Essay

Chartering Fintech: The OCC's Newest Nonbank Proposal

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Abstract

The Office of the Comptroller of the Currency is responsible for ensuring federally chartered banks' safety and soundness, compliance with federal banking laws, and compliance with federal laws regarding fair access to financial services and fair treatment of customers. The states have historically overseen and regulated nonbank companies, including nonbank financial services providers like money transmitters, mortgage lenders, consumer lenders, and debt collectors. Applicable regulations include state safety and soundness requirements and both state and federal consumer protection and anti–money laundering laws. In 2016, the OCC announced its intention to create a new national bank charter for nonbank companies, thus pulling chartered nonbank fintech companies into the national bank regulatory system. This will potentially preempt and replace the licensing, regulation, and supervision responsibilities of state authorities while allowing circumvention of other regulatory safeguards. Moreover, this power grab by the OCC is beyond its authority as delegated by Congress. In addition to questions of the legality of the charters and whether state or federal regulators are better situated to regulate such institutions, the proposed charters raise significant concerns regarding the separation of commerce and banking that has been a hallmark of the U.S. financial regulatory system since the founding of the country.

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Introduction

The Office of the Comptroller of the Currency ("OCC") is responsible for chartering national banks and for ensuring their safety and soundness, compliance with federal banking laws, fair access to

financial services, and fair treatment of customers.[1] The states have historically overseen and regulated nonbank companies, including nonbank financial services providers like money transmitters, mortgage lenders, consumer lenders, and debt collectors. State authorities have enforced a wide range of regulations against nonbank providers, including state safety and soundness requirements as well as state and federal consumer protection and anti–money laundering laws. The OCC has recently explored creating a new national bank charter for nondepository companies ("Nondepository Charter Decision"), which would pull chartered nondepository financial technology ("fintech") companies—and potentially other nondepository institutions—into the national banking regulatory system.

Approving national bank charters for nondepository fintech firms will potentially preempt and replace the licensing, regulation, and supervision responsibilities of state authorities. In addition to preemption concerns, the Nondepository Charter Decision runs afoul of the OCC's congressionally delegated authority by chartering *nondepository* institutions as national banks without express statutory power to do so. The question of whether the OCC has authority to charter nondepository fintech national banks may be resolved by the courts as a question of statutory interpretation. Because providing national bank charters to nondepository fintech companies would create serious public policy concerns, however, the scope of the OCC's chartering authority should be resolved by Congress. The proposed charter option for new nondepository banks resurrects the industrial loan company controversy from the mid-2000s[2] as well as the accompanying debates about the importance of maintaining our nation's historic separation of banking and commerce and avoiding any further extensions of the federal safety net for banks. Furthermore, the process the OCC used to reach the decision may well have violated the Administrative Procedure Act ("APA").[3] The OCC's Nondepository Charter

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1 12 U.S.C. § 1(a) (2012). The OCC is led by the Comptroller of the Currency. There have been three Comptrollers since the OCC began to consider the possibility of creating a charter option for nondepository "fintech" national banks: Thomas Curry, who served from April 9, 2012 to May 5, 2017; Keith Noreika, who served as Acting Comptroller from May 6, 2017 to November 26, 2017; and Joseph M. Otting, who was sworn in as the new Comptroller on November 27, 2017.

2 *See infra* Section II.D (describing the ILC debate).

3 5 U.S.C. § 554 (2012). This criticism of the Nondepository Charter Decision will not be analyzed in this Essay, but raises additional concerns about the validity of such charters without additional process undertaken by the OCC.

Decision was challenged on these grounds in two separate lawsuits, both of which were dismissed for lack of standing.[4]

The first half of this Essay analyzes the current regulatory system and its history to provide the relevant context for considering the OCC's Nondepository Charter Decision. Part I of this Essay provides an overview of regulation of banking and financial services in the United States under the dual banking system, which divides regulation between the states and multiple federal agencies. Part II discusses national bank powers and the history of OCC regulation. Sections II.A and II.B describe the ways in which Congress has defined and the courts have interpreted the powers of national banks, as well as the OCC's efforts to expand the powers of national banks through its regulations and interpretations. Section II.C traces the history of our nation's policy of separating banking and commerce and examines the wisdom and importance of this policy. Section II.D reviews the industrial loan company debate, which involved many of the same issues regarding the separation of banking and commerce that have been raised by the present controversy over the OCC's proposed charter option for nondepository fintech national banks. Part III describes the narrowly defined authority that Congress has granted to the OCC to charter Special Purpose National Banks ("SPNBs")—the category in which fintech banks would fall—and the question of whether the general requirement of federal deposit insurance for national banks applies to such entities.

The second half of this Essay reviews and critiques the process by which the OCC issued its Nondepository Charter Decision. Part IV provides an overview of the OCC's process for issuing the decision. Part V examines the OCC's authority for the decision, including the presence or absence of congressional authorization for nondepository national banks (in Section V.A), the authority of the OCC to charter such banks (in Section V.B), the question of whether the OCC's decision is entitled to *Chevron* deference (in Section V.C), and the potential impact of the OCC's decision on the separation of banking and commerce (in Section V.D).

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[4] Conference of State Bank Supervisors v. Office of the Comptroller of the Currency (*CSBS*), No. 17-0763 (DLF), 2018 WL 2023507, at *1 (D.D.C. Apr. 30, 2018); Vullo v. Office of the Comptroller of the Currency, No. 17 Civ. 3574 (NRB), 2017 WL 6512245, at *1 (S.D.N.Y. Dec. 12, 2017). On April 2, 2018, a court dismissed the New York suit for lack of standing; the *CSBS* suit met the same fate in the U.S. District Court for the District of Columbia on April 30, 2018. As noted, the cases and any subsequent appeals may answer the question of whether the OCC has the legal authority to offer such charters but will not definitively speak to the *wisdom* of such action, which should be addressed by Congress.

I. The Regulation of Banking in the United States

Since 1863, regulation of banks in the United States has operated under a "dual banking system," which allows commercial banks to choose between national or state charters. Although states charter the vast majority of private business enterprises,[5] banks are able to select between federal and state charters, an option that allows them to choose their primary regulator. The dual banking system is believed to foster regulatory competition and serve democratic and federalist ideals, constraining federal power and producing better regulatory schemes at both the state and national levels. As discussed in Section I.A below, there may be reasons to question both the competitive nature of the system and its responsiveness to consumer preferences, thus raising doubt about the value of the dual banking system and suspicion over the constraints on the power of the national bank regulator, the OCC. Section I.B provides a brief overview of the national charter's preemption benefits and regulatory scheme.

A. *The Dual Banking System*

The dual banking system is unique not only because it permits federal chartering of banks, but also because the federal charters supplement rather than supplant state charters. The dual system has "'such widespread political support among regulators and politicians' that its premises are rarely questioned."[6] The dual system reflects the American preference for limiting the scope of centralized federal power over financial institutions and financial services.[7] Additionally, the system's competitive design *should* "produce the optimum scheme of banking regulation over time."[8]

Professor Elizabeth Schiltz suggests that there are two arguments supporting the states' ability to compete with the power of the federal government in bank regulation: (1) states as "laboratories of reform" and (2) "subsidiarity," i.e., the federalist "preference for governance at the most local level."[9] The "laboratory" argument asserts that states

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5 Geoffrey P. Miller, *Banking Regulation: The Future of the Dual Banking System*, 53 Brook. L. Rev. 1, 12 (1987).

6 Elizabeth R. Schiltz, *Damming* Watters*: Channeling the Power of Federal Preemption of State Consumer Banking Laws*, 35 Fla. St. U. L. Rev. 893, 939 (2008) (quoting Henry N. Butler & Jonathan R. Macey, *The Myth of Competition in the Dual Banking System*, 73 Cornell L. Rev. 677, 678 (1988)).

7 *See id.* at 934.

8 *Id.* at 935.

9 *Id.* at 934–35 (quoting George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 Colum. L. Rev. 331, 339 (1994)); *see also*

will innovate in order to compete, thus leading to the emergence of alternatives in banking service and regulatory approaches.[10] States will, therefore, prevent the federal government from acting as a monopolistic regulator and will exert competitive pressure on federal regulators by providing innovations that the OCC will have strong incentives to adopt to remain competitive in attracting banks into the national banking system.[11]

The subsidiarity argument is concerned with democratic accountability rather than innovation and competition. The preference for local governmental control is based on the "mistrust of centralized power" as well as the democratic belief that local government is closer to, and thus will be more "responsive and accountable" to, its constituents.[12] Supporters of the dual banking system maintain that state bank regulators will respond to the preferences of their constituents, thus local regulations will reflect local concerns. If consumers broadly have similar concerns, those will be reflected in the majority of—or even all—state regulatory schemes, which may put pressure on the federal system to adopt similar approaches. This consideration for consumer preferences could easily be completely absent from a purely federal regulatory approach where consumers are too far removed from the Comptroller of the Currency ("Comptroller"), who is largely unaccountable to them.[13] Compounding such concerns around consumer preferences and potential for agency capture are the OCC's budgetary incentives to attract more banks to national charters and maintain them within the federal system.[14]

Historically, the argument in support of the dual banking system has focused on the benefits of the competitive approach, i.e., the laboratory argument.[15] Essentially, concentration of financial power is

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New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

10 Schiltz, *supra* note 6, at 934.

11 *See id.*

12 *Id.* at 934–35.

13 *See* Christopher L. Peterson, *Federalism and Predatory Lending: Unmasking the Deregulatory Agenda*, 78 Temp. L. Rev. 1, 72–73 (2005) ("The comptroller of the currency does not stand for election, lives in Washington, D.C., serves as a partisan appointment, and is closely tied to one of the most powerful industries in the country.").

14 *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, 232, 356 (2004).

15 Schiltz, *supra* note 6, at 935.

avoided by allowing states to compete with the federal government, and the resulting competition will also produce optimal outcomes in bank powers and regulatory schemes, which will ultimately be adopted in both systems. This formulation largely ignores the underlying subsidiarity benefits.[16]

As Schiltz points out, the benefits of local governance in terms of proximity and accountability to local communities are just as important as justifications for the dual banking system, even though the accountability argument has become prominent more recently in connection with the debate over federal preemption of state consumer protection laws.[17] The emergence of the accountability argument in the preemption context is understandable, Schiltz explains, because individual consumers needing protection are represented more effectively by local governments, not the Comptroller.[18] These consumers were simply too far removed from the bank powers debates that previously dominated the dual banking system conversation for their preferences to have been of great concern.[19] Of course, the laboratory-innovation argument works for consumer protection as well as for service innovations and expanding bank powers.[20]

The dual banking system is believed to constrain concentration of federal power in banking.[21] Some have questioned, however, whether there is actually competition and innovation, democratic accountability, and improvement attributable to the dual banking system in the regulatory schemes.

In theory, the dual system fuels regulatory competition, which, under competitive markets theory, should lead to more efficient regulation that serves the regulatory goals.[22] The regulators are the suppli-

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16 *See id.* at 936.

17 *See id.* at 936–37.

18 *Id.* at 937–38 (explaining the particular relevance of local democratic accountability to consumer protection regulation of bank activities).

19 *See id.* at 937 ("[T]he citizenry is more likely to be aware of, to care about, and to hold government responsible for the presence or absence of consumer protection regulations than regulations of bank powers, geographic restrictions, or safety and soundness regulations.").

20 *See id.* at 936 (citing *Congressional Review of OCC Preemption: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs.*, 108th Cong. 145–149 (2004) (statement of Diana L. Taylor, Superintendent of Banks for the State of New York)); *see also* Arthur E. Wilmarth, Jr., *The Dodd-Frank Act's Expansion of State Authority to Protect Consumers of Financial Services*, 36 J. CORP. L. 893, 913–14 (2011) (discussing state difficulties enforcing state consumer protection laws against national banks due to OCC's preemptive measures).

21 *See* Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 411–16 (1987) (Stevens, J., concurring).

22 *See* Kenneth E. Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 STAN. L. REV. 1, 8–13 (1977).

ers, the product is regulation, and the consumers are banks. Logically, banks will prefer minimal regulation that will cost less and broaden their autonomy and powers.[23] Banking regulation, however, is meant to protect the national economy from systemic risk and to protect bank customers. Because banks will not consider these factors in their selection of a regulator, normal market operation seems unlikely to lead to ideal regulation.[24] This problem of bank incentives leads to criticism that the dual system opens the door for a "race to the bottom" and a competition for laxity.[25]

Banks' desire for deregulation may help to explain why the most widely touted benefit of regulatory competition is *innovation* rather than efficiency. Nevertheless, in some cases, deregulation may be aligned with consumer preferences.[26] And, of course, regulators have many considerations beyond what banks demand, including "faithfully pursuing regulatory objectives, currying favor from political groups, avoiding negative media scrutiny, generating fundraising sources, and expanding regulatory power and prestige."[27] In situations where these nondemand considerations could cause overregulation, regulatory competition may act to correct the market.[28] Perhaps most important, the bank regulatory system has safeguards in place to prevent excessive deregulation, such as the capital requirements and other prudential regulations issued by the Federal Reserve System ("FRS") and the Federal Deposit Insurance Corporation ("FDIC").[29] The Consumer Financial Protection Bureau ("CFPB"), established in 2010, provides

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23 For example, the ability of national banks to "export" usury laws and other consumer protection laws from their "home state" (the state in which their main office is located) demonstrates bank selection in favor of deregulation. *See* Daniel Schwarcz, *Regulating Insurance Sales or Selling Insurance Regulation?: Against Regulatory Competition in Insurance*, 94 MINN. L. REV. 1707, 1727–28 (2010).

24 *See id.* at 1727 ("[B]anking law literature does not generally defend regulatory competition based primarily on claims that banks would demand efficient regulation. . . . There is little reason to expect that banks would fully consider [systemic] risk in selecting a regulator, as [externality] costs (by definition) fall on unrelated third parties.").

25 Hossein Nabilou, *Regulatory Arbitrage and Hedge Fund Regulation: The Need for a Transnational Response*, 22 FORDHAM J. CORP. & FIN. L. 557, 573–78 (2017) (discussing the costs and benefits of regulatory competition and noting "competition among regulators creates exploitable gaps and fractures that can undermine their objectives" and that some believe it "leads firms to migrate to poorly-regulated jurisdictions").

26 *Cf.* Timothy J. Muris, *Payment Card Regulation and the (Mis)Application of the Economics of Two-Sided Markets*, 2005 COLUM. BUS. L. REV. 515, 547 (2005) (finding that the deregulation of credit card interest rates enabled the elimination of annual fees in response to consumer preferences).

27 Schwarcz, *supra* note 23, at 1728–29.

28 *Id.* at 1730 n.99.

29 *Id.* at 1731–32.

an additional safeguard in the consumer protection realm that is not subject to regulatory competition.[30] If these are operating correctly, the "bottom" to which regulators race should still be "safe and sound," eliminating much of the concern.

Some scholars have questioned not what effect the competition will have, but whether the dual banking system is, in fact, competitive at all. Professors Henry Butler and Jonathan Macey have argued that the competition between regulators in the dual banking system is a mere "myth" because there are not significant differences between the state and national charters.[31] Professor Arthur Wilmarth has criticized Butler and Macey's claims, pointing both to state innovations that have been nationally adopted[32] and the role of the states in "permitting interstate acquisitions of banks by bank holding companies and in authorizing new powers for state banks" prior to any action in those areas by Congress.[33]

Butler and Macey observed that federal preemption of state regulations undermines competition, pointing to, for example, the Glass-Steagall Act[34] and limitations on interstate banking. Notably, Glass-Steagall was repealed in 1999 with the passage of the Gramm-Leach-Bliley Act,[35] and in 1994 the Riegle-Neal Interstate Banking and Branching Efficiency Act[36] "removed most of the remaining state barriers to bank holding company expansion and authorized interstate branching."[37]

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30 *Id.* at 1732 (discussing the CFPB as a hypothetical agency because it was created by Dodd-Frank shortly after the article was published). For an argument that the CFPB is much less likely to be captured than the OCC, see Arthur E. Wilmarth, Jr., *The Financial Services Industry's Misguided Quest to Undermine the Consumer Financial Protection Bureau*, 31 REV. BANKING & FIN. L. 881, 940–951 (2012).

31 Butler & Macey, *supra* note 6, at 678.

32 For example, "free banking laws, checking accounts, branch banking, real estate lending, trust services, reserve requirements, and deposit insurance" all came from the states and were later adopted by Congress for national banks. Arthur E. Wilmarth, Jr., *The Expansion of State Bank Powers, the Federal Response, and the Case for Preserving the Dual Banking System*, 58 FORDHAM L. REV. 1133, 1156 (1990).

33 *Id.* at 1251.

34 Glass-Steagall Act, Pub. L. No. 73-66, 48 Stat. 162 (1933).

35 Gramm-Leach-Bliley Act, Pub. L. No. 106-102, § 101, 113 Stat. 1338, 1341, 1368–69 (1999).

36 Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338.

37 Christine E. Blair & Rose M. Kushmeider, *Challenges to the Dual Banking System: The Funding of Bank Supervision*, 18 FDIC BANKING REV. 1, 3 n.5 (2006).

Schiltz observes that the state bank charters have largely become standardized,[38] and that while state banks are increasingly subjected to federal regulation, national banks are increasingly immunized from state regulation.[39] Over time, differences between national and state charters with regards to federal deposit insurance (and accompanying oversight), reserve and capital requirements, lending limits, and permissible investments have diminished or vanished.[40] The coupling of the homogenization of state charters between state and national bank powers[41] and increased federal regulation of state chartered banks dissipates the distinction between the charters, as does the competition between national and state regulators.[42] Notably, although the powers of banks under both charters have equalized, state and federal regulators retain the ability to adopt different supervisory policies.[43]

In the interceding years since this hearty debate there have been significant developments in banking regulation that may raise new concerns and alleviate others, as with the interstate banking issue discussed here.[44] Banking law stagnation was a predicted result of "a monopoly provider of banking powers [who] would have no incentive to liberalize the restrictions on entry into the banking industry, to develop innovative ways to solve contracting problems banks face, or to respond rationally to technological changes."[45] The debate over fintech charters certainly signals that regardless of the precise scope of potential competition between federal and state regulators, innovation is still occurring through regulatory competition. Moreover, in light of the devastating financial crisis of 2007–2009, the question of which firms should be granted access to banking charters has raised significant policy concerns in terms of preventing costly expansions of the federal safety net for banks and reducing potential systemic risks to our financial system and national economy. The financial crisis also triggered major concerns about protecting bank customers from predatory conduct by banks and other providers of financial services. The

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38 *See* Schiltz, *supra* note 6, at 932–33.

39 *Id.* at 894.

40 Blair & Kushmeider, *supra* note 37, at 3–4.

41 Almost all states have "wild card" laws granting their state-chartered banks "whatever powers their federal counterparts possess." Peterson, *supra* note 13, at 75.

42 Schiltz, *supra* note 6, at 932–33.

43 *See* Peterson, *supra* note 13, at 76.

44 The diligent reader will note that the Butler & Macey–Wilmarth scholarly debate occurred more than two decades ago. Additional examination may be appropriate but is outside the scope of this Essay. The arguments as they have been made are presented here to inform the considerations raised by the OCC's Nondepository Charter Decision.

45 Butler & Macey, *supra* note 6, at 713.

following Section addresses the ways in which the national bank system attempts to achieve these goals.

B. The National Bank System

The OCC approves National bank charters pursuant to provisions of the National Bank Act ("NBA").[46] The NBA preempts a number of state laws and regulations. Thus, for example, national banks are exempt from state rules addressing licensing, enforcement, and interest rates.[47] Under the *Barnett Bank* test, states can regulate national banks, but they cannot prevent or significantly interfere with the exercise of a federally granted power by national banks.[48] Under Dodd-Frank, which codified the *Barnett Bank* test, the NBA preempts a state consumer financial law only in three situations: where

> (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 of Marion County, N. A. v. Nelson, Florida Insurance Commissioner, et al., 517 U.S. 25 (1996), 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

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46 National Banking Act, ch. 106, §§ 12, 17, 18, 13 Stat. 99, 102, 104 (1864) (codified as amended at 12 U.S.C. §§ 26–27 (2012)); *see also* EDWARD V. MURPHY, CONG. RESEARCH SERV., R43087, WHO REGULATES WHOM AND HOW? AN OVERVIEW OF U.S. FINANCIAL REGULATORY POLICY FOR BANKING AND SECURITIES MARKETS 16 (2015), https://fas.org/sgp/crs/misc/R43087.pdf [https://perma.cc/MZ6X-EBEM] (noting that state-chartered banks are regulated by the applicable state regulator based on where their charter was issued and, at the federal level, by either the Federal Reserve Board or the Federal Deposit Insurance Corporation).

47 In 2007, the Supreme Court upheld the OCC's preemptive authority over licensing and supervisory enforcement. *See* Watters v. Wachovia Bank, N.A., 550 U.S. 1, 7, 21 (2007). Only two years later, the Court ruled that the OCC did not, however, have the *exclusive* right to enforce non-preempted state laws against national banks. *See* Cuomo v. Clearing House Ass'n, 557 U.S. 519, 529 (2009). The *Cuomo* court thus preserved the power of the state attorneys general to enforce valid state laws against national banks. *See id.* Congress expressly codified the *Cuomo* holding in 2010. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), Pub. L. No. 111-203 § 1044(a), 124 Stat. 1376, 2014–17 (2010) (codified at 12 U.S.C. § 25b(i)(1) (2012)).

48 *See* Barnett Bank of Marion Cty. v. Nelson, 517 U.S. 25, 31 (1996) (holding that a state law prohibiting national bank from selling insurance was preempted by federal permission for national banks to sell insurance in small towns).

> Comptroller of the Currency on a case-by-case basis, in accordance with applicable law; or
>
> (C) the State consumer financial law is preempted by a provision of Federal law other than title 62 of the Revised Statutes.[49]

If the OCC claims preemption of a state law under (B), it will prevail only if "substantial evidence, made on the record . . . supports the specific finding" that a state law significantly interferes with national banks' exercise of their powers.[50] Although the *Barnett Bank* "significant interference" test has been statutorily adopted, the requisite degree of interference remains unclear and will require additional guidance from the Court.[51]

The National Bank Act created the national banking system and established the OCC, a bureau of the Treasury Department, as the primary regulator of national banks.[52] The OCC charters national banks, supervises those banks, and "prescribe[s] rules and regulations to carry out [these] responsibilities."[53] National banks are required to be members of the FRS,[54] subjecting them, at least in theory, to supervision by the Federal Reserve Board ("Fed").[55] National banks that accept deposits other than trust funds must be FDIC insured,[56] which

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49 Dodd-Frank § 1044(a), 12 U.S.C. § 25b(b)(1) (2012).

50 *Id.* § 25b(c). In claiming preemption, the OCC must act on a case-by-case basis. *Id.* § 25b(b)(1)(B). In 12 C.F.R. §§ 7.4007–.4008 (2018), the OCC has established blanket preemption rules. These regulations appear to run afoul of the case-by-case requirement, raising doubt of their validity. *See* Wilmarth, *supra* note 20, at 938.

51 Wilmarth, *supra* note 20, at 928; *see also* Baptista v. JP Morgan Chase Bank, N.A., 640 F.3d 1194, 1197–98 (11th Cir. 2011) (holding state statute prohibiting banks from charging noncustomers for cashing checks was preempted because it significantly interfered with the bank's ability to charge fees); Lusnak v. Bank of Am., N.A., No. CV 14-1855-GHK (AJWx), 2014 U.S. Dist. LEXIS 154225, at *9–16, *21 (C.D. Cal. Oct. 29, 2014) (discussing Dodd-Frank's impact on the NBA preemption analysis and applying 12 U.S.C. § 25(b)(1)(B) to find that a California escrow law significantly interfered with national banks' lending activities and thus was preempted by the NBA).

52 *See* 12 U.S.C. § 1 (2012); Davis v. Elmira Sav. Bank, 161 U.S. 275, 284–85 (1896) (discussing the context and purpose of the NBA).

53 12 U.S.C. §§ 1(a), 93a (2012). OCC supervision includes conducting examinations and taking enforcement actions (including the issuance of civil money penalties and cease-and-desist orders) against banks that are not in compliance with applicable laws and regulations. J. Parker Murphy, *More Sense Than Money: National Charter Option for FinTech Firms Is the Right Choice*, 18 N.C. J.L. & TECH. 359, 367 (2017) (citing 12 U.S.C. § 1818 (2012) (Cease and Desist Orders); § 1818(i)(2) (Civil Money Penalty Orders); § 1831o (2012) (Prompt Corrective Action Directives)).

54 12 U.S.C. § 222 (2012).

55 Section V.D, *infra*, discusses the Fed's supervision of national banks.

56 *See* 12 U.S.C. § 1815(a) (2012); text of this provision is provided *infra* in the text accompanying note 146.

entails a separate application to, and approval by, the FDIC. The dispersion of financial institution regulatory and supervisory power, even at the federal level, compounds the risk of regulatory arbitrage by creating an environment in which entities can manipulate the system to navigate between regulators. Thus, for example, large banks typically choose between being a national bank (with the OCC as its primary regulator) and a state-chartered bank that is a member of the FRS (with the Fed as its primary federal regulator). The desire to attract a greater number of institutions to national bank charters has led the OCC to expand the breadth of national bank powers and the scope of preemption of state law as discussed in the following Part.

II. The OCC's History of Expanding National Bank Powers

Under the "bank powers clause," in section 24 (Seventh) of the NBA, the OCC has the authority to charter national banking associations by granting them "all such incidental powers as shall be necessary to carry on the business of banking" and then listing five express powers.[57] The express powers of national banks under section 24 (Seventh) include "(1) discounting and negotiating notes; (2) receiving deposits; (3) trading currency; (4) making loans on personal security; and (5) circulating notes."[58] The terms "incidental powers" and the "business of banking" are not expressly defined in the NBA, but include activities authorized at the discretion of the Comptroller, within reasonable bounds.[59] The following Sections address the approaches to interpreting these terms generally and by the OCC, the policy of the separation of banking and commerce, and a prior debate on implications of special purpose banks and that policy.

A. Various Approaches to the Bank Powers Clause

The National Bank Act defines the powers of national banks in accordance with three basic concepts: (1) the "business of banking," (2) the "general business" of national banks, and (3) the "incidental" powers of national banks.[60] The Act's text and structure strongly indi-

57 12 U.S.C. § 24 (Seventh) (2012).

58 1 Keith R. Fisher, Banking Law Manual § 5.02[2] (2d ed. 2017).

59 *See* Nationsbank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 258–59 n.2 (1995) ("[T]he Comptroller . . . has discretion to authorize activities beyond those specifically enumerated," but the Comptroller's exercise of that authority must be kept within "reasonable bounds."); Indep. Bankers Ass'n of Am. v. Conover, No. 84-1403-CIV-J-12, 1985 U.S. Dist. LEXIS 22529, at *22–23 (M.D. Fla. Feb. 15, 1985).

60 For the NBA's references to the "business of banking," see 12 U.S.C. §§ 21, 24 (Sev-

cate that the "business of banking" includes the "general business" *plus* the "incidental" powers of national banks.[61] In addition, the "general business" of banking refers to *all three* "core activities" found in the definition of "branch" in section 36(j).[62] Under this approach, the term "branch" is best understood as a place at which *any* of these three core activities is conducted. This is sensible because a national bank need not offer *all* its primary services at every location. In contrast, Congress evidently understood and intended that the "general business" conducted by a national bank at its main office under section 81 would include *all three* core activities. That understanding is consistent with section 22 (Second), which provides that a national bank's organizational certificate must specify the bank's main office where its "operations of discount and deposit are to be carried on."[63]

When comparing the three core activities in section 36(j) with the five express powers listed in section 24 (Seventh), one quickly determines that the only two additional powers listed in section 24 (Seventh) are engaging in foreign exchange and issuing national bank notes.[64] It is understandable that the former power (foreign exchange) would not necessarily be conducted at every branch. In addition, the latter power (issuing national bank notes) was superseded by the Federal Reserve Act ("FRA"),[65] which authorized the creation of Federal

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enth), 26–27 (2012). For the NBA's description of the "general business" of a national bank, see *id.* § 81. For the NBA's grant of "incidental" powers to national banks, see *id.* § 24 (Seventh).

61 This framework was proposed by Professor Wilmarth while assisting with this Essay. It is consistent with the Secretary of the Treasury and Assistant Attorney General's opinion in *Lowry National Bank of Atlanta, Ga.*, which drew a clear distinction between "business incident to the banking business" and the "general banking business" and classified deposit-taking as part of the "general banking business." *See* Lowry Nat'l Bank of Atlanta, Ga.—Establishment of Branch Office, 29 Op. Att'y Gen. 81, 86, 90 (1911). The opinion also suggests a collective nature to the general business banking: this concept is not defined by single acts such as "dealing in bills of exchange, or possibly to some other particular class of business incident to the banking business" but by the carrying out of the *general* powers. *Id.* at 86.

62 12 U.S.C. § 36(j) ("The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which deposits are received, or checks paid, or money lent."); *see* Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 404 (1987) (stating that the "general business" of a national bank under section 81 "can plausibly be read to cover only those activities that are part of the bank's core banking functions"); *id.* at 409 (concluding that the "core banking functions" of a national bank include "those [three activities] explicitly enumerated" in the definition of "branch" in section 36(f), which later became section 36(j)).

63 12 U.S.C. § 22 (Second).

64 The reference in section 24 (Seventh) to "discounting and negotiating notes" is functionally equivalent to the reference in section 36(j) to "paying checks" because checks are negotiable instruments.

65 Federal Reserve Act of 1913, ch. 6, 38 Stat. 251 (codified as amended at 12 U.S.C. §§ 221–522 (2012)).

Reserve notes in 1913, a new form of national currency that replaced national bank notes.[66] Thus, the three core activities in section 36(j) are the same as the three most important express powers granted in 24 (Seventh), a congruence that supports the view that those three activities should collectively be viewed as the "general business" of banks that, in part, establishes the "business of banking" under the National Bank Act. The business of banking also includes the implied powers that come from "incidental" activities permitted under section 24 (Seventh). The remainder of this Section looks at how "incidental" powers have been interpreted by the courts, before turning to the OCC's approach to bank powers.

Some early interpretations of the incidental powers clause by the Supreme Court took a more restrictive approach, epitomized in Justice Brandeis's admonition that "[a] practice is not within the incidental powers of a corporation merely because it is convenient in the performance of an express power."[67] Over time, however, the restrictive approach gave way to a much more permissive interpretation.[68] In 1972, the First Circuit in *Arnold Tours, Inc. v. Camp*[69] found that the use of "necessary" in 24 (Seventh) did not mean "indispensable."[70] Instead, the court adopted a position that was diametrically opposed to Justice Brandeis's, holding that incidental powers include those that are "convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act."[71]

In 1995 the Supreme Court adopted an expansive view of the "incidental powers" clause when it approved the Comptroller's determination that acting as an agent for the sale of annuities was part of the "business of banking" in *Nationsbank of North Carolina, N.A. v. Vari-*

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66 § 16, 38 Stat. at 265.

67 Tex. & Pac. Ry. Co. v. Pottorff, 291 U.S. 245, 255 n.7 (1934).

68 For a detailed review of judicial decisions construing the bank powers clause from 1867 through 1972, see Edward L. Symons, Jr., *The "Business of Banking" in Historical Perspective*, 51 GEO. WASH. L. REV. 676, 701–14 (1983).

69 472 F.2d 427 (1st Cir. 1972).

70 *Id.* at 430.

71 *Id.* at 432 (finding operation of a full-scale travel agency by a national bank was not an exercise of incidental powers and therefore not permissible under the NBA). This definition of "necessary" comports with the Supreme Court's interpretation of "necessary" as used in the Necessary and Proper Clause of the Constitution. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413 (1819) (finding that the Second Bank of the United States was "convenient" and "useful" for the performance of authorized financial functions of the federal government and was therefore a constitutional exercise of congressional authority under the Necessary and Proper Clause).

able Annuity Life Insurance Co. (*VALIC*).[72] In *VALIC*, the Court determined the Comptroller's determinations were reasonable and were therefore entitled to deference under the second part of the *Chevron* doctrine.[73] The Court noted that the Comptroller's "discretion to authorize activities beyond those specifically enumerated" in the National Bank Act "must be kept within reasonable bounds."[74] But the Court did not specify any particular standard or test for defining those "reasonable bounds."[75]

B. The OCC's Aggressive Expansion of Bank Powers

The OCC has a history of interpreting the business of banking and incidental powers broadly to expand the scope of banks' powers, thus expanding the scope of its own authority and enticing additional firms to seek national charters.[76] The cases discussed above involved challenges to the OCC's grant of new powers to banks. Comptrollers have determined, for example, that the business of banking includes data processing,[77] correspondent banking services,[78] finder services,[79] and building a webpage and webhosting.[80] Thus, the OCC is firmly committed to a very broad view of national bank powers,[81] even though that view arguably exceeds the Supreme Court's reference to "reasonable bounds" on the Comptroller's authority in *VALIC*.

The year after *VALIC*, the OCC's then–Chief Counsel, Julie Williams, articulated three alternative tests for what constitutes a permissible incidental power:

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72 513 U.S. 251, 251 (1995).

73 *Id.* A clear definition of the second step of *Chevron* is a matter of some debate, but if Congress did not speak directly to the matter in dispute (step one), it essentially asks whether the agency's interpretation was reasonable. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) ("[T]he question for the court is whether the agency's answer is based on a permissible construction of the statute."). For a recent analysis of *Chevron*, see Nicholas R. Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 Geo. Wash. L. Rev. 1392 (2017).

74 *VALIC*, 513 U.S. at 258–59 n.2.

75 *Id.* at 258 n.2.

76 *See* Kathryn Reed Edge, *Bank on It: Fintech: Fad or Future*, 53 Tenn. B.J. 34, 35 (2017) ("Historically, when presented with changes in the market place, the OCC has worked to find a way to fill any void by giving national banks expanded authority . . . .").

77 12 C.F.R. § 7.5006 (2012).

78 *Id.* § 7.5007.

79 *Id.* § 7.1002.

80 *See* Office of the Comptroller of the Currency, Interpretive Letter No. 875 (Oct. 31, 1999).

81 *See id.*

(i) Is the activity a contemporary functional equivalent or logical outgrowth of a recognized banking function?
(ii) Does the activity benefit customers and/or strengthen the bank?
(iii) Are the risks of the activity similar to the type of risks already assumed by banks?[82]

This departure reflects the OCC's push for expansion of the bank powers clause, which seemingly gained momentum after *VALIC* and is discussed in the following Section. In an ardent criticism of the OCC's expansion of bank powers, Professor Saule Omarova asserts that the OCC has "rendered [the] concept [of the business of banking] meaningless as a potentially limiting device and transformed it into a potent source of the agency's power to reshape, unilaterally and in a nontransparent manner, substantive legal and regulatory boundaries."[83] The effect, Omarova asserts, has been to "undermine the integrity and efficiency of the existing system of U.S. bank regulation" because it expanded bank powers so that large commercial banks dealing in derivatives were able to emerge—or perhaps more aptly, spawn—under the old statute.[84] This gave the impression that these institutions' operations remained in the "stable and conservative combination of deposit-taking and lending," thereby forestalling debate on the expansions.[85]

In aggressively interpreting the powers of national banks, the OCC seems to follow the adage that it is better to ask for forgiveness than permission. That is, the OCC will act first and, if necessary, "fight the courts for after-the-fact permission."[86] The OCC has recently reiterated its adoption of the broad interpretation of the business of banking as something that "develops over time as the economy and business methods evolve."[87] However, limitations on bank activities

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[82] Julie L. Williams & Mark P. Jacobsen, *The Business of Banking: Looking to the Future*, 50 BUS. LAW. 783, 784–85 (1995); *see also* Office of the Comptroller of the Currency, Interpretive Letter No. 875 (Oct. 31, 1999); Office of the Comptroller of the Currency, Interpretive Letter No. 754 (Nov. 6, 1996).

[83] Saule T. Omarova, *The Quiet Metamorphosis: How Derivatives Changed the "Business of Banking*,*"* 63 U. MIAMI L. REV. 1041, 1047 (2009). Professor Omarova identifies three principal tools of statutory interpretation used by the OCC to make expansive "findings" of bank powers in the context of derivatives: (1) the "look-through" method, (2) the "functional equivalency" method, and (3) the "elastic definition" method, which she calls "the most radically revisionist and expansive." *Id.* at 1046.

[84] *Id.* at 1047.

[85] *Id.*

[86] Edge, *supra* note 76, at 35.

[87] OFFICE OF THE COMPTROLLER OF THE CURRENCY, EXPLORING SPECIAL PURPOSE NATIONAL BANK CHARTERS FOR FINTECH COMPANIES 4 (Dec. 2016) [hereinafter SPNB WHITE

are a mechanism designed by Congress "to protect the safety and soundness of banks" as institutions and the system as a whole.[88] The expansion of bank powers by the OCC potentially puts the nation's financial system at risk by permitting national banks to engage in activities that may present risks that are not fully understood by the OCC and the banks, and may also threaten the longstanding congressional policy of separating banking and commerce.[89] As discussed in the following Section, that policy is designed to prevent excessive concentrations of financial and economic power, to safeguard the federal safety net from overextension or abuse, and to facilitate close supervision of financial institutions capable of jeopardizing the financial system and economy.

C. *The Policy of Separating Banking and Commerce*

In response to frequent efforts by banks to expand into commercial activities and commercial firms to control banks, "[l]egislators have imposed legal limitations on bank powers and affiliations whenever it became evident that either (i) the involvement of banks in commerce was threatening their safety and soundness, or (ii) commercial firms were acquiring control of large numbers of banks."[90]

The separation of banking from commerce "has long been the keystone of our banking system."[91] The limitation of national bank powers to enumerated traditional powers, such as deposit-taking and "all such incidental powers as shall be necessary to carry on the *business of banking*," reflects the separation of banking from other types of business.[92] The longstanding policy of separating banking and commerce is based on Congress's understanding of the special role that banks play in the national economy. Although the rigor of the separation has fluctuated, "failures of depository institutions involved with commercial activities triggered serious financial crises on several occasions," spurring legislation to reinforce the separation policy.[93]

PAPER], https://www.occ.gov/topics/responsible-innovation/comments/special-purpose-national-bank-charters-for-fintech.pdf [https://perma.cc/L4E6-C6BA].

88 Omarova, *supra* note 83, at 1048–49.

89 *See id.* at 1106–08.

90 Arthur E. Wilmarth, Jr., *Wal-Mart and the Separation of Banking and Commerce*, 39 CONN. L. REV. 1539, 1586 (2007).

91 S. REP. NO. 100-19, at 8 (1987), *as reprinted in* 1987 U.S.C.C.A.N. 489, 498.

92 *See* 12 U.S.C. § 24 (Seventh) (2012) (emphasis added); FISHER, *supra* note 58, at § 5.02[2][a] ("The powers clause in Section 24 (Seventh) promoted fragmentation by erecting a formidable wall between banking and commerce.").

93 Wilmarth, *supra* note 90, at 1554.

Following the market crash and bank failures that created and exacerbated the Great Depression, Congress passed the Banking Act of 1933, commonly known as the Glass-Steagall Act.[94] Congress criticized banks' speculative securities and real estate operations and their use of "affiliates to circumvent existing statutory restraints on investment" activities.[95] To curb these risky behaviors, Glass-Steagall prohibited banks from affiliating with securities firms and imposed restrictions on other types of bank affiliations.[96]

Just over two decades later, in 1956, Congress passed the Bank Holding Company Act ("BHCA")[97] to "prevent companies from controlling both banks and commercial firms."[98] To accomplish that purpose, the BHCA prohibited companies that controlled two or more banks from acquiring nonfinancial firms and required divestiture of any already-held nonfinancial subsidiaries within two years.[99] In 1970, Congress amended the BHCA so that it would reach one-bank holding companies, thereby closing the loophole created by the 1956 Act's application only to *multibank* holding companies.

The primary purpose of the 1970 amendments was "to continue [Congress's] long-standing policy of separating banking from commerce."[100] The multibank loophole had led the six largest banks and many large nonbank companies to acquire a *single* bank, thereby avoiding the BHCA's provisions and effecting the comingling of banking and commerce.[101] Congress concluded that its reiteration and strengthening of the separation policy was necessary in order "(1) to prevent undesirable concentrations of economic and financial power, and (2) to prevent banks affiliated with commercial firms from engaging in activities that would threaten the financial system or distort the economy."[102]

The 1970 amendments revised the definition of "bank" to include banks that not only accepted demand deposits—the lone prerequisite

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94 Glass-Steagall Act, Pub. L. No. 73-66, 48 Stat. 162 (1933); *see* Wilmarth, *supra* note 90, at 1564.

95 Wilmarth, *supra* note 90, at 1564.

96 *See* Glass-Steagall Act, §§ 5(c), 16; Wilmarth, *supra* note 90, at 1564 (describing in detail Glass-Steagall's provisions).

97 Pub. L. No. 84-511, 70 Stat. 133 (1956) (codified as amended at 12 U.S.C. §§ 1841–1850 (2012)).

98 Wilmarth, *supra* note 90, at 1566–67.

99 *Id.*

100 S. Rep. No. 91-1084 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 5519, 5522; *see also* Wilmarth, *supra* note 90, at 1568.

101 Wilmarth, *supra* note 90, at 1568.

102 *Id.* at 1568–69.

in the pre-1970 definition—but *also* made commercial loans.[103] This led to the creation of the "nonbank bank loophole," which was intended only to exempt one particular institution in existence at the time.[104] However when other commercial entities began taking advantage of the loophole, Congress acted once again to reinforce the separation of banking and commerce. The Competitive Equality Banking Act of 1987 ("CEBA")[105] closed the nonbank bank loophole by expanding the 1970 "bank" definition to cover all FDIC-insured banks, with few exceptions.[106] One of those exceptions allows commercial firms to own consumer banks that are chartered in several states (called industrial loan companies or "ILCs").[107] In 2005, several large commercial firms ignited a debate, discussed in the following Section, over the wisdom of these ILCs.[108]

D. *The ILC Debate: Risks of Commercial and Banking Affiliates*

One significant motivation for the separation of banking and commerce is the fear of extending the federal banking safety net to protect commercial enterprises.[109] When Walmart, Home Depot, and several other commercial firms attempted to obtain ILC charters in 2005, the resulting debate focused on the separation of banking and commerce as opponents of the new ILC charters raised concerns for potential abuse and overextension of the banking safety net if such charters were granted.[110] Three key arguments, summarized below, were made against allowing commercial firms to acquire ILCs: (1) the acquisitions would violate the longstanding principle of separation of

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103 *Id.* at 1569.

104 *Id.*

105 Pub. L. No. 100-86, § 101, 101 Stat. 552, 554 (codified at 12 U.S.C. § 1841(c) (2012)).

106 Wilmarth, *supra* note 90, at 1569-70.

107 *Id.* at 1572. Existing commercial owners of nonbank banks were grandfathered, but under such restrictive conditions that "the number of 'nonbank banks' declined from 169 in 1987 to . . . only 8 in 2005." *Id.* at 1570.

108 The following Section addresses some of this debate, but for an in-depth analysis, see Wilmarth, *supra* note 90.

109 *Hearing Before the Subcomm. on Telecomms. & Fin. of the H. Comm. on Energy & Commerce*, 102d Cong. (1991) [hereinafter *Hearing*] (statement of E. Gerald Corrigan, President, Federal Reserve Bank of New York), *as reprinted in* 77 Fed. Res. Bull. 411, 419–20 (1991). "The federal 'safety net' for financial institutions consists of (i) federal deposit insurance, (ii) protection for uninsured depositors and other uninsured creditors of" too-big-to-fail banks under the FDIA systemic risk exception, and "(iii) discount window advances provided by the FRB as 'lender of last resort.'" Wilmarth, *supra* note 90, at 1588 n.284.

110 *Compare* Wilmarth, *supra* note 90, at 1588 (arguing against the ownership of ILCs by commercial firms), *with* Mehrsa Baradaran, *Reconsidering the Separation of Banking and Commerce*, 80 GEO. WASH. L. REV. 385, 389 (2012) (arguing that commercial ownership of banks could strengthen safety and soundness of the banking system).

banking and commerce, (2) the acquisitions would subject the financial system and economy to great risk, and (3) there was no mechanism for effective federal supervision of the commercial owners despite their access to the federal safety net.[111]

First, commercial ownership of ILCs would violate the longstanding policy of keeping banking and commerce separate. Although Congress explicitly permitted ILCs in CEBA, these entities existed in a very different form in 1987 than in 2005, when commercial firms sought to acquire them and use them to provide retail banking services.[112] As with the multibank-bank-holding-company and nonbank bank loopholes, it appears Congress simply did not "appreciate the potential impact" of the ILC exception they created in CEBA.[113]

Second, commercially owned ILCs would threaten the financial system and economy because the commercial firms would obtain access to the federal safety net subsidies and the firms could cause the ILCs to make loans and investments to their parent companies.[114] Both of these effects would create "competitive inequities" against firms that did not own ILCs and would put the FDIC fund at risk by increasing the likelihood of a government bailout of the commercial owner in order to save the ILC.[115] The ILC's access to the federal "subsidy"[116] could be used to back or encourage risky commercial ventures by the commercial parent.[117] A failing parent company could also use the bank to make preferential loans to itself[118] or fraudulently use the bank's assets to prop itself up.[119]

Sections 23A and 23B of the FRA impose quantitative and qualitative limits on transactions between FDIC-insured banks (including

111 Wilmarth, *supra* note 90, at 1543 (citing FDIC, Moratorium on Certain Industrial Bank Applications and Notices: Limited Extension of Moratorium, 72 Fed. Reg. 5290, 5291–92 (Feb. 5, 2007)).

112 *See id.* at 1572–73.

113 *Id.* at 1573.

114 *See id.* at 1543–44.

115 *Id.* at 1588.

116 This refers to the "subsidy" provided by the federal safety net "'to commercial banks and other depository institutions by allowing them to obtain low-cost funds,' and by 'shift[ing] part of the risk of bank failure from bank owners and their affiliates to the federal bank insurance fund and, if necessary, to taxpayers.'" *Id.* at 1589 (alteration in original) (quoting U.S. Gov't Accountability Off., GAO-05-621, Industrial Loan Corporations: Recent Asset Growth And Commercial Interest Highlight Differences In Regulatory Authority 71–72 (2005)).

117 Baradaran, *supra* note 110, at 430.

118 Wilmarth, *supra* note 90, at 1594.

119 Baradaran, *supra* note 110, at 430.

ILCs) and their affiliates (including their parent companies)[120] in order to prevent exportation of federal subsidy "to protect federally insured depository institutions from excessive credit exposure to their affiliates, and to prevent transfer of federal subsidy to nondepository financial institutions."[121] However, these restrictions have not been vigorously enforced. This is due, in part, to the difficulty of detecting violations and, more alarmingly, to exemptions granted in times of crisis.[122] Section 23A was, for example, proven unable to withstand the pressures created by the financial crisis when the Fed granted exemptions that permitted large banks to provide massive amounts of financial assistance to securities and mutual fund affiliates during the crisis. The Fed's exemptions effectively rendered Section 23A "irrelevant" during the financial crisis, which occurred just a few years after the ILC debate.[123] The effective nullification of Section 23A opens the door for ILCs and their owners to conduct "abusive and unsound transactions" that carry increased risk of the ILCs failing and of the government, in turn, incurring hundreds of millions of dollars in losses.[124]

It is virtually inconceivable that a large commercial parent company like Amazon or Walmart would be allowed to fail; thus, it is easy to imagine that the federal government would allow a subsidiary ILC to provide financial assistance to its struggling commercial parent company, or that the federal government would provide help to the subsidiary bank as well as the commercial parent to prevent their joint failure.[125] At the time of the ILC debate, the government had already demonstrated a willingness to intervene "to maintain the stability of the financial markets after the failure of a major non-banking firm" through guarantees, payments, or other support.[126] These prior

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120 Glass-Steagall Act § 13, 12 U.S.C. § 371c (2012) ("Section 23A"); § 371c-1 ("Section 23B").

121 Saule T. Omarova, *From Gramm-Leach-Bliley to Dodd-Frank: The Unfulfilled Promise of Section 23A of the Federal Reserve Act*, 89 N.C. L. Rev. 1683, 1683 (2011).

122 *See* Wilmarth, *supra* note 90, at 1596–98.

123 Omarova, *supra* note 121, at 1690. Omarova's article provides an in-depth examination of the history and implementation of 23A's affiliate restrictions, and the FRS's employment of exemptions during the financial crisis to allow the precise extension of the safety net these rules should have helped prevent.

124 Wilmarth, *supra* note 90, at 1597.

125 *See* Baradaran, *supra* note 110, at 433. Even Senator Jake Garn, a co-sponsor of the ILC loophole, later testified before Congress that the exception was never meant to permit a company like Walmart to use the loophole to provide retail bank operations. Wilmarth, *supra* note 90, at 1572.

126 Wilmarth, *supra* note 90, at 1593.

bailouts communicated to commercial parent companies that the safety net would be there to catch them if they fell.[127] This concern, too, was validated when the federal government rescued both GM and its ILC, GMAC, with a multibillion-dollar bailout during the financial crisis.[128]

Finally, the FDIC lacks authority to supervise commercial firms that own ILCs. The FDIC may review transactions between a commercial owner and its subsidiary ILC but has no authority to regulate the other activities of the commercial firm. The above-described systemic risks may justify granting supervisory powers over commercial owners of ILCs, but a financial regulator may struggle to exercise those powers without the requisite knowledge of general commercial firms.[129] Moreover, granting supervisory authority over commercial owners would inappropriately inject the federal government into the general economy and further give the impression that the commercial firms were backed by the FDIC.[130]

These arguments demonstrate that the safety and soundness goals embedded in the policy of separating banking and commerce are threatened by the comingling of commercial firms and FDIC-insured banks. Additionally, competition in the commercial markets is undermined in a variety of ways by access to the federal subsidy and the—probably accurate—perception that the government would stand behind commercial owners of insured banks.[131]

Ultimately, Walmart did not acquire an ILC.[132] The FDIC imposed consecutive moratoria on acquisitions of ILCs by commercial firms, and the Dodd-Frank Act imposed a three-year moratorium on the approval of new acquisitions of ILCs by commercial firms. However, the Dodd-Frank moratorium expired in July 2013, and Congress has not taken any further action to prevent such acquisitions.[133] As of 2011, there were thirty-four ILCs chartered by five states, representing $102.4 billion in assets.[134] In 2017, two fintech firms applied for

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127 *See id.*

128 Baradaran, *supra* note 110, at 431–32; *see also* Arthur E. Wilmarth, *Beware the Return of the ILC*, AM. BANKER: BANKTHINK (Aug. 2, 2017, 3:28 PM), https://www.americanbanker.com/opinion/beware-the-return-of-the-ilc [https://perma.cc/4LAF-QBYX].

129 *See* Wilmarth, *supra* note 90, at 1613.

130 *See Hearing*, *supra* note 109, at 417–19 (statement of E. Gerald Corrigan).

131 *See* Wilmarth, *supra* note 90, at 1570–71 (describing Senate report on CEBA).

132 Lalita Clozel, *Square's Bid to Be Industrial Bank Inflames ILC Debate*, AM. BANKER (Sept. 6, 2017, 6:01 PM), https://www.americanbanker.com/news/square-to-apply-for-industrial-bank-inflaming-ilc-debate [https://perma.cc/766Y-F5K2].

133 Dodd-Frank § 603(a)(4), 12 U.S.C. § 1815 (2012).

134 U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-160, BANK HOLDING COMPANY ACT:

ILC charters, reigniting the ILC debate.[135] As noted, many of the concerns raised by those who opposed an ILC charter for Walmart were confirmed by the federal government's bailout of GMAC and assistance to GE Capital during the financial crisis. The Walmart debate and events during the financial crisis provide important lessons that should be heeded about the dangers of mixing banking and commerce, even in the context of limited-purpose banks, as discussed in the following Part.

III. Special Purpose National Banks

As defined by the OCC, a special purpose national bank ("SPNB") is a type of national bank that "offer[s] only a small number of products, target[s] a limited customer base, incorporate[s] nontraditional elements, or ha[s] narrowly targeted business plans."[136] SPNBs are subject to the same activity limitations as national banks.[137] However, only some of the laws and regulations that apply to traditional banks will apply to the OCC's proposed fintech national banks because of one important qualification: a *nondepository* SPNB will not be FDIC insured.[138]

A. Congressional Authorization for Nondepository Banks

Congress has expressly authorized the OCC to charter only two types of nondepository national banks: trust banks and bankers' banks. In 1978, Congress amended section 27(a) of the NBA to au-

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Characteristics and Regulation of Exempt Institutions and the Implications of Removing the Exemptions 17–18 (2005).

135 Clozel, *supra* note 132. Fintech firms SoFi and Square both submitted ILC applications in 2017. However, SoFi withdrew its application in October. *See id.*; Lalita Clozel, *SoFi Withdraws Bank Application in Wake of Scandal*, Am. Banker (Oct. 13, 2017, 5:35 PM), https://www.americanbanker.com/news/sofi-withdraws-bank-application-in-wake-of-scandal [https://perma.cc/UH7P-UVP2]. Additional discussion of whether the FDIC should grant these kinds of applications is beyond the scope of this Essay, but the ILC charter debate clearly raises public policy issues that are very similar to those triggered by the OCC's proposed national bank charters for nondepository fintech firms.

136 Office of the Comptroller of the Currency, Comptroller's Licensing Manual: Charters 50 (2016), https://www.occ.gov/publications/publications-by-type/licensing-manuals/charters.pdf [https://perma.cc/Q6JF-M9QD].

137 *Id.*

138 Office of the Comptroller of the Currency, Evaluating Charter Applications from Financial Technology Companies 2 (2017) [hereinafter Manual Supplement], https://www.occ.treas.gov/publications/publications-by-type/licensing-manuals/file-pub-lm-fintech-licensing-manual-supplement.pdf [https://perma.cc/E56R-6HSZ] (defining SPNB in part as "a national bank that . . . does not take deposits within the meaning of the Federal Deposit Insurance Act . . . and therefore is not insured by the [FDIC]"). The application of the insurance requirement found in 12 U.S.C. § 222 to SPNBs is discussed in Section III.B below.

thorize the OCC to charter trust banks.[139] Congress adopted that amendment after a federal district court held that the OCC did not have the authority to charter a bank that would provide only the fiduciary services of a trust company but would not accept deposits. The district court held that the proposed special purpose trust national bank was unlawful because it would "not engage in *any* of the general banking powers enumerated in Section 24(Seventh) of the NBA."[140] At the OCC's request, Congress amended section 27(a) to grant the OCC specific authority to charter national banks whose activities were limited to trust services.[141] In 1982, Congress similarly amended section 27(b) of the NBA to grant the OCC specific authority to charter bankers' banks—nondepository banks that provide services to other banks.[142]

Notwithstanding the two narrowly defined grants of authority provided by Congress in section 27, the OCC promulgated a much broader regulation dealing with the chartering of SPNBs in 2003. Under 12 C.F.R. § 5.20(e)(1), the OCC asserts that it may charter any type of SPNB that limits its activities to specified "activities within the business of banking," provided that the SPNB conducts "at least one of the following three core banking functions: Receiving deposits; paying checks; or lending money."[143] Until it issued its Nondepository Charter Decision in 2017, the OCC never used this 2003 regulation to issue an SPNB charter to a bank that does not take deposits,[144] perhaps fearing that the courts might reject such a power grab.

B. The Federal Deposit Insurance Requirement

Under the Federal Reserve Act, all national banks must be FDIC insured.[145] Section 1815 of Title 12 provides that upon application and

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139 *See* Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, § 1504, 92 Stat. 3641, 3713 (amending 12 U.S.C. § 27(a)).

140 Plaintiff's Opposition to Defendants' Motion to Dismiss at 38, Conference of State Bank Supervisors v. Office of the Comptroller of the Currency, No. 17-cv-00763 (JEB) (D.D.C. Sept. 13, 2017) [hereinafter CSBS Opposition to Motion to Dismiss] (citing Nat'l State Bank v. Smith, No. 76-1479, 1977 U.S. Dist. LEXIS 18184 (D.N.J. Sept. 16, 1977)).

141 *See id.* at 38–39.

142 *See* Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 404(a), 96 Stat. 1469, 1511.

143 12 C.F.R. § 5.20(e)(1) (2018).

144 *See* Reply in Support of Defendants' Motion to Dismiss at 7, Conference of State Bank Supervisors v. Office of the Comptroller of the Currency, No. 17-cv-00763 (JEB) (D.D.C. Oct. 4, 2017) [hereinafter OCC Motion to Dismiss CSBS Suit].

145 *See* 12 U.S.C. § 222 (2012) ("Every national bank in any State shall . . . become a member bank of the Federal Reserve System . . . and shall thereupon be an insured bank under the

approval, "any depository institution which is engaged in the business of receiving deposits other than trust funds . . . may become an insured depository institution."[146] The implication of these laws is that national banks will be FDIC insured and will accept deposits. However, trust banks and bankers' banks are national banks that are not required to be FDIC insured.

As discussed above, Congress established the OCC's authority to charter trust banks in 1978 and bankers' banks in 1982. When adding bankers' banks, Congress also amended § 1818 to provide that the OCC's enforcement powers would apply to "any national banking association chartered by the Comptroller of the Currency, including an uninsured association."[147] The Senate Report supports that Congress intended to exempt bankers' and trust banks from the insurance requirement.[148] It stated, "the enforcement powers of the OCC extend to national banks operating under a limited charter, for example trust companies and bankers' banks. Because these associations may not receive retail deposits, they may be uninsured."[149] The Senate Report, along with specific congressional approval for these two narrowly defined categories of nondepository institutions, supports the conclusion that those two categories are the only lawful exceptions to the general requirement that all national banks must be FDIC-insured banks under 12 U.S.C. § 222.[150]

Federal Deposit Insurance Act [12 U.S.C. § 1811 et seq.], and failure to do so shall subject such bank to the penalty provided by section 501a of this title." (third alteration in original)).

146 12 U.S.C. § 1815(a).

147 Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 404(c), 96 Stat. 1469, 1512 (1982) (amending 12 U.S.C. § 1818(b)(5)).

148 *See* S. Rep. No. 97-536, at 61 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 3054, 3115.

149 *Id.*

150 The 1982 Senate report is consistent with the "cardinal rule" of statutory construction that "repeals [of statutes] by implication are not favored," and "[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." Morton v. Mancari, 417 U.S. 535, 549–50 (1974) (quoting Posadas v. Nat'l City Bank, 296 U.S. 497, 503 (1936)). There is no conflict in federal policy that makes section 222 and section 27 irreconcilable, and therefore section 27 should be interpreted as creating two narrowly defined exceptions to section 222's general rule that all national banks must be FDIC-insured institutions. As the Supreme Court has explained, "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Id.* at 551. Because Section 222 and Section 27 both apply to "the same subject"—national banks—"the rule is to give effect to both if possible . . . . The intention of the legislature to repeal 'must be clear and manifest.'" *Id.* (alteration in original) (quoting United States v. Borden Co., 308 U.S. 188, 198 (1939)). Congress did not express any intention to repeal section 222's general requirement of federal deposit insurance for national banks when it amended Section 27 in 1978 and 1982. The

The narrowly defined exemptions for trust banks and bankers' banks from section 222's federal deposit insurance requirement, which Congress confirmed in 1982, clearly indicate that any further exemptions must be granted by Congress, and not by the OCC or other federal regulatory agencies. Section 222 therefore creates grave doubts about whether a nondepository institution that is not explicitly authorized by Congress may be granted a national bank charter, as discussed below. Moreover, there are further questions about whether such institutions should be permitted as a matter of public policy to avoid the laws and rules governing FDIC-insured institutions.[151]

In addition to the dubious validity of the regulation on which the OCC relies for its authority to issue new nondepository SPNB charters, the OCC's aggressive assertions of sweeping authority in the past demonstrate a pattern of agency capture and conflicts of interest, which create further concern for the legitimacy and advisability of this chartering power.[152] Nevertheless, the OCC has charged ahead and indicated its intention[153] to charter fintech and other nondepository SPNBs.

Senate committee report for the 1982 legislation indicates the lack of any such intention. S. Rep. No. 97-536 (2012), *as reprinted in* 1982 U.S.C.C.A.N. 3054.

151 The following are some rules that apply only to FDIC-insured institutions: 12 U.S.C. §§ 371c, 371c-1 (2012) (affiliate transaction restrictions); *id.* § 1831o (prompt corrective action); *id.* § 1831p-1 (Federal Deposit Insurance Act's ("FDIA") safety and soundness standards); *id.* § 1829b (FDIA's retention of records); *id.* § 2901(b) (Community Reinvestment Act); *id.* §§ 3201–3208 (management interlock restrictions).

152 *See* Wilmarth, *supra* note 14, at 232 ("Given the OCC's financial self-interest and its empire-building agenda, the OCC faces a clear conflict of interests (and the risk of regulatory capture) whenever the agency considers the desirability of (i) preempting state consumer protection laws or (ii) taking vigorous enforcement measures against one of its most important constituents.").

153 Former Acting Comptroller Noreika repeatedly claimed that the OCC had not made a *final* decision on whether or not to grant nondepository fintech (SPNB) charters. Mr. Noreika's repeated disclaimers were evidently designed to support the OCC's claims of lack of standing and ripeness in the lawsuits challenging the OCC's authority to issue fintech charters, a tactic that was effective. *Compare* Thomas J. Curry, Comptroller, Office of the Comptroller of the Currency, Remarks at Georgetown University Law Center: Special Purpose National Bank Charters for Fintech Companies (Dec. 2, 2016) ("We have decided to move forward and to make available special purpose national charters to fintech companies for a few basic reasons."), *with* Keith A. Noreika, Acting Comptroller, Office of the Comptroller of the Currency, Remarks Before Georgetown University's Fintech Week (Oct. 19, 2017) ("Although we will defend our authority vigorously, we have not decided whether we will exercise that specific authority."). Mr. Noreika's comments are particularly questionable in light of his comments disparaging the separation of banking and commerce. *See, e.g.*, *infra* note 248 and accompanying text.

IV. The OCC's Proposed Fintech Charter

Fintech companies include marketplace lenders, payment-related service providers, enterprises providing digital currency and distributed ledgers, and firms offering financial planning and wealth management products and services.[154] The OCC has not formally defined "fintech," perhaps in part because its Nondepository Charter Decision has a stated scope that extends beyond these "technology-driven financial services providers."[155]

Despite the ultimate decision's breadth, the Nondepository Charter Decision was sparked by the OCC's interest in encouraging fintech and "responsible innovation."[156] The OCC noted that in 2014, the hundred largest money transmitters transferred more than $800 billion for their customers.[157] This "explosive growth . . . has drawn the interest and attention of the OCC."[158] Some fintechs that are not affiliated with commercial firms can pursue a traditional national bank charter, and some are doing so.[159] Firms that intend to accept deposits could seek a regular bank charter, would be insured by the FDIC, and thus would come under all federal laws and regulations that apply to other FDIC-insured national banks. The primary concern created by the OCC's recent proposal is that the agency has expressed its intention to charter banks operated by other fintech and commercial firms as *nondepository* national banks.

In August 2015, the OCC announced a new initiative to study financial services innovations and to design "a framework supporting responsible innovation."[160] In March 2016, the OCC published a white paper describing its initiative to evaluate the opportunities and risks presented by rapid advances in financial technology.[161] Six months

154 SPNB White Paper, *supra* note 87, at 2.

155 Complaint para. 2, Conference of State Bank Supervisors v. Office of the Comptroller of the Currency, No. 1:17-cv-00763 (JEB) (D.D.C. Apr. 26, 2017) [hereinafter CSBS Complaint].

156 SPNB White Paper, *supra* note 87, at 3.

157 CSBS Complaint, *supra* note 155, para. 4.

158 *Id.*

159 *See, e.g.*, Lalita Clozel, *Mobile-Only Fintech Makes Play for (Regular) Bank Charter*, Am. Banker (July 25, 2017, 8:00 PM), https://www.americanbanker.com/news/mobile-only-fintech-makes-play-for-regular-bank-charter [https://perma.cc/7B37-QVDZ] (reporting that Varo Money, a mobile-only financial institution, filed applications with the OCC and FDIC for a traditional national bank charter).

160 SPNB White Paper, *supra* note 87, at 3.

161 Office of the Comptroller of the Currency, Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective (Mar. 2016), https://www.occ.gov/publications/publications-by-type/other-publications-reports/pub-responsible-innovation-banking-system-occ-perspective.pdf [https://perma.cc/99DQ-YU5F].

later, in September, the agency issued a proposed rulemaking in which it publicly stated for the first time that it was considering the creation of a nondepository SPNB charter for fintech firms.[162] This proposed rulemaking provoked significant statements of concern and opposition by state regulators, consumer advocates, community banks, and other members of the public.[163] That same month, the OCC also published revisions to the Comptroller's Licensing Manual,[164] further paving the way for the issuance of nondepository charters.

On December 2, 2016, the OCC announced its decision to create a new SPNB charter for fintech and other nondepository national banks.[165] According to the OCC's white paper, *Exploring Special Purpose National Bank Charters for Fintech Companies* ("SPNB White Paper"), also issued on December 2, 2016, the OCC's sole source of authority for the new nondepository charters is the OCC's SPNB regulation promulgated in 2003, 12 C.F.R. § 5.20(e)(1).[166] Then-Comptroller Curry stated that the OCC would be developing a "formal agency policy for evaluating applications" for nondepository charters.[167]

The SPNB White Paper discussed the benefits of issuing nondepository charters and sought comments from the public to help inform the OCC's development of its SPNB chartering policy.[168] The SPNB White Paper outlined certain general "baseline" supervisory requirements for charter recipients, such as a robust business plan, effective governance structure, capital and liquidity requirements, compliance risk management, financial inclusion, and resolution plans.[169] The specific application of these requirements would, however, be determined on a case-by-case basis in the issuance of each charter.[170] The OCC invited public comment on the mechanics of implementing the char-

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162 *See* Receiverships for Uninsured National Banks, 81 Fed. Reg. 62,835 (proposed Sept. 13, 2016) (to be codified at 12 C.F.R. pt. 51).

163 *See* CSBS Complaint, *supra* note 155, para. 49.

164 *See* Office of the Comptroller of the Currency, OCC Bull. No. 2016-29, Revised Comptroller's Licensing Manual Booklet (2016).

165 Curry, *supra* note 153. The OCC finalized the Receivership for Uninsured National Banks rule without change and without meaningful response to the public feedback received in response to the proposed rulemaking. *See id.*

166 *See* SPNB White Paper, *supra* note 87, at 3; *see supra* text accompanying note 144.

167 Curry, *supra* note 153.

168 SPNB White Paper, *supra* note 87, at 1, 15–16.

169 *Id.* at 8–13.

170 *Id.* at 6; *see also supra* note 151 and accompanying text (enumerating rules that would be inapplicable to SPNBs unless the OCC, through this ad hoc chartering process, explicitly required their compliance as a charter term).

ters, but not on the question of *whether* the OCC should grant such charters in the first place.[171]

The OCC's Nondepository Charter Decision and SPNB White Paper were heavily criticized by consumer groups, banking and financial industry trade associations, state government officials, and members of the U.S. Senate and House of Representatives.[172] Commenters questioned the OCC's authority to issue charters to nondepository institutions, with some arguing that the OCC must first obtain express congressional authority for such charters.[173] Senator Sherrod Brown, the ranking member on the Senate Committee on Banking, Housing, and Urban Affairs, and Senator Jeff Merkley, a member of the Committee, submitted a joint comment letter questioning the OCC's authority, observing that "it is far from clear whether the OCC has authority to grant [the proposed charters]."[174] The Senators also questioned the wisdom of the proposed charters in light of their likely detrimental impact on financial inclusion, consumer protection, and the separation of banking and commerce.[175] Other commenters voiced the same concerns and raised additional concerns about potential consumer harm, preemption of state law, regulatory gaps, safety and soundness risks, lack of adequately specified eligibility requirements, adequacy of supervision and regulation, and the need for generally applicable regulations promulgated pursuant to the APA's notice-and-comment requirements for informal rules.[176]

On March 15, 2017, the OCC published a *Summary of Comments and Explanatory Statement*.[177] The OCC's response has been criticized for failing to respond to many of the criticisms raised by public comments, including the OCC's lack of authority for the charters.[178] The OCC's explicit statement in its *Summary of Comments and Explana-*

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171 SPNB White Paper, *supra* note 87, at 15–16; *see also* CSBS Complaint, *supra* note 155, para. 58.

172 *See* CSBS Complaint, *supra* note 155, paras. 59–67.

173 *See id.* paras. 61–62, 65–67.

174 Letter from Senators Sherrod Brown & Jeff Merkley to Thomas Curry, Comptroller of the Currency (Jan. 9, 2017), https://www.brown.senate.gov/newsroom/press/release/brown-merkley-press-federal-agencies-on-oversight-of-financial-technology- [https://perma.cc/HZ2D-QTVC].

175 *See id.* at 2–5.

176 *See* CSBS Complaint, *supra* note 155, paras. 59–67.

177 Office of the Comptroller of the Currency, OCC Summary of Comments and Explanatory Statement: Special Purpose National Bank Charters for Financial Technology Companies (Mar. 2017) [hereinafter Summary of Comments & Explanatory Statement], https://www.occ.treas.gov/topics/bank-operations/innovation/summary-explanatory-statement-fintech-charters.pdf [https://perma.cc/89SX-4WS5].

178 *See, e.g.*, CSBS Complaint, *supra* note 155, para. 73.

tory Statement that deposit-taking is not required for an SPNB charter indicates that new SPNBs will qualify for charters under 12 C.F.R. 5.20(e)(1) if they engage in either lending money or paying checks,[179] and the OCC has interpreted the latter function as including "issuing debit cards or engaging in other means of facilitating payments electronically."[180]

The OCC's Chartering Manual Supplement, which was published on the same day as the *Summary of Comments and Explanatory Statement*, echoed this expectation, stating that SPNB charters would be available to a financial services entity that "engages in a limited range of banking activities, including one of the core banking functions described at 12 CFR 5.20(e)(1), but does not take deposits within the meaning of the Federal Deposit Insurance Act (FDIA) and therefore is not insured by the [FDIC]."[181] The Manual Supplement noted that SPNBs could engage in activities not previously "determined to be part of, or incidental to, the business of banking or to fall within an established core banking function."[182]

The Manual Supplement also described application procedures, standards, and supervisory requirements for SPNBs.[183] However, the word "described" overstates the degree to which the Manual Supplement provided specific information regarding applicable requirements and standards. Instead of providing clarity on the laws and regulations that would apply to nondepository SPNBs, the Manual Supplement stated that the OCC would make a case-by-case assessment of each SPNB applicant and would tailor the OCC's general regulatory requirements to the particular circumstances of individual applicants, especially where the laws and regulations that apply to FDIC-insured banks would not automatically govern uninsured nondepository firms.[184] The OCC's proffer of a negotiated process and individualized tailoring of regulatory requirements—an approach that does not occur for full-service banks—demonstrates the OCC's willingness to accommodate the fintech firms that will become the subjects of its supervision. "Traditional banks may wonder why their primary prudential regulator seems so willing to customize regulation and oversight of

179 *See* Summary of Comments & Explanatory Statement, *supra* note 177, at 14–15.

180 SPNB White Paper, *supra* note 87, at 4.

181 Manual Supplement, *supra* note 138, at 2; *see infra* note 191 and accompanying text.

182 Manual Supplement, *supra* note 138, at 5.

183 *See id.* at 6–13.

184 *See id.* at 15. For a list of such rules, see *supra* note 151.

non-bank entities but does not show the same responsiveness when it comes to normally chartered national banks."[185]

The Manual Supplement included a request for public comment.[186] Commenters responded to the feedback request on the Manual Supplement with criticisms that were similar to the comments submitted in response to the OCC's preceding publications.[187] In particular, the Conference of State Bank Supervisors ("CSBS"), a nationwide association of state banking and financial institution regulators, criticized the "*ad hoc* regulatory treatment" of SPNBs described above and emphasized that because such banks would not be FDIC insured, they would subsequently *not* be required to comply with most federal banking laws.[188]

Following the OCC's March 2017 actions, two lawsuits were filed challenging the decision to offer nondepository SPNB charters to fintech firms. Both suits have since been dismissed for lack of standing. CSBS brought one suit,[189] and the other was brought by the New York Department of Financial Services, the New York governmental agency statutorily charged with "enforcing [the state's] banking, financial services, and insurance laws."[190]

V. Does the OCC Have Authority to Issue SPNB Charters to Fintech Companies?

The OCC asserts that it is entitled to charter a nondepository national bank pursuant to its regulation issued in 2003, 12 C.F.R. § 5.20(e)(1), which requires that an SPNB only engage in *one* of three core banking activities.[191] The OCC argues that § 5.20(e)(1) is entitled to *Chevron* deference and is a reasonable interpretation of the ambig-

185 1 Barkley Clark & Barbara Clark, The Law of Bank Deposits, Collections, & Credit Cards § 1.07 (3d ed. 2017).

186 Press Release, Office of the Comptroller of the Currency, OCC Issues Draft Licensing Manual Supplement for Evaluating Charter Applications from Financial Technology Companies, Will Accept Comments Through April 14 (Mar. 15, 2017), https://occ.gov/news-issuances/news-releases/2017/nr-occ-2017-31.html [https://perma.cc/K83L-QQ87].

187 *See* CSBS Complaint, *supra* note 155, paras. 74–75.

188 *Id.* para. 75.

189 Conference of State Bank Supervisors v. Office of the Comptroller of the Currency, No. 1:17-cv-00763 (JEB) (D.D.C. filed Apr. 26, 2017).

190 Vullo v. Office of the Comptroller of the Currency, No. 17 Civ. 3574 (NRB), 2017 WL 6512245, at *1, *9 (S.D.N.Y. Dec. 12, 2017) (dismissing the suit for lack of standing and ripeness on the basis that the OCC had not yet made a final determination whether to offer nondepository SPNB charters, and, therefore, the issuance of such charters, was "contingent on future events that may never occur").

191 OCC Motion to Dismiss CSBS Suit, *supra* note 144, at 26.

uous statutory term, "business of banking."[192] But there are four persuasive grounds for rejecting the OCC's arguments and overturning the OCC's SPNB Charter Decision. First, the SPNB Charter Decision is not valid because the text and structure of the National Bank Act demonstrate that the "business of banking" requires deposit-taking unless Congress has expressly authorized the OCC to charter a specifically defined category of nondepository national banks. Second, Congress has not provided such an exception for nondepository fintech national banks. Third, the OCC's expansive interpretation of the "business of banking" is not entitled to *Chevron* deference because recent Supreme Court jurisprudence makes clear that agency deference is not appropriate when dealing with an issue central to a regulatory scheme that has serious economic and political implications and when the authority has not been expressly delegated to the agency.[193] Finally, even if *Chevron* applies to the SPNB Charter Decision, the OCC's interpretation is not reasonable and is not entitled to deference because it undermines Congress's longstanding policy of separating banking and commerce.

A. *The SPNB Charter Decision Conflicts with the Statutory Requirement that All National Banks Must Accept Deposits Unless Congress Has Provided an Exception to That Requirement*

In defense of its interpretation that national banks need only engage in one of the three core banking functions, the OCC relies on 12 U.S.C. § 36(j),[194] which defines a "branch" of a national bank as a location (other than the main office) where "deposits are received, or checks paid, or money lent."[195] The OCC also relies on *Clarke v. Securities Industry Ass'n*,[196] in which the Court found reasonable the

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192 *Id.* at 17–19.

193 Additionally, § 5.20(e)(1) arguably implicates the preemption standards under 12 U.S.C. § 25b(b)(5) (2012), which supplant *Chevron* to the extent that it seeks to preempt state consumer financial laws. *See* Letter from Americans for Fin. Reform et al. to Thomas Curry, Comptroller of the Currency 1–2 n.8 (Nov. 2016), https://www.nclc.org/images/pdf/rulemaking/occ-fintech-charter-44grps.pdf [https://perma.cc/8PBN-QF5T] ("We believe that the current regulations violate the Dodd-Frank standards even as applied to traditional national banks, and that the OCC would be required to follow the Dodd-Frank case-by-case rules if it attempted to preempt state laws for a new type of entity."). Because the two court cases challenging the SPNB Charter Decision have not yet proceeded beyond motions to dismiss, the degree to which the OCC's action would preempt state consumer financial laws has not yet been litigated by the parties or determined by any court.

194 OCC Motion to Dismiss CSBS Suit, *supra* note 144, at 25.

195 12 U.S.C. § 36(j) (2012).

196 479 U.S. 388 (1987). *Clarke* refers to § 36(j) as "36(f)." The section was relabeled

OCC's conclusion that the general business of the bank under sections 36 and 81 included only "core banking functions," and that those core functions included the three specific activities listed in section 36(j).[197] However, the OCC's reliance on the definition of "branch" as the touchstone for defining the "general business" and the "business of banking" is not persuasive when one examines the text and structure of the National Bank Act as well as the discussion in *Clarke* and the opinion in *Lowry National Bank*, which the Supreme Court relied on in *Clarke*.

The National Bank Act and related federal statutes indicate that the "business of banking" conducted by a national bank *requires* deposit-taking unless Congress has expressly authorized the OCC to charter a specifically defined category of nondepository national banks.[198] Both 12 U.S.C. §§ 22 (Second) and 24 (Seventh) expressly refer to deposit-taking as part of the business of a national bank. Section 24 (Seventh), discussed at length above, includes deposit-taking among the expressly granted powers of national banks.[199] Section 22 provides that a national bank's organization certificate must specify the place where the bank's "operations of discount *and* deposit are to be carried on."[200] Thus, both statutes plainly indicate that *all* national banks must engage in deposit-taking as part of their general business.

Two related statutes support the view that deposit-taking is an essential part of the business of every national bank, absent a specific statutory exemption. Under the FRA, 12 U.S.C. § 222 requires that all national banks must be members of the FRS and must also be FDIC insured.[201] Under the BHCA, 12 U.S.C. § 1841(c), a "bank" is an institution that receives FDIC-insured deposits, or one that both accepts demand deposits and makes commercial loans.[202] The only statutory exceptions to § 222's requirement of deposit insurance for every national bank are trust banks and bankers' banks, pursuant to 12 U.S.C. § 27(a) and (b), statutes passed by Congress *after* § 222. In addition,

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"36(j)" in 1994, seven years after the Court decided *Clarke*. Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, § 102(b)(1), 108 Stat. 2338, 2349.

197 *See* OCC Motion to Dismiss CSBS Suit, *supra* note 144, at 25 (citing *Clarke*, 479 U.S. at 406–09).

198 *See, e.g.*, CSBS Complaint, *supra* note 155, paras. 6, 7, 65, 77–82.

199 *See supra* Part II.

200 12 U.S.C. § 22 (Second) (2012) (emphasis added).

201 *Id.* § 222 (2012) ("Every national bank in any State shall . . . become a member bank of the Federal Reserve System . . . and shall thereupon be an insured bank under the Federal Deposit Insurance Act [12 U.S.C. § 1811 et seq.], and failure to do so shall subject such bank to the penalty provided by section 501a of this title." (third alteration in original)).

202 *Id.* § 1841(c)(1) (2012).

12 U.S.C. § 1841(c)(2)(D) exempts trust banks from the definition of "bank" under the BHCA because trust banks are permitted *not* to accept deposits other than trust funds. In light of the foregoing statutes, the only reasonable conclusion is that *all* national banks must accept deposits as part of their "general business" *unless* Congress has expressly authorized the OCC to charter a specifically defined category of nondepository national banks. The OCC does not have authority to create additional implied exceptions through agency regulations.[203]

The Supreme Court's decision in *Clarke* is consistent with the foregoing interpretation of the relevant statutes.[204] In *Clarke*, the Supreme Court stated that the description of a national bank's "general business" in 12 U.S.C. § 81 "can plausibly be read to cover only those activities that are part of the bank's core banking functions."[205] The Court also concluded that the "core banking functions" of a national bank included the three activities "explicitly enumerated" in the definition of "branch" in 12 U.S.C. § 36(j).[206] Thus, *Clarke* supports the view that the "general business" of a national bank under section 81 includes *all* of the three activities enumerated in section 36(j), *including* deposit-taking. That conclusion draws further support from the Court's endorsement of the Attorney General's 1911 opinion in *Lowry National Bank*. In that opinion, as discussed above, the Attorney General concluded that it was *not* permissible for national banks to accept deposits away from their main office because deposit-taking was part of the "general business" of a national bank and national banks did not then have authority to establish branches.[207]

Congress therefore has consistently manifested an intent that all national banks must accept deposits *except* in the expressly authorized cases of trust banks and bankers' banks. Accordingly, the OCC may not decide to charter a bank that would not take deposits, because such a bank and any parent company of the bank would be able to avoid regulation under the FDIA and the BHCA without Congress's authorization.[208]

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203 *See infra* Section V.B.

204 479 U.S. 388, 401 (1987).

205 *Id.* at 404.

206 *Id.* at 409.

207 *See id.* at 404–05 (citing Lowry Nat'l Bank of Atlanta, Ga.—Establishment of Branch Office, 29 Op. Att'y Gen. 81 (1911)); *Lowry Nat'l Bank*, 29 Op. Atty. Gen. at 90.

208 CSBS Opposition to Motion to Dismiss, *supra* note 140, at 3 (citing Whitney v. National Bank of New Orleans & Trust Co., 379 U.S. 411 (1965)) ("[A]ny interpretation of the 'business of banking' in the NBA must be consistent with the Bank Holding Company Act's . . . definition

B. Congress Has Not Authorized the OCC to Issue Regulations That Create Implied Exceptions to the Deposit-Taking Requirement for National Banks

As shown in the preceding Section, the NBA and related federal statutes require all national banks to accept deposits unless Congress has expressly authorized the issuance of national bank charters to specifically defined categories of nondepository banks. The only instances in which Congress has granted the OCC authority to charter nondepository national banks are trust banks and bankers' banks.[209] The congressional grant of authority to charter trust and bankers' banks was warranted because "solely providing fiduciary services or correspondent banking services did not, under existing law, qualify as carrying on the business of banking."[210] Congress has not enacted any statute that would allow the OCC to establish additional exemptions from the deposit-taking requirement under the NBA and the requirement of FDIC deposit insurance under 12 U.S.C. § 222.

In *National State Bank v. Smith*,[211] a federal district court rejected the OCC's claim of authority to charter trust banks because those banks would not accept deposits. The OCC has rejected *Smith* because the district court's decision was subsequently overruled by Congress's 1978 amendment to section 27(a), which granted the OCC specific authority to issue trust bank charters.[212] CSBS adeptly responded that Congress's amendment granting the OCC a *narrowly defined* trust bank chartering authority does not undermine the reasoning in *National State Bank*, but rather demonstrated Congress's agreement that the OCC lacked such authority.[213] Congress's decision to authorize *only* the chartering of trust banks, rather than granting broad authority to the OCC to charter all types of nondepository SPNBs, contradicts the OCC assertion of such authority for 12 C.F.R. § 5.20(e)(1) and the Nondepository Charter Decision.

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of 'bank,' given the complementary regulatory role of these statutes and the agencies that oversee them.").

209 12 U.S.C. § 27(a)–(b) (2012); *id*. § 1841(c)(2)(D); CSBS Opposition to Motion to Dismiss, *supra* note 140, at 4. Credit card national banks are SPNBs, but they have a limited authority to accept deposits as shown in 12 U.S.C. § 1841(c)(2)(F). All credit card national banks are currently FDIC-insured banks. *See* Indep. Ins. Agents of Am., Inc. v. Hawke, 211 F.3d 638, 643–45 (D.C. Cir. 2000).

210 CSBS Opposition to Motion to Dismiss, *supra* note 140, at 37.

211 No. 76-1479, 1977 U.S. Dist. LEXIS 18184 (D.N.J. Sept. 16, 1977).

212 *See* OCC Motion to Dismiss CSBS Suit, *supra* note 144, at 22.

213 CSBS Opposition to Motion to Dismiss, *supra* note 140, at 39.

The OCC correctly observes that "[t]here is no express statutory chartering authority for credit card banks in the National Bank Act."[214] In *Independent Community Bankers Ass'n v. Board of Governors of Federal Reserve System* ("*ICBA*"),[215] the D.C. Circuit upheld the OCC's power to charter credit card banks with limited deposit-taking authority. In the CSBS lawsuit, the OCC relied upon this case to assert that it charters credit card banks based on the general statutory authority endorsed in *ICBA*, which supports its claim that the "concept of a special purpose national bank charter . . . follows a decades-old OCC practice" and does not "require specific statutory authority."[216]

Importantly, *ICBA* did not address whether there were certain essential banking activities that constitute the *minimum* content of the "general business" of national banks under 12 U.S.C. § 81. The *ICBA* court, instead, rejected an argument that a national bank "is established to discharge all the duties enumerated in its enabling legislation."[217] The court relied, in part, upon an early Comptroller opinion approving a similar limited charter because national banks do not have to engage in "the full range of permissible activities" and may "concentrate on a few specific activities."[218] To say, as the court did, that a national bank is not obligated to undertake *every* permissible activity is a far cry from the claim that there are *no* activity requirements or that a bank must only engage in one of a subset of its permissible activities. Thus, the court in *ICBA* considered only the question of the *maximum* required content of the business conducted by a national bank and did not consider the *minimum* required content issue that was addressed in *Smith* as well as a similar federal district court decision in 1985.[219]

As demonstrated by the circumstances of *ICBA*, specific congressional authority for the national credit card bank charters was not necessary to ensure compliance with the NBA nor the BHCA. While the

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214 Defendants' Motion to Dismiss, Conference of State Bank Supervisors v. Office of the Comptroller of the Currency at 30, No. 17-cv-00763 (JEB) (D.D.C. Oct. 2, 2017) [hereinafter Defendants' Motion to Dismiss].

215 820 F.2d 428 (D.C. Cir. 1987).

216 Defendants' Motion to Dismiss, *supra* note 214, at 30, 35 n.6.

217 *ICBA*, 820 F.2d at 438.

218 *Id.* at 439.

219 In *Indep. Bankers Ass'n of Am. v. Conover*, No. 84-1403-CIV-J-12, 1985 U.S. Dist. LEXIS 22529, at *33, *36 (M.D. Fla. Feb. 15, 1985), the court held that the OCC did not have authority to issue charters for "nonbank banks" that engaged in commercial lending but not in deposit-taking. Congress effectively endorsed the district court's decision when it closed the "nonbank bank" loophole in 1987. *See supra* note 106 and accompanying text.

BHCA exempts credit card banks from the definition of "bank" in 12 U.S.C. § 1841(c)(2)(F), it acknowledges that credit card banks can accept some deposits as long as they do not solicit or accept deposits from the general public.[220] All credit card banks accept deposits from one or more of their affiliated companies and receive FDIC insurance for those deposits.[221] Thus, the lack of explicit authority for chartering credit card banks with limited deposit-taking functions does not support the OCC's assertion that it can charter *nondepository* institutions without express congressional permission.[222]

The foregoing statutory analysis supports an application of the canon of statutory construction known as *expressio unius est exclusio alterius*.[223] Under that canon, Congress's granting of narrowly defined authority to the OCC to issue charters for nondepository trust companies and bankers' banks clearly implies that the OCC does *not* have authority to issue charters for *other* types of nondepository national banks.[224] Put another way, there would have been no reason for Congress to grant specific authority for trust company and bankers' bank charters if the OCC already had a general authority to charter nondepository national banks. Moreover, the 1978 and 1982 amendments for trust companies and bankers' banks would have been stated in general terms if Congress intended to confer a broad authority to charter nondepository national banks.[225] In fact, Congress expressed a clear intent to prevent the chartering of nondepository "nonbank banks"—i.e., national banks that made loans but did *not* accept deposits—when Congress closed the "nonbank bank" loophole by enacting

220 12 U.S.C. § 1841 (2012).

221 The OCC reported in the preamble to its recent final rule, Receiverships for Uninsured National Banks, that as of December 2, 2016, it supervised fifty-two uninsured banks, which were *all* trust banks. 81 Fed. Reg. 92,594, 92,595 (Dec. 20, 2016) (to be codified at 12 C.F.R. pt. 51). Thus, no credit card banks are not FDIC insured.

222 CSBS Opposition to Motion to Dismiss, *supra* note 140, at 42 (citing 12 U.S.C. § 1841(c)(2)(F) (2012)) (noting that "credit card banks *do* engage in deposit-taking activities and are FDIC insured").

223 *Expressio Unius Est Exclusio Alterius Legal Definition*, MERRIAM-WEBSTER, https://www.merriam-webster.com/legal/expressio%20unius%20est%20exclusio%20alterius [https://perma.cc/4Z26-YF4L] (defining this phrase as "a principle in statutory construction: when one or more things of a class are expressly mentioned others of the same class are excluded").

224 Indep. Ins. Agents of Am. v. Hawke, 211 F.3d 638, 643–45 (D.C. Cir. 2000) (holding that Congress expressly authorized national banks to act as agents in selling insurance only in small towns under 12 U.S.C. § 92, and granted a general authority for insurance agency activities only to financial subsidiaries of national banks under 12 U.S.C. § 24a). In view of specific and narrowly defined grants of authority, the court struck down an OCC ruling that allowed national banks to sell crop insurance on an unlimited geographic basis. *Id.*

225 *See* Indep. Bankers Ass'n of Am. v. Conover, No. 84-1403-CIV-J-12, 1985 U.S. Dist. LEXIS 22529, at *14–15 (M.D. Fla. Feb. 15, 1985).

the Competitive Equality Banking Act in 1987.[226] Moreover, the interplay of federal financial regulatory statutes such as sections 22 (Second), 24 (Seventh), 222, and 27,[227] legislative history, and historical context[228] all support the indispensability of deposit-taking. While the courts may decide this legal question,[229] there are prudential reasons to caution against this type of charter, even if it is found to be within the OCC's authority to issue them.[230]

C. *The OCC's Nondepository SPNB Charter Decision Is Not Entitled to* Chevron *Deference*

The OCC's invocation of its own regulation, 12 C.F.R. § 5.20(e)(1), for its authority to grant the proposed charters is not entitled to *Chevron* deference and should be overruled. As shown above in Sections III.A and IIII.B, the OCC's regulation conflicts with the clear intent of Congress as manifested in the NBA and related federal statutes and should therefore be struck down under the first step of *Chevron*. Moreover, in *Gonzales v. Oregon*,[231] the Supreme Court found that a regulation issued by the Attorney General was not entitled to deference because it was promulgated without any grant of authority by Congress. The Court determined that the Attorney General did not provide any basis for concluding that Congress intended to grant him the authority to prohibit services by physicians that were authorized under applicable state laws.[232] Similarly, because the OCC has not been delegated the authority to define the "business of banking" or to exempt national banks from the otherwise applicable provi-

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226 *See supra* notes 106–09 and accompanying text; *see also* CSBS Opposition to Motion to Dismiss, *supra* note 140, at 31.

227 These provisions and their relationships are described in detail in Section III.B, *supra*.

228 *See* CSBS Opposition to Motion to Dismiss, *supra* note 140, at 34 (citing historical documents and Supreme Court cases affirming the claim that accepting demand deposits is an essential aspect of the business of banking).

229 The district court did not speak to the merits of the OCC's authority to charter the proposed SPNBs before dismissing the case. *See supra* note 4: *see also* OCC Motion to Dismiss CSBS Suit, *supra* note 144, at 3–7.

230 In addition to the separation of banking and commerce discussed *infra* Section III.C, concerns have been raised regarding preemption, the Tenth Amendment, and consumer protection. *See, e.g.*, Keith R. Fisher, *Toward a Basal Tenth Amendment: A Riposte to National Bank Preemption of State Consumer Protection Laws*, 29 HARV. J.L. & PUB. POL'Y 981, 1031–33 (2006); Mark Furletti, *The Debate over the National Bank Act and the Preemption of State Efforts to Regulate Credit Cards*, 77 TEMP. L. REV. 425, 427–30 (2004). While these arguments are persuasive and bear consideration, they are outside the scope of this Essay and will not be addressed in depth.

231 546 U.S. 243 (2006).

232 *Id.* at 258–61.

sions of the BHCA and the FDIA, § 5.20(e)(1) of the OCC's regulations is not entitled to *Chevron* deference.

Chevron deference "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."[233] In both *FDA v. Brown & Williamson Tobacco Corp*[234] and *King v. Burwell*,[235] the Supreme Court found that Congress had not made any such delegation after considering the relevant statutory and regulatory schemes and the "economic and political significance" of the questions that the agencies attempted to decide by issuing regulations.[236] Whether or not national banks must accept deposits, and must accept regulation under the FDIA and (potentially) under the BHCA, similarly, are questions that are of fundamental importance to the federal bank regulatory scheme and have momentous implications for the national economy.

Congress has established the financial regulatory system over time, and the fundamental purposes embodied in the federal regulatory scheme therefore must be evaluated in the context of all the relevant statutes. Although many have criticized today's financial regulatory system with multiple federal regulators that have overlapping supervisory authorities, the purpose of that regulatory scheme is to protect the nation's economy and financial system by ensuring effective oversight of the banking industry, which plays a unique role of great importance in our economy and has access to unique and costly forms of government support. A fundamental purpose of our regulatory system is to segregate banks from other commercial firms. The OCC's proposal to grant national bank charters to nondepository institutions that are owned by commercial firms would undermine Congress's longstanding policy of separating banking and commerce,

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233 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000); *see also Gonzales*, 546 U.S. at 258 ("*Chevron* deference, however, is not accorded merely because the statute is ambiguous and an administrative official is involved. To begin with, the rule must be promulgated pursuant to authority Congress has delegated to the official.").

234 529 U.S. at 159–61 (striking down the FDA's attempt to regulate tobacco products as drug-dispensing devices, after finding that Congress had "precluded the FDA from regulating tobacco products" in view of "the FDCA's overall regulatory scheme and the subsequent tobacco legislation").

235 135 S. Ct. 2480, 2489 (2015) (holding that whether or not tax credits were available on the health insurance established by the federal government was not delegated to the IRS and thus not subject to *Chevron* analysis because it was central to the statutory scheme of the ACA and "a question of deep 'economic and political significance'" (quoting Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014))).

236 *See id.*; *Brown & Williamson Tobacco Corp.*, 529 U.S. at 132–33.

thereby ignoring a central tenet of the financial regulatory system that Congress has deliberately constructed.

In *Brown & Williamson Tobacco Corp.*, the Court declined to give deference to the FDA's attempt to regulate tobacco products as drug-dispensing devices, concluding that "[g]iven this history [of Congress's regulation of tobacco products] and the breadth of the authority that the FDA has asserted, we are obliged to defer not to the agency's expansive construction of the statute, but to Congress' consistent judgment to deny the FDA this power."[237] A similar determination would be appropriate here. The OCC is attempting to give itself expansive authority to grant national bank charters to nondepository institutions, a power that Congress has repeatedly refused to provide or endorse in the past. The narrowly defined amendments to section 27 of the National Bank Act in 1978 and 1982, Congress's decision to close the "nonbank bank" loophole in 1987, and the decisions by federal district courts in *Smith* and *Conover* provide compelling evidence of a "consistent judgment to deny the [OCC] this power."[238] Congress has not delegated to the OCC the chartering authority asserted in 12 C.F.R. § 5.20(e)(1), and *Chevron* is therefore inapplicable.

If one reviews the three key statutory concepts of the "business of banking," the "incidental" powers of national banks, and the "general business" of national banks, as discussed above,[239] it becomes apparent that only the OCC has authority to define the maximum permissible scope of the "incidental" powers of national banks that are part of the "business of banking," and even that authority must be kept within "reasonable bounds" under *VALIC*. The OCC simply does not have delegated authority to define the minimum required content of the "general business" of banking in a way that would allow national banks (except for trust banks and bankers' banks) to operate as nondepository institutions that are not subject to regulation under the FDIA or the BHCA.[240] This understanding of the regulatory framework for chartering national banks comports with prior court deci-

237 *Brown & Williamson Tobacco Corp.*, 529 U.S. at 160.

238 *See id.* at 137–38, 160 (noting Congress's subsequent legislative acts relating to tobacco and considering them as relevant to determining its intent for the regulation of tobacco, which conflicted with and undermined the FDA's action).

239 *See supra* note 62 and accompanying text.

240 *See supra* Section V.C (discussing the applicability of *Chevron* deference to the Nondepository Charter Decision).

sions and congressional grants of *specific* authority for charters of nondepository institutions.[241]

D. The OCC's Nondepository SPNB Charters for Fintech Firms Should Be Rejected as a Serious Threat to the Separation of Banking and Commerce

The OCC's attempt to provide SPNB charters for nondepository institutions should be overruled because it threatens the separation of banking and commerce that is a hallmark of the U.S. banking regulatory system.[242] Mixing banking and commerce creates a significant risk of abuse of the financial resources of SPNBs, unfair access to low-cost deposits, and a dangerous expansion of the federal safety net that could lead to the subsidization of commercial conglomerates like Google and Amazon.[243] Some have claimed that allowing fintech firms to receive national bank charters would require them to "conform to a formal system of federal regulation."[244] However, the OCC is intentionally structuring the SPNBs to avoid the FDIA and especially the BHCA,[245] which is intended to protect the system by keeping banking and commerce separate.

The potential threat of the OCC's fintech charter initiative to the separation of banking and commerce was underscored when former Acting Comptroller Keith Noreika stated in September 2017 that the proposed SPNB nondepository charters would be open to commercial firms, such as Walmart or Google.[246] That statement represented a significant departure from Noreika's predecessor, Comptroller Curry, who stated in March 2017 that "[p]roposals that would mix banking and commerce are inconsistent with the OCC's chartering standards and would not be approved."[247] In contrast, Noreika has repeatedly discounted the importance of separating banking and commerce, claiming that it has become "a religious exercise" and should be stud-

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241 *See supra* Section V.B (discussing congressional authorization of nondepository institutions).

242 *See supra* Section II.C.

243 *See id.*

244 J. Parker Murphy, *supra* note 53, at 364.

245 *See supra* Part V (discussing the structuring of SPNBs and recent OCC action in this area).

246 *See* Lalita Clozel, *Fintech Charter Open to Commercial Firms: OCC's Noreika*, Am. Banker (Sept. 28, 2017, 6:13 PM), https://www.americanbanker.com/news/fintech-charter-open-to-commercial-firms-like-walmart-occs-noreika [https://perma.cc/ET45-ZXBM].

247 Thomas Curry, Comptroller of the Currency, Remarks at LendIt USA 2017 8 (Mar. 6, 2017), https://www.occ.treas.gov/news-issuances/speeches/2017/pub-speech-2017-27.pdf [https://perma.cc/2XDS-GT4B].

ied and presumably abandoned in favor of permitting greater "diversification" within our financial system.[248] After harsh criticism, Noreika attempted to clarify those comments in a speech on October 19, 2017, stating,

> I merely suggested that we should *talk* to *any* company interested in becoming a bank and that commercial companies should not be prohibited from applying—*if* they meet the criteria for doing so. Talking about and applying for are a long way from approval of an application, and even further away from resulting in the kind of harm and abuse suggested.[249]

Despite Noreika's assurances, the OCC's Nondepository Charter Decision does not provide any apparent basis on which the OCC would treat Google, Apple, or Amazon differently from any other fintech applicant. In fact, such huge, successful corporations may be appealing. Much as GM and GE Capital may have looked years ago when they could acquire ILCs, such corporations would seem to be sufficiently large and stable to support a nondepository banking subsidiary without endangering the safety net. However, if economic and business conditions change for the worse (as they certainly did for GM and GE Capital[250]), such giant entities are exactly those that are likely to be considered too big to fail.

Under the BHCA, if a fintech company chartered as a national bank were controlled by a holding company, it would generally be subject to the Fed's supervision.[251] As Mr. Noreika noted in a recent speech, however, the BHCA has a precise definition of "bank" that would have to be satisfied before an entity owning a nationally chartered fintech bank would be subject to the Act's provisions.[252] The BHCA's definition of "bank" includes FDIC-insured banks and institutions that accept demand deposits *and* make commercial loans.[253] Thus, a fintech national bank that neither accepts deposits nor is

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248 John Crabb, *Q&A with Former OCC Acting Comptroller Keith Noreika*, INT'L FIN. L. REV. (Nov. 28, 2017), http://www.iflr.com/Article/3770594/Banking/EXCLUSIVE-Q-A-with-former-OCC-acting-Comptroller-Keith-Noreika.html [https://perma.cc/QL4T-KJ2D].

249 Noreika, *supra* note 153, at 8.

250 GE Capital is an ILC that received government assistance in during the financial crisis; at the time GE said access to such assistance "may reassure investors and help the lender compete with banks that already have government-protected debt." *F.D.I.C. to Back $139 Billion in GE Capital Debt*, N.Y. TIMES: DEALBOOK (Nov. 12, 2009, 6:02 PM), https://dealbook.nytimes.com/2008/11/12/fdic-to-back-139-billion-in-ge-capital-debt/ [https://perma.cc/YP2U-2P87].

251 12 U.S.C. §§ 1841–1850 (2012).

252 Noreika, *supra* note 153, at 8.

253 12 U.S.C. § 1841(c)(1).

FDIC insured would not trigger BHCA compliance for any entity that controlled such a bank. As discussed above, it is far from clear whether a fintech national bank could operate lawfully under such an arrangement in view of 12 U.S.C. § 222.[254]

The Fed has not issued any public comments on the role that it would or should play in the regulation of fintech national banks or their holding companies.[255] In addition to the holding company issues under the BHCA, the Fed, at least in theory, may have some backup supervisory authority over member national banks under the Federal Reserve Act. The primary supervision of FRS member banks is divided between the Fed and OCC: the OCC is the primary regulator of national member banks, including for compliance with applicable Federal Reserve laws and regulations,[256] and the Fed is the primary regulator of state member banks.[257] Despite this arrangement, technically, 12 U.S.C. § 248(a)(1)–(2) gives the Fed the authority to examine and require reports of *all* banks that are members of the FRS, including national banks.[258] Due to the unprecedented nature of the proposed nondepository SPNBs, it is not at all clear to what extent the FRS would exert its statutory authority to examine such banks, assuming they did become FRS members.

The holding company question is of greater significance due to the potential separation of banking and commerce issues that will arise if the OCC permits companies like Google, Amazon, and Apple to acquire a nondepository fintech national bank and thereby gain access to the federal safety net, including the Fed's discount window. In response to this concern, Noreika has cited "national credit card banks, state merchant processing banks, [and] state-chartered ILCs"

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254 *See supra* Section V.A.

255 *See, e.g.*, Lalita Clozel, *Can the OCC Really Grant Fintech Charter to a Google?*, AM. BANKER (Oct. 3, 2017, 11:30 AM), http://www.americanbanker.com/news/can-the-occ-really-grant-fintech-charter-to-a-google [https://perma.cc/XM4M-PVL9] ("[A] fintech-chartered institution would be a national bank under the National Bank Act, meaning that it would have to be a member of the Federal Reserve System. (The Fed declined to comment for this story, because the fintech charter is still only a 'proposal.')").

256 *See* FISHER, *supra* note 58, at § 2.03[3][c][ii] ("While the Federal Reserve Board has regulatory oversight authority over national banks in their capacity as members of the Federal Reserve System, it defers to the Comptroller for purposes of primary supervision." (emphasis omitted)); *see also* 12 U.S.C. § 324 (addressing laws applicable to FRS member banks).

257 12 U.S.C. §§ 248(a)(1), 325, 338, 483.

258 *See* Mark B. Greenlee, *Historical Review of "Umbrella Supervision" by the Board of Governors of the Federal Reserve System*, 27 REV. BANKING & FIN. L. 407, 447 n.153 (2008) (citing 12 U.S.C. § 248(a)(1)) (drawing a distinction between the Fed's umbrella supervision and "the Board's authority to examine national banks under section 11(a)(1) of the Federal Reserve Act").

as examples of instances where "commercial companies are allowed to own banks at the state and federal levels without such abuse and harm."[259] Notably, credit card banks engage in minimal deposit-taking and are FDIC insured.[260] Moreover, state-chartered ILCs are hardly a persuasive example of the absence of "abuse and harm" given the massive bailout that the federal government provided to GM's ILC, GMAC, and the extensive financial support that the federal government provided to GE Capital.[261]

The arguments from the ILC debate—and the way they have played out in the years since—are applicable here: (1) the importance of upholding the policy of separating banking and commerce; (2) the dangers of extending the federal safety net to protect and subsidize commercial owners of banking institutions; (3) the risks of contagion—i.e., that the financial problems of commercial owners will spread to their banks, as well as related risks created by conflicts of interest and preferential lending from banks to their commercial owners; (4) severe problems that would be created by extending federal bank supervision beyond the banking system into the commercial sector; and (5) unfair competitive advantages for commercial owners of banks (including explicit and implicit federal subsidies) compared to firms that do not own banks.[262]

Relatedly, one commentator has noted that the mixing of commerce and banking already occurs with "synthetic banks" that operate pursuant to state-level licenses.[263] However, referring to such state-licensed financial providers as "banks" is misleading because they do not have access to the federal safety net (including FDIC insurance, the Fed's discount window, and the Fed's payment system), which are the attributes of "banking" that primarily motivate the policy of separating banking and commerce. Moreover, the process of state licensing is admittedly costly and subject to state oversight, and therefore "most companies don't do it."[264] In fact, state licensing and oversight avoidance is one of the most frequently voiced arguments for creating a fintech national bank charter, and that argument raises additional concerns that the OCC's fintech charter initiative could result in "competition in laxity" with the states and greater opportunities for

259 Noreika, *supra* note 153, at 8.

260 *Supra* notes 220–22 and accompanying text.

261 *See supra* notes 125–28, 250 and accompanying text.

262 *See supra* Section II.D.

263 Clozel, *supra* note 255 (quoting Pratin Vallabhaneni, a partner at Arnold & Porter).

264 *Id.*

abuse of financial customers and the growth of poorly regulated systemic risks.

Conclusion

The OCC's attempt to provide national bank charters to nondepository fintech institutions that could be owned by commercial firms, are not FDIC insured, and would avoid compliance with many of the most important federal banking laws would have significant (and potentially devastating) implications for the U.S. economy and our system of financial regulation. Those policy issues are the types of questions that are most appropriately addressed to, and resolved by, Congress. Congress has repeatedly declined to give the OCC any type of blanket authority to charter nondepository institutions as national banks, thereby indicating that the OCC does not have authority to resolve such fundamental policy questions on its own by regulatory fiat.

The fintech charter proposal is just the most recent power grab by the OCC. The courts should, as they have done before, prevent the OCC's attempt to expand its authority beyond the limits established by Congress. Congress should also clarify the OCC's power in order to discourage similar attempts in the future. In a system that is already fraught with opportunities for regulatory arbitrage and exploitation of a "competition in laxity" among regulators, new types of federally chartered financial institutions that are created by the OCC without statutory authority will only create further potential for unfair competition, abuse of financial customers, and dangerous concentrations of systemic risk. In the current context of continuing political disputes about the trajectory of future financial reforms, the least that should be done is to stop a single rogue regulator from rewriting the fundamentals of banking regulation on its own.