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Banking Law: An Overview of Federal Preemption in the Dual Banking System

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Summary

Banks play a critical role in the United States economy, channeling funds from savers to borrowers and thereby facilitating economic activity. To address the risks of bank failures and excessive risk-taking, and the problem that consumers at times lack the information or expertise to make sound choices concerning financial products and services, both federal and state lawmakers have imposed a host of regulations on commercial banks.

The United States has what is referred to as a "dual banking system," in which banks can choose to apply for a charter from a state banking authority or a federal charter from the Office of the Comptroller of the Currency (OCC), a bureau within the Department of the Treasury. A bank's choice of chartering authority is also a choice of primary regulator, as state regulatory agencies serve as the primary regulators of state-chartered banks, and the OCC serves as the primary regulator of national banks. Despite receiving their authorities from state law, state banks are subject to many federal laws. Among other federal laws, state banks are subject to certain federal tax, consumer protection, and antidiscrimination laws. Similarly, although they receive their powers from federal law, national banks are not wholly immune from state law. Rather, national banks are often subject to generally applicable state laws concerning contracts, torts, property rights, and debt collection when those laws do not conflict with or frustrate the purpose of federal law.

Nonetheless, federal law preempts state laws that interfere with the powers of national banks. In *Barnett Bank of Marion County, N.A. v. Nelson*, the Supreme Court held that the National Bank Act of 1864 (NBA) preempts state laws that "significantly interfere" with a "national bank's exercise of its powers"—a standard that lower courts have applied to hold a wide variety of state laws preempted. The Court has also issued two decisions on the preemptive scope of a provision of the NBA limiting "visitorial powers" over national banks to the OCC, holding that the provision extends to the operating subsidiaries of national banks, but does not bar state judicial law enforcement actions against national banks. Finally, the OCC has taken a broad view of the preemptive effects of the NBA, a view that it has reaffirmed after the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank).

This report provides an overview of the respective roles of the federal government and the states in regulating banking. The report begins by providing a general overview of the doctrine of federal preemption, before discussing the American "dual banking system." It then addresses several key areas where preemption issues have arisen with respect to banking law, including (1) the standard for implied preemption of state laws that interfere with the powers of national banks adopted by the Supreme Court in *Barnett Bank*; (2) the Court's decisions in two cases concerning "visitorial powers" over national banks, *Watters v. Wachovia Bank, N.A.* and *Cuomo v. Clearing House Association, L.L.C.*; and (3) interpretive letters and rules concerning federal preemption issued by the OCC. The report also discusses the provisions in Dodd-Frank concerning preemption of state consumer protection laws, and their interpretation by courts and the OCC. Finally, the report concludes by discussing issues that are likely of interest to the 115th Congress concerning preemption, including provisions in the Financial CHOICE Act of 2017 regarding which entities may benefit from NBA preemption of state usury laws.

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The banking industry plays a critical role in the United States economy, channeling funds from savers to borrowers and thereby facilitating economic activity.[1] Among other things, banks provide loans to businesses, help individuals finance purchases of cars and homes, and offer services such as checking and savings accounts, debit cards, and ATMs.[2] As of December 2017, there were 888 nationally chartered banks in the United States holding a total of slightly less than $11 trillion in assets, and 4,040 state-chartered banks holding a total of slightly more than $5 trillion in assets.[3] Banking has also played a central role in American political culture, from President Jackson's criticism of the Second Bank of the United States to the "Occupy Wall Street" movement,[4] making banking regulation an issue of perennial interest to Congress.

Many commentators regard banking regulation as essential to the protection of depositors and consumers, the maintenance of macroeconomic stability, and the promotion of an efficient and competitive financial system.[5] More specifically, observers have argued that bank regulation is warranted to correct for a number of market failures, including, among other things: (1) the risk of bank failures, which impose externalities on the financial system when they cause depositors to withdraw their assets from solvent banks; (2) the possibility that access to government deposit insurance, central bank liquidity, and government bailouts will cause banks to take on excessive risk (a problem often referred to as "moral hazard"); and (3) the possibility that consumers at times lack sufficient information or expertise to make sound choices regarding financial products and services (a problem often referred to as "asymmetric information").[6] To address these risks, regulators have, among other things, restricted the activities that banks may engage in,[7] required that banks maintain minimum levels of capital[8] and government deposit insurance,[9] and enacted

[1] FREDERIC S. MISHKIN, THE ECONOMICS OF MONEY, BANKING, AND FINANCIAL MARKETS 232 (11th ed. 2016). This report is limited to a discussion of the regulation of commercial banks, and does not address the regulation of savings associations or thrifts. For an overview of key issues concerning federal preemption and the regulation of thrifts, *see* Carliss N. Chatman, *HOLA Preemption and the Original Intent of Congress: Are Federal Thrifts Necessary to Stabilize the Housing Market?*, 18 FORDHAM J. CORP. & FIN. L. 565 (2013).

[2] *See* MISHKIN, *supra* note 1 at 232.

[3] These figures were derived from a search of an online database maintained by the Federal Deposit Insurance Corporation on December 21, 2017. *See* FDIC, *Bank Data & Statistics*, https://www.fdic.gov/bank/statistical/.

[4] *See generally* Gretchen Ritter, Goldbugs and Greenbacks: The Antimonopoly Tradition and the Politics of Finance in America, 1865-1896 (1997); Richard T. McCulley, Banks and Politics During the Progressive Era: The Origins of the Federal Reserve System, 1897-1913 (1992); Bray Hammond, Banks and Politics in America from the Revolution to the Civil War (1991); John M. McFaul, The Politics of Jacksonian Finance (1972); Roderick M. Hills, Jr., *Exorcising* McCulloch*: The Conflict-Ridden History of American Banking Nationalism and Dodd-Frank Preemption*, 161 U. Pa. L. Rev. 1235 (2013); CRS Report R42081, *Finance and the Economy: Occupy Wall Street in Historical Perspective*, by (name redacted) .

[5] *See* KENNETH SPONG, BANKING REGULATION: ITS PURPOSES, IMPLEMENTATION, AND EFFECTS 5-10 (2000).

[6] David Llewellyn, *The Economic Rationale for Financial Regulation*, UNITED KINGDOM FINANCIAL SERVICES AUTHORITY (1999), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.125.8957&rep=rep1&type=pdf. *See also* RICHARD SCOTT CARNELL, JONATHAN R. MACEY & GEOFFREY P. MILLER, THE LAW OF FINANCIAL INSTITUTIONS 118-19 (6th ed. 2017); Erik F. Gerding, *The Subprime Crisis and the Link Between Consumer Financial Protection and Systemic Risk*, 5 FIU L. REV. 93 (2009); Mark J. Flannery, *Supervising Bank Safety and Soundness: Some Open Issues*, 92 FED. RES. BANK OF ATLANTA ECON. REV. 83, 85-86 (2007); David G. Oedel, *Private Interbank Discipline*, 16 HARV. J. L. & PUB. POL'Y 327, 330 n.8 (1993). *But see* Peter J. Wallison, *Why Do We Regulate Banks?* 14, REGULATION (Winter 2005-06) (arguing that many of the traditional arguments for bank regulation are not persuasive).

[7] *See* CARNELL, ET AL., *supra* note 6 at 129-184; MICHAEL S. BARR, HOWELL E. JACKSON & MARGARET E. TAHYAR, FINANCIAL REGULATION: LAW AND POLICY 183-210 (2016).

[8] *See* CARNELL, ET AL., *supra* note 6 at 238-276; BARR, ET AL., *supra* note 7 at 259-331. In the context of bank regulation, "capital" refers to "the amount of losses that an institution can suffer without impairing its obligations to creditors and other claimants." BARR, ET AL., *supra* note 7 at 259.

consumer protection measures related to usury, predatory lending, home foreclosures, debt collection, and mandatory disclosures in lending.[10] This complex regulatory apparatus has raised important issues concerning the division of authority between the federal government and the states, and the related question of how to treat cases where federal and state regulations overlap.[11]

This report provides an overview of the respective roles of the federal and state governments in regulating banking. The report begins by providing a general overview of the doctrine of federal preemption, before discussing the American "dual banking system." It then addresses several key areas where preemption issues have arisen with respect to banking law, including (1) the standard for implied preemption of state laws that interfere with the powers of national banks adopted by the Supreme Court in *Barnett Bank of Marion County, N.A. v. Nelson*;[12] (2) the Court's decisions in two cases concerning "visitorial powers" over national banks, *Watters v. Wachovia Bank, N.A.*[13] and *Cuomo v. Clearing House Association, L.L.C.*;[14] and (3) interpretive letters and rules concerning federal preemption issued by the Office of the Comptroller of the Currency (the OCC). The report also discusses the provisions in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank)[15] concerning preemption of state consumer protection laws, and their interpretation by courts and the OCC. Finally, the report concludes by discussing issues that are likely of interest to the 115th Congress concerning preemption, including provisions in the Financial CHOICE Act of 2017[16] concerning which entities may benefit from National Bank Act (NBA) preemption of state usury laws.

Background

The Doctrine of Preemption

The doctrine of federal preemption is grounded in the Supremacy Clause of Article VI of the Constitution, which provides that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or

(...continued)

[9] BARR, ET AL., *supra* note 7 at 166.

[10] *See* CARNELL, ET AL., *supra* note 6 at 495-552; BARR, ET AL., *supra* note 7 at 551-654.

[11] *See* V. Gerard Comizio & Helen Y. Lee, *Understanding the Federal Preemption Debate and a Potential Uniformity Solution*, 6 BUS. L. BRIEF 51, 51 (2010) ("Preemption has been a key feature of the dual banking system that has developed in the U.S. since national banks were created in 1863 under the National Currency Act . . . The dual banking system has resulted in many benefits to all banks and their customers, but preemption has become a flashpoint in the dual banking system in recent years."); Andrew T. Reardon, *An Examination of Recent Preemption Issues in Banking Law*, 90 IOWA L. REV. 347, 355 (2004) ("The issue at the center of most disputes between state and federal banking regulators and state and national banks is federal preemption."); HOWELL E. JACKSON & EDWARD L. SYMONS, JR., REGULATION OF FINANCIAL INSTITUTIONS 66 (1999) ("On the one hand, we envision a banking system in which state and national banks compete with each other—dual banking. But we also strive to maintain 'competitive equality' between state and national banks. To what extent can the two policies co-exist, or must one totally dominate the other?"). *See also* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 768 (1994) (noting that preemption "is almost certainly the most frequently used doctrine of constitutional law in practice.").

[12] 517 U.S. 25 (1996).

[13] 550 U.S. 1 (2007).

[14] 557 U.S. 519 (2009).

[15] P.L. 111-203, 124 Stat. 1376 (2010).

[16] H.R. 10, 115th Cong., (2017).

Laws of any State to the Contrary notwithstanding."[17] The Supreme Court has explained that "under the Supremacy Clause . . . any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield."[18]

Disputes over the desirability of broad federal preemption implicate a range of values. Proponents of broad preemption often cite the benefits of uniform national regulations[19] and the concentration of expertise in federal agencies.[20] Opponents of broad preemption, by contrast, often appeal to the importance of policy experimentation and the enhanced democratic accountability that they believe accompanies state and local regulation.[21]

The Supreme Court has identified two general ways in which federal law can preempt state law. Federal law can preempt state law *expressly* where a federal statute or regulation contains explicit preemptive language—that is, where a clause in the relevant federal law explicitly provides that it displaces certain categories of state law. For example, the Employee Retirement Income Security Act of 1974[22] contains an express preemption clause providing that some of the Act's provisions "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" described elsewhere in the statute.[23]

Federal law can also preempt state law *impliedly*, "when Congress' command is . . . implicitly contained in" the relevant federal law's "structure and purpose."[24] The Court has identified two subcategories of implied preemption. First, "field preemption" occurs "where the scheme of

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

[18] Gade v. Nat'l Solid Wastes Mgmt. Assn., 505 U.S. 88, 108 (1992).

[19] *See* Alan Untereiner, *The Defense of Preemption: A View From the Trenches*, 84 TUL. L. REV. 1257, 1262 (2010) (arguing that the "multiplicity of government actors below the federal level virtually ensures that, in the absence of federal preemption, businesses with national operations that serve national markets will be subject to complicated, overlapping, and sometimes even conflicting legal regimes."); John C. Dugan, Comptroller of the Currency, *Remarks Before Women in Housing and Finance: The Need to Preserve Uniform National Standards for National Banks* 7 (Sept. 24, 2009), https://www.occ.treas.gov/news-issuances/speeches/2009/pub-speech-2009-112.pdf ("[W]e live in an era where the market for financial products and services is often national in scope . . . In this context, regressing to a regulatory regime that fails to recognize . . . the need for a single set of rules for banks with customers in multiple states . . . would discard many of the benefits consumers reap from our modern financial product delivery system.").

[20] *See* Untereiner *supra* note 19 at 1262 ("In many cases, Congress's adoption of a preemptive scheme . . . ensures that the legal rules governing complex areas of the economy or products are formulated by expert regulators with a broad national perspective and needed scientific or technical expertise, rather than by decision makers—such as municipal officials, elected state judges, and lay juries—who may have a far more parochial perspective and limited set of information.").

[21] *See* Robert R.M. Verchick and Nina Mendelson, *Preemption and Theories of Federalism* in PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION 13, 17 (William W. Buzbee ed. 2009) ("[P]reserving state regulatory authority may . . . benefit citizens by prompting greater engagement in government. Citizens are often presumed to be able to participate more directly in policy making at the state level."); Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 4 (2007) ("Federalism's value, if there is any, lies in the often competitive interaction between the levels of government. In particular, a presumption against federal preemption of state law makes sense not because states are necessarily good regulators of conduct within their borders, but rather because state regulation makes Congress a more honest and democratically accountable regulator of conduct throughout the nation."); Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1850 (2004) ("Preemption doctrine . . . goes to whether state governments actually have the opportunity to provide beneficial regulation for their citizens; there can be no experimentation or policy diversity, and little point to citizen participation, if such opportunities are supplanted by federal policy.").

[22] P.L. 93-406, 88 Stat. 829 (codified in part at 29 U.S.C. § 1001 *et seq*.).

[23] 29 U.S.C. § 1144(a).

[24] *Gade*, 505 U.S. at 98 (internal quotation marks and citation omitted).

federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[25] Second, "conflict preemption" occurs where "compliance with both federal and state regulations is a physical impossibility,"[26] or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[27] In *Hines v. Davidowitz*, for example, the Court held that a federal law imposing registration requirements on aliens ages 14 and over—but not going so far as to impose a fee for registration or require that aliens carry an identification card—preempted a state statute that did impose those latter requirements.[28] The Court reasoned that the state statute stood as an obstacle to the accomplishment of the federal statute's purpose to "protect the personal liberties of law-abiding aliens through one uniform national registration system, and to leave them free from the possibility of inquisitorial practices and police surveillance. . . ."[29] The Court has repeatedly noted that in both implied preemption cases like *Hines* and express preemption cases, "the purpose of Congress" is the "ultimate touchstone" of its analysis.[30]

As will be discussed in more detail below, some federal banking laws expressly preempt state laws, while others do so impliedly. The OCC, an independent bureau within the Department of the Treasury[31] that serves as the primary regulator for federally chartered banks, has promulgated broad rules that expressly preempt certain categories of state laws concerning federally chartered banks.[32] And the Supreme Court has held that the NBA[33] impliedly preempts state laws that "significantly interfere with" a national bank's exercise of the powers conferred by that Act.[34]

The Dual Banking System

Federal preemption of state banking law raises particularly thorny questions in part because of the American "dual banking system," which divides chartering and regulatory authority over banks between the federal government and the states. This system has its origins in the National Currency Act of 1863[35] and the NBA, enacted one year later.[36] Since that time, banks have had

[25] *Id*.

[26] Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

[27] Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

[28] *Id*. at 74.

[29] *Id*.

[30] Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (internal quotation marks and citation omitted).

[31] While the OCC is located within the Department of the Treasury, "[t]he Secretary of the Treasury may not delay or prevent the issuance of any rule or the promulgation of any regulation by the Comptroller of the Currency, and may not intervene in any matter or proceeding before the Comptroller of the Currency (including agency enforcement actions), unless specifically provided by law." 12 U.S.C. § 1(b)(1). Moreover, the OCC's budget is not tied to the budget of the Department of the Treasury, as the OCC does not receive appropriations from Congress and is instead funded primarily by assessments on regulated banks. *See About the OCC*, OFFICE OF THE COMPTROLLER OF THE CURRENCY, https://www.occ.treas.gov/about/what-we-do/mission/index-about.html (last visited Jan. 17, 2018); 12 U.S.C. § 16 ("The Comptroller of the Currency may collect an assessment, fee, or other charge from any [regulated] entity . . . as the Comptroller determines is necessary or appropriate to carry out the responsibilities of the Office of the Comptroller of the Currency.").

[32] *See infra* "The OCC and Regulatory Preemption" and "Dodd-Frank and the OCC's 2011 Preemption Rules" (discussing the Office of the Comptroller of the Currency's preemption rules).

[33] 13 Stat. 99.

[34] Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25 (1996). For a discussion of *Barnett Bank*, see *infra "Barnett Bank."*

[35] 12 Stat. 665.

[36] 13 Stat. 99.

the option of applying for a national charter from the OCC or a state charter from a state's primary banking regulator.[37] Existing banks may also convert from a state charter to a national charter and vice versa.[38]

The considerations that lead a bank to choose a national or state charter are varied and have changed over time as the regulatory landscape has shifted. A bank may select a national charter in order to benefit from federal preemption of certain unfavorable state regulations,[39] to secure the greater simplicity of uniform national regulation when it operates in multiple states,[40] or because of aggressive legal actions taken by certain state regulators.[41] In contrast, a bank may select a state charter to avoid the generally higher supervisory fees charged by the OCC or because it perceives federal regulation as being more onerous than state regulation.[42] A bank's "choice of chartering authority is also a choice of primary regulator," as the OCC serves as the primary regulator of national banks, and state banking authorities serve as the primary regulators for state-chartered banks.[43]

Laws Governing National Banks

The NBA grants the OCC broad powers to regulate the organization,[44] examination,[45] and operation[46] of national banks. National banks must also become members of the Federal Reserve System (the FRS),[47] the central bank of the United States, which conducts the nation's monetary policy and is responsible for regulating the safety and soundness of the financial system.[48] Membership in the FRS entails supervision by the Federal Reserve Board.[49] Federal law also requires national banks to obtain deposit insurance from the Federal Deposit Insurance Corporation (the FDIC),[50] and the FDIC examines all insured institutions.[51]

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[37] BARR ET AL., *supra* note 7 at 160. Before 1863, bank regulation was primarily a matter of state law. *See* MICHAEL P. MALLOY, PRINCIPLES OF BANK REGULATION 7-9 (3rd ed. 2011). The history of U.S. banking regulation before 1863 is beyond the scope of this report. For a discussion of that history, *see* CARNELL ET AL., *supra* note 6 at 3-9; Hills, *supra* note 4 at 1241-55; Carl Felsenfeld & Genci Bilali, *Is There a Dual Banking System?*, 2 J. BUS. ENTREPRENEURSHIP & L. ISS. 30, 34-43 (2008); Edward L. Symons, Jr., *The United States Banking System*, 19 BROOK. J. INT'L L. 1, 6-9 (1993). The Supreme Court has held that the federal government has the constitutional authority to charter banks within the states. *See* McCulloch v. State of Maryland, 17 U.S. 316, 326 (1819); Franklin Nat. Bank of Franklin Square v. People, 347 U.S. 373, 375 (1954).

[38] 12 U.S.C. § 35; BARR, ET AL., *supra* note 7 at 166.

[39] *See* 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, 275 (2004).

[40] Felsenfeld & Bilali, *supra* note 37 at 57.

[41] *Id.*

[42] Binyamin Appelbaum, *By Switching Their Charters, Banks Skirt Supervision*, WASH. POST (Jan. 22, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/01/21/AR2009012104267.html.

[43] BARR, ET AL., *supra* note 7 at 165-66; 12 U.S.C. § 484(a) ("No national bank shall be subject to any visitorial powers except as authorized by Federal law.").

[44] 12 U.S.C. §§ 21, 26.

[45] *Id.* § 481.

[46] *Id.* §§ 81-92a.

[47] *Id.* § 282.

[48] *About the Federal Reserve System*, BD. OF GOV. OF THE FED. RES. SYS., https://www.federalreserve.gov/aboutthefed/structure-federal-reserve-system.htm (last visited Jan. 17, 2018).

[49] *See Supervision Group*, FED. RES. BANK OF NEW YORK, https://www.newyorkfed.org/financial-institution-supervision/financial-institution-supervision-group.html (last visited Jan. 17, 2018).

[50] 12 C.F.R. § 5.20(e)(3).

National banks "possess only those powers conferred upon them by Congress."[52] Section 24 of the NBA lists the powers granted to national banks, which include: (1) "discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt," (2) "receiving deposits," (3) "buying and selling exchange, coin, and bullion," (4) "loaning money on personal security," and (5) "obtaining, issuing, and circulating notes."[53] Section 24 also grants national banks "all such incidental powers as shall be necessary to carry on the business of banking."[54] Federal court and administrative rulings have identified roughly 80 specific activities that fall within the "incidental powers" of national banks.[55]

Despite receiving their authorities from federal law, national banks are not wholly immune from state law. Rather, the Supreme Court has explained that "general state laws" concerning "the dealings and contracts of national banks" are valid as long as they do not "expressly conflict" with federal law, "frustrate the purpose for which national banks were created," or impair the ability of national banks to "discharge the duties imposed upon them" by federal law.[56] Along these lines, the Court has explained that national banks "are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation," because their contracts, ability to acquire and transfer property, rights to collect debts, and liability to be sued for debts "are all based on State law."[57] The OCC has attempted to synthesize various court rulings on the applicability of state laws to national banks as establishing a general principle that such laws are valid as long as they "do not regulate the manner, content or extent of the activities authorized for national banks under federal law, but rather establish the legal infrastructure around the conduct of that business."[58]

Laws Governing State Banks

While state banking laws are by no means uniform,[59] they typically provide state-chartered banks with the power to engage in banking activities similar to those listed in the NBA and activities that are "incidental to the business of banking."[60] Just as national banks are often subject to state

(...continued)

[51] 12 U.S.C. § 1820(b).

[52] Indep. Ins. Agents of Am., Inc. v. Hawke, 211 F.3d 638, 640 (D.C. Cir. 2000).

[53] 12 U.S.C. § 24 (Seventh).

[54] *Id.*

[55] *See* Christian A. Johnson, *Wild Card Statutes, Parity, and National Banks—The Renascence of State Banking Powers*, 26 LOY. U. CHI. L. J. 351, 356 n.28 (1995). For a more detailed discussion of the "incidental powers" of national banks, *see* BARR ET AL., *supra* note 7 at 192-212.

[56] McClellan v. Chipman, 164 U.S. 347, 357 (1896).

[57] Nat'l Bank v. Commonwealth, 76 U.S. (9 Wall.) 353, 362 (1869).

[58] *National Banks and the Dual Banking System*, OFFICE OF THE COMPTROLLER OF THE CURRENCY (Sept. 2003) at 27, https://www.occ.treas.gov/publications/publications-by-type/other-publications-reports/national-banks-and-the-dual-banking-system.pdf. *But see* Hills, *supra* note 4 at 1279-87 (criticizing the OCC's "legal infrastructure" metaphor as "absurd" if interpreted literally and "arbitrary and unpredictable" if interpreted flexibly).

[59] *See* Howard H. Hackley, *Our Baffling Banking System*, 52 VA. L. REV. 565, 580 (1966).

[60] *See, e.g.*, N.Y. Banking Law § 96(1) (granting New York-chartered banks the power to "discount, purchase and negotiate promissory notes, drafts, bills of exchange, other evidences of debt, and obligations in writing to pay in installments or otherwise all or part of the price of personal property or that of the performance of services; purchase accounts receivable . . . ; lend money on real or personal security; borrow money and secure such borrowings by pledging assets; buy and sell exchange, coin and bullion; and receive deposits of moneys, securities or other personal property upon such terms as the bank or trust company shall prescribe; and exercise all such incidental powers as shall be necessary to carry on the business of banking."); Johnson, *supra* note 55 at 357.

law despite receiving their powers from federal law, state banks are often subject to federal laws despite receiving their powers from state law. Among other federal laws, state banks are subject to certain federal tax,[61] consumer protection,[62] and antidiscrimination laws,[63] in addition to any federal laws applicable to state banks by virtue of their membership in the FRS or supervision by the FDIC.

State-chartered banks may choose to become members of the FRS.[64] According to some observers, membership in the FRS entails a number of benefits, including reputational benefits,[65] and, perhaps most importantly, the ability to borrow from the Federal Reserve's "discount window" to meet temporary liquidity needs.[66]

All states require state-chartered banks to obtain FDIC insurance.[67] The FDIC accordingly serves as the principal federal regulator of state banks that are not members of the FRS.

The Convergence of State and Federal Regulation

Since the inception of the dual banking system, but particularly in the latter half of the 20th century, state regulatory agencies and the OCC have competed for bank charters.[68] Some commentators have argued that this "regulatory competition" created by the dual banking system "reduces the likelihood of unimaginative and unresponsive regulation of the banking system that could occur where there is a monopoly of regulation."[69] Others, however, have criticized the dual banking system for leading to "competition in laxity"—that is, a "race to the bottom" between federal and state regulators.[70] Other critics of the dual banking system have argued that state bank access to FDIC insurance promotes "moral hazard" by "creat[ing] incentives for state banking regulators to authorize certain unsound banking practices," and that regulatory competition

[61] *See* Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869).

[62] *See, e.g.*, 15 U.S.C. § 1601.

[63] *See, e.g.*, 42 U.S.C. § 3601.

[64] 12 U.S.C. § 321.

[65] *See Federal Reserve Membership*, FED. RES. BANK OF RICHMOND, https://www.richmondfed.org/banking/federal_reserve_membership (last visited Jan. 17, 2018) ("Membership [in the Federal Reserve System] conveys an association with the general reputation and public trust the Federal Reserve enjoys as our nation's central bank.").

[66] R. Alton Gilbert, *Benefits of Borrowing from the Federal Reserve when the Discount Rate is Below Market Interest Rates*, FED. RES. BANK OF ST. LOUIS (Mar. 1979), https://files.stlouisfed.org/files/htdocs/publications/review/79/03/Borrowing_Mar1979.pdf ("Bankers generally rate access to the discount window as one of the most, if not *the* most, important benefits of Federal Reserve membership.").

[67] BARR, ET AL., *supra* note 7 at 166.

[68] Johnson, *supra* note 55 at 357.

[69] *Id*. *See also* GEORGE J. BENSTON, ROBERT A. EISENBEIS, PAUL M. HORVITZ, EDWARD J. KANE, AND GEORGE G. KAUFMAN, PERSPECTIVES ON SAFE AND SOUND BANKING: PAST, PRESENT, AND FUTURE 276-78 (1986) (defending the dual banking system on the grounds that it promotes beneficial regulatory competition); Arthur E. Wilmarth, Jr., *The Expansion of State Bank Powers, The Federal Response, and The Case For Preserving the Dual Banking System*, 58 FORDHAM L. REV. 1133, 1135 (1990) (arguing that under the dual banking system, "the federal and state regulatory components have each played a creative role in helping the banking industry adapt to changing competitive conditions."); Kenneth E. Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 STAN. L. REV. 1, 8-13 (1977) (arguing that the ability of banks to select between federal and state charters encourages regulators to adopt optimal regulations).

[70] *See* Address by Arthur Burns, Chairman, *Maintaining the Soundness of Our Banking System*, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, American Bankers Association Convention (Oct. 21, 1974), https://www.newyorkfed.org/medialibrary/media/research/monthly_review/1974_pdf/11_1_74.pdf; Melanie L. Fein, *The Fragmented Depository Institutions System: A Case for Unification*, 29 AM. U. L. REV. 633 (1980).

between banking authorities has in fact led to "anticompetitive restrictions on entry into the banking industry rather than regulatory forbearance."[71]

Certain state banking authorities have competed with the OCC by granting state-chartered banks powers not available to national banks, "especially in the arena of insurance underwriting, real estate, and corporate debt/equity underwriting."[72] On the other hand, certain state banks unhappy with their regulatory treatment by state authorities have converted to national charters. In 2004, for example, JPMorgan Chase & Company and HSBC Bank, two of the largest state banks at the time, converted from New York state charters to national charters.[73]

While this competition between state and federal regulators persists,[74] the regulatory treatment of national and state banks has converged over time for a number of reasons.[75] First, as noted above, all national and state banks are now required to obtain FDIC insurance, which entails regulation and oversight by the FDIC.[76] Section 24 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA), as implemented by the FDIC's regulations,[77] prohibits FDIC-insured state banks from engaging as a principal in activities that are not permitted for national banks, absent permission from the FDIC.[78] While the FDIC occasionally grants such permission, commentators have argued that Section 24 of FDICIA "has had the ultimate effect of unifying the state and the federal banking systems."[79]

Second, beginning in the 1960s, many states passed statutes granting state-chartered banks the power to engage in any activities permitted for national banks (so-called "wild card statutes").[80] Such statutes are by no means uniform in their operation. While some wild card statutes are self-executing, others require the state's banking regulator to affirmatively grant state banks the power to engage in activities permitted for national banks.[81] Some wild card statutes look to federal statutes to determine which activities qualify as activities permitted for national banks, while others look to federal statutes, OCC regulations, and judicial decisions.[82] Finally, some wild card statutes expressly override all conflicting state laws, while others restrict their effect to activities that do not contravene state law.[83] Despite these differences, commentators have observed that

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[71] Henry N. Butler & Jonathan Macey, *The Myth of Competition in the Dual Banking System*, 73 CORNELL L. REV. 677, 679, 712-13 (1988).

[72] BARR, ET AL., *supra* note 7 at 176-77.

[73] Hal S. Scott, *Federalism and Financial Regulation* in FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS 139, 146 (Richard A. Epstein & Michael S. Greve, eds. 2007). *See also* Felsenfeld & Bilali, *supra* note 37 at 53-8 (discussing the JP Morgan and HSBC conversions).

[74] *See, e.g.*, Jessica Silver-Greenberg, Small Banks Shift Charters to Avoid U.S. as Regulator, N.Y. Times (April 2, 2012), http://www.nytimes.com/2012/04/03/business/small-banks-shift-charters-to-avoid-us-as-regulator.html; Appelbaum, *supra* note 42.

[75] *See* BARR, ET AL., *supra* note 7 at 178 (noting that "we are now far from the original dual banking system, with independent federal and state regulators and independent state and national banking systems.").

[76] 12 C.F.R. § 5.20(e)(3); BARR, ET AL., *supra* note 7 at 166.

[77] 12 C.F.R. § 362.

[78] 12 U.S.C. § 1831a.

[79] Felsenfeld & Bilali, *supra* note 37 at 73.

[80] *See* Johnson, *supra* note 55 at 368; John J. Schroeder, *"Duel" Banking System? State Bank Parity Laws: An Examination of Regulatory Practice, Constitutional Issues, and Philosophical Questions*, 36 IND. L. REV. 197 (2003).

[81] Johnson, *supra* note 55 at 370.

[82] *Id*. at 371.

[83] *Id*.

wild card statutes "have had the effect of reducing the differences between" state and national banks.[84]

Third, a number of federal statutes either explicitly or implicitly preempt state laws in ways that eliminate differential regulatory treatment for state and national banks. For example, in *Marquette National Bank of Minneapolis v. First Omaha Services Corporation*, the Supreme Court held that the NBA grants national banks the power to "export" the maximum interest rates allowed by their home states, even when those rates are higher than the maximum rates established in other states in which they operate.[85] In *Marquette*, the Court considered whether a national bank headquartered in Nebraska, which permitted banks to charge credit-card holders up to 18 percent interest per year on certain unpaid balances, could charge its Minnesota customers more than the 12 percent maximum interest allowable under Minnesota law.[86] The Court held that because the Nebraska-based national bank was "located" in Nebraska even when it conducted business with Minnesota customers, an NBA provision allowing national banks to charge interest rates "allowed by the laws of the State . . . where the bank is located" permitted the bank to avail itself of the higher maximum interest rates allowed by Nebraska law even when doing business with Minnesota customers.[87] Two years after the *Marquette* decision, Congress enacted legislation to extend the same power to "export" the maximum interest rates allowable in a bank's home state to state banks, preempting contrary state law.[88]

Branch Banking

Branch banking represents another area in which preemptive statutes have promoted regulatory parity for state and national banks. For much of U.S. history, banks were allowed to operate only as "unit banks" and "ha[ve] one, and only one, brick-and-mortar office."[89] However, restrictions on intrastate bank branching have largely disappeared, and "[n]early every state allows its banks to do business anywhere in the state."[90] The federal McFadden Act of 1927 preserves competitive parity between state and national banks with respect to intrastate branching by providing that national banks can establish branches within a state to the same extent as state banks.[91]

Similarly, the Riegle-Neal Amendments Act of 1997 (the Riegle-Neal Amendments) preserves parity between state and national banks with respect to interstate branching.[92] As with intrastate branching, states prohibited interstate branching for much of U.S. history.[93] In the early 1990s, however, "some states began to allow interstate branching, usually on a reciprocal basis."[94] In

[84] Felsenfeld & Bilali, *supra* note 37 at 71. *See also* BARR, ET AL., *supra* note 7 at 178.

[85] 439 U.S. 299, 301 (1978).

[86] *Id.* at 303.

[87] *Id.* at 308-09; 12 U.S.C. § 85.

[88] 12 U.S.C. § 1831d(a) ("In order to prevent discrimination against State-chartered insured depository institutions . . . with respect to interest rates . . . such State bank[s] . . . may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest . . . at the rate allowed by the laws of the State . . . where the bank is located. . . .").

[89] CARNELL, *supra* note 6 at 187.

[90] *Id.*

[91] *See* 12 U.S.C. § 36(c).

[92] P.L. 105-24, 111 Stat. 238 (1997).

[93] Hayley M. Brady & Mark V. Purpura, *The Riegle-Neal Amendments Act of 1997: The Impact of Interstate Branching on the Dual Banking System*, 2 N.C. BANKING INST. 230, 232 (1998).

[94] *Id.*

1994, Congress authorized interstate branching by both national and state banks in the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (the Riegle-Neal Act).[95] The Riegle-Neal Act "established . . . a comprehensive federal statutory scheme for interstate branching by state and national banks," but treated state and national banks differently with respect to the issue of which state laws governed a bank's branches.[96] While the Riegle-Neal Act provided that the laws of a *national* bank branch's "host state"[97] (as distinguished from the bank's "home state"[98]) applied only with respect to certain subjects, and only if those laws are not otherwise preempted by the NBA, the 1994 law contained no limitations on the applicability of host state laws to *state* bank branches.[99] This differential treatment "led to concerns that the nation's dual banking system might be jeopardized because State banks might opt to convert from state to national bank charters to avoid compliance with a multitude of different state laws."[100] Accordingly, in 1997, Congress passed and President Clinton signed the Riegle-Neal Amendments,[101] which provided that the laws of a state bank branch's host state apply only to the extent that they would apply to a branch of an out-of-state national bank.[102]

Barnett Bank and Preemption of State Interference with the Powers of National Banks

A key issue in banking law preemption is the extent to which federal law preempts state laws that interfere with the powers granted to national banks. In 1996, in its seminal decision in *Barnett Bank of Marion County, N.A. v. Nelson*, the Supreme Court held that federal banking law preempts state laws that "significantly interfere with [a] national bank's exercise of its powers."[103] *Barnett Bank* involved a challenge to a state law that prohibited banks from selling insurance in towns with fewer than five thousand residents.[104] The Court held that a federal statute granting national banks the authority to sell insurance in such towns impliedly preempted the state law because the state law presented an "obstacle" to the accomplishment of the federal statute's purpose "to grant small town national banks the authority to sell insurance, whether or not a State grants . . . similar approval."[105] In so holding, the Court reasoned that "normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted."[106] The Court also found it significant that the relevant federal statute (1) provided that national banks "may" sell insurance without qualification, and (2) referred to

[95] P.L. 103-328, 108 Stat. 2338 (1994).

[96] FDIC General Counsel's Opinion No. 11, Interest Charges by Interstate State Banks, 63 Fed. Reg. 27282 (May 18, 1998) [hereinafter "Interest Charges by Interstate State Banks."].

[97] For purposes of the Riegle-Neal Act, a bank's "host state" is any "[s]tate, other than the home [s]tate of the bank, in which the bank maintains, or seeks to establish and maintain, a branch." 12 U.S.C. § 1831u(g)(5).

[98] For purposes of the Riegle-Neal Act, a state bank's "home state" is the "[s]tate by which the bank is chartered." *Id.* § 1831u(g)(4)(A)(ii). A national bank's "home state" is the "state in which the main office of the bank is located." *Id.* § 1831u(g)(4)(A)(i).

[99] *Id*. § 36(f)(1).

[100] Interest Charges by Interstate State Banks, 63 Fed. Reg. at 27284.

[101] P.L. 105-24, 11 Stat. 238 (1997).

[102] 12 U.S.C. § 1831a(j)(2).

[103] 517 U.S. 25, 33 (1996).

[104] *Id*. at 28-9.

[105] *Id*. at 31, 37 (internal quotations omitted).

[106] *Id*. at 33.

federal rules and regulations that governed such sales, "suggest[ing] a broad, not a limited, permission."[107] While the Court found that the challenged law was preempted, it cautioned that federal statutes granting certain powers to national banks will not preempt state laws where the relevant federal statutes contain "an explicit statement that the exercise of that power is subject to state law."[108]

Lower courts have generally followed *Barnett Bank*'s rule that absent indications to the contrary, federal statutes and regulations that grant national banks the power to engage in specific activities preempt state laws that prohibit or "significantly interfere[] with" those activities. In *Wells Fargo Bank of Texas N.A. v. James*, for example, the Fifth Circuit[109] held that an OCC regulation granting national banks the power to "charge [their] customers non-interest charges and fees"[110] preempted a state statute prohibiting banks from charging a fee for cashing checks in certain circumstances, reasoning that the state statute "prohibit[ed] the exercise of a power which federal law expressly grants the national banks."[111] Similarly, in *Monroe Retail, Inc. v. RBS Citizens, N.A.*, the Sixth Circuit held that the OCC regulation at issue in *James* preempted state law conversion claims brought against a class of national banks based on fees they charged for processing garnishment orders.[112] The Sixth Circuit reasoned that under *Barnett Bank*, "the level of 'interference' that gives rise to preemption under the NBA is not very high," concluding that the state garnishment statute on which the plaintiff's conversion claims were based "interfere[d] with" national banks' ability to collect fees.[113] The Ninth Circuit employed similar reasoning in *Rose v. Chase Bank USA, N.A.*, which held that an NBA provision granting national banks the power to "loan money on personal security"[114] preempted a state statute imposing various disclosure requirements on credit card issuers under the *Barnett Bank* test.[115] In arriving at this conclusion, the Ninth Circuit reasoned that "[w]here . . . Congress has explicitly granted a power to a national bank without any indication that Congress intended for that power to be subject to local restriction, Congress is presumed to have intended to preempt state laws."[116]

Along these lines, federal courts have adopted broad interpretations of an NBA provision authorizing national banks to dismiss officers "at pleasure."[117] In *Schweikert v. Bank of America, N.A.*, for example, the Fourth Circuit held that this provision preempted a state law claim for wrongful discharge brought by a former officer of a national bank.[118] Similarly, the Ninth Circuit has held that this "at pleasure" provision preempted a claim brought by a former officer of a

[107] *Id*. at 32.

[108] *Id*. at 34.

[109] For purposes of brevity, references to a particular circuit in the body of this report (e.g., the Fifth Circuit) refer to the U.S. Court of Appeals for that particular circuit.

[110] 12 C.F.R. § 7.4002(a).

[111] 321 F.3d 488, 495 (5th Cir. 2003).

[112] 589 F.3d 274, 281 (6th Cir. 2009).

[113] *Id*. at 283.

[114] 12 U.S.C. § 24 (Seventh).

[115] 513 F.3d 1032, 1037 (9th Cir. 2008).

[116] *Id*. Courts have also applied the *Barnett Bank* test to hold that federal laws and regulations preempt state laws that (1) require licenses for real estate lending, *see* Wells Fargo Bank v. Boutris, 419 F.3d, 949, 965-66 (9th Cir. 2005) and Wachovia Bank v. Burke, 414 F.3d 305, 309 (2d Cir. 2005); (2) regulate ATM fees, *see* Bank of Am. v. City and Cty. of San Francisco, 309 F.3d 551, 561 (9th Cir. 2002); and (3) regulate the prepayment fees a national bank can impose upon borrowers, *see* Nat'l City Bank of Ind. v. Turnbaugh, 463 F.3d 325, 333 (4th Cir. 2002).

[117] 12 U.S.C. § 24 (Fifth).

[118] 521 F.3d 285, 288-89 (4th Cir. 2008).

national bank for breach of an employment agreement, reasoning that "[a]n agreement which attempts to circumvent the complete discretion of a national bank's board of directors to terminate an officer at will is void as against [federal] public policy."[119] And in *Wiersum v. U.S. Bank, N.A.*, the Eleventh Circuit relied on *Barnett Bank* and the Fourth Circuit's reasoning in *Schweikert* to conclude that the "at pleasure" provision in the NBA preempted a wrongful-termination claim brought by a former officer of a national bank under a state whistleblower statute.[120]

While federal courts have adopted expansive views of the circumstances in which state laws "significantly interfere with [a] national bank's exercise of its powers" under *Barnett Bank*, not all state laws that affect national banks have been found to be preempted. In *Gutierrez v. Wells Fargo Bank, NA*, for example, the Ninth Circuit held that certain state laws that affect the operations of national banks survive preemption under *Barnett Bank*.[121] The *Gutierrez* litigation involved Wells Fargo's use of a method called "high-to-low" posting for debit card transactions, whereby the bank posted large transactions to customers' accounts before small transactions.[122] The plaintiffs in *Gutierrez* brought a variety of state law claims based on the theory that Wells Fargo adopted the "high-to-low" method for the sole purpose of maximizing the number of overdraft fees it could charge customers.[123] In response, Wells Fargo—a national bank—argued that OCC regulations preempted the state law claims.[124]

The Ninth Circuit held that the OCC regulations preempted some, but not all, of the plaintiffs' claims. The court held that a regulation authorizing national banks to establish "the method of calculating" noninterest charges and fees "in [their] discretion"[125] preempted claims premised on the theory that Wells Fargo's posting method was an unfair business practice.[126] The Court also held that claims based on the bank's failure to affirmatively disclose its use of the "high-to-low" method were preempted by a regulation providing that national banks may exercise their deposit-taking powers "without regard to state law limitations concerning . . . disclosure requirements."[127]

However, the court held that claims based on *misleading statements* the bank had made about its posting method were not preempted, reasoning that such claims were based on "a non-discriminating state law of general applicability that does not conflict with federal law, frustrate the purposes of the [NBA], or impair the efficiency of national banks to discharge their duties."[128] In arriving at this conclusion, the Ninth Circuit rejected the argument that the claims were preempted because a prohibition on misleading statements "necessarily touches on" the authority of national banks to provide checking accounts, explaining that "such an expansive interpretation . . . would swallow all laws."[129] Because a prohibition of fraudulent representations did not "subject [the bank's] ability to receive deposits, to set account terms, to implement a posting method, or to calculate fees to surveillance under a rival oversight regime, nor . . . stand as an

[119] Mackey v. Pioneer Nat'l Bank, 867 F.2d 520, 524 (9th Cir. 1989).

[120] 785 F.3d 483, 490-91 (11th Cir. 2015).

[121] 704 F.3d 712, 730 (9th Cir. 2012).

[122] *Id*. at 716.

[123] *Id*.

[124] *Id*. at 723-28.

[125] 12 C.F.R. § 7.4002(b)(2).

[126] *Gutierrez*, 704 F.3d at 725.

[127] *Id*. at 726; 12 C.F.R. § 7.4007(b)(3).

[128] *Gutierrez*, 704 F.3d at 726 (internal quotation marks omitted).

[129] *Id*. at 727 (internal quotation marks and citation omitted).

obstacle to the accomplishment of the [NBA's] purposes," the court allowed the misrepresentation claims to proceed.[130]

Visitorial Powers: *Watters* and *Cuomo*

A provision of the NBA providing that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law" has also been at the center of two major Supreme Court decisions concerning federal preemption of state banking law.[131] In *Watters v. Wachovia Bank, N.A.*, a 2007 case, the Court held that this provision, together with an OCC regulation providing that national banks may conduct authorized activities through "operating subsidiaries,"[132] preempted state licensing, reporting, and visitation requirements for the operating subsidiaries of national banks.[133] The case involved a suit by Wachovia Mortgage, a state-chartered entity that was also a wholly owned subsidiary of Wachovia Bank (a national bank) against the Commissioner of Michigan's Office of Financial and Insurance Services (OFIS).[134] In the suit, Wachovia Mortgage sought declaratory and injunctive relief prohibiting the OFIS from exercising visitorial powers over it and from enforcing Michigan's requirement that mortgage lenders register with the state.[135]

In affirming a lower court injunction against the OFIS, the Court explained that "in analyzing whether state law hampers the federally permitted activities of a national bank," the proper inquiry "focuse[s] on the exercise of the bank's *powers*, not on its corporate structure."[136] Because "duplicative state examination, supervision, and regulation would significantly burden" national banks' ability to engage in authorized activities, the Court reasoned that such "state controls" would also unacceptably "interfere with [those] same activit[ies] when engaged in by an operating subsidiary."[137] Accordingly, the Court held that the OFIS was barred from exercising visitorial powers over Wachovia Mortgage, just as it was barred from exercising such powers over Wachovia Bank.[138] As discussed later in this report, the Dodd-Frank Act legislatively abrogated *Watters*'s holding that states may not examine or regulate the activities of national bank subsidiaries.[139]

Two years after *Watters*, the Court held in *Cuomo v. Clearing House Association, L.L.C.* that the NBA's preemption provision concerning "visitorial powers" does not implicate judicial law enforcement actions brought against national banks.[140] In *Cuomo*, the Attorney General of New

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[130] *Id*.

[131] 12 U.S.C. § 484(a). The term "visitorial powers" is derived from the sovereign's right to inspect the books and records of corporations, which paralleled the right of the church to supervise its institutions and the right of the founder of a charitable institution 'to see that [his] property [was] rightly employed.'" Cuomo v. Clearing House Ass'n, LLC, 557 U.S. 519, 525 (2009) (quoting 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 469 (1765)). When the NBA was enacted in 1864, "visitation" was similarly understood as "'[t]he act of examining into the affairs of a corporation' by 'the government itself.'" *Id*. at 526 (quoting 2 J. BOUVIER, A LAW DICTIONARY 790 (15th ed. 1883)).

[132] 12 C.F.R. § 5.34(e)(1).

[133] 550 U.S. 1, 7 (2007).

[134] *Id*. at 8.

[135] *Id*. at 9.

[136] *Id*. at 18 (emphasis in original).

[137] *Id*. at 17-18.

[138] *Id*.

[139] *See* 12 U.S.C. § 25b(h)(2); *infra* "Other Dodd-Frank Preemption Provisions."

[140] 557 U.S. 519, 536 (2009).

York (the NYAG) had sent letters to several national banks requesting nonpublic information about their lending practices in order to determine whether the banks had violated state fair lending laws.[141] The OCC and a banking trade group sued the NYAG to enjoin the information request, arguing that an OCC regulation preempted information requests by state law enforcement against national banks.[142] The relevant OCC regulation interpreted the NBA's restriction of "visitorial powers" over national banks to the OCC as meaning that "[s]tate officials may not . . . prosecut[e] enforcement actions" against national banks, "except in limited circumstances authorized by federal law."[143]

The Supreme Court rejected the interpretation of the NBA adopted by the OCC's regulation, drawing a distinction between (1) "supervision," or "the right to oversee corporate affairs," which qualify as "visitorial powers" that only the OCC can exercise over national banks, and (2) "law enforcement," which falls outside the scope of "visitorial powers," and which states can accordingly pursue against national banks.[144] The Court explained that while the term "visitorial powers" includes "any form of administrative oversight that allows a sovereign to inspect books and records on demand," it does not include judicial actions to enforce state law against a national bank.[145]

The OCC and Regulatory Preemption

While the courts have figured prominently in disputes over implied preemption, OCC regulations that expressly preempt state law have also generated controversy. As discussed, the NBA grants the OCC broad authority to supervise and regulate national banks.[146] While some commentators regard the OCC's authority to promulgate preemptive regulations as implicitly supported by the original text of the NBA and its legislative history,[147] Congress formally recognized that the OCC has such authority in 1994 in the Riegle-Neal Act.[148] Specifically, the 1994 law provides that host state laws concerning certain subjects shall apply to the branches of out-of-state national banks to the same extent as such laws apply to state-chartered banks except "when the Comptroller of the Currency determines that the application of such State laws would have a discriminatory effect on the branch in comparison with the effect the application of such State laws would have with respect to branches of a bank chartered by the host State."[149]

[141] *Id*. at 522.

[142] *Id*.

[143] 12 C.F.R. § 7.4000(a)(1).

[144] *Cuomo*, 557 U.S. at 527-28.

[145] *Id*. at 535-36. The Court ultimately held in *Cuomo* that the legality of the NYAG's information requests depended on the legality of the action that the NYAG threatened to take if the requests were not honored. *Id*. at 536. Because the Court concluded that the NYAG had the legal authority to prosecute judicial enforcement actions against national banks, it vacated the lower court injunction against the requests insofar as the injunction prohibited the NYAG from bringing judicial enforcement actions if the information requests were not honored. *Id*. However, because all parties conceded that the issuance of executive subpoenas (that is, subpoenas issued by an executive branch agency or official, as opposed to a court) to national banks would qualify as an "exercise of supervisory power" that was preempted by the NBA, the Court upheld the injunction as applied to the threatened issuance of executive subpoenas. *Id*.

[146] *See* notes 44-46 *supra*.

[147] *See* Nancy L. Perkins, Howard N. Cayne, & Laurence Hutt, Watters v. Wachovia*: A Functional Approach to Federal Banking Law Preemption*, 27 REV. BANKING & FIN. L. 127, 176-77 (2007).

[148] 12 U.S.C. § 36(f)(1)(A)(ii).

[149] *Id*.

The OCC has asserted what many commentators have characterized as an expansive view of federal banking law preemption.[150] In the 1990s and early 2000s, the OCC issued a number of interpretive letters and legal opinions regarding preemption. Among other things, the OCC took the position that federal law preempted state laws that limited the ability of national banks to:

- advertise;[151]
- operate offices within a certain distance from state-chartered bank home offices;[152]
- operate ATM machines;[153]
- engage in fiduciary activities;[154]
- finance automobile purchases;[155]
- sell annuities;[156]
- sell repossessed automobiles without an automobile dealer license;[157]and
- conduct Internet auctions of certificates of deposit.[158]

And in 2004, in response to a wave of state laws combating subprime and predatory lending,[159] the OCC issued, in the words of one commentator, "sweeping" preemption rules that identified broad categories of state law that the NBA preempted.[160]

In one rule issued in 2004, which was the subject of the *Cuomo* litigation,[161] the OCC construed an NBA provision providing that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law"[162] to mean that "[s]tate officials may not . . . conduct[] examinations, inspect[] or requir[e] the production of books or records of national banks, or prosecut[e] enforcement actions" against national banks "except in limited circumstances authorized by federal law."[163]

In addition to its rule on visitorial powers, the OCC issued a final rule in 2004 that articulated a more general preemption standard under the NBA.[164] The rule provided that "state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized" real estate lending, non-real estate lending, deposit-taking, or other powers "are not applicable to

[150] Wilmarth, *supra* note 39 at 233; Hills, *supra* note 4 at 1275; BARR, *supra* note 7 at 599.

[151] OCC Interp. Ltr. No. 804 (Sept. 30, 1997).

[152] OCC Interp. Ltr. No. 590 (June 18, 1992).

[153] OCC Interp. Ltr. No. 939 (Oct. 15, 2001); OCC Interp. Ltr. No. 789 (June 27, 1997).

[154] OCC Corp. Decision 97-33 (June 1, 1997).

[155] Preemption Determination, 66 Fed. Reg. 28,593 (May 23, 2001).

[156] OCC Interp. Ltr. No. 749 (Sept. 13, 1996).

[157] Preemption Opinion, 66 Fed. Reg. 23,977 (May 10, 2001).

[158] Preemption Determination, 65 Fed. Reg. 15,037 (Mar. 20, 2000).

[159] BARR, *supra* note 7 at 598.

[160] Wilmarth, *supra* note 39 at 233. *See also* Hills, *supra* note 4 at 1275 (describing the 2004 OCC preemption rules as "broadly constru[ing] the preemptive effects of federal banking laws."); BARR, *supra* note 7 at 599 (describing the 2004 OCC preemption rules as "broad").

[161] *See supra* "Visitorial Powers: *Watters* and *Cuomo*."

[162] 12 U.S.C. § 484(a).

[163] 12 C.F.R. § 7.4000(a)(1). As discussed in "Visitorial Powers: *Watters* and *Cuomo*" *supra*, the Supreme Court rejected the OCC's view that "visitorial powers" include state judicial law enforcement actions in *Cuomo* in 2009.

[164] 12 C.F.R. §§ 7.4007-4008 (2005).

national banks" except "where made applicable by Federal law."[165] The OCC explained that it intended the phrase "obstruct, impair, or condition" to function "as the distillation of the various preemption constructs articulated by the Supreme Court, as recognized in *Hines* [*v. Davidowitz*][166] and *Barnett Bank* [*of Marion County, N.A. v. Nelson*],[167] and not as a replacement construct that is in any way inconsistent with those standards."[168]

Beyond this general statement concerning the circumstances in which the NBA preempted state law, the OCC's rule identified specific categories of state laws concerning national banks' real estate lending, non-real estate lending, and deposit-taking powers that were preempted under the NBA. First, the OCC rule provided that national banks "may make real estate loans . . . without regard to state law limitations concerning":

- licensing and registration (except for purposes of service of process);
- "[t]he ability of a creditor to require or obtain private mortgage insurance, insurance for other collateral, or other credit enhancements or risk mitigants, in furtherance of safe and sound banking practices";
- loan-to-value ratios;
- terms of credit;
- "[t]he aggregate amount of funds that may be loaned upon the security of real estate";
- escrow accounts;
- security property;
- access to and use of credit reports;
- disclosure and advertising;
- processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages;
- disbursements and repayments;
- rates of interest on loans;
- due-on-sale clauses, with certain exceptions; and
- "[c]ovenants and restrictions that must be contained in a lease to qualify the leasehold as acceptable security for a real estate loan."[169]

Second, the rule provided that national banks "may make non-real estate loans without regard to state law limitations concerning" many of the same matters identified in the regulation concerning real estate lending.[170] Finally, the rule provided that national banks "may exercise [their] deposit-taking powers without regard to state law limitations concerning": (1) abandoned and dormant accounts, (2) checking accounts, (3) disclosure requirements, (3) funds availability,

[165] *Id.* §§ 34.4(a); 7.4007(b)(1); 7.4008(d)(1); 7.4009(b) (2005).

[166] 312 U.S. 52 (1941).

[167] 517 U.S. 25 (1996).

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

[169] 12 C.F.R. § 34.4(a) (2005).

[170] *Id.* § 7.4008(d)(2) (2005).

(4) savings account orders of withdrawal, (5) state licensing or registration requirements (except for purposes of service of process), and (6) special purpose savings services.[171]

The OCC rule also identified general categories of state law that the NBA did not preempt. The rule provided that state laws concerning (1) contracts, (2) torts, (3) criminal law, (4) rights to collect debts, (5) the acquisition and transfer of property, (5) taxation, (6) zoning, and, with respect to real estate lending, (7) certain homestead laws, were not preempted by the NBA, provided that they were "not inconsistent with" and "only incidentally affect[ed]" the deposit-taking, real estate lending, and non-real estate lending powers of national banks.[172] The OCC has characterized such generally applicable state laws as "establishing the legal infrastructure" surrounding the activities of national banks, and as surviving preemption so long as they "do not regulate the manner, content or extent of the activities authorized for national banks under federal law."[173]

Dodd-Frank and the OCC's 2011 Preemption Rules

The OCC's 2004 preemption rules have attracted criticism. Beginning in 2008, the United States experienced a financial crisis widely believed to have been caused in part by reckless subprime mortgage lending and a collapse in the real estate market.[174] Commentators have debated the role that the preemption of state antipredatory lending laws played in the crisis. Some observers contend that national banks played a significant role in the type of predatory lending that arguably led to the crisis, and that federal preemption "effectively gut[ted] states' ability to legislate against predatory lending practices."[175] Others reject the conclusion that preemption played a significant

[171] *Id*. § 7.4007(b) (2005). The "deposit-taking powers" of national banks include the power to "receive deposits and engage in any activity incidental to receiving deposits, including issuing evidence of accounts, subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any other applicable Federal law." *Id*.§ 7.4007(a).

[172] *Id*. §§ 34.4(b) 7.4007(c), 7.4008(e), 7.4009(c)(2) (2005).

[173] *National Banks and the Dual Banking System*, OFFICE OF THE COMPTROLLER OF THE CURRENCY 27 (Sept. 2003), https://www.occ.treas.gov/publications/publications-by-type/other-publications-reports/national-banks-and-the-dual-banking-system.pdf. One commentator has criticized the coherence of the OCC's preemption rules and the helpfulness of its "legal infrastructure" metaphor. Hills, *supra* note 4 at 1279-87. According to this commentator, because many state laws fall within a category of laws that the rules identify as preempted *and* a category of laws that the rules identify as surviving preemption, courts lack clear criteria for making preemption determinations, and accordingly must make such determinations on the basis of "arbitrary and unpredictable matters of legal characterization." Hills, *supra* note 4 at 1284. *See also id*. at 1282-84 (raising as one possible interpretation of the OCC's preemption rules the view that the NBA does not preempt any "generally applicable law that does not subject the business of banking to any special conditions," but rejecting the tenability of such an approach on the grounds 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.").

[174] *See generally Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States*, U.S. FIN. CRISIS INQUIRY COMMISSION 67-80 (2011).

[175] Nicholas Bagley, *The Unwarranted Regulatory Preemption of Predatory Lending Laws*, 79 N.Y.U. L. REV. 2274, 2275 (2004). *See also* Kathleen C. Engel & Patricia A. McCoy, *Federal Preemption and Consumer Financial Protection: Past and Future*, 3 BANKING & FIN. SERVICES POL'Y REP. 25, 34 (2012) (arguing that federal preemption of state consumer protection laws resulted in state banks lobbying state regulators for deregulation on the grounds that deregulation was necessary to preserve competitive parity with national banks); Lei Ding et al., THE PREEMPTION EFFECT: THE IMPACT OF FEDERAL PREEMPTION OF STATE ANTI-PREDATORY LENDING LAWS ON THE FORECLOSURE CRISIS 19 (2010), http://ourfinancialsecurity.org/wp-content/uploads/2010/03/UNC-CCC-Preemption-Effect-Impact-of-Federal-Preemption-on-Foreclosure-Crisis.pdf (finding that OCC-regulated lenders "increased their share of loans originated with risky characteristics in states with strong [antipredatory lending laws]" after the OCC issued its 2004 preemption rules, and that "preemption consistently increased the default risk of privately securitized mortgages originated by the OCC lenders" in states with antipredatory lending laws); Testimony of Ill. Att'y Gen. Lisa Madigan (continued...)

role in causing the crisis and argue that national banks and their subsidiaries accounted for only a small share of subprime mortgage lending leading up to the crisis.[176]

In 2010, Congress responded to concerns over the effects of federal preemption of state consumer protection laws in Sections 1041 and 1044 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).[177] Section 1044 contains a provision articulating a general standard to govern the preemption of "state consumer financial laws," and additional provisions addressing a number of discrete preemption issues.[178] Section 1041 has been interpreted by one commentator to function as a "savings clause" that exempts state consumer protection laws from preemption by federal consumer protection laws.[179]

General Preemption Standard

Section 1044 of Dodd-Frank provides a set of rules to govern the preemption of "state consumer financial laws."[180] In so doing, Section 1044 defines the term "state consumer financial law" to mean "a State law that does not directly or indirectly discriminate against national banks and that directly and specifically regulates the manner, content, or terms and conditions of any financial transaction . . . or any account related thereto, with respect to a consumer."[181] Section 1044 provides that a "state consumer financial law" is preempted only if:

> (A) application of a State consumer financial law would have a discriminatory effect on national banks, in comparison with the effect of the law on a bank chartered by that State;
>
> (B) in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in [*Barnett Bank*], the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers; and any preemption determination under this subparagraph may be made by a court, or by regulation or order of the Comptroller of the Currency on a case-by-case basis, in accordance with applicable law; or

(...continued)

before the Financial Crisis Inquiry Commission , 111th Cong. (Jan. 14, 2010) (citing a study conducted by the National Consumer Law Center that concluded that in 2006, "national banks, federal thrifts, and their operating subsidiaries were responsible for 31.5 percent of subprime mortgage loans," and arguing that "states struggled to make the argument that the predatory practices and products which fueled the oncoming [crisis] were unfair and deceptive, because the federal regulators' refusal to reform those practices and products served as an implicit endorsement of their legality."); Arthur E. Wilmarth, Jr., *Comptroller Dugan is Wrong About the Causes of the Financial Crisis and the Scope of Federal Preemption*, 1 LOMBARD STREET NO. 15 (Nov. 9, 2009) ("[F]ederally regulated institutions, including several of the largest national banks, were the primary private-sector catalysts of the current financial crisis.").

[176] *See* Raymond Natter & Katie Wechsler, *Dodd-Frank Act and National Bank Preemption: Much Ado About Nothing*, 7 VA. L. & BUS. REV. 301, 329-34 (2012); Remarks by John C. Dugan, Comptroller of the Currency at 7 (July 21, 2010), https://www.occ.treas.gov/news-issuances/speeches/2010/pub-speech-2010-84a.pdf ("[T]ruly predatory forms of subprime loans never took root among national banks in part because of the OCC's early and strong guidance addressing these types of loans. And even non-predatory forms of subprime lending . . . were never dominated by national banks . . . The numbers bear out this statement, . . . which is the strongest proof that the federal preemption that applies to national banks did not create a haven for subprime mortgages.").

[177] P.L. 111-203 §§ 1041, 1044, 124 Stat. 1376 (2010) (codified at 12 U.S.C. §§ 25b, 5551).

[178] 12 U.S.C. § 25b.

[179] 12 U.S.C. § 5551(a)(1); Jared Elosta, *Dynamic Federalism and Consumer Financial Protection: How the Dodd-Frank Act Changes the Preemption Debate*, 89 N.C. L. REV. 1273, 1298 n.160 (2011).

[180] 12 U.S.C. § 25b.

[181] *Id.* § 25b(a)(2).

> (C) the State consumer financial law is preempted by a provision of Federal law other than title 62 of the Revised Statutes.[182]

Section 1044 defines the term "case-by-case basis" to mean "a determination . . . made by the Comptroller [of the Currency] concerning the impact of a particular State consumer financial law on any national bank . . . or the law of any other State with substantively equivalent terms."[183] Section 1044 further provides that "[w]hen making a determination on a case-by-case basis that a State consumer financial law of another State has substantively equivalent terms as one that the Comptroller is preempting, the Comptroller shall first consult with the [Consumer Financial Protection Bureau] and shall take the views of the Bureau into account when making the determination."[184]

Section 1044's Legislative History

Dodd-Frank's adoption of a general preemption standard can be traced to a legislative proposal for financial reform submitted to Congress by the Obama Administration in June 2009.[185] The Obama Administration's proposed reforms would have eliminated NBA preemption of state consumer protection laws altogether—a proposal that was not accepted by either the House of Representatives or the Senate.[186] Rather, in December 2009, Representative Barney Frank introduced a modified version of the Obama Administration's proposal, which provided that a state consumer financial law was preempted if the OCC found that it "prevents or significantly interferes with the ability of . . . [a] national bank to engage in the business of banking."[187]

While the original proposed legislation did not reference *Barnett Bank*, a successful amendment introduced during floor consideration in the House of Representatives modified the bill to provide for NBA preemption of state consumer financial laws that "prevent[], significantly interfere[] with, or materially impair[] the ability" of a national bank to engage in the business of banking.[188] Representative Melissa Bean, the principal author of the amendment, explained that the addition of the words "materially impair[]" was intended to "more accurately reflect the Supreme Court Case of *Barnett Bank v. Nelson*, which established the preemption standard currently applied to national banks. . . ."[189] Representative Bean further explained that the amendment was driven by a concern "that limiting the underlying text to the shorthand expression of 'prevents or significantly interferes with' could be construed as narrowing the Constitutional standard," and by a desire to ensure "that there would be no question that the preemption standard is the same as the standard described in *Barnett*."[190] The proposed bill passed the House on December 11, 2009.[191]

After the Senate consented to strike the entirety of the House bill following the enactment clause, it substituted a new bill, which provided that preemption determinations with respect to state consumer financial laws are to be made "in accordance with the legal standard of the decision of

[182] *Id.* § 25b(b)(1).

[183] *Id.* § 25b(b)(3)(A).

[184] *Id.* § 25b(b)(3)(B).

[185] U.S. DEP'T. OF THE TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION 61 (2009).

[186] *Id.*

[187] H.R. 4173, 111th Cong. § 4404 (as introduced to the House of Representatives, Dec. 2, 2009).

[188] H.R. 4173, 111th Cong. § 4404 (as passed by the House of Representatives, 1st Sess. (2009)).

[189] 155 CONG. REC. E3029 (daily ed. Dec. 16, 2009).

[190] *Id.*

[191] 156 CONG. REC. H14,904 (daily ed. Dec. 11, 2009).

the Supreme Court of the United States in *Barnett Bank v. Nelson*."[192] A report issued by the Senate Banking Committee indicated that the preemption provision of the proposed bill was intended to "undo[] broader standards adopted by rules, orders, and interpretations issued by the OCC in 2004."[193] After additional amendments that did not significantly change the language of the preemption provision, the Senate passed the proposed bill in May 2010.[194]

A House-Senate conference committee reported back a modified version of the bill adding the "prevents or significantly interferes with" language to the bill's preemption provision.[195] The conference report on the modified bill indicated that the bill "revise[d] the standard the OCC will use to preempt state consumer protection laws" and codified the *Barnett Bank* preemption standard.[196]

During Senate consideration of the conference report, Senator Thomas Carper indicated that he read the modified preemption provision as "maintain[ing] the *Barnett Bank* standard for determining when a State law is preempted."[197] Senator Christopher Dodd responded that Senator Carper's interpretation of Section 1044 was "correct," and explained that "[t]here should be no doubt that the legislation codifies the preemption standard stated by the U.S. Supreme Court in [*Barnett Bank*]."[198] Senator Timothy Johnson echoed this view during the debate over the conference committee report, indicating that he read the bill's preemption provision as "codifying the preemption standard expressed by the U.S. Supreme Court in [the] *Barnett Bank* . . . case."[199] The reconciled bill passed the House in June 2010, and was passed by the Senate and signed by President Obama in July.[200]

The Aftermath of Dodd-Frank and the OCC's 2011 Preemption Rules

Commentators have debated the scope of Section 1044. Some commentators view Section 1044's use of the phrase "prevents or significantly interferes with" as adopting a preemption standard that is more restrictive than the OCC's previous "obstruct, impair, or condition" language.[201] Others contend that Section 1044 merely codified *Barnett Bank*, and was not intended to effect significant changes to existing law.[202]

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[192] S. 3217 111th Cong. § 1044 2d Sess. (as reported by the Senate Banking Committee on Apr. 15, 2010).

[193] Sen. Rep. No. 111-176, 175-76 (2010).

[194] 156 CONG. REC. S4043 (daily ed. May 20, 2010).

[195] H.R. Rep. No. 111-517 (2010) (Conf. Rep.).

[196] *Id*.

[197] 156 CONG. REC. S5902 (daily ed. July 15, 2010).

[198] *Id*.

[199] *Id*. at S5889.

[200] 156 CONG. REC. S5902 (daily ed. July 15, 2010).

[201] *See* Hills, *supra* note 4 at 1238 ("How could such unusually specific statutory admonitions *not* be an effort to trim back on the preemption status quo?"); Elosta, *supra* note 179 at 1299 ("Dodd-Frank requires significant interference, whereas the OCC's 2004 formulation merely required obstruction or impairment.").

[202] *See* Natter & Wechsler, *supra* note 176 at 348 ("[I]t appears clear that the Dodd-Frank Act did not modify the traditional legal standards for determining if state law is preempted, and that the legislation simply codifies the *Barnett Bank* case."). While Natter and Wechsler maintain that Dodd-Frank "basically leaves intact the traditional rules for determining if a state law is preempted," *id*. at 337, they do not appear to take a position on whether the OCC's 2004 rules exceed the scope of preemption authorized under the *Barnett Bank* standard.

In 2011, in a move that generated significant debate, the OCC issued a notice of proposed rulemaking that reaffirmed its pre-Dodd-Frank preemption decisions.[203] The OCC concluded that "because the Dodd-Frank Act preserves the *Barnett* conflict preemption standard," its 2004 preemption rules remained consistent with applicable law.[204] However, the OCC also recognized that in providing for preemption of state laws that "obstruct, impair, or condition" a national bank's powers, its 2004 preemption rules "created ambiguities and misunderstandings regarding the preemption standard that [they] were intended to convey."[205] Accordingly, the OCC proposed removing this language from its new preemption rules.[206]

Less than a week after the OCC issued its proposed rules, George W. Madison, the General Counsel of the Department of the Treasury, wrote a letter to the Comptroller of the Currency expressing concern about the rules.[207] In the letter, Madison expressed concern that the OCC's proposed rule was "inconsistent with the plain language of [Dodd-Frank] and its legislative history," and could be read to preempt broad categories of state law in the future, in violation of Section 1044's requirement that the OCC make "case-by-case" preemption determinations.[208] Madison argued that interpreting Section 1044 as making no significant changes to existing preemption standards conflicted with "basic canons of statutory construction" and the conference report's indication that the legislation was intended to "revise[]" the OCC's preemption standards.[209]

Senator Carl Levin also expressed disagreement with the proposed rules in a letter to the Comptroller, arguing that "[i]f [Congress] had wanted to leave the OCC's purported federal preemptive powers unchanged, Congress could have engaged in a very simple exercise—do nothing."[210] Senator Levin argued that with Section 1044, "Congress clearly intended for the *Barnett* case—as distinct from the OCC's longstanding misinterpretation of it—to provide a foundation for preemption decisions made under the Dodd-Frank Act (or prior to its enactment)."[211] Senator Levin further contended that Section 1044's instruction that courts act "in accordance with" (as opposed to "apply") the *Barnett Bank* preemption standard suggested the adoption of a "hybrid" test that was "not exactly the same as *Barnett*, but not significantly different from it."[212]

Other Senators disagreed with the broad interpretation of Section 1044 advocated by the Treasury Department and Senator Levin. Senators Carper and Mark Warner wrote a letter to then Secretary of the Treasury Timothy Geithner criticizing the reasoning in Madison's letter as "ignor[ing] the clear legislative history indicating that [Section 1044] is intended to codify the *Barnett* case."[213]

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[203] Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 30,557 (proposed May 26, 2011).

[204] *Id*. at 30,563.

[205] *Id*.

[206] *Id*.

[207] Letter from George W. Madison, General Counsel, Dep't of the Treasury, to John Walsh, Acting Comptroller of the Currency (June 27, 2011), http://cdn.americanbanker.com/media/pdfs/TreasuryOCC_062811.pdf.

[208] *Id*.

[209] *Id*.

[210] Letter from Senator Carl Levin to Timothy Geithner, Secretary of the Treasury and John Walsh, Acting Comptroller of the Currency (July 13, 2011).

[211] *Id*.

[212] *Id*.

[213] Letter from Senators Thomas Carper and Mark Warner to Timothy Geithner, Secretary of the Treasury (July 8, 2011), https://www.politico.com/pdf/PPM170_treasury_preemption_letter_final.pdf.

In responding to Madison's argument that the conference committee report indicated that the proposed bill "revise[d]" the OCC's preemption standards, Senators Carper and Warner argued that the OCC's proposed rule would remove the potentially troublesome "obstruct, impair, or condition" language and therefore effectuate the contemplated "revis[ion]."[214]

The OCC ultimately agreed with Senators Carper and Warner and rejected the arguments offered by Madison and Senator Levin. In July 2011, the OCC published a final regulation revising its preemption rules.[215] In the final rule, the OCC concluded that "the Dodd-Frank Act does not create a new, stand-alone 'prevents or significantly interferes' preemption standard, but, rather, incorporates the conflict preemption legal standard and the reasoning that supports it in the Supreme Court's *Barnett* decision."[216] The rule also deleted the phrase "obstruct, impair, or condition" from the relevant preemption standard, and noted that preemption determinations based "exclusively" on that language "would need to be reexamined to ascertain whether the determination is consistent with the *Barnett* conflict preemption analysis."[217] However, the rule indicated that the OCC had not identified any preemption determinations that in fact relied "exclusively" on the relevant language.[218] The final rule also noted that all future preemption determinations would be subject to Section 1044's requirement concerning "case-by-case" determinations.[219]

The courts that have considered the issue have agreed with the OCC's view that Section 1044 codifies the *Barnett Bank* standard for preemption. In *Baptista v. JP Morgan Chase Bank, N.A.*, the Eleventh Circuit interpreted Section 1044 as codifying the *Barnett Bank* test rather than as adopting a new preemption standard, concluding that it was "clear" that "under the Dodd-Frank Act, the proper preemption test asks whether there is a significant conflict between the state and federal statutes—that is, the test for conflict preemption."[220] Several district courts have also endorsed this reading of Section 1044 and expressed the view that Section 1044 did not significantly change pre-Dodd-Frank preemption law.[221]

Other Dodd-Frank Preemption Provisions

Section 1044 contains a number of other provisions concerning OCC preemption determinations. First, Section 1044 provides that courts reviewing OCC preemption determinations should accord the OCC only *Skidmore* deference, under which courts assess an agency's interpretation of a statute "depending upon the thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency, the consistency with other valid determinations made by the

[214] *Id*.

[215] Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 43,549, 43,555 (July 21, 2011).

[216] *Id*.

[217] *Id*. at 43,556.

[218] *Id*. at 43,556 n.43. It does not appear as though the OCC has identified any such preemption determinations since issuing the 2011 rules.

[219] *Id*. at 43,557.

[220] 640 F.3d 1194, 1197 (11th Cir. 2011).

[221] Meluzio v. Capital One Bank (USA), N.A., 469 B.R. 250, 256 (N.D.W.Va. 2012) (holding that Section 1044 did not change the standard for preemption under the NBA); Cline v. Bank of Am., N.A., 823 F. Supp. 2d 387, 396 (S.D.W.Va. 2011) (holding that the Section 1044 is "better understood as [a] clarification[] of the law as opposed to a substantive change[] thereof."); United States Bank Nat'l Ass'n v. Schipper, 812 F. Supp. 2d 963, 969 n.1 (S.D. Iowa 2011) (concluding that "the Dodd-Frank Act did not materially alter the standard for preemption.").

agency, and other factors which the court finds persuasive and relevant to its decision."[222] *Skidmore* deference is less permissive than *Chevron* deference, according to which courts defer to agency interpretations as long as they are reasonable.[223] According to one recent empirical study, agency interpretations are "significantly more likely to prevail under *Chevron* deference (77.4%) than *Skidmore* deference (56.0%). . . ."[224]

Second, Section 1044 provides that no OCC preemption determination "shall be interpreted or applied so as to invalidate, or otherwise declare inapplicable to a national bank, the provision of the State consumer financial law, unless substantial evidence, made on the record of the proceeding, supports the specific finding regarding the preemption of such provision in accordance with the legal standard" established by *Barnett Bank*.[225] This "substantial evidence" standard is often used in cases involving the Administrative Procedure Act, which provides that courts shall hold unlawful an agency's formal rules and other determinations made on the basis of a formal hearing when they are "unsupported by substantial evidence."[226] The Supreme Court has explained that "substantial evidence" entails "more than a mere scintilla" of evidence," and requires "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[227]

The "substantial evidence" test is contrasted with the "arbitrary and capricious" standard of review for agency actions, which generally applies to informal rulemakings.[228] The Supreme Court has explained that "[a]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it cannot be ascribed to a difference in view of the product of agency expertise."[229] Courts have generally held "that the distinction between the substantial evidence test and the arbitrary and capricious test is largely semantic."[230] Accordingly, two commentators have contended that "the use of 'substantial evidence,' rather

[222] 12 U.S.C. § 25b(b)(5)(A); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("The weight of [an agency's] judgment in a particular case will depend on 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 the power to persuade, if lacking power to control.").

[223] *See* 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" as long as agency regulations are "based on a permissible construction of the statute."). The extent to which OCC preemption determinations received *Chevron* deference before Dodd-Frank is somewhat unclear. In *Cuomo*, the Court acknowledged "the familiar *Chevron* framework" before evaluating the OCC's interpretation of the term "visitorial powers" in the NBA, but ultimately rejected the OCC's interpretation. Cuomo v. Clearing House Ass'n LLC, 557 U.S. 519, 525 (2009). And the Court did not explicitly address the issue of deference in *Watters*. *See* Perkins, et al., *supra* note 147 at 167. In some pre-Dodd Frank cases, lower courts applied *Chevron* deference in evaluating OCC preemption determinations. *See Turnbaugh*, 463 F.3d at 332; *James*, 321 F.3d at 494.

[224] Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 6 (2017).

[225] 12 U.S.C. § 25b(c).

[226] 5 U.S.C. § 706(2)(E).

[227] Richardson v. Perales, 402 U.S. 389, 401 (1971) (internal quotation marks and citation omitted).

[228] *See* 5 U.S.C. § 706(2)(A).

[229] Motor Vehicles Mfrs. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983).

[230] Ass'n of Data Processing Serv. Org. v. Bd. of Gov. of Fed. Res. Sys., 745 F.2d 677, 684 (D.C. Cir. 1984) (collecting cases); *see generally* CRS Report R44699, *An Introduction to Judicial Review of Federal Agency Action*, by (name red acted)

than 'arbitrary and capricious' is not likely to result in a meaningful difference in the scope or outcome of court reviews of OCC preemption determinations."[231]

Third, Section 1044 provides that the OCC shall (1) "periodically conduct a review, through public notice and comment, of each determination that a provision of Federal law preempts a State consumer financial law," (2) "conduct such review within the 5-year period after prescribing or otherwise issuing such determination, and at least once during each 5-year period thereafter," and (3) "[a]fter conducting the review of, and inspecting the comments made on, the determination, . . . publish a notice in the Federal Register announcing the decision to continue or rescind the determination or a proposal to amend the determination."[232]

Fourth, Section 1044 provides that the OCC must submit to Congress a report addressing its decision to continue, rescind, or propose an amendment to any preemption determination.[233]

Fifth, Section 1044 provides that "no provision of title 62 of the Revised Statutes or [12 U.S.C. section 371] . . . shall be construed as preempting, annulling, or affecting the applicability of State law to any subsidiary, affiliate, or agent of a national bank (other than a subsidiary, affiliate, or agent that is chartered as a national bank),"[234] thereby reversing the effect of the Supreme Court's decision in *Watters*.[235] Accordingly, states may now supervise and regulate the activities of national bank subsidiaries, affiliates, and agents that are not themselves chartered as national banks.

Finally, Section 1041 of Dodd-Frank is a "savings clause"[236] that one commentator has interpreted as exempting state consumer protection laws from preemption by federal consumer protection laws.[237] Section 1041 provides that:

> This title, other than sections 1044 through 1048, may not be construed as annulling, altering or affecting, or exempting any person . . . from complying with the statutes, regulations, orders, or interpretations in effect in any State, except to the extent that any such provision of law is inconsistent with the provisions of this title, and then only to the extent of the inconsistency.[238]

Section 1041 further provides (1) that "a statute, regulation, order, or interpretation in effect in any State is not inconsistent with the provisions of this title if the protection that such statute, regulation, order, or interpretation affords to consumers is greater than the protection provided under this title," and (2) that the Consumer Financial Protection Bureau may make determinations

[231] Natter & Wechsler, *supra* note 176 at 359.

[232] 12 U.S.C. § 25b(d)(1).

[233] *Id*. § 25b(d)(2).

[234] *Id*. § 25b(h)(2).

[235] *See* Gordon v. Kohl's Dep't Stores, Inc., 172 F. Supp. 3d 840, 864 (E.D. Pa. 2016) (noting that "by the plain language of the statute . . . the Dodd-Frank Act effectively overturned the subsidiary-preemption holding in *Watters*."); OCC Interp. Ltr. No. 1132, 2011 WL 2110224, at 1(May 12, 2011) (noting that Dodd-Frank "eliminates preemption of state law for national bank subsidiaries, agents, and affiliates.").

[236] Provisions in federal law that insulate certain types of state laws from preemption are commonly referred to as "savings clauses." *See generally* ALAN E. UNTEREINER, THE PREEMPTION DEFENSE IN TORT ACTIONS: LAW, STRATEGY AND PRACTICE 192-207 (2008).

[237] *See* Elosta, *supra* note 179 at 1298 n.160 ("The preemption provisions in Dodd-Frank . . . are somewhat unclear and courts will undoubtedly spend a lot of time studying them to determine Congress's intent. However, based on the language of the provisions and their separate locations in the text of Dodd-Frank, a plausible interpretation is that section 1041(a)(2) exempts state consumer protection laws from preemption by federal consumer protection laws while section[] 1044 . . . set[s] a different preemption standard based on the NBA. . . .").

[238] 12 U.S.C. § 5551(a)(1).

"regarding whether a state statute, regulation, order, or interpretation . . . is inconsistent with the provisions of this title" on its own motion or in response to "a nonfrivolous petition initiated by any interested person."[239] To date, no court has interpreted the scope of Section 1041's savings clause.[240]

Banking Law Preemption and the 115th Congress: Issues for Consideration

The Trump Administration and several Members of Congress have indicated that financial regulatory reform is among their top legislative priorities.[241] In this vein, in June 2017, the House of Representatives passed the Financial CHOICE Act of 2017, which makes a number of significant changes to Dodd-Frank.[242] While the Financial CHOICE Act is not principally focused on banking preemption, it contains one provision related to that issue.

Section 581 of the Act provides that "[a] loan that is valid when made as to its maximum rate of interest . . . shall remain valid with respect to such rate regardless of whether the loan is subsequently sold, assigned, or otherwise transferred to a third party, and may be enforced by such third party notwithstanding any State law to the contrary."[243] The provision appears to be intended to abrogate the Second Circuit's decision in *Madden v. Midland Funding LLC*.[244]

In *Madden*, a New York resident whose debt to a national bank had been sold to debt purchasers brought a putative class action against the debt purchasers alleging violations of New York usury law.[245] In response, the defendant debt purchasers contended that because the NBA permits national banks to "charge on any loan . . . interest at the rate allowed by the laws of the State . . . where the bank is located,"[246] the national bank that originated the plaintiff's debt was incorporated in Delaware, and the interest rate on the debt was permissible under Delaware law, the plaintiff's claims were preempted.[247] The Second Circuit rejected this argument, reasoning that because the defendant debt purchasers were not themselves national banks and were not acting "on behalf of" national banks, application of New York usury law to the debt purchasers did not "significantly interfere with" the ability of the relevant national bank to exercise its powers under the *Barnett Bank* test.[248] The court accordingly held that the NBA did not preempt

[239] *Id.* § 5551(a)(2).

[240] A Westlaw search on January 17, 2018 did not identify any cases interpreting the scope of this savings clause.

[241] *See* U.S. DEP'T OF THE TREASURY, *A Financial System That Creates Economic Opportunities: Banks and Credit Unions* (June 2017), https://www.treasury.gov/press-center/press-releases/Documents/A%20Financial%20System.pdf; U.S. HOUSE OF REPRESENTATIVES FIN. SERV. COMM., *'Dismantling Dodd-Frank' a Top Priority for Administration, Congress* (Jan. 26, 2017), https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=401421.

[242] H.R. 10 (115th Cong.). For an overview of the major changes in the Financial CHOICE Act, *see* REGULATING WALL STREET: CHOICE ACT VS. DODD-FRANK, NYU STERN & NYU LAW SCHOOL FACULTY (Matthew P. Richardson, Kermit L. Schoenholtz, Bruce Tuckman, and Lawrence J. White eds. 2017). For a discussion of the various policy issues raised by the Financial CHOICE Act, *see* CRS Report R44839, *The Financial CHOICE Act in the 115th Congress: Selected Policy Issues*, by (name redacted) et al.

[243] H.R. 10 (115th Cong.) § 581.

[244] 786 F.3d 246 (2d Cir. 2015). Separate bills to abrogate the *Madden* decision have been introduced in the House of Representatives and the Senate. *See* H.R. 3299 (115th Cong.), S. 1642 (115th Cong.).

[245] *Id.*

[246] 12 U.S.C. § 85.

[247] *Madden*, 786 F.3d at 250.

[248] *Id.* at 251.

the application of New York usury law to the debt purchasers.[249] The Supreme Court denied the *Madden* defendants' petition for a writ of certiorari in June 2016,[250] and the OCC has indicated that it does not intend to issue an interpretive opinion addressing the issue.[251]

It remains to be seen whether the Senate will consider the Financial CHOICE Act. More broadly, it is an open question as to whether banking preemption issues will figure as prominently in debates over financial regulatory reform as they did during the drafting and implementation of Dodd-Frank. Nonetheless, federal preemption and the relationship between state and federal banking law likely will remain important background considerations as Congress grapples with issues of prudential bank regulation, financial stability, and consumer protection.

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[249] *Id.* at 247.

[250] *See* Midland Funding, LLC v. Madden, No. 15-610, 136 S. Ct. 2505 (June 27, 2016).

[251] *See* Alan S. Kaplinsky, *OCC must stand up for preemption*, AMERICAN BANKER (Mar. 20, 2017), https://www.americanbanker.com/opinion/occ-must-stand-up-for-preemption.