
ARTICLE

EXORCISING *McCULLOCH*: THE CONFLICT-RIDDEN HISTORY OF AMERICAN BANKING NATIONALISM AND DODD-FRANK PREEMPTION

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*Conventional wisdom holds that federal laws conferring banking powers on national banks presumptively preempt state laws seeking to control the exercise of those powers. This conventional wisdom originates with *McCulloch v. Maryland*, which established that nationally chartered banks are federal instrumentalities entitled to regulate themselves free from state law—even when national law fails to address the risks that state law seeks to regulate. Incorporated into the National Bank Act of 1864 by nineteenth-century precedents but then abandoned by the New Deal Court, *McCulloch*'s theory of preemption is being revived today by the Office of the Comptroller of the Currency (OCC) to preempt broad swaths of state law.*

*This Article maintains that it is time to exorcise *McCulloch*'s theory from our preemption jurisprudence. Far from historically sanctioned, *McCulloch*'s theory that national banks are federal instrumentalities offends a deeply rooted tradition in American political culture and law that I call the “anti-banker nondelegation doctrine.” This principle has been manifest in campaigns against national banks’ immunities from political oversight, ranging from Andrew Jackson’s 1832 veto of the charter of the Second Bank of the United States to Louis Brandeis’s 1912 campaign against the “House of Morgan” as a “financial oligarchy.” In contrast to*

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McCulloch's view of banks as impartial instruments of the federal government, the American political system and the post–New Deal federal courts have adopted the view that federal law should not delegate unsupervised power to private banks to regulate their own operations. Accordingly, if federal regulators displace state laws regulating banking practices, then those federal regulators must explain how federal law addresses the risks that those state laws were attempting to control.

The most recent effort to eliminate McCulloch's theory of preemption is section 1044(a) of the Dodd–Frank Act. Section 1044(a) provides detailed standards governing the OCC's power to preempt state law. This Article argues that the OCC's 2011 rules mistakenly revive McCulloch's theory of preemption. This revival contradicts not only section 1044(a); it also contravenes the general tradition of distrusting grants to national banks of immunity from state law. Like McCulloch, the OCC's rules draw irrational distinctions between states' general common law doctrines and states' rules specifically directed toward banking practices, and subject the latter to a sort of field preemption. This Article contends that such preemption is unprincipled and mistaken. Instead, it urges courts to follow the ordinary principles of conflict preemption—that is, to find state law preempted only where the OCC has specifically approved the banking practice forbidden by state law.

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INTRODUCTION

The federal courts seem to assume a long, unbroken historical consensus that nationally chartered banks ought to be governed by the federal government to the exclusion of state regulation. Since the Supreme Court handed down *McCulloch v. Maryland*,¹ judges and scholars have commonly declared that “history” has called for centralized law governing nationally chartered banks. As Justice Breyer described preemption of state law under federal laws conferring powers on banks in *Barnett Bank of Marion County v. Nelson*:

In using the word “powers,” the [National Bank Act] chooses a legal concept that, in the context of national bank legislation, has a history. That history is one of interpreting grants of both enumerated and incidental “powers” to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law.²

This “history,” according to Justice Breyer, requires the presumption that “normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted.”³ Thus, there should be no need for judicial straining to figure out a way for state and federal law to coexist. If a bank is authorized by federal law to do something, then that bank’s authorization preempts any state law that

¹ 17 U.S. (4 Wheat.) 316 (1819).

² 517 U.S. 25, 32 (1996).

³ *Id.* at 33.

interferes with a banking power “that Congress explicitly granted”—even if the state law in question is neutral and does not discriminate against national banks. As Jamelle Sharpe describes the doctrine, courts review state regulation of national banks under a “Centralization Default,”⁴ derived from an alleged jurisprudential tradition of regarding state control of nationally chartered banks with suspicion.

The idea that American history implies this sort of “Centralization Default” has been defended administratively, as well. Consider, as an example of administrative reliance on alleged historical consensus, the justification for the preemption rules issued by the Office of the Comptroller of the Currency (OCC) in the summer of 2011.⁵ The OCC’s rules construed the Dodd-Frank Act’s preemption clauses—which provide that a state consumer financial law is preempted, even if such a law does not single out nationally chartered banks for discriminatory treatment, if the state law “prevents or significantly interferes with the exercise by the national bank of its powers”⁶—as expressly codifying *Barnett Bank*’s preemption standard.⁷ Despite the reference to *Barnett Bank*, one might reasonably infer that this clause was intended to cut back on preemption of state law. After all, it contains unusual requirements that the OCC support preemption by making a “specific finding,”⁸ on a “case-by-case basis,”⁹ supported by “substantial evidence, made on the record of the proceeding.”¹⁰ Furthermore, the clause provides only *Skidmore*—not *Chevron*—deference for agency preemption findings, and it expressly bars field preemption.¹¹ How could such unusually specific statutory admonitions *not* be an effort to trim back on the preemption status quo?

⁴ Jamelle C. Sharpe, *Legislating Preemption*, 53 WM. & MARY L. REV. 163, 172 (2011).

⁵ See Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 43,549, 43,554 (July 21, 2011).

⁶ 12 U.S.C. § 25b(b)(1)(B) (2006, Supp. IV 2011).

⁷ Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. at 43,556.

⁸ *Id.* § 25b(c).

⁹ *Id.* § 25b(b)(1)(B).

¹⁰ *Id.* § 25b(c).

¹¹ Compare *id.* § 25b(b)(5)(A) (“A court reviewing any [agency] determinations . . . shall assess the validity of such determinations, depending on 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.”), with *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (“The weight of [an administrator’s] judgment in a particular case will depend upon 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, if lacking power to control.”), and *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984) (holding that courts must defer to “an agency’s construction of the statute which it administers,” so long as the agency’s regulations are “based on a permissible construction of the statute”).

Yet the OCC reissued its 2004, pre-Dodd-Frank rules in almost identical terms in the summer of 2011.¹² Despite disavowing field preemption,¹³ the OCC declared once more that nationally chartered banks may make non-real estate loans “without regard to state-law limitations concerning” a broad array of topics.¹⁴ George W. Madison, the Department of Treasury’s General Counsel, bluntly criticized the 2011 rule for “seem[ing] to take the position that the Dodd-Frank standard has no effect.”¹⁵ In response, the OCC predictably trotted out the argument from history: broad preemption had been a “pillar[]” of banking law for “nearly 150 years.”¹⁶ Broad preemption, the OCC argued, provided the uniformity of regulation necessary to promote a national market in financial services that would guarantee “prosperity and growth.”¹⁷

The OCC also argued that nationally uniform rules were suggested not only by historical practice but also by the national scale of the financial services market. Technological change (e.g., Internet banking), legal change (e.g., the authorization of interstate bank branching), and increased mobility of consumers caused “[m]arkets for credit (both consumer and commercial), deposits, and many other financial products and services” to become “national, if not international, in scope.”¹⁸ Such national markets required “consistent, national standards, regardless of the location of a customer when he or she first becomes a bank customer or the location to which the customer may move *after* becoming a bank customer.”¹⁹ “[D]iverse and potentially conflicting state and local laws” raise compliance costs, and “national banks must either absorb the costs, pass the costs on to consumers, or eliminate various products from jurisdictions where the costs are prohibitive.”²⁰

¹² Compare Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. at 43,565-66, with Bank Activities and Operations, 69 Fed. Reg. 1895, 1904 (Jan. 13, 2004), and Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1916-17 (Jan. 13, 2004). These preemption rules, as amended in 2011, are codified at 12 C.F.R. pt. 7, subpt. D (2012).

¹³ See *infra* notes 274-77 and accompanying text.

¹⁴ 12 C.F.R. § 7.4008(d). The topics included state law requirements regarding, inter alia, licensing, registration, creditors’ insurance requirements, loan-to-value ratios, terms of credit, and access to credit reports. *Id.*

¹⁵ Letter from George W. Madison, General Counsel, Dep’t of the Treasury, to John Walsh, Acting Comptroller of the Currency, Office of the Comptroller of the Currency 2 (June 27, 2011), available at http://cdn.americanbanker.com/media/pdfs/TreasuryOCC_062811.pdf.

¹⁶ Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 43,549, 43,554 (July 21, 2011).

¹⁷ *Id.*

¹⁸ Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1907 (Jan. 13, 2004).

¹⁹ *Id.* at 1908.

²⁰ *Id.*

In sum, the OCC has justified its preemption rule with a combination of historical precedent and alleged economies of scale achieved by having one set of uniform rules for a national industry. In this Article, I argue that the breadth of the OCC's rule defies both its historical and its policy-based justifications. The OCC's rule preempts state banking laws without making any specific findings about whether federal law adequately addresses the specific risks of bad banking behavior that the particular state banking laws attempt to remedy. Far from being justified by "nearly 150 years" of precedent, this *de facto* field preemption of state banking law runs afoul of a deeply rooted American legal and political tradition that I term the "anti-banker nondelegation doctrine."

Under this doctrine, national law would supplant state law only if the national lawmakers (whether Congress or agency rulemakers) actually set forth specific national regulatory standards to replace state law. Absent such specific supervision, opponents of private bankers have preferred the inefficiency of state law to the perceived corruption of bankers' self-regulation. But by broadly preempting state laws without inquiring whether federal law provides some substitute protections for the supplanted state rules, the OCC's preemption rule in effect gives private banks autonomy from public oversight. This interpretation runs counter to the anti-banker nondelegation doctrine.

This is not to say that the OCC's wholesale preemption of state banking law is unprecedented. As I argue in Section I.B, the OCC's preemption rule is best explained as a revival of *McCulloch's* theory that nationally chartered banks are "federal instrumentalities" that enjoy the same immunity from state taxation and regulation as genuine agencies of the federal government. As I explain in Part II, however, *McCulloch's* federal instrumentality theory has long been discredited. Initially rejected by Jacksonian Democrats as an impermissible delegation of governmental power to private financial interests, the ideological underpinnings of *McCulloch* were further undermined by growing distrust of private bankers after the Panic of 1907, Woodrow Wilson's New Freedom campaign, and Louis Brandeis's campaign against the power of banks to regulate themselves without governmental oversight. Starting in the 1920s, the Supreme Court gradually loosened preemption doctrine to allow state laws to fill gaps in the National Bank Act on specific banking issues. By the end of the New Deal, *McCulloch's* distinction between general state laws and specifically bank-related state laws was in shambles, replaced by ordinary principles of conflict preemption.

In Part III, I argue that the OCC's 2004 and 2011 rules are a renewed effort to revive *McCulloch's* theory of field preemption. Under the OCC's

rules, states' general common law doctrines are given deference, while states' rules specifically regulating banking practices are presumed to be preempted. The OCC has justified these rules as an effort to secure scale economies through nationally uniform regulations for banking practices that take place on a national scale. But by exempting state common law doctrines, the OCC's rules seem far too underinclusive for this objective. Instead, the OCC's rules seem better calculated to protect private banks' autonomy from state regulation, even when national bank regulators have made no specific findings about the reliability of private banks' self-regulation.

This objective suffers from two flaws: First, the OCC has never articulated any argument for special suspicion of states' banking-specific rules. Second, section 1044(a) of the Dodd-Frank Act, defining the scope of banking preemption, seems to repudiate such across-the-board preemption of state law. Both in its language and its legislative history, section 1044(a) expresses the same anti-banker nondelegation principle as that pressed by Andrew Jackson in 1832 against Nicholas Biddle or by Louis Brandeis in 1912 against the House of Morgan: the principle allowing state law to be set aside by federal regulators only after they specifically examine the risks controlled by state law.

In Part IV, I conclude by outlining a strategy for finally exorcising *McCulloch* from our preemption doctrine through ordinary rules of conflict preemption. State law should govern banks unless the OCC has specifically approved the banking practice that state law forbids. There are good reasons to nationalize banking policy, including scale economies in risk assessment and suppression of state protectionism. But the traditional suspicion of bankers' influence over the national government suggests that the OCC should approve the specific banking practices that state laws forbid only after making factual findings about the specific concerns addressed by the state laws that are preempted. This is not to say that the OCC could not simply ensure good banking practices by deregulating some aspects of banking and relying on markets untrammelled by state law. Rather, I argue that the adequacy of markets is a topic on which the OCC should bring its expertise to bear, rather than recite preemptive *ipse dixit* dating from *McCulloch*.

I. THE ANTI-BANKER NONDELEGATION DOCTRINE VERSUS THE FEDERAL INSTRUMENTALITY DOCTRINE IN ANTEBELLUM AMERICAN BANKING LAW

To understand the OCC's rule on preemption of state law, it is helpful to outline the two rival nineteenth-century theories about federalism and

banking in a democracy. Both are deeply rooted in American anxieties about the relationship between democracy and finance, albeit in diametrically opposed ways. The “anti-banker nondelegation doctrine” is rooted in the fear that financiers corrupt democracy through wealth, specialized knowledge, and insider connections. The “federal instrumentality” theory is rooted in the opposite assumption: private bankers properly serve as quasi-governmental agents whose expertise serves federal policy. Under this theory, private bankers need protection from shortsighted democratic excesses of parochial state legislation. The authoritative expositions of these two theories were Chief Justice John Marshall’s opinion in *McCulloch v. Maryland*²¹ and President Andrew Jackson’s message accompanying his veto of the Second Bank of the United States.²² These articulations became the symbols of, respectively, the Federalist (and later Whig and Republican) and Democratic constitutional ideologies in the nineteenth century. Their influence lives on today: Jackson’s rhetoric animates the attacks on banking preemption that led to the Dodd-Frank Act, while *McCulloch*’s federal instrumentality theory gave life to the 1864 National Bank Act that, as I argue in Part IV, the OCC is attempting to revive with its 2004/2011 rules.²³ In assessing the latter, therefore, it is helpful to see both theories laid out in their pure forms.

A. Jackson’s Veto Message and the Anti-Banker Nondelegation Doctrine

President Andrew Jackson’s opposition to the Second Bank of the United States had deep cultural and constitutional roots. Since before the ratification of the Constitution, Americans in the economically peripheral Southern and Western regions had been deeply suspicious of banks and the Eastern financial elites they represented. Western Pennsylvanians’ opposition to the chartering of the Bank of North America in 1786 was an early manifestation of this suspicion,²⁴ as was, during the ratification debates, Anti-Federalist

²¹ 17 U.S. (4 Wheat.) 316 (1819).

²² Veto Message from President Jackson to the U.S. Senate (July 10, 1832) [hereinafter Jackson Veto Message], reprinted in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, H.R. MISC. DOC. NO. 53-210, pt. 2, at 576 (James D. Richardson ed., 2d Sess. 1896).

²³ See *supra* notes 12–13 and accompanying text; *infra* note 274–77 and accompanying text.

²⁴ See generally Gordon S. Wood, *Interests and Disinterestedness in the Making of the Constitution*, in BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 69, 94 (Richard Beeman et al. eds., 1987). The leader of the opponents in the state legislature of the proposed Bank of North America was William Findley, an Irish immigrant who made his home in western Pennsylvania and embodied the western Pennsylvanians’ “middling

opposition to granting Congress the power to charter corporations.²⁵ The Anti-Federalists believed this power would benefit only speculators at “constant expence to the public.”²⁶ The most obvious precedent for Jackson’s opposition to the Second Bank of the United States was Madison and Jefferson’s opposition to the First Bank of the United States.²⁷ The opposition to the First Bank came largely from the South and West, expressed in constitutional terms by three leading Virginian politicians—James Madison, then a Congressman;²⁸ Edmund Randolph, President Washington’s Attorney General;²⁹ and Thomas Jefferson, Washington’s Secretary of State.³⁰ Their

aspirations, middling achievements, and middling resentments.” *Id.* at 94, 97. The opponents resented wealthy Philadelphia financier Robert Morris for his proposal to pool large amounts of capital for investment in large-scale projects like mills or factories rather than give small farmers access to consumer credit. Janet A. Riesman, *Money, Credit, and Federalist Political Economy*, in *BEYOND CONFEDERATION*, *supra*, at 128, 147-49. The debate over the chartering—which was defeated, to Morris’s dismay—is available in *DEBATES AND PROCEEDINGS OF THE GENERAL ASSEMBLY OF PENNSYLVANIA: ON THE MEMORIALS PRAYING A REPEAL OR SUSPENSION OF THE LAW ANNULING THE CHARTER OF THE BANK* (Mathew Carey ed., Philadelphia, Seddon & Pritchard 1786).

²⁵ When Madison proposed an express power “to grant charters of incorporation where the interest of the U.S. might require & the legislative provisions of individual States may be incompetent,” Rufus King, the Massachusetts ally of Alexander Hamilton, argued that “[t]he States will be prejudiced and divided into parties by [an express power to charter corporations]” and reminded the Convention of the controversies over the Bank of North America by observing that “[i]n Philad[elphia] & New York, It will be referred to the establishment of a Bank, which has been a subject of contention in those Cities. In other places it will be referred to mercantile monopolies.” James Madison, Notes (Sept. 14, 1787), in 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 615-16 (Max Farrand ed., 1966). The proposal was abandoned. *Id.* at 616.

²⁶ Letter I, in *A REVIEW OF THE REVENUE SYSTEM ADAPTED BY THE FIRST CONGRESS UNDER THE FEDERAL CONSTITUTION* 1, 12-13 (Philadelphia, T. Dobson 1794). On Anti-Federalists’ tendencies to be “agrarian-localist” groups located further from eastern seaports and “commercial-cosmopolitan” occupations, see JACKSON TURNER MAIN, *POLITICAL PARTIES BEFORE THE CONSTITUTION* 358, 388 (1973) (emphases omitted).

²⁷ Alexander Hamilton proposed the First Bank of the United States as a private corporation that would enjoy the exclusive privilege of holding deposits of federal revenue without paying interest while using the funds as security to make loans and create a de facto federal currency through such commercial paper. See generally Alexander Hamilton, Second Report on the Further Provision Necessary for Establishing Public Credit (Report on a National Bank) (Dec. 13, 1790), in 7 *THE PAPERS OF ALEXANDER HAMILTON* 236 (Harold C. Syrett & Jacob E. Cooke eds., 1963).

²⁸ James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791) (rejecting arguments that the Bank could be created under the “general welfare,” “necessary and proper,” or Taxing and Spending Clauses), in *JAMES MADISON: WRITINGS* 480, 480-90 (Jack N. Rakove ed., 1999).

²⁹ Letter from Edmund Randolph, Att’y Gen., to Pres. George Washington (Feb. 12, 1791) (“[L]et it be propounded as an eternal question to those who build new powers on this clause, whether the latitude of construction which they arrogate will not terminate in an unlimited power in Congress? . . . [S]o far as [the Act] incorporates the Bank, [the Attorney General] is bound to declare his opinion to be against its constitutionality.”), in *THE CONSTITUTION AND THE ATTORNEYS GENERAL* 3, 3-7 (H. Jefferson Powell ed., 1999).

opposition was expressed in constitutional and textual terms as a worry that an implied power to charter the First Bank would destroy “the essential characteristic of the government, as composed of limited and enumerated powers.”³¹ But underlying these legal arguments was a deeper ideological opposition to high finance, associated with large Northeastern cities—in the opposition’s bitter phrases, “speculators & Tories”³² or “stockjobbers.”³³ The suspicion that private bankers could corruptly manipulate public officials was a deeply entrenched aspect of Anglo-American ideology, dating back to the South Sea Bubble of 1720.³⁴ The 1720 financial scandal wracked English politics and inspired twelve dozen essays written by John Trenchard and Thomas Gordon between 1720 and 1723, collectively republished as *Cato’s Letters*.³⁵ The broad message of *Cato’s Letters* was that officials were always at risk of being corrupted by financial elites in complex ways that voters would not be able to detect. More than a century after the South Sea Bubble popped, Andrew Jackson used its example in his opposition to the Second Bank: “I do not dislike your Bank any more than all banks,” Jackson informed

³⁰ See Thomas Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank (arguing that a bank is unconstitutional, for while it would be “convenient,” it is not “necessary” for the federal government (citing the Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18)), in 19 THE PAPERS OF THOMAS JEFFERSON 275, 275-80 (Julian P. Boyd & Ruth W. Lester eds., 1974). For a general account of the debate, see STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788-1800, at 229-34 (1993).

³¹ Madison, *supra* note 28, at 485. In Jefferson’s words, “To take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless feild [sic] of power, no longer susceptible of any definition.” Jefferson, *supra* note 30, at 276.

³² Letter from James Madison to Thomas Jefferson (May 1, 1791), in 14 THE PAPERS OF JAMES MADISON 14, 16 (Robert A. Rutland et al. eds., 1983); see ELKINS & MCKITRICK, *supra* note 30, at 234.

³³ Letter from Thomas Jefferson to James Madison (Aug. 8, 1791), in 14 THE PAPERS OF JAMES MADISON, *supra* note 32, at 69, 69; see ELKINS & MCKITRICK, *supra* note 30, at 244.

³⁴ The South Sea Company scandal was essentially a joint-stock company’s alleged bribing of government ministers and members of Parliament with stock in return for assistance in inflating the stock’s trading value. See generally HELEN J. PAUL, THE SOUTH SEA BUBBLE: AN ECONOMIC HISTORY OF ITS ORIGINS AND CONSEQUENCES (2011).

³⁵ JOHN TRENCHARD & THOMAS GORDON, CATO’S LETTERS (Ronald Hamowy ed., Liberty Fund 1995) (1724). *Cato’s Letters* became one of the most widely read tracts in colonial America; while it was just one of the numerous works attacking the alleged corruption caused by private access to public credit, *Cato’s Letters* in particular propelled Country Party ideology across the Atlantic to the North American colonies. Forrest McDonald, *A Founding Father’s Library*, LITERATURE OF LIBERTY, Jan./Mar. 1978, at 4, 13; see also BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 35-36 (1967) (describing the publication of *Cato’s Letters* as a “searing indictment of eighteenth-century English politics” and its use in colonial America to advance “political liberty”). For another prominent example of an attack on private access to public credit, see Henry St. John Bolingbroke, Some Reflections on the Present State of the Nation, *reprinted in* 2 THE WORKS OF LORD BOLINGBROKE 439, 454-58 (Philadelphia, Carey & Hart 1841).

Nicholas Biddle, President of the Second Bank, “[b]ut ever since I read the history of the South Sea Bubble I have been afraid of Banks.”³⁶

In his attack on the Second Bank, Jackson transformed the idea that financiers tend to “capture” the government through insider connections and specialized knowledge into the platform of the Democratic Party.³⁷ When vetoing the Second Bank, Jackson argued that congressional delegations of power, revenue, and immunities to private corporations should be subjected to what we would call, in modern constitutional parlance, “strict scrutiny”: Unless absolutely necessary, such privileges should be deemed outside Congress’s implied power under Article I to adopt means necessary and proper for the execution of express powers. According to Jackson’s veto message, the federal charter’s various grants of exclusive privileges to the Bank were improper because they were not strictly “necessary” for any legitimate federal policy beyond enriching the Bank’s investors.³⁸ In particular, Jackson objected to Congress’s decision to grant the Bank exclusive banking privileges in Washington, D.C.,³⁹ an exclusive role as the federal

³⁶ 2 JOHN SPENCER BASSETT, *THE LIFE OF ANDREW JACKSON* 599 (new ed. 1931) (citation omitted).

³⁷ See SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828*, at 299–301 (1999) (discussing Martin Van Buren’s use of Anti-Federalism’s “resonance for the vast majority of the people” in its opposition to financial elites as a central aspect of Jacksonian ideology); GERALD LEONARD, *THE INVENTION OF PARTY POLITICS: FEDERALISM, POPULAR SOVEREIGNTY, AND CONSTITUTIONAL DEVELOPMENT IN JACKSONIAN ILLINOIS* 112–115 (2002) (“On the Jacksonian side . . . the Bank was central, and the concern was constitutional.”); JOEL H. SILBEY, *THE AMERICAN POLITICAL NATION, 1838–1893*, at 81–86 (1991) (detailing how the principles of limited government embodied in Jackson’s “victory” over the Second Bank were eventually built into the Democratic Party’s first national platform). This idea of capture influenced Democrats in the state legislature, who in turn voted on corporate charters and banking issues in ways consistently different from—and in a much more hostile manner than—Whigs. See Herbert Ershkowitz & William G. Shade, *Consensus or Conflict?: Political Behavior in the State Legislatures During the Jacksonian Era*, 58 J. AM. HIST. 591, 594–621 (1971). “Less optimistic than their Whig counterparts, and more fearful of concentrations of power, Democrats emphasized limited government to insure individual liberty rather than create opportunity”; they thus opposed granting special economic privileges. *Id.* at 617. Voters further from metropolitan centers seemed especially amenable to the Jacksonian message. See generally JAMES ROGER SHARP, *THE JACKSONIANS VERSUS THE BANKS: POLITICS IN THE STATES AFTER THE PANIC OF 1837* (1970).

³⁸ In Jackson’s words, “[M]any of the powers and privileges conferred on [the Bank] can not be supposed necessary for the purpose for which it is proposed to be created, and are not, therefore, means necessary to attain the end in view, and consequently not justified by the Constitution.” Jackson Veto Message, *supra* note 22, at 583.

³⁹ Jackson’s message reserved special hostility for the provisions “declar[ing] that Congress shall not increase the capital of existing banks, nor create other banks with capitals exceeding in the whole \$6,000,000” for a term of fifteen years. *Id.* at 584 (emphasis omitted). “The Constitution declares that the Congress shall have power to exercise exclusive legislation in all cases whatsoever

government's fiscal agent, and a special tax exemption not enjoyed by state-chartered banks. "It can not be 'necessary' or 'proper,'" President Jackson complained in his veto message, "for Congress to barter away or divest themselves of any of the powers vested in them by the Constitution to be exercised for the public good. . . . This restriction on themselves and grant of a monopoly to the bank is therefore unconstitutional."⁴⁰

Unlike Southern opposition to the Bank, which was largely rooted in a desire to prevent federal state-building rather than a desire to control financial elites,⁴¹ Jackson's objection was not that Congress was exercising *too much* power over banking, but that it was not exercising *enough*. By delegating exclusive privileges for a fifteen-year period to a single private corporation, Congress was abdicating its responsibility to oversee self-interested private actors. Jackson disliked state-chartered banks as much as the Second Bank of the United States, but state-chartered banks were at least beyond the control of the "great capitalists" like Nicholas Biddle, who, Jacksonians believed, had special influence over federal legislators like Henry Clay and

over the District of Columbia . . . and this act declares they shall not." *Id.* (internal quotation marks omitted). Jackson complained:

Which is the supreme law of the land? This provision can not be "necessary" or "proper" or *constitutional* unless the absurdity be admitted that whenever it be "necessary and proper" in the opinion of Congress they have a right to barter away one portion of the powers vested in them by the Constitution as a means of executing the rest.

Id.

⁴⁰ *Id.* at 583-84.

⁴¹ On Southerners' general desire to suppress state-building in favor of private and plantation ordering, see generally ROBIN L. EINHORN, *AMERICAN TAXATION, AMERICAN SLAVERY* (2006); see also Daniel M. Mulcare, *Restricted Authority: Slavery Politics, Internal Improvements, and the Limitation of National Administrative Capacity*, 61 POL. RES. Q. 671, 677 (2008) (documenting the successful efforts of Southern state legislators in ensuring that the "federal government's potential encroachment into states' municipal authority . . . never made it out of the legislative process"). The Virginia opponents of the Second Bank were in fact financial elites themselves, deeply enmeshed in state banks and the "traditional system of planter elite domination" in eastern Virginia. WILLIAM G. SHADE, *DEMOCRATIZING THE OLD DOMINION: VIRGINIA AND THE SECOND PARTY SYSTEM, 1824-1861*, at 84 (1996). Indeed, some members of the Richmond Junto, the group that controlled the Republican Party in Virginia after 1800, were deeply invested in a system of exclusive commercial privileges: John Brockenbrough, the brother of one of Marshall's opponents on the Virginia Supreme Court, was the head of the state-chartered Bank of Virginia and managed a network that maintained state banknotes at par and mimicked the contractionist policy of the Bank of the United States at the state level. See JOHN M. MCFAL, *THE POLITICS OF JACKSONIAN FINANCE* 21 (1972); see also Joseph H. Harrison, Jr., *Oligarchs and Democrats: The Richmond Junto*, 78 VA. MAG. HIST. & BIOGRAPHY 184, 194-95 (1970). Brockenbrough and Thomas Ritchie, the influential editor of the *Richmond Enquirer*, opposed Jackson's policy of "hard-money" radicalism, which would have limited the power of banks to issue paper and thereby affected the supply of currency. LARRY SCHWEIKART, *BANKING IN THE AMERICAN SOUTH FROM THE AGE OF JACKSON TO RECONSTRUCTION* 34-37 (1987).

Daniel Webster⁴²: “The States in which these institutions are situated, can at all times control them, and would effectually interpose to prevent such abuses of power.”⁴³ Democrats were familiar with the idea that democratic processes available through state institutions⁴⁴ could legitimize enterprises that would otherwise exercise questionable powers.⁴⁵ The problem with the Second Bank was that it stood outside those state democratic processes yet was not subject to federal supervision by the President (who controlled only a fifth of the directors of the Second Bank) or Congress (which, according to Jackson, had bargained away its right to increase the Bank’s contribution or grant privileges to rival institutions).

Jacksonian opposition to the Second Bank shows that the anti-banker nondelegation theory was—and remains—perfectly compatible with the goal of imposing nationally uniform laws on banks for the sake of market harmonization. Protecting state power, for Jackson and his “hard money” followers, was a means to the end of controlling financiers, not an end in itself. The important thing was that the banks be democratically controlled,⁴⁶ not that any particular level of government control them. Jackson’s argument was not that Congress could not charter a national bank, but that Congress could not create such a bank as a self-regulating private institution, liberated from state law yet only minimally supervised by federal officials. The policies of the Jackson and Van Buren Administrations suggest that Democrats were not averse, in principle, to the creation of national institutions that could impose centralized order on banking. For example, the “pet

⁴² On Jacksonians’ belief in Biddle’s corruption of national politics, see STEPHEN F. KNOTT, *ALEXANDER HAMILTON AND THE PERSISTENCE OF MYTH* 31-32 (2002); and ROBERT V. REMINI, *THE LIFE OF ANDREW JACKSON* 222-23 (abr. ed. 1988). In justifying the removal of federal monies from the Second Bank of the United States to various state banks, future-Chief Justice Roger Taney, then Jackson’s Secretary of the Treasury, argued that the state banks would prevent the banking business from “be[ing] monopolized by the great capitalists.” 10 REG. DEB. app. 160 (1834) (report of Roger Taney, Secretary of the Treasury).

⁴³ *Id.* at 161; see also *id.* at 83-85 (Memorial of Government Directors of the Bank of the United States) (accusing the private directors of the Second Bank of the United States of “systematically nullifying the representatives of the Government and people” by behaving in a secretive manner and acting like a “commercial bank” rather than a public agency).

⁴⁴ Examples familiar to Democrats at the time would have included state constitutional conventions, state plebiscites, small electoral districts, and numerous elections.

⁴⁵ On the strategy of legitimating banking democratically, see L. RAY GUNN, *THE DECLINE OF AUTHORITY: PUBLIC ECONOMIC POLICY AND POLITICAL DEVELOPMENT IN NEW YORK, 1800-1860, at 186-87* (1988) (describing the treatment of banks at New York’s 1846 constitutional convention).

⁴⁶ See, e.g., JON MEACHAM, *AMERICAN LION: ANDREW JACKSON IN THE WHITE HOUSE* 209-10 (2008) (“Jackson’s decision was framed in sweeping terms, arguing that the goal of government should be to better the lives of the many, not reward the few. . . . Jackson was . . . arguing that an end to privilege would mark the beginning of a truly democratic era.”).

bank” policy adopted by Levi Woodbury, Roger Taney’s successor as Jackson’s Secretary of the Treasury, forced the national government’s “hard money” agenda on private banks by conditioning eligibility to receive federal deposits on not issuing bank notes in small denominations.⁴⁷ Replacing “pet banks” with the “independent Treasury system,” President Van Buren further strengthened central control of federal revenue by delegating to six federal agencies the duty of holding federal revenue without the power either to lend it themselves or to deposit it in state-chartered banks for private lending.⁴⁸ Antebellum Democrats simply disliked public aid to either state- or federally chartered private banks,⁴⁹ and they opposed Whig and Republican proposals to secure state-chartered bank notes with federal securities.⁵⁰ But “hard money” Democrats eventually became the most enthusiastic supporters of U.S. Treasury Secretary Salmon Chase’s proposal to create “greenback” paper money as legal tender notes, because these notes had no connection to private banks.⁵¹

In sum, the anti-banker nondelegation theory was not a theory of states’ rights but a theory of bankers’ wrongs. It was a theory of nondelegation, not decentralization. Arguments about the benefits of nationally uniform banking law are, therefore, nonresponsive to the theory’s demand for active democratic supervision of banking. Federal preemption of state banking laws is perfectly consistent with this theory as long as federal regulators actively supervise private bankers. Such preemption violates the anti-banker nondelegation theory only when it gives private bankers freedom to set banking policy without active democratic supervision.

⁴⁷ MCFaul, *supra* note 41, at 77-79.

⁴⁸ The six agencies were the Treasury Department, the New Orleans Branch Mint, the Boston and New York customhouses, and two depositories, one in Charleston and another in St. Louis. See Act of July 4, 1840, ch. 41, §§ 2-4, 5 Stat. 385, 386, *repealed by* Act of Aug. 13, 1841, ch. 7, 5 Stat. 439.

⁴⁹ CHARLES SELLERS, *THE MARKET REVOLUTION: JACKSONIAN AMERICA, 1815-1846*, at 333 (1991) (describing Postmaster General Amos Kendall’s denunciation of state-chartered banks as a “young *Nobility System*”).

⁵⁰ WILLIAM GERALD SHADE, *BANKS OR NO BANKS: THE MONEY ISSUE IN WESTERN POLITICS, 1832-1865*, at 228-29, 233-34 (1972) (noting Democratic opposition to Whig Millard Fillmore’s “sugges[tion of] a national free banking scheme based upon the existing state banks” and Democrat Salmon Chase’s opposition to using banks in eastern seaboard cities as federal depositories).

⁵¹ See GRETCHEN RITTER, *GOLDBUGS AND GREENBACKS: THE ANTIMONOPOLY TRADITION AND THE POLITICS OF FINANCE IN AMERICA, 1865-1896*, at 76 (1997) (describing “hard-money” Jacksonians’ quick conversion to the cause of federal paper money); SHARP, *supra* note 37, at 19-21 (describing conversion of Ohio “hard-money” Democrats to the greenback movement).

B. *McCulloch's Federal Instrumentality Theory
and Banking as a Suspect Classification*

McCulloch v. Maryland,⁵² a major target of Jackson's veto message,⁵³ set forth an entirely different model of Congress's authority to delegate powers to private bankers, founded on an entirely different attitude toward bankers' trustworthiness in advancing the public interest.

In holding that the Second Bank was immune from Maryland's tax, Chief Justice Marshall reasoned that the Bank was an agent of the federal government, despite the fact that the federal government did not actually control the president of this private institution who was answerable only to the Bank's mostly private board of directors.⁵⁴ In Marshall's reasoning, the Bank counted as a *de facto* federal agency because it acted as the federal government's exclusive fiscal agent. It was entitled to use federal revenue deposited in its vaults for private banking ventures such as redeeming state bank notes to limit the supply of paper currency. Whatever the Bank did within the scope of this agency was beyond the power of the states to control, for the same reason that the states could not control the letters held by a federal postmaster, the customs receipts held by a customs official, or the damages won by a U.S. Attorney. "Those means are not given by the people of a particular State," Marshall reasoned, "but by the people of all the States. They are given by all, for the benefit of all—and upon theory, should be subjected to that government only which belongs to all."⁵⁵

Taken literally, this theory implied that the Bank should be immune not only from state taxation but also from every other sort of state law—whether contract, tort, property, or criminal law. In Marshall's words, "[T]he States have no power, by taxation *or otherwise*, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."⁵⁶ But this literal reading would make the Bank a law unto itself, as there was no federal code of tort, contract, crimes, or property that would

⁵² 17 U.S. (4 Wheat.) 316 (1819).

⁵³ See Jackson Veto Message, *supra* note 22, at 586-87; MEACHAM, *supra* note 46, at 211 ("Jackson had made it clear that he interpreted the Court's ruling in *McCulloch v. Maryland* . . . as inconclusive. But he also had made it clear that it hardly mattered—that he was bound to interpret the laws as he understood them regardless of what the Court said.").

⁵⁴ See *McCulloch*, 17 U.S. (4 Wheat.) at 430 ("We find . . . a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers.").

⁵⁵ *Id.* at 428-29.

⁵⁶ *Id.* at 436 (emphasis added).

restrict its operations if state law were preempted.⁵⁷ Therefore, Marshall's theory of immunity enshrined in *McCulloch* would plainly have to be constrained to prevent the Bank from becoming a self-governing dictatorship.

McCulloch offered a limiting principle to constrain the field preemption that it unleashed—the distinction between the banking operations of the Second Bank and all other aspects of the Bank. This limiting principle became the backbone of preemption doctrine in banking law from the end of the Civil War until the 1920s and is the essential principle that the OCC seeks to revive, so examining the distinction at its origins can clarify the character of the OCC's preemption claims.

1. *McCulloch's* Distinction Between Banking-Specific Activities and Nonbanking Activities

Chief Justice Marshall's discussion in *McCulloch* of state taxes not preempted by the Bank's charter illustrates the distinction between banking operations and other nonbanking activities:

This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union⁵⁸

What do these two permissible taxes (on the bank's real property and on bank stock owned by private citizens) have in common? First, they are

⁵⁷ Given *McCulloch's* theory of immunity, state law would not apply to the Bank in federal court under section 34 of the Judiciary Act of 1789. See Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (current version at 28 U.S.C. § 1652 (2006)). Section 34 provided that “the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.” *Id.* Under the *McCulloch* Court's reasoning, the Constitution “otherwise require[d]” that state laws could *not* “be regarded as rules of decision.”

Federal courts could still hear disputes involving banks under their “arising under” jurisdiction, see *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 826 (1824), or when fashioning general common law for commercial transactions, see *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18-19 (1842), overruled by *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). But there was no federal common law of crimes. The logic of *McCulloch* implied that the Bank should be regarded as an *imperium in imperio*, with the result that in responding to criminal fraud allegations, the Bank would not be governed by federal or state law, but rather only by its directors' fiat.

⁵⁸ *McCulloch*, 17 U.S. (4 Wheat.) at 436-37.

nondiscriminatory: they do not single out institutions affiliated with the federal government. Nondiscrimination, however, was not sufficient to save a state tax from preemption under *McCulloch*'s principle of supremacy—a point the Court made explicit ten years later in *Weston v. City Council*.⁵⁹

In addition, a state tax on a private institution could not control federal “operations.” The *McCulloch* Court distinguished between state burdens on federal operations and ordinary state laws affecting private institutions purely in their private capacities by invoking the concept of “resources which [the state governments] originally possessed.”⁶⁰ Even absent the creation of a federally chartered bank, states would contain land and people. State law, therefore, did not control the operations of the Bank by asserting power over such land and people. When federal agencies like the Bank purchased real estate or sold shares of stock within a state, they took the private property rights to the seller’s land or the buyer’s payment as they found them—defined by state law. In the *Weston* Court’s characterization of the *McCulloch* Court’s dicta, “property acquired by that corporation in a state was supposed to be placed in the same condition with property acquired by an individual.”⁶¹ By contrast, state taxation of federal tax revenue or federal bond proceeds deposited in a federally chartered bank’s vaults tapped a source of wealth that would not exist but for the special collective effort of the entire Union. The latter tax was preempted because it attacked the Second Bank as the federal government’s fiscal agent rather than as an

⁵⁹ 27 U.S. (2 Pet.) 449, 467-69 (1829). In *Weston*, the Court, in an opinion authored by Chief Justice Marshall, held that the Constitution’s principle of supremacy barred the City of Charleston from imposing a tax on any interest-bearing obligations, expressly including but not limited to certain bonds issued by the United States, *id.*, even though, as Justice Johnson pointed out in dissent, the City’s tax did not discriminate against the federal government. *Id.* at 472-73 (Johnson, J., dissentiente). According to Justice Johnson, Charleston’s exemption of “state stock, city stock, and stock of their own chartered banks” from the otherwise generally applicable tax was “no masked attack upon the powers of the general government”; rather, it could be explained by the city council’s desire not to impair the obligation of its own contracts or violate the immunity conferred on the state-chartered banks by the state legislature. *Id.* at 472. Indeed, the good faith of the city council could be inferred from its exemption of the stock of the Bank of the United States. *Id.* The express specification of six- and seven-percent bonds, according to Justice Johnson, although “most clumsily worded,” was simply an avoidance of “unequal and unjust” taxation of federal bonds bearing a lower interest rate. *Id.* at 472-73. The *Weston* majority responded that the tax “b[ore] directly upon” “the contract subsisting between the government and the individual,” because such a tax “operates upon the contract the instant it is framed, and must imply a right to affect that contract.” *Id.* at 465 (majority opinion). In other words, although the tax was paid by a private bondholder, it was imposed on the federal government’s act of borrowing money—it was, in effect, a tax on one of “the various operations of government.” *Id.*

⁶⁰ *McCulloch*, 17 U.S. (4 Wheat.) at 436.

⁶¹ *Weston*, 27 U.S. (2 Pet.) at 469.

ordinary holder of private property defined by state laws preexisting that federal charter.

For Chief Justice Marshall, this conceptual division between a private institution's nonfederal existence and its federally authorized operations provided a crisp way to avoid conflict:

[W]e have an intelligible standard, applicable to every case to which the power may be applied. . . . We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve.⁶²

One does not need to be a twentieth-century legal realist, however, to see that Marshall's distinction between wealth created by the Union and the states' original wealth rests on a legerdemain of what Daryl Levinson has called constitutional "framing."⁶³ The boundary between federal business and private business could contract and expand with the judge's willingness to alter the frame with which a transaction was viewed. As Professor Arthur Wilmarth has noted, Marshall conceded in *Osborn v. Bank of the United States*⁶⁴ that the Second Bank engaged in private banking operations but argued that this private banking business was "inseparably connected" to its "public functions" of supplying currency for the federal government's transactions.⁶⁵ In other contexts, Marshall drew lines separating what was private from what was federal. Marshall conceded in *Weston*, for instance, that all of the land of those states formed after the ratification of the Constitution was once owned by the federal government.⁶⁶ Why, then, were not all state taxes on real estate within such states an invasion of wealth created by the federal government? Chief Justice Marshall brushed this *reductio ad absurdum* aside by noting that the federal government does not continue to hold federal land after it is auctioned off to private citizens,

⁶² *McCulloch*, 17 U.S. (4 Wheat.) at 429-30.

⁶³ Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1367-71 (2002) (arguing that formal distinctions between state and federal roles in regulation break down during constitutional litigation because the Court can "frame" the transaction by expanding or constricting its interpretive lens).

⁶⁴ 22 U.S. (9 Wheat.) 738 (1824).

⁶⁵ 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, 240-42 (2004) (noting that the OCC has failed to issue an enforcement order against any of the eight largest national banks).

⁶⁶ See 27 U.S. (2 Pet.) at 459 ("It is said . . . that where lands are sold, the United States parts with the freehold with no prospect of resumption . . .").

whereas the federal government does maintain long-term relationships with federal bondholders until the bonds mature.⁶⁷

But this response seems like a non sequitur: Why can the federal government not take credit for creating the states that entered the Union after ratification? Such states, after all, had no original resources until they were created by federal statute. The Taney Court's later effort to distinguish between private persons' federally created wealth and their nonfederal wealth in *Dobbins v. Commissioners* illustrates the futility of the distinction.⁶⁸ In *Dobbins*, the Court held that the income of a captain of a U.S. revenue cutter was exempt from a county tax imposed on "all offices and posts of profit."⁶⁹ But, as counsel for Erie County noted, the tax on Captain Dobbins's income could be viewed as a tax on one of Erie County's private citizens.⁷⁰ The federal government did not create Captain Dobbins, after all. Even if the federal government created his ship, why was his labor not part of those "resources which [the states] originally possessed" under *McCulloch*? The *Dobbins* Court reasoned that Congress appropriated the money that paid Dobbins's salary and that taxing that salary would vary the compensation of federal officers, thereby affecting the operation of a federal statute.⁷¹ In the Court's words, "[T]he officer, as such, [is no] less a means to carry into effect these great objects than the vessel which he commands, the instruments which are used to navigate her, or than the guns put on board to enforce obedience to the law."⁷² If "[t]hese inanimate objects . . . cannot be taxed by a state, because they are means," then the officer could likewise not be taxed.⁷³ Such reasoning invited later formalistic distinctions between salaries that were directly defined by law and federal employees' incomes that were not so specifically defined by Congress.⁷⁴

⁶⁷ *Id.* at 468-69 ("The distinction is, we think, apparent. When lands are sold, no connexion remains between the purchaser and the government. The lands purchased become a part of the mass of property in the country with no implied exemption from common burthens.")

⁶⁸ See 41 U.S. (16 Pet.) 435 (1842), *overruled in part by* North Dakota v. United States, 495 U.S. 423 (1990).

⁶⁹ *Id.* at 445-50.

⁷⁰ *Id.* at 443.

⁷¹ *Id.* at 449-50.

⁷² *Id.* at 448.

⁷³ *Id.*

⁷⁴ In *Melcher v. City of Boston*, 50 Mass. (9 Met.) 73 (1845), for instance, the Massachusetts Supreme Judicial Court held that Boston *could* tax the income of a federal postal clerk by distinguishing *Dobbins* on the thin ground that the "office" of a revenue cutter captain was created by statute, whereas "the act regulating the post office department, does not, in terms, create any such office, or give any such character to these agents, as entitles them to be denominated public officers of the national government." *Id.* at 76-77.

Prior to the Civil War, the *McCulloch* Court's distinction between federally authorized banking operations and ordinary corporate property turned out to be not only conceptually limp but also politically untenable. South Carolina blatantly ignored the spirit of *McCulloch*'s two-part test at its creation⁷⁵ and again construed the decision into desuetude in 1832 at the height of the nullification crisis.⁷⁶

The problem with *McCulloch* was not, however, merely sectional. It was also ideological. By preempting state taxes even when those taxes did not discriminate against federal property, the doctrine seemed to confer special privileges on private parties with connections to the federal government. As Justice Thompson—not a Southerner but a New Yorker— inveighed, *McCulloch*'s immunity doctrine made federal bondholders “a privileged class of public creditors, who, though living under the protection of the government, are exempted from bearing any of its burthens.”⁷⁷ As President Jackson noted in his veto message, exempting a nationally chartered bank from taxes that state-chartered banks had to pay conferred an unfair competitive advantage on one private party over another.⁷⁸ As one state court judge characterized the opposition to the Second Bank's special federal privileges in the eyes of its opponents, “[T]his is a great monied monopoly, which, in the hands of the General Government, will become a gulph in the vortex of which, every minor institution will be swallowed up.”⁷⁹ Unsurprisingly,

⁷⁵ *Bulow v. City Council*, 10 S.C.L. (1 Nott & McC.) 527 (1819). The *Bulow* court overlooked the blatantly discriminatory character of a city tax on the Second Bank's stock, apparently by finding its facial neutrality sufficient. As for taxing the resources of the federal government, it was easy enough for the court to note that the tax applied only to shares owned by private citizens and not the federal government. *Id.* at 529-30. The dissent from Justice Abraham Nott, a former Federalist representative to the Sixth Congress who was thrown out of office when Jefferson was elected in 1800, suggested the partisan character of the decision. *See id.* at 533-35 (Nott, J., dissenting) (“If Congress has the power, it can be limited in the exercise of it only by its own discretion. . . . It is in vain, that Congress has power to erect public institutions if they must be subject to the capricious will of every corporate town in the United States for their existence.”).

⁷⁶ *See State ex rel. Berney v. Tax Collector*, 18 S.C.L. (2 Bail.) 654, 678-79 (1831) (upholding a state tax on stock dividends arising from the Second Bank of the United States because the tax was imposed in general terms).

⁷⁷ *Weston v. City Council*, 27 U.S. (2 Pet.) 449, 478 (1829). Justice Johnson used similar terms in decrying the Bank's immunity as a cloak for wealthy coupon clippers: “[W]hy should one who enjoys all the advantages of a society purchased at a heavy expense, and lives in affluence upon an income derived exclusively from interest on government stock, be exempted from taxation?” *Id.* at 473.

⁷⁸ *See* Jackson Veto Message, *supra* note 22, at 587-89.

⁷⁹ *Bulow*, 10 S.C.L. (1 Nott & McC.) at 534-35 (Nott, J., dissenting).

the Taney Court did not cite *McCulloch* until the Civil War,⁸⁰ after which it upheld federally issued “greenback” currency.⁸¹

2. The National Bank Act of 1864 and the Judicial Exhumation of *McCulloch*

While *McCulloch*'s distinction between banking-specific and all other state laws may have been conceptually indeterminate and arguably inequalitarian, the distinction was politically congenial to the new Republican-dominated Congress and Court after the Civil War. The National Bank Act of 1864 expressly adopted *McCulloch*'s dicta on permissible taxes by banning taxes on national banks' deposits but authorizing taxes on the value of private shareholders' stock and banks' real property, so long as these taxes were imposed in a nondiscriminatory fashion.⁸² As with the antebellum distinction in *Dobbins*, the conceptual foundation for this distinction seemed shaky. For instance, in *Van Allen v. Assessors*, the Court upheld a state tax on private shareholders' stock on the theory that such a tax was no different than any other tax on personal property.⁸³ Chief Justice Chase noted in partial dissent that such a tax constituted “an actual, though indirect, taxation of” the federal bonds in the banks' vaults;⁸⁴ the banking associations in question, “resembl[ing]” the Bank of the United States, were “entitled to all the protection and all the immunities to which that bank was entitled.”⁸⁵ Although Chase denounced what he took to be the majority's departure from *McCulloch* and *Osborn*,⁸⁶ the majority was faithful to the central formalism of *McCulloch* in distinguishing between prohibited state taxes on banking operations (such as bank deposits) and permitted state taxes on activities falling within the states' original powers (such as the owning of real estate or corporate shares).

Why rely on such a practically meaningless distinction? Like the *McCulloch* Court, the postwar Congress and Supreme Court were trying to divide

⁸⁰ See GERARD N. MAGLIOCCA, *ANDREW JACKSON AND THE CONSTITUTION* 70-73 (2007) (describing the antebellum demise of *McCulloch*).

⁸¹ See *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 537-47 (1871).

⁸² National Bank Act of 1864, ch. 106, § 41, 13 Stat. 99, 111-12 (current version at scattered sections of 12 U.S.C.).

⁸³ 70 U.S. (3 Wall.) 573, 584 (1866) (“This is a distinct independent interest or property, held by the shareholder like any other property that may belong to him.”).

⁸⁴ *Id.* at 589 (Chase, C.J., concurring in part and dissenting in part).

⁸⁵ *Id.* at 590.

⁸⁶ See *id.* at 591 (referring to *McCulloch* and *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), as “the judgments of great men and great judges” that “have acquired almost the force of constitutional sanctions”).

resources between the states and the federal government by those resources' proximity to the business of banking. Taxes on real estate or private citizens' "moneyed capital"⁸⁷ were taxes on the resources ordinarily available to states. Taxes on deposits, by contrast, taxed a banking activity specifically authorized by a federal charter and were therefore an attack on federal resources. That the two sorts of taxes had identical practical effects did not detract from the value of the distinction as an apparently simple way of dividing taxing power between state and federal spheres. On this theory, good (formalistic) fences made good neighbors.

In particular, the *McCulloch* dividing line was intended to perform the same function after the Civil War that it performed under the antebellum Court—to assuage state fears that federally conferred immunity would eat up state jurisdiction. As the Court reassuringly emphasized, nationally chartered banks were "governed in their daily course of business far more by the laws of the State than of the nation" and "[i]t is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional."⁸⁸ Even when a state tax imposed administrative duties identical to those imposed by the National Bank Act, the Court would tolerate the state law if the tax did not touch the banks' deposits but instead was legally incident on types of property not unique to banking.⁸⁹

Using *McCulloch* to define banks' tax liabilities under state law was a familiar enterprise. But how would *McCulloch* apply to state regulation of nationally chartered banks? The Supreme Court relied on a distinction analogous to the line between nonbanking property (e.g., real estate and private stock shares) and bank deposits. State laws that specifically targeted banking practices like the charging of interest or the taking of deposits were subjected to a strict rule of field preemption: if any provision of federal law remotely addressed the topic covered by state law, then the latter was preempted. In *Farmers' & Mechanics' National Bank v. Dearing*, for instance, the Court refused to clarify ambiguous terms in the National Banking Act in a manner that would subject the nationally chartered bank to state usury

⁸⁷ National Bank Act § 47, 13 Stat. at 111-12; *Van Allen*, 70 U.S. (3 Wall.) at 577, 583-84.

⁸⁸ *Nat'l Bank v. Kentucky*, 76 U.S. (9 Wall.) 353, 362 (1870).

⁸⁹ In *Waite v. Dowley*, 94 U.S. 527 (1877), in which the Court considered a state law requiring national banks to furnish lists of shareholders, it specifically rejected the notion that, because federal law also required shareholder lists, federal law "cover[ed] the same ground as that covered by the Vermont statute" and should, therefore, preempt Vermont law. *Id.* at 533-34. The Vermont statute served a different purpose than the similar federal law, according to the Court, and therefore "was not in conflict with any provision of the act of Congress." *Id.*

penalties.⁹⁰ The Court justified this result on “[t]he reasoning of Secretary Hamilton and of this court in *McCulloch v. Maryland* . . . and in *Osborne [sic] v. The Bank of the United States*.”⁹¹ Since Congress had established federal banks as a means to execute federal policy, the *Dearing* Court reasoned, “the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit.”⁹² To allow states to set the penalty as well as the interest rate would ensure that a nationally chartered bank “would be liable, in the discharge of its most important trusts, to be annoyed and thwarted by the will or caprice of every State in the Union.”⁹³

The Court was equally hostile to state regulations specifically directed at deposit-taking when such laws were applied to nationally chartered banks. In *Easton v. Iowa*, for instance, the Court held that the National Bank Act preempted an Iowa law that imposed criminal liability on bank officers for committing fraud if they accepted deposits after knowing that their bank had become insolvent.⁹⁴ As in *Dearing*, the Court invoked *McCulloch* and *Osborn*; it stated that, despite being private institutions, national banks were also federal instrumentalities that could not be subject even to state laws that did not directly conflict with any federal rule,⁹⁵ because “confusion would necessarily result from control possessed and exercised by two independent authorities.”⁹⁶ Iowa’s law could not stand, not because some provision of the National Bank Act specifically prohibited it or even duplicated it, but rather because the Court presumed that the existing rules

⁹⁰ See 91 U.S. 29, 32-33 (1875). The National Bank Act incorporated as a ceiling on interest either “interest at the rate allowed by the laws of the State or Territory where the bank is located, and no more,” or, “when no rate is fixed by the laws of the State or Territory, . . . a rate not exceeding seven per centum.” *Id.* at 30-31 (quoting National Bank Act § 30, 13 Stat. at 108). The statute’s definition of the penalty for violating this ceiling, however, suffered from an ambiguous modifier applying only to banks “knowingly taking, receiving, reserving, or charging a rate of interest greater than aforesaid.” *Id.* (quoting National Bank Act § 30, 108 Stat. at 108). To what did “aforesaid” refer—the 7% interest ceiling set by federal law, or the violation of state-defined interest rates as well? Under the latter interpretation, federal penalties would apply in every state; under the former construction, states could set their own penalties for violations of their interest ceilings.

⁹¹ *Id.* at 33.

⁹² *Id.* at 34.

⁹³ *Id.*

⁹⁴ 188 U.S. 220, 227-28, 238-39 (1903).

⁹⁵ As the *Easton* Court acknowledged, “[T]here is no express prohibition contained in the Federal statutes [duplicating or contradicting Iowa’s rule], but there are apt provisions, sanctioned by severe penalties, which are intended to protect the depositors and other creditors of national banks from fraudulent banking.” *Id.* at 230.

⁹⁶ *Id.* at 232. The Court stated, “[W]e are unable to perceive that Congress intended to leave the field open for the States to attempt to promote the welfare and stability of national banks by direct legislation.” *Id.* at 231-32.

contained within the National Bank Act were exclusive: "It thus appears that Congress has provided a symmetrical and complete scheme for the banks to be organized under the provisions of the statute."⁹⁷

Likewise, the Court held in *First National Bank of San Jose v. California* that the National Bank Act preempted California's law providing for the escheat to the state of bank accounts that were unclaimed for more than twenty years, to the extent that the state law applied to nationally chartered banks.⁹⁸ As with Iowa's law in *Easton*, no specific provision of the National Bank Act addressed the abandonment of bank accounts with which California's law explicitly conflicted. Instead, the Court emphasized that the National Bank Act generally authorized national banks to receive deposits, a power that reasonably implied the right to repay the deposit on the demand of the rightful accountholder despite the passage of time.⁹⁹ This general federal authorization to repay accounts did not express any specific policy about abandoned accounts—California was manifestly dealing with an issue that Congress simply had overlooked. Nevertheless, the Court presumed that Congress's silence indicated an intention to exclude any state law specifically directed to the management of bank accounts. The basis for this presumption of field preemption was less a judicial inquiry into the likely beliefs of Congress, however, than *McCulloch*'s idea that national banks were federal instrumentalities "designed to be used to aid the government in the administration of an important branch of the public service."¹⁰⁰ Therefore, according to the Court, "the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit."¹⁰¹ The Court was not willing to infer any such permission from Congress's silence on the topic of abandoned accounts.

In sum, the Court invoked *McCulloch* to bar states from filling the gaps in the National Bank Act with state laws if those state laws specifically targeted activities integral to the business of banking. The aforementioned examples of these activities include the charging of interest (*Dearing*), the acceptance of deposits (*Easton*), and the maintenance of accounts (*First National Bank of San Jose*). For state laws singling out banking practices, the Court construed *McCulloch* to require a presumption of field preemption. Federal law was presumed to act "like an eraser that rubs out state law in a

⁹⁷ *Id.* at 231.

⁹⁸ 262 U.S. 366, 366-67, 370 (1923).

⁹⁹ *Id.* at 368-70.

¹⁰⁰ *Id.* at 369 (quoting *Farmers' & Mechs.' Nat'l Bank v. Dearing*, 91 U.S. 29, 33 (1875)).

¹⁰¹ *Id.* (quoting *Dearing*, 91 U.S. at 34).

given area, leaving only federal law,”¹⁰² even when nothing in the federal law specifically addressed the issue covered by the state law. Insofar as states regulated banking-specific activities (such as deposit-taking or lending money at interest), the National Bank Act was presumed to be “a symmetrical and complete scheme for the banks” that implicitly excluded any state gap-filling on topics not covered by the Act.¹⁰³ In effect, state laws specifically addressing banking practices fell into a “suspect classification” under which the Court would presume preemption absent very specific statutory authorization.

But the Court completely abandoned this presumption of preemption when states imposed laws on nationally chartered banks that were less closely tied to the business of banking. As it stated in *First National Bank of San Jose*, nationally chartered banks’ “contracts and dealings are subject to the operation of general and undiscriminating state laws” because such laws “do not conflict with the letter or the general object and purposes of congressional legislation.”¹⁰⁴ Likewise, in *Easton*, the Court gave its blessing to state criminal laws by noting that “[u]ndoubtedly a State has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction.”¹⁰⁵ This proposition did not mean that such general state laws were never preempted by the National Bank Act. If there were some provision of the Act (say, its anti-preference policy regarding distributions to creditors) that contradicted a state’s common law rule, then the state’s rule would have to give way.¹⁰⁶ Such a specific conflict between state and federal law, however, would not be presumed. Instead, the Court relied on an opposite presumption, absent some specific congressional intention to the contrary, that nationally chartered banks were “governed in their daily course of business far more by the laws of the State than of the nation.”¹⁰⁷

This tolerance of “general laws” ensured that state common laws of contract, property, and corporations would generally escape preemption unless there was a specific conflict between a common law rule and some policy

¹⁰² Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 730-31 (2008).

¹⁰³ *Easton v. Iowa*, 188 U.S. 220, 231 (1903).

¹⁰⁴ *First Nat’l Bank of San Jose*, 262 U.S. at 368-69.

¹⁰⁵ *Easton*, 188 U.S. at 239.

¹⁰⁶ In *Davis v. Elmira Savings Bank*, 161 U.S. 275 (1896), for instance, the Court held that New York could not give a preference to savings banks who were creditors of a nationally chartered bank in the event of the latter’s insolvency, *id.* at 283-84, because “one of the objects of the national bank system was to secure, in the event of insolvency, a just and equal distribution of the assets of national banks among all unsecured creditors, and to prevent such banks from creating preferences in contemplation of insolvency,” *id.* at 284.

¹⁰⁷ *Nat’l Bank v. Kentucky*, 76 U.S. (9 Wall.) 353, 362 (1870).

contained within the National Bank Act. In *McClellan v. Chipman*, for instance, the Court allowed Massachusetts to enforce its prohibition on preferential transfers to creditors against a nationally chartered bank, even though such a rule prohibited a particular exercise of a power expressly conferred by the National Bank Act to receive real estate in satisfaction of debts.¹⁰⁸ The Commonwealth's prohibition of the national bank's power to receive real estate in a preferential transfer was not significant and created "no express conflict," because the state law barred the exercise of the national bank's powers only "under particular and exceptional circumstances."¹⁰⁹ The Court reasoned that "[n]o function of such banks is destroyed or hampered by allowing the banks to exercise the power to take real estate, provided only they do so under the same conditions and restrictions to which all the other citizens of the State are subjected."¹¹⁰ Subjecting the bank to the general background provisions of state contract law was not a significant burden on the exercise of federally conferred powers even when that law completely foreclosed one such exercise (receiving preferential transfers), because the National Bank Act presupposed that nationally chartered banks would engage in business, "as to their contracts in general, under the operation of the state law."¹¹¹

In contrast to its decisions dealing with state laws specifically addressing banking practices, the Court upheld general state laws even when they overlapped with specific provisions of the National Bank Act. For instance, the private right of shareholders to inspect a nationally chartered bank's books under state law, for instance, served some of the same functions as the powers of the Federal Comptroller of the Currency to inspect a bank's accounts. In *Guthrie v. Harkness*, the Court nonetheless held a state law granting this right to private citizens not preempted¹¹² because the Court was "unable to find any definition of 'visitorial powers'"—the term used in the federal statute—"which can be held to include the common law right of the shareholder to inspect the books of the corporation."¹¹³

¹⁰⁸ 164 U.S. 347, 361 (1896).

¹⁰⁹ *Id.* at 358.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 359.

¹¹² 199 U.S. 148, 159 (1905). The *Guthrie* Court acknowledged that national banks still fit within *McCulloch's* idea of a federal instrumentality—"a public institution, notwithstanding it is the subject of private ownership" that "may issue bills, which circulate as part of the currency of the country" and that "is subject to examination and in a large measure to the supervision of the Comptroller of the Currency." *Id.* at 157.

¹¹³ *Id.* at 157.

What made the states' general rules of common law less subject to preemption than their rules specifically addressing banking practices? The Court had practical reasons to want to preserve states' common law rules. In 1882, Congress enacted a statute eliminating nationally chartered banks' power (which had existed since 1863) to remove cases to federal court,¹¹⁴ thereby reducing the capacity of the federal courts to fashion general federal common law to govern the banks' transactions pursuant to *Swift v. Tyson*.¹¹⁵ Thus, the alternative to subjecting banks to state law was frequently anarchy.

This practical explanation, however, cannot explain why the Court did not simply allow state law to apply in any case where the federal statute did not address the mischief targeted by that state law. Why not simply use conflict preemption to define the scope of state power over national banks and allow state statutes—even statutes specifically regulating deposit-taking, lending, or other banking-specific activities—to fill gaps in the National Bank Act where the latter was silent or unclear? The answer cannot be that general laws intrude less into the business of banking than banking-specific state laws. Massachusetts's law at issue in *McClellan* prohibiting debtors from preferentially transferring real estate to banks practically impedes a bank's business just as much as Iowa's law at issue in *Easton* prohibiting bank officers from accepting deposits. The difference between the two, therefore, cannot be explained adequately by a desire to protect a national market with uniform rules suitable for interstate banking.

The distinction between general and banking-oriented state laws was driven less by bankers' needs for regulatory uniformity in a national market and more by judges' needs for doctrinal simplicity. *McCulloch* provided a relatively crisp way to divide federal jurisdiction from state jurisdiction, so the federal courts adapted *McCulloch's* state taxation rules to state regulation. Like state taxes on real property or corporate stock blessed by *McCulloch*,

¹¹⁴ Prior to 1882, under the National Currency Act of 1863, nationally chartered banks could remove their contractual disputes to federal courts. National Currency Act, ch. 58, § 59, 12 Stat. 665, 681 (1863) (current version at 28 U.S.C. § 1348). The 1882 Act withdrew that right of removal. Act of July 12, 1882, ch. 290, § 4, 22 Stat. 162, 163, *repealed in relevant part by* Act of June 25, 1948, ch. 646, § 39, 62 Stat. 869, 992-94 (1948). The 1948 Act restored the original jurisdiction of federal courts over suits "against any national banking association." Sec. 1, § 1348, 62 Stat. at 933 (codified at 28 U.S.C. § 1348 (2006)).

¹¹⁵ 41 U.S. (16 Pet.) 1 (1842), *overruled by* *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Under *Swift*, federal courts had fashioned rules of general federal common law to govern nationally chartered banks' transactions, corporate powers, and governance whenever disputes arising out of those transactions ended up in federal court. *See, e.g.*, *Briggs v. Spaulding*, 141 U.S. 132, 147 (1891) (holding that the "degree of care required" of directors of corporations "depends upon the subject to which it is to be applied . . . determined in view of all circumstances"); *Martin v. Webb*, 110 U.S. 7, 14-15 (1884) (recognizing the power of a cashier to bind a bank as its agent where agency was shown by parol evidence).

state common law rules seemed to fall within the states' "original" powers rather than to exploit federally created resources. By contrast, state rules aimed at banking, like state taxes imposed on banks' deposits, seemed to attack a subject (nationally chartered banking) that was purely a product of federal law. Treating banking-specific activity as a suspect classification that state laws could not address without triggering preemption was simply an easy way to translate *McCulloch's* tax-based inquiry into the context of regulation.

II. THE SECOND DEMISE OF *MCCULLOCH'S* FEDERAL INSTRUMENTALITY THEORY

Whatever its advantages in terms of doctrinal clarity, the *McCulloch* Court's distinction between suspect banking-specific laws and general laws had one striking disadvantage: it prohibited states from addressing issues that neither Congress nor any federal agency had ever actually considered. The reason was simply that the presence or absence of a federal law addressing some topic was orthogonal to *McCulloch's* test. States could not, therefore, fill gaps in federal banking regulations with their own banking-specific rules. In practical effect, *McCulloch* delegated the duty of filling gaps in federal regulatory schemes away from states and to the officers of private banking corporations. Such preemption might have made sense if one viewed national banks' officers as "upon much the same plane as are officers of the United States."¹¹⁶ The success of Louis Brandeis and Woodrow Wilson's attack on private bankers' power during the presidential campaign of 1912, however, made this understanding of nationally chartered banks politically untenable. *McCulloch's* theory of national banks as federal instrumentalities beyond the control of states' banking-specific laws had been tacitly repudiated by the New Deal Court for half a century when the OCC attempted to revive it in 2004.

By the early twentieth century, the notion that privately owned banks were the equivalent of disinterested federal officials had become completely indefensible. Between 1907 and 1914, the Democratic Party made opposition to legal privileges for private bankers the centerpiece of their political platform, culminating in Woodrow Wilson and Louis Brandeis's "New Freedom" campaign of 1912. Like Andrew Jackson's veto message of 1832, this campaign created a political climate in which *McCulloch's* theory of

¹¹⁶ *First Nat'l Bank of Bay City v. Fellows ex rel. Union Trust Co.*, 244 U.S. 416, 430 (1917) (Van Devanter, J., dissenting).

banking immunity from state law was politically—and, eventually, judicially—doomed.

A. *The Panic of 1907 and Brandeis's Revival of
the Anti-Banker Nondelegation Principle*

The end of *McCulloch's* privileging of private bankers as federal officials was a long time coming. Greenbackers, Anti-Monopoly Party members, and Populists had railed against the power of financial elites since the end of the Civil War,¹¹⁷ but these attacks had little political traction in a two-party system where neither party would espouse the anti-banking cause.¹¹⁸ Although William Jennings Bryan made hostility to banks a major part of the Democratic Party's platform in 1896, he had been so thoroughly trounced in the election that embrace of an anti-banking agenda seemed like political suicide.¹¹⁹

The Panic of 1907, however, changed everything. Brought on by a coincidence of events—the San Francisco earthquake and the resulting loss of capital reserves, an unsuccessful but highly leveraged effort to corner the copper market, and a resulting fear that lenders in that effort would be illiquid—the Panic exposed the fragility of a financial system essentially rooted in the self-governance of decentralized bankers.¹²⁰ J.P. Morgan almost single-handedly staved off a full-blown depression by pledging his own resources and strong-arming other bankers to do likewise, thereby guaranteeing the deposits of illiquid but solvent banks.¹²¹ Despite the arguably heroic quality of his intervention, Morgan's determination of the

¹¹⁷ See IRWIN UNGER, *THE GREENBACK ERA: A SOCIAL AND POLITICAL HISTORY OF AMERICAN FINANCE: 1865–1879*, at 68, 68–119 (1964) (discussing the rise of the Greenback movement after the Civil War, which consisted of “[a]grarian intellectuals and politicians . . . who drew their inspiration from the anti-monopoly . . . tradition of Jeffersonian and Jacksonian Democracy”).

¹¹⁸ The Democratic Party was the most obvious home for such anti-banking sentiment, as it was dominant in the undercapitalized South. The Democrats, however, depended on support from New York to win the Presidency, and were thus forced to adopt a more neutral attitude toward banking. See SCOTT C. JAMES, *PRESIDENTS, PARTIES, AND THE STATE: A PARTY SYSTEM PERSPECTIVE ON DEMOCRATIC REGULATORY CHOICE, 1884–1936*, at 44–45 (2000).

¹¹⁹ On Bryan's defeat, see generally GERARD N. MAGLIOCCA, *THE TRAGEDY OF WILLIAM JENNINGS BRYAN: CONSTITUTIONAL LAW AND THE POLITICS OF BACKLASH* (2011). The Democratic Party's nomination of Alton Parker in 1904 was taken to be a rejection of Bryanism and his “New Silver” platform. See EDMUND MORRIS, *THEODORE REX* 339 (2001).

¹²⁰ On the causes of the Panic of 1907, see ROBERT F. BRUNER & SEAN D. CARR, *THE PANIC OF 1907: LESSONS LEARNED FROM THE MARKET'S PERFECT STORM* 13–49 (2007).

¹²¹ See *id.* at 115–25 (discussing Morgan's response to the crisis, including convening presidents of trust companies in his library and locking the door until a solution was reached “to pay off . . . depositors in time”).

nation's fate by negotiating with other Wall Street elites in his private library rubbed against democratic sensibilities. Farmers, workers, and middle-class professionals all rebelled against this notion of being governed by the "House of Morgan."¹²²

The moment was ripe for reevaluation of national banks' privileges and immunities. The first sign of trouble for the idea of self-governing banks was the newly elected Democratic Congress's rejection of the "Aldrich Plan" in 1912. A proposal of the National Monetary Commission, the Aldrich Plan—named for stalwart conservative Republican Senator Nelson Aldrich—proposed a self-governing association of national banks to stave off future runs and panics by pooling their deposits free from meddling politicians,¹²³ thus effectively codifying the power that J.P. Morgan had informally wielded in 1907. The Democratic Congress, newly elected between 1910 and 1912, hooted the plan down, thereby setting the stage for a showdown over the legal status of banks during the 1912 presidential election.¹²⁴

Like Jackson's 1832 veto message, Woodrow Wilson's "New Freedom" campaign focused on the illegitimacy of bankers' exercising governmental power without democratic oversight. Inspired by Louis Brandeis's denunciation of "the Money Trust," the New Freedom platform asserted that investment bankers fostered inefficient and undemocratic monopolies in utilities, railroads, and manufacturing by sitting on "interlocking directorates" of corporate boards.¹²⁵ The campaign was fueled by the Pujo Committee's 1912 investigation into the influence of bankers over industry.¹²⁶ The Committee's report concluded that a system of interlocking directorates allowed a handful of bankers to govern the nation. Louis Brandeis's essays in *Harper's*

¹²² See RICHARD T. MCCULLEY, *BANKS AND POLITICS DURING THE PROGRESSIVE ERA: THE ORIGINS OF THE FEDERAL RESERVE SYSTEM, 1897–1913*, at 280–81 (1992) (discussing the Pujo Committee's criticism of private bankers' control over the economy).

¹²³ The National Monetary Commission was an entity created by the Aldrich-Vreeland Act in the wake of the Panic of 1907. See ELMUS WICKER, *THE GREAT DEBATE ON BANKING REFORM: NELSON ALDRICH AND THE ORIGINS OF THE FED* ch. 4 (2005). For the Commission's report, see NELSON W. ALDRICH ET AL., *NAT'L MONETARY COMM'N, REPORT OF THE NATIONAL MONETARY COMMISSION*, S. DOC. NO. 62-243 (2d Sess. 1912).

¹²⁴ See MCCULLEY, *supra* note 122, at 260–62 (discussing the unified Democratic opposition to the Aldrich Plan).

¹²⁵ See LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 51–52 (1914) (referring to interlocking directorates as "the most potent instrument of the Money Trust" because of the conflicts of interest they create).

¹²⁶ See *id.* at 32–33 (reporting the Committee's findings that members of J.P. Morgan & Co. held 341 directorships in 112 corporations with aggregate resources of \$22 billion). The Pujo Committee proceedings included calling an aged J.P. Morgan to testify about the appointments of members of the "House of Morgan" and related financial firms to dozens of corporate boards. See RON CHERNOW, *THE HOUSE OF MORGAN* 152–58 (1990).

Weekly publicized the Pujo Committee's findings and reinforced the idea that bankers formed a "financial oligarchy"¹²⁷ resulting in "the suppression of industrial liberty, indeed of manhood itself."¹²⁸ Brandeis called for a variety of reforms to curb bankers' power, including more disclosures to investors of bankers' fees and influence¹²⁹ and stricter prohibitions on bankers' conflicts of interest when sitting on multiple boards.¹³⁰ Soon thereafter, Congress enacted the 1913 Federal Reserve Act, which included the key Brandeisian principle that banks in the federal reserve system must be subject to the supervision of a Federal Reserve Board appointed by the President.¹³¹

Beyond this supervision of banks, however, the Federal Reserve Act incorporated an assumption that Andrew Jackson would readily have embraced: private bankers could not be trusted to determine the nation's financial policies without some form of democratic oversight. This anti-banker nondelegation doctrine implied that federal law should not preempt state banking rules unless federal officials had actually evaluated the particular risks addressed by state law. In effect, Brandeis's assault on government by bankers was also an assault on *McCulloch's* theory of field preemption.

B. *Judicial Retreat from McCulloch's Field Preemption, 1924–1948*

In short, the early twentieth century saw a revival of the anti-banker nondelegation doctrine remarkably similar to the Jacksonian principles that led to the first downfall of *McCulloch*. By the 1920s, the Court itself had beaten a steady retreat from its earlier confident assertions that nationally chartered banks were federal instruments beyond state control. Instead, the Court repeatedly used ordinary principles of conflict preemption to uphold state laws specifically targeting banking practices where there was no conflict with the National Bank Act.

There were signs of trouble for *McCulloch* even before the 1920s. *First National Bank of Bay City v. Fellows ex rel. Union Trust Co.* was ostensibly a nationalistic decision in which the Court upheld the Federal Reserve Act of 1913 by finding that Congress had the power to authorize national banks to

¹²⁷ See *id.* ch. 1.

¹²⁸ *Id.* at 48. The essays, originally published between August 1913 and December 1914 in *Harper's Weekly*, were later published as a tract. *Id.* at xiv.

¹²⁹ See *id.* at 101-08.

¹³⁰ See *id.* at 56 ("Obviously, interlocking directorates, and all that term implies, must be effectually prohibited before the freedom of American business can be regained.").

¹³¹ Federal Reserve Act, ch. 6, §§ 9–11, 38 Stat. 251, 259–63 (1913) (codified as amended in scattered sections of 12 U.S.C.).

hold securities as trustees in probate proceedings.¹³² The Court summarily dismissed the notion that delegating broad supervisory powers to the Federal Reserve Board violated the nondelegation doctrine. But buried in the decision was a sign of judicial impatience with *McCulloch*: the Court upheld the power of state courts to enforce state limits on national banks.¹³³ Setting aside nineteenth-century decisions prohibiting state courts from issuing writs of habeas corpus against federal officers, the Court upheld state courts' power to supervise national banks by noting the urgent need for state probate courts to secure determinations of the powers of trustees.¹³⁴ As Justice Van Devanter noted in dissent, the idea of allowing state courts to enforce state laws against federal instrumentalities was flatly inconsistent with the *McCulloch* Court's idea that national banks' officers stand "upon much the same plane as [do] officers of the United States."¹³⁵ By 1917, *McCulloch*'s equation of private bankers with federal officials had apparently worn thin.

First National Bank in St. Louis v. Missouri was the first decision overthrowing *McCulloch*'s analysis to uphold a state law.¹³⁶ In *First National Bank in St. Louis*, the Court upheld Missouri's law barring banks from opening branch offices within the state.¹³⁷ Ignoring *McCulloch*'s principle of field preemption, the Court instead applied only those precedents, like *McClellan*, that allowed state laws to be enforced where they did not conflict with any specific provisions of the National Bank Act. The majority began by noting that the National Bank Act "by fair construction of the statutes" did not empower nationally chartered banks to form branches unless they had such powers under a previous state charter.¹³⁸ It was "self evident" that a state statute prohibiting the formation of branches could not frustrate the purpose of a federal statute that did not authorize branches.¹³⁹ Given that the state statute did not conflict with the National Bank Act, the majority concluded that "the way is open for the enforcement of the state statute."¹⁴⁰ In other words, the Court ignored, without expressly overruling, *McCulloch*'s theory of field preemption and instead applied ordinary conflict preemption.

¹³² See 244 U.S. 416, 421-28 (1917).

¹³³ *Id.* at 426-28.

¹³⁴ *Id.* at 428.

¹³⁵ *Id.* at 430 (Van Devanter, J., dissenting); see *id.* (suggesting that interference with national banks by state legislatures "seriously imperiled" federal supremacy).

¹³⁶ *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 656-59 (1924).

¹³⁷ *Id.* at 658-61.

¹³⁸ *Id.* at 657-59.

¹³⁹ *Id.* at 659.

¹⁴⁰ *Id.* at 660.

In his dissent, Justice Van Devanter correctly asserted that “principles . . . settled a century ago in the days of the Bank of the United States” dictated that Missouri’s banking-specific statute should be preempted insofar as it applied to “corporate instrumentalities of the United States.”¹⁴¹

The destruction of *McCulloch*’s immunity for national banks was completed in the New Deal Courts of Chief Justices Hughes, Stone, and Vinson. From 1934 until 1948, the Court repeatedly applied ordinary conflict preemption, while ignoring the idea that banks should be free from state oversight even when federal law did not endorse banks’ policy choices, to uphold the application of states’ banking-specific laws to nationally chartered banks. In *Lewis v. Fidelity & Deposit Co.*, the Court held that states could prohibit a bank from being appointed a depository of state or local government revenues unless the bank provided a bond creating a lien on all of the bank’s assets to ensure faithful performance of the contract.¹⁴² The Court began and ended its analysis with the question of whether the National Bank Act’s prohibition on preferences for creditors implicitly prohibited such a bonding requirement. Finding no conflict, the Court upheld the Georgia statute without any reference to *McCulloch*.¹⁴³ Likewise, in *Wichita Royalty Co. v. City National Bank of Wichita Falls*, the Court followed *Erie Railroad v. Tompkins* in applying Texas’s law to the question of whether a bank was responsible for a depositor’s trustee’s misappropriation of a deposit for personal use.¹⁴⁴ Again, there was no mention of *McCulloch*’s prohibition on subjecting national banks to states’ banking-specific laws.

Finally, in *Anderson National Bank v. Lockett*, the Court virtually overruled its 1923 opinion in *First National Bank of San Jose* when it held that Kentucky could deem that certain bank accounts were abandoned and, therefore, would escheat to the State upon notice to accountholders and after a defined interval of time.¹⁴⁵ The Court attempted to distinguish *First National Bank of San Jose* by characterizing Kentucky’s statute as less “unusual” and “harsh” than California’s and, therefore, less of a deterrent to depositors’ entrusting their funds to a national bank.¹⁴⁶ But the Court’s re-characterization of *McCulloch*’s holding represented the complete repudiation of *McCulloch*’s theory of field preemption. According to the *Lockett* Court, the Kentucky statute was consistent with *McCulloch*, because it “does not

¹⁴¹ *Id.* at 662 (Van Devanter, J., dissenting). Justice Van Devanter’s dissent was joined by Chief Justice William Howard Taft and Justice Pierce Butler.

¹⁴² 292 U.S. 559, 565-70 (1934).

¹⁴³ *Id.*

¹⁴⁴ 306 U.S. 103, 104-10 (1939).

¹⁴⁵ 321 U.S. 233, 241-42 (1944).

¹⁴⁶ *Id.* at 250.

discriminate against national banks, cf. *McCulloch v. Maryland*, 4 Wheat. 316, by directing payment to the state by state and national banks alike, of presumptively abandoned accounts.”¹⁴⁷ Such a statement flew in the face of the Marshall Court’s understanding of *McCulloch*. As noted earlier, the *Weston* Court specifically rejected this idea that nondiscrimination against the federal government sufficed to satisfy *McCulloch*’s principle of supremacy.¹⁴⁸ The *Lockett* Court also noted that there was not “any word in the national banking laws which expressly or by implication conflicts with the provisions of the Kentucky statutes.”¹⁴⁹ This observation, while true, was irrelevant under *Easton* and *Dearing*, under which such a conflict was presumed absent clear federal authorization for state regulation of federal instrumentalities.

The *Lockett* Court, in short, adopted sub silentio a new and narrower reading of banks’ immunity that permitted states to impose regulations on lending and deposit-taking, so long as the states did not thereby discriminate against any nationally chartered banks or contradict any policies of the federal government. This implicitly narrower reading did not mean that banks never received the benefits of preemption. If a federal statute contained a specific provision preempting a state law, then, of course, that state law could have no effect.¹⁵⁰ Moreover, the preemptive provision of the federal statute could be implicit rather than explicit; if some state law contradicted the spirit or purpose of federal banking law, it would be set aside.¹⁵¹ Federal courts could exercise a lot of creativity in inferring such implied federal purposes from federal statutes because, during the 1940s, the New Deal Court embraced a robust judicial purposivism in statutory interpretation.¹⁵² This purposivism could be the occasion of much judicial hand wringing about the degree to which federal banking law permitted judges to invent principles of federal common law to govern national banks.¹⁵³

¹⁴⁷ *Id.* at 247. This was the Court’s only citation to *McCulloch*.

¹⁴⁸ *Cf. supra* subsection I.B.1.

¹⁴⁹ *Anderson Nat’l Bank*, 321 U.S. at 247-48.

¹⁵⁰ *See, e.g.*, *Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 99-101 (1941) (holding that the tax exemption for federal land banks expressly conferred by the Federal Farm Loan Act of 1916 applied to and therefore preempted North Dakota’s attempt to enforce a sales tax on a bank’s purchase of lumber).

¹⁵¹ *See, e.g.*, *Deitrick v. Greaney*, 309 U.S. 190, 200-01 (1940) (holding that federal courts could disregard a state law that would circumvent a federal prohibition on a national bank’s purchasing its own stock).

¹⁵² *See, e.g.*, *United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 542 (1940) (“In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress.”).

¹⁵³ *Compare D’Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 456-61 (1942) (defending a principle of federal common law, inferred from the spirit of the statute, that certain state law

C. Replacing McCulloch with Modern Conflict Preemption

After *Lockett*, the fundamental principle defining banking preemption had changed, as lower courts recognized.¹⁵⁴ The Supreme Court no longer asserted that states could never regulate national banks. The Court instead emphasized that states could not deny or impair banking powers that Congress had explicitly conferred.

*Barnett Bank of Marion County v. Nelson*¹⁵⁵ illustrates this post–New Deal focus on conflict preemption. The Florida law at issue in *Barnett*—a prohibition on the sale of insurance by any bank affiliated with a holding company¹⁵⁶—was a banking-specific law that, under the old *Dearing-Easton* reading of the National Bank Act, should have been automatically preempted as a forbidden regulation of national banks’ deposit-taking operations. The *Barnett* Court, however, ignored the banking-specific character of the Florida law. Instead, it focused on the conflict between the Florida statute and a 1916 federal law authorizing national banks to sell insurance.¹⁵⁷ Relying on what it called “ordinary legal principles of pre-emption,”¹⁵⁸ the *Barnett* Court stated that a federal grant of banking power “ordinarily pre-empt[s]

defenses against a promissory note were inapplicable against the FDIC as the receiver of a national bank), *with id.* at 465 (Frankfurter, J., concurring) (urging reliance on state law because “we have put to one side, as unnecessary to the disposition of this case, the duty of this Court to make law ‘interstitially’ (as Mr. Justice Holmes put it in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 [(1917)]) in controversies arising in the federal courts outside their diversity jurisdiction”). Frankfurter’s skepticism about federal common law is indicated by his citation of the particular passage of Holmes’s dissenting opinion in *Jensen* in which Holmes declared that he “recognize[d] without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.” *Jensen*, 244 U.S. at 221 (Holmes, J., dissenting). He concluded that a federal court cannot make up admiralty law wholesale but rather “must take the rights of the parties from a different authority, just as it does when it enforces a lien created by a State.” *Id.* Holmes urged reliance on state law because “[t]he only authority available is the common law or statutes of a State.” *Id.*

¹⁵⁴ See, e.g., *California v. Coast Fed. Sav. & Loan Ass’n*, 98 F. Supp. 311, 319 (S.D. Cal. 1951) (distinguishing *Lockett* because it addressed the powers of nationally chartered banks rather than nationally chartered savings and loans, and noting that for banks, Congress left “open a field for state regulation and the application of state laws; but as to federal savings and loan associations, Congress made plenary, preemptive delegation to the [Home Loan Bank] Board to organize, incorporate, supervise and regulate, leaving no field for state supervision”). Although *Coast Federal* is merely a district court decision, it was one of the first decisions to recognize that federally chartered savings and loans were governed by a more aggressive standard of federal preemption than nationally chartered banks—a distinction the district court correctly attributed to New Deal decisions like *Lockett*. For a discussion of the standard applying to savings and loans, see *infra* notes 289–300 and accompanying text.

¹⁵⁵ 517 U.S. 25 (1996).

¹⁵⁶ *Id.* at 28–29.

¹⁵⁷ See *id.* at 31–38.

¹⁵⁸ *Id.* at 37–38.

contrary state law” because “normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted.”¹⁵⁹ Because the Florida law barred Barnett Bank from an exercise of a federally conferred power, the Court held that it constituted a “significant[]” impairment of that power¹⁶⁰—hardly a surprising conclusion, given the breadth of the state law’s restriction. In so holding, the *Barnett* Court cited *Luckett* for the proposition that *Barnett*’s holding would not “deprive States of the power to regulate national banks, where (unlike here) doing so does not prevent or significantly interfere with the national bank’s exercise of its powers.”¹⁶¹ The citation was a significant affirmation of *Luckett*’s principle that federal banking law does not automatically preempt a state regulation that is targeted specifically at a banking activity.¹⁶²

It would be an exaggeration to state that the Court abandoned entirely the earlier nineteenth-century tradition under which states were barred from regulating banks with laws specifically targeting banking activities. The old precedents continued to be cited. In *Watters v. Wachovia Bank*, for instance, the Court approvingly quoted *Dearing*’s sweeping statement that “the States can exercise no control over [national banks], nor in any wise affect their operation, except in so far as Congress may see proper to permit.”¹⁶³ The *Watters* Court acknowledged that “[f]ederally chartered banks are subject to state laws of general application in their daily business to the extent such laws do not conflict with the letter or the general purposes of the [National Banking Act].”¹⁶⁴ However, the use of the phrase “state laws of general application” suggested by negative implication that state laws *not* of general application would be preempted. This suggestion of some sort of field preemption for all state laws targeting national banks’ lending or deposit-taking activities was reinforced by the *Watters* Court’s subsequent observation that “[d]iverse and duplicative superintendence of national banks’ engagement in the business of banking, we observed over a century ago, is precisely what the [National Bank Act] was designed to prevent.”¹⁶⁵ To support this last assertion, the Court quoted with approval the *Easton* Court’s statement that federal banking law created a banking

¹⁵⁹ *Id.* at 32-33.

¹⁶⁰ *Id.* at 33.

¹⁶¹ *Id.*

¹⁶² In the case of *Luckett*, the banking activity at issue was the maintenance of abandoned or dormant accounts. See *supra* text accompanying notes 145-48.

¹⁶³ *Watters v. Wachovia Bank*, 550 U.S. 1, 11 (2007) (alterations in original) (quoting *Farmers’ & Mechs.’ Nat’l Bank v. Dearing*, 91 U.S. 29, 34 (1875)).

¹⁶⁴ *Id.* (emphasis added).

¹⁶⁵ *Id.* at 13-14.

system that was “independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the States.”¹⁶⁶

The *Watters* Court, however, never embraced wholesale field preemption of all state laws that specifically targeted banking business. The Court rested its holding on a specific authorization rather than a general ban on states’ enforcing banking-specific rules against national banks or their subsidiaries. In analyzing why Michigan could not subject such subsidiaries to the general oversight of Michigan’s banking authorities, the *Watters* Court relied on the National Bank Act’s specific provision barring states from exercising visitorial powers over national banks.¹⁶⁷ Moreover, the Court offered an argument specific to the “duplicative” character of the general supervisory power asserted by Michigan: the OCC already exercised precisely the same power in the form of its visitorial power.¹⁶⁸

The Court most clearly rejected *McCulloch*’s theory of preemption in *Cuomo v. Clearing House Ass’n*.¹⁶⁹ There, the Court, in an opinion by Justice Scalia, held that the OCC’s exclusive visitorial power did not preempt the New York Attorney General’s power to enforce the state’s fair-lending laws in state or federal court.¹⁷⁰ In defense of its theory that the lawsuit was preempted because it was an exercise of visitorial powers exclusively vested in the OCC, the OCC argued that the National Bank Act barred, at the very least, public officials’ lawsuits to enforce “state banking laws.”¹⁷¹ These specific banking laws, the OCC argued, were preempted even if enforcement of other more general laws was not preempted—for instance, general rules of contract and property—that supply “the legal infrastructure” for banking.¹⁷² In rejecting this “distinction between ‘implementation’ of ‘infrastructure’ and judicial enforcement of other laws,” Justice Scalia observed that “[o]f course [this distinction] can be found nowhere within the text of the statute” and, therefore, “attempts to do what Congress declined to do: exempt national banks from all state banking laws, or at least state enforcement of those laws.”¹⁷³ Thus, the *Clearing House* Court expressly

¹⁶⁶ *Id.* at 14 (quoting *Easton v. Iowa*, 188 U.S. 220, 229 (1903)).

¹⁶⁷ *See id.* at 14-15 (“No national bank shall be subject to any visitorial powers except as authorized by Federal law” (quoting 12 U.S.C. § 484(a) (2006))).

¹⁶⁸ *Id.* at 13-14.

¹⁶⁹ 557 U.S. 519 (2009).

¹⁷⁰ *Id.* at 535-36.

¹⁷¹ *Id.* at 529-33.

¹⁷² *Id.* at 531-32 (quoting *Bank Activities and Operations*, 69 Fed. Reg. 1895, 1896 (Jan. 13, 2004)).

¹⁷³ *Id.* at 533. It is perhaps not surprising that *Clearing House* was written by the Court’s most outspoken textualist.

rejected the idea that the National Bank Act contained an implicit general prohibition on state laws specifically tailored for the regulation of lending—precisely the position that the Court had defended since *McCulloch*.¹⁷⁴ Indeed, even the OCC seemed to concede that the state's fair-lending law might not be preempted "because its substantive requirements are not meaningfully different from those imposed by federal law."¹⁷⁵

In sum, since the New Deal, the Court has gradually edged away from the idea, derived from *McCulloch*, that national banks are immune from state laws specifically targeting the business of banking. The New Deal Court never explained why it retreated from *McCulloch*'s holding that nationally chartered banks were immune from state regulation of their banking activities. One can, however, identify two trends in the policies and jurisprudence of the early twentieth century sufficient to explain the outcomes of these decisions: decreasing trust of private bankers and increasing trust for state governments.

First, the idea that federally chartered banks were somehow carrying out the policies of the federal government simply seemed absurd in light of the distrust of bankers expressed in the progressive and populist politics leading up to the Wilson Administration. The Second Bank of the United States might plausibly have been regarded as a federal agent akin to, say, a member of the Federal Reserve today. The federal government owned twenty percent of the Bank's stock and appointed several of its directors, and the Bank enjoyed the unique position of holding and disbursing federal deposits in return for a sizable "bonus" paid over to the federal government.¹⁷⁶ One might, therefore, regard the Bank as a sort of quasi-governmental entity like Amtrak—an entity that, while formally private, nevertheless enjoyed a unique status as an agent of federal financial policy.¹⁷⁷ Nationally chartered banks, however, do not have a relationship with the federal government remotely resembling that which the Second Bank had. The federal government does

¹⁷⁴ Arthur E. Wilmarth, Jr., *The Dodd-Frank Act's Expansion of State Authority to Protect Consumers of Financial Services*, 36 J. CORP. L. 893, 936-37 (2011) (explaining the *Clearing House* Court's rejection of "'legal infrastructure' theory").

¹⁷⁵ Brief for the Federal Respondent at 42, *Clearing House*, 557 U.S. 519 (No. 08-453), 2009 WL 815241.

¹⁷⁶ For more on the structure of the Second Bank as a governmental agency, see RALPH C.H. CATTERALL, *THE SECOND BANK OF THE UNITED STATES* 453-77 (1903). The Bank, by the terms of its charter, was obliged to pay a "bonus" of \$1,500,000 to the United States. *Id.* at 453, 474.

¹⁷⁷ See *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995) ("[W]here, as [in the case of Amtrak], the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.").

not appoint their directors, own their stock, or even review their federal charters according to any predictable standards.¹⁷⁸ That such banks make various marketing, lending, or deposit-taking decisions hardly means that the federal government has implicitly endorsed those decisions. To the contrary, as Louis Brandeis urged before his appointment to the Supreme Court, those decisions might be made by an “inner group of the Money Trust”¹⁷⁹—“builders of imperial power”¹⁸⁰ or a “financial oligarchy”¹⁸¹—without any imprimatur whatsoever from any democratically accountable federal official.

Indeed, the legal tradition of private implementation of public policy on which *McCulloch* rested has been torn down by late nineteenth-century state-building. It was the norm in the early nineteenth century to delegate regulatory matters to essentially private actors operating for their own profit. Navy ship captains were paid through prize money from their captures, U.S. Attorneys were paid with bounties from their victorious lawsuits, and so forth.¹⁸² This regime of privatized government, however, was washed away by the gradual development of a professional, full-time American bureaucracy between the end of the Civil War and the New Deal. Delegations of governmental power to private enterprises further declined with the nondelegation decisions, such as *A.L.A. Schechter Poultry Corp. v. United States*, in which the Court struck down the National Industrial Recovery Act’s authorization for private trade associations of industry to fix prices, wages, and working conditions in codes of fair competition.¹⁸³ This doctrinal rejection of private delegations not closely supervised by full-time bureaucrats is a special application of the more general idea that private entities cannot have the last word on their own regulation. This principle is so deeply rooted in American political culture that efforts to immunize

¹⁷⁸ Henry N. Butler & Jonathan R. Macey, *The Myth of Competition in the Dual Banking System*, 73 CORNELL L. REV. 677, 685 (1988) (explaining that the process of obtaining a national bank charter is untethered by any predictable standards).

¹⁷⁹ BRANDEIS, *supra* note 125, at 35.

¹⁸⁰ *Id.* at 36.

¹⁸¹ *Id.* ch. 1.

¹⁸² See NICHOLAS PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940 (forthcoming Oct. 2013). On the role of private profit in the compensation of the Navy, see Nicholas Parrillo, *The De-Privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century*, 19 YALE J.L. & HUMAN. 1 (2007).

¹⁸³ See 295 U.S. 495, 503 (1935) (finding that section 3 of the National Industrial Recovery Act “demonstrates an illegal delegation of legislative power”); see also *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (striking down the delegation of power to the majority of miners to set wages for an entire industry and calling it “legislative delegation in its most obnoxious form”).

federally chartered banks from state control through broad field preemption have twice collapsed.

Second, and quite apart from hostility toward bankers, the foundations of *McCulloch* were being sapped by increased judicial trust of states. Chief Justice Marshall called for a simple, formal, bright line separating federal and state jurisdiction because he wanted the Court to be

relieved, as [it] ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve.¹⁸⁴

Marshall's implicit assumption—accurate in the antebellum period—was that states were itching to undermine federal policy and, therefore, needed to be restrained by clear lines rather than by any “perplexing inquiry” into degrees of interference with federal ends.¹⁸⁵

By the 1920s, however, this concern with states making war on the federal government was obsolete, and its obsolescence led the Court to abandon antebellum notions of federal immunity from state taxes. Justice Holmes led the way in 1928 with his famous aphorism that “[t]he power to tax is not the power to destroy while this Court sits.”¹⁸⁶ Although Holmes made this remark in dissent from an opinion barring state taxation of gasoline sold to the federal government by a private firm,¹⁸⁷ his view became the law within a decade. Rather than stop states' usurpations with simple, bright-line rules that would have overprotected federal turf, the Court switched to case-by-case adjudication of mushy standards, weighing each state law against the specific federal interest that it was said to transgress. In *Graves v. New York ex rel. O'Keefe*, the Court finally overruled *Dobbins* and allowed states to tax the incomes of federal employees.¹⁸⁸ In approving what he took to be the majority's “important shift in constitutional doctrine,”¹⁸⁹ Justice Frankfurter noted that the expansive scope of federal immunity from state taxes was the

¹⁸⁴ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 430 (1819).

¹⁸⁵ *Id.*

¹⁸⁶ *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting).

¹⁸⁷ *See id.* at 220-22.

¹⁸⁸ *See* 306 U.S. 466, 487 (1939) (holding that an immunity of federal employees from state taxation should not be found “to be implied from the Constitution, because if allowed it would impose to an inadmissible extent a restriction on the taxing power which the Constitution has reserved to the state governments”).

¹⁸⁹ *Id.* at 487 (Frankfurter, J., concurring).

result of “an unfortunate remark in the opinion in *McCulloch v. Maryland*” that was made “[p]artly as a flourish of rhetoric and partly because the intellectual fashion of the times indulged a free use of absolutes.”¹⁹⁰ But this penchant for “absolutes” was driven not only by “intellectual fashion” but also by antebellum political realities—in particular, states’ seeking to shut down federal policies and even make war against the federal government—that had since vanished.

The obsolescence of extreme distrust toward state governments similarly justified the Court’s shift away from field preemption of state laws regulating federally chartered banks’ banking activities. As the Supreme Court noted in *Atherton v. FDIC*, the notion that federally chartered banks required the protection of federal common law “might have seemed a strong one during most of the first century of our Nation’s history, for then state-chartered banks were the norm and federally chartered banks an exception—and federal banks often encountered hostility and deleterious state laws.”¹⁹¹ That fear of state hostility to federal policy being obsolete, the capacious immunity designed to counteract it also lapsed into desuetude. The *Atherton* Court concluded that “[t]o point to a federal charter by itself shows no conflict, threat, or need for ‘federal common law.’”¹⁹² For identical reasons, the mere existence of a federal charter also indicates no special need for field preemption whenever the powers associated with that charter are limited.

III. *MCCULLOCH*’S THIRD RESURRECTION? THE CASE AGAINST THE OCC’S 2004 AND 2011 RULES ON PREEMPTION

One might think that *McCulloch*’s theory of field preemption, having died two deaths already—first at the hands of Andrew Jackson in 1832 and then at those of Louis Brandeis in 1912—would be well and truly buried. In 2004, however, the OCC revived the theory once more. Provoked, in part, by states’ efforts to control so-called predatory lending,¹⁹³ the OCC issued rules in 2004 that broadly construed the preemptive effects of federal banking laws. Relying on its visitorial powers under the National Bank

¹⁹⁰ *Id.* at 489.

¹⁹¹ 519 U.S. 213, 221 (1997).

¹⁹² *Id.* at 223.

¹⁹³ Predatory loans are loans with high fees or interest rates made to borrowers at high risk of defaulting. See Nicholas Bagley, Note, *The Unwarranted Regulatory Preemption of Predatory Lending Laws*, 79 N.Y.U. L. REV. 2274, 2277-78 (2004) (reviewing “predatory lending” practices and state responses thereto during the late 1990s and early 2000s).

Act,¹⁹⁴ the OCC took an outspoken stance against any state enforcement of banking-specific laws on lending or deposit-taking.¹⁹⁵ The OCC also aggressively asserted that nationally chartered banks were free to disregard state laws specifically related to lending money secured by real estate, on the theory that such state laws “obstruct, impair, or condition a national bank’s ability to fully exercise its Federally authorized real estate lending powers.”¹⁹⁶ The OCC emphasized that its list of preempted state limits was non-exhaustive and that other state laws could be preempted if the OCC found that they obstructed, impaired, or conditioned banks’ power to make loans secured by real estate.¹⁹⁷ The OCC qualified this sweeping criterion for preemption by listing several categories of laws, such as contracts, torts, criminal law, rights to acquire and transfer real property, and rights to collect debts, that were presumptively not preempted “to the extent that they only incidentally affect the exercise of national banks’ real estate lending powers.”¹⁹⁸

In essence, the 2004 rules reinstated the nineteenth-century theory, derived from *McCulloch*, that banking-specific laws constitute a suspect classification for purposes of preemption under the National Bank Act.¹⁹⁹ As with *McCulloch*’s two earlier incarnations, an economic crisis inspired a political backlash, this time against the OCC’s 2004 attempt to insulate banks from state law. Following the collapse of real estate prices between 2007 and 2008 and the resulting wave of bank failures and bailouts, Congress enacted the Dodd-Frank Act in 2010, and in it, section 1044(a), a provision containing specific language apparently constraining the preemption of states’ “consumer financial laws.”²⁰⁰

¹⁹⁴ See 12 U.S.C. § 484(a) (2006) (“No national bank shall be subject to any visitatorial powers except as authorized by Federal law . . .”).

¹⁹⁵ “Federal law commits the supervision of national banks’ Federally-authorized banking business exclusively to the OCC, (except where Federal law provides otherwise), and does not apportion that responsibility among the OCC and the states.” Bank Activities and Operations, 69 Fed. Reg. 1895, 1895 (Jan. 13, 2004).

¹⁹⁶ Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1911 (Jan. 13, 2004) (quoting the text of the revised rule later codified at 12 C.F.R. § 34.4(a) (2005) (current version at 12 C.F.R. § 34.4(a) (2012))). For an example of the types of preempted state laws, see, 12 C.F.R. § 7.4007(b) (2012) (deposit-taking); *id.* § 7.4008(d) (non-real estate loans); *id.* § 34.4(a) (real estate loans).

¹⁹⁷ Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. at 1911.

¹⁹⁸ *Id.* at 1917 (codified at 12 C.F.R. § 34(b) (2005)).

¹⁹⁹ See *supra* subsection I.B.1.

²⁰⁰ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1044(a), 124 Stat. 1376, 2014-17 (2010) (codified at 12 U.S.C. § 25b (2006, Supp. IV 2011)).

In 2011, however, the OCC doubled down on its 2004 approach to preemption by reissuing its 2004 rules in barely altered form.²⁰¹ As in 1832 and 1912, the stage is once more set for a legal and political showdown over federal officials' efforts to protect national banks from state control. As I argue below, there are several plausible legal arguments that the OCC should lose this third round.

First, as a matter of pure administrative rationality, the OCC's 2004 and 2011 preemption rules are only tenuously related to the goal of market harmonization that the OCC proffers as its justification. The rules are more closely geared toward protecting private bankers' autonomy than national regulatory uniformity. This mismatch suggests that those rules could be struck down as arbitrary and capricious under 5 U.S.C. § 706(2)(A) of the Administrative Procedure Act.

Second, section 1044(a) of the Dodd-Frank Act seems to adopt an anti-banker nondelegation doctrine that rejects the idea of preempting state law without substituting equivalent federal regulation. In particular, section 1044(a)'s specific call for "case-by-case" evaluation of "the impact of a particular State consumer financial law on any national bank"²⁰² is hard to explain unless it requires that, before national regulators preempt a state law, they analyze the specific risks addressed by that law to ensure that bankers can be trusted to self-regulate those risks. Despite its assurances to the contrary, the OCC has no such procedure in place for such analysis.

*A. Are the OCC's Preemption Rules Rationally Related
to the Goal of Market Harmonization?*

What explains the OCC's division of state laws into these presumptively preempted and nonpreempted categories? As I noted at the outset of this Article, the OCC repeatedly invoked the idea of national uniformity to facilitate an interstate market in financial services.²⁰³ This argument for a single set of rules to control a single market is essentially an argument for field preemption to realize economies of scale in regulation. Using a term from the jurisprudence of the European Court of Justice, one can characterize this rationale for preemption as an argument for market harmonization, that is, uniform rules for a national market.²⁰⁴ Because one set of rules can perform as well as fifty, the only effects of multiple rules are "costly and

²⁰¹ See *infra* notes 274-77 and accompanying text.

²⁰² 12 U.S.C. § 25b(b)(3).

²⁰³ See *supra* text accompanying notes 16-20.

²⁰⁴ See generally PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW* 635-36 (3d ed. 2003) (reviewing European Union case law and theory on market harmonization).

burdensome” compliance efforts that lead to “uncertain liabilities and potential exposure.”²⁰⁵ Uniform rules, on this account, generate benefits regardless of their content, because it is cheaper to learn and comply with one set of rules than with fifty. Professor Merrill terms such preemption the “displacement” of state law that “radically simplifies the regulatory structure in any given area, replacing a *mélange* of federal, state, and local requirements with a single set of federal rules.”²⁰⁶ As Merrill notes, such policy rests on a general judgment “about the benefits and costs of legal uniformity,” not on an individualized determination that some particular state rule interferes with any specific federal rule.²⁰⁷ In short, despite the OCC’s disclaimers to the contrary,²⁰⁸ the OCC’s rationale for its 2004 rules, with its emphasis on the overall benefits of regulatory uniformity²⁰⁹ regardless of the content of any specific state banking rule, institutes a regime of field preemption.

The difficulty with the market harmonization rationale is that *McCulloch*’s distinction between general and banking-specific laws was designed for an entirely different purpose: the protection of nationally chartered banks from hostile state legislation. By leaving states’ general common law doctrines largely intact, the OCC has pursued the goal of national uniformity with extraordinary underinclusiveness. The irrationality of the OCC’s rules is only exacerbated by the OCC’s failure to provide any coherent rule for when general state law constitutes permissible “legal infrastructure” for banking,²¹⁰ as opposed to an impermissible impediment to national banks’ powers.

That common law claims can have the same regulatory purposes and effects as rules enforced by administrative agencies is hardly a novelty. As the Supreme Court now regularly announces, a liability award “can be, indeed is designed to be, a potent method of governing conduct and controlling policy.”²¹¹ Moreover, the generality of the underlying common law standard

²⁰⁵ Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1908 (Jan. 13, 2004).

²⁰⁶ Merrill, *supra* note 102, at 732.

²⁰⁷ *Id.* at 733.

²⁰⁸ See Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 43,549, 43,556 (July 21, 2011) (“[T]hese rules are not based on a field preemption standard. They were based on the OCC’s conclusion that the listed types and terms of state laws would be preempted by application of the conflict preemption standard of the *Barnett* decision.” (footnote omitted)).

²⁰⁹ See, e.g., *id.* at 43,554 (“Throughout our history, uniform national standards have proved to be a powerful engine for prosperity and growth.”).

²¹⁰ Bank Activities and Operations, 69 Fed. Reg. 1895, 1896 (Jan. 13, 2004).

²¹¹ *Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261, 1269 (2012) (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)).

does not mitigate its regulatory purpose and effect. If a bank is held liable for abusive debt collection practices, the fact that the underlying common law or statutory cause of action is not specific to the defendant's identity as a bank does not change the bank's incentives. Regardless of the underlying state rule's general phrasing, the bank will still have to change its behavior or face (using the OCC's phrase) "uncertain liabilities and potential exposure."²¹² As the Supreme Court has noted, "[T]here is little reason why state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute."²¹³ In short, the OCC's ban on state laws that single out banking practices is completely orthogonal to their rationale of harmonizing markets.

Aware that even general state laws can effectively regulate banking activities in precisely the same ways as banking-specific state laws, the OCC does not automatically give blanket approval to any state law that is general in form.²¹⁴ Instead, the OCC's rules provide that general state laws escape preemption only if they are "not inconsistent with the real estate lending powers of national banks" and "only incidentally affect the exercise of national banks' real estate lending powers."²¹⁵

But what does it mean for a state law to affect banking "incidentally"? The OCC has invoked the metaphor of "legal infrastructure" to explain "incidental" effects, stating that the critical question is whether or not the state laws "form the legal infrastructure that makes it practicable to exercise a permissible Federal power."²¹⁶ General laws that constitute such "legal infrastructure" are not preempted, because their effects on banking are "incidental." By contrast, state laws that "attempt to regulate the manner or content of national banks' real estate lending" are preempted even if those laws are general in form.²¹⁷

The term "legal infrastructure," however, is a metaphor vainly searching for some unambiguous definition. The OCC is correct that, at least since *Erie* and arguably since 1882 (when national banks lost their automatic right to remove litigation to federal courts),²¹⁸ national banks have depended on

²¹² Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1908 (Jan. 13, 2004).

²¹³ *Morales v. Trans World Airlines*, 504 U.S. 374, 386 (1992).

²¹⁴ "The label a state attaches to its laws will not affect the analysis of whether that law is preempted." Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. at 1912 n.59.

²¹⁵ *Id.* at 1917 (quoting regulation now codified at 12 C.F.R. § 34(b) (2006)).

²¹⁶ *Id.* at 1912.

²¹⁷ *Id.*

²¹⁸ See *supra* note 114 and accompanying text.

state law to avoid anarchy because there has been no general federal common law to define banks' powers to engage in the banking business.²¹⁹ But the goal of insuring nationally uniform rules for national banks cannot explain why all state common law doctrines should escape preemption while the states' banking-specific laws should be set aside. Both types of rules seek to remedy evils within the banking business, such as consumer ignorance, unequal bargaining power, deceptive trade practices, problems in proving consent arising from forgery, duress, and the like. Why should the limits on enforcement of unconscionable bargains contained in a state's common law of contracts be exempted from preemption, as "legal infrastructure" necessary for banking business, while similar state banking rules about mandatory disclosures to customers are preempted?

The metaphor of "infrastructure" by itself obviously will not answer this question. One gets the sense that the OCC regards legitimate common law rules as paving a road over which banking bargains can be driven, while preempted rules constitute roadblocks and impediments to commerce. But the distinction implied by the metaphor turns out to be malleable and confusing: Roads, after all, need rules, traffic signs, and signals if traffic is to move smoothly. Such rules can slow traffic down and redirect it to safe routes as well as speed it up. How, then, can one distinguish those commerce-guiding rules that facilitate banking business from those that impermissibly impede it?

The OCC has nothing to say on the definition of "legal infrastructure" that is neither tautological nor patently incorrect. Take, for instance, the following passage from the OCC's explanation of its rule on visitorial powers, in which the OCC explains that "legal infrastructure"

typically does not affect the content or extent of the Federally-authorized business of banking conducted by national banks, but rather establishes the legal infrastructure that surrounds and supports the ability of national banks—and others—to do business. In other words, these state laws provide a framework for a national bank's ability to exercise powers granted under Federal law; they do not obstruct or condition a national bank's exercise of those powers.²²⁰

²¹⁹ *Cf. O'Melveny & Myers v. FDIC*, 512 U.S. 79, 88 (1994) ("Uniformity of law might facilitate the [FDIC's] nationwide litigation of these suits, eliminating state-by-state research and reducing uncertainty—but if the avoidance of those ordinary consequences qualified as an identifiable federal interest, we would be awash in 'federal common-law' rules.").

²²⁰ *Bank Activities and Operations*, 69 Fed. Reg. 1895, 1896 (Jan. 13, 2004).

This statement, taken literally, is absurd. How can it be that a common law contract rule “typically does not affect the content or extent . . . of the . . . business of banking”? Common law rules provide contractual procedures that are designed to reduce fraud and deception, increase parties’ information, and otherwise ensure that bargains reflect preferences. By definition, such rules change the content of bargains by eliminating fraudulent bargains and promoting honest ones. Likewise, contract law regularly reduces the *extent* of bargains by rendering some contracts illegal that might otherwise be enforced. As the *McClellan* Court noted—in a case approved by the OCC²²¹—“Of course, in the broadest sense, any limitation by a State on the making of contracts is a restraint upon the power of a national bank within the State to make such contracts,” such as those for “the taking of real estate, as a security for an antecedent debt.”²²² If a state bars a sixteen-year-old from making a credit card contract, it will diminish the extent of credit card contracts, but the OCC would surely not regard this law as impermissibly impeding national banks’ powers to make loans or take deposits.

The confusion inherent in the OCC’s concept of “legal infrastructure” is well illustrated by the Sixth Circuit’s decision in *Monroe Retail, Inc. v. RBS Citizens, N.A.*²²³ The issue in *Monroe Retail* was whether national banks violated Ohio’s anti-conversion law by charging between twenty-five and eighty dollars to garnish debtors’ bank accounts on behalf of creditor-retailers. The retailers argued that, because Ohio law allowed banks to charge only one dollar to garnish debtors’ bank accounts, the extra fees charged by the banks (which frequently left no money to satisfy the garnishor-creditors’ claims) constituted illegal conversion under Ohio law.²²⁴ In response, the banks argued that Ohio’s conversion laws were preempted by the OCC’s rules barring state laws that limited activity incidental to receiving deposits, such as charging fees.²²⁵ According to the banks, the rules’ protection for “[r]ights to collect debts”²²⁶ applied only to *the banks’* rights to collect debts:

²²¹ See, e.g., Letter from John D. Hawke, Jr., Comptroller of the Currency, to Sen. Paul S. Sarbanes 2-3 & n.3, 4 & n.15 (Dec. 9, 2003), available at <http://www.occ.gov/static/enforcement-actions/SarbanesPreemptionletter.pdf>.

²²² *McClellan v. Chipman*, 164 U.S. 347, 358 (1896).

²²³ 589 F.3d 274 (6th Cir. 2009).

²²⁴ *Id.* at 277.

²²⁵ See *id.* The rule is codified at 12 C.F.R. § 7.4007(a) (2012) (“A national bank may . . . engage in any activity incidental to receiving deposits . . .”).

²²⁶ 12 C.F.R. § 7.4007(c)(4).

the very same state law could be preempted or not preempted depending on whether a bank was seeking the benefit of the law.²²⁷

Not surprisingly, the Sixth Circuit rejected this one-sided view of banking preemption, simply because it “defie[d] common sense.”²²⁸ Despite its absurdity, that view was consistent with the literal meaning of the OCC’s opinion that state law counts as part of the permissible “legal infrastructure” only if it does not “obstruct or condition a national bank’s exercise of [federally conferred] powers.”²²⁹ But if a national bank loses a case as a result of state law, then how have its powers not been obstructed or conditioned?

The OCC, in short, has adopted a definition of permissible “legal infrastructure” with literal terms that are absurd and, therefore, untenable.²³⁰ Yet it is not obvious how the absurdity can be cured short of simply enforcing every generally applicable state law that does not subject the business of banking to any special conditions. With a few exceptions, this is the course that lower courts have taken. Thus, courts have consistently sided with the OCC’s efforts to preempt state regulations specifically directed toward banking practices. They have rejected state efforts to subject national banks to comprehensive licensing schemes,²³¹ mandated disclosures,²³² various forms of price regulation for ATM fees or check-cashing,²³³ anti-usury limits on interest rates,²³⁴ or (most controversially) bans on “predatory” lending

²²⁷ *Monroe Retail*, 589 F.3d at 282.

²²⁸ *Id.*

²²⁹ Bank Activities and Operations, 69 Fed. Reg. 1895, 1896 (Jan. 13, 2004).

²³⁰ In other scenarios, the Supreme Court has rejected the literal meaning of text that produced an absurd legal asymmetry between the rights of parties. *See, e.g., Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 509-10 (1989) (“No matter how plain the text of the Rule may be, we cannot accept an interpretation that would deny a civil plaintiff the same right to impeach an adversary’s testimony that it grants to a civil defendant.”).

²³¹ *See, e.g., Wells Fargo Bank v. Boutris*, 419 F.3d 949, 965-66 (9th Cir. 2005) (holding that the OCC’s regulations preempted California’s system for licensing real estate lending); *Wachovia Bank v. Burke*, 414 F.3d 305, 309 (2d Cir. 2005) (holding that the National Banking Act and OCC rules preempted Connecticut’s licensing requirements for a mortgage subsidiary of a national bank).

²³² *See, e.g., Rose v. Chase Bank USA*, 513 F.3d 1032, 1036-37 (9th Cir. 2008) (finding that the National Bank Act’s authorization to “loan money on personal security” preempted California’s requirement of specific disclosures accompanying bank offers of credit cards (citation omitted)).

²³³ *See, e.g., Nat’l City Bank of Ind. v. Turnbaugh*, 463 F.3d 325, 331-33 (4th Cir. 2006) (holding that federal regulations preempted a Maryland law that restricted the amount of prepayment fees a national bank or its mortgage lending subsidiaries could impose upon borrowers); *Wells Fargo Bank of Tex. v. James*, 321 F.3d 488, 495 (5th Cir. 2003) (holding that an OCC regulation permitting national banks to charge “non-interest charges and fees” preempted a Texas law prohibiting check-cashing fees (citation omitted)); *Bank of Am. v. City and County of San Francisco*, 309 F.3d 551, 566 (9th Cir. 2002) (striking down San Francisco’s ban on banks’ charging non-account holders for use of ATM machines).

²³⁴ *Discover Bank v. Vaden*, 489 F.3d 594, 605-06 (4th Cir. 2007), *rev’d on other grounds*, 556 U.S. 49 (2009).

practices.²³⁵ But courts have also allowed a wide variety of private claims rooted in more general state common law doctrines or general statutes defining anti-consumer fraud. These claims include allegations that either national banks or mortgage servicers claiming to act on their behalf should be held liable for engaging in deception in the sale of liens;²³⁶ unconscionably skimming home equity with fraudulent appraisals or overestimating borrowers' income in approving loans;²³⁷ involuntarily enrolling people in credit card programs in violation of a state false claims act;²³⁸ unconscionably harassing debtors to collect payment in violation of a state consumer protection statute;²³⁹ turning tax refund-anticipation loan proceeds over to other banks to satisfy plaintiffs' preexisting debts in violation of state debt collection rules;²⁴⁰ wrongfully demanding excessive service charges in

²³⁵ North Carolina was the first state to enact a statute banning banking practices targeting low-income and unsophisticated borrowers to induce them to borrow more than they could repay and thereby generate loan origination fees or strip borrowers of home equity. *See* Act of July 22, 1999, 1999 N.C. Sess. Laws 332 (codified at N.C. GEN. STAT. §§ 24-1.1A to -10.2 (2012)). Georgia followed with a statute of its own in 2004. *See* Georgia Fair Lending Act, GA. CODE ANN. §§ 7-6A-1 to -13 (2012), *invalidated by* *Salvador v. Bank of Am. (In re Salvador)*, 456 B.R. 610 (Bankr. M.D. Ga. 2011). The OCC's rules preempting state regulation of lending and deposit-taking were promulgated shortly thereafter, in response to Georgia's statute. *See* Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1908 (Jan. 13, 2004).

²³⁶ *See, e.g., Gerber v. Wells Fargo Bank*, No. 11-01083, 2012 WL 413997, at *4-9 (D. Ariz. Feb. 9, 2012) (rejecting the argument, at the motion to dismiss stage, that the National Bank Act preempted a consumer fraud claim for deception where the plaintiff claimed that the seller failed to disclose the junior status of a lien it sold him).

²³⁷ *See, e.g., Conrad v. Wells Fargo Bank*, No. 08-0829, 2009 WL 36478, at *2-3 (S.D. W. Va. Jan. 5, 2009) (finding no preemption of claims that a bank engaged in a pattern of home equity skimming and predatory lending practices to make unfair loans based on fraudulent appraisals); *Moore v. Wells Fargo Bank (In re Moore)*, 470 B.R. 390, 396 (Bankr. S.D. W. Va. 2012) (holding that the "claims of unconscionability in this case are not preempted by the National Banking Act").

²³⁸ *See, e.g., Arevalo v. Bank of Am.*, 850 F. Supp. 2d 1008, 1024-28 (N.D. Cal. 2011) (allowing claims under California's Consumer Legal Remedies Act and False Advertising Law for involuntarily enrolling plaintiff in a credit card program, against a national bank, over its preemption defense).

²³⁹ *See, e.g., Cline v. Bank of Am.*, 823 F. Supp. 2d 387, 398-99 (S.D. W. Va. 2011) (holding that the National Bank Act and the OCC's implementing regulations did not preempt a borrower's claims against a mortgage servicer for misrepresentation and unconscionable and unfair debt collection practices, in violation of the West Virginia Consumer Credit and Protection Act); *Smith v. BAC Home Loans Servicing*, 769 F. Supp. 2d 1033, 1046-47 (S.D. W. Va. 2011) (same).

²⁴⁰ *See, e.g., Hood v. Santa Barbara Bank & Trust*, 49 Cal. Rptr. 3d 369, 382-83 (Ct. App. 2006) (holding that the OCC's deposit-taking and lending regulations did not preempt state tort claims or debt collection laws).

connection with mortgage foreclosure,²⁴¹ and fraudulently adjusting the order in which ATM fees are posted in order to maximize overdraft fees.²⁴²

It is easy to see that virtually any banking-specific prohibition can be reframed as a general common law or statutory theory under a law that makes no particular mention of banking. Indeed, some courts have allowed general state law claims of unfair trade practices, even when these claims incorporate statutory standards peculiar to lending as the standards for liability. In *Aguayo v. U.S. Bank*, for instance, the Ninth Circuit characterized the California Rees-Levering Act's post-repossession notice requirements as pertaining to "rights to collect debts"—a nonpreempted category under the OCC's rules—rather than as "concerning [d]isclosure and advertising" (a preempted category, according to the OCC).²⁴³ The notice requirements were not vague common law injunctions to be "fair" or avoid "fraud" but rather bright-line regulatory mandates to provide detailed information to the borrower after the lender repossesses a motor vehicle for nonpayment of a loan.²⁴⁴ Because the plaintiff had challenged the bank's noncompliance in a private claim brought under California's Unfair Competition Law, the *Aguayo* court treated the state's regulatory mandates as fitting in with other private law claims that the OCC seemed to preserve.²⁴⁵

Even when courts disallow general claims for effectively targeting banking practices, they offer no clear criteria for distinguishing permissible from preempted state rules. Thus, the power to invoke preemption of general state law hangs on arbitrary and unpredictable matters of legal characterization. In *Martinez v. Wells Fargo Home Mortgage, Inc.*, the Ninth Circuit held that the plaintiff's state law claim alleging fraudulent failure to disclose

²⁴¹ See, e.g., *In re Ocwen Loan Servicing, LLC Mortg. Servicing Litig.*, 491 F.3d 638, 643 (7th Cir. 2007) (finding that the Office of Thrift Supervision's rules implementing the Home Owners' Loan Act do not "deprive persons harmed by the wrongful acts of savings and loan associations of their basic state common-law-type remedies").

²⁴² See, e.g., *In re Checking Account Overdraft Litig.*, 694 F. Supp. 2d 1302, 1313-14 (S.D. Fla. 2010) (holding that claims challenging "the allegedly unlawful manner in which the banks operate their overdraft programs to maximize fees at the expense of consumers" under state law for using largest-to-smallest posting policies were not preempted by the OCC's 2011 rules authorizing noninterest fees or its guidance allowing posting of withdrawals in any order); *White v. Wachovia Bank*, 563 F. Supp. 2d 1358, 1366-69 (N.D. Ga. 2008) (holding that the OCC's 2004 rules did not preempt a claim of maximizing overdraft fees).

²⁴³ 653 F.3d 912, 918, 925-26 (9th Cir. 2011) (quoting 12 C.F.R. § 7.4008(e)(4) & (d)(2)(viii) (2010), respectively), *cert. denied*, 133 S. Ct. 106 (2012).

²⁴⁴ *Id.* at 924-28.

²⁴⁵ See *id.* ("The district court's broad reading of the terms 'disclosure' and 'other credit-related documents' would effectively preempt *any* document related to debt collection, something the OCC was acutely aware of when deliberately choosing the final language of the preemption rule to save such state laws." (quoting *Bank Activities and Operations; Real Estate Lending and Appraisals*, 69 Fed. Reg. 1904, 1912 (Jan. 13, 2004))).

closing costs was preempted by the OCC's rule authorizing noninterest charges and fees.²⁴⁶ The court offered no reason why the state law claim should be preempted as a regulation of fees and charges rather than permitted as a state contract or tort claim under the OCC's rule preserving state common law. *Martinez* and other decisions like it²⁴⁷ seem to be based on nothing more than arbitrary characterizations of private claims as either nonpreempted contract, tort, or collection-of-debts claims, or as preempted regulation-of-banks claims.

The OCC's rules, in short, invite unpredictable and unprincipled arguments about whether a state law should be characterized as "infrastructure" that "incidentally" affects banking or as a significant impairment to banking. But this is not the only sort of unpredictability promoted by the rules. General common law theories of fraud are rooted in loosely defined legal standards that are shored up in a specific case only after a verdict is rendered. By contrast, state laws specifically directed toward banking crisply define duties that banks can easily identify before disputes arise. If market harmonization is the goal, why seek to prohibit the predictable legal duty defined ex ante in a statute or regulation, but allow the vague and unpredictable legal duty enforced ex post through damages?

The paradox is well illustrated by the California Supreme Court's recent decision in *Parks v. MBNA America Bank*, in which the court struck down a California statute regulating so-called "convenience checks."²⁴⁸ The court held that this state law, requiring specific disclosures to be printed on the fronts of preprinted checks sent to credit card holders,²⁴⁹ was preempted by the National Bank Act, because it limited banks' powers to enter into personal credit lending agreements.²⁵⁰ In reaching this conclusion, however, the court distinguished *Perdue v. Crocker National Bank*,²⁵¹ in which it had held that federal banking laws did not preempt state law theories that bank charges for overdrawn accounts were based on unconscionable contracts.²⁵²

²⁴⁶ 598 F.3d 549, 556 (9th Cir. 2010).

²⁴⁷ See, e.g., *Wier v. Countrywide Bank*, No. 10-11468, 2011 WL 1256944, at *4 (E.D. Mich. Mar. 31, 2011) (finding preemption of state law fraudulent inducement and misrepresentation claims); *Austin v. Provident Bank*, No. 04-00033, 2005 WL 1785285, at *6 (N.D. Miss. Jul. 26, 2005) (finding preemption of a common law fraud claim that lenders deliberately targeted disadvantaged individuals in need of financing who were more vulnerable to the defendants' practices of selling loans at excessive interest rates).

²⁴⁸ 278 P.3d 1193, 1194-1204 (Cal. 2012), cert. denied, 133 S. Ct. 653 (2012).

²⁴⁹ *Id.* at 1195.

²⁵⁰ *Id.* at 1199.

²⁵¹ 702 P.2d 503 (Cal. 1985).

²⁵² *Id.* at 523.

The *Parks* court reasoned that the disclosure requirement at issue, unlike the state laws regarding unconscionability in *Perdue*,

does not state a background legal principle against fraudulent, deceptive, or unconscionable practices. It prescribes specific and affirmative conduct that credit card issuers must undertake if they wish to lend money through convenience checks. Unlike the state law considered in *Perdue*, the disclosure requirements . . . cannot be understood as part of the general legal backdrop to Congress's enactment of federal banking legislation.²⁵³

The passage illustrates the paradox of the OCC's distinction: How does it reduce the costs of banks' compliance with multiple state laws by preempting requirements of "specific and affirmative conduct" in favor of amorphous "background legal principles" barring "unconscionable" conduct? Surely, the latter deters as many or more banking practices than the former, if only because unpredictable liability requires the bank to tailor its conduct to create a margin of safety.

In sum, the OCC's preemption rule is both too broad and too narrow to produce uniform and predictable national rules that advance the goal of market harmonization. If the OCC simply wanted to avoid subjecting banks to conflicting state regulatory standards, then it could promulgate rules to resolve such conflicts if and when they do in fact occur, just as the Supreme Court grants certiorari review to resolve conflicts among the circuit courts of appeals. The OCC's rule, however, goes much further, by barring any state from adopting banking-specific rules even when such rules conflict with no other states' laws—indeed, even when the states converge on a common regulatory standard. Moreover, the OCC's rule does not go far enough to provide a genuinely uniform legal regime for banks, because the rule does little to resolve conflicts among states' common law rules.

This mismatch between rule and reason might be a ground for striking down the former under arbitrary and capricious review.²⁵⁴ Although the standards of justification under the Administrative Procedure Act are deferential, an agency must nevertheless articulate in the administrative record the actual basis for its actions.²⁵⁵ That principle might apply all the more powerfully to the OCC's preemption rules, because there are good reasons to be skeptical about *McCulloch's* principle that private bankers

²⁵³ *Parks*, 278 P.3d at 1202.

²⁵⁴ See Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2006).

²⁵⁵ See, e.g., *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43-44 & n.9 (1983) ("The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given." (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947))).

constitute federal instrumentalities entitled to exercise autonomous judgment free from governmental oversight. By hiding behind largely irrelevant rhetoric about the importance of national regulatory uniformity for interstate commerce, the OCC has avoided substantive analysis of *McCulloch*'s principle of the independence of federal instrumentalities from state law—the very principle that seems to be the actual basis for its rules.

B. *Are the OCC's Preemption Rules Consistent with the Dodd-Frank Act's Standards for Preemption?*

Quite apart from the OCC's compliance with principles of administrative rationality, the OCC's 2011 rules are arguably inconsistent with section 1044(a) of the Dodd-Frank Act. The question turns on whether or not one reads section 1044(a) as a reassertion of the anti-banker nondelegation doctrine. There is both statutory text and legislative history suggesting that section 1044(a) finally repudiates the sort of categorical field preemption that, under *McCulloch* and its post-Civil War progeny, precluded states from enforcing banking-specific rules against nationally chartered banks. One might reasonably construe section 1044(a) as a third rejection²⁵⁶ of the idea of granting private banks broad powers of self-governance free from state or federal oversight. So construed, the OCC's 2011 rules might fall outside section 1044(a), to the extent that they adopt such across-the-board preemption of state law without providing some federal substitute.

Section 1044(a) of the Dodd-Frank Act provides an elaborate set of rules to govern preemption of "state consumer financial laws."²⁵⁷ Under Dodd-Frank's preemption standard, "state consumer financial laws" would be preempted by federal banking laws only if they discriminate against national banks or "prevent[] or significantly interfere[] with the exercise by the national bank of its powers" as measured according to "the legal standard for preemption in" *Barnett Bank*.²⁵⁸ The Dodd-Frank Act specifically requires such preemption determinations to be made "on a case-by-case basis" after analysis of "the impact of a particular State consumer financial law on any national bank that is subject to that law,"²⁵⁹ with those case-by-case determinations supported by "substantial evidence, made on the record

²⁵⁶ The first two rejections were Andrew Jackson's 1832 campaign against Nicholas Biddle and Louis Brandeis's 1912 campaign against the House of Morgan. See *supra* Sections I.A & II.A.

²⁵⁷ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1044(a), 124 Stat. 1376, 2014-17 (2010) (codified at 12 U.S.C. § 25b (2006, Supp. IV 2011)).

²⁵⁸ 12 U.S.C. § 25b(b)(1)(B) (citing *Barnett Bank of Marion Cnty. v. Nelson*, 517 U.S. 25 (1996)).

²⁵⁹ *Id.* § 25b(b)(3)(A).

of the proceeding.”²⁶⁰ The statute also specifically rejects “field” preemption of any area of state law under the Act.²⁶¹

But the meaning of the *Barnett Bank* standard, incorporated by section 1044(a), is ambiguous. On the one hand, in *Barnett Bank*, the Court held that a Florida law was preempted because it banned certain banks from engaging in the business of selling insurance, thereby implying that some state laws were preempted because they barred banking activities permissible under federal law.²⁶² On the other hand, merely banning a banking activity permitted by federal law does not always “impair significantly” banking powers.²⁶³ Otherwise, the *Barnett Bank* Court could not have approvingly cited *Anderson National Bank v. Lueckett*²⁶⁴ for the proposition that federal banking law does not “deprive States of the power to regulate national banks, where (unlike here) doing so does not prevent or significantly interfere with the national bank’s exercise of its powers.”²⁶⁵ Congress therefore might have deliberately adopted a vague legal standard to avoid resolving the contentious question of the precise degree to which federal law preempted state banking rules.

The scope of federal preemption was hotly contested after the OCC’s 2004 rules were invoked to preempt states’ prohibitions on predatory lending. Consumer advocates, claiming that the OCC had been captured by the banks on which it was dependent for revenue (in the form of chartering fees), attempted to shrink the scope of banking preemption as much as possible.²⁶⁶ These advocates’ complaints were not baseless: as Professor Arthur Wilmarth has exhaustively documented, federal regulatory authorities,

²⁶⁰ *Id.* § 25b(c).

²⁶¹ *Id.* § 25b(b)(4).

²⁶² *Barnett Bank*, 517 U.S. at 32-38.

²⁶³ *Id.* at 33.

²⁶⁴ 321 U.S. 233 (1944).

²⁶⁵ *Barnett Bank*, 517 U.S. at 33 (citing *Lueckett*, 321 U.S. at 247-52).

²⁶⁶ See, e.g., Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 86-95 (2008) (“The OCC’s inaction may also be attributable, at least in part, to its direct financial stake in keeping its bank clients happy. Large national banks fund a significant portion of the OCC’s budget.”); Vincent Di Lorenzo, *Federalism, Consumer Protection and Regulatory Preemption: A Case for Heightened Judicial Review*, 10 U. PA. J. BUS. & EMP. L. 273, 281 (2008) (“[T]he OCC has not acted as a neutral forum to resolve conflicting policies. Rather it has acted as an advocate for the interests of national banks and therefore as an advocate for the broadest possible preemption of state law.”); Arthur E. Wilmarth, Jr., *Cuomo v. Clearing House: The Supreme Court Responds to the Subprime Financial Crisis and Delivers a Major Victory for the Dual Banking System and Consumer Protection* (noting that the OCC’s rules have relieved banks from having to follow state laws protecting consumers), in *THE PANIC OF 2008: CAUSES, CONSEQUENCES AND IMPLICATIONS FOR REFORM* 295, 307-10 & 335 n.89 (Lawrence E. Mitchell & Arthur E. Wilmarth, Jr. eds., 2010); Wilmarth, *supra* note 65, at 356 (noting that the OCC has failed to issue any enforcement order against any of the eight largest national banks).

including the OCC, repeatedly failed to regulate banking practices that turned out to be detrimental to consumers.²⁶⁷ However, the banks' advocates in Congress, like Representative Melissa Bean of Illinois, have tried to preserve the preemption provided by existing precedent.²⁶⁸ *Barnett Bank* was a convenient vehicle by which these pro- and anti-bank factions could compromise through what Professor Victoria Nourse has termed "structure-induced ambiguity,"²⁶⁹ thereby sidestepping gridlock in the bicameral process.

One does not, however, have to know how *Barnett Bank* defines significant impairment of banking powers to determine that *Barnett Bank* unambiguously rejects *McCulloch*. *Barnett's* embrace of *Lockett*, as noted above in Part II, suggests as much. Likewise, under the *in pari materia* canon, section 1044(a) incorporates the Court's 2009 decision in *Cuomo v. Clearing House Ass'n*²⁷⁰ just as clearly as it incorporates *Lockett*, because the *Clearing House* Court construed the *Barnett Bank* standard on the eve of section 1044(a)'s enactment. The *Clearing House* Court expressly rejected the distinction between general state laws and state laws specifically targeting banking. The Court observed that the distinction, proposed by the OCC to justify its ban on enforcement of state fair lending laws, "can be found nowhere within the text of the statute" and, therefore, "attempts to do what Congress declined to do: exempt national banks from all state banking laws, or at least state enforcement of those laws."²⁷¹

Section 1044(a)'s requirements for preemption determinations further suggest the rejection of broad *McCulloch*-style preemption.²⁷² Like the *Barnett Bank* standard itself, these procedural requirements are not self-explanatory. By requiring some sort of "case-by-case" examination of the "impact" of "particular" state laws, these provisions preclude preemption on the basis of the mere linguistic form of a state law. Yet the OCC's preemption

²⁶⁷ Wilmarth, *supra* note 174, at 897-919 (documenting repeated instances of federal agencies' failing to regulate credit practices harmful to consumers).

²⁶⁸ See 155 CONG. REC. E3029 (daily ed. Dec. 17, 2009) (statement of Rep. Melissa Bean) (arguing for statutory preservation of the *Barnett Bank* standard). For a brief overview of the preemption provision's contested legislative history, see Sharpe, *supra* note 4, at 221-23.

²⁶⁹ Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119, 1129-30 (2011); see *id.* (arguing that the difficulty of passing legislation encourages statutory ambiguity).

²⁷⁰ 557 U.S. 519 (2009).

²⁷¹ *Id.* at 533.

²⁷² See 12 U.S.C. § 25b(b)(3)(A) (2006) (requiring that preemption decisions be made "on a case-by-case basis" after analysis of "the impact of a particular State consumer financial law on any national bank that is subject to that law"); *id.* § 25b(c) (requiring preemption decisions to be supported by "substantial evidence, made on the record of the proceeding").

of state laws based on their generality seems like precisely that sort of merely formal, linguistic inquiry.

Section 1044(a), in sum, seems finally and unambiguously to overrule *McCulloch*'s field preemption of state laws targeting banking activities for special regulatory treatment. With what exact standard section 1044(a) replaces *McCulloch*'s test remains ambiguous, but section 1044(a) unambiguously eliminates *McCulloch*'s ban on banking-specific laws after almost two centuries of on-again, off-again existence.

Do the OCC's 2011 rules constitute an implicit endorsement of *McCulloch*'s theory of preemption? Those rules, to the outrage of critics,²⁷³ largely copied the 2004 rules. While making necessary adjustments regarding the exclusivity of the OCC's visitorial powers to accommodate the Supreme Court's decision in *Clearing House*, the OCC largely left intact its 2004 rules preempting broad categories of state laws.²⁷⁴ The OCC listed categories of state laws that were preempted, all of which specifically regulated deposit-taking or lending operations, while more general state laws that did not specifically refer to banking activities were saved "to the extent consistent with" the *Barnett Bank* decision.²⁷⁵ In defense of its decision to double down on its 2004 revival of *McCulloch*'s approach to preemption, the OCC stated

²⁷³ For some characteristic criticisms, see Press Release, Nat'l Consumer Law Ctr., Statement of NCLC Managing Attorney Lauren Saunders on OCC Final Preemption Rule (July 20, 2011), available at <http://www.nclc.org/images/pdf/preemption/occ-preemption-statement.pdf> (accusing the OCC of "thumb[ing] its nose at state efforts to protect consumers"). The OCC acknowledged that some commenters believed that "by retaining . . . rules that preempt categories of state laws, that the propos[ed] rules) would circumvent the Dodd-Frank Act procedural and consultation requirements. These commenters asserted that the preemption of categories and/or terms of state laws is equivalent to 'occupation of the field,' rather than conflict, preemption." Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 43,549, 43,553 (July 21, 2011).

²⁷⁴ The OCC deleted the reference in its 2004 rules to state laws "obstruct[ing], impair[ing], or condition[ing]" national banks' powers, 12 C.F.R. § 34.4(a) (2005). See Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. at 43,556 ("[T]he words 'obstruct, impair or condition' as used in the 2004 preemption rules were intended to reflect the precedents cited in *Barnett*, not to create a new preemption standard. Nevertheless, we acknowledge that the phrase created confusion and misunderstanding . . . For these reasons, the OCC is deleting the phrase . . ."). Having made these minor modifications, the OCC asserted that its "rules are not based on a field preemption standard," but rather on its "conclusion that the listed types and terms of state laws would be preempted by application of the conflict preemption standard of the *Barnett* decision." *Id.* at 43,556. But this explanation seems to reduce to the assertion that avoiding the magical word "field" thus renders its provisions only conflict preemption provisions. See, e.g., *id.* at 43,557 n.48 (contrasting the OCC's rules with the Office of Thrift Supervision's rules that "assert an 'occupation of the field' preemption standard" (quoting 12 C.F.R. § 560.2 (2011) (citing 12 C.F.R. § 557.11))). The OCC's reasoning does little to answer commenters charge that its rules simply field preempt state laws through the enumeration of categories.

²⁷⁵ 12 C.F.R. § 34.4(b) (2012).

that its 2004 rules had been expressly designed to be consistent with the Court's decision in *Barnett Bank*.²⁷⁶ Since the Dodd-Frank Act specifically incorporated this standard, the OCC regarded its old rules as consistent with the new statutory language. As for the requirements for a case-by-case analysis of particular state laws' impact backed by substantial evidence in the record, the OCC argued that these were procedural requirements not intended to apply retroactively to rules enacted before the Dodd-Frank Act became effective.²⁷⁷

Consider three reasons why the OCC's 2004 and 2011 rules are best understood as adopting *McCulloch*'s federal instrumentality theory of field preemption.

First, the distinction drawn in the OCC's rules between general state laws and banking-specific state laws is precisely the distinction adopted by nineteenth-century courts trying to extend *McCulloch* from taxation to regulation.²⁷⁸ The intuitively obvious point of declaring banking-specific laws to be a suspect classification is not to secure uniformity but rather to protect banks from hostile state legislation. In the nineteenth century, generally applicable common law rules were not regarded as posing a threat to the national banks' federal mission; banking-specific laws, however, were.

Second, the OCC devoted much of its justification for its rule to quotations from opinions invoking *McCulloch*'s federal instrumentality theory, while ignoring or minimizing precedents that later abandoned the idea of federal instrumentalities' immunity. Ignoring *First National Bank of Bay City v. Fellows ex rel. Union Trust Co.*,²⁷⁹ the OCC's reasons for its rule on visitorial powers quoted heavily from *Dearing*²⁸⁰ and *Easton*²⁸¹ while distinguishing *First National Bank in St. Louis*²⁸² as resting on "a unique set of circumstances, now outdated."²⁸³ The OCC made no mention of Justice Van Devanter's dissenting opinion in *First National Bank in St. Louis*, joined by Chief Justice Taft, which stated that the majority's decision undercut the

²⁷⁶ Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. at 43,566.

²⁷⁷ See *id.* at 43,557 ("[T]hese provisions clearly apply to determinations made under the *Barnett* standard provisions of the Dodd-Frank Act that are not effective until July 21, 2011. . . . Future preemption determinations would be subject to the new Dodd-Frank Act procedural provisions.").

²⁷⁸ See *infra* subsection I.B.2.

²⁷⁹ 244 U.S. 416 (1917).

²⁸⁰ *Farmers' & Mechs.' Nat'l Bank v. Dearing*, 91 U.S. 29 (1875).

²⁸¹ *Easton v. Iowa*, 188 U.S. 220 (1903).

²⁸² *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924).

²⁸³ *Bank Activities and Operations*, 69 Fed. Reg. 1895, 1899 (Jan. 13, 2004). For a discussion of these cases, see *supra* text accompanying notes 90-95.

basic premise of *McCulloch*.²⁸⁴ The OCC underscored how closely it was following the old jurisprudence by basing its list of nonpreempted areas closely on the Supreme Court's language in *National Bank v. Kentucky*, including debt collection among the categories of nonpreempted laws,²⁸⁵ because *Kentucky* included debt collection.²⁸⁶ The OCC's current rule on deposit-taking grudgingly acknowledges that preemption of state laws on "[a]bandoned and dormant accounts"²⁸⁷ "does not apply to state laws of the type upheld by the United States Supreme Court in *Anderson National Bank v. Lueckett*,"²⁸⁸ but the OCC says nothing whatsoever about *Lueckett's* reasoning—in particular, its rejection of the idea that federal law preempts all banking-specific laws.

Third, the OCC copied the Office of Thrift Supervision's (OTS) 1996 rules defining preemption of state law under the Home Owners' Loan Act of 1933 (HOLA),²⁸⁹ and the OTS's rules were expressly rooted in *McCulloch's* federal instrumentality theory of field preemption.²⁹⁰ The OTS's 1996 rules expressly declared that they occupied the fields of lending and deposit-taking.²⁹¹ This position followed the longstanding position of lower courts that the OTS and its predecessor agency, the Federal Home Loan Bank Board (FHLBB), were both authorized by HOLA to impose field preemption on state laws regulating federally chartered savings and loans (S&Ls), a view implicitly approved by the Supreme Court.²⁹² S&Ls were viewed as

²⁸⁴ See *First Nat'l Bank in St. Louis*, 263 U.S. at 662-68 (Van Devanter, J., dissenting) ("It must be admitted that, in so far as the legislation of Congress does not provide otherwise, the general laws of a State have the same application to the ordinary transactions of a national bank But not so on questions of corporate power. . . . National banks, like other corporations, have such powers as their creator confers on them, expressly or by fair implication, and none other. . . . Only where those laws bring state laws into the problem,—as by enabling national banks to act as executors, administrators, etc., where that is permitted by state laws,—can the latter have any bearing on the question of corporate power—the privileges which the bank may exercise.").

²⁸⁵ Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1912 (Jan. 13, 2004); see 12 C.F.R. § 34.4(b)(5) (2005) ("Right to collect debts").

²⁸⁶ 76 U.S. (9 Wall.) 353, 362 (1870) ("Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law.").

²⁸⁷ 12 C.F.R. § 7.4007(b)(1) (2012).

²⁸⁸ *Id.* § 7.4007(b)(1) n.3 (citing *Anderson Nat'l Bank v. Lueckett*, 321 U.S. 233 (1944)).

²⁸⁹ 12 U.S.C. §§ 1461-1470 (2006).

²⁹⁰ On the OCC's copying of the OTS's rules, see Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. at 1911 n.56 ("The list [of preempted state laws] is also substantially identical to the types of laws specified in a comparable regulation of the OTS. See 12 CFR 560.2(b).").

²⁹¹ 12 C.F.R. § 560.2(a) (1996).

²⁹² In *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, the Court suggested that it would be broadly deferential to the preemption decisions of the FHLBB on the theory that the HOLA was "a radical and comprehensive response to the inadequacies of the existing state systems." 458 U.S. 141, 160 (1982) (quoting *Conf. of Fed. Sav. & Loan Ass'ns v. Stein*, 604 F.2d 1256, 1257 (9th

distinct from banks because of the former institutions' status as fiscal agents of the federal government. During the 1930s and 1940s, the Home Owners' Loan Corporation, an entity entirely controlled and capitalized by the federal government, was authorized to buy private mortgages in default from federally chartered S&Ls, by using U.S. bonds that were deposited in the S&Ls' vaults for use in making direct loans to homeowners.²⁹³ Federally chartered S&Ls were, therefore, the federal government's chosen agents for implementing a specifically defined stimulus measure using resources supplied by the federal government.²⁹⁴ Courts emphasized federally chartered S&Ls' status as federal instrumentalities and relied on those associations' federally assigned function of aiding distressed housing markets using federal funds.²⁹⁵ This line of reasoning eventually led a district court in 1951 to find that *Luckett* did not apply to federally chartered S&Ls on the grounds that they primarily served as the federal government's agents in stimulating the depressed housing market with federal revenue.²⁹⁶

The FHLBB and OTS's theory of field preemption, therefore, was rooted in precisely the logic of *McCulloch*—that is, the idea that the federal government's fiscal agents were entitled to immunity from state law. Such a theory was plausible, albeit controversial, when applied to Nicholas Biddle's Second Bank of the United States, which had a unique status as the exclusive depository of federal revenues. The theory had some plausibility as well when applied to S&Ls that were effectively lending out federal revenue to aid in the federal mission of making homes available to distressed homeowners and home buyers. But as noted in Part II, such a "federal instrumentality" theory made little sense when applied to the thousands of nationally chartered banks that neither served as the federal government's unique fiscal

Cir. 1979), *summarily aff'd*, 445 U.S. 921 (1980)). The *de la Cuesta* Court noted that "the Board need not feel bound by existing state law." *Id.* at 162.

²⁹³ For an overview of the Home Owners' Loan Corporation and its relationship to federally chartered S&Ls under HOLA, see SUSAN HOFFMANN, *POLITICS AND BANKING: IDEAS, PUBLIC POLICY, AND THE CREATION OF FINANCIAL INSTITUTIONS* 169-73 (2001).

²⁹⁴ See generally C. LOWELL HARRISS, *HISTORY AND POLICIES OF THE HOME OWNERS' LOAN CORPORATION* (1951) (providing a history of HOLA).

²⁹⁵ See, e.g., *Waterbury Sav. Bank v. Danaher*, 20 A.2d 455, 463-64 (Conn. 1940) (distinguishing between state-chartered and federally chartered savings and loan associations to determine that only the latter were exempt from state laws requiring payment of unemployment insurance assessments).

²⁹⁶ See *California v. Coast Fed. Sav. & Loan Ass'n*, 98 F. Supp. 311, 319 (S.D. Cal. 1951) ("As to national banks, Congress expressly left open a field for state regulation and the application of state laws; but as to federal savings and loan associations, Congress made plenary, preemptive delegation to the Board to organize, incorporate, supervise and regulate, leaving no field for state supervision.").

agents nor acted as lenders of federal aid to a federally subsidized economic sector.²⁹⁷

The OCC has attempted to distance itself from the charge that, by copying the OTS's rules, it adopted *McCulloch's* "federal instrumentality" theory of field preemption. Although the OCC had invited comment on whether it should expressly adopt field preemption similar to that imposed by the OTS,²⁹⁸ its 2004 statement ultimately declared that "we decline to adopt the suggestion of these commenters that we declare that these regulations 'occupy the field' of national banks' real estate lending, other lending, and deposit-taking activities."²⁹⁹ The OCC's 2004 renunciation of field preemption, however, was belied by its actions. The only point the various state laws declared to be preempted by the OCC's 2004 and 2011 rules held in common was their focus on deposit-taking and lending; rather than conduct any particularized inquiry into whether certain types of banking-specific laws might raise the costs of interstate banking, the OCC simply swept all such laws aside. The conclusion is irresistible that, in 2004, the OCC based its determinations about preemption exclusively on whether the state law in question focused on banking activities and found that such a focus alone was sufficient to preempt a state law. That the OCC was not adopting a position significantly different from the OTS's theory of field preemption is further suggested by the OCC's assertion in its 2004 statement of basis and purpose that "the effect of labeling [as either field or conflict preemption] is largely immaterial in the present circumstances."³⁰⁰

Mindful of the legal standard now contained in section 1044(a) of the Dodd-Frank Act, the OCC in 2011 carefully reiterated that it was applying *Barnett Bank's* "conflict" standard of preemption by relying on "an evaluation of the extent and nature of an impediment posed by state law to the exercise of a power granted national banks under Federal law."³⁰¹ Rejecting the idea that it needed to provide case-by-case evaluation of such impediments for rules promulgated before section 1044(a) was enacted, the OCC asserted, "Where the same type of impediment exists under multiple states' laws, a single conclusion of preemption can apply to multiple laws that contain the same type of impediment—that generate the same type of

²⁹⁷ See Wilmarth, *supra* note 65, at 242-44.

²⁹⁸ Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1910 (Jan. 13, 2004).

²⁹⁹ *Id.* at 1911.

³⁰⁰ *Id.*

³⁰¹ Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 43,549, 43,556 (July 21, 2011).

conflict with a Federally-granted power.”³⁰² The analysis of such a “conflict” was, according to the OCC, what distinguished its variety of preemption from “the OTS’s preemption rules.”³⁰³

This careful alteration of terminology, however, did not lead to any more specific explanation of how the state laws listed as preempted conflicted with any particular federal policy. Instead, the OCC generally asserted that “[t]he types and terms of laws that are set out in the 2004 preemption rules were based on the OCC’s experience with the potential impact of such laws on national bank powers and operations.”³⁰⁴ The OCC nowhere described that impact in anything but conclusory terms; it declared that “state laws that would affect the ability of national banks to underwrite and mitigate credit risk, manage credit risk exposures, and manage loan-related assets . . . would meaningfully interfere with fundamental and substantial elements of the business of national banks.”³⁰⁵ The essence of the OCC’s argument was simply that private banks have expertise in their business, and state laws that second guess such expertise are preempted by the *Barnett Bank* standard.

These general statements, however, do not distinguish the preempted state laws from any of the common law rules that the OCC spared. Common law rules also obviously “affect whether and how the bank may offer a core banking product and manage some of its most basic funding functions in operating a banking business.”³⁰⁶ Why, then, is a negligence claim spared from preemption, while a more specific state regulation directed specifically to fraud prevention is preempted? The only plausible answer—and the answer given by lower courts³⁰⁷—is that a state law specifically addressing anti-fraud precautions targets banking operations, while the state common law claim is not specifically tailored to banks. This answer, however, suggests that the real driver behind the OCC’s distinctions is not the degree to which a state rule “affects” deposit-taking and lending, but rather the degree

³⁰² *Id.*

³⁰³ *Id.* at 43,557 n.48.

³⁰⁴ *Id.* at 43,557.

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ “[T]here is nothing unique about national banks in considering that question,” because everyone “is under a duty not to base a commercial transaction upon a forgery, and the standards governing performance of that duty traditionally have been established by state common and statutory law.” *Johnson v. Wachovia Bank*, No. 05-2654, 2006 WL 278549, at *2 (D. Md. Feb. 2, 2006). The *Johnson* court held that a widow’s claims for constructive fraud, negligence, fraud, violation of the Maryland Consumer Protection Act, and rescission were not preempted. *Id.* Lower courts have routinely recognized this. *See, e.g., White v. Wachovia Bank*, 563 F. Supp. 2d 1358, 1369 (N.D. Ga. 2008) (finding that federal law did not preempt plaintiff’s state law contract claims); *Great W. Res. v. Bank of Ark.*, No. 05-5152, 2006 WL 626375, at *3-4 (W.D. Ark. Mar. 13, 2006) (declining to dismiss state law contract claims on grounds of preemption).

to which a state rule singles out such activities. This rule essentially revives *McCulloch*'s "federal instrumentality" rule designed to stop states from interfering with federal banking policy, not to minimize the costs of doing business in multiple states.

The OCC's failure in both 2004 and 2011 to articulate a plausible justification for distinguishing between common law claims and state banking laws suggests that the OCC ought not to receive a great deal of deference for the distinction. Under section 1044(a) of the Dodd-Frank Act, the OCC's preemption determinations are to be given *Skidmore* rather than *Chevron* deference.³⁰⁸ Although the distinction between these two species of deference is less than crystalline,³⁰⁹ *Skidmore* deference leaves basic policy questions for courts to resolve but authorizes courts to give "weight" to an agency's judgment based on a sliding scale of multiple considerations, including the agency's consistency, exercise of expertise, thoroughness, and so forth.³¹⁰ On this account, section 1044(a) withholds from the OCC the basic task of determining whether banking preemption should be governed by *McCulloch*'s principle of "strict scrutiny" for banking-specific state laws. Instead, courts are to resolve the basic policy question left open by *Barnett Bank* by using the OCC as an expert body akin to a special master or expert witness that can answer more precise questions about the effects of state laws on national banking interests—but they are not to defer blindly to its interpretations.

IV. OLD HICKORY'S REVENGE: THE CASE FOR CONDITIONING PREEMPTION ON THE OCC'S EXAMINATION OF THE RISKS ADDRESSED BY STATE LAW

According to the OCC's 2011 statement of basis and purpose, state banking laws targeting lending and deposit-taking operations "meaningfully interfere with fundamental and substantial elements of the business of national banks and with *their* responsibilities to manage that business and

³⁰⁸ See *supra* note 11.

³⁰⁹ For a summary of the conflicts among scholars and judges over whether *Skidmore* embodies an "independent judgment" or a "sliding scale" model of deference, see Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1251-59 (2007).

³¹⁰ See Peter L. Strauss, "Deference" is Too Confusing—Let's Call Them "Chevron Space" and "Skidmore Weight," 112 COLUM. L. REV. 1143, 1145 (2012) ("'Skidmore weight' addresses the possibility that an agency's view on a given statutory question may in itself warrant respect by judges who themselves have ultimate interpretive authority."). Hickman & Krueger found that the great majority of courts follow a "sliding scale" approach to *Skidmore* deference. See Hickman & Krueger, *supra* note 309, at 1271 & tbl.1.

those risks.”³¹¹ The italicized word “their” perfectly encapsulates the assumption behind those rules: under the OCC’s federal instrumentality theory of preemption, private bankers have the primary responsibility to manage the risks that they create. This ideal of protecting bankers’ autonomy lies at the heart of *McCulloch* and, more generally, the theory of privately owned federal instrumentalities. Whatever its protestations to the contrary, the OCC aggressively defends *McCulloch*’s idea that private banks, when they receive federal charters, are federal agencies in their own right, entitled to make banking policy even when that policy has not been reviewed by any genuinely federal official.

Section 1044(a) of the Dodd-Frank Act is the latest political effort to cut back on the idea that federal agencies should treat private banks as if they were public agencies. Endorsing the anti-banker nondelegation doctrine, however, does not imply that state law should play the lead role, or even any ultimate role, in regulating nationally chartered banks. Like Jackson’s 1832 campaign against Nicholas Biddle’s Second Bank and Brandeis’s 1912 campaign against the House of Morgan, Dodd-Frank’s limits on preemption are designed not so much to preserve state law as to ensure that, if a state law is preempted, federal regulators carefully consider—“case-by-case”—the risks that such a state law attempts to mitigate. There are obvious reasons why national banks are optimally regulated by national agencies. Assessing the default risk—safety and soundness—of banks requires information about how and why panics and insolvency occur and some expert capacity to evaluate that information. It is likely that a national agency will be better situated to acquire that necessary expertise than fifty state agencies, for the usual reasons of scale economies and holdout problems in information acquisition. Financial products and services are sold across state lines; national banks operate at a national scale to pool reserves, achieve scale economies, and spread risks. For these reasons, replacing state with federal banking law might be ultimately the most sensible regime for nationally chartered banks. Such replacement, however, should involve a genuinely public agency’s evaluation of each state law’s costs and benefits and not merely an evaluation by a private entity regulated by the state law being evaluated. How can preemption doctrine be nudged in the direction of insuring such evaluations?

In what follows, I make two suggestions for encouraging the OCC to exercise its expertise rather than delegate away its policy-making responsibilities to private bankers. First, section 1044(a) should be construed to bar

³¹¹ Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 43,549, 43,557 (July 21, 2011) (emphasis added).

preemption of state law unless, in the course of the federal administrative process, the OCC makes specific findings of fact about why the mischief prohibited by a state law does not justify a limit on private bankers' policy-making discretion. Second, courts should consider functionally when suppression of state law is most desirable; they should require weaker evidence that the OCC has considered a risk when the OCC is suppressing some evil policy which state governments are unusually prone to promulgate. In particular, I suggest that courts ought to be quick to find preemption where state law (a) has an apparently protectionist purpose to insulate local providers of financial services from national banks' competition or (b) expropriates national banks' investments in a state.

A. *Prodding the OCC into Exercising Its Expertise*

Preemption under section 1044(a), rightly understood, can transform state law into a catalyst for the OCC's careful consideration of banking risks. The essential ingredient of such a catalyzing preemption doctrine is what Professor Catherine Sharkey has termed the "agency reference" theory of preemption³¹²: When a private party argues for preemption of some state law by the OCC's rules under the National Bank Act, courts should demand some coherent argument—rooted in agency expertise—that the OCC has provided either a substitute federal rule or a reasoned analysis for why no rule is necessary. Such reasoned analysis would involve some assessment of the risk addressed by the challenged state law, the adequacy of existing federal rules to address that risk, or the adequacy of consumer information and market competition to address that risk absent any such federal rule. Ultimately, judicial assessment of the OCC's administrative record would determine whether the OCC had made some judgment about banking risks that was inconsistent with the implicit judgment made by state law. In Professor Sharkey's words, the OCC should provide "a fine-grained account of the precise regulatory review conducted by the agency and evidence as to its compatibility with state law . . . claims."³¹³

Suppose, for instance, that a state legislature identifies some class of credit consumers who are prone to the specific risk of excessive debt—say, a risk that banks will market credit cards to college students who lack the

³¹² For a discussion of the agency reference theory, see Catherine M. Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 DUKE L.J. 2125, 2155-56 (2009) [hereinafter Sharkey, *Federalism Accountability*]; and Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 477-84 (2008).

³¹³ Catherine M. Sharkey, *Colloquy, What Riegel Portends for FDA Preemption of State Law Products Liability Claims*, 103 NW. U. L. REV. 437, 441 (2009).

maturity and financial skills to make responsible borrowing decisions. Suppose further that, responding to this perceived risk, the legislature prohibits the marketing of credit cards to college students except through an officially approved marketing policy with information about good credit management.³¹⁴ Should the National Bank Act be construed to preempt such a law on the grounds that it places conditions on “incidental powers,” conferred by the National Bank Act, “necessary to carry on the business of banking”?³¹⁵ The OCC’s preemption rule seems to preempt such state laws: it bars all state law limitations on “[d]isclosure and advertising, including laws requiring specific statements, information, or other content to be included in . . . credit solicitations.”³¹⁶ In enacting this provision, however, the OCC never gave any consideration to the special risks posed by college students’ credit decisions. The OCC instead simply stated that “compliance with state-dictated disclosure requirements clearly present[s] a significant interference, within the meaning of *Barnett*, with the exercise of . . . national bank powers.”³¹⁷ Preempting the state law under this very general rule would, therefore, allow banks to become the only entities to consider how banks’ own credit card marketing to college students should be regulated. This might make sense if credit markets, unaided by any special rules, functioned well. But the OCC has also made no findings about whether college students are well informed consumers of credit. To preempt state law by citing the OCC’s general declaration that states cannot impede banks’ marketing decisions is effectively to make the banks the final arbiters of their own marketing decisions.

Does such a delegation of policymaking discretion to banks make any sense as a matter of policy? If banks were akin to federal field offices staffed by disinterested officers carrying out federal policy, the delegation would be no different than the delegation of powers to postmasters or U.S. Attorneys. But there is no reason to trust banks as such disinterested federal instrumentalities: American political history, from the days of Andrew Jackson to Brandeis to Dodd-Frank, suggests that Americans do *not* (and should not) trust bankers to such an extraordinary degree.

The advantage of the agency reference theory is that it assigns the costs of formulating federal policies on specific banking risks to the parties most

³¹⁴ See, e.g., N.Y. EDUC. LAW § 6437 (McKinney 2010) (“Each college shall prohibit the advertising, marketing, or merchandising of credit cards on college campuses to students, except pursuant to an official college credit card marketing policy.”).

³¹⁵ 12 U.S.C. § 24 (2006).

³¹⁶ 12 C.F.R. § 7.4008(d)(8) (2012).

³¹⁷ Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 43,549, 43,557 (July 21, 2011).

capable of bearing those costs—the banks regulated by the OCC. There are three advantages to placing the burden of overcoming administrative inertia on the banks rather than on consumers. First, bankers are the OCC's natural constituency, the private parties with whom the OCC must regularly work and to whom the OCC is likely to be most responsive. Second, the banks already have data at their disposal concerning the credit-worthiness and borrowing behavior of consumers. Third, the agency reference theory gives the banks a strong incentive to demand policies specifically addressing the banking risks being regulated by the states: Absent such a policy, a bank cannot obtain the protection of preemption. Such preemption is more valuable to banks than to consumers because, unlike consumers, banks benefit from regulatory uniformity regardless of the content of a regulation. For any enterprise doing business in more than one state, there are scale economies in operating under a single, nationwide set of rules, because the costs of compliance (e.g., researching rules, designing financial products that comply with the rules, and so forth) are reduced.³¹⁸

Requiring the OCC to address the risks regulated by a state law before preempting that state law, therefore, has the beneficial effect of prodding the OCC into addressing banking risks that it might otherwise ignore. State law, on this account, is not the final source of banking regulation, but is rather a catalyst for federal regulation.³¹⁹ Such a prod might be especially necessary because, as compared with elected state officials like attorneys general or governors, federal regulators might be risk-averse to regulatory action changing the status quo.³²⁰ Such administrative action can stir up bankers and consumer advocates to lobby Congress to place pressure on the agency, for instance, through congressional committee hearings, appropriations riders, and other forms of legislative harassment. For bureaucrats who

³¹⁸ See Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 29-32 (2007) (discussing nonuniform state regulation as a threat to large-scale business enterprises).

³¹⁹ For examples of state law as an impetus for agency action, see generally David A. Kessler & David C. Vladeck, *A Critical Examination of the FDA's Efforts to Preempt Failure-to-Warn Claims*, 96 GEO. L.J. 461, 477 (2008) (explaining that "tort law often informs regulation decisions, and the FDA has often acted in response to information that has come to light in state damages litigation after a drug has been approved" (footnote omitted)); Sharkey, *Federalism Accountability*, *supra* note 312, at 2146-55. For examples of state law as an impetus for congressional action, see Hills, *supra* note 318, at 19-27.

³²⁰ See JOEL D. ABERBACH ET AL., BUREAUCRATS AND POLITICIANS IN WESTERN DEMOCRACIES 102-14 (1981) (contrasting bureaucrats' criteria for evaluating policy with those of politicians).

prefer the quiet life, it is simpler to take no action whatsoever on a particular risk than it is to support either explicit regulation or deregulation.³²¹

This is not to say that state law can directly interfere with the federal administrative process by basing legal liability under state law on private parties' acts or omissions in the federal administrative process. Such direct state meddling with federal decisionmaking is generally prohibited.³²² There is, however, no such ban on state laws' complementing federal law by imposing liability for risks that federal agencies lack personnel or time to evaluate.³²³ State law imposes no duty on private parties to urge federal regulators to address risks regulated at the state level: that private action is an incidental (albeit happy) side-effect, not a legal requirement, of state law.

Even if the agency reference theory constitutes good regulatory policy, it must also be a sound interpretation of the Dodd-Frank Act. Under section 1044(a) of Dodd-Frank, state laws are preempted only if they violate the *Barnett Bank* standard by "impair[ing] significantly" a banking power that Congress "explicitly granted."³²⁴ As suggested in Section II.C, the meaning of "explicitly" is ambiguous. It cannot be that any banking practice is "explicitly granted" simply because the practice falls within the powers conferred by the National Bank Act: Such a reading would be inconsistent with cases cited approvingly by the *Barnett Bank* Court, such as *Luckett* and *McClellan*.³²⁵ But the *Barnett Bank* Court never defined the degree of specificity of federal authorization sufficient to preempt state law.

The agency reference theory provides a ready-made interpretation of what it means for federal law to "explicitly" confer a power: if either Congress or a federal agency explicitly considers whether existing federal

³²¹ See Wilmarth, *supra* note 174, at 949-53 (offering the analogous argument that state regulation can provide regulatory competition that reduces the likelihood of industry capture of federal agencies).

³²² See *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347-48 (2001) (barring a state law claim of a fraudulent representation made to the FDA to obtain federal approval for medical devices). In *PLIVA, Inc. v. Mensing*, the Court suggested, with a later "*cf.*" citation to *Buckman*, that states could not predicate liability on failures to communicate with the FDA. See 131 S. Ct. 2567, 2578 (2011) ("Although requesting FDA assistance would have satisfied the manufacturers' federal duty, it would not have satisfied their state tort-law duty to provide adequate labeling. State law demanded a safer label; it did not instruct the manufacturer to communicate with the FDA about the possibility of a safer label.").

³²³ See *Wyeth v. Levine*, 555 U.S. 555, 578-79 (2009) (observing that state laws imposing damages on manufacturers who fail to warn about risks that emerge after drugs are placed on the market create "a complementary form of drug regulation" that supplements the FDA's "limited resources" and "offers an additional, and important, layer of consumer protection").

³²⁴ *Barnett Bank of Marion Cnty. v. Nelson*, 517 U.S. 25, 33 (1996) (emphasis added).

³²⁵ For *Luckett*, see *supra* notes 145-50 and accompanying text; for *McClellan*, see *supra* notes 108-11 and accompanying text.

law adequately controls a particular type of risk, then federal law “explicitly” confers the power to engage in banking practices that create that risk. Such a reading reconciles the *Barnett Bank* Court’s holding that a 1916 statute explicitly granted the power to sell insurance to national banks owned by holding companies³²⁶ with the *Lockett* Court’s holding that the National Bank Act did not explicitly confer the power to maintain bank accounts past the period when they were deemed abandoned by Kentucky law.³²⁷ By specifically authorizing national banks to sell insurance, Congress had presumably considered the risks that the sellers would compete with local banks. After all, one cannot sell insurance without potentially depriving competitors of business. By contrast, Congress might authorize banks to maintain bank accounts without reaching any conclusion about whether or not such accounts should be deemed abandoned when they are inactive for extended periods of time after notice has been given to account holders.

Construing “explicitly” to require some specific endorsement of a banking risk by either Congress or the OCC also harmonizes the substantial impairment standard with section 1044(a)’s various procedural safeguards. Section 1044(a) requires a preemption decision to be made on the basis of a “case-by-case” determination³²⁸ of a state law’s “impact”³²⁹ on national banks, supported by “specific findings” that are backed by “substantial evidence.”³³⁰ Such language meshes well with reading *Barnett Bank* as stressing powers “explicitly granted,” because these procedures require an individualized (“case-by-case”) evaluation of a “particular” risk addressed by state law. If that risk is adequately addressed by federal law, then the state law’s salutary “impact” is presumably gratuitous and, therefore, an “impair[ment]” of a national bank’s honest, safe, and sound banking practices. If, instead, federal law does not address the risk addressed by state law, then state law plugs a hole in public oversight of banking and does not “impair,” but rather *improves*, such banking. In other words, process and substance go together: whether federal law “explicitly grant[s]” banks the power to incur particular risks in disregard of a state law depends on whether some federal decision-maker has explicitly considered the risks in question.

Such a reading of section 1044(a) is neither required nor foreclosed by the statute’s text. Because section 1044(a) specifically withholds *Chevron* deference from the OCC,³³¹ however, it remains for the courts, not the

³²⁶ See *id.* at 33.

³²⁷ See *Anderson Nat’l Bank v. Lockett*, 321 U.S. 233, 248-52 (1944).

³²⁸ 12 U.S.C. § 25b(b)(3)(A)–(B) (2006, Supp. IV 2011).

³²⁹ *Id.* § 25b(b)(3)(A).

³³⁰ *Id.* § 25b(c).

³³¹ See *supra* text accompanying note 308.

OCC, to resolve the major ambiguities in the statute. The withholding of *Chevron* deference does not mean, however, that the OCC cannot receive any deference: the administrative process in section 1044(a) defers to the OCC's consideration of the risks addressed by state law if the OCC points to some "substantial evidence" in the record showing that additional state regulation is unnecessary. Ordinary principles of administrative law also require that the OCC respond to contrary evidence that such risks are significant and unaddressed by existing federal rules with some commentary on the evidence's inadequacy.³³² The agency's silence would be a recipe for judicial reversal, even if the court ultimately refused to weigh the agency's evidence against its opponents'.

There is some indication that some lower courts have already adopted such an agency reference model for preemption under section 1044(a). For instance, the court in *In re Checking Account Overdraft Litigation* found that the OCC's rule expressly authorizing national banks to charge noninterest fees³³³ did not authorize them to arrange deliberately the order of posting to maximize the possibility of customers' accounts being overdrawn.³³⁴ In reaching this holding, the court did not find decisive the OCC's interpretation of its own rule stating that banks did not need to post withdrawals in the order in which they were received.³³⁵ Although the OCC's published guidance specifically assumed that banks could post withdrawals in any order,³³⁶ the court reasoned that the guidance never stated that banks could do so specifically with the purpose of deceiving customers into incurring overdraft fees.³³⁷ Because the OCC had not addressed the issue covered by state law—whether banks' self-interest in maximizing fees would produce the right balance of overdraft protection given the low probability that consumers would monitor the risks of overdraft—the court assumed that the OCC's rule on posting did not preempt the state law.³³⁸

The *Checking Account Overdraft Litigation* decision comports with those of other lower courts in allowing states to regulate banking risks when their regulations take the form of general common law theories of liability not

³³² See *supra* note 255 and accompanying text.

³³³ 12 C.F.R. § 7.4002(a) (2012).

³³⁴ *In re Checking Account Overdraft Litig.*, 694 F. Supp. 2d 1302, 1313-14 (S.D. Fla. 2010).

³³⁵ *Id.* at 1312-13.

³³⁶ For instance, the Guidance urged that, as a best practice, banks should "[c]learly explain to consumers that transactions may not be processed in the order in which they occurred, and that the order in which transactions are received by the institution and processed can affect the total amount of overdraft fees incurred by the consumer." Joint Guidance on Overdraft Protection Programs, 70 Fed. Reg. 9127, 9132 (Feb. 24, 2005).

³³⁷ See *Checking Account Overdraft Litig.*, 694 F. Supp. 2d at 1313-14.

³³⁸ *Id.*

especially targeted at the business of banking. Where state laws take the form of banking-specific regulations, lower courts still find that such laws are preempted, even absent any specific findings that compliance with the law would be especially burdensome for the bank.³³⁹ That lower courts continue to treat general and banking-specific state laws differently for purposes of preemption, even after section 1044(a) of the Dodd-Frank Act was enacted, illustrates the persistence of *McCulloch*'s hold on the judicial mind. As explained in Section III.A above, the distinction between states' general and banking-specific laws makes no sense in terms of market harmonization, minimization of banks' compliance costs, protection of banking consumers, or any other conceivable goal of federal banking law. It lives on only as a sort of doctrinal ghost haunting the doctrine long after its justification has passed away.

Fortunately, the benefits of the agency reference theory can be realized even if the courts insist on distinguishing between general and banking-specific state laws. If *stare decisis* leads courts to honor *McCulloch*'s distinction between banking-specific rules and more general rules, courts can still refuse to find preemption of state common law liability unless the OCC evaluates the specific risks addressed by such liability. Such a barrier to preemption would still induce banks to petition the OCC for clarifications of federal banking law regarding the proper regulation of such specific risks. Because, as noted above in Section III.A, virtually any banking-specific rule can be reframed as a common law theory not especially targeted at banking practices, such a barrier to preemption would accomplish much if not all that completely overruling *McCulloch* would accomplish.

B. *Presuming Preemption on Functional Grounds:
A Presumption Against States' Protectionism and
Expropriation of National Banks' Investments*

The argument for requiring the OCC to evaluate a risk before preempting state laws that regulate that risk does not require any blanket "anti-preemption" canon. Federal agencies and federal courts have good reasons to be suspicious of state regulations of nationally chartered banks, because these regulations are likely the products of the political dysfunction to which state legislature are prone. In particular, protectionism and expropriation are two dangers that a presumption in favor of preemption might usefully

³³⁹ See, e.g., *Parks v. MBNA America Bank*, 278 P.3d 1193, 1203-04 (Cal.) (holding that disclosure requirements for convenience checks were preempted as a matter of law, even absent any proof that requirements imposed compliance burdens on banks), *cert. denied*, 133 S. Ct. 653 (2012).

combat, while imposing very little burden on the useful “prodding” function of state law described above.

First, consider the dangers of protectionism through the lens of the facts of *Barnett Bank* itself. The state law at issue in *Barnett* was a Florida statute prohibiting affiliates of national holding companies from selling insurance in small towns in Florida while allowing small-town bankers to peddle such insurance.³⁴⁰ The state law was, in short, blatantly protectionist. Moreover, the Florida law undermined a 1916 federal statute authorizing nationally chartered banks to sell insurance on the same terms as any other firm “authorized by the authorities of the State . . . to do business [there].”³⁴¹ To construe the 1916 federal statute as exempting the Florida statute from preemption simply because the latter did not single out national banks would gut the federal law of its obvious purpose—the suppression of state protectionism in favor of small town bankers and against larger-scale institutions.

Such protectionism is the first circumstance in which, on functional grounds, courts ought to adopt a presumption in favor of preemption. Small bankers are likely to have exceptional networks of organization in the state legislatures. Voters are unlikely to scrutinize their labors on behalf of obscure regulatory schemes that exclude competitors while providing scale economies in finance. When a federal law seems, therefore, to be directed at unlocking a local market for financial services that state laws keep closed, courts ought to suspend their deference toward the latter and give the former broad scope to operate outside its literal terms.

Opposition to protectionism can explain the result in decisions finding preemption even where such opposition does not explicitly appear in the courts’ reasoning in those decisions. In *Franklin National Bank of Franklin Square v. New York*, for instance, the Court held that the National Bank Act’s grant of incidental advertising powers preempted a New York statute prohibiting banks “from using the word ‘saving’ or ‘savings’ in their advertising or business.”³⁴² The statute applied only to banks not chartered by the State of New York: On its face and in its stated purpose, the goal of the statute was to protect New York’s own chartered savings banks and savings and loan associations from competition by commercial banks by helping consumers distinguish between the two types of institutions.³⁴³ *Franklin* found preemption based on the general idea that advertising was “one of the

³⁴⁰ *Barnett Bank of Marion Cnty. v. Nelson*, 517 U.S. 25, 28-29 (1996).

³⁴¹ *Id.* at 28 (quoting 12 U.S.C. § 92 (1994)).

³⁴² 347 U.S. 373, 374 (1954).

³⁴³ *See id.*

most usual and useful of weapons” in banking, such that the Court could not accept “that the incidental powers granted to national banks should be construed so narrowly as to preclude the use of advertising in any branch of their authorized business.”³⁴⁴ The Court did not, however, explain why this state limit on incidental powers was distinct from myriad other state laws with which national banks had to comply. The protectionist character of the preempted state law, however, supplies an answer to this question. Unlike, say, a general ban on false advertising, New York’s actual regulation was explicable only in protectionist terms.

Even when a state law does not facially discriminate against nonresident or nationally chartered banks, courts may infer a protectionist purpose from a severe protectionist effect. In *U.S. Bank National Ass’n v. Schipper*, for instance, the district court held that the National Bank Act preempted an Iowa law requiring anyone providing a central routing unit (CRU) for ATM transactions to appoint consumer, business, and agricultural representatives to the CRU’s policymaking body.³⁴⁵ According to the court, Iowa’s law “effectively prohibited” national banks “from providing CRU services” to any state-chartered credit unions unless the banks restructured their boards of directors to comply with Iowa’s representation rules.³⁴⁶ So effective was Iowa’s law that only one company had been approved by the Iowa administrator to act as a CRU for all of Iowa.³⁴⁷ Such stark exclusionary effects are signals of likely protectionist purpose that do not require hypersensitive judicial antennae to detect. The *Schipper* court did not rely on these exclusionary effects to find that Iowa’s law was preempted; instead, it noted only that CRU services were “incidental” banking powers under the National Bank Act that Iowa could not significantly impair.³⁴⁸

Preemption doctrine should also discourage states’ desire to expropriate nationally chartered banks’ sunk assets. San Francisco’s effort to prohibit banks from charging for the use of ATM machines in the early 2000s stands as the classic example of recent state anti-banking expropriation. In striking down this measure, the Ninth Circuit recited the usual rhetoric about nationally chartered banks being federal instrumentalities that state law

³⁴⁴ *Id.* at 377.

³⁴⁵ See 812 F. Supp. 2d 963, 973 (S.D. Iowa 2011) (“[T]he provisions in the Iowa [law] that prevent or significantly interfere with U.S. Bank’s ability to provide [central routing unit] services are preempted by federal law.”).

³⁴⁶ *Id.* at 972-73.

³⁴⁷ *Id.* at 966.

³⁴⁸ *Id.* at 973.

could not touch.³⁴⁹ This rhetoric, taken literally, is either formalistic or simply untrue: state common law imposes a myriad of legal duties on national banks that lower courts universally uphold. The better functional justification for a strong norm of preemption, however, is that imposing price controls on fees charged by banks for the use of their physical infrastructure looks like an effort to expropriate prior investments for self-defeating populist ends. Those ends are self-defeating because such price controls discourage the very investments that the locality seeks to exploit. Moreover, the ban on ATM fees cannot be justified as an effort to protect consumers from charges about which they are likely to be ignorant: to the contrary, an ATM machine gives customers ample warning of the precise charges the bank imposes before the consumers consummate their transactions.

Why distrust state efforts at expropriation? The functional, as opposed to formal, reason is that states are locked into the sovereign's dilemma: they seek to encourage investments by giving assurances that those investments will be respected, but absent an enforcement mechanism by some higher sovereign, they cannot credibly commit to honor their own assurances. The Constitution's Contracts³⁵⁰ and Takings³⁵¹ Clauses can be viewed as efforts to overcome the sovereign's dilemma. By protecting investment-backed expectations and the sovereign's contractual commitments, the Clauses free subnational governments from the risk premiums that wary investors would otherwise charge. It is no favor for robust federalism to "liberate" subnational governments from such constraints. Banking preemption can supplement such doctrines by barring price controls that serve no function other than to expropriate preexisting infrastructure like ATM machines.

CONCLUSION

It has been almost two hundred years since the Supreme Court held in *McCulloch* that nationally chartered banks, as federal instrumentalities, must enjoy presumptive autonomy from state law. Controversial when it was handed down, Chief Justice Marshall's opinion has long outlived the historical period of which it is a creature. Treating a corporation, chartered by

³⁴⁹ See *Bank of Am. v. City & County of San Francisco*, 309 F.3d 551, 561 (9th Cir. 2002) ("National Banks are 'instrumentalit[ies] of the federal government, created for a public purpose, and . . . subject to the paramount authority of the United States.'" (alterations in original) (quoting *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 308 (1978))).

³⁵⁰ U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .").

³⁵¹ U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

Congress to be the federal government's exclusive fiscal agent, as a federal agency entitled to set banking policy without further governmental oversight was plausible, albeit hotly contested, before the Civil War. Such an assumption, however, becomes completely untenable when federally chartered banks are instead thousands of self-interested private enterprises with no duties to act as Congress's special fiscal agent.

There is no reason to treat such enterprises differently from any other businesses insofar as preemption is concerned. Where federal law provides some rule by which a banking practice is to be governed, then that rule should trump contrary state law. Moreover, given the needs of the financial sector operating in a multistate market, one might even presume that those federal rules trump any additional state regulation addressing the same risk as federal law. But if there is no federal rule governing some banking activity, then state law should, by default, govern that activity.

Indeed, no one—not Chief Justice Marshall in *McCulloch* itself, nor the OCC, nor the national banks—contests that *some* state law must govern such transactions for which federal law provides no rule. Even if disuniform law is bad, anarchy is worse. Banking cannot survive without laws defining contracts, property, crimes, and other matters on which commerce depends. The error of the OCC is to assume that such general state laws can be usefully distinguished from state laws specifically addressed to banking, on the theory that only the former supply the “infrastructure” for banking operations with which the latter interfere.

McCulloch distinguished taxes on banking operations from general property taxes on the ground that the former constituted an attack on federal supremacy. Once one abandons the assumption that national banks' policy choices represent the presumptive policies of the federal government, then this supremacy-based argument for drawing diffuse lines between laws defining legal “infrastructure” and other sorts of state laws disappears. Instead, all state law serves the goal of filling gaps in federal law until the relevant federal regulator gets around to supplying a substitute federal rule. Rather than allow banks selectively to disregard state laws that address banking risks the OCC has ignored, it is both wiser and more consistent with ordinary preemption doctrine for the OCC to evaluate the risks addressed by the states and to address those risks with consciously adopted federal policies.