982, at 10, https://www.minneapolisfed.org/research/qr/qr632.pdf [https://perma.cc/LW6X-6SCY].

[17] 8 REG. DEB. app. 79 (1832).

[18] Pub. L. No. 111-203, 124 Stat. 1376 (codified as amended primarily in scattered sections of 12 U.S.C. and 15 U.S.C.). The long form name of the Act is revealing: "An Act to promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail,' to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes." *Id.* at 1376.

[19] *See e.g.*, C. Boyden Gray & Jim R. Purcell, Opinion, *Why Dodd-Frank is Unconstitutional*, WALL ST. J. (Jun. 21, 2012, 6:41 PM), https://www.wsj.com/articles/SB10001424052702304765304577480451892603234 [https://perma.cc/AHF4-H877] (arguing that the structure of the Consumer Finance Protection Bureau violates constitutional separation of powers).

[20] Indeed, much of the rest of the world regards bailouts as routine crisis measures. Luke Frazza, *The List: The World's Biggest Bailouts*, FOREIGN POL'Y (Sept. 15, 2008, 12:00 AM),

banking preemption authority under Section 1044 benefits the cause of sound banking regulation and consumer protection. Much like Jackson's veto, Section 1044 represents an unwarranted policy preference for state regulators and against their federal counterparts. In deviating from the Dual Banking system generally, Dodd-Frank's preemption provisions actually deprive our banking system of many of the benefits that follow from Federalist principles.

The narrative which contributed to the passage of Section 1044,[21] that federal regulators were asleep at the wheel in 2008 and that excessive federal preemption hamstrung state regulators that could have otherwise prevented or lessened the impact of the 2008 financial crisis, is likely wrong for many of the same reasons that Jackson's faith in state-dominated banking was wrong.[22] But more importantly, Dodd-Frank's curtailment of federal banking preemption authority undermines Federalism principles and in doing so defeats the goal of an efficient, coherent, and state-inclusive banking scheme.[23]

This paper argues that regardless of how much or what kind of financial regulation is optimal, it should be enacted within the confines of our Dual Banking system consistent with the principles that motivate our Federalism. Part I details the practice and precedent of our Dual Banking system as a part of our Federalism. Part II provides a recent history of federal banking law and its departures from our Dual Banking system. Part III argues that Federalism values would be better served by liberal federal preemption standards for state laws affecting nationally chartered banks. Part IV argues that Section 1044's *Skidmore* instructions also threaten Federalism interests. This

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https://foreignpolicy.com/2008/09/15/the-list-the-worlds-biggest-bailouts [https://perma.cc/2FBP-DA27]. There may be an intuitive progressive flair to the goal of "ending bailouts," but there is also a laissez-faire dimension to the project, which betrays a hostility to government intervention. *See e.g.*, Steve Chapman, *The Case Against the Bailout*, REASON (Sept. 25, 2008, 7:00 AM), https://reason.com/2008/09/25/the-case-against-the-bailout [https://perma.cc/Q3XX-H5KN] ("Not only that, the more effective it is, the more damage it will do to the free market system. Saving companies from their bad gambles turns business into a game of 'profits for me, losses for you,' corroding the incentives that make capitalism so innovative and efficient.").

[21] *See* Jared Elosta, *Dynamic Federalism and Consumer Financial Protection: How the Dodd-Frank Act Changes the Preemption Debate*, 89 N.C. L. REV. 1273, 1274 (2011) ("Bar-Gill and Warren also alleged that the aggressive preemption of state consumer financial protection laws by the Office of the Comptroller of the Currency ('OCC') in the 2000s weakened consumer financial protection at the state level.").

[22] *See generally* Kathleen C. Engel & Patricia A. McCoy, *Federal Preemption and Consumer Financial Protection: Past and Future*, 31 BANKING & FIN. SERVS. POL'Y REP. 25, 34 (2012) (questioning whether consumer finance protection laws have any impact on financial stability).

[23] Ultimately, this paper tries to be agnostic on the question of whether consumer finance protection laws would or would not have prevented or lessened the impact of the 2008 financial crisis. It is an irrelevant question, as consumer finance protection laws can be passed at the federal level for national banks as well, consistent with our Dual Banking system.

article concludes with an endorsement of improving federal regulation instead of curtailing federal preemption in the area of consumer financial protection.

I. THE IMPORTANCE OF OUR DUAL BANKING SYSTEM

While our Dual Banking system has not been a part of American government for as many years as our Constitution has, it is nonetheless an important part of our Federalist traditions. Indeed, many parts of the Dual Banking system take on constitutional significance when expressed in federal legislative commands under the Supremacy Clause, most commonly in order to achieve parity between state and national banks in terms of their authorized powers. This drive for competitive parity not only has a long history in the Federal Congress and Judiciary,[24] but also in a national consensus which includes state legislatures.[25]

A. Federal Legislative and Judicial Recognition

Our Dual Banking system has been an integral aspect of American banking since the passage of the National Bank Acts of 1863 and 1864 (collectively, "National Bank Act"). Passed in the middle of the Civil War by Radical Republicans, the National Bank Act was designed to establish a national currency, raise war money, and establish nationally chartered banks.[26] Prior to the National Bank Act, bank chartering was essentially an enterprise left to the states, much as corporate chartering is left to the states today, at least for now.[27] Potential applicants interested in opening a bank had to apply to a state office in order to obtain a charter, and the state which chartered that bank was responsible for its regulation, much in the same way that

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[24] *See infra* Section I.A.

[25] *See infra* Section I.B.

[26] *See generally* Kevin Dowd, "US Banking in the 'Free Banking' Period," *in* THE EXPERIENCE OF FREE BANKING (Kevin Dowd ed., 1992) (summarizing the state of banking immediately before the first and second National Banking Act ("NBA")); Richard Grossman, *US Banking History, Civil War to World War II*, EH.NET ENCYCLOPEDIA (Robert Whaples, ed., 2008), https://eh.net/encyclopedia/us-banking-history-civil-war-to-world-war-ii/ [https://perma.cc/S3H3-T2GW] (discussing the purposes behind the NBA, which were to establish a national currency, raise war money and basically obliterate state charters).

[27] Senator Warren has a plan to introduce mandatory federal charters for certain large U.S. corporations which would limit their ability to engage in political activities and mandate worker representation on corporate boards, among other things which surely would offend the Delaware bar. Matthew Yglesias, *Elizabeth Warren Has a Plan to Save Capitalism*, VOX (Aug. 15, 2018, 11:05 AM), https://www.vox.com/2018/8/15/17683022/elizabeth-warren-accountable-capitalism-corporations [https://perma.cc/SY8J-JGAL].

the internal affairs doctrine excludes foreign states from regulating the internal governance of a foreign corporation chartered by any other state today.[28]

After the passage of the National Bank Act, state-chartered banks or prospective bank managers had the option to apply for national charters that would subject them to federal regulation and supervision instead of state oversight.[29] Importantly, the Civil War Congresses actually expressed a preference for national bank charters *over* state charters, limiting the authority of states to tax nationally chartered banks in 1864,[30] while establishing a 10% tax on state bank notes, eliminating all state bank currency, and generally encouraging state banks to acquire national charters in 1865.[31] This preference for national charters would not last into the 20th Century.

From the postbellum period onwards, federal policy regarding state charters softened, moving towards the goal of parity between state and federal bank charters in order to allow equal competition between nationally and state-chartered banks.[32] This shift accelerated in the 20th Century. In 1927, Congress passed the McFadden Act, specifically allowing nationally chartered banks to branch within a state to the extent state-chartered banks in that state could in order to achieve exact precision between national and state banks within each state.[33] This measure was enacted in reaction to the rise in

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[28] *See generally* McDermott Inc. v. Lewis, 531 A.2d 206 (Del. 1987) (applying the internal affairs doctrine).

[29] For information on the distinction between regulation and supervision, see *Banking Supervision*, FED. RSRV. EDUC. https://www.federalreserveeducation.org/about-the-fed/structure-and-functions/banking-supervision [https://perma.cc/S6N4-PHX6] (last visited Nov. 17, 2020). State-chartered banks retain the power to switch to a national charter today, and vice versa for nationally chartered banks. *See, e.g.*, Dan Ennis, *OCC Signs Off on Fifth Third's Switch to National Bank*, BANKING DIVE (Sept. 12, 2019), https://www.bankingdive.com/news/fifth-third-occ-national-bank-charter/562741 [https://perma.cc/WN2V-XLHY] (detailing the OCC's approval of a Cincinnati-based bank's application for a national charter).

[30] Act of June 3, 1864, ch. 106, § 41, 13 Stat. 111, (codified as amended at 12 U.S.C. § 548) (limiting state taxation of nationally chartered banks); *see also* Samuel B. Chase, Jr., *State Taxation of Banks*, 32 L. & CONTEMP. PROBLEMS 149, 150 (1967) (noting that courts have upheld federal power to determine a state's ability to tax national banks).

[31] FED. RSRV. BANK OF PHILA., THE STATE AND NATIONAL BANKING ERAS: A CHAPTER IN THE HISTORY OF CENTRAL BANKING 12 (2016), https://wayback.archive-it.org/8115/20190122150741/https://www.philadelphiafed.org/-/media/publications/economic-education/state-and-national-banking-eras.pdf?la=en [https://perma.cc/YEA4-URFS].

[32] *Compare* Henry N. Butler & Jonathan R. Macey, *The Myth of Competition in the Dual Banking System*, 73 CORNELL L. REV. 677, 681–83 (1988) (detailing the Congressional desire to eliminate Dual Banking during the civil war), *with* E. A. GOLDENWEISER, IRA CLERK, M. J. FLEMING, L. R. ROUNDS, E. L. SMEAD, FED. RSRV. COMMITTEE ON BRANCH, GROUP, AND CHAIN BANKING, THE DUAL BANKING SYSTEM IN THE UNITED STATES 1–16 (1930), (discussing the transition from the Civil War Period to the early 20th Century, during which a "form of rivalry which has been described as a competition in laxity" emerged in the Dual Banking system).

[33] Ch. 191, § 7, 44 Stat. 1224, 1228–29.

expanded intrastate chartering authority of state banks. For most of American history, banks were limited to one location. In interpreting the McFadden Act, the Supreme Court itself noted the "competitive equality" that Congress seeks to establish between state and nationally chartered banks, especially given the "competitive tensions inherent in a dual banking structure where state and national banks coexist."[34]

Later, when some states began to allow *inter*state branching, the Federal government acted again to restore parity to the Dual Banking system by passing the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994.[35] Again, Riegle-Neal respected parity within each state by only granting the power to branch between states to national banks chartered in those states in which state banks also had this authority.[36]

Another example of the importance that Congress places on parity is deposit insurance, which today covers consumer bank deposits for all banks, state and national, as of 1950. The Original Banking Act of 1933 did not mandate that state-chartered banks acquire deposit insurance from the Federal Deposit Insurance Company, but this was remedied with the Federal Deposit Act of 1950.[37] More recently, in 1991, Section 24 of the Federal Deposit Insurance Corporation (FDIC) Improvement Act was passed to limit the corporate powers of state-chartered, FDIC insured banks to those given to nationally chartered banks.[38] Collectively, these examples suggest that Congress has endorsed parity within our Dual Banking system by limiting or expanding the power of national or state-chartered banks to ensure that one would not overwhelm the other.

B. A National Consensus

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[34] First Nat'l Bank v. Dickinson, 396 U.S. 122, 131 (1969); *see also id.* at 133 ("The policy of competitive quality is therefore firmly embedded in the statutes governing the national banking system.").

[35] Pub. L. No. 103-328, 108 Stat. 2338 (codified in scattered sections of 12 U.S.C.).

[36] *See* 12 U.S.C. § 36(c) ("A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, *if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question*") (emphasis added); 12 U.S.C. § 1831u(a)(4)(A) ("An interstate merger transaction may involve the acquisition of a branch of an insured bank without the acquisition of the bank *only if the law of the State in which the branch is located* permits out-of-State banks to acquire a branch of a bank in such State without acquiring the bank.") (emphasis added).

[37] *See* Federal Deposit Insurance Act of 1950, Pub. L. No. 81-797, § 5 (codified as amended at 12 U.S.C. § 1815(a)(1)) (extending deposit insurance to almost all depository institutions, state and national).

[38] Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, §303(a), 105 Stat. 2236, 2349–53 (codified as amended at 12 U.S.C. § 1831(a)).

This respect, and at times, demand for parity between national and state banks has not been pursued by the federal government alone. Similarly, state legislatures have acted through "wild card statutes," which in effect "grant[] state-chartered banks the power to engage in any activities permitted for national banks."[39] The structure of these statutes varies immensely from state to state, but regardless of their form they serve as a sign that the federalist interests promoted by a competitive Dual Banking system are favored both by the national and state governments.[40] In fact, their "near-unanimous adoption" by state legislatures suggests that there is a national consensus on the issue.[41]

In instances in which state governments have tried to directly impede the powers of nationally chartered banks rather than establishing competitive parity, in effect breaking the rules of our Dual Banking system, the Supreme Court has ruled in favor of preemption. In *Barnett Bank v. Nelson*, the court held that any state laws which "significantly interfere with the national bank's exercise of its powers" are preempted by the original National Bank Act of 1863.[42] In this case, Florida had made it illegal for banks of any kind to sell insurance, a power which national legislation had granted to all nationally chartered banks.[43] The Supreme Court ruled that because the state law was in clear conflict with the federal law authorizing the sale of insurance by national banks, it was preempted.[44] The Barnett preemption standard has since been interpreted to "hold a wide variety of state laws preempted."[45] This is not to say that the Supreme Court was ratifying a national policy of hostility to state banking preferences. Instead, it was confirming the power of the federal government to determine the powers of its own banks, just as states generally have over their own chartered institutions. This in effect forced states to turn to the federal legislative process in order to limit the terms on

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[39] JAY B. SYKES, CONG. RSCH. SERV., R45081, BANKING LAW: AN OVERVIEW OF FEDERAL PREEMPTION IN THE DUAL BANKING SYSTEM 8 (2018).

[40] John J. Schroeder, *"Duel" Banking System? State Bank Parity Laws: An Examination of Regulatory Practice, Constitutional Issues, and Philosophical Questions*, 36 IND. L. REV. 197, 202–08 (2003).

[41] *Id.* at 200.

[42] Barnett Bank v. Nelson, 517 U.S. 25, 33 (1996).

[43] *Id.* at 28–29 (citing 12 U.S.C. § 92 and FLA. STAT. § 626.988 (Supp. 1996) (repealed by Laws 1999, c. 99-388, § 8, eff. July 1, 1999)).

[44] *See id.* at 34 ("The Federal Statute before us, as in *Franklin Nat. Bank*, explicitly grants a national bank an authorization, permission, or power."). Interestingly, the court found that the McCarran–Ferguson Act's special state insurance law pre-emption standard under 15 U.S.C. § 1012(b) did not apply because the federal law authorizing national banks to sell insurance specifically related to the business of insurance. *Id.* at 38. This provision of the act bears a functional similarity to Dodd-Frank's OCC pre-emption standard under Section 1044.

[45] SYKES, *supra* note 39, at "Summary."

which national bank charters could compete, consistent with our Dual Banking system.

II. RECENT DEVELOPMENTS IN DUAL BANKING

This system of parity under Dual Banking continued until 2004, according to proponents of Section 1044, when the Office of the Comptroller of the Currency ("OCC") published a final rule on preemption "clarifying the applicability of state law to national banks."[46] This OCC rulemaking, they argued, expanded the scope of federal preemption of state banking laws to "create large holes in the regulatory fabric that encourage[d] lenders to use a national charter to evade local protection."[47] These OCC rules[48] were directly responded to in Dodd-Frank in the form of Section 1044,[49] which curtails the preemption of state banking laws affecting nationally chartered banks.

A. The 2004 OCC Rules

The crucial language in the 2004 OCC Rules clarified that state laws are preempted if they "obstruct, impair, or condition a national bank's exercise of its lending, deposit-taking, or other powers granted to it under Federal law."[50] This left state laws in force over national banks only to the extent that they had an "incidental" effect on "a national bank's exercise of its lending, deposit-taking, or other powers granted to it under Federal law."[51] Critics alleged that this standard for preemption was akin to a kind of field-preemption[52] which largely eviscerated, inter alia, state consumer lending laws.[53] Senator Elizabeth Warren, one of the chief architects of Dodd-Frank,

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[46] OFFICE OF THE COMPTROLLER OF THE CURRENCY, OCC BULL. NO. 2004-6, PREEMPTION AND VISITORIAL POWERS: TWO FINAL RULES (2004).
[47] Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 83 (2008).
[48] *See infra* Section II.A.
[49] *See infra* Section II.B.
[50] Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1904 (Jan. 13, 2004) (codified at 12 C.F.R. pts. 7, 34).
[51] *Id.* at 1911–12.
[52] *See* Arizona v. United States, 567 U.S. 387, 399 (2012) ("[T]he States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its *exclusive* governance.") (emphasis added) (discussing field preemption as a form of preemption in which all state law governing an area is preempted by federal law according to Congress's wishes).
[53] *See generally* Wook Bai Kim, *Challenging the Roots of the Subprime Mortgage Crisis: The OCC's Operating Subsidiaries Regulations and* Watters v. Wachovia Bank, 21 LOY.

and later a favored candidate for the first official director of the Consumer Financial Protection Bureau ("CFPB"), was an early critic of this preemption standard. In 2008 she suggested that the preemption standard enshrined in the 2004 rules was so broad that it could arguably render nationally chartered banks "free to flaunt all state laws."[54]

The OCC maintained that its new preemption rule was only intended to "distill" the various preemption doctrines established by the Supreme Court under the National Bank Act, not to expand upon them.[55] It also explicitly identified areas of state law that it did not believe the National Bank Act generally preempted for national banks, including "contracts, collection of debts, acquisition and transfer of property, taxation, zoning, crimes, torts, and homestead rights."[56]

Irrespective of the exact scope of the 2004 OCC rules, it is clear that a great deal of state consumer finance protection laws were covered, and critics allege that the sort of predatory loans which caused the 2008 financial crisis would have been offered less frequently if the 2004 OCC rules had not been promulgated.[57] The extent to which state consumer finance protection laws actually would have reduced the quantity of subprime mortgages securitized

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CONSUMER L. REV. 278, 287 (2009) ("[T]he states' ability to enforce their consumer protection laws was effectively eliminated and, in fact, a regime of de facto 'field preemption' of the states' regulatory power has been created."); Arthur E. Wilmarth Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 ANN. REV. BANKING & FIN. L. 225, 228 (2004) ("[T]he OCC has deliberately crafted its rules to accomplish a sweeping preemption of state laws that is equivalent to the 'field preemption' regime established by the Office of Thrift Supervision ("OTS") for federal savings associations and their operating subsidiaries."). *But see* Dori K. Bailey, *A Defense of the Doctrine of Preemption: Revealing the Fallacy That Federal Preemption Contributed to the Financial Crisis*, 16 U. PA. J. CONST. L. 1041, 1097–1103 (2014) (arguing that the preemption of state laws affecting loan origination did not contribute to the 2008 crisis).

[54] Elizabeth Warren, *Banks: State Laws Not for Us*, CREDIT SLIPS (May 6, 2008, 8:21 PM) https://www.creditslips.org/creditslips/2008/05/banks-state-law.html [https://perma.cc/ZY57- D2V7].

[55] *See* SYKES, *supra* note 39, at 16 ("The OCC explained that it intended the phrase 'obstruct, impair, or condition' to function as the distillation of the various preemption constructs articulated by the Supreme Court . . . and not as a replacement construct that is in any way inconsistent with those standards." (internal quotation omitted)).

[56] Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1905 (Jan. 13, 2004) (codified at 12 C.F.R. pts. 7, 34). This certainly implies that the 2004 OCC rules did not purport to preempt all state laws related to the business of banking.

[57] *See e.g.*, Arthur E. Wilmarth, Jr., *The Dodd-Frank Act's Expansion of State Authority to Protect Consumers of Financial Services*, 36 J. CORP. L. 893, 897 (2011) ("Regulatory inaction and preemption by federal banking agencies played a significant role in allowing abusive nonprime lending to grow and spread during the past decade."); LEI DING, ROBERTO G. QUERCIA, CAROLINA REID & ALAN WHITE, CTR. FOR CMTY. CAPITAL, THE PREEMPTION EFFECT: THE IMPACT OF FEDERAL PREEMPTION OF STATE ANTI-PREDATORY LENDING LAWS ON THE FORECLOSURE CRISIS 19 (2010) ("[P]reemption consistently increased the default risk of privately securitized mortgages originated by the OCC lenders . . . .").

at the time of the 2008 financial crisis is beyond the scope of this paper, but it is beyond dispute that subprime lending was a major factor in the crisis.[58]

B. Dodd-Frank's Response

In 2010, Dodd-Frank made two targeted changes to the preemption standards for state "consumer financial laws," which are defined as state laws "that do[] not directly or indirectly discriminate against national banks and that directly and specifically regulate[] the manner, content, or terms and conditions of any financial transaction" of a "consumer."[59] First, Dodd-Frank revised the scope of state laws affecting the operation of national banks preempted under the National Bank Act. Second, Dodd-Frank mandated courts to use *Skidmore* deference when evaluating rules promulgated by the OCC which purport to preempt state law.

Section 1044 of Dodd-Frank set out three alternative criteria for the preemption of state consumer financial protection laws. First, such a law could be preempted if it had a "discriminatory effect on national banks, in comparison with the effect of the law on a bank chartered by that State."[60] This provision clearly displays an interest in the parity of state and national bank charters, much in the same way that Riegle-Neil did with respect to interstate branching.

Second, a state consumer finance protection law could be preempted if "in accordance with the legal standard for preemption" established in *Barnett Bank*, "the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers."[61] Clearly this provision implies that Congress believed the 2004 OCC rules went beyond the preemption standard established in *Barnett Bank*.[62] Notably, this provision also limited OCC determinations that a state law was preempted under Dodd-Frank to case-by-case determinations, and only after consultation with the newly created Consumer Finance Protection Bureau.[63]

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[58] *See* FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES xxiii (2011) ("We conclude collapsing mortgage-lending standards and the mortgage securitization pipeline lit and spread the flame of contagion and crisis.").

[59] 12 U.S.C. § 25b(a)(2).

[60] 12 U.S.C. § 25b(b)(1)(A).

[61] 12 U.S.C. § 25b(b)(1)(B); *see also* Barnett Bank v. Nelson, 517 U.S. 25, 33 (1996) (providing the preemption standard).

[62] Otherwise there would be no reason to revise the relevant preemption standard after the 2004 OCC rules.

[63] *See* 12 U.S.C. § 25b(b)(3)(A) ("[T]he term 'case-by-case basis' refers to a determination pursuant to this section made by the Comptroller concerning the impact of a particular State consumer financial law on any national bank . . . ."); 12 U.S.C. § 25b(b)(3)(B) ("When making a determination on a case-by-case basis that a State consumer financial law of

Third, a state law could be preempted if it was preempted by federal law outside of Title 62, in which Dodd-Frank is housed.[64]

If there was any doubt as to whether the Dodd-Frank preemption standard would actually narrow the preemption powers of the OCC, cases immediately following Dodd-Frank's passage eliminated it. In 2011, a federal court held in *In Re Checking Account Overdraft Litigation* that national banks were not exempt from certain state "bad faith" tort actions that related to the management of depository accounts.[65] This holding was especially notable because under OCC rules both before and after Dodd-Frank, state law concerning the management of checking accounts was usually preempted.[66] More recently in 2018, the Supreme Court denied cert in *Lusnak v. Bank of America, N.A.*, in which the 9th Circuit had held that state laws requiring nationally chartered banks to pay interest on escrow accounts were not preempted under Dodd-Frank's preemption standards, despite the fact that interest payments on deposits lie at the heart of banking activity.[67] Some commentators have suggested, however, that the Supreme Court's unwillingness to grant cert in that case may have had more to do with certain Justices' hostility to *Chevron* deference, rather than their opinions on OCC preemption.[68]

Regardless of its precise effects, Section 1044 was clearly intended to restrict the extent to which the OCC can allow national banks to operate independent of state laws relating to consumer finance protection. In fact, the original proposal for financial reform crafted by the Obama Administration in June of 2009 would have "eliminated NBA preemption of state consumer

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another State has substantively equivalent terms as one that the Comptroller is preempting, the Comptroller shall first consult with the Bureau of Consumer Financial Protection . . . .").

64 12 U.S.C. § 25b(b)(1)(C).

65 *See* In Re Checking Account Overdraft Litigation, 797 F. Supp. 2d 1312, 1320, 1322 (S.D. Fla. 2011) (applying "the standard for preemption in the context of the NBA [as] provided by an amendment to the NBA, found in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010").

66 *See* Gregory D. Omer, *Federal Banking Law Preemption in the Post-Dodd Frank World: A Review of Significant Developments*, BANKING L. COMM. J. (A.B.A., Chi., Ill.), Apr. 1, 2019, https://www.americanbar.org/groups/business_law/publications/committee_newsletters/ban k ing/2019/201904/fa_1/ [https://perma.cc/LH2S-MRUQ] (citing Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1916 (Jan. 13, 2004) and 12 C.F.R. 7.4007(b)(2) (2020)).

67 Lusnak v. Bank of Am., 883 F.3d 1185, 1194–97 (9th Cir.), *cert. denied*, 139 S. Ct. 567 (2018).

68 *See* Andrew Tauber, Reginald R. Goeke & David L. Beam, *US Supreme Court Refuses to Review Ninth Circuit* Lusnak *Decision Requiring National Banks to Abide by State Interest-on-Escrow Laws*, MAYER BROWN (Nov. 20, 2018), https://www.mayerbrown.com/en/perspectives-events/publications/2018/11/us-supreme-court-refuses-to-review-ninth-circuit-i [https://perma.cc/2HT9-M5R2] (suggesting that *Lusnak*, a decision "palpably wrong and contrary to long-standing precedent governing a critical area of the economy," was a prime opportunity for the Supreme Court to limit *Chevron* deference).

protection laws altogether."[69] This approach failed to gain traction in Congress, and the codification of *Barnett Bank*'s preemption standard in Section 1044 was ultimately proposed by then-representative Barney Frank of Massachusetts.[70]

The second notable preemption provision in Section 1044 is the command to courts to "assess the validity" of OCC preemption determinations "depending upon the thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency, the consistency with other valid determinations made by the agency, and other factors which the court finds persuasive and relevant to its decision."[71] This language is directly lifted from *Skidmore v. Swift & Co.*, a decision which evaluated a federal agency's interpretive rules for consistency with law according to what is now called *Skidmore* deference.[72] At a descriptive level, mandating *Skidmore* deference as opposed to *Chevron* deference makes any OCC rulemakings less likely to pass judicial review, as *Skidmore* review is less deferential than *Chevron* review, which only requires that agency interpretations of the statute be reasonable.[73] At least one study has found that agency interpretations reviewed under *Skidmore* are 21.4% less likely to survive judicial scrutiny than those reviewed under *Chevron* deference.[74]

More importantly, what the command to use *Skidmore* deference really entails is a radical departure from agency procedure as we know it today.[75] Courts reviewing OCC preemption determinations cannot defer to the OCC's interpretation of Dodd-Frank or the National Bank Act. They must decide each preemption question as a matter of law, effectively entrusting each "case-by-case" preemption decision to the judiciary, with the hope that the assigned judge is amenable to Dodd-Frank's policy goals.

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[69] SYKES, s*upra* note 39, at 19.
[70] *Id.*
[71] 12 U.S.C. § 25b(b)(5)(A).
[72] *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (holding that waiting time could count as working time under the Fair Labor Standards Act of 1938).
[73] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).
[74] *See* Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 6 (2017) ("[A]gency interpretations were significantly more likely to prevail under *Chevron* deference (77.4%) than *Skidmore* deference (56.0%) or, especially, de novo review (38.5%).").
[75] Section 1044's hostility to *Chevron* deference is another area in which Dodd-Frank seems comparatively conservative. Generally, limiting the reach of *Chevron* deference is associated with conservative legal advocates. *See* Kimberly Strawbridge Robinson, *High Court Could Take First Step to* Chevron *Doctrine's Demise*, BLOOMBERG L. (Mar. 28, 2019, 4:56 AM), https://news.bloomberglaw.com/us-law-week/high-court-could-take-first-step-to-chevron-doctrines-demise [https://perma.cc/E5C7-PM6P] ("Conservatives have increasingly attacked [the *Auer* and *Chevron*] doctrines in service of a grander plan to curb the administrative state.").

III. SECTION 1044'S INCONSISTENCIES WITH FEDERALISM AND DUAL BANKING

It is important to note the kind of Federalism problem that Section 1044 presents. Formally, there is no purely constitutional issue with Section 1044. The federal government is generally free to curtail the degree to which it authorizes its agencies to preempt state law under the Supremacy Clause, which establishes that federal law "made in [p]ursuance" of the Constitution is "the supreme [l]aw of the [l]and."[76] This includes agency rulemakings as authorized by federal law which express the intent of Congress as evaluated under *Chevron* deference, or presumably other standards of administrative review as instructed by Congress.[77] Conversely, as long as the OCC's 2004 rules were a reasonable interpretation of the statutory authority accorded to the agency under the National Bank Act, or later by Dodd-Frank, then they should be valid. Alternatively, if the scope of the preemption afforded by the 2004 rules was too broad to be a reasonable interpretation of Congress's intent, then they should be invalidated. At their core, these are all questions of statutory interpretation.

Other traditional constitutional Federalism disputes are also not applicable here. The preemption that follows national bank charters does not implicate the regulation of any traditional state functions by the federal government,[78] or federal funding requirements,[79] or the commandeering of state officials or resources.[80] The Federalism problem that arises here may be unique, in that the extent to which state law is preempted depends on the number of available and operating national bank charters, but this does not seem like a distinction worthy of constitutional significance. Recent

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[76] U.S. CONST. art. VI, cl. 2.

[77] *But see* William N. Eskridge, Jr., *Vetogates,* Chevron*, Preemption,* 83 NOTRE DAME L. REV. 1441, 1442 (2008) (arguing that *Chevron* should not apply in full for purposes of the Supremacy Clause because, strictly speaking, rulemakings are not federal law made in pursuance of the Constitution).

[78] *See e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 548 (1985) (discarding the project of identifying "traditional governmental functions," which are immune from federal regulation).

[79] *See e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 581 (2012) (holding that the Medicaid expansion conditions under the Affordable Care Act were as coercive as "a gun to the head"); South Dakota v. Dole, 483 U.S. 203, 211 (1987) (holding that the federal government conditioning highway funding on states setting their legal drinking age to twenty-one was not coercive).

[80] *See e.g.*, Printz v. United States, 521 U.S. 898, 935 (1997) (holding that the Brady Handgun Violence Prevention Act was unconstitutional in part because it commandeered state and local law enforcement officers to aid the federal government in enforcing background checks); New York v. United States, 505 U.S. 144, 176 (1992) (holding that the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act, which forced certain states to take title to nuclear waste, constituted unconstitutional commandeering).

challenges based on this observation that rely on the Tenth Amendment have been largely ineffective in the Fintech context, where state banks and state bank regulators have challenged special purpose national Fintech charters made available to non-bank financial institutions, worrying the charters would allow a broader market of financial companies to avoid state law through federal preemption.[81]

The actual Federalism problem with Section 1044 is that it departs from our Dual Banking system and the Federalism benefits that this system guarantees. By empowering state banking agencies to regulate the banking activities of federal banks, Section 1044 takes us towards more of a state-centered banking monoculture instead of a system predicated on parity between state and nationally chartered banks that exist in distinct regulatory spheres. While it may seem counterintuitive, federal preemption of state law in this context actually serves the cause of Federalism by preserving competition between state and national banks to promote financial innovation[82] and ensuring democratic accountability and political transparency,[83] which not only guarantees that banking policy will be democratic, but also that it can evolve through productive national discourse.

Section 1044 is also unnecessary given that the structure of our federal government protects states from encroachment by federal banking regulators,[84] states possess institutional clout with federal regulators[85] through which they can affect federal banking policy, and states have a certain residuum of regulatory power due to some banks' preference for local regulators.[86] In short, Section 1044 deprives us of Federalism benefits in a policy area in which states are clearly capable of fending off Federal encroachment on their own.

A. Competition and Policy Innovation

One of the most commonly cited benefits of our Federalism is the experimentation and competition that it fosters between states, and in a Dual Banking context these benefits also accrue to the state *and* federal banking systems. As Larry Kramer said, states can compete on terms of "regulatory innovation" for "capital and taxpayers."[87] Or, as Justice Brandeis phrased it

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[81] *See generally* Complaint for Declaratory and Injunctive Relief, Conference of State Bank Supervisors v. Office of the Comptroller of the Currency, No. 1:18-cv-02449, 2019 WL 4194541 (D.D.C. 2018) (listing the grievances that the CSBS has with the OCC's Fintech charter).

[82] *See infra* Section III.A.

[83] *See infra* Section III.B.

[84] *See infra* Section III.C.

[85] *See infra* Section III.D.

[86] *See infra* Section III.E

[87] Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1499 (1994).

in *New State Ice Co. v. Liebmann*, states may "serve as a laboratory . . . without risk to the rest of the country."[88]

The problem with Section 1044's three preemption conditions is that they reduce the extent to which competition can occur both between state and federally chartered banks, as well as between different state banks. National charters are already a clear minority in the grand scheme of our banking system, with the FDIC reporting 7,214 OCC charters as of November 27, 2020, compared to 17,341 state-chartered banking institutions.[89] By subjecting all nationally chartered banks to "a litany of consumer protection rules that vary from state to state,"[90] Dodd-Frank may ultimately reduce the attractiveness of federal charters or encourage consolidation in order to spread the cost of regulatory compliance, undermining the goal of charter competition in terms of parity.[91]

Limiting the preemptive effect of the NBA also threatens to compromise charter competition as between states, as occurred in *Madden v. Midland Funding*, a post Dodd-Frank case from the Second Circuit in which the court held that "federal preemption of state usury laws under the National Banking Act does not extend to certain entities holding debt originated by national banks."[92] These entities include many third party holders of debt originated by national banks, reducing the ability of national banks to originate and sell debt effectively.[93] One of the principal benefits of the NBA is that it limits the effect of state laws on the "business of banking," including loan origination, to those laws passed by the state in which a state bank is chartered, "allow[ing] lenders and borrowers to avoid time-consuming investigation of each state's usury laws by ensuring that a lender generally need only consider the usury law that governs in the state listed on its

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[88] 285 U.S. 262, 311 (1932).

[89] *Institution Directory: Current List of All Institutions*, FDIC, (Nov. 27, 2020), https://www7.fdic.gov/idasp/warp_download_all.asp [https://perma.cc/7PFP-7B2R].

[90] Bar-Gill & Warren, *supra* note 47, at 83.

[91] *See* Avner Mendelson, *Survival Strategy: Cut the Number of Banks in Half*, AM. BANKER: BANKTHINK (Jan. 30, 2018, 12:30 PM), https://www.americanbanker.com/opinion/survival-strategy-cut-the-number-of-banks-in-half [https://perma.cc/DFY3-3R32] (noting the rising rate of consolidation of banks over the last two decades). *See generally* RON FELDMAN & PAUL SCHRECK, FED. RSRV. BANK OF MINNEAPOLIS, ASSESSING COMMUNITY BANK CONSOLIDATION (2014), https://www.minneapolisfed.org/~/media/files/pubs/eppapers/14-1/epp_14-1.pdf [https://perma.cc/A8U8-7PH3] (examining research that suggests that increased regulatory burdens after the financial crisis have accelerated the consolidation of community banks).

[92] *See* Michael Marvin, *Interest Exportation and Preemption:* Madden*'s Impact on National Banks, the Secondary Credit Market, and P2P Lending*, 116 COLUM. L. REV. 1807, 1807 (2016); Madden v. Midland Funding, LLC, 786 F.3d 246, 251 (2d Cir. 2015) (applying the "significantly interfere" standard from *Barnett Bank v. Nelson*, 517 U.S. 25 (1996)).

[93] *See* Marvin, *supra* note 92, at 1814 ("These new transaction costs imposed by *Madden* are particularly high because remedies for usury law violations also vary among states.").

charter."[94] This is especially reasonable given the large variance in state usury limits, which can vary from 25% to 8% without much reason across state lines, but the number of state laws affecting the "business of banking" which could hamper efficient interstate banking are too numerous to mention.[95] Liberal preemption standards are necessary in order to allow both national and state-chartered banks to compete on equal terms with other state banks, which makes both systems more efficient and allows for local policy variation and innovation.

This reality is reflected both in the history of intra and interstate branching, in which state banks pressed the national government and the governments of their sister states to modernize their banking systems to allow more liberal branching.[96] It continues in the wide diversity of regulatory regimes which govern each state charter system. For instance, while at the federal level, and in most states, charters may be obtained for credit unions, thrifts and regular bank institutions, some states such as Delaware and Wyoming do not offer credit union charters.[97] Many states, such as Pennsylvania and New Jersey consolidate chartering and supervision of all of their depository institutions in one state agency, whereas at the federal level they are dispersed.[98] Even now, the federal government is

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[94] *Id*. The effect of this part of the NBA is similar to the Delaware internal affairs doctrine. *See e.g.*, McDermott Inc. v. Lewis, 531 A.2d 206, 218–19 (Del. 1987) (applying the internal affairs doctrine to limit the effect of non-Delaware law on the Delaware corporation in question).

[95] Marvin, *supra* note 92, at 1816.

[96] *See supra* Section I.A.

[97] SUNSET ADVISORY COMM'N, SUNSET HEARING MATERIAL 9 (2008), https://web.archive.org/web/20081030022451/http://www.sunset.state.tx.us/81streports/cud/cud_hm.pdf [https://perma.cc/VDD2-B6YF].

[98] The Pennsylvania Department of Banking and Securities is responsible for approving charter applications for Pennsylvania state-chartered banks. *See* 7 PA. CONS. STAT. §§ 1005, 1007 (2020) (describing the application process for Pennsylvania state charter applicants). The state legislature also gave it the power to "exercise . . . discretionary powers," "promulgat[e] . . . rules and regulations," and "examin[e] and supervis[e]" depository institutions. 7 PA. CONS. STAT. § 103(b) (2020). *See also* 7 PA. CONS. STAT. §§ 112, 115, 1604, 1605, 1703, 1808 (2020) (authorizing various supervisory and regulatory powers for the Department). The New Jersey Department of Banking & Insurance is also responsible for approving charter applications for depository institutions chartered by the state of New Jersey, as well as supervising those institutions. *See* N.J. REV. STAT. §§ 17:9A-9, 17:12B-14, 17:12B-246 (2020) (setting out the charter application requirements for New Jersey chartered depository institutions); N.J. REV. STAT. § 17:9-43 (2020) (establishing the examination, supervisory and regulatory authority of the Commissioner of the New Jersey Department of Banking & Insurance). Compare these schemes with the federal one, which features a multitude of regulators. The Office of the Comptroller of the Currency is responsible for the chartering of National Banks and Federal Savings Associations. 12 U.S.C. §§ 21, 1464. The National Credit Union Administration charters federal credit unions. 12 U.S.C. § 1759. But the number of regulators, examiners, and supervisors that oversee these

experimenting with the establishment of new "Fintech" charters in order to extend financial supervision into the "shadow banking" industry, which has evaded most regulation and supervision since 2008.[99]

All of this experimentation has not been fruitless. States have taken a particularly rigorous role in promoting the development of financial services, inspiring our modern form of checking accounts, branching, real estate lending, deposit insurance (a policy whose invention is usually attributed to the federal government), and trust services, which have since been emulated by the banks of sister states and national banks.[100]

B. Democratic Accountability and Political Discourse

Another source of conflict between Section 1044's preemption provisions and Federalism principles is their tendency to erode democratic accountability. Just as when "the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished,"[101] when the federal government allows state regulators to set policy for national banks, or other state banks, it becomes unclear which government is responsible for that action. Granted, our system of financial regulation is already hopelessly complex, but that does not mean that we should not work towards something better. A world in which the public can better understand and take action to reform national or state financial institutions is a world in which more reform would likely occur. The federalist

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institutions includes the Office of the Comptroller of the Currency and the National Credit Union Administration themselves as well as the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Consumer Finance Protection Bureau to name a few. MARC LABONTE, CONG. RSCH. SERV., R44918, WHO REGULATES WHOM? AN OVERVIEW OF THE U.S. FINANCIAL REGULATORY FRAMEWORK 7–16 (2017). For a sympathetic view of this regulatory diversity and more detail on the federal financial regulatory landscape, see Lawrence J. White, *In Defense of Regulatory Diversity*, MONEY & BANKING (Oct. 16, 2017), https://www.moneyandbanking.com/commentary/2017/10/14/in-defense-of-regulatory-diversity [https://perma.cc/85NL-ZHWF].

[99] *See* Todd H. Baker, Charter or Not, Fintechs Are Already 'Banking', AMERICAN BANKER: BANKTHINK (Nov. 22, 2019, 9:00 AM), https://www.americanbanker.com/opinion/charter-or-not-fintechs-are-already-banking [https://perma.cc/3CF4-Z7PH] (discussing Fintech charters and whether "inviting fintech, along with other types of parallel and shadow banking entities, into the regulated banking system—rather than pushing them away—is the right policy outcome to manage systemic risks").

[100] Schroeder, *supra* note 40, at 201 (citing Arthur E. Wilmarth, Jr., *The Expansion of State Bank Powers, the Federal Response, and the Case for Preserving the Dual Banking System*, 58 FORDHAM L. REV. 1133, 1156 (1990)).

[101] *See* New York v. United States, 505 U.S. 144, 168 (1992) (discussing how the commandeering of the State of New York per the Low-Level Radioactive Waste Policy Amendments Act reduced the accountability of the Federal government by allowing it to act through New York).

principles of democratic accountability underlying the holding in *New York v. United States* with respect to the anti-commandeering principle apply in full force here, even if Section 1044 does not constitute commandeering.[102]

Limiting the application of state banking law to the banks chartered by a given state also serves the discursive benefits of Federalism by facilitating "'dissenting by deciding,' giving political outliers an opportunity to force engagement, set the national agenda," and "offer a real-life instantiation of their views."[103] Clear examples of this kind of dissenting by deciding include the early adoption of depository insurance by eight states—Oklahoma, Kansas, Nebraska, South Dakota, Texas, Mississippi, North Dakota, and Washington after the panic of 1907—decades before the national government established the Federal Deposit Insurance Corporation.[104] These programs were all the more notable because they initially put their state-chartered institutions at a competitive disadvantage because of insurance costs, which their less scrupulous sister states and national bank competitors did not have to pay. These states eventually won the national conversation when the federal government acted after the Great Depression to establish the FDIC.[105] It is unclear whether the national government would have taken this action without the living case studies of these early adopters.

Another good example of the discursive benefits of Federalism leading to concrete national change is the national evolution of branching previously mentioned in this paper.[106] The McFadden and later acts were clear federal responses to aggressive state reforms which forced the hand of the national government into partially legalizing intra and interstate branching, in fear that their charters and other state charters would become obsolete.[107] While this change may appear a banal economic reform to most, the development of complex branching in America was revolutionary, and vigorously opposed by entrenched skeptics of banking who often harbored

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[102] *Id.*

[103] Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1895 (2014).

[104] Eugene Nelson White, *State-Sponsored Insurance of Bank Deposits in the United States, 1907–1929*, 41 J. ECON. HIST., 537, 537–38 (1981).

[105] Banking Act of 1933, Pub. L. No. 73-66, § 12B(a), 48 Stat. 162, 168 (1933) (current version at 12 U.S.C. § 1811(a)).

[106] *See supra* Section I.A.

[107] *See generally* Gary Richardson, Daniel Park, Alejandro Komai & Michael Gou, *McFadden Act of 1927*, FEDERAL RESERVE HISTORY, (Nov. 22, 2013), https://www.federalreservehistory.org/essays/mcfadden_act [https://perma.cc/3TRP-JV2Z] (discussing the history of the McFadden Act); Raghuram G. Rajan & Rodney Ramcharan, *Constituencies and Legislation: The Fight Over The McFadden Act Of 1927*, at 2 (Nat'l Bureau Econ. Rsch., Working Paper No. 17266, 2011) ("Before the McFadden Act, some states allowed state banks to open multiple branches, while others prohibited all branching. However, nationally chartered banks were, in all cases, not allowed to open branches . . . As a result, an increasing number of national banks gave up their charter . . . .") (citations omitted).

paranoias regarding large financial institutions related to anti-Semitism, including representative McFadden himself.[108] These changes would allow banks to diversify their geographic risk pools enough to permit later liberal reform such as the Community Reinvestment Act, which was passed in part due to the lack of credit provided to underserved communities in certain states which "prohibited interstate branching or acquisitions and in some cases restricted even intrastate branching, reducing competition," and "contribut[ing] to the perception that banking institutions were failing to adequately serve the credit needs of some residents of their communities."[109] It stands to reason that the more we allow states to impede on each other's ability to innovate their banking practices and bring those innovations into the national conversation, the less innovation we will actually see. Section 1044 makes it easier for states to stand in the way of this kind of innovation.

C. State Law is Protected by the Structure of the Federal Government

If we were concerned about the ability of states to influence national policy at all, then perhaps Section 1044's preemption provisions would be warranted, but all the evidence suggests that states are perfectly capable of influencing the federal consumer finance laws that apply directly to national banks. The traditional arguments advanced by the *Garcia* court regarding states' abilities to influence national policy apply here.[110] While the electoral college is apportioned to somewhat over-represent states as opposed to

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[108] McFadden was likely not the only member of Congress whose banking policy was informed by anti-Semitism, but he may have been the most outspoken. *See Congress Acts to Expunge McFadden Remarks on Jews*, JEWISH DAILY BULL., June 2, 1933, at 4 (reporting on a Congressional motion to expunge anti-Semitic remarks by Representative McFadden, which included quotations from the Protocols of the Elders of Zion in the House of Representatives). It is no accident that this prejudiced outburst was inspired by the Congress's consideration of the United States going off of the gold standard, which occurred within a week on June 5, 1933. H.R.J. Res. 192, 73rd Cong. (1933).

[109] Ben S. Bernanke, Chairman, Fed. Rsrv., Speech at the Community Affairs Research Conference, Washington, D.C.: The Community Reinvestment Act: Its Evolution and New Challenges, (Mar. 30, 2007), https://www.federalreserve.gov/newsevents/speech/Bernanke20070330a.htm [https://perma.cc/KGC3-XCP2].

[110] Kramer, *supra* note 87, at 1488–90. In *Garcia*, the Supreme Court noted the importance of the Senate as a political guarantee of State sovereignty.

> [The states] were given more direct influence in the Senate, where each State received equal representation and each Senator was to be selected by the legislature of his State. The significance attached to the States' equal representation in the Senate is underscored by the prohibition of any constitutional amendment divesting a State of equal representation without the State's consent.

Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 551 (1985) (citations omitted).

people,[111] the clearer example of the political safeguards of Federalism is the Senate, which was famously designed to directly represent state interests.[112] The limitations on federal power that the *Garcia* court claimed Article I creates are not relevant here, as bank chartering is a concurrent state and federal affair. At any rate, as Larry Kramer points out, the interpretation of Article I as an exclusive list of federal powers has been "obliterated" by the development of Commerce Clause doctrine since the early 20th Century.[113] Still, the disproportionate power that the Senate and the Electoral College afford to states in the federal government should allow them to influence federal banking policy such that direct state regulation of nationally chartered banks is unnecessary.

While the 17th Amendment to the U.S. Constitution has arguably watered down the power that the Senate gives states over national policy, it has not eliminated it, and a brief survey of the history of bank regulation in the United States reveals constant allowances for state authority.[114] In addition to the examples already mentioned, the very structure of the federal reserve system as established in 1913 reveals compromises for state interests. In what has come to be known as the Wilsonian Compromise, the Federal Reserve's Board of Governors was decentralized in regional reserve banks and staffed by private bankers from around the country in order to maintain a "balance of power . . . between local and national figures, much as the U.S. Constitution had done with states and national governments."[115] The Consumer Finance Protection Bureau itself, as established under Dodd-Frank, is proof that states are perfectly capable of establishing national institutions and laws to ensure that national banks are kept in check and adequately regulated within the realm of consumer finance and other areas of financial regulation.

This Congressional respect for the parity of state and national charters and for state banking regimes generally vindicates "Wechsler's claim that states are protected because Congress must overcome a heavy 'burden of persuasion' before displacing state law" even if this belief is not generally "an important part of the political scene in Washington today."[116] Even if there is no presumption against federal intrusion as a political norm in the

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[111] In that the electoral college apportions electors according to the number of Senate seats each state has, in addition to the number of representatives to which it is entitled.
[112] *See, e.g.*, Kramer, *supra* note 87, at 1489 ("[S]tates have direct control over the Senate through their equal representation in that body . . . .").
[113] *Id.* at 1488; *cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 324–26, 424 (1819) (finding that the necessary and proper clause authorizes the creation of a national bank).
[114] U.S. CONST. amend. XVII (ending the direct election of Senators).
[115] *See* CONTI-BROWN, *supra* note 7, at 22 (discussing the motivating principles behind the unique structure of the federal reserve).
[116] Kramer, *supra* note 87, at 1505.

modern Congress, in the realm of banking policy, it seems that there truly is a "local sensitivity to central intervention" as Wechsler suggested was necessary to protect our Federalism.[117] Even if our administrative agencies, such as the OCC, are not interested in preserving state consumer finance laws, there is nothing stopping Congress from passing its own which apply to national banks, as it has in the recent past. This approach would also likely result in more effective financial regulation, as "not all state agencies have experience with such large and complex institutions" like those which commonly acquire federal charters.[118]

D. States Possess Institutional Power over Federal Regulators

Another important check that states can rely on in order to establish their preferred consumer protection regime is the highly integrated nature of our banking regulatory system. In fact, federal regulators, and especially FDIC supervisors, who conduct regular "examinations"[119] of all state and federal FDIC insured banks rely on state regulators for large amounts of financial information. Bank examination is a specialized form of regulation in which examiners review the financial data of a bank on a regular basis in order to assess its "safety and soundness," which refers to the general health of the institution in question.[120] Federal examiners take examination data and generate what is referred to as a "CAMELS" rating, which assesses certain objective factors, like capital adequacy, asset quality, earnings levels and adequacy, liquidity adequacy, and sensitivity to market risk, as well as subjective information such as management capability, which relates to whether the bank's management makes sound decisions and operates their bank in a way which ensures "safety and soundness."[121] CAMELS ratings are

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[117] Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 547 (1954).
[118] Schroeder, *supra* note 40, at 202.
[119] For insight on the examination process from the FDIC's perspective, see generally *Bank Examinations*, FDIC, https://www.fdic.gov/regulations/examinations/ [https://perma.cc/5NBA-6G5G] (last updated Oct. 19, 2020).
[120] *See generally Safety & Soundness Supervision*, FED. RSRV. BANK ST. LOUIS, https://www.stlouisfed.org/bank-supervision/supervision-and-regulation/safety-soundness-supervision [https://perma.cc/9TML-9MUD] (providing an overview of the goals of examination); BD. OF GOVERNORS OF THE FED. RSRV. SYS., DIV. OF SUPERVISION AND REGULATION, COMMERCIAL BANK EXAMINATION MANUAL 3 (2020), https://www.federalreserve.gov/publications/files/cbem.pdf [https://perma.cc/5YMY-VZZP] (defining safety and soundness as "including assessing risk-management systems and financial condition as well as determining compliance with laws and regulations").
[121] *See id.* at 7 (describing the six components of the Uniform Financial Institutions Rating System, or "CAMELS" system). For a succinct summary of the Uniform Financial Institutions Rating System and the consequences of adverse CAMELS ratings, see Julie

extremely meaningful to banks and other depository institutions, as they influence the premium that must be paid for deposit insurance, change the relative likelihood of facing sanctions from supervisors, and affect banks' ability to expand or hire officers and directors.[122] And importantly, adverse CAMELS ratings are ordinarily not eligible for judicial review, but are instead subject to limited internal appeals processes which vary by regulator.[123] Indeed, some banks never receive any potential to appeal because the consequence of receiving a significantly adverse CAMELS rating may be swift involuntary receivership by the FDIC and liquidation.[124]

Especially since the passage of the Federal Deposit Insurance Act of 1950, the FDIC and other federal regulators have relied on state agencies for the information that they use to generate CAMELS reports, putting them in a "crucial role in administering federal law," especially with regards to the determination of subjective management factors.[125] Section 10(d)(9) of the FDI Act effectively mandates the Federal Financial Institutions Examination Council to reduce the extent to which federal supervisors engage in duplicative, costly examinations, and instead instructs federal and state banking agencies to work together in numerous areas, including:

> Conducting alternate, joint, and concurrent examinations of insured depository institutions, and of the branches and agencies of foreign banks that have been chartered by the states; Processing safety and soundness examination reports and applications on a timely basis; Using common examination report and application forms; Developing and issuing informal (e.g., board resolutions, memoranda of

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Andersen Hill, *When Bank Examiners Get it Wrong: Financial Institution Appeals of Material Supervisory Determinations*, 92 WASH. U. L. REV. 1101, 1107–11 (2015) and accompanying footnotes.

[122] *Id.* at 1108–09.

[123] 12 U.S.C. § 4806(f); *see also* Hill, *supra* note 121, at 1115–60 (discussing the history and nature of OCC, Federal Reserve, FDIC, and NCUA material supervisory determinations appeals processes).

[124] *But see* Builders Bank v. FDIC, 846 F.3d 272 (7th Cir. 2017) (holding that CAMELS ratings are not beyond judicial review, and disclosing Builders Bank's CAMELS rating); Nikhil Gore, *Seventh Circuit Holds Open a Narrow Path for Challenging Bank Supervisory Ratings*, COVINGTON, (Feb. 12, 2017), https://www.covfinancialservices.com/2017/02/seventh- circuit-holds-open-a-narrow-path-for-challenging-bank-supervisory-ratings/ [https://perma.cc/7RBN-KR77] (discussing the promise that Builders Bank holds for the judicial review of CAMELS ratings). The vast majority of bank liquidations make judicial review of CAMELS ratings impossible. *Id.* Even Builders Bank did not survive long enough to finish its appeal. Builders NAB LLC v. FDIC, 922 F.3d 775, 777 (7th Cir. 2019) ("Before the case could be resolved on remand, however, Builders Bank merged into a non-bank enterprise, Builders NAB LLC, and left the banking business.").

[125] *See* Gerken, *supra* note 103, at 1903 (discussing the leverage that states and local actors gain over the Federal government by being administrators of federal law).

> understanding or other similar agreements) and formal enforcement actions; Exchanging supervisory information; Offering federal agency training programs to state examiners; and Providing access to the federal agency databases.[126]

This allows state banking agencies to influence federal CAMELS ratings for all banks within their jurisdiction, turning "dissenters into decisionmakers, not just lobbyists or supplicants," and allowing them to "set policy rather than merely complain about it."[127] Unfortunately due to the immense secrecy surrounding supervisory information,[128] it is hard to say how much state supervisory data has actually influenced federal examination policy, but it is clearly possible for states to adjust the way in which they report managerial competency to the FDIC, using their own standards and language, in order to increase or decrease the scrutiny that certain lending practices or national banking institutions face.[129]

This "power of the servant" is endowed in state banking agencies simply by virtue of the immense difficulty of accumulating supervisory information. As with other areas of federal policy mandates, the federal government must rely on states to get the job of FDIC supervision done, which grants states "leverage" and "discretion in choosing how to accomplish [their] tasks."[130] And the fact that CAMELS ratings are effectively unreviewable by courts means that these state-influenced determinations would have immense staying power pending some costly federal change in examination policy.

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[126] FED. DEPOSIT INS. CORP., RMS MANUAL OF EXAMINATION POLICIES, at 1.1-11, https://www.fdic.gov/regulations/safety/manual/section1-1.pdf [https://perma.cc/4FVA-EWXH].

[127] Gerken, *supra* note 103, at 1903.

[128] For a comprehensive discussion of the great lengths to which federal regulators go in order to keep supervisory information confidential, see Margaret E. Tahyar, *Are Bank Regulators Special?*, CLEARING HOUSE: BANK POLICY INSTITUTE, https://www.theclearinghouse.org/banking-perspectives/2018/2018-q1-banking-perspectives/articles/are-bank-regulators-special [https://perma.cc/5S94-Q5CC] (last visited Apr. 15, 2020).

[129] We know at least that state banking agencies are represented on the Federal Financial Institutions Examination Council through the State Liaison Committee, whose chairman is a voting member of the Federal Financial Institutions Examination Council. *State Representation in Federal Agencies*, CONF. ST. BANK SUPERVISORS, (Oct. 30, 2017), https://www.csbs.org/state-representation-federal-agencies [https://perma.cc/JM3C-8TH2]. This means that States have some formal voting power to influence "uniform principles, standards, and report forms for the federal examination of financial institutions." *About the FFIEC*, FED. FIN. INST. EXAMINATION COUNCIL, (Apr. 15, 2020, 11:10 AM), https://www.ffiec.gov/about.htm [https://perma.cc/Z7MR-7PZY].

[130] Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1266 (2009).

Additionally, because state regulators serve "two masters," and one could argue they more directly serve their state constituencies,[131] they are not directly accountable to federal banking agencies that might object to the way in which this data is collected.[132]

Another example of regulatory integration serving as a source of state power that renders Section 1044's preemption provisions unnecessary comes from within Dodd-Frank itself. Since the inception of Dodd-Frank, the CFPB has presented itself as an ally to state attorneys general in the fight against predatory lending. In an address to the National Association of Attorneys General in March of 2011, the first official director of the CFPB, Richard Cordray, stated that the CFPB was "committed to building a strong partnership" with state attorneys general.[133] Part of the motivation for this alliance stemmed from the shared policy objectives of the CFPB and state attorneys general, as well as the limited resources of the CFPB, but it also followed from a recognition of the expertise of state attorneys general in areas where Cordray noted that they had "preceded" the CFPB.[134] Simply put, state attorneys general had been at the task of consumer finance protection for much longer than the CFPB had. Ultimately, consumer finance regulation is a national effort. Loans originated in Montana end up in collateralized debt obligations in Manhattan, and the federal government must rely on partnerships with state attorneys general to enforce federal banking policy.

An early example of this kind of cooperation occurred while Elizabeth Warren was still acting head of the CFPB. In a report to state attorneys

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[131] One particularly interesting example of state bank agencies flouting federal law to serve the interests of their constituencies is the tolerance of marijuana banking in jurisdictions that have legalized the substance at the state level. *See Colorado Banks Quietly Serving Cannabis Industry*, INS. J. (Oct. 4, 2019), https://www.insurancejournal.com/news/west/2019/10/04/544488.htm [https://perma.cc/HY67-HMHN] (noting that at least "35 banks and credit unions" served marijuana businesses from 2014 to 2019); Jesse Paul, *Colorado's Top Federal Prosecutor Says Banks Working with Marijuana Industry Have "No Carve Out" From Prosecutions*, COLO. SUN (Oct. 2, 2019, 5:00 AM) https://coloradosun.com/2019/10/02/marijuana-banking-federal-prosecution-colorado/ [https://perma.cc/K3NC-MZSD] (suggesting that federal prosecutors are well aware of the illegality of these operations); s*ee also* Tom Angell, *State Financial Regulators Press Congress to Allow Marijuana Banking Access*, FORBES (Apr. 16, 2019, 8:45 AM), https://www.forbes.com/sites/tomangell/2019/04/16/state-financial-regulators-press-congress-to-allow-marijuana-banking-access/#13625ce055c9 [https://perma.cc/6GGB-4YTL] (reporting on some bank regulators' efforts to secure congressional approval of marijuana banking).

[132] Bulman-Pozen & Gerken, *supra* note 130, at 1270–71.

[133] Richard Cordray, Remarks at the National Association of Attorneys General Spring Meeting: Partnering: The Consumer Financial Protection Bureau and State Attorneys General (Mar. 8, 2011), https://www.consumerfinance.gov/about-us/newsroom/partnering-the-consumer-financial-protection-bureau-and-state-attorneys-general/ [https://perma.cc/SAC5-36Y9].

[134] *Id.*

general, the CFPB's Consumer Bureau announced that the country's "five largest mortgage firms . . . saved more than $20 billion since the housing crisis began in 2007 by taking shortcuts in processing troubled borrowers' home loans."[135] While this report clearly serves as an example of the willingness of the CFPB to work with state agencies, at the time it also worried lawmakers who were threatened by the apparent "link between the Bureau of Consumer Financial Protection, led by [then] Harvard professor Elizabeth Warren, and the 50 state attorneys general who [were] leading the nationwide probe into the five firms' improper foreclosure practices."[136] The fledgling agency at that time had already begun to provide "advice" to attorneys general who were contemplating settlements with those mortgage firms, which speaks to a deep connection between the law enforcement capacity of state Attorneys General and the new federal consumer finance protection regime.[137]

Of course, there is always the risk that a national administration hostile to the interests of consumer finance protection will take office and reduce the effectiveness of federal consumer financial protection laws. The Trump administration has done exactly this.[138] But we must remember that Federalism is a politically neutral principle of American government. Even in times in which the federal government opposes their interest in national consumer finance policy, states may use federal reliance on their cooperation with the CFPB to influence federal policy. And even if they lack any productive relationship with federal regulators, states still do not need protection from preemption under Section 1044 because of the integration of state and federal agencies through bank supervision, and the inherent power of Congress to ratchet up regulations for nationally chartered banks.

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[135] Shahien Nasiripour, *Big Banks Save Billions as Homeowners Suffer, Internal Federal Report by CFPB Finds*, HUFFPOST (Dec. 6, 2017), https://www.huffpost.com/entry/big-banks-save-billions-homeowners-suffer_n_841712 [https://perma.cc/82UL-MHKP].

[136] *Id.*

[137] *Id.* Then-Professor Warren was forced to admit "under intense questioning" by the House Financial Services Committee that this advice had been given. *Id.* This episode suggests that the CFPB may prove an ally to state attorneys general even in spite of federal opposition.

[138] *See, e.g.*, Press Release, Consumer Fed'n Am., CFPB Law Enforcement Plummets Under Trump Administration, (Mar. 11, 2019), https://consumerfed.org/press_release/16137/ [https://perma.cc/SA4E-BPGD] (noting that the decline in enforcement activity was most clear "in the areas where the volume of consumer complaints received by the CFPB is the highest"); CHRISTOPHER L. PETERSON, CONSUMER FED'N AM., DORMANT: THE CONSUMER FINANCIAL PROTECTION BUREAU'S LAW ENFORCEMENT PROGRAM IN DECLINE 3 (2019), https://consumerfed.org/wp-content/uploads/2019/03/CFPB-Enforcement-in-Decline.pdf [https://perma.cc/2FZ8-YP8B] (finding that "[t]he average amount of monetary relief per case awarded to victims of illegal consumer financial practices has declined by approximately 96%" since 2015).

E. States Retain Regulatory Power through Localist Preferences

Additionally, state charters retain some regulatory sway even in the face of aggressive federal preemption through nationally chartered banks. There is a reason why state banks greatly outnumber national banks, and why early state reforms like mandatory deposit insurance were able to be pursued without state banks overwhelmingly switching to national charters.[139] Ultimately, "some bankers prefer a more provincial regulatory approach, expecting local regulators to be more sympathetic to, and familiar with, local economic issues and idiosyncrasies."[140] Some might discard this sentiment as endorsing nepotism,[141] but it is indisputable that some state-chartered banks prefer their local regulators to federal alternatives whether that be because of institutional ties, or in some cases, lax regulation.[142] The many instances of lax regulation by state regulators in an attempt to capture banks may give pause to some who ardently support state regulators over their federal counterparts, but it is also true that some banks may simply "desire to work with a local regulatory presence" whose regulatory regime is apt for the structure or location of their bank.[143]

For many banks, holding onto a state charter or switching from a national charter may also help them avoid "significantly higher regulatory and examination fees," in addition to granting them access to favorable local laws and "local access to their primary regulators."[144] This is especially true as the OCC has suffered from increased turnover in recent years which makes building a productive regulatory relationship difficult for many nationally chartered banks.[145]

Whatever the exact cause of some banks' preference for state regulators may be, it grants states some residual power to regulate according

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[139] *See, e.g.*, White, *supra* note 104, at 537 (discussing states' pioneering of deposit insurance).
[140] Schroeder, *supra* note 40, at 202.
[141] It is easy to follow the implication that state regulators will go too easy on banks chartered in their home state due to favoritism and competition for charters, thus compromising the integrity of our financial system.
[142] For an example of state supervision getting too lax, see *Texas Bank Insider Abuse, Lax Oversight by Directors, Led to First Failure in 18 Months; More Review Needed*, REG. REP. (Sept. 26, 2019), https://www.regreport.info/2019/09/26/texas-bank-insider-abuse-lax-oversight-by-directors-led-to-first-failure-in-18-months/ [https://perma.cc/7576-FR6D]. *See also* Kevin Wack, *Regulatory Competition is Hot Again — and That's Worrisome*, AM. BANKER, (Jan. 6, 2019, 10:00 PM) https://www.americanbanker.com/news/regulatory-competition-is-hot-again-and-thats-worrisome [https://perma.cc/RL6B-M7JG] (providing an overview of the hazards of regulatory competition, including the potential for lax supervision).
[143] Schroeder, *supra* note 40, at 222.
[144] John Reichert & Jim Sheriff, *Weighing the Benefits of a State Charter*, BANK DIRECTOR (Nov. 17, 2017), https://www.bankdirector.com/issues/regulation/weighing-benefits-state-charter/ [https://perma.cc/CE3Q-ZCPM].
[145] *Id.*

to their consumer finance protection preferences, at least with respect to banks which possess state charters who are unable to preempt relevant state law. Of course, this space for legislation and regulation is limited by the degree to which state-chartered banks prefer state regulators to national regulators because the option to convert to a federal charter is generally open to them.[146] At some threshold of state regulatory intervention, they would make the decision to switch, which is why it is fortunate that states have also been uniquely successful in implementing banking policy at the federal level.

IV. THE ANTI-FEDERALIST CONSEQUENCES OF *SKIDMORE* REVIEW

Besides substantively changing the kind of state laws that were eligible for preemption by federal bank regulation under the National Bank Act and the Federal Reserve Act, Section 1044 also prescribes a standard of review for courts to use when "reviewing any determinations made by the Comptroller regarding preemption of a State law."[147] This change offends the principles of our Dual Banking system and works against the Federalism benefits it ostensibly promotes because it encourages judicial policymaking[148] within arbitrary federal circuit divisions and does not respect the Presidency as an instrument of federal policymaking.[149] More generally, the *Skidmore* command under Section 1044 is unnecessary because traditional interpretive canons regarding preemption are sufficient to safeguard state interests.[150]

In order to grasp the Federalism consequences of discarding *Chevron* deference for OCC preemption determinations under Section 1044 of Dodd-Frank, it is important to note exactly what *Skidmore* deference is. When exercising *Chevron* deference, a court is not responsible for determining whether an agency's interpretation of a statute is correct as a matter of law. Instead, the question is whether an agency's interpretation is "based on a permissible construction of the statute" in question.[151] Where Congress has spoken to the issue in question, that is the only reasonable interpretation, but where "Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision

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[146] Some have noticed an uptick in state-chartered banks acquiring national charters under the Trump administration. *See* Lalita Clozel, *Why Some Banks Are Ditching Their State Regulators*, WALL ST. J., (Sep. 17, 2019, 12:18 AM), https://www.wsj.com/articles/why-some-banks-are-ditching-their-state-regulators-11568693912 [https://perma.cc/Y529-RM8T] (reporting that six banks had switched to federal charters since 2017, as opposed to zero banks doing so between 2014 and 2016).
[147] 12 U.S.C. § 25b(b)(5)(A).
[148] *See infra* Section IV.A.
[149] *See infra* Section IV.B.
[150] *See infra* Section IV.C.
[151] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

of the statute by regulation."[152] In effect, *Chevron* allows Congress to delegate rulemaking authority to agencies, including the OCC (except as prohibited by section 1044), within a range of reasonable interpretations of the statutes they are entrusted to administer.

Prior to *Chevron*,[153] administrative interpretations were granted what is now referred to as *Skidmore* deference, which is not based on any express or implied delegation of rulemaking authority by Congress to an agency. Instead, it is based solely on an agency's expertise over the matter in question, which entitles the agency's interpretation to deference according to the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade."[154] Some commentators suggest that *Skidmore* deference is in fact not a kind of deference at all, because the *Skidmore* factors only grant agency interpretations the respect that would follow from any generic legal position that is validly reasoned and persuasive.[155] As the late Justice Scalia put it, "the rule of *Skidmore* deference is an empty truism and a trifling statement of the obvious: A judge should take into account the well-considered views of expert observers."[156]

The policy reasons that motivated the Dodd-Frank congress to create Section 1044's *Skidmore* provision are self-evident, "in light of the OCC's history of controversial preemption decisions based on conflict-of-interest and regulatory-capture concerns."[157] By limiting the amount of deference OCC preemption determinations were given, Congress hoped to limit the degree to which these preemption determinations are successful, but in the process it discarded important Federalism interests without any guaranteed benefits to state consumer finance protection law.

A. Judicial Policymaking

For the same reasons that the Supreme Court has turned away from judicial "line-drawing of the most arbitrary sort" for defining traditional state

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[152] *Id.* at 843–44.
[153] *But see* United States v. Mead Corp., 533 U.S. 218, 221 (2001) (holding that *Skidmore* deference has continued relevance for agency interpretations in situations where Congress has not delegated statutory authority).
[154] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).
[155] *See e.g.*, Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143, 1146 (2012) (declining to refer to *Skidmore* deference as deference at all, but merely "as an element of independent judicial judgment").
[156] *Mead*, 533 U.S. at 250 (Scalia, J., dissenting).
[157] Kent Barnett, *Codifying Chevmore*, 90 N.Y.U. L. REV. 1, 8 (2015).

functions immune from federal regulation, Congress should not entrust preemption determinations to courts under *Skidmore* deference.[158]

First, *Skidmore* deference invites judicial policy making on issues of immense national importance involving the operation of our national banking system. Judges are rarely trained economists, and in the words of Larry Kramer, they "lack the resources, know-how, and flexibility to make dependable decisions about the level at which to govern in today's complex and rapidly evolving world."[159] Because of this relative lack of economic and policy training, it is hard to see how most judges could make informed decisions about which state banking laws are worthy of preemption. The more likely outcome would be arbitrary judicial line drawing inevitably informed by judges' subconscious policy preferences.[160] Delegating important questions of consumer finance and banking efficiency to untrained judges also destroys the discursive process of federal and state banking innovation that has led to so many previously mentioned innovations in our financial sector.[161]

Skidmore deference as applied to preemption decisions under Section 1044 is also less democratic. Whatever state of financial regulation that state and federal agencies arrive at through the political safeguards of Federalism and deliberation at all levels of government should be left as is without unelected judges influencing national policy. It also does not necessarily follow that entrusting preemption decisions to judges will actually result in less harsh forms of preemption. The implicit biases of judges who are hostile to states with comprehensive consumer finance protection laws may be more likely to preempt state laws, in which case all that the *Skidmore* provision of Section 1044 does is insulate from later judicial review the administrative interpretations of judges who reach each preemption question first.

Additionally, the use of *Skidmore* deference under Section 1044 will ultimately lead to more circuit splits. Because an administrative interpretation decided under *Skidmore* must be decided as a matter of law, "beyond the power of the agency to change even through rulemaking,"[162] every OCC preemption rulemaking regarding consumer finance protection law that reaches judicial review is more likely to be decided differently by each

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[158] *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 544 (1985) (deciding that the judicial categories of traditional versus untraditional state functions were arbitrary and unworkable).
[159] Kramer, *supra* note 87, at 1503.
[160] *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) ("Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences.").
[161] *See supra* Section III.B.
[162] *See* United States v. Mead Corp., 533 U.S. 218, 249–50 (2001) (Scalia, J., dissenting) (noting that *Skidmore* deference results in courts deciding administrative interpretations as a matter of law, which gives them precedential value and prevents amendment by means of rulemaking).

federal circuit.[163] This means that the effect of Section 1044 on state law will differ by circuit across the country until the Supreme Court grants cert to resolve all of these questions, as with *Madden v. Midland Funding*,[164] or more recently, *Lusnak v. Bank of America*, in which the Ninth Circuit held that the areas of state law the OCC says are presumed to be preempted per 12 C.F.R. §§ 7.4008 and 34.4 carry no weight in the judicial determination of preemption issues under Dodd-Frank.[165]

These circuit splits may become a headache for the OCC and nationally chartered banks, but more importantly they divide the country into areas in which law applies differently without any of the attending benefits that a federalist regime offers. We tolerate states with different laws in order to "give[] democracy's outliers the same opportunities that members of the majority routinely enjoy,"[166] i.e. their own preferred policies, or to facilitate a "national conversation" on divisive subjects through "a variety of local ones,"[167] or to encourage innovation and experimentation, but circuit splits provide none of these benefits in a way that is amenable to our democratic process. The banking law that Section 1044's *Skidmore* provision will assign to each federal circuit will be inevitably random, such that the citizens within these circuits will not be invested in the smorgasbord of policy that they end up with. And more troublingly, this "ossification"[168] of preemption under Dodd-Frank means that the OCC will be powerless to change policy in the event of systematic financial distress. It is hard to imagine an area of policy besides national security that demands more immediate flexibility in times of crisis than financial regulation.

B. Federalist Policymaking from the Presidency

In fact, proponents of Federalism in America should embrace *Chevron* for preemption questions with open arms, including in the area of banking regulation. This is because the executive branch, which ultimately guides agency action, is well suited for the task of resolving federalist preemption disputes. As Herbert Wechsler stated, "the prime organ of a . . .

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[163] Unlike under *Chevron* deference, in which circuits must only agree that an agency's administrative interpretation is reasonable, under *Skidmore*, each circuit must independently arrive at the same interpretation of a given statute to create a cohesive national policy.
[164] Madden v. Midland Funding, LLC, 786 F.3d 246 (2d Cir. 2015).
[165] *See* Lusnak v. Bank of Am., 883 F.3d 1185, 1194 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 567 (2018) ("These changes [to preemption per Dodd-Frank] have no bearing here where the preemption determination is made by this court and not the OCC.").
[166] Gerken, *supra* note 103, at 1898.
[167] *Id.* at 1896.
[168] *See* United States v. Mead Corp., 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) (referring to the ossification of agency interpretations made under *Skidmore* deference after judicial review).

'national spirit' is, of course, the President—both as the Chief Executive and as the leader of his party."[169] As Wechsler argued, this position comes from the structure of the electoral college, which is largely populated by adding the number of seats in the Senate and the House together, resulting in a blend of state and purely federal interests.[170] In other words, the presidency must be won by a federalist coalition of electors.

In this respect, the President is a better candidate to resolve questions of administrative interpretation in a way which honors the interests of states and the national government than an unelected judge, who may err in favor of their "personal policy preferences."[171] Additionally, in the words of Elena Kagan, "presidential leadership enhances transparency, enabling the public to comprehend more accurately the sources and nature of bureaucratic power."[172] This serves the Federalism interest inherent in democratic accountability. By entrusting all OCC preemption choices to the OCC itself, as influenced by Presidential policy, Congress could make the respective sources of federal and state banking policy clearer to the public. More concretely, Justice Kagan has noted that "presidential leadership establishes an electoral link between the public and the bureaucracy, increasing the latter's responsiveness to the former."[173] This "electoral link" is particularly important in order to translate public knowledge of federal versus state policy into actual electoral outcomes at the state and federal level in order to make the discursive benefits of Federalism real.[174] All of this is especially true today given the heightened impact that Presidents have on agency policy since the advent of Office of Management and Budget regulatory review, which allows Presidents to inject themselves into the rulemaking process in order to guide agency policy directly at the national level.[175]

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[169] Wechsler, *supra* note 117, at 552.

[170] *Cf.* U.S. CONST. amend. XXIII (affording representation in the electoral college to the District of Columbia). Ultimately the District's representation is not significant enough to undermine the Federalist character of the electoral college, which is undeniably more representative of state and national policy preferences than the unelected judiciary. Wechsler, *supra* note 117, at 552.

[171] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

[172] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–32 (2001).

[173] *Id.* at 2332.

[174] *Id.*

[175] *See Summary of Executive Order 12866 – Regulatory Planning and Review*, ENVIRONMENTAL PROTECTION AGENCY, https://www.epa.gov/laws-regulations/summary-executive-order-12866-regulatory-planning-and-review [https://perma.cc/EWV2-Y2X9] (last visited Nov. 19, 2020) (providing an overview of EO 12866 and 13563 and the OMB review process).

C. Traditional Preemption Principles Protect against Undue Preemption

Section 1044's *Skidmore* command is also unnecessary because traditional preemption principles are sufficient to guard against unwarranted intrusions into state law. While some scholars "have argued that granting *Chevron* deference to agency interpretations regarding preemption is inappropriate" because it would put Federalism questions in the hands of unelected agency officials,[176] there is little constitutional muster in this sentiment. The Supremacy Clause clearly states that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."[177] When Congress leaves "a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."[178] In other words, a regulation promulgated by an administrative agency within the reasonable bounds of a delegation of authority from Congress really is law for purposes of the Supremacy Clause. *Chevron* deference is more than an interpretive rule, it is a recognition that Congress makes certain *laws* which it "entrusted" agencies "to administer."[179] Unfortunately, the Supreme Court has failed to outright endorse *Chevron* deference in preemption determinations by federal agencies, sometimes being "quite deferential" and other times being "almost entirely nondeferential."[180] Most recently, in *Coventry Health Care of Missouri, Inc. v. Nevils*, the Supreme Court once again sidestepped the question.[181]

The constitutional basis of *Chevron* deference is a Congressional delegation of authority, and in a preemption context, courts are more than capable of determining where an agency exceeded the reasonable bounds of a Congressional delegation. *Rice v. Santa Fe Elevator Corp.* is a good

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[176] Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 740–41 (2004) (citing Jack W. Campbell IV, *Regulatory Preemption in the* Garcia/Chevron *Era*, 59 U. PITT. L. REV. 805, 832 (1998); Damien Marshall, Note, *The Application of* Chevron *Deference in Regulatory Preemption Cases*, 87 GEO. L.J. 263, 278 (1998); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331 (2000)).

[177] U.S. CONST. art. VI, § 2.

[178] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

[179] *Id.* at 844.

[180] *See* Gregory M. Dickinson, *Calibrating* Chevron *for Preemption*, 63 ADMIN. L. REV. 667, 668, 668 n.1 (2011) (noting the lack of guidance from the Supreme Court on this issue, citing in particular *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 328–32 (2008) and *Watters v. Wachovia Bank*, 550 U.S. 1, 20–21 (2007)). *Watters* is a particularly good example for the purposes of this comment, as the Supreme Court declined to state what level of deference was appropriate for the OCC's determination that state-chartered operating subsidiaries of national banks can be regulated by the Office of the Comptroller of Currency rather than by the agencies of states in which those subsidiaries are located. *Id.*

[181] *See* Coventry Health Care of Missouri, Inc. v. Nevils, 137 S. Ct. 1190, 1198 n.3 (2017) ("Because the statute alone resolves this dispute, we need not consider whether *Chevron* deference attaches to OPM's 2015 rule.").

example of this kind of interpretive framework, although it was a pre-*Chevron* holding.[182] In *Rice*, the Supreme Court held that because in regulating warehouse licenses, Congress had entered a "field which the States have traditionally occupied," it would begin its preemption analysis "with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[183]

In effect, this kind of interpretive clear statement rule could inform *Chevron* analysis as applied to the preemption of state consumer financial protection laws, perhaps narrowing the range of preemptive interpretations that the OCC could argue were reasonable given the history and purpose of the National Banking Act. This recognition that Congress does not generally intend to supplant state law would hedge against wanton preemption while honoring the foundation of *Chevron* deference, which is Congress's intent with respect to a statute's meaning.

At the very least, a more comprehensive and consistent national banking system would follow. And most importantly, those who object to OCC preemption rulemakings could always petition Congress to make new law affecting nationally chartered banks.

CONCLUSION

Section 1044 represents a bold statement of Congressional preference for more consumer finance regulation following the 2008 financial crisis. By curtailing the power of federal banking agencies like the Office of the Comptroller to preempt state banking laws, Dodd-Frank sought to leave more of these laws in place to guard against the imprudent consumer lending that was thought to have contributed to the crisis.[184] Regardless of whether you believe more consumer protection laws would improve the financial stability of our banking system or not, this paper has argued that any banking reforms should be made within the confines of our Dual Banking system to secure important Federalism benefits. Ultimately this means that if more consumer protection is warranted for lending performed by national banks, it should come from federal law, not state regulators.

In order to secure Federalism values such as democratic accountability, policy innovation, and political transparency, our Dual Banking regime must be protected through preemption of state banking regulations for nationally chartered banks under deferential *Chevron* review.

[182] 331 U.S. 218 (1947).
[183] *Id.* at 230.
[184] *See generally* John V. Duca, *Subprime Mortgage Crisis: 2007–2010*, FED. RSRV. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/subprime_mortgage_crisis [https://perma.cc/YP3H-BNES] (discussing the Subprime Mortgage Crisis, which is generally thought to have caused the 2008 recession).

Section 1044 undermines these interests to little or no benefit to consumer protection given the historical success of banks in securing protective federal policy, integrating their supervisory regulators with the Federal supervision system, and partnering with federal consumer finance protection agencies. Where these measures fail, states can still rely on the residual local attractiveness of their charters to entice banks to operate under their regulatory purview, as well as the interpretive canons that inform *Chevron* review in the federal court system.

The ultimate proof of concept for this model of regulation lies within Dodd-Frank itself in the establishment of the Consumer Finance Protection Bureau, which has the power to issue substantive rulemakings to prohibit unfair, deceptive, or abusive acts and practices related to mortgages, credit cards, and other forms of consumer finance.[185] Covered persons under the CFPB's broad regulatory jurisdiction include any entities and their service providers who offer or provide any "consumer financial product or service," with few carve outs.[186] Importantly, the CFPB not only has rulemaking authority, but also enforcement power and even supervisory authority over banks *and* non-bank institutions.[187] And while its leadership structure may have been struck down this year, the CFPB's mandate continues with the Supreme Court's blessing as living proof that Congress can act aggressively to regulate national banks and their lending practices directly.[188] Instead of abandoning our Dual Banking system, future consumer finance protection reform should follow in the CFPB's footsteps by ensuring that national banks play by federal rules. In the words of now Senator Warren, "[t]he problem is not in the federal preemption; it is in the failure of federal law to offer a suitable alternative to the preempted state law."[189]

[185] *See* Jean Eaglesham, *Warning Shot on Financial Protection*, WALL ST. J., (Feb. 9, 2011, 12:01 AM), https://www.wsj.com/articles/SB10001424052748703507804576130370862263258 [https://perma.cc/RA72-YP2H] (discussing the enforcement activities then-director Richard Cordray planned within the CFPB's jurisdiction). For a comprehensive list of the CFPB's authorities, consult 12 U.S.C. §§ 5531–5538.

[186] 12 U.S.C. § 5481(6); *see also* 12 U.S.C. § 5517 (describing classes of persons and entities over whom the CFPB does not have power).

[187] 12 U.S.C. § 5514(a)(1)(C). For an analysis of the CFPB's uniquely extensive regulatory powers, and a comparison with the FTC's jurisdiction, see generally Joseph L. Barloon, Darren M. Welch & Neepa K. Mehta, *"Leveling the Playing Field": Implications of CFPB Authority over Non-Depository Financial Institutions*, 27 ANTITRUST 71 (2013).

[188] *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2209 (2020) ("The provisions of the Dodd-Frank Act bearing on the CFPB's structure and duties remain fully operative without the offending tenure restriction.").

[189] Bar-Gill & Warren, *supra* note 47, at 83.