

**A DEFENSE OF THE DOCTRINE OF PREEMPTION:
REVEALING THE FALLACY THAT FEDERAL PREEMPTION
CONTRIBUTED TO THE FINANCIAL CRISIS**

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INTRODUCTION

At the center of our national culture is the belief that every American should own a home, the so-called “American dream.”¹ Yet, during the recent financial crisis, our nation experienced the worst displacement of Americans out of their homes since the Great Depression.² Thus, it is important to objectively understand what contributed to the crisis and what did not. Some have used the financial crisis to promote changes in the long-standing doctrine of federal preemption. These proponents have argued that federal preemption of state laws resulted in the financial crisis and reform legislation was needed.³ For example, then Governor of New York Eliot Spitzer argued that the federal government used preemption “in an unprecedented assault on state legislatures, as well as on state attorneys general and anyone else on the side of consumers.”⁴ According to Mr. Spitzer, the use of preemption made the federal government “a willing accomplice to the lenders” engaged in the predatory lending that ultimately resulted in the subprime mortgage crisis.⁵

Congress responded with the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”).⁶ The Dodd-Frank Act made sweeping reforms to the financial world in an effort “[t]o promote the financial stability of the United States” in the wake of the financial crisis.⁷ Financial institutions are now subject to a myriad of

1 Anthony DePalma, *Why Owning a Home is the American Dream*, N.Y. TIMES, Sept. 11, 1988, at RP5.

2 BD. OF GOVERNORS OF THE FED. RESERVE SYS., THE U.S. HOUSING MARKET: CURRENT CONDITIONS AND POLICY CONSIDERATIONS 1, 3 (2012) (explaining that, since 2006, “an unprecedented number of households have lost, or are on the verge of losing, their homes,” and that the decline in housing prices between 2007 and 2009 was “unprecedented since the Great Depression”).

3 See Office of Thrift Supervision Integration, Dodd-Frank Act Implementation, 76 Fed. Reg. 43,549, 43,553 (July 21, 2011) [hereinafter Dodd-Frank Implementation] (objecting to preemption of state and local laws).

4 Eliot Spitzer, *Predatory Lenders’ Partner in Crime*, WASH. POST, Feb. 14, 2008, at A25.

5 *Id.*

6 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) [hereinafter Dodd-Frank Act] (codified in scattered sections of U.S.C.).

7 *Id.* pmb1.

new laws.⁸ One of the areas of reform concerns federal preemption for national banks and federal thrifts.⁹ This Article will examine the doctrine of federal preemption in the banking realm and whether federal preemption did, in fact, contribute to the financial crisis.

This Article will first explore the basic framework of the doctrine of preemption in the context of banking. Part I will begin by discussing the judicial constructs of preemption law in banking, including an examination of the seminal case of *Barnett Bank of Marion County, N.A. v. Nelson*.¹⁰ In Part II, this Article will provide a critical examination of how the Dodd-Frank Act maintained some of these judicial constructs and altered others. While this Article analyzes the impact of these changes on the doctrine of preemption, the overall effect of these provisions is yet to be realized.

In Part III, this Article will then examine whether federal preemption contributed to the financial crisis. Those in opposition to federal preemption have argued that federal preemption prevented states from regulating and enforcing state laws against national banks and federal thrifts, and this lack of regulation and enforcement resulted in the subprime mortgage crisis and the financial crisis.¹¹ Based on independent data and an analysis of the preemption doctrine, this Article will argue that federal preemption did not contribute to the crises.

Finally, in Part IV, this Article will examine the benefits versus the costs of eliminating federal preemption and requiring national banks and federal thrifts to comply with the varying laws of fifty states. Based on this analysis, this Article will argue that the costs of eliminating federal preemption far outweigh the supposed benefits.

I. FEDERAL PREEMPTION

The Supremacy Clause provides that federal law “shall be the supreme [l]aw” of the United States, notwithstanding any contrary state

⁸ See, e.g., *id.* §§ 601–628, 124 Stat. at 1596–641 (Bank and Savings Association Holding Company and Depository Institution Regulatory Improvements Act of 2010) (codified in scattered sections of 12 U.S.C.); see also *id.* §§ 1400–98, 124 Stat. at 2136–212 (Mortgage Reform and Anti-Predatory Lending Act) (codified in scattered sections of U.S.C.).

⁹ See 12 U.S.C. §§ 25b, 1465 (2012).

¹⁰ *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25 (1996).

¹¹ See Joseph R. Mason et al., *The Economic Impact of Eliminating Preemption of State Consumer Protection Laws*, 12 U. PA. J. BUS. L. 781, 790 (2010) (“[C]ritics of preemption continue to push three main arguments, including blaming federal regulation for the subprime crisis, alleging that federal regulation has been lax, and that preemption threatens the banking market’s stability.”).

law.¹² Therefore, within constitutional bounds, the federal government has the authority and power to preempt state law.¹³ The following Subpart will analyze the doctrine of federal preemption in the context of banking.

A. Preemption in the Banking Context

The doctrine of preemption starts with an initial inquiry: whether Congress, in promulgating a specific statute, intended the federal law to preempt state law.¹⁴ If a court finds such congressional intent “to set aside the laws” of a state, then the “Supremacy Clause requires” the court to uphold the federal law, and the state law will be preempted.¹⁵ In the context of banking, the Supreme Court has held that national banks “are governed in their daily course of business” by certain kinds of state law, including laws with respect to contracts, purchase and sale of property, debt collections, and liability for debts owed by banks.¹⁶ In other matters, the law of preemption generally follows three basic principles: (i) express preemption, (ii) implied or field preemption, and (iii) conflict preemption.¹⁷

12 U.S. CONST. art. VI, cl. 2; *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 360–61 (1819) (“The 6th article of the constitution of the United States, declares, that the laws made in pursuance of it, ‘shall be the *supreme* law of the land, any thing in the constitution, or laws of any State to the contrary notwithstanding.’ By this declaration, the States are prohibited from passing any acts which shall be repugnant to a law of the United States.”).

13 See RICHARD SCOTT CARNELL ET AL., *THE LAW OF BANKING AND FINANCIAL INSTITUTIONS* 92, 95 (4th ed. 2009) (“Within constitutional limits, Congress has supreme authority Congress has very broad authority to regulate national banks, federal savings institutions, and federal credit unions and to preempt any inconsistent state law.”).

14 *Barnett Bank*, 517 U.S. at 30 (“Th[e] question [of preemption] is basically one of congressional intent.”); *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 280 (1987) (“In determining whether a state statute is pre-empted by federal law and therefore invalid under the Supremacy Clause . . . our sole task is to ascertain the intent of Congress.”); *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 152 (1982) (“The pre-emption doctrine, which has its roots in the Supremacy Clause, requires us to examine congressional intent.” (citation omitted)); *Wells Fargo Bank of Tex., N.A. v. James*, 321 F.3d 488, 491 (5th Cir. 2003) (explaining that “our paramount concern is to effectuate the intent of Congress” when determining whether a state law is preempted).

15 *Barnett Bank*, 517 U.S. at 30.

16 *Nat’l Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 362 (1869); see also 12 C.F.R. §§7.4007(c), 7.4008(e) (2014) (providing that state laws with respect to contracts, torts, criminal law, rights to collect debts, acquisition and transfer of property, taxation, and zoning “apply to national banks to the extent consistent with the decision of the Supreme Court in *Barnett Bank of Marion Cnty., N.A. v. Nelson*”).

17 *Baptista v. JPMorgan Chase Bank, N.A.*, 640 F.3d 1194, 1197 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 253 (2011); *James*, 321 F.3d at 491; *Bank of Am. v. City of S.F.*, 309 F.3d 551, 558 (9th Cir. 2002); *Am. Bankers Ass’n v. Lockyer*, 239 F. Supp. 2d 1000, 1007 (E.D. Cal. 2002); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 226 (2000).

Express preemption can be analyzed in the forms of express statutory preemption, express regulatory preemption, and express nonpreemption.¹⁸ Express statutory preemption occurs when a valid federal statute explicitly states that it preempts state law.¹⁹ In this instance, the courts will follow the express congressional intent.²⁰ The particular federal law will govern, and the state law purporting to apply to the bank will be preempted.²¹ A bank subject to the federal law will need to comply only with the federal law; the state law is not applicable to the bank.²²

Express regulatory preemption occurs when a federal regulation explicitly states that it preempts state law.²³ Courts have found that federal regulations have the same preemptive effect as federal statutes.²⁴ Moreover, a “pre-emptive regulation’s force does not depend on express congressional authority” to preempt state law.²⁵ The basic analysis in this regard is whether the regulatory body was acting within its regulatory authority in promulgating the regulation, and whether the regulation is a reasonable interpretation of federal law

¹⁸ See CARNELL ET AL., *supra* note 13, at 94.

¹⁹ See, e.g., 12 U.S.C. § 1831d(a) (2012) (“In order to prevent discrimination against State-chartered insured depository institutions, . . . with respect to interest rates, if the applicable rate prescribed in this section exceeds the rate such State bank . . . would be permitted to charge . . . such State bank . . . may, notwithstanding any State constitution or statute which is hereby preempted . . . charge on any loan . . .”); *Barnett Bank*, 517 U.S. at 31; *Cal. Fed. Sav. & Loan Ass’n*, 479 U.S. at 280; *de la Cuesta*, 458 U.S. at 152–53; *Jones v. Rath Packing Co.*, 430 U.S. 519, 530–31 (1977); *James*, 321 F.3d at 491; *Bank of Am.*, 309 F.3d at 558; *Am. Bankers Ass’n*, 239 F. Supp. 2d at 1007.

²⁰ *Barnett Bank*, 517 U.S. at 30 (explaining that if Congress intended the federal statute to preempt state law, then “the Supremacy Clause requires courts to follow federal, not state law”).

²¹ *de la Cuesta*, 458 U.S. at 152–53 (noting that preemption is “compelled” when the congressional intent is “explicitly stated in the statute’s language” (quoting *Jones*, 430 U.S. at 525)).

²² CARNELL ET AL., *supra* note 13, at 94.

²³ See *de la Cuesta*, 458 U.S. at 147 (explaining that federal thrift associations “shall not be bound by or subject to any conflicting State law which imposes different . . . due-on-sale requirements” (quoting 41 Fed. Reg. 18,296, 18,287 (May 3, 1976))). The current federal regulation provides for a “permanent preemption of state prohibitions on the exercise of due-on-sale clauses” by both federal savings associations and state-chartered thrift institutions. Preemption of State Due-On-Sale Laws, 12 C.F.R. § 591.1 (2002).

²⁴ *de la Cuesta*, 458 U.S. at 153; *Blum v. Bacon*, 457 U.S. 132, 145–46 (1982) (finding a state law invalid under the Supremacy Clause because it conflicts with a valid federal regulation); *Ridgway v. Ridgway*, 454 U.S. 46, 60 (1981) (holding that the “controlling provisions” of the federal regulation “prevail over and displace inconsistent state law”); *United States v. Shimer*, 367 U.S. 374, 381 (1961) (finding a federal regulation “displace[d] inconsistent state law”).

²⁵ *de la Cuesta*, 458 U.S. at 154.

and not an abuse of regulatory discretion.²⁶ If a court finds express regulatory preemption exists, then a bank subject to the federal regulation will need to comply only with the federal regulation; the state law is similarly not applicable to the bank.²⁷

Express nonpreemption can occur when the federal statute or regulation explicitly provides that it does not preempt state law.²⁸ As a result, both the federal law or regulation (as the case may be) and the state law would be applicable to the bank.²⁹ As a practical matter, the bank must comply with the stricter of the two.³⁰ For example, if the federal law is stricter, then effectively, the bank would have to comply with that law.³¹

If an express statutory or regulatory preemption (or express nonpreemption) does not exist, then the analysis becomes whether the federal statute reveals an implicit intent by Congress to preempt state law.³² Thus, state law can be preempted by implication. Courts will consider whether the “nonspecific statutory language” or the “structure and purpose” of the federal statute clearly indicates an implicit intent to preempt state law.³³ For example, the federal law may indicate a clear intent to occupy that entire field of law.³⁴ This form

26 *Id.* at 153–54 (“Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily.”); *Shimer*, 367 U.S. at 383 (“If [the administrator’s] choice represents a reasonable accommodation of conflicting policies that were committed to the agency’s care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.”); *see also Blum*, 457 U.S. at 145–46 (“The [federal administrator’s] decision to apply the [federal] regulation . . . is eminently reasonable and deserves judicial deference.”); *Ridgway*, 454 U.S. at 57 (finding that there had “been no suggestion that these regulations are unreasonable, unauthorized, or inconsistent with the [federal statute]”).

27 CARNELL ET AL., *supra* note 13, at 94.

28 *Id.*

29 *Id.*

30 *See id.* (“One law is more stringent than another if it prohibits more, requires more, or allows less.” (emphasis omitted)).

31 *Id.*

32 *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 31 (1996); *see* *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 152–53 (1983) (“Pre-emption may be either express or implied . . .”).

33 *Barnett Bank*, 517 U.S. at 31 (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)); *de la Cuesta*, 458 U.S. at 152–53 (quoting *Jones*, 430 U.S. at 525).

34 *Barnett Bank*, 517 U.S. at 31; *see de la Cuesta*, 458 U.S. at 153 (“[A] scheme of federal regulation [created by the federal statute] may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject . . .” (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))) (internal quotation

of preemption is referred to as field preemption.³⁵ Prior to the Dodd-Frank Act, some courts viewed the Home Owners' Loan Act ("HOLA"), the federal statute which provides for the chartering and regulation of federal savings associations,³⁶ as occupying the field with respect to such institutions.³⁷

If an express statutory or regulatory preemption does not exist, and there does not appear to be any implication that the federal law occupies a particular field of law, then the analysis turns to whether the state statute conflicts with the federal law.³⁸ This type of preemption is known as conflict preemption.³⁹ Courts may find conflict preemption when the federal law and the state law are in "irreconcilable conflict."⁴⁰ For instance, conflict preemption may be found when it would be physically impossible for the bank to comply with both the federal law and the state law.⁴¹ For example, a state law may provide that all banks in the state must open by 8:00 a.m., and a federal law might provide that national banks may not open until 9:00 a.m. It would be a physical impossibility for a national bank located

marks omitted)); *Wells Fargo Bank of Tex., N.A. v. James*, 321 F.3d 488, 491 (5th Cir. 2003).

³⁵ *Bank of Am. v. City of S.F.*, 309 F.3d 551, 558 (9th Cir. 2002); *Am. Bankers Ass'n v. Lockyer*, 239 F. Supp. 2d 1000, 1007–08 (E.D. Cal. 2002); Nelson, *supra* note 17, at 227.

³⁶ 12 U.S.C. §§ 1461–1470 (2012).

³⁷ *See Meyers v. Beverly Hills Fed. Sav. & Loan Ass'n*, 499 F.2d 1145, 1147 (9th Cir. 1974) ("[F]ederal law preempts the field of prepayments of real estate loans to federally chartered savings and loan associations, so that any California law in the area is inapplicable to federal savings and loan associations . . . operating within California."); *California v. Coast Fed. Sav. & Loan Ass'n*, 98 F. Supp. 311, 318 (S.D. Cal. 1951) (stating that the Home Owners' Loan Act "embrace[s] the entire field" and that it is thus "clear that Congress has preempted the field, making invalid the state statutes plaintiffs rely upon . . . when attempted to be invoked against a Federal savings and loan association"); *see also First Fed. Sav. & Loan Ass'n of Wis. v. Loomis*, 97 F.2d 831, 834 (7th Cir. 1938) (affirming the finding of the district court that "the plaintiff is a corporation organized and existing pursuant to and by virtue of [the Home Owners' Loan] Act . . . and that as a Federal savings and loan association it is under the sole authority and control of the laws of the United States").

³⁸ *Barnett Bank*, 517 U.S. at 31; *de la Cuesta*, 458 U.S. at 153; *Bank of Am.*, 309 F.3d at 558.

³⁹ *Am. Bankers Ass'n*, 239 F. Supp. 2d at 1008; Nelson, *supra* note 17, at 227–28.

⁴⁰ *Barnett Bank*, 517 U.S. at 31 (quoting *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982)); *Wells Fargo Bank of Tex.*, 321 F.3d at 491; *Am. Bankers Ass'n*, 239 F. Supp. 2d at 1008.

⁴¹ *See Barnett Bank*, 517 U.S. at 31 (declaring physical impossibility to be an "irreconcilable conflict"); *de la Cuesta*, 458 U.S. at 153 ("[S]tate law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when 'compliance with both 'federal and state regulations is a physical impossibility . . .'" (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963)); *Bank of Am.*, 309 F.3d at 558; *Am. Bankers Ass'n*, 239 F. Supp. 2d at 1008 ("[A]ctual conflict arises when simultaneous compliance with state and federal law is a physical impossibility . . ." (internal quotation marks omitted)).

in this state to comply with both the federal law and the state law. Conflict preemption also may be found when the state law is an obstacle to the accomplishment of the purposes and objectives of the federal law.⁴² This form of conflict preemption is referred to as obstacle preemption.⁴³ Thus, obstacle preemption can occur when the state law is inconsistent with the federal law, or the state law interferes with federal policy.⁴⁴

The principles of conflict preemption continue to apply even when the state law is particularly important to the state.⁴⁵ For example, in *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, despite acknowledging that “real property law is a matter of special concern” to a state, the Supreme Court held that a federal regulation permitting federal savings and loan associations to enforce due-on-sale clauses in mortgage loans preempted a conflicting state law.⁴⁶ Moreover, as the Supreme Court indicated in *de la Cuesta*, a conflict with state law may be found when a federal law or regulation provides permission to take certain actions, such as permitting federal savings and loan associations to include and enforce a due-on-sale provision in their mortgage agreements, but does not require that those actions be taken.⁴⁷ Similarly, preemption may be found when it is possible for a national bank to comply with both the federal and the state laws; however, the state laws “infringe the national banking laws or impose an undue burden on the performance of the banks’ functions.”⁴⁸ In addition, preemption may occur if the state law “frustrates the purpose

42 *Barnett Bank*, 517 U.S. at 31; *de la Cuesta*, 458 U.S. at 153; *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977); *Bethlehem Steel Co. v. N.Y. State Labor Relations Bd.*, 330 U.S. 767, 773 (1947); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Bank of Am.*, 309 F.3d at 558; *Am. Bankers Ass'n*, 239 F. Supp. 2d at 1008.

43 Nelson, *supra* note 17, at 228–29.

44 *See id.* (stating that obstacle preemption may be found both when “state and federal law contradict each other” and when “the effects of state law will hinder accomplishment of the purposes behind federal law”); *see also* CARNELL ET AL., *supra* note 13, at 94 (discussing the key question of whether “the state law interfere[s] with the policy of the federal law” (emphasis omitted)).

45 *de la Cuesta*, 458 U.S. at 153 (“The relative importance to the State of its own law is not material when there is a conflict with a valid federal law . . .” (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962))); *Ridgway v. Ridgway*, 454 U.S. 46, 54–55 (1981).

46 *de la Cuesta*, 458 U.S. at 153, 159.

47 *Id.* at 155 (“The conflict does not evaporate because the . . . regulation simply permits, but does not compel, federal savings and loans to include due-on-sale clauses in their contracts and to enforce those provisions when the security property is transferred.”).

48 *Ass'n of Banks in Ins. v. Duryee*, 270 F.3d 397, 404 (6th Cir. 2001) (quoting *Anderson Nat'l Bank v. Lueckett* 321 U.S. 233, 248 (1944)).

of . . . national legislation, or impairs the efficiencies of . . . agencies of the federal government” to carry out their responsibilities.⁴⁹

Moreover, the principles of conflict preemption in banking are not hindered by a presumption against preemption. The presumption against preemption “rests on the assumption that Congress did not intend to supplant state law.”⁵⁰ As the Supreme Court has explained, when Congress legislates in a field which has been “traditionally occupied” by the states, courts “start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”⁵¹ However, a presumption against preemption “is not triggered when the State regulates in an area where there has been a history of significant federal presence.”⁵² “National banking is the paradigmatic example.”⁵³ Thus, “because there has been a ‘history of significant federal presence’ in national banking, the presumption against preemption of state law is inapplicable.”⁵⁴

B. Barnett Bank of Marion County, N.A. v. Nelson

The seminal case in the preemption law of banking is *Barnett Bank of Marion County, N.A. v. Nelson*, in which the Supreme Court addressed the issue of whether a federal bank statute and a Florida state statute were in “irreconcilable conflict.”⁵⁵ The facts and the Supreme Court’s analysis of the case are worth discussing in detail, especially in light of the preeminence of this case in subsequent case law and con-

49 *Am. Bankers Ass’n v. Lockyer*, 239 F. Supp. 2d 1000, 1008 (E.D. Cal. 2002) (quoting *McClellan v. Chipman*, 164 U.S. 347, 357 (1896)). *See also* *Wells Fargo Bank of Tex., N.A. v. James*, 321 F.3d 488, 491 (5th Cir. 2003); *Bank of Am. v. City of S.F.*, 309 F.3d 551, 561 (9th Cir. 2002) (citing *First Nat’l Bank of San Jose v. California*, 262 U.S. 366, 369 (1923)).

50 *Bank of Am.*, 309 F.3d at 558.

51 *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

52 *United States v. Locke*, 529 U.S. 89, 108 (2000); *see also* Robert S. Peck, *A Separation-of-Powers Defense of the “Presumption Against Preemption,”* 84 TUL. L. REV. 1185, 1195 (2010) (“The presumption does not apply where there has been a history of significant federal presence . . .” (internal quotation marks omitted)).

53 *Cuomo v. Clearing House Ass’n*, 557 U.S. 519, 554 (2009) (Thomas, J., dissenting).

54 *Bank of Am.*, 309 F.3d at 559 (quoting *Locke*, 529 U.S. at 108). *See also* *Wachovia Bank v. Burke*, 414 F.3d 305, 314 (2d Cir. 2005) (“The presumption against federal preemption disappears, however, in fields of federal regulation that have been substantially occupied by federal authority for an extended period of time. Regulation of federally chartered banks is one such area.” (quoting *Flagg v. Yonkers Sav. & Loan Ass’n*, 396 F.3d 178, 183 (2d Cir. 2005)).

55 *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 31 (1996).

gressional statutes.⁵⁶ The federal statute at issue in the case, 12 U.S.C. § 92, granted to national banks the power to sell insurance in small towns, specifically those towns that do not exceed 5,000 people.⁵⁷

The federal statute provided in relevant part that a national bank located and doing business in any place the population of which does not exceed five thousand inhabitants . . . may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State . . . to do business in [that] State, by soliciting and selling insurance⁵⁸

The Florida statute provided that a bank may sell insurance in these small towns; however, such a bank may not be a subsidiary of a holding company.⁵⁹ Barnett Bank was a subsidiary of a holding company.⁶⁰

The Court acknowledged that the two statutes do not directly conflict, which would be the case if the federal statute required national banks to sell insurance and the state law prohibited national banks from selling insurance.⁶¹ This hypothetical circumstance would be a case of physical impossibility.⁶² Instead, the Court considered whether the state statute, which prohibited a national bank that is a subsidiary of a holding company from selling insurance in these small towns, “st[ood] as an obstacle to the accomplishment” of one of the purposes of the federal statute.⁶³ In effect, the Court considered whether conflict preemption applied.⁶⁴

The state of Florida argued that the federal statute is limited to only those circumstances where a contrary state law does not exist.⁶⁵ Thus, the Court considered whether the literal language of the fed-

⁵⁶ See 12 U.S.C. § 25b(b)(1)(B)–(C) (2012) (citing to *Barnett Bank*); 15 U.S.C. § 6701(d)(2)(A) (2012) (codifying the Supreme Court’s decision in *Barnett Bank* barring any state from preventing insurance sales where it is otherwise authorized by federal law); Ass’n of Banks in Ins. v. Duryee, 270 F.3d 397, 404–05 (6th Cir. 2001) (citing *Barnett Bank* as the legal standard of preemption).

⁵⁷ *Barnett Bank*, 517 U.S. at 28.

⁵⁸ 12 U.S.C. § 92 (2012).

⁵⁹ Fla. Stat. § 626.988(2) (Supp. 1996).

⁶⁰ *Barnett Bank*, 517 U.S. at 29.

⁶¹ *Id.* at 31.

⁶² See *id.* (describing the inability to comply with two conflicting statutes as a “physical impossibility”); Fla. Lime & Avocado Growers, Inc. v. Paul 373 U.S. 132, 142–143 (1963) (“[F]ederal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce.”).

⁶³ *Barnett Bank*, 517 U.S. at 31 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

⁶⁴ *Id.*

⁶⁵ *Id.* at 32 (“[T]he State of Florida and its supporting *amici* argue . . . that the Federal Statute grants national banks a permission that is limited to circumstances where state law is not to the contrary.”).

eral statute indicated a broad or a limited permission, and found that the plain language of the statute suggested a broad permission.⁶⁶ The statute provided that national banks “*may . . . act as the agent*” for sales of insurance.⁶⁷ Moreover, the federal statute was not qualified by any reference to state regulation with respect to the licensing of banks as insurance agents.⁶⁸ The federal statute expressly provided that any “rules or regulations” governing a national bank’s sale of insurance would be prescribed by the Comptroller of the Currency.⁶⁹ In fact, the only reference to state regulation was limited to the licensing of insurance companies.⁷⁰

Further, the federal statute provided that the grant of authority to sell insurance is “in addition” to other powers granted to national banks.⁷¹ The Court explained that grants of “powers” to national banks, whether enumerated⁷² or incidental,⁷³ historically have been interpreted “as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law.”⁷⁴ In a case where Con-

66 *Id.* (“[T]he Federal Statute’s language suggests a broad, not a limited, permission. That language says, without qualification, that national banks ‘*may . . . act as the agent*’ for insurance sales.” (quoting 12 U.S.C. § 92)).

67 12 U.S.C. § 92 (emphasis added); *Barnett Bank*, 517 U.S. at 32.

68 *See* 12 U.S.C. § 92; *Barnett Bank*, 517 U.S. at 32 (discussing that 12 U.S.C. § 92 only refers to state regulation in the context of “licensing—not of banks and insurance agents, but of the insurance companies whose policies the bank, as insurance agent, will sell”).

69 12 U.S.C. § 92.

70 *Id.*

71 *Id.*

72 Enumerated powers of national banks are those powers expressly granted to national banks by statute. *See, e.g.*, 12 U.S.C. § 24 (2012) (granting national banks the power to receive deposits and make loans); CARNELL ET AL., *supra* note 13, at 108 (explaining that a “bank’s authority depends on the analysis of the statutory text”).

73 Incidental powers of national banks are those powers that have been interpreted by the courts or the applicable Federal banking regulator to be incidental to the business of banking. *See* 12 U.S.C. § 24 (2012) (granting national banks the power “[t]o exercise . . . all such incidental powers as shall be necessary to carry on the business of banking”); *see also* NationsBank of N.C. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 259 (1995) (holding that the business of banking is not limited to the enumerated powers set forth in 12 U.S.C. § 24 and the Comptroller of the Currency has the discretion to authorize activities beyond those powers expressly set forth in the statute); CARNELL ET AL., *supra* note 13, at 108–09.

74 *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 32 (1996); *see also* *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 170 (1982) (holding that a federal regulation permitting national banks to include a “due on sale” clause in mortgage agreements preempts a conflicting state statute prohibiting the acceleration of a debt upon sale of the property); *Franklin Nat’l Bank of Franklin Square v. New York*, 347 U.S. 373, 375–79 (1954) (holding that a federal statute permitting national banks to accept savings deposits preempts a conflicting state statute prohibiting the use of the word “savings” in the advertising of certain state and national banks); *First Nat’l Bank of San Jose v. California*, 262 U.S. 366, 368–69 (1923) (finding that national banks’ “power” to receive deposits

gress has explicitly granted a power to a national bank, the Court reasoned that Congress would not want the states to “forbid, or significantly impair,” that power.⁷⁵ In contrast, states continued to have the power to prescribe laws to regulate national banks where those state laws did not “prevent or significantly interfere” with the exercise by the national bank of the powers granted by federal authority.⁷⁶

The federal statute in this case explicitly granted a national bank the power to sell insurance.⁷⁷ The federal statute did not expressly condition the exercise of that power upon state permission, and thus the federal statute contained no “indication” that it was Congress’s intent to subject that power to a state restriction.⁷⁸

The Court concluded that the word “may” in the federal statute should have a broad interpretation that did not condition the federal power upon state permission.⁷⁹ Thus, the Court held that the federal statute granted national banks the power to sell insurance regardless of whether or not a state permitted banks to sell insurance.⁸⁰ Under the “ordinary legal principles of pre[e]mption,” the state statute was preempted.⁸¹

As further discussed in Part II.A, the *Barnett* decision continues to be the seminal case in the preemption law of banking.⁸²

preempts contrary state escheat law); *Bank of Am. v. City of S.F.*, 309 F.3d 551, 555, 557–60, 561–64 (9th Cir. 2002) (finding that the National Bank Act preempts conflicting municipal ordinances prohibiting the charging of ATM fees to non-depositors).

⁷⁵ *Barnett Bank*, 517 U.S. at 33; *Rose v. Chase Bank USA, N.A.*, 513 F.3d 1032, 1037 (9th Cir. 2008); *Bank of Am.*, 309 F.3d at 561.

⁷⁶ *Barnett Bank*, 517 U.S. at 33; *see also* *Anderson Nat’l Bank v. Lueckett*, 321 U.S. 233, 247–52 (1944) (holding that a state law requiring surrender of abandoned accounts was not an “unlawful encroachment on the rights and privileges of national banks”); *McClennan v. Chipman*, 164 U.S. 347, 358 (1896) (finding that a state statute prohibiting national banks from taking real estate from insolvent transferees would not “destroy[] or hamper[]” any of the functions of national banks); *Nat’l Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 362 (1869) (holding that national banks are not exempt from a state law that does not “interfere with, or impair the[] efficiency” of a national bank’s performance of its functions); *Bank of Am. v. City of S.F.*, 309 F.3d 551, 558–59 (9th Cir. 2002) (“State regulation of banking is permissible when it does not prevent or significantly interfere with the national bank’s exercise of its powers.” (internal quotation marks omitted)).

⁷⁷ *Barnett Bank*, 517 U.S. at 34.

⁷⁸ *Id.* at 34–35 (citing *Franklin Nat’l Bank*, 347 U.S. at 378).

⁷⁹ *Id.* at 35 (citing *Franklin Nat’l Bank*, 347 U.S. at 343).

⁸⁰ *Id.* at 37.

⁸¹ *Id.* at 28, 37–38 (holding that the ordinary rules of preemption, rather than the special McCarran-Ferguson anti-preemption rule, apply where the federal statute “specifically relates to the business of insurance”).

⁸² *Id.* at 25; *see infra* Part II.A.

II. THE DODD-FRANK ACT AND FEDERAL PREEMPTION

In the Dodd-Frank Act, Congress addressed the doctrine of federal preemption in the banking realm. This Part will first discuss the preemption standard provided in the statute.

A. *The Preemption Standard*

In the spirit of reform premised by the statute, the Dodd-Frank Act specifically addresses preemption with regard to State consumer financial laws.⁸³ A “State consumer financial law” is a state law “that does not directly or indirectly discriminate against national banks and that directly and specifically regulates the manner, content, or terms and conditions of any financial transaction . . . with respect to a consumer.”⁸⁴ The Act’s preemption standard provides that a State consumer financial law will be preempted only if one of the following three circumstances apply: (i) the “application of a State consumer financial law would have a discriminatory effect on national banks” as compared to the effect of the law on state-chartered banks,⁸⁵ (ii) the State consumer financial law “prevents or significantly interferes” with the national bank’s exercise of its powers “in accordance with the legal standard for preemption” in the *Barnett* decision,⁸⁶ or (iii) the State consumer financial law is preempted by another federal law.⁸⁷ Notably, with respect to national banks, the Dodd-Frank Act does not address preemption of state laws that do not meet the criteria of a “State consumer financial law.”⁸⁸ Thus, existing preemption standards would still apply to national banks with respect to those state laws. Further, the Dodd-Frank Act expressly provides that the National Bank Act “does not occupy the field in any area of [s]tate law.”⁸⁹

In considering the preemption standard, it is evident Congress was concerned with discrimination against national banks. As an initial matter, a state law will not fall within the scope of a “State consumer financial law” if it directly or indirectly discriminates against

83 See 12 U.S.C. § 25b (2012) (clarifying state law preemption standards for national banks and subsidiaries).

84 *Id.* § 25b(a)(2) .

85 *Id.* § 25b(b)(1)(A) .

86 *Id.* § 25b(b)(1)(B) .

87 *Id.* § 25b(b)(1)(C) .

88 Dodd-Frank Implementation, *supra* note 3, at 43,551 n.11; *see id.* at 43,556 n.47 (“[N]othing in Dodd-Frank affects the [Comptroller’s] authority to address preemption questions concerning laws other than ‘state consumer financial laws.’”).

89 12 U.S.C. § 25b(b)(4).

national banks.⁹⁰ A state law that directly discriminates against national banks presumably would permit less or require more of a national bank than a state-chartered bank. For example, if a state law required national banks to provide drive-up window service while state-chartered banks were not held to the same requirement, then the state law would directly discriminate against national banks. Similarly, if a state law required national banks to be closed on Saturdays but state-chartered banks were permitted to be open on Saturdays, then the state law would directly discriminate against national banks.

A state law that indirectly discriminates against national banks is somewhat less obvious; however, one can imagine a circumstance in which the state law required borrowers of national banks to pay a two percent mortgage recordation tax while borrowers of state-chartered banks paid a mortgage recordation tax of only one percent of the loan amount. In this example, the fee is paid by the borrower; thus, the state law indirectly discriminates against national banks by requiring borrowers of national banks to pay higher fees than borrowers of state banks.

If a state law “does not directly or indirectly discriminate against national banks” and “directly and specifically regulates the manner, content, or terms and conditions of any financial transaction” with a consumer, then the state law will be considered a “State consumer financial law” under the statute.⁹¹ The analysis then turns to whether the state law may be preempted pursuant to one of the three prongs of the preemption standard.

The first prong of the preemption standard, which may be aptly called “discriminatory effect preemption,” is a new standard for finding preemption of a State consumer financial law.⁹² This prong provides that a State consumer financial law may be preempted, even if it

⁹⁰ *Id.* § 25b(a)(2) .

⁹¹ *Id.*

⁹² Interpretive Letter No. 1132 from John Walsh, Acting Comptroller of the Currency, Office of the Comptroller of the Currency, to Sen. Thomas R. Carper, at 2 & n.5 (May 12, 2011). While discriminatory effect preemption is a new standard in the preemption of State consumer financial laws, the concern of a possible discriminatory effect against national banks has a long history in the usury laws of banking. *See, e.g.,* *Tiffany v. Nat'l Bank of Mo.*, 85 U.S. 409, 413 (1873) (expressing a concern with “expos[ing] [national banks] to the hazard of unfriendly legislation by the States,” and thus holding that national banks may charge interest at the same rate as that permitted to be charged by state-chartered banks, but if a higher rate is permitted to be charged by other lenders in the state, national banks may charge that higher rate); *cf.* 12 U.S.C. § 1831d(a) (2012) (permitting insured state-chartered banks to charge the highest rate of interest permitted by lenders in the state as a means of avoiding discrimination against insured banks in general).

does not directly or indirectly discriminate against national banks but rather, if it has a “discriminatory effect on national banks” as compared to the effect on state-chartered banks.⁹³ One may look to the Equal Credit Opportunity Act (“ECOA”) ⁹⁴ to discern the meaning of discriminatory effect within banking law. The ECOA prohibits discrimination against credit applicants on the basis, *inter alia*, of age, gender, marital status, race, color, religion, or national origin.⁹⁵ The Federal Reserve Board adopted an “effects test” in interpreting the ECOA.⁹⁶ The ECOA may prohibit a particular practice by a creditor that has a “disproportionately negative impact” or effect on one of the protected classes.⁹⁷ This may be the case even if the creditor had “no intent to discriminate” and the practice itself appears to be “neutral on its face.”⁹⁸

As applied to the discriminatory effect preemption prong, a State consumer financial law may be deemed to have a discriminatory effect on national banks as compared to the effect on state banks if, for example, the law provides that all businesses located in the state must pay a fee to the state to obtain a license to operate. Under this law, state banks would be required to pay the single fee to the state to obtain a license while national banks would be required to pay the fee for a state license plus the fee to the Comptroller of the Currency to obtain a charter to operate as a national bank.⁹⁹ Thus, this state law, while appearing neutral on its face, would have a disproportionately negative impact or effect on national banks as compared to state banks.

The second prong, generally referred to as “*Barnett* standard preemption,”¹⁰⁰ has been a source of debate regarding whether the prong preserves and codifies the *Barnett* precedent of conflict preemption¹⁰¹ or creates a new preemption standard. This debate will be further discussed in Part II.A.1. The third prong simply acknowl-

93 12 U.S.C. § 25b(b)(1)(A)–(B) (2012).

94 Equal Credit Opportunity Act, Pub. L. No. 93-495, 88 Stat. 1521 (1974) (codified as amended at 15 U.S.C. §§ 1691(a)–(f) (2012)).

95 15 U.S.C. § 1691(a)(1).

96 CARNELL ET AL., *supra* note 13, at 354; *see* 12 C.F.R. § 202.6 (2013).

97 12 C.F.R. § 202.6(a)(2). An exception exists if the “practice meets a legitimate business need” of the creditor that cannot reasonably be accomplished as well in a way that is less unequal in its effect. *Id.*

98 *Id.*

99 *See infra* note 411 and accompanying text.

100 Interpretive Letter No. 1132, *supra* note 92, at 2–4.

101 *See Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25 (1996).

edges preemption of State consumer financial laws by other federal laws.¹⁰²

The Dodd-Frank Act also provides new procedures the Comptroller must follow under the *Barnett* standard preemption prong.¹⁰³ Any preemption determination under this prong may be made either “by a court, or by regulation or order of the Comptroller of the Currency on a case-by-case basis.”¹⁰⁴ In each instance, the Comptroller must make a determination about the impact the “particular State consumer financial law” has on national banks that are subject to either the particular state law or, more broadly, the law of another state with “substantively equivalent terms.”¹⁰⁵ The Comptroller must consult with the Bureau of Consumer Financial Protection (“BCFP”) in determining that another state’s law is “substantively equivalent” to the state law at issue.¹⁰⁶ This language was intended to allow the Comptroller “to make a single determination” regarding the consumer financial laws of multiple states provided each law includes “substantively equivalent terms.”¹⁰⁷ Moreover, the Comptroller may not preempt a State consumer financial law “unless substantial evidence, made on the record of the proceeding, supports the specific finding [of preemption] . . . in accordance with the legal standard” of the *Barnett* decision.¹⁰⁸ The Comptroller is further required to conduct a periodic review every five years after making a preemption determination with respect to a State consumer financial law.¹⁰⁹ The Comptroller’s review is subject to notice and public comment.¹¹⁰

The following Subparts examine the debate regarding the interpretation of the *Barnett* preemption standard and illustrate how the standard will be applied by the Comptroller and the courts.

1. Interpretation

The *Barnett* standard preemption prong provides that a State consumer financial law may be preempted if it “prevents or significantly interferes” with the national bank’s exercise of its powers “in accord-

102 12 U.S.C. § 25b(b)(1)(C) (2012) (“[T]he State consumer financial law is preempted by a provision of Federal law other than title 62 of the Revised Statutes.”).

103 Dodd-Frank Implementation, *supra* note 3, at 43,551 n.11.

104 12 U.S.C. § 25b(b)(1)(B).

105 *Id.* § 25b(b)(3)(A).

106 *Id.* § 25b(b)(3)(B).

107 Interpretive Letter No. 1132, *supra* note 92, at 4 & n.17 (citing S. REP. NO. 11-176, at 176 (2010)).

108 12 U.S.C. § 25b(c).

109 *Id.* § 25b(d)(1).

110 *Id.*

ance with the legal standard for preemption” in the *Barnett* decision.¹¹¹ Two competing theories have been proffered regarding how this prong should be interpreted.

In a May 12, 2011 letter to Senator Thomas Carper, who along with Senator Mark Warner authored the final version of the preemption provisions of the Dodd-Frank Act, the Acting Comptroller of the Currency, John Walsh, discussed his interpretation of the *Barnett* standard preemption prong.¹¹² According to Walsh, the use of the phrase “in accordance with the legal standard for preemption” in the *Barnett* decision should be interpreted as Congress’s intention that the Comptroller use the standard for conflict preemption discussed in *Barnett*.¹¹³ Walsh acknowledged that the statute includes the phrase “prevent[s] or significantly interfere[s]” from the *Barnett* case and, therefore, the conflict preemption analysis will start with this formulation.¹¹⁴ However, Walsh argued that the statute requires that phrase to be analyzed “in accordance with the legal standard for preemption” in the *Barnett* decision; thus, the Comptroller’s analysis will incorporate the Supreme Court’s entire analysis of conflict preemption in *Barnett* rather than just the single phrase.¹¹⁵

This analysis appears to be sound. In examining the plain language of the statute, if Congress intended to narrow the preemption standard to a “prevents or significantly interferes” standard, then the qualifying phrase, “in accordance with the legal standard for preemption” in the *Barnett* case,¹¹⁶ would be unnecessary. Alternatively, if Congress intended the “prevents or significantly interferes” language to be the new standard for preemption, then the qualifying phrase might simply state “in accordance with” the *Barnett* case. However, the qualifying phrase refers to the “legal standard for preemption” in the *Barnett* decision.¹¹⁷ Thus, Congress appears to have contemplated a “legal standard for preemption” broader than the “prevents or significantly interferes” language.

This interpretation is reinforced by the “substantial evidence” requirement of the statute, in which a finding of preemption must be

111 *Id.* § 25b(b)(1)(B).

112 Interpretive Letter No. 1132, *supra* note 92, at 1.

113 *Id.* at 2 (quoting 12 U.S.C. § 25b(b)(1)(B)) (citing *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 31–32 (1996)).

114 *Id.* (quoting 12 U.S.C. § 25b(b)(1)(B)) (citing *Barnett Bank*, 517 U.S. at 33).

115 *Id.* at 2–3 & n.13 (quoting 12 U.S.C. § 25b(b)(1)(B)) (citing *Barnett Bank*, 517 U.S. at 33–34).

116 12 U.S.C. § 25b(b)(1)(B).

117 *Id.*

“in accordance with the legal standard” of the *Barnett* decision.¹¹⁸ This interpretation is further supported by statutory and judicial precedent.¹¹⁹ The language of the *Barnett* standard preemption provision in the Dodd-Frank Act is effectively the same language Congress used in the Gramm-Leach-Bliley Act of 1999 when setting forth preemption standards for the sale of insurance by national banks.¹²⁰ Moreover, the Sixth Circuit in *Ass’n of Banks in Insurance v. Duryee*, applied the same *Barnett* “legal standards for preemption” provision in the Gramm-Leach-Bliley Act to preempt certain state licensing laws that prohibited national banks from acting as insurance agents in small towns with a population of 5,000 or less.¹²¹ The Sixth Circuit’s analysis makes clear that the “*Barnett Bank* standard” of the Gramm-Leach-Bliley Act refers to the entire analysis of the Supreme Court in the *Barnett* decision.¹²²

Further, Senator Carper released a statement indicating that the Comptroller’s view of the *Barnett* standard preemption provisions of the Dodd-Frank Act is consistent with his intent and the legislative language.¹²³ Senator Carper highlighted that the *Barnett* standard preemption provisions in the Dodd-Frank Act “do not create a brand new preemption standard, but instead clarify that the traditional preemption tests, as laid out by the Supreme Court in the *Barnett* case, continue to apply.”¹²⁴

However, the Department of the Treasury took a different view. In a June 27, 2011 letter to Acting Comptroller Walsh, General Counsel of the Department of the Treasury George W. Madison argued

118 *Id.* § 25b(c); *see also* Interpretive Letter No. 1132, *supra* note 92, at 3 & n.13 (explaining the “substantial evidence” requirement of the statute).

119 15 U.S.C. § 6701(d)(2)(A) (2012); *Ass’n of Banks in Ins. v. Duryee*, 270 F.3d 397, 404–05, 408–10 (6th Cir. 2001) (citing the *Barnett Bank* decision as the standard for findings of preemption); *see also* Interpretive Letter No. 1132, *supra* note 92, at 3.

120 15 U.S.C. § 6701(d)(2)(A) (“In accordance with the legal standards for preemption set forth in the [*Barnett Bank* decision], no State may . . . prevent or significantly interfere with the ability of a depository institution . . . to engage . . . in any insurance sales, solicitation, or crossmarketing activity.”); *see also* Interpretive Letter No. 1132, *supra* note 92, at 3; Letter from Sen. Thomas R. Carper & Sen. Mark R. Warner to Timothy Geithner, Sec’y of the Treasury, at 2 (July 8, 2011) (noting the similarities in the language between the Dodd-Frank Act and the Gramm-Leach-Bliley Act).

121 *Ass’n of Banks in Ins.*, 270 F.3d at 400–01, 404–05, 408–10; *see also* Interpretive Letter No. 1132, *supra* note 92, at 3.

122 *Ass’n of Bank in Ins.*, 270 F.3d at 404–05, 408 (discussing in detail the Court’s entire analysis in the *Barnett Bank* decision and finding preemption under the “traditional *Barnett Bank* standards”); *see also* Interpretive Letter No. 1132, *supra* note 92, at 3.

123 *OCC Letter Sketches Implementation Plan For Preemption Regime Under Dodd-Frank*, BANKINGDAILY (May 13, 2011), <https://newsletters.aba.com/bcnl/20110527>.

124 *Id.* (quoting May 13, 2011 statement of Sen. Carper).

that the “plain language of the statute” provides that a State consumer financial law may be preempted if the law “prevents or significantly interferes with the exercise by the national bank of its powers.”¹²⁵ Therefore, according to the Treasury, Congress intended the “relevant test” to be the more narrow “prevents or significantly interferes” standard in the *Barnett* decision and not the broader interpretation of the “entirety of the *Barnett* opinion” advocated by the Comptroller.¹²⁶

In pointed response, Senator Carper and Senator Warner authored a joint correspondence to the Secretary of the Treasury Timothy Geithner reiterating that the “*Barnett* standard was maintained.”¹²⁷ Senators Carper and Warner explained that the “prevents or significantly interferes” language “is not a limiting phrase” but rather is “stating the touchstone of the *Barnett* case.”¹²⁸ Further, the Senators emphasized that a finding by the Comptroller to preempt a State consumer financial law will be upheld by a court only if the determination is “in accordance with the legal standard” of the *Barnett* decision.¹²⁹ Therefore, the Dodd-Frank Act “explicitly order[s]” a court to review the Comptroller’s preemption finding “based on the legal standard of *Barnett*, not some part of it.”¹³⁰ As the Senators stated, it would be an “absurdity” if Congress were instructing courts to use a standard of review that is broader than the standard used by the Comptroller of the Currency.¹³¹

In the final rule implementing the preemption provisions of the Dodd-Frank Act, the Comptroller further explained that the statute’s reference to the “legal standard for preemption” in the *Barnett* decision is a reference to “*conflict preemption*, applied in the context of powers granted national banks under Federal law.”¹³² The Dodd-Frank Act was not intended to establish, nor does it establish, a new “prevents or significantly interferes” standard for preemption.¹³³ The “prevents or significantly interferes” language in the statute is simply a reference to “part of” the Supreme Court’s “discussion of its reasoning” in the *Barnett* decision and was not intended to be construed as

125 Comment Letter from George W. Madison, Gen. Counsel of the Dep’t of the Treasury, to John Walsh, Acting Comptroller of the Currency, at 1–2 (June 27, 2011), available at http://cdn.americanbanker.com/media/pdfs/TreasuryOCC_062811.pdf.

126 *Id.* at 2.

127 Letter from Carper & Warner, *supra* note 120, at 1 (emphasis added).

128 *Id.*

129 *Id.* at 2 (quoting 12 U.S.C. § 25b(c) (2012)).

130 *Id.* (emphasis added).

131 *Id.*

132 Dodd-Frank Implementation, *supra* note 3, at 43,555.

133 *Id.*

the “legal standard for preemption” in the decision.¹³⁴ Thus, the statute “incorporates the conflict preemption legal standard and the reasoning that supports it in the Supreme Court’s *Barnett* decision.”¹³⁵

In sum, Congress’s intent clearly was to maintain and codify the *Barnett* preemption standard.¹³⁶ This “standard is conflict preemption, as supported by the reasoning” of the *Barnett* decision.¹³⁷ This reasoning includes the “prevents or significantly interferes” formulation, “but is not bounded by” it.¹³⁸ Thus, the standard is broader than the “prevents or significantly interferes” language and incorporates the entirety of the *Barnett* preemption analysis.¹³⁹ The Comptroller will, therefore, consider the Supreme Court’s entire analysis of conflict preemption in the *Barnett* decision when determining whether to preempt a State consumer financial law.¹⁴⁰ This crucial clarification in the interpretation of the preemption standard is exceedingly important in the doctrine of preemption for national banks. If Congress had not intended to preserve the conflict preemption analysis in the *Barnett* decision, but instead sought to create a new, narrower “prevents or significantly interferes” standard, then “it would have been rejecting not just *Barnett*, but also . . . well over a century of judicial precedent upon which the decision was founded.”¹⁴¹

2. Application

Based on this interpretation of the *Barnett* standard preemption prong, exactly what factors will guide the Comptroller in determining whether a State consumer financial law is preempted? According to the Comptroller, the “essence” of the analysis under the *Barnett* conflict preemption standard is an “evaluation of the extent and nature” of any “impediment” a state law imposes on the “exercise of a power

134 *Id.*

135 *Id.*

136 Letter from Carper & Warner, *supra* note 120, at 1 (“[T]he statute is intended to codify the *Barnett* case.”); Interpretive Letter No. 1132, *supra* note 92, at 1–2 (citing 156 CONG. REC. S5902 (daily ed. July 15, 2010) (colloquy between Sen. Carper and Chairman Dodd) (“There should be no doubt that the legislation codifies the preemption standard stated by the U.S. Supreme Court in [*Barnett Bank*].”)); *see also* H.R. REP. NO. 111-517, at 875 (2010) (Conf. Rep.) (“The conference report [accompanying the Dodd-Frank Act] codifies the standard in . . . *Barnett Bank* . . .”).

137 Dodd-Frank Implementation, *supra* note 3, at 43,555.

138 *Id.*

139 Letter from Carper & Warner, *supra* note 120, at 1–2.

140 Interpretive Letter No. 1132, *supra* note 92, at 2–3 & n.13.

141 Dodd-Frank Implementation, *supra* note 3, at 43,555.

granted national banks under Federal law.”¹⁴² The “conflict” the Comptroller analyzes under the conflict preemption standard is the “nature and scope of that impediment.”¹⁴³ Moreover, the “prevents or significantly interferes” formulation is the “touchstone” of the *Barnett* standard for conflict preemption and the related analysis.¹⁴⁴ For example, in *Barnett*, the state statute restricting the ability of a national bank to sell insurance in small towns imposed an “impediment” on the “exercise of a power granted national banks under Federal law.”¹⁴⁵ Based on the Supreme Court’s analysis, the “nature and scope” of that impediment significantly interfered with the ability of a national bank to exercise its power granted under federal law to sell insurance in small towns.¹⁴⁶ Thus, the state statute was preempted.¹⁴⁷

Similarly, under the *Barnett* standard, state laws that require national banks to make certain disclosures or refrain from using certain terms in advertising with respect to taking deposits or making loans would “present a significant interference” with the exercise of powers granted national banks under federal law.¹⁴⁸ For instance, in *Franklin National Bank of Franklin Square v. New York*, the Supreme Court found a “clear conflict” between a federal statute that permitted national banks to accept savings deposits and a state statute that prohibited the use of the word “savings” in the advertising of certain state and national banks.¹⁴⁹ The Court found “no indication that Congress intended to make this phase of national banking subject to” state law.¹⁵⁰ Thus, the state statute was preempted.¹⁵¹ *Franklin National Bank* was

142 Dodd-Frank Implementation, *supra* note 3, at 43,556. It should be noted that while the preemption analysis in the *Barnett* decision could be applied to any type of state law, the scope of the *Barnett* standard preemption provisions in the Dodd-Frank Act is limited to the determination of whether a state consumer financial law is applicable to national banks. *Id.* at 43,556 n.47.

143 *Id.* at 43,556.

144 *Id.* at 43,555; Letter from Carper & Warner, *supra* note 120, at 1; *see also* Interpretive Letter No. 1132, *supra* note 92, at 2 (explaining that the preemption provision includes the phrase “prevents or significantly interferes” from the *Barnett* case and, therefore, the conflict preemption analysis will start with this formulation).

145 *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 32–33 (1996); Dodd-Frank Implementation, *supra* note 3, at 43,556.

146 *Barnett Bank*, 517 U.S. at 32–33; Dodd-Frank Implementation, *supra* note 3, at 43,556.

147 *Barnett Bank*, 517 U.S. at 28, 37–43.

148 Dodd-Frank Implementation, *supra* note 3, at 43,557.

149 *Franklin Nat’l Bank of Franklin Square v. New York*, 347 U.S. 373, 374, 378 (1954).

150 *Id.* at 378.

151 *Id.* at 374; *see also* *Gutierrez v. Wells Fargo Bank, N.A.*, 704 F.3d 712, 726 (9th Cir. 2012) (“The requirement to make particular disclosures falls squarely within the purview of federal banking regulation and is expressly preempted”); *Rose v. Chase Bank USA, N.A.*, 513 F.3d 1032, 1036–38 (9th Cir. 2008) (finding that the National Bank Act preempted a state law requiring certain disclosures on convenience checks issued by na-

expressly discussed in the *Barnett* opinion and is one of the many cases upon which the *Barnett* decision relied.¹⁵²

Moreover, state laws that impose an impediment on a fundamental or core banking business would significantly interfere with the ability of a national bank to manage that business.¹⁵³ For example, state laws that would impact the ability of a national bank to “underwrite and mitigate credit risk, manage credit risk exposures, and manage loan-related assets” would “meaningfully interfere” with the “fundamental” banking business of making loans and managing the associated credit risks.¹⁵⁴ Similarly, state laws that would impose or alter standards with respect to the depository activities of a national bank, such as standards affecting the types and terms of deposit accounts or the availability of funds, would “significantly interfere” with the management of a “core” business of national banks.¹⁵⁵ State laws directed at the depository activities of a national bank are significant because such laws affect the “overall risk management and funding strategies” of a bank, “including liquidity, interest rate risk exposure, funding management, and fraud prevention.”¹⁵⁶

Judicial interpretation of the preemption provisions of the Dodd-Frank Act provides further enlightenment. For example, in *Baptista v. JPMorgan Chase Bank, N.A.*, the Eleventh Circuit reviewed the dismissal of a class action suit against JPMorgan Chase for charging a check cashing service fee to a non-account holder.¹⁵⁷ The plaintiff-

tional banks); *Am. Bankers Ass’n v. Lockyer*, 239 F. Supp.2d 1000, 1014–18 (E.D. Cal. 2002) (finding preemption of a state law that required mandatory disclosures on credit card bills because the “monetary and non-monetary costs” of the disclosures “constitute[d] a significant interference” with the powers granted to national banks under the National Bank Act).

152 *Barnett Bank*, 517 U.S. at 33–35 (“In defining the pre-emptive scope of statutes and regulations granting a power to national banks, [prior] cases take the view that normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted. . . . Thus, the Court’s discussion in *Franklin Nat. Bank* [sic], the holding of that case, and the other precedent . . . strongly argue for [an interpretation of the federal statute] that does not condition federal permission upon that of the State.”).

153 *Dodd-Frank Implementation*, *supra* note 3, at 43,557.

154 *Id.* (explaining that, for example, state laws affecting “the protection of collateral value, credit enhancements, risk mitigation, loan-to-value standards, loan amortization and repayment requirements . . . when a loan may be called due and payable, escrow standards, use of credit reports to assess creditworthiness of borrowers, and origination, managing, and purchasing and selling extensions of credit” would meaningfully interfere with a national bank’s fundamental business of making loans and managing the associated risks).

155 *Id.*

156 *Id.*

157 *Baptista v. JPMorgan Chase Bank, N.A.*, 640 F.3d 1194, 1196 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 253 (2011).

appellant alleged the service fee violated a Florida statute that “prohibit[ed] a bank from ‘settling] any check drawn on it otherwise than at par.’”¹⁵⁸ In considering the question of what type of preemption would be applicable (i.e., express preemption, field preemption, or conflict preemption), the Eleventh Circuit underscored that the Dodd-Frank Act amended the preemption section of the National Bank Act “to address this very issue.”¹⁵⁹ Upon review of the *Barnett* preemption standard in the statute, as well as the *Barnett* case itself, the court found that “under the Dodd-Frank Act, the proper preemption test asks whether there is a significant conflict between the state and federal statutes—that is, the test for conflict preemption.”¹⁶⁰ Applying this test, the court found a “clear conflict” to exist.¹⁶¹ The state statute which prohibited the charging of fees to non-account holders was in “substantial conflict with federal authorization,” which permitted such fees to be charged.¹⁶² Thus, the state statute was preempted.¹⁶³

A number of points may be drawn from the *Baptista* case. In its analysis, the Eleventh Circuit observed that the Supreme Court in *Barnett* found that the “controlling question” was whether the state law “forbid[s], or . . . impair[s] significantly, the exercise of a power that Congress explicitly granted.”¹⁶⁴ The Eleventh Circuit concluded that the “proper preemption test” under the Dodd-Frank Act is “the test for conflict preemption.”¹⁶⁵ This analysis was directly in line with that of the Comptroller and with the intent of Congress. The “prevents or significantly interferes” formulation or even the “forbid[s], or . . . impair[s] significantly” formulation is the “touchstone” of the preemption analysis.¹⁶⁶ However, the analysis does not end with either of these formulations. As the Eleventh Circuit and the Comp-

158 *Id.* (quoting FLA. STAT. § 655.85 (2011)).

159 *Id.* at 1197.

160 *Id.*

161 *Id.* at 1198.

162 *Id.*

163 *Id.*

164 *Id.* at 1197 (quoting *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 33 (1996)).

165 *Id.*

166 *See* Dodd-Frank Implementation, *supra* note 3, at 43,555 (noting that the “prevents or significantly interferes” formulation is the “touchstone” of the *Barnett* standard for conflict preemption and the related analysis); Letter from Carper and Warner, *supra* note 120, at 1 (explaining that the “prevents or significantly interferes” language “is not a limiting phrase” but rather “stat[es] the touchstone of the *Barnett* case”); *see also* Interpretive Letter No. 1132, *supra* note 92, at 2 (explaining that the provision includes the phrase “prevents or significantly interferes” from the *Barnett* case and, therefore, the conflict preemption analysis will start with this formulation).

troller pointed out, the preemption standard under the Dodd-Frank Act is the broader test of “conflict preemption” based on the entirety of the analysis in the Supreme Court’s *Barnett* decision.¹⁶⁷

Further, as discussed previously in Part I.A, the principles of conflict preemption continue to apply even when the state law is particularly important to the state.¹⁶⁸ The state law in *Baptista* “[did] not directly or indirectly discriminate against national banks and . . . directly and specifically regulate[d] the manner, content, or terms and conditions of [a] financial transaction . . . with respect to a consumer.”¹⁶⁹ Thus, the state law at issue in *Baptista* was a State consumer financial law under the meaning of the Dodd-Frank Act.¹⁷⁰ While State consumer financial laws are, without question, of particular importance to the state, it is evident that even after the financial crisis, during which many consumers suffered financial harm,¹⁷¹ courts will continue to honor the principles of conflict preemption as indicated by the decision in *Baptista* to preempt a State consumer financial law.¹⁷²

Moreover, not only was the state statute in *Baptista* a State consumer financial law, but, in particular, it was a law that protected individuals who did not have a bank account in which to deposit a check and, therefore, would need to cash the check with the bank upon which the check was drawn.¹⁷³ Such individuals are most likely of limited financial means and lack the wherewithal to open and maintain the minimum balances necessary for a modern bank account.¹⁷⁴ These are exactly the type of individuals the Dodd-Frank Act

167 *Baptista*, 640 F.3d at 1197; Dodd-Frank Implementation, *supra* note 3, at 43,555 (“Th[e] standard is conflict preemption, as supported by the reasoning of the [*Barnett*] decision.”).

168 *See supra* notes 45–46 and accompanying text.

169 12 U.S.C. § 25b(a)(2) (2012); *Baptista* 640 F.3d at 1196 (11th Cir. 2011).

170 12 U.S.C. § 25b(a)(2); *Baptista*, 640 F.3d at 1196–97.

171 156 CONG. REC. S5888 (daily ed. July 15, 2010) (statement of Sen. Johnson) (explaining that, as a result of the financial crisis, “Americans . . . were losing their homes, jobs, and long-term savings”).

172 *See Baptista*, 640 F.3d at 1196–98.

173 *Baptista* did not have a checking account with Chase. It may be presumed that *Baptista* also did not have a checking account with any other bank and, therefore, needed to cash the check with the bank upon which it was drawn. *See id.* at 1196. *See also* Wells Fargo Bank of Tex., N.A. v. James, 321 F.3d 488, 490 (5th Cir. 2003) (describing a similar statute that was enacted in Texas “as a consumer protection measure . . . to ensure that Texas employees, and in particular the working poor, receive payment for the face value of their paycheck.”).

174 *See James*, 321 F.3d at 490 (“[I]ndividuals who do not have a checking account and who seek to cash checks at the institution which issued the [check] are predominantly low-income individuals . . .”); 156 CONG. REC. S5871 (daily ed. July 15, 2010) (statement of Sen. Akaka) (“Regular checking accounts may be too expensive for some consumers un-

ostensibly intended to protect.¹⁷⁵ One of the primary purposes of the statute was “to protect consumers from abusive financial services practices.”¹⁷⁶ Yet, the Dodd-Frank Act directs courts to precisely the conflict preemption analysis undertaken in *Baptista*, which resulted in the preemption of a State consumer financial law that otherwise would have prevented a bank from charging a consumer a \$6.00 fee to cash a \$262.48 check.¹⁷⁷ While some may find this to be an untenable result, it is the correct result for two reasons.

First, preemption is the correct result under the *Baptista* court’s preemption analysis.¹⁷⁸ Specifically, the National Bank Act permits banks to “exercise . . . all such incidental powers as shall be necessary to carry on the business of banking[] by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt.”¹⁷⁹ In addition, the Comptroller promulgated a regulation pursuant to the National Bank Act that permits a national bank to “charge its customers non-interest charges and fees, including deposit account service charges.”¹⁸⁰ The Comptroller’s interpretation of the term “customer” included “any person who presents a check for payment.”¹⁸¹ The Eleventh Circuit found that the Comptroller was authorized to “regulate banking and banking-related activities.”¹⁸² Further, the Comptroller’s interpretation of the term “customer” to be “any person presenting a check for payment” was “not unreasonable.”¹⁸³ The court noted that the significant objective of the Comptroller’s regulation was to permit national banks not only to charge such fees but also to provide national banks with the “option of *how* to charge” the fees.¹⁸⁴ The Eleventh Circuit found that the state law

able to maintain minimum balances or afford monthly fees.”). For example, the Chase Total Checking account requires the account holder to pay a “\$12 [m]onthly [s]ervice [f]ee” or, to avoid the monthly fee, the account holder must (i) make “monthly direct deposits totaling \$500 or more,” (ii) maintain a “\$1,500 minimum daily balance,” or (iii) maintain an “average daily balance of \$5,000 or more” combined with another account. Chase Total Checking, CHASE, <https://www.chase.com/checking/total-checking> (last visited Mar. 29, 2013).

175 See generally 156 CONG. REC. S5870 (daily ed. July 15, 2010) (explaining that one of the purposes of the Dodd-Frank Act is “to protect consumers”).

176 Dodd-Frank Act, Pub. L. No. 111-203, pmbl., 124 Stat. 1376.

177 *Baptista*, 640 F.3d at 1196–98.

178 *Id.*

179 *Id.* at 1196 (quoting 12 U.S.C. § 24).

180 *Id.* at 1196–97 (quoting 12 C.F.R. § 7.4002(a) (2001)).

181 *Id.* at 1197 (quoting *James*, 321 F.3d at 490 & n.2).

182 *Id.* at 1198.

183 *Id.*

184 *Id.* at 1198 n.2 (“[T]he establishment of non-interest charges and fees, their amounts, and the method of calculating them are business decisions to be made by each bank, in

“reduce[d] the bank’s fee options by [fifty percent].”¹⁸⁵ Thus, the state statute prohibiting the charging of a check cashing service fee to non-account holders was in “substantial conflict” with the Comptroller’s regulation pursuant to the National Bank Act that allowed banks to charge these fees.¹⁸⁶ Therefore, the court correctly held that the state statute was preempted.¹⁸⁷

Second, the check cashing fee is not an abusive practice. Rather, charging a check cashing fee to non-account holders is a means of mitigating the risk of paying on a check with a fraudulent endorsement. The basic rule is that the depository bank is liable for a check paid with a forged endorsement.¹⁸⁸ When the depository bank presents a check for payment to the drawee or payor bank, the depository bank warrants to the drawee bank that the check does not contain a fraudulent endorsement.¹⁸⁹ If the drawee bank pays on a check that does contain a fraudulent endorsement, then the drawee bank has recourse against the depository bank.¹⁹⁰ However, if the drawee bank cashes the check rather than paying the check through the normal clearance process, then the drawee bank bears the risk of a fraudulent endorsement.¹⁹¹ For example, under the facts of the *Baptista* case, Chase cashed the check for a non-account holder.¹⁹² Therefore, the bank did not know the payee on the check and could not verify the signature endorsing the check. As the drawee bank cashing a check for a non-account holder, Chase assumed the considerable risk that the endorsement on the check may have been forged. Thus, the check cashing fee is an appropriate means of mitigating the bank’s substantial risk of paying on a check with a forged endorsement.¹⁹³ As discussed in this Subpart, state laws affecting the depository activities

its discretion, according to sound banking judgment and safe and sound banking principles.” (quoting 12 C.F.R. § 7.4002 (2001)); accord *Gutierrez v. Wells Fargo Bank, N.A.* 704 F.3d 712, 723–25 (9th Cir. 2012).

185 *Baptista*, 640 F.3d at 1198.

186 *Id.* at 1196–98.

187 *Id.* at 1198.

188 U.C.C. §4-208(b) (2002); Craig W. Smith, *Drawee Bank Not Required to Examine Checks for Forged Endorsements*, BANKERSONLINE.COM (Mar. 26, 2001), http://www.bankersonline.com/compliance/v_gurus_cmp032601.html.

189 U.C.C. §4-208(a) (2002); Smith, *supra* note 188.

190 U.C.C. §4-208(b); Smith, *supra* note 188.

191 CARNELL ET AL., *supra* note 13, at 51.

192 *Baptista*, 640 F.3d at 1196.

193 *But cf.* Dodd-Frank Act, Pub. L. No. 111-203, §1075, 124 Stat. 1376, 2068–74 (2010) (codified at 15 U.S.C. §1693o-2) (addressing interchange transaction fees regarding electronic debit card transactions). Notably, the Dodd-Frank Act does not address either transaction fees or fraud prevention fees with respect to the cashing of checks for non-account holders.

of a national bank, such as standards relating to the terms of deposit accounts, would “significantly interfere” with the management of a “core” business of national banks because such laws affect the “risk management” of a bank, including the prevention of fraud.¹⁹⁴

While the Dodd-Frank Act provided the reform of new procedures to be followed by the Comptroller in preemption determinations,¹⁹⁵ the *Barnett* standard of conflict preemption was maintained for State consumer financial laws.¹⁹⁶ Thus, the doctrine of preemption has been effectively unchanged in this area.¹⁹⁷ The Comptroller and the courts have the same latitude as before to find State consumer financial laws in conflict with federal laws and therefore preempted. The law of preemption was also unchanged with regard to state laws that do not qualify as State consumer financial laws.¹⁹⁸ In contrast, the statute provided for discriminatory effect preemption as a new standard for finding preemption of a State consumer financial law.¹⁹⁹ Thus, the standard for preemption of state law has been broadened in this respect.

The following Subpart provides an analysis of the standard of review that courts should apply to the Comptroller’s preemption decisions. The Dodd-Frank Act has instituted a significant reform in this area.

B. Standard of Review

Courts have developed two levels of deference when reviewing actions by an administrative agency.²⁰⁰ The “higher level of deference is known as ‘*Chevron* deference’” and is based on the principles articulated by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*²⁰¹ Courts will provide *Chevron* deference “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpreta-

194 Dodd-Frank Implementation, *supra* note 3, at 43,557; *see also supra* notes 155–56 and accompanying text.

195 *See supra* notes 103–10 and accompanying text.

196 *See supra* notes 136–37 and accompanying text. With regard to national banks, the statute addresses only State consumer financial laws. *See supra* note 88 and accompanying text.

197 *See U.S. Bank Nat’l Ass’n v. Schipper*, 812 F. Supp. 2d 963 n.1 (S.D. Iowa 2011) (“[T]he Dodd-Frank Act adopts the same standard applied by the *Watters* court Thus, the Dodd-Frank Act did not materially alter the standard for preemption the Court must apply in this case.”).

198 *See supra* note 88 and accompanying text.

199 12 U.S.C. § 25b(b)(1)(A) (2012). *See supra* note 92 and accompanying text.

200 *Bate v. Wells Fargo Bank, N.A.*, 454 B.R. 869, 877 (Bankr. M.D. Fla. 2011).

201 *Id.* (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

tion . . . was promulgated in the exercise of that authority.”²⁰² An agency may show that it is empowered to act with the force of law “in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.”²⁰³

Prior to the Dodd-Frank Act, the standard of review applied to a decision by the Comptroller of the Currency was based on the *Chevron* framework.²⁰⁴ Under this framework, a court first considers whether the federal statute reveals an “unambiguously expressed intent of Congress’ that addresses ‘the precise question at issue.’”²⁰⁵ If Congress’s intent is found, “that is the end of the matter.”²⁰⁶ A court will enforce that intent.²⁰⁷ Thus, if “Congress has spoken unambiguously as to the precise question at hand, the court must enforce Congress’ intent” even if the agency empowered to administer the statute has “adopted an alternate interpretation.”²⁰⁸

However, if Congress has not “directly spoken to the precise question at issue,” *Chevron* provided that a court will defer to an administrative agency’s interpretation where it “is based on a permissible construction of the statute” the agency administers.²⁰⁹ In *Chevron*, the Supreme Court further explained that “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”²¹⁰ Moreover, if the agency’s interpretation “represents a reasonable accommodation of conflicting policies that were committed to the agency’s care by the statute, [the courts] should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.”²¹¹ Courts have interpreted *Chevron* to “require deference to any reasonable interpretation of the statute offered by the agency.”²¹² As stated by the Supreme Court in

202 United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

203 *Id.* at 227; David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 146 (2010).

204 Cuomo v. Clearing House Ass’n, 557 U.S. 519, 525 (2009) (citing *Chevron*, 467 U.S. at 844).

205 *Indep. Ins. Agents of Am., Inc. v. Ludwig*, 997 F.2d 958, 959 (D.C. Cir. 1993) (citations omitted) (quoting *Chevron* 467 U.S. at 843).

206 NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 257 (1995) (quoting *Chevron*, 467 U.S. at 842).

207 *Indep. Ins. Agents of Am., Inc.* 997 F.2d at 959 (citing *Chevron*, 467 U.S. at 842).

208 Wells Fargo Bank of Tex., N.A. v. James, 321 F.3d 488, 492 (5th Cir. 2003) (citing *Chevron*, 467 U.S. at 837).

209 *Chevron*, 467 U.S. at 842–43.

210 *Id.* at 844.

211 *Id.* at 845 (quoting United States v. Shimer, 367 U.S. 374, 383 (1961)).

212 Zaring, *supra* note 203, at 144.

NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co., if the agency’s interpretation “fills a gap or defines a term in a way that is reasonable” the courts will give the agency’s interpretation “controlling weight.”²¹³ Thus, where Congress’s intent is not found, courts will defer to an administrative “agency’s reasonable interpretation of a statute it is charged with administering.”²¹⁴ Courts defer to agency interpretations under *Chevron* based on a “presumption” that when Congress leaves “ambiguity in a statute meant for implementation by an agency,” Congress intended that the agency would resolve the ambiguity and should “possess whatever degree of discretion the ambiguity allows.”²¹⁵

The Comptroller of the Currency is the agency charged with administering the National Bank Act.²¹⁶ Congress granted the Comptroller the general authority to “prescribe rules and regulations” under the National Bank Act²¹⁷ as well as the specific authority to make preemption determinations under the statute.²¹⁸ Thus, if the review-

213 *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995) (quoting *Chevron*, 467 U.S. at 844).

214 *See Cuomo v. Clearing House Ass’n*, 557 U.S. 519, 525 (2009) (citing *Chevron*, 467 U.S. at 844) (articulating the legal test to determine whether to grant deference to a government agency’s interpretation of a statute which it administers); *see also Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 739 (1996) (“It is our practice to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering.”); *Indep. Ins. Agents of Am., Inc. v. Ludwig*, 997 F.2d 958, 960 (D.C. Cir. 1993) (explaining that if congressional intent is not found, “we must defer to the agency’s interpretation so long as it is permissible”).

215 *Smiley*, 517 U.S. at 740–41 (citing *Chevron*, 467 U.S. at 843–44).

216 *See Cuomo*, 557 U.S. at 525 (stating the fact that the Comptroller of the Currency administers the National Bank Act); *see also* 12 U.S.C. § 93a (2012) (“[T]he Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office”); *Smiley*, 517 U.S. at 739 (“The Comptroller . . . is charged with the enforcement of banking laws to an extent that warrants the invocation of [the rule of deference] with respect to his deliberative conclusions as to the meaning of these laws.” (quoting *NationsBank of N.C.*, 513 U.S. at 256–57)); *Baptista v. JPMorgan Chase Bank, N.A.*, 640 F.3d 1194, 1196, 1198 (11th Cir. 2011) (“Congress clearly intended that the [Comptroller] be empowered to regulate banking and banking-related activities.”); *Wells Fargo Bank of Tex., N.A. v. James*, 321 F.3d 488, 490 (5th Cir. 2003) (“[T]he Comptroller of the Currency . . . is the agency empowered by the [National Bank Act] to supervise and regulate federally chartered banks in accordance with the broad substantive provisions of the [statute].”).

217 12 U.S.C. § 93a (2012) .

218 *See id.* § 43(a) (explaining that “before issuing any opinion letter or interpretive rule . . . that concludes that Federal law preempts the application to a national bank of any State law regarding community reinvestment, consumer protection, fair lending, or the establishment of intrastate branches,” the Comptroller must adhere to certain procedural requirements); *see also Rose v. Chase Manhattan Bank USA, N.A.* 396 F. Supp. 2d 1116, 1122 (C.D. Cal. 2005) (“Pursuant to 11 [sic] U.S.C. § 43 . . . , the OCC possesses the

ing court finds ambiguity in the meaning of the National Bank Act, then the Comptroller “can give authoritative meaning to the statute within the bounds of that uncertainty.”²¹⁹ However, the existence of ambiguity in the statute “does not expand *Chevron* deference to cover virtually any interpretation of the National Bank Act.”²²⁰ While the Comptroller’s regulation does not need to be “the best interpretation of the statute,” the regulation must be a “reasonable” interpretation of the statute.²²¹

Courts also will review the agency’s interpretation of its own regulation promulgated pursuant to a statute to determine whether that interpretation is reasonable.²²² The standard used when an agency interprets a regulation it has promulgated is provided by *Auer v. Robbins*.²²³ A court’s first step in determining whether to provide *Auer* deference is to consider whether the language of the agency’s regulation is ambiguous.²²⁴ If a reviewing court determines that the agency’s regulation is “ambiguous as to the precise issue” in question, then the “agency’s interpretation of its own regulation is controlling unless

authority to preempt certain state laws.” (citing *Wells Fargo Bank, N.A. v. Boutris*, 419 F.3d 949, 962–63 (9th Cir. 2005)).

219 See *Cuomo*, 557 U.S. at 535 (noting that the Comptroller’s regulation interpreting the term “visitorial powers” in the National Bank Act to include “conducting examinations [and] inspecting or requiring the production of books or records” of a national bank is a reasonable interpretation of the National Bank Act (quoting 12 C.F.R. § 7.4000 (2009))); see also 12 U.S.C. § 484(a) (“No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice . . .”).

220 *Cuomo*, 557 U.S. at 519 (holding that the Comptroller’s regulation preempting a state’s enforcement of its own laws in state court is not a reasonable interpretation of the term “visitorial powers” in the National Bank Act (citing 12 C.F.R. § 7.4000)).

221 See *Smiley*, 517 U.S. at 737–40, 744–45, 747 (holding that the Comptroller’s regulation interpreting the term “interest” in the National Bank Act to include late payment fees on credit cards is a reasonable interpretation of the statute); see also 12 U.S.C. § 85 (noting that interest may be charged on any “evidence of debt”); 12 C.F.R. § 7.4001(a) (2011) (noting that interest “includes any payment compensating a creditor or prospective creditor for an extension of credit” as well as fees associated with the extension of credit, such as late fees).

222 See *Baptista v. JPMorgan Chase Bank, N.A.* 640 F.3d 1194, 1198 (11th Cir. 2011) (finding preemption where state law conflicts with the Comptroller’s regulation promulgated pursuant to the National Bank Act and the agency’s interpretation of its regulation is “not unreasonable”); see also 12 C.F.R. § 7.4002 (providing for preemption when in accordance with United States Constitutional principles).

223 See *Baptista*, 640 F.3d at 1197–98 (noting that the standard used to determine whether to defer to an agency’s interpretation of a regulation it has promulgated is *Auer* deference); see also *Wells Fargo Bank of Tex., N.A. v. James*, 321 F.3d 488, 494 (5th Cir. 2003) (citing *Auer v. Robbins*, 519 U.S. 452, 458 (1997) (confirming that *Auer* deference is the legal standard used when an agency interprets a regulation it has promulgated).

224 *James*, 321 F.3d at 494 (citing *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000)) (explaining the *Auer* deference legal test).

it is clearly erroneous.”²²⁵ Thus, under *Auer*, “an agency’s interpretation of its own regulation is also entitled to *Chevron* deference.”²²⁶

In addition, courts will consider whether the agency’s current interpretation is a deviation from its prior policy.²²⁷ A deviation from prior policy may be found when the agency’s new interpretation constitutes a “change of official agency position.”²²⁸ However, prior agency letters that contradict a new regulation would likely be “too informal” to be considered a “binding agency policy.”²²⁹ Nevertheless, *Chevron* deference has sometimes been afforded based on a new agency letter in cases where a formal notice and comment rulemaking was not required.²³⁰ Moreover, while a “[s]udden and unexplained change” or a change that does not consider “legitimate reliance on prior interpretation” may be found to be “arbitrary, capricious[, or] an abuse of discretion,” change in and of itself is “not

225 *See id.* (citing *Auer*, 519 U.S. at 461) (holding that the Comptroller’s interpretation of the term “customer” in its regulation to mean “any person who presents a check for payment” is not clearly erroneous and, therefore, is controlling; determining that a state statute which prohibited banks from paying a check drawn on it other than at par regardless of whether the payee is an account holder at the bank is in “irreconcilable conflict” with the Comptroller’s regulation permitting national banks to charge fees when cashing checks for non-account holders, and thus, is preempted); *see also* 12 C.F.R. § 7.4002(a) (providing that national banks may charge “non-interest charges and fees, including deposit account service charges”); *cf. Cuomo*, 557 U.S. at 531–32 (finding the “Comptroller’s interpretation of its regulation . . . cannot be reconciled with” the regulation or the statute).

226 *Bate v. Wells Fargo Bank, N.A.* 454 B.R. 869, 877 (Bankr. M.D. Fla. 2011) (citing *Auer*, 519 U.S. at 461) (explaining that where an agency’s regulations were not created by the agency, but rather represent a “codification” of Supreme Court precedent, the agency’s interpretation of its regulations “should not be given *Chevron* deference” and thus applying *Skidmore*-level deference to the Comptroller’s interpretation). The *Bate* court’s decision to use a *Skidmore* standard of review was in part based on the Supreme Court case of *Wyeth v. Levine*, 129 S. Ct. 1187 (2009). *Bate* 454 B.R. at 878 & n.57. *Wyeth* concerned a declaration of preemption by the Food and Drug Administration (“FDA”) with regard to state law. *Wyeth* 129 S. Ct. at 1193. The Supreme Court found that Congress had not granted the FDA authority to preempt state law. *Id.* at 1201–02. Therefore, the Court applied *Skidmore*-level deference. *Id.* at 1201. In contrast, as the *Bate* court acknowledged, “the OCC has been given authority to make determinations on the preemption of consumer protection laws.” *Bate*, 454 B.R. at 878.

227 *Smiley v. Citibank (S.D.)*, N.A. 517 U.S. 735, 742–43 (1996) (finding that the Comptroller’s regulation did not constitute a change in the official policy of the agency); *Indep. Ins. Agents of Am., Inc. v. Ludwig*, 997 F.2d 958, 962 (D.C. Cir 1993) (holding that the Comptroller’s interpretation of the National Bank Act to permit national banks located in a town of 5,000 or less to sell insurance outside that town is a reasonable interpretation of the statute and does not diverge from prior policy).

228 *Smiley*, 517 U.S. at 742–43.

229 *Id.* at 743.

230 *United States v. Mead Corp.*, 533 U.S. 218, 231 & n.13 (2001) (citing *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256–57, 263 (1995) (finding *Chevron* deference even in the absence of administrative formalities)).

invalidating.”²³¹ As stated by the Supreme Court in *Smiley v. Citibank (South Dakota), N.A.*, “the whole point of *Chevron*” is that the agency responsible for interpreting the ambiguities of a statute should have the discretion to interpret that statute, including the discretion to change its interpretation.²³²

The second and lower level of deference is “*Skidmore* deference” based on the Supreme Court’s decision in *Skidmore v. Swift & Co.*²³³ *Skidmore* deference generally applies when an agency is not acting with the force of law.²³⁴ In contrast to the higher level *Chevron* deference,²³⁵ which is based on a “reasonableness” standard,²³⁶ the level of deference provided to an agency under the *Skidmore* standard is based on “the thoroughness evident in [the agency’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.”²³⁷ There is a significant distinction between the two levels of deference. Under *Chevron*, a court is deciding whether the agency’s interpretation is “within the bounds of reasonableness” notwithstanding the possibility that the court itself may have arrived at a different interpretation.²³⁸ Under *Skidmore*, the court itself is deciding how to best interpret the law with the agency’s interpretation provided as a reference.²³⁹ Under *Chevron* deference, the courts “*must* defer” to an agency’s reasonable interpretation of a statute; however, under *Skidmore* deference, the courts “*may* defer” depending upon the persuasiveness of the agency’s interpretation.²⁴⁰ Thus, in contrast to *Chevron*

231 *Smiley*, 517 U.S. at 742 (“[T]he mere fact that an agency interpretation contradicts a prior agency position is not fatal.”).

232 *Id.*; *see also NationsBank of N.C.*, 513 U.S. at 263 (“[A]ny change in the Comptroller’s position might reduce, but would not eliminate, the deference we owe his reasoned determinations.”).

233 *Bate v. Wells Fargo Bank, N.A.* 454 B.R. 869, 877 (Bankr. M.D. Fla. 2011).

234 *Mead*, 533 U.S. at 237 (“*Chevron* left *Skidmore* intact and applicable where statutory circumstances indicate no intent to delegate general authority to make rules with force of law, or where such authority was not invoked”); Zaring, *supra* note 203, at 145–46 (explaining the difference between *Chevron* deference and *Skidmore* deference).

235 *Bate*, 454 B.R. at 877 (explaining the levels of deference accorded agency interpretations of which *Chevron* deference is the most deferential).

236 *See supra* notes 210–14 and accompanying text.

237 *Bate*, 454 B.R. at 877 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)) (explaining the factors involved in determining the level of deference to grant under the *Skidmore* standard).

238 William Funk, *Judicial Deference and Regulatory Preemption by Federal Agencies*, 84 TUL. L. REV. 1233, 1241 (2010) .

239 *Id.*

240 Zaring, *supra* note 203, at 146.

deference, agency interpretations reviewed under *Skidmore* deference are “not controlling upon the courts.”²⁴¹

In the Dodd-Frank Act, Congress adopted *Skidmore* deference as the new standard of review of a decision by the Comptroller to preempt a state law.²⁴² Under the statute, a court reviewing a preemption determination by the Comptroller must “assess the validity of such determinations” based upon (i) the thoroughness of the Comptroller’s consideration, (ii) the validity of the Comptroller’s reasoning, (iii) the consistency with the Comptroller’s other valid determinations, and (iv) any other persuasive and relevant factors.²⁴³ Thus, courts must now use the four part *Skidmore* test in reviewing a preemption decision by the Comptroller.²⁴⁴ Moreover, the new standard of review is applicable to the Comptroller’s preemption determinations regarding *any* state laws, not only State consumer financial laws.²⁴⁵

Congress apparently has decided to accord the Comptroller the lower level of deference under *Skidmore*,²⁴⁶ even though Congress has delegated to the Comptroller the general authority “to make rules carrying the force of law” in its role as the agency charged with administering the National Bank Act.²⁴⁷ An agency determination made under such congressional delegation of authority is normally provided with *Chevron*-level deference.²⁴⁸ In the context of preemption, this agency deference was bolstered by the Supreme Court’s determination that a “pre-emptive regulation’s force does not depend on express congressional authorization” to preempt state law.²⁴⁹ Thus, an agency may rely on its general rulemaking authority and does not need express congressional authority to preempt state law.²⁵⁰ Howev-

241 *Id.* (quoting *Skidmore*, 323 U.S. at 140).

242 See 12 U.S.C. § 25b(b)(5) (2012) (setting forth *Skidmore* deference as the standard of review to be used when courts review preemption determinations by the Comptroller); see also *Bate*, 454 B.R. at 877 n.46 (“*Skidmore* level deference has been incorporated in the new Dodd-Frank Wall Street Reform and Consumer Protection Act . . .”).

243 12 U.S.C. § 25b(b)(5)(A).

244 *Id.*; *Skidmore*, 323 U.S. at 140 (establishing a four-part test for deference).

245 See 12 U.S.C. § 25b(b)(5)(A) (“A court reviewing *any* determinations made by the Comptroller regarding preemption of a State law by title 62 of the Revised Statutes or section 371 of this title shall assess the validity of such determinations . . .” (emphasis added)).

246 *Id.*

247 *United States v. Mead Corp.* 533 U.S. 218, 226–27 (2001); see also *supra* notes 216–17 and accompanying text.

248 See *supra* notes 202–03 and accompanying text.

249 *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 154 (1982).

250 *Cf. Thomas W. Merrill, Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 768 (2008) (finding the Supreme Court’s statement to indicate only an implied proposition of general agency authority to preempt state law).

er, the Comptroller's authority to make preemption determinations does not rest solely on Supreme Court precedent. Congress has delegated to the Comptroller the specific authority to make preemption determinations under the National Bank Act.²⁵¹ As a result, the Comptroller has been accorded *Chevron*-level deference in its determinations pursuant to the National Bank Act, including its determinations of preemption.²⁵² Thus, the Dodd-Frank Act marks a sea change in the level of deference provided to the Comptroller's decisions to preempt a state law.²⁵³

However, the effect of this shift in the standard of review remains to be seen. As a practical matter, it is unlikely a court will refuse to provide deference to an agency interpretation that is reasonable even if the lower level *Skidmore* deference is applied.²⁵⁴ Moreover, scholars have argued that "the 'reasonable agency' standard is, increasingly clearly the standard that courts *actually* apply to all exercises of judicial review of administrative action, no matter what standard they purport to use."²⁵⁵ Taken a step further, in the *Baptista* case, despite the court expressly acknowledging the preemption standard set forth in the Dodd-Frank Act, the Eleventh Circuit did not even allude to the statute's new *Skidmore* standard of review.²⁵⁶ Instead, the Eleventh Circuit simply noted that *Auer* level deference should be applied when an agency is interpreting its own regulations.²⁵⁷ Thus, the court applied the *Chevron* reasonableness standard to the Comptroller's interpretation of its regulation promulgated pursuant to the National Bank Act.²⁵⁸

The Eleventh Circuit's reasoning regarding the standard of review in the *Baptista* case²⁵⁹ poses some questions. Why did the court follow the Dodd-Frank Act with respect to the standard for preemption, yet fail to follow the statute's directive regarding the standard of review?²⁶⁰ The simple answer may be that the preemption provisions of

251 See 12 U.S.C. § 43 (2012) (statute authorizing the Comptroller to preempt state law in accordance with the National Bank Act).

252 See *supra* notes 204, 219 and accompanying text.

253 See 12 U.S.C. § 25b(b)(5)(A) (referring to the section of the statute that accords *Skidmore* deference as the standard of review for preemption).

254 Zaring, *supra* note 203, at 159.

255 *Id.* at 137.

256 *Baptista v. JPMorgan Chase Bank, N.A.* 640 F.3d 1194, 1197–98 (11th Cir. 2011); see *supra* note 242 and accompanying text.

257 *Baptista*, 640 F.3d at 1197–98.

258 *Id.* at 1198 (adopting the Fifth Circuit's reasoning to find preemption by the federal regulation at issue, in accordance with the agency's interpretation of its own regulation).

259 See generally *id.* at 1197–98.

260 See 12 U.S.C. §§ 25b(b)(1)(B), (5)(A) (2012); *Baptista*, 640 F.3d at 1197–98.

the Dodd-Frank Act, while enacted, were a little over two months short of the effective date.²⁶¹ On the other hand, given the court's lack of acknowledgement of the statute's new standard of review, is the Eleventh Circuit's application of *Auer* deference and determination of *Chevron* reasonableness in the *Baptista* case an indication that courts will continue to give deference to preemption interpretations by the Comptroller that are reasonable even under the statute's new *Skidmore* standard?²⁶² While these questions may not be answered imminently and certainly not unequivocally, it is possible that some courts reviewing a determination by the Comptroller to preempt a state law may continue to use the reasonableness standard of *Chevron*.²⁶³

Nevertheless, an examination of the new four-prong standard of review is warranted. The first prong directs a reviewing court to assess the thoroughness of the Comptroller's consideration in deciding to preempt a state law.²⁶⁴ Courts have interpreted this prong to require "in-depth consideration of the disputed issue."²⁶⁵ Arguably, this prong presents a more rigorous standard of review of the Comptroller's preemption determinations than required under *Chevron*.²⁶⁶ However, at least with respect to State consumer financial laws, the new procedures the Comptroller must follow in making a preemption determination should meet the "thoroughness" requirement.²⁶⁷ For example, any determination by the Comptroller under the *Barnett* standard preemption provision may be made either "by regulation or order . . . on a case-by-case basis."²⁶⁸ In each case, the Comptroller must make a determination about the effect of the "particular State consumer financial law" on national banks subject to that state law or the law of another state with "substantively equivalent terms."²⁶⁹

261 The preemption provisions of the Dodd-Frank Act became effective on the designated transfer date, which the Act defined as one year after the date of enactment. The date of enactment was July 21, 2010; thus, the transfer date was July 21, 2011. See Dodd-Frank Act, Pub. L. No. 111-203, pmb., 124 Stat. 1376.; see also 12 U.S.C. § 25b note (2010) ("Enactment and amendment of section by Pub. L. 111-203 effective on the designated transfer date . . ."). The Eleventh Circuit decided the *Baptista* case on May 11, 2011. *Baptista*, 640 F.3d at 1194.

262 See *Baptista*, 640 F.3d at 1197-98; 12 U.S.C. § 25b(b)(5)(A).

263 See, e.g., *Baptista*, 640 F.3d at 1197-98; see also *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984).

264 12 U.S.C. § 25b(b)(5)(A).

265 *Doe v. Leavitt*, 552 F.3d 75, 81 (1st Cir. 2009).

266 *Chevron*, 467 U.S. at 842-45.

267 See 12 U.S.C. § 25(b)(5)(A); Dodd-Frank Implementation, *supra* note 3, at 43,551 n.11.

268 12 U.S.C. § 25b(b)(1)(B).

269 *Id.* § 25b(b)(3)(A).

The Comptroller must consult with the BCFP in determining that the law of another state is “substantively equivalent” to the state law at issue.²⁷⁰ Moreover, the Comptroller may not preempt a State consumer financial law “unless substantial evidence, made on the record of the proceeding, supports the specific finding [of preemption] in accordance with the legal standard” of the *Barnett* decision.²⁷¹ Thus, these new requirements appear to build in a level of thoroughness in the Comptroller’s determinations which should be sufficient to withstand judicial review of this prong.

The second prong requires a court to assess the validity of the Comptroller’s reasoning in making a preemption determination.²⁷² In reviewing the validity of an agency’s reasoning, a court will consider “whether an agency pronouncement is well-reasoned, substantiated, and logical.”²⁷³ Thus, the question is whether this prong introduces a more rigorous standard than the *Chevron* reasonableness test, or whether this prong is simply a codification of *Chevron*.²⁷⁴ Arguably, for a decision to be reasonable, that decision must be well-reasoned, logical, and substantiated or supported.²⁷⁵ For example, in *Colaio v.*

²⁷⁰ *Id.* § 25b(b)(3)(B).

²⁷¹ *Id.* § 25b(c).

²⁷² *Id.* § 25b(b)(5)(A).

²⁷³ *De La Mota v. U.S. Dep’t of Educ.*, 412 F.3d 71, 80–81 (2d Cir. 2005); *see also* *Natural Res. Def. Council, Inc. v. U.S. Consumer Prod. Safety Comm’n*, 597 F. Supp. 2d 370, 391 (S.D.N.Y. 2009) (finding that the Commission’s opinion letter regarding the phthalate proscriptions of the Consumer Product Safety Improvement Act “does not demonstrate the thoroughness of consideration and validity of reasoning that would warrant deference under *Skidmore*”).

²⁷⁴ *See* 12 U.S.C. § 25b(b)(5)(A); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984).

²⁷⁵ *See generally* *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 253, 263–64 (1995) (holding that the Comptroller’s interpretation of the National Bank Act regarding the brokerage of annuities is reasonable and finding that “any change in the Comptroller’s position might reduce, but would not eliminate, the deference . . . owe[d] [to] his reasoned determinations”); *Baptista v. JP Morgan Chase Bank*, 640 F.3d 1194, 1198 n.2 (11th Cir. 2011) (finding that the Comptroller’s interpretation of the term “customer” to include “any person presenting a check for payment” was supported by the National Bank Act and the Comptroller’s regulation promulgated thereunder, and, thus, that it was not unreasonable); *Colaio v. Feinberg*, 262 F. Supp. 2d 273, 279, 289, 300 (S.D.N.Y. 2003) (finding the Special Master’s interpretive policies with respect to the September 11th Victim Compensation Fund in the Air Transportation Safety and System Stabilization Act to be valid under *Skidmore* because the “policies do not contradict the Act or its regulations, are supported by evidence and valid reasoning . . . are persuasive as carrying out congressional intent . . . [and thus] are reasonable and proper implementations of the Act and regulations”); *Hadley v. Workforce Appeals Bd.*, 303 P.3d 1037, 1040 (Utah Ct. App. 2013) (finding that “[a] claimant acts reasonably where ‘the decision to quit [is] logical, sensible, or practical’” (quoting Utah Admin. Code R994-405-103(1)(a))).

Feinberg, a federal district court held that a Special Master's interpretive policies with regard to the September 11th Victim Compensation Fund were valid under the *Skidmore* standard because, *inter alia*, the policies "[were] supported by evidence and valid reasoning," and were therefore reasonable.²⁷⁶ Additionally, in *Hadley v. Workforce Appeals Board*, the court explained that a claimant for unemployment benefits "act[ed] reasonably" when, *inter alia*, the decision to resign is "logical, sensible, or practical . . ."²⁷⁷ Thus, borrowing from other fields of law, this prong may be interpreted to be a codification of the *Chevron* reasonableness standard.²⁷⁸ Nevertheless, this prong will likely be the crux of a court's standard of review analysis.

The third prong requires a court to assess whether the decision is consistent with the Comptroller's other valid determinations.²⁷⁹ As discussed in this Part, this prong historically has been applied by courts in reviewing the Comptroller's decisions under the *Chevron* standard.²⁸⁰ Thus, this prong does not change the standard applied to the Comptroller's determinations; rather, this prong merely codifies judicial precedent.

The fourth prong provides a reviewing court with discretion to consider any other persuasive and relevant factors.²⁸¹ This formulation is a slight variation of the *Skidmore* standard, which provides for a court to consider "all those factors which give [the agency] power to persuade."²⁸² Courts have interpreted this prong of the *Skidmore* standard to include consideration of the agency's thoroughness, the validity of its reasoning, and its consistency as factors that "either contribute[] to or detract[] from the power of an agency's interpretation to persuade."²⁸³ However, additional factors may be considered, such as the agency's expertise, "as factors in an agency's power to persuade."²⁸⁴

In considering whether this catch-all prong introduces a more rigorous standard of review of the Comptroller's preemption decisions, it is notable that under the *Chevron* reasonableness test, courts

276 *Colaio*, 262 F. Supp. 2d at 279, 289, 300.

277 *Hadley*, 303 P.3d at 1040.

278 *See* 12 U.S.C. § 25b(b)(5)(A); *Chevron*, 467 U.S. at 842–45; *Colaio*, 262 F. Supp. 2d at 279, 289, 300; *Hadley*, 303 P.3d at 1040.

279 12 U.S.C. § 25b(b)(5)(A).

280 *See supra* notes 227–31 and accompanying text.

281 12 U.S.C. § 25b(b)(5)(A).

282 *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

283 *Doe v. Leavitt*, 552 F.3d 75, 80–81 (1st Cir. 2009) (citing *Skidmore*, 323 U.S. at 140).

284 *Id.* (citing Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1257 (2007)).

are not restricted in considering any persuasive and relevant factors in deciding whether the agency's interpretation is reasonable.²⁸⁵ Moreover, the Comptroller's expertise in the area of national banking law is well settled.²⁸⁶ Thus, any persuasive and relevant factors reviewed under this prong are likely to provide additional support to a court's decision rather than introduce a more rigorous standard of review of the Comptroller's preemption determinations.

Thus, while the Dodd-Frank Act's new standard of review marks a sea change in the level of deference to be accorded to the Comptroller in his preemption determinations,²⁸⁷ the ultimate effect of this reform may, in practice, be minimal. All in all, the standard of review to be used in reviewing agency actions has always been a source of debate,²⁸⁸ and Congress's decision to employ a new standard to be used in reviewing the Comptroller's determinations to preempt state laws will likely be a source of continuing disagreement and idiosyncratic application by the courts.

The next Subpart addresses the issue of subsidiary preemption. While the Dodd-Frank Act endeavored to provide a meaningful reform in this area of preemption law, the effort is based on an unfounded premise.

C. *Subsidiaries of National Banks*

Prior to the Dodd-Frank Act, the preemption law with respect to subsidiaries of national banks was governed by the Supreme Court's decision in *Watters v. Wachovia Bank, N.A.*²⁸⁹ An analysis of the case is worthwhile to appreciate the many considerations involved in the issue of subsidiary preemption.

1. *Watters v. Wachovia Bank, N.A.*

The *Watters* case addressed the question of whether the mortgage lending activities conducted by an operating subsidiary of a national bank were subject to state reporting, licensing, and visitorial re-

285 See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–66 (1984) (considering how clearly Congress has spoken on the issue and the reasonableness of the agency's interpretation without limiting the factors considered in the analysis; the Court considered, inter alia, the statutory language and the legislative history).

286 See *supra* note 216 and accompanying text.

287 See 12 U.S.C. § 25b(b)(5)(A) (2012).

288 Zaring, *supra* note 203, at 138, 152; see also Funk, *supra* note 238, at 1253 (“The doctrine describing judicial deference to federal agency opinions is riddled with inconsistencies and disparate application.”).

289 *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007).

quirements.²⁹⁰ Specifically, the case concerned a Michigan state law that required “mortgage brokers, lenders and servicers that are subsidiaries of national banks to register with the [state] and submit to state supervision.”²⁹¹ In addition, the Michigan law authorized the state commissioner to “take regulatory or enforcement action against covered lenders” under the state statute.²⁹² Wachovia Bank was a national bank that conducted its real estate lending activities through a state-chartered, wholly owned corporation approved by the Comptroller as an operating subsidiary of Wachovia Bank.²⁹³

As discussed by the *Watters* Court, the National Bank Act provides national banks with an express authorization to “engage in real estate lending.”²⁹⁴ Further, the statute permits national banks “[t]o exercise . . . all such incidental powers as shall be necessary to carry on the business of banking.”²⁹⁵ A national bank’s incidental powers include the power to “conduct certain activities through ‘operating subsidiaries.’”²⁹⁶ Such “operating subsidiaries” are “authorized to engage solely in activities the [national] bank itself could undertake, and [are] subject to the same terms and conditions as those applicable to the [national] bank.”²⁹⁷

As the Court pointed out, the Comptroller supervises operating subsidiaries of national banks in the same manner as national banks.²⁹⁸ Moreover, the Comptroller “treats national banks and their operating subsidiaries as a single economic enterprise” and “appl[ies] the same controls whether banking ‘activities are conducted directly or through an operating subsidiary.’”²⁹⁹

Citing the *Barnett* decision, the *Watters* Court found that the determination of preemption focuses “on the exercise of a bank’s *pow-*

290 *Id.* at 7, 14 (“Visitation . . . is the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations.” (quoting *Guthrie v. Harkness*, 199 U.S. 148, 158 (1905))).

291 *Id.* at 8 (citing MICH. COMP. LAWS §§ 445.1656(1) (2002), 445.1679(1)(a) (2002), 493.52(1) (1998), 493.53a(d) (1998)).

292 *Id.* at 9–10.

293 *Id.* at 7.

294 *Id.* at 7, 12 (citing 12 U.S.C. § 371).

295 *Id.* at 7, 11 (quoting 12 U.S.C. § 24).

296 *Id.* at 7, 15–16 (citing 12 U.S.C. § 24a(g)(3)(A); 12 C.F.R. § 5.34(e) (2006)).

297 *Id.* at 7, 18 (citing 12 U.S.C. § 24a(g)(3)(A); 12 C.F.R. § 5.34(e)).

298 *Id.* at 16 (citing 12 C.F.R. § 5.34(e)(3)); *see also* U.S. OFFICE OF THE COMPTROLLER OF THE CURRENCY, RELATED ORGANIZATIONS: COMPTROLLER’S HANDBOOK 53 (2004) [hereinafter COMPTROLLER’S HANDBOOK] (“Operating subsidiaries are subject to the same supervision and regulation as the parent bank, except where otherwise provided by law or OCC regulation.”).

299 *Watters*, 550 U.S. at 17.

ers, not on its corporate structure.”³⁰⁰ According to the *Watters* Court, “[a] national bank has the power to engage in real estate lending through an operating subsidiary, subject to the same terms and conditions that govern the national bank itself; that power cannot be significantly impaired or impeded by state law.”³⁰¹

Moreover, “[t]o prevent inconsistent or intrusive state regulation from impairing” the powers granted to national banks, the National Bank Act provides that “[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law,’ vested in the courts of justice.”³⁰² As stated by the *Watters* Court, the National Bank Act was specifically “designed to prevent” the “diverse and duplicative superintendence of national banks” by the states.³⁰³

Thus, the Court held that the mortgage lending activities of Wachovia Bank, “whether conducted by the bank itself or through the bank’s operating subsidiary, [were] subject to” the sole superintendence of the Comptroller of the Currency.³⁰⁴ Neither the national bank nor its operating subsidiary was subject to state mandated reporting, licensing, or visitorial requirements.³⁰⁵

2. *Reversal of Watters by the Dodd-Frank Act*

In the Dodd-Frank Act, Congress addressed preemption with respect to subsidiaries and affiliates of national banks.³⁰⁶ A State consumer financial law will be applicable to any “subsidiary or affiliate of a national bank” that is not itself a national bank “to the same extent that the State consumer financial law applies to any person, corporation, or other entity subject to such State law.”³⁰⁷ Under this provision, the Dodd-Frank Act eliminated preemption for operating subsidiaries of national banks with respect to State consumer financial laws.³⁰⁸

The Dodd-Frank Act further provides that the “applicability of *any* State law to any subsidiary or affiliate of a national bank” that is not

³⁰⁰ *Id.* at 18 (citing *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 32 (1996)).

³⁰¹ *Id.* at 21 (citing *Barnett Bank*, 517 U.S. at 33–34; 12 U.S.C. §§ 24 (Seventh), 24a(g)(3)(A), 371).

³⁰² *Id.* at 11, 13–14 (quoting 12 U.S.C. § 484(a)).

³⁰³ *Id.* at 13–14; *see also id.* at 11 (“[F]ederal control shields national banks from unduly burdensome and duplicative state regulation.”).

³⁰⁴ *Id.* at 7.

³⁰⁵ *Id.* (explaining that reporting, licensing and visitorial requirements mandated by the state do not apply to the national bank or its operating subsidiary).

³⁰⁶ 12 U.S.C. § 25b(b)(2), (c), (h)(2) (2012).

³⁰⁷ *Id.* § 25b(e).

³⁰⁸ *Id.*

itself a national bank will not be preempted, annulled, or affected by the federal banking laws.³⁰⁹ Thus, the Dodd-Frank Act reversed the *Watters* opinion and eliminated preemption for operating subsidiaries of national banks with respect to *all* state laws, not only State consumer financial laws.³¹⁰ Therefore, operating subsidiaries of national banks must comply with all state laws.³¹¹

A clarifying distinction should be made here. As discussed in Part II.A, with respect to national banks, the Dodd-Frank Act does not address the preemption of state laws other than State consumer financial laws.³¹² Thus, as it pertains to national banks, the Dodd-Frank Act addresses preemption of State consumer financial laws only.³¹³ However, with respect to subsidiaries of national banks, the Dodd-Frank Act addresses all state laws and eliminates preemption of all state laws for subsidiaries of national banks.³¹⁴

3. Elimination of Subsidiary Preemption

While these provisions of the Dodd-Frank Act were enacted in the spirit of reform, the elimination of preemption for subsidiaries of national banks will be exceedingly more burdensome on the national charter. National banks must ensure that every subsidiary complies not only with federal law but also with the particular laws of the many states in which the subsidiary is doing business.³¹⁵ Moreover, these provisions appear to be based on one of two concerns: (i) the concern that an operating subsidiary of a national bank engaged in mortgage activities would unduly benefit from the preemption of state laws by conducting its mortgage lending business in a manner that would harm the inhabitants of the particular state, or (ii) the concern that an operating subsidiary of a national bank engaged in mortgage activities would unduly benefit by the preemption of state laws by conducting its mortgage lending business unfettered by state laws while its state-regulated competitors would be held to those state laws, thereby creating an unequal playing field in favor of the national bank subsidiaries.³¹⁶

309 *Id.* § 25b(b)(2), (h)(2) (emphasis added).

310 *Id.* § 25b(b)(2), (e), (h)(2); *see Watters*, 550 U.S. at 7.

311 12 U.S.C. § 25b(b)(2), (e), (h)(2).

312 *See supra* note 88 and accompanying text.

313 12 U.S.C. § 25b.

314 *Id.* § 25b(b)(2), (e), (h)(2).

315 *Id.*

316 *See generally* 156 CONG. REC. S5870-02 (daily ed. July 15, 2010) (explaining that one of the purposes of the Dodd-Frank Act is “to protect consumers”); *see also Watters v. Wachovia*

With respect to the first concern, as found by the Supreme Court in the *Watters* opinion, the Comptroller regulates a national bank and its operating subsidiaries as one economic unit.³¹⁷ Both the Comptroller and Congress have viewed a national bank and its operating subsidiaries as a single economic enterprise “for accounting purposes, regulatory reporting purposes, and for purposes of applying many Federal statutory or regulatory limits.”³¹⁸ Similarly, in determining whether national banks have the power to engage in new activities, the Supreme Court has consistently viewed national banks and their operating subsidiaries as a single entity.³¹⁹ Moreover, Congress has expressly provided that an operating subsidiary of a national bank may engage “solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that govern the conduct of such activities by national banks.”³²⁰ Thus, operating subsidiaries are subject to the same rigors of regulatory oversight the Comptroller applies to the parent national bank.³²¹

Perhaps due to the regulatory oversight, operating subsidiaries of national banks were not responsible for originating the vast majority of subprime mortgages in the years leading up to the subprime mortgage crisis.³²² Rather, as will be discussed in Part III.B, state-regulated lending institutions, for which federal preemption did not apply, were responsible for underwriting the overwhelming majority of subprime mortgages.³²³ Moreover, evidence indicates that subprime lenders regulated by the states, in particular independent mortgage

Bank, N.A. 550 U.S. 1, 43 (2007) (Stevens, J., dissenting) (“[T]he primary advantage of maintaining an operating subsidiary as a separate corporation is that it shields the national bank from the operating subsidiaries’ liabilities. . . . The federal interest in protecting depositors in national banks from their subsidiaries’ liabilities surely does not justify a grant of immunity from laws that apply to competitors.”).

317 *Watters*, 530 U.S. at 17 (citing COMPTROLLER’S HANDBOOK, *supra* note 298, at 64).

318 Brief Amicus Curiae of the Office of the Comptroller of the Currency in Support of Plaintiffs’ Motion for Summary Judgment at 7 & n.5, *Wachovia Bank, N.A. v. Watters*, 334 F. Supp. 2d 957 (W.D. Mich. 2004) (Civ. Act. No. 5:03-CV-0105), *aff’d*, 550 U.S. 1 (2007) (citing 12 U.S.C. § 371c(b)(2)(A); 12 C.F.R. § 5.34(e)(4)).

319 *See, e.g.*, *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 254 (1995) (permitting sale of annuities by operating subsidiary); *Marquette Nat’l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299, 301–02 (1978) (permitting credit card subsidiary to employ the usury laws of its home state when issuing credit cards in another state).

320 12 U.S.C. § 24a(g)(3)(A) (2012). In contrast, other affiliates of national banks may engage in activities that are not permitted for national banks to engage in directly. *See id.* §24a(a)(2)(A)(i) (authorizing financial subsidiaries to engage in activities that are “financial in nature or incidental to a financial activity”).

321 *Watters*, 550 U.S. at 17 (citing COMPTROLLER’S HANDBOOK, *supra* note 298, at 64).

322 *See infra* note 443 and accompanying text.

323 *See infra* notes 438–42 and accompanying text.

companies regulated solely by the states, engaged in abusive lending practices.³²⁴ For example, Congress has found that many prospective borrowers were steered into accepting mortgage loans they could not afford.³²⁵ Therefore, operating subsidiaries of national banks did not unduly benefit from the preemption of state laws. Instead, state-regulated lending institutions were the entities that conducted their mortgage lending businesses in a manner that harmed the inhabitants of the state in which they were operating.

With respect to the second concern, the operating subsidiaries of national banks are held to federal law by the Comptroller of the Currency.³²⁶ In contrast, as further discussed in Part III.B, nothing in the doctrine of preemption prevented the states from regulating and enforcing state laws with respect to state-regulated lending institutions, for which federal preemption did not apply.³²⁷ Yet, these state-regulated institutions were responsible for originating the vast majority of subprime mortgages, despite the unfettered ability of the states to regulate these lenders.³²⁸ Clearly, the market recognized this imbalance in regulatory oversight, as evidenced by the significant share of subprime mortgages originated by state-regulated lending institutions.³²⁹ As a result, national banks and their operating subsidiaries were, in effect, unduly harmed by the apparent difference in regulatory oversight applied to the state-regulated lending institutions, thereby creating an unequal playing field *in favor of the state-regulated lenders* and not the other way around.

For example, the subprime mortgage crisis caused an overall market decline in housing prices.³³⁰ As a result, many homeowners experienced negative equity.³³¹ Negative equity, or more commonly an “underwater” mortgage, occurs when the value of the home is reduced below the mortgage balance.³³² While declines in housing prices initially affected subprime loans because these mortgages generally included minimal or no down payments, as housing prices con-

324 See *infra* notes 436, 453–54 and accompanying text.

325 156 CONG. REC. S5870 (daily ed. July 15, 2010) (Remarks of Sen. Akaka) (“Prospective homebuyers were steered into mortgage products that had risks and costs that they could not understand or afford.”).

326 *Watters*, 550 U.S. at 16–17.

327 See *infra* notes 434–37 and accompanying text.

328 See *infra* notes 438–42 and accompanying text.

329 See *infra* notes 439, 441 and accompanying text.

330 *The Downturn in Facts and Figures*, BBC NEWS, Nov. 21, 2007, <http://news.bbc.co.uk/2/hi/business/7073131.stm>.

331 Bd. of Governors of the Fed. Reserve Sys., *supra* note 2, at 3–4.

332 *Id.* at 4.

tinued to decline, “even many prime borrowers who had made sizeable down payments fell underwater,” resulting in a high level of delinquencies in the housing finance market.³³³ For example, NBT Bancorp Inc., the holding company of NBT Bank, National Association, was not active in the subprime mortgage market.³³⁴ Yet, delinquencies in the bank’s residential mortgages increased nearly five times between 2007 and 2012.³³⁵ Moreover, losses on residential real estate loans during the same time period more than tripled.³³⁶ Thus, national banks and their operating subsidiaries were unduly harmed by the decline in housing prices. This decline was set in motion by the state-regulated lending institutions, which originated the overwhelming majority of subprime mortgages,³³⁷ ultimately resulting in the subprime mortgage crisis.³³⁸

As another example, some national banks acquired investments in mortgage-backed securities backed by “poorly underwritten subprime mortgages, unduly relying on the investment grade ratings” of these securities.³³⁹ Mortgage-backed securities are created by pooling together various mortgages and creating a debt security that is sold to investors.³⁴⁰ When the subprime mortgage market collapsed, many of these mortgage-backed securities became impaired causing losses to investors, including national banks.³⁴¹

³³³ *Id.* at 5.

³³⁴ NBT BANCORP INC., 2012 ANNUAL REPORT 41 (2013) (noting that “[s]ubprime mortgage lending, which has been the riskiest sector of the residential housing market, is not a market that [NBT Bancorp Inc.] has ever actively pursued,” instead, NBT Bancorp Inc. “is a prime lender”).

³³⁵ Residential real estate mortgages placed on nonaccrual status increased from \$1,372,000 in 2007 to \$8,083,000 in 2012. Compare NBT BANCORP INC., 2007 ANNUAL REPORT 30 (2008), with NBT BANCORP INC., 2012 ANNUAL REPORT, *supra* note 334, at 49. Loans are placed on nonaccrual status, that is, interest is no longer accrued on the loans, when payments become delinquent. Compare NBT BANCORP INC., 2012 ANNUAL REPORT, *supra* note 334, at 71, with NBT BANCORP INC., 2007 ANNUAL REPORT, *supra* note 335, at 52.

³³⁶ FED. FIN. INSTS. EXAMINATION COUNCIL, UNIFORM BANK PERFORMANCE REPORT (2007), available at <https://cdr.ffiec.gov/public/Reports/UbprReport.aspx?rptCycleIds=47%2c72%2c45%2c44%2c43&rptid=283&idrssi=702117&peerGroupType=&supplemental> (last visited Mar. 31, 2013) (recording that losses on residential real estate mortgages, as a percentage of total loans, increased from 0.07% in 2007 to 0.29% in 2012).

³³⁷ See *infra* notes 439, 441 and accompanying text.

³³⁸ See *infra* note 404 and accompanying text.

³³⁹ OFFICE OF THE COMPTROLLER OF THE CURRENCY, STATEMENT OF JOHN C. DUGAN, COMPTROLLER OF THE CURRENCY, BEFORE THE FINANCIAL CRISIS INQUIRY COMMISSION 9–10 (2010) [hereinafter Statement of John C. Dugan].

³⁴⁰ See Adam B. Ashcraft & Til Schuermann, *Understanding the Securitization of Subprime Mortgage Credit*, 318 FED. RESERVE BANK OF N.Y. STAFF REP 5 (2008), available at <https://www.econstor.eu/dspace/bitstream/10419/60823/1/587537833.pdf>.

³⁴¹ See generally KATALINA M. BIANCO, THE SUBPRIME LENDING CRISIS: CAUSES AND EFFECTS OF THE MORTGAGE MELTDOWN 12–15 (2008), available at <http://business.cch.com/>

In sum, the elimination of preemption for subsidiaries of national banks will be particularly burdensome on the national charter and is regrettably based upon an unfounded premise. Undoubtedly, national banks will respond to this change by merging their operating subsidiaries into the parent bank rather than incurring the burdensome cost of complying with the diverse laws of the fifty states.

The following Subpart will discuss the visitorial powers provision of the National Bank Act and the ability of the states to enforce laws against national banks.

C. Visitation

The National Bank Act provides that “[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice.”³⁴² The Comptroller had issued a regulation interpreting the term “visitorial powers” to include “conducting examinations, inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions” against national banks.³⁴³ The regulation also affirmed that only the Comptroller of the Currency “may exercise visitorial powers with respect to national banks”³⁴⁴ Thus, under the Comptroller’s regulation, only the Comptroller of the Currency had the authority to prosecute enforcement actions against national banks.³⁴⁵

The Supreme Court considered the statutory term “visitorial powers” in *Cuomo v. Clearing House Ass’n* and found the Comptroller had reasonably interpreted “visitorial powers” to include “conducting examinations and inspecting or requiring the production of books or records of national banks.”³⁴⁶ However, the Supreme Court did not find reasonable the Comptroller’s extension of the term “visitorial powers” to include prosecuting enforcement actions in state court.³⁴⁷ According to the Court, a state’s visitorial powers should be distin-

bankingfinance/focus/news/Subprime_WP_rev.pdf (“[T]ens of billions of dollars worth of mortgage-backed paper all but disappeared.”).

342 12 U.S.C. § 484(a) (2012).

343 12 C.F.R. § 7.4000(a) (2009).

344 *Id.*

345 *See* *Cuomo v. Clearing House Ass’n*, 557 U.S. 519, 525 (2009) (noting that the Comptroller’s “regulation prohibits the States from prosecuting enforcement actions” with respect to national banks (internal quotation marks omitted)); *see also* *Nat’l State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981, 989 (3d Cir. 1980) (“[E]nforcement of the state statute is the responsibility of the Comptroller of the Currency rather than the State Commissioner.”).

346 *Cuomo*, 557 U.S. at 535–36.

347 *Id.* at 525, 536.

guished from its power to enforce the law, and only the former is preempted by the National Bank Act.³⁴⁸ Moreover, the purpose of the statute's reservation of powers "vested in the courts of justice" was intended to preserve the courts' ordinary powers of enforcing the law.³⁴⁹ Thus, the Court held that a state attorney general is permitted to bring judicial enforcement actions against national banks.³⁵⁰

Remarkably, the *Cuomo* Court asserted that its prior decision in *Watters* was fully in accord with the distinction between supervision and law enforcement.³⁵¹ However, the state regulations preempted in *Watters* included the power to enforce the law.³⁵² One may query how the Court's prior decision in *Watters* was fully in accord with the distinction between supervision and law enforcement, when the *Watters* decision preempted a state law that included the power of law enforcement. Yet, the *Cuomo* Court did not address this inconsistency in its reasoning. Rather, the *Cuomo* Court maintained that "the sole question [in *Watters*] was whether operating subsidiaries of national banks enjoyed the same immunity from state visitation" as the parent national bank.³⁵³ Thus, the *Cuomo* Court narrowed the scope of the *Watters* decision to apply only to the question of how operating subsidiaries of national banks are to be treated with respect to state visitation,³⁵⁴ without acknowledging that state visitation in the *Watters* case included the power to enforce the law.³⁵⁵

Congress also addressed the issue of visitorial powers in the Dodd-Frank Act. In accordance with the Supreme Court's decision in *Cuomo*, the visitation provisions of federal banking law do not limit or restrict the authority of a state attorney general "to enforce an applicable law" against a national bank by bringing an action in court.³⁵⁶

348 *Id.* at 526–29.

349 *Id.* at 530.

350 *Id.* at 536.

351 *Id.* at 528.

352 *Watters v. Wachovia Bank, N.A.* 550 U.S. 1, 9–10 (2007); *see also Cuomo*, 557 U.S. at 552 (Thomas, J., dissenting) ("[T]he Court was fully aware that the Michigan statutes [in *Watters*] granted state banking commissioners the very enforcement authority that petitioner seeks to exert over the national banks in this case.").

353 *Id.* at 528.

354 *See id.* at 528–29 (stating explicitly that "[t]he opinion addresses and answers no other question").

355 *See id.* at 552–53 (Thomas, J., dissenting) ("The Court's conclusion in *Watters* that § 484(a) deprives the States of inspection and enforcement authority over the mortgage-lending practices of national banks lends weight to the agency's construction of the statute.").

356 12 U.S.C. § 25b(i)(1) (2012). However, a state attorney general is restricted in conducting non-judicial investigations or oversight of a national bank. *See* 12 C.F.R. § 7.4000(b) (2011).

Thus, the Dodd-Frank Act codified the *Cuomo* decision.³⁵⁷ A state attorney general has the authority to bring an action against a national bank in court to enforce a non-preempted state law.³⁵⁸ These visitorial powers provisions apply to federal thrifts and their subsidiaries “to the same extent and in the same manner” as national banks and national bank subsidiaries.³⁵⁹

The codification of the *Cuomo* decision may result in any of three potential outcomes. The states may serve as a back-up enforcement authority to the federal regulators. For example, if a federal regulator fails to enforce an applicable law against a national bank, a federal thrift, or their respective subsidiaries, then the states may use this enforcement power to bring an action in court to enforce that law. Alternatively, the states may use this enforcement power collaboratively by working together with the federal regulator to ensure that applicable laws are enforced. Then again, the states may choose to work independently of the federal regulator, potentially resulting in the duplicative enforcement regimes that the *Watters* Court sought to avoid.³⁶⁰

Additionally, as discussed in Part III.B, states have always had the sole power to regulate and enforce applicable laws with respect to independent mortgage companies.³⁶¹ Notwithstanding this absolute authority held by the states, independent mortgage companies were responsible for originating the vast majority of subprime mortgage loans.³⁶² With the codification of the *Cuomo* decision,³⁶³ it remains to be seen whether or not the states will use this relatively new enforcement power with respect to national banks and federal thrifts in an effective manner.

The next Subpart will explore the doctrine of preemption regarding federal savings associations and the particularly apposite reform established by the Dodd-Frank Act.

357 See 12 U.S.C. § 25b(i)(1) (noting the statute expressly states that it is “[i]n accordance with the decision of the Supreme Court of the United States in *Cuomo*”).

358 See Dodd-Frank Implementation, *supra* note 3, at 43,552 (grounding its assertion on the Supreme Court opinion in *Cuomo*).

359 12 U.S.C. § 1465(c) .

360 See *Watters v. Wachovia Bank, N.A.* 550 U.S. 1, 13–14 (2007) (noting the National Bank Act was specifically “designed to prevent” the “diverse and duplicative superintendence of national banks” by the states).

361 See *infra* note 442 and accompanying text.

362 See *infra* note 441 and accompanying text.

363 See 12 U.S.C. § 25b(i)(1) .

D. Federal Savings Associations

As discussed in Part I.A, the Home Owner's Loan Act was viewed by some courts as occupying the field with respect to federal savings associations.³⁶⁴ For example, the Ninth Circuit has held that "federal law preempts the field of prepayments of real estate loans to federally chartered savings and loan associations, so that any California law in the area is inapplicable to federal savings and loan associations operating within California."³⁶⁵ Moreover, a field preemption standard for federal savings associations was explicitly set forth in regulations promulgated by the Office of Thrift Supervision ("OTS"), the prior regulator of federal thrifts.³⁶⁶ As provided by the regulations, the OTS "occupies the entire field of . . . deposit-related regulations" and the "entire field of lending regulation" with respect to federal savings associations.³⁶⁷ Even the Supreme Court has given an implicit nod to the field preemption doctrine for federal savings associations. As expressed by the Court in *Fidelity Federal Savings & Loan v. de la Cuesta*, the Federal Home Loan Bank Board (the first regulator of federal thrifts)³⁶⁸ was authorized by the HOLA to promulgate comprehensive "regulations governing 'the powers and operations of every [f]ederal savings and loan association from its cradle to its corporate grave.'"³⁶⁹ More specifically, the Court found that the "broad language of the [HOLA] expresses *no limits* on the [Federal Home Loan Bank] Board's authority to regulate the lending practices of federal savings and loans."³⁷⁰

³⁶⁴ See *supra* notes 36–37 and accompanying text.

³⁶⁵ *Meyers v. Beverly Hills Fed. Sav. & Loan Ass'n*, 499 F.2d 1145, 1147 (9th Cir. 1974).

³⁶⁶ See 12 U.S.C. §§ 5411, 5412 (transferring all functions of the Office of Thrift Supervision with respect to federal savings associations to the Office of the Comptroller of the Currency effective July 21, 2011).

³⁶⁷ 12 C.F.R. § 557.11(b) (2011) (authorizing the scope of authority with respect to deposit-related regulations); *id.* § 560.2(a) (authorizing the scope of authority with respect to lending regulation).

³⁶⁸ See *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 144 (1982) ("The [Federal Home Loan Bank] Board . . . was formed in 1932 and thereafter was vested with plenary authority to administer the Home Owners' Loan Act of 1933 . . ." (citation omitted)).

³⁶⁹ *Id.* at 144–45 (quoting *California v. Coast Fed. Sav. & Loan Ass'n*, 98 F. Supp. 311, 316 (S.D. Cal. 1951)); *Meyers*, 499 F.2d at 1146–47 (quoting *Coast Fed. Sav. & Loan Ass'n*, 98 F. Supp. at 316).

³⁷⁰ *de la Cuesta*, 458 U.S. at 161 (emphasis added) ("Congress plainly envisioned that federal savings and loans would be governed by what the Board—not any particular state—deemed to be the 'best practices.'"); see also *First Fed. Sav. & Loan Ass'n of Bos. v. Tax Comm'n of Mass.*, 437 U.S. 255, 258 n.3 (1978) (noting that the HOLA "protects federal associations from being forced into the state regulatory mold").

However, as part of the reform legislation, the Dodd-Frank Act changed the preemption standards applicable to federal savings associations to conform to the legal standards applicable to national banks.³⁷¹ Congress also expressly provided that the Home Owners' Loan Act³⁷² "does not occupy the field in any area of [s]tate law."³⁷³ Thus, federal savings associations will no longer benefit from field preemption. Instead, in accordance with the legal standards applicable to national banks, the conflict preemption standard of *Barnett* will be applied to federal thrifts.³⁷⁴ Moreover, operating subsidiaries of federal thrifts will no longer benefit from any type of preemption. Instead, in accordance with the legal standards applicable to operating subsidiaries of national banks, operating subsidiaries of federal thrifts will be subject to relevant state laws.³⁷⁵

In considering this change in the preemption standard for federal thrifts from field preemption to conflict preemption,³⁷⁶ it is important to understand the initial divergence in preemption standards between national banks and federal thrifts. As provided in the HOLA, one of the primary purposes for the creation of thrift institutions was to provide financing for home ownership.³⁷⁷ Indeed, the Supreme Court has noted that the "HOLA, a product of the Great Depression of the 1930's, was intended 'to provide emergency relief with respect to home mortgage indebtedness' at a time when as many as half of all home loans in the country were in default."³⁷⁸ Thus, Congress enacted the HOLA to "provide[] for the creation of a system of federal sav-

371 12 U.S.C. § 1465(a) ("Any determination by a court or by the Director [of the Office of Thrift Supervision] or any successor officer or agency regarding the relation of a State law to a provision of this chapter or any regulation or order prescribed under this chapter shall be made in accordance with the laws and legal standards applicable to national banks regarding the preemption of State law.").

372 *Id.* §§ 1461–1470.

373 *Id.* § 1465(b).

374 *Id.* § 25b(b) (noting that "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*," a State consumer financial law is preempted if "the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers"); *see supra* notes 371, 373 and accompanying text.

375 *See* 12 U.S.C. §§ 25b(b)(2), (e), (h)(2), 1465(a); 12 C.F.R. §§ 7.4010(a), 34.6 (2011).

376 Dodd-Frank Implementation, *supra* note 3, at 43,556 n.48 (noting that a conflict preemption standard "is in contrast to the [Office of Thrift Supervision's] preemption rules, which assert an 'occupation of the field' preemption standard for Federal savings associations").

377 *See* 12 U.S.C. § 1464(a).

378 *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 159 (1982) (quoting H.R. REP. NO. 210, at 1 (1933) (Conf. Rep.)).

ings and loan associations . . . ‘to promote the thrift of the people . . . to finance their homes and the homes of their neighbors.’³⁷⁹

Therefore, the policy underlying the field preemption doctrine for federal savings associations was to protect the powers of federal savings associations in providing credit for individuals to purchase a home.³⁸⁰ In contrast, national banks did not share this same fundamental purpose to promote home ownership, and thus did not benefit from field preemption of state laws. Rather, the courts historically have relegated national banks to the higher standard of conflict preemption.³⁸¹ While a field preemption standard was not universally applied by the courts,³⁸² the benefits of a field preemption standard for federal savings associations in certain jurisdictions should not be underestimated. For example, in the Ninth Circuit, the courts have consistently held that federal law occupied the field with respect to federal thrifts.³⁸³ Thus, many California state laws were preempted

379 *Id.* at 160 (quoting S. REP. NO. 91, at 2 (1933)).

380 12 U.S.C. § 1464(a) (specifying that thrift institutions are created “for the deposit of funds and for the extension of credit for homes and other goods and services The lending and investment powers conferred . . . are intended to encourage such institutions to provide credit for housing safely and soundly”); *California v. Coast Fed. Sav. & Loan Ass’n*, 98 F. Supp. 311, 316 (S.D. Cal. 1951) (finding one of the purposes for the creation of federal savings and loan associations is to provide financing for home ownership).

381 *See, e.g., Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25 (1996); *see also Franklin Nat’l Bank of Franklin Square v. New York*, 347 U.S. 373, 375–79 (1954) (holding that a federal statute permitting national banks to accept savings deposits preempts a conflicting state statute prohibiting the use of the word “savings” in the advertising of certain state and national banks); *First Nat’l Bank of San Jose v. California*, 262 U.S. 366, 368–69 (1923) (finding that national banks’ “power” to receive deposits preempts contrary state escheat law).

382 Some courts did apply a conflict preemption standard for federal savings and loan associations. *See, e.g., de la Cuesta*, 458 U.S. at 159, 170 (implicitly acknowledging the doctrine of field preemption for federal thrifts while still applying a conflict preemption standard in holding that a federal regulation permitting federal savings and loan associations to enforce due-on-sale clauses preempted a conflicting state law). Thus, the impact of a conflict preemption standard on federal thrifts may not be significant in certain areas, such as the law regarding due-on-sale clauses.

383 *See, e.g., Meyers v. Beverly Hills Fed. Sav. & Loan Ass’n*, 499 F.2d 1145, 1147 (9th Cir. 1974) (“[F]ederal law preempts the field of prepayments of real estate loans to federally chartered savings and loan associations, so that any California law in the area is inapplicable to federal savings and loan associations operating within California.”); *Glendale Fed. Sav. & Loan Ass’n v. Fox*, 459 F. Supp. 903, 911 (C.D. Cal. 1978) (“The Ninth Circuit has taken the position that Congress, in the HOLA, delegated to the [Federal Home Loan] Bank Board the authority to regulate the operations of federal savings and loan associations to the exclusion of state regulation.”); *Coast Fed. Sav. & Loan Ass’n*, 98 F. Supp. at 318 (“[T]he [Home Owners’ Loan] [A]ct . . . which authorized the creation, operation and supervision of federal savings and loan associations . . . embrace[s] the entire field It seems clear that Congress has preempted the field, making invalid the state statutes plaintiffs rely upon . . . when attempted to be invoked against a Federal savings and loan association.”).

without the need to apply the more rigorous standard of conflict preemption.

While the policy underlying a field preemption standard for federal thrifts, that of helping to provide home ownership to our nation's citizens, has been a long-standing hallmark of our national policy,³⁸⁴ the use of a field preemption doctrine for federal thrifts in order to further the national policy of home ownership was misguided. As now firmly established by the Dodd-Frank Act,³⁸⁵ federal thrifts should be held to the same preemption standards as national banks. There are three reasons for this conclusion.

First and foremost, the National Bank Act was passed with the underlying policy of creating a system of national banks authorized to issue a uniform national currency.³⁸⁶ A uniform national currency would, in turn, facilitate interstate commerce.³⁸⁷ However, courts historically did not apply a preemption of the field standard for national banks in order to further the national policy goal of facilitating interstate commerce.³⁸⁸ Even in modern times, where national banks facilitate interstate commerce through deposit services, trust and investment services, and commercial and consumer lending activities,³⁸⁹ courts still do not apply a preemption of the field standard for national banks.³⁹⁰

384 See *supra* notes 377–79 and accompanying text.

385 See *supra* notes 371–75 and accompanying text.

386 12 U.S.C. § 38 (2012) (“The Act entitled ‘An Act to provide a national currency . . . and to provide for the circulation and redemption thereof,’ approved June 3, 1864, shall be known as ‘The National Bank Act.’”); CARNELL ET AL., *supra* note 13, at 8–9; ROSS M. ROBERTSON, *THE COMPTROLLER & BANK SUPERVISION: A HISTORICAL PERSPECTIVE* 45 (1995 ed.).

387 See *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 548 (1869) (finding that “Congress has undertaken to supply a currency for the entire country” which may be used “in all the transactions of commerce”).

388 See, e.g., *First Nat’l Bank of San Jose v. California*, 262 U.S. 366, 368–69 (1923) (finding that national banks’ “power” to receive deposits preempts contrary state escheat law).

389 MICHAEL P. MALLOY, *BANKING & FINANCIAL SERVICES LAW* 27–28 (2d ed. 2005) (“[C]ommercial banks [(i.e., national banks and state banks)] are authorized to offer the full range of banking services, including demand accounts (i.e., checking accounts) for business and personal use, savings and time deposits, investment and loan services, trust department services, and the like.” (emphasis omitted)).

390 See, e.g., *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25 (1996); see also *Franklin Nat’l Bank of Franklin Square v. New York*, 347 U.S. 373, 375–79 (1954) (holding that a federal statute permitting national banks to accept savings deposits preempts a conflicting state statute prohibiting the use of the word “savings” in the advertising of certain state and national banks).

Second, similar to the HOLA for federal thrifts, the National Bank Act covers nearly every aspect of a national bank's existence.³⁹¹ Moreover, similar to the prior regulators of federal savings associations, the Comptroller of the Currency has broad authority granted by the National Bank Act to regulate the operations of national banks.³⁹² Yet, courts have not found that Congress, in the National Bank Act, intended to preempt the entire field of law with respect to national banks,³⁹³ nor have courts found that the Comptroller's regulations preempt the field regarding national banks.³⁹⁴

Third, a consistent preemption standard for both national banks and federal savings associations is certainly warranted given the similarities in services provided by both types of depository institutions.³⁹⁵ For example, a large proportion of home mortgages are now underwritten by national banks.³⁹⁶ Thus, for all these reasons, preemption law with respect to federal thrifts should be guided by the same standard that applies to national banks: a conflict preemption standard.

The following Part will address the argument that federal preemption resulted in the subprime mortgage crisis and the financial crisis.

³⁹¹ See 12 U.S.C. §§ 21–216 (2012); *Bank of Am. v. City of S.F.*, 309 F.3d 551, 558 (9th Cir. 2002) (“[S]ince the passage of the National Bank Act in 1864, the federal presence in banking has been significant.” (citing *Barnett Bank*, 517 U.S. at 32–33)).

³⁹² See 12 U.S.C. §§ 1–216; CARNELL ET AL., *supra* note 13, at 61 (“[T]he Comptroller operates with broad autonomy reinforced by statute.”); MALLOY, *supra* note 389, at 40 (“Approval by the Comptroller is required for virtually all significant actions to be taken by a national bank – chartering, establishment of branches, changes in corporate control and structure of organization – and the [Comptroller] also supervises the day-to-day activities of national banks, including the loan and investment policies of the banks, trust activities, issuance of securities and the like.”); ROBERTSON, *supra* note 386, at 1.

³⁹³ *Idaho Dep’t of Fin. v. Sec. Pac. Bank Idaho, N.A.* 800 F. Supp. 922, 925 (D. Idaho 1992) (“It is clear that Congress has not completely preempted the entire banking field either expressly or impliedly, so any preemption must arise out of an actual conflict between federal and state law.”).

³⁹⁴ *McCormick v. Wells Fargo Bank*, No. 3:08-0944, 2009 WL 151588, at *2 (S.D. W. Va. Jan. 22, 2009) (“[T]here is . . . no field preemption of national bank regulation.”).

³⁹⁵ CARNELL ET AL., *supra* note 13, at 27–28 (“No longer do stark contrasts exist between commercial banks and thrift institutions. Thrifts can make commercial and consumer loans. They can offer credit cards, trust services, and personal and corporate checking accounts. . . . Banks and their affiliates, in turn, originate a large proportion of all home mortgages.”).

³⁹⁶ *Id.* at 28.

III. THE FALLACY THAT FEDERAL PREEMPTION CONTRIBUTED TO THE FINANCIAL CRISIS

There are those who believe that federal preemption of state laws is “bad public policy” and should not be permitted.³⁹⁷ According to this line of reasoning, federal preemption allowed predatory lending to occur and ultimately resulted in the subprime mortgage crisis and the financial crisis.³⁹⁸ Predatory lending generally involves lending terms and practices that are unfair, abusive, deceptive or fraudulent to the borrower, and is generally associated with subprime mortgage loans.³⁹⁹ While not all subprime mortgage loans were predatory in nature,⁴⁰⁰ subprime mortgage loans generally were granted to individuals “with impaired or limited credit histories, or high debt relative to their income.”⁴⁰¹ Not surprisingly, subprime mortgage loans experienced high rates of default.⁴⁰² According to a study by the Joint Center for Housing Studies of Harvard University, between 2003 and 2007, “[d]efaults on subprime loans within six to eighteen months of origination . . . increased with each successive” year.⁴⁰³ Many economists and experts in the field believe the subprime mortgage crisis was caused by “the combination of a number of factors in which subprime lending played a major part.”⁴⁰⁴

Another type of nonprime loan that contributed to the financial crisis is the Alt-A mortgage loan.⁴⁰⁵ Alt-A mortgages have better credit

397 Dodd-Frank Implementation, *supra* note 3, at 43,553.

398 *Id.*; see also Mason et al., *supra* note 11, at 790 (discussing arguments that blame federal “preemption of state banking laws” for permitting “banks to originate predatory subprime . . . mortgages”); Spitzer, *supra* note 4, at A25 (arguing that the federal government engaged in an “aggressive . . . campaign” aimed at preventing the states from protecting consumers against predatory lending practices).

399 U.S. DEP’T OF TREASURY & U.S. HOUSING & URBAN DEV., CURBING PREDATORY HOME MORTGAGE LENDING: A JOINT REPORT 1 (2000), available at <http://www.treasury.gov/press-center/press-releases/Documents/treasrpt.pdf> (providing a general definition of predatory lending).

400 See Statement of John C. Dugan, *supra* note 339, at 7 (“[P]redatory lending is usually a subset of subprime lending, but it is different from the type of subprime lending that was lawful but involved exceptionally weak underwriting standards.”).

401 U.S. DEP’T OF TREASURY & U.S. DEP’T OF HOUSING & URBAN DEV., *supra* note 399, at 13.

402 See Bianco, *supra* note 341, at 6 (noting that “high default rates” were experienced on subprime mortgage loans granted to “higher-risk borrowers with lower income or lesser credit history than ‘prime’ borrowers”).

403 JOINT CTR. FOR HOUSING STUDIES OF HARVARD UNIVERSITY, THE STATE OF THE NATION’S HOUSING 20 (2008), available at <http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/son2008.pdf>.

404 Bianco, *supra* note 341, at 3.

405 See generally Prabha Natarajan, *Toxic Debt Returns to Fashion*, WALL ST. J., Sept. 2, 2010, at C6 (“Alt-A mortgages became infamous during the financial crisis for their inadequate or

quality than subprime loans; however, these alternative mortgage products have inferior credit quality when compared to prime loans.⁴⁰⁶ Alt-A mortgages were marketed to individuals with credit scores that were better than those of subprime borrowers; however, these alternative mortgage products required “little or no verification of income.”⁴⁰⁷ In addition, Alt-A mortgages generally included higher loan amounts relative to the value of the home, and higher debt relative to the borrower’s income, than prime loans.⁴⁰⁸ Similar to subprime mortgage loans, Alt-A mortgages experienced high rates of default.⁴⁰⁹

Keeping in mind the issues associated with nonprime mortgage loans, this Part will address the argument that federal preemption resulted in the subprime mortgage crisis and the financial crisis and reveal the fallacy of this premise. Based on independent data and an analysis of the preemption doctrine, this Part will demonstrate that federal preemption did not contribute to the crises.

Before addressing these matters, it is important to understand the complex structure of the regulatory environment for different lending institutions. This Part will first discuss the federal bank and thrift regulatory agencies and the financial institutions regulated by each agency.

A. *The Federal Regulatory Agencies and the Institutions they Regulate*

The federal bank and thrift regulatory agencies have evolved over the long history of banking. The Office of the Comptroller of the Currency, the first banking regulator, was established under the National Currency Act of 1863, now known as the National Bank Act of 1864,⁴¹⁰ as the regulator of national banks.⁴¹¹ The Comptroller’s au-

inaccurate documentation; many failed quickly because home buyers couldn’t afford to make the monthly payments.”).

406 See Patrick Bajari et al., *A Dynamic Model of Subprime Mortgage Default: Estimation and Policy Implication* 4 n.3 (Nov. 23, 2011) (unpublished paper), available at <http://are.berkeley.edu/documents/seminar/2011Nov23MortgageDynamic.pdf>.

407 Chris Isidore, *Liar loans: Mortgage Woes Beyond Subprime*, CNN MONEY (Mar. 19, 2007, 5:01 PM), http://money.cnn.com/2007/03/19/news/economy/next_subprime/index.htm.

408 See Bianco, *supra* note 341, at 6 (stating that mortgage loans classified as Alt-A exhibit an increased risk profile because these loans generally have “higher loan-to-value and debt-to-income ratios” compared to prime mortgages).

409 *Id.*

410 12 U.S.C. §§ 1–216 (2012).

411 *Id.*; see CARNELL ET AL., *supra* note 13, at 61 (“The Comptroller of the Currency . . . regulates . . . national banks”); MALLOY, *supra* note 389, at 19 (“Approval by the Comptroller is required for virtually all significant actions to be taken by a national bank—chartering, establishment of branches, changes in corporate control and structure of or-

thority also extends to subsidiaries of national banks.⁴¹² Under the Dodd-Frank Act, Congress granted the Comptroller the additional authority to regulate federal savings associations.⁴¹³ Previously, federal savings associations were regulated by the OTS.⁴¹⁴ However, the Dodd-Frank Act abolished the OTS and transferred the powers and responsibilities of the OTS to the Comptroller of the Currency, the Federal Deposit Insurance Corporation (“FDIC”), and the Board of Governors of the Federal Reserve (“Federal Reserve Board”), as further delineated in this Subpart.⁴¹⁵

The Federal Reserve System was established in 1913 under the Federal Reserve Act.⁴¹⁶ The Federal Reserve Board and the Federal Reserve banks (collectively, the “Federal Reserve”) are responsible for regulating bank holding companies and state-chartered banks that are members of the Federal Reserve System.⁴¹⁷ The Federal Reserve shares the supervision of state-chartered member banks with the respective states in which those banks are chartered.⁴¹⁸ The Federal Reserve also has limited responsibility for regulating nonbank affiliates of member banks, including nonbank affiliates of national banks and nonbank affiliates of state member banks.⁴¹⁹ The Federal Reserve shares the supervision of these nonbank affiliates with the states.⁴²⁰ Under the Dodd-Frank Act, Congress granted the Federal Reserve Board the additional authority to regulate savings and loan holding

ganization—and the [Comptroller] also supervises the day-to-day activities of national banks, including the loan and investment policies of the banks, trust activities, issuance of securities and the like.”); ROBERTSON, *supra* note 386, at 44–45, 81.

412 See generally 12 U.S.C. § 24a; MALLOY, *supra* note 389, at 40.

413 See generally 12 U.S.C. § 5412.

414 The OTS previously regulated federally chartered savings associations, state-chartered savings associations, and savings and loan holding companies. See *id.* § 5412(b). The OTS shared supervision of the state-chartered savings associations with the respective states in which those institutions were chartered. CARNELL ET AL., *supra* note 13, at 63. Prior to the OTS, the Federal Home Loan Bank Board was the regulator of federal and state thrifts and thrift holding companies. MALLOY, *supra* note 389, at 51.

415 The Dodd-Frank Act abolished the OTS and transferred its responsibilities to the other bank regulatory agencies effective July 21, 2011. See 12 U.S.C. §§ 5411–5413.

416 Federal Reserve Act, Pub. L. No. 63-43, 38 Stat. 251 (1913) (codified at 12 U.S.C. §§ 221–505); CARNELL ET AL., *supra* note 13, at 13; MALLOY, *supra* note 389, at 47.

417 12 U.S.C. §§ 321, 325, 1844; CARNELL ET AL., *supra* note 13, at 62; MALLOY, *supra* note 389, at 47.

418 12 U.S.C. § 326; CARNELL ET AL., *supra* note 13, at 63; MALLOY, *supra* note 389, at 40.

419 See 12 U.S.C. §§ 334, 338, 1828a(b) (noting that in connection with the examination of state member banks, the Federal Reserve may examine the affiliates of the state member banks to determine “the relations between [the state member banks] and their affiliates and the effect of such relations on the affairs of” the state member banks).

420 *Id.* § 1846(a).

companies.⁴²¹ Previously, these institutions were regulated by the OTS.⁴²² Also under the Dodd-Frank Act, the Federal Reserve Board now has examination authority with respect to a designated nonbank financial company and any of its subsidiaries.⁴²³

The FDIC was established under the Banking Act of 1933.⁴²⁴ The FDIC regulates state-chartered banks that are not members of the Federal Reserve System.⁴²⁵ These state-chartered non-member banks are supervised by both the FDIC and the respective states in which the bank is chartered.⁴²⁶ Under the Dodd-Frank Act, Congress granted the FDIC the additional authority to regulate state-chartered savings associations.⁴²⁷ Previously, the OTS was the federal regulator of these institutions.⁴²⁸

With the abrogation of the OTS and the transferring of regulatory authority for federal savings associations to the Comptroller of the Currency,⁴²⁹ the Dodd-Frank Act streamlined the bank and thrift regulatory environment. The Comptroller now regulates both national banks and federal thrifts.⁴³⁰ However, state-chartered banks and thrifts continue to be subject to supervision by both a federal banking agency (the FDIC or the Federal Reserve) and the state in which the institution is chartered.⁴³¹

⁴²¹ *Id.* § 5412.

⁴²² *See generally id.* § 5412(b).

⁴²³ A nonbank financial company is a company that is “predominantly engaged” in financial activities. *Id.* § 5311(a)(4). A company will be designated as a nonbank financial company subject to supervision by the Federal Reserve Board based on whether “material financial distress” at the company “could pose a threat to the financial stability of the United States.” *Id.* §§ 5323(a)(1), (b)(1).

⁴²⁴ Banking Act of 1933, Pub. L. No. 73-66, 48 Stat. 162 (1933) (codified as amended in scattered sections of 12 U.S.C.); CARNELL ET AL., *supra* note 13, at 18.

⁴²⁵ 12 U.S.C. § 1820(b); CARNELL ET AL., *supra* note 13, at 62. The FDIC also has the authority to examine any insured depository institution if the FDIC determines that such examination is necessary for deposit insurance purposes (so-called back-up examination authority). In addition, if the primary federal regulator of an insured depository institution fails to carry out necessary enforcement action, the FDIC has the power to take enforcement action (so-called back-up enforcement authority). *Id.*; 12 U.S.C. § 1818(t). Additionally, under the Dodd-Frank Act, the FDIC’s back-up examination authority was expanded to cover nonbank financial companies supervised by the Federal Reserve Board and bank holding companies with \$50 billion or more in assets. *Id.* §§ 1820(b), 5365(a). The Dodd-Frank Act also expanded the FDIC’s back-up enforcement authority to cover any depository institution holding company. *Id.* § 1818(t).

⁴²⁶ *Id.* § 1820(h).

⁴²⁷ *Id.* § 5412.

⁴²⁸ *Id.* § 5412(b).

⁴²⁹ *See supra* notes 413–15 and accompanying text.

⁴³⁰ *See supra* notes 411–13 and accompanying text.

⁴³¹ *See supra* notes 417–18, 425–27 and accompanying text.

As discussed in Parts I and II, federal preemption applies to national banks and federal savings associations. The next Subpart will focus on the lending institutions for which federal preemption does not apply.

B. Preemption Does Not Apply to State-Regulated Lending Institutions

In examining whether federal preemption contributed to the subprime mortgage crisis and the financial crisis, it is important to distinguish between financial institutions subject to federal preemption and those not subject to federal preemption. Federal preemption applies to national banks and federal thrifts.⁴³² These banking institutions are regulated primarily by a federal banking agency.⁴³³ However, federal preemption does not apply to lending institutions regulated by the states.⁴³⁴ These state-regulated mortgage underwriters include state-chartered banks and thrifts, nonbank affiliates of national banks and federal thrifts under a holding company,⁴³⁵ and independent mortgage companies that are not affiliated with a bank or thrift.⁴³⁶ Therefore, prior to and during the financial crisis, states were free to enact and enforce mortgage lending laws with respect to these state-regulated lending institutions without the threat or imposition of federal preemption.⁴³⁷

However, despite the states' power to regulate and enforce mortgage lending laws unimpeded by federal preemption, the "vast majority" of nonprime loans, including subprime mortgages and Alt-A mortgages, were originated by state-regulated lending institutions.⁴³⁸

⁴³² See *supra* Parts I, II.A, II.E.

⁴³³ As provided by the Dodd-Frank Act, national banks and federal thrifts are both regulated by the Comptroller of the Currency. See *supra* notes 411–13 and accompanying text.

⁴³⁴ Statement of John C. Dugan, *supra* note 339, at 5.

⁴³⁵ Nonbank affiliates of national banks and federal thrifts under a holding company should be clearly distinguished from operating subsidiaries of national banks and federal thrifts. Prior to the Dodd-Frank Act, operating subsidiaries of national banks and federal thrifts received the same preemption of state laws that the parent national bank or federal thrift received. See *Watters v. Wachovia Bank, N.A.* 550 U.S. 1, 7 (2007); 12 C.F.R. §559.3(n) (2003) (noting that state law applies to an operating subsidiary of a federal thrift only to the same extent that it applies to the parent federal thrift). In stark contrast, federal preemption did not apply to the affiliates of national banks and federal thrifts under a holding company. See generally Statement of John C. Dugan, *supra* note 339, at 6–7. These nonbank affiliates share the same parent holding company with the particular national bank or federal thrift. See *id.* at 5, chart 1.

⁴³⁶ See Statement of John C. Dugan, *supra* note 339, at 5. This Article will define "independent mortgage companies" as entities that are not affiliated with a bank or thrift and are in the business of providing residential mortgage loans to consumers.

⁴³⁷ *Id.* at 5–6.

⁴³⁸ *Id.* at 8.

Independent data indicates that during the peak of the mortgage crisis from 2005 to 2007, seventy-two percent of the nonprime loans, including nearly seventy-eight percent of the subprime loans, were originated by lending institutions subject to state jurisdiction.⁴³⁹ Thus, federal preemption did not apply with respect to nearly three-quarters of the nonprime loans, including nearly eighty percent of the subprime mortgages.⁴⁴⁰ Moreover, independent mortgage companies, alone, were responsible for originating more than half of the nonprime loans, including nearly sixty-four percent of the subprime loans.⁴⁴¹ These independent mortgage companies were regulated solely by the states in which the companies were operating and did not benefit from federal preemption.⁴⁴² In contrast, during the same time period, national banks and their subsidiaries accounted for only twelve percent of the nonprime loans.⁴⁴³

A study of data associated with loans made under guidelines established by the Community Reinvestment Act (“CRA”) reveals that “only six percent of all the higher-priced loans” made to “lower income borrowers or neighborhoods” were extended by lenders covered by the CRA.⁴⁴⁴ The CRA covers insured depository institutions.⁴⁴⁵ The Act does not cover independent mortgage companies or nonbank affiliates of national banks and federal thrifts under a holding company. Thus, these state-regulated lenders, for which preemption does

439 *Id.* at 8, app. B at 3–4 (acknowledging that data is derived from Loan Performance Corp., now owned by First American CoreLogic, Inc.); *id.* app. B at 4 n.2 (“The [72 percent and 78 percent] figure[s] understate[] the actual extent of state authority, because loans made by affiliates of federal thrifts are [not included in these percentages] but actually are subject to state authority.”).

440 *See id.* at 8; *see also id.* app. B at 4.

441 *See id.* app. B at 2, 4 (“Lenders supervised only by the states originated 63.6 percent of subprime loans during these years, and 57.1 percent of combined nonprime [loans]”); *see also* Mason et al., *supra* note 11, at 803–04 (“Our analysis indicates that the vast majority of subprime loans were originated by lenders outside of the banking system’s regulatory apparatus.”).

442 Statement of John C. Dugan, *supra* note 339, at 4 (“[M]ortgage lenders that are not affiliated with banks or thrifts are subject only to state supervision.”).

443 *See id.* app. B at 4 (explaining that, from 2005 to 2007, national banks and their subsidiaries originated 12.1% of the nonprime loans, including 10.6% of the subprime loans, while federal thrifts and their subsidiaries originated 15.9% of the nonprime loans, including 11.5% of the subprime loans). *But see id.* app. B at 4 n.2 (noting that these figures are somewhat overstated because loans made by affiliates of federal thrifts are included in the percentages for federal thrifts).

444 U.S. DEP’T OF TREASURY, FINANCIAL REGULATORY REFORM, A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION 69 (2009) (“[T]he worst abuses were made by firms not covered by [the] CRA.”).

445 *See generally* 12 U.S.C. §§ 2901(a), 2902(2) (2012).

not apply, were responsible for originating ninety-four percent of all the higher-priced loans.⁴⁴⁶

In examining the argument that federal preemption resulted in the subprime mortgage crisis and the financial crisis, it is clear that the argument is flawed. As the independent data demonstrates, the “overwhelming majority” of subprime mortgages were originated by state-regulated lending institutions for which federal preemption did not apply.⁴⁴⁷ In particular, independent mortgage companies, those lending institutions regulated solely by the states, accounted for more than half of the subprime mortgage originations.⁴⁴⁸ As stated by Barney Frank, former Chairman of the House Committee on Financial Services and co-sponsor of the Dodd-Frank Act, the subprime mortgage crisis was caused not by the regulated banks, but instead “[by] loans being made outside of the regular banking system.”⁴⁴⁹ In discussing the “role of regulation,” Representative Frank observed that “[r]easonable regulation of mortgages by the bank . . . regulators allowed the market to function in an efficient and constructive way, while mortgages made and sold in the unregulated sector led to the crisis.”⁴⁵⁰ Even state attorneys general have found that “[a]lmost all of the leading subprime lenders [were] mortgage companies and finance companies, not banks or direct bank subsidiaries.”⁴⁵¹ For example, one particularly notorious independent mortgage company held a significant share of the subprime mortgage market. According to the Washington State Department of Financial Institutions, “Ameriquest Mortgage Company was the largest privately held retail

446 Mason et al., *supra* note 11, at 782, 791.

447 *Id.* at 782; *see also id.* at 787–88 (“The overwhelming majority of instances of predatory lending involved loans originated by institutions not subject to preemption, but instead under the purview of state laws.”).

448 *See supra* notes 441–42 and accompanying text.

449 Representative Barney Frank, Chairman of the House Financial Services Committee, Speech at National Press Club: The “Loan Arrangers” Will Not Ride Again (July 27, 2009), available at http://www.huffingtonpost.com/rep-barney-frank/the-loan-arrangers-will-n_b_247264.html.

450 Barney Frank, Op-Ed., *Lessons of the Subprime Crisis*, BOSTON GLOBE, July 14, 2007, http://www.boston.com/news/globe/editorial_opinion/oped/articles/2007/09/14/lessons_of_the_subprime_crisis.

451 Julie L. Williams & Michael S. Bylsma, *Federal Preemption and Federal Banking Agency Responses to Predatory Lending*, 59 BUS. LAW. 1193 n.29 (2004) (“Based on consumer complaints received, as well as investigations and enforcement actions undertaken by the Attorneys General, predatory lending abuses are largely confined to the subprime mortgage lending market and to non-depository institutions.” (quoting Brief of Amicus Curiae State Attorneys Gen. in Opposition to Plaintiff’s Motion for Summary Judgment and in Support of Defendants’ Motion for Summary Judgment, Nat’l Home Equity Mortgage Ass’n v. Office of Thrift Supervision, 271 F. Supp. 2d 264 (D.D.C. 2003) (No. CIV.A.02-2506(GK)), 2003 WL 24210106, at *8)).

mortgage lender in America and the largest subprime lender by volume.”⁴⁵²

Moreover, evidence indicates that state-regulated subprime lenders, in particular, independent mortgage companies regulated solely by the states, engaged in abusive lending practices.⁴⁵³ For example, despite the ability of the states to regulate and enforce state lending laws unhampered by federal preemption, Ameriquest was permitted to engage in “unlawful mortgage lending practices from January 1, 1999 through December 31, 2005” before entering into a multistate settlement agreement with forty-nine states in January 2006.⁴⁵⁴ Ameriquest could have applied for a charter to become a national bank or a federal thrift and, thus, receive the benefit of federal preemption for its multistate mortgage lending operations. Yet, Ameriquest chose to remain an independent mortgage company regulated by the states. Clearly, Ameriquest did not view federal preemption as a means of avoiding compliance with state law nor was preemption involved in any way in the predatory lending activities of this state-regulated mortgage company.

Perhaps even more revealing is the fact that a number of large bank holding companies chose to establish their subprime mortgage lending operations in the affiliate of the national bank (for which preemption did not apply) rather than in the national bank (for which preemption did apply).⁴⁵⁵ One could query why these bank holding companies chose to place their subprime mortgage lending operations in an entity that did not benefit from federal preemption. Perhaps the level of regulation differed, making state-regulated mortgage lending institutions more attractive to the subprime mortgage market. Whatever the reason, it is clear that bank holding companies were not relying on federal preemption to shield their subprime mortgage lending institutions from state law. Instead, state laws, including any laws the states chose to enact with respect to regu-

⁴⁵² *Ameriquest Settlement Facts*, WASH. STATE DEP’T OF FIN. INSTS., http://www.dfi.wa.gov/cs/ameriquest_facts.htm (last visited Feb. 18, 2013).

⁴⁵³ U.S. DEP’T OF TREASURY & U.S. DEP’T OF HOUSING & URBAN DEV., *supra* note 399, at 13 (“[A]n unscrupulous subset of these subprime . . . lenders (often those not subject to federal banking supervision) . . . engage[d] in abusive lending practices that strip[ped] borrowers’ home equity and place[d] them at increased risk of foreclosure.”).

⁴⁵⁴ AMERIQUEST MULTISTATE SETTLEMENT (Mar. 29, 2013), <http://ameriquestmultistatesettlement.com>.

⁴⁵⁵ Statement of John C. Dugan, *supra* note 339, at 6–7; *see also id.* at 7 (“For example, HSBC, Citigroup, Wells Fargo, and Countrywide (when it owned a national bank) conducted most of their subprime mortgage lending in holding company affiliates of national banks that were . . . subject to . . . state supervision.”).

lation, supervision, and enforcement, were fully applicable to these state-regulated affiliates of national banks.⁴⁵⁶

Moreover, the power of states to regulate the affiliates of national banks under a holding company has been made explicit by Congress.⁴⁵⁷ The Bank Holding Company Act “expressly empowers states to regulate bank holding companies and their subsidiaries.”⁴⁵⁸ Thus, states have the statutory authority, granted by Congress, to regulate the affiliates of national banks under a bank holding company. In contrast, the Savings and Loan Holding Company Act is silent regarding the power of states to regulate savings and loan holding companies and their subsidiaries.⁴⁵⁹ However, the Second Circuit has interpreted “Congress’s silence . . . as implicit approval of state regulation.”⁴⁶⁰ Thus, states also have the authority to regulate affiliates of federal thrifts under a holding company.

Additionally, independent data indicates that, between 2000 and 2009, approximately 240 federally regulated banks converted from a federal charter to a state charter.⁴⁶¹ Of this amount, roughly twelve percent converted to a state charter to avoid federal regulatory actions.⁴⁶² According to another study, between 2000 and 2011, almost 300 national banks converted to a state charter while only ninety-two state-chartered banks converted to a nationally chartered bank.⁴⁶³ The apparent reason for the conversions from a national charter to a state charter was the “pursuit of leniency” a state regulator would be expected to provide in comparison to a federal regulator.⁴⁶⁴ Thus, many federally chartered banks converted to state-regulated institu-

456 *Id.* at 6 (“[T]he overwhelming majority of subprime lending was done outside of national banks in entities that were subject to state law . . .”).

457 *See* 12 U.S.C. § 1846(a) (2012) (“No provision of this chapter shall be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to companies, banks, bank holding companies, and subsidiaries thereof.”).

458 *Sears Roebuck & Co. v. Brown*, 806 F.2d 399, 410 (2d Cir. 1986) (citing 12 U.S.C. § 1846).

459 *See id.* (“[T]he [Savings and Loan Holding Company Act] does not expressly allow regulation of S&L holding companies by states . . .”).

460 *Id.* (basing its interpretation upon Congress’s indication that “it was aware at the time of the [Savings and Loan Holding Company Act’s] passage that states already regulated savings and loan holding companies and their subsidiaries”).

461 Binyamin Appelbaum, *By Switching Their Charters, Banks Skirt Supervision*, WASH. POST, Jan. 22, 2009, http://articles.washingtonpost.com/2009-01-22/business/36867887_1_national-charters-regulators-state-charters.

462 *Id.*

463 Barbara A. Rehm, *Two-Decade Trend Squeezes Choice from Dual Banking System*, AM. BANKER (Oct. 26, 2011, 3:00 PM), http://www.americanbanker.com/issues/176_208/national-banks-community-policymakers-charter-1043546-1.html.

464 *See* Appelbaum, *supra* note 461.

tions in an effort to avoid federal regulation, notwithstanding the state lending laws that would be fully applicable to these newly converted state banks.⁴⁶⁵ Evidently, these banks were not relying on federal preemption to avoid compliance with state law.

As demonstrated, the doctrine of federal “preemption did not and does not prevent regulation” of independent mortgage companies.⁴⁶⁶ Nor does federal preemption prevent regulation of other state-regulated lending institutions, including affiliates of national banks and federal thrifts under a holding company and state-chartered banks and thrifts.⁴⁶⁷ Nevertheless, nearly three-quarters of the nonprime loans, including nearly eighty percent of the subprime loans, were originated by state-regulated lending institutions for which federal preemption did not apply.⁴⁶⁸ State-regulated lenders also were responsible for originating ninety-four percent of all the higher-priced loans.⁴⁶⁹ Moreover, state-regulated subprime lenders engaged in abusive and unlawful lending practices, despite the unhampered ability of the states to regulate and enforce state anti-predatory lending laws against these lenders.⁴⁷⁰

The supposed link between federal preemption and the subprime mortgage crisis is even more tenuous when one considers the choice of bank holding companies to place their mortgage lending business in the affiliate of the national bank rather than in the national bank,⁴⁷¹ knowing federal preemption would not apply to the affiliate of the national bank. Clearly, bank holding companies were not relying on federal preemption to shield their mortgage lending subsidiaries from state laws. Rather, state laws were fully applicable to these state-regulated mortgage lenders.⁴⁷² The argument against federal preemption is further weakened by the choice of nationally chartered banks to convert to state charters despite the applicability of state lending laws to state-regulated institutions.⁴⁷³ Similar to the bank holding companies, these banks were not depending upon federal

465 See *supra* notes 434–35 and accompanying text.

466 Dodd-Frank Implementation, *supra* note 3, at 43,554.

467 See *supra* notes 434–37 and accompanying text.

468 See *supra* notes 439–40 and accompanying text.

469 See *supra* notes 444–46 and accompanying text.

470 See *supra* notes 434–37, 453–54 and accompanying text.

471 Statement of John C. Dugan, *supra* note 339, at 6–7 (“[S]everal large bank holding companies conducted all or most of their subprime mortgage lending in nonbank subsidiaries rather than their national bank subsidiaries.”).

472 *Id.* at 6.

473 See *supra* notes 461–65 and accompanying text.

preemption to protect their mortgage lending activities from state laws.

Even granting that national banks and federal thrifts engaged in nonprime lending, albeit to a minimal extent,⁴⁷⁴ this fact does not support the argument that federal preemption led to the subprime mortgage crisis and the financial crisis. Obviously, state lending laws did not prohibit nonprime mortgage lending, in and of itself, as evidenced by the significant percentage of subprime loans and Alt-A loans originated by state-regulated mortgage lenders.⁴⁷⁵ Thus, the origination of nonprime loans by national banks and federal thrifts does not implicate federal preemption as a contributing cause of the subprime mortgage crisis and the financial crisis. There is no nexus between federal preemption and the subprime mortgage crisis.

As an illustration, suppose the Federal Emergency Management Agency (“FEMA”) is responsible for dam safety on waterways used for interstate commerce, and New York State is responsible for dam safety on reservoirs in the state used for drinking water. There are ten dams located in the state. Two of the dams are regulated by FEMA and the other eight dams are regulated by the state. The FEMA regulated dams benefit from federal preemption of state laws. The other eight dams are fully subject to state laws. The state experiences a severe storm and a hundred-year flood. All ten dams suffer breaches during the flood which cause massive property damage downstream. Would it be reasonable to blame the property damage on the preemption of state laws? I would argue that federal preemption did not contribute to the damage. Had the two FEMA-regulated dams been subject to state laws, the result would have been the same. The storm still would have occurred, the dams still would have been breached, and the massive property damage still would have been suffered.

Likewise, the argument that federal preemption is to blame for the financial crisis is a fallacy. Federal preemption did not lead to the subprime mortgage crisis and the financial crisis, nor did federal preemption contribute to the crises.

The next Part will discuss the supposed benefits of eliminating federal preemption versus the costs.

⁴⁷⁴ See *supra* note 443 and accompanying text.

⁴⁷⁵ See *supra* notes 439–41 and accompanying text.

IV. BENEFITS VERSUS COSTS OF ELIMINATING FEDERAL PREEMPTION

As discussed in Part II.A.1, the meaning of the preemption provisions of the Dodd-Frank Act was debated in a number of letters among the executive and legislative branches of the government.⁴⁷⁶ In response to a letter by the Treasury Department to the Comptroller of the Currency, Senators Carper and Warner indicated that although the Administration supported the elimination of federal preemption, Congress “rejected” that position.⁴⁷⁷ While the Treasury Department, in its letter to the Comptroller, did not explicitly advocate elimination of federal preemption, the Treasury argued for a narrowing of the preemption standard.⁴⁷⁸ Thus, fewer state consumer financial laws would be preempted under the Treasury’s interpretation.

While the elimination of federal preemption, or even a narrowing of the preemption standard, may be considered a curiously Federalist position for a Democratic administration,⁴⁷⁹ the overarching policy behind the position is clearly to protect consumers by ensuring the applicability of State consumer financial laws to national banks. This position is consistent with a liberal viewpoint.⁴⁸⁰ While protecting consumers is certainly a worthy public policy goal shared by the author of this Article, this goal would not be furthered by the elimination of federal preemption. As discussed in Part III.B, national banks and federal thrifts, those banking institutions for which federal preemption applies, were not responsible for originating the vast majority of nonprime mortgages, including subprime mortgages and Alt-A mortgages.⁴⁸¹ Rather, state-regulated lenders were responsible for underwriting the bulk of these nonprime mortgages.⁴⁸² Moreover, state-regulated lenders, in particular, independent mortgage compa-

476 See discussion *supra* Part II.A.1.

477 Letter from Carper and Warner, *supra* note 120, at 1 (“While we understand that the position of the Administration was to eliminate federal preemption for national banks, the fact is that Congress did not accept that position.”).

478 See Comment Letter from George W. Madison, *supra* note 125, at 1–2 (“We believe that . . . Congress intended that a state consumer financial law may be preempted only if the law ‘prevents or significantly interferes’ with the exercise of a national bank’s powers . . .”).

479 See, e.g., Gregory M. Dickinson, *An Empirical Study of Obstacle Preemption in the Supreme Court*, 89 NEB. L. REV. 682 (2011) (“Preemption defies traditional conservative—liberal alignment, as conservatives are torn between support of federalism and capitalist efficiency, and liberals are torn between support of strong national governance and multiplicity of legal remedies.”).

480 See *id.* at 685–86.

481 See *supra* note 443 and accompanying text.

482 See *supra* notes 438–41 and accompanying text.

nies, engaged in predatory lending practices.⁴⁸³ Federal preemption did not apply to these state-regulated lending institutions.⁴⁸⁴ Thus, the supposed benefit of eliminating federal preemption—the protection of consumers through the enhanced applicability of State consumer financial laws—is simply a fallacy.

At the same time, the costs of eliminating federal preemption would be staggering to the banking industry.⁴⁸⁵ These costs are not only measured in dollars, but also in the public policy issues that would ensue.⁴⁸⁶ In setting forth the preemption provisions in the Dodd-Frank Act, Congress desired to provide “certainty” to both consumers and the banking industry regarding the standard for preemption.⁴⁸⁷ This certainty would be greatly diminished if federal preemption was eliminated. For example, if federal preemption was eliminated or narrowed within the *Barnett* standard, it would create “great uncertainty” for the banking industry.⁴⁸⁸ National banks would need to review each of the products and services offered on a nationwide basis to determine whether the bank was in compliance with “hundreds of differing state and local laws.”⁴⁸⁹ Undoubtedly, litigation would follow in an attempt to determine the parameters of the new standard and whether national banks were in compliance with that new standard in all fifty states.⁴⁹⁰ Moreover, complying with the differing standards of individual states may “require a bank to determine which state’s law governs—the law of the state where a person provides a product or service; the law of the home state of the bank; or the law of the state where the customer is located.”⁴⁹¹ Any disa-

483 See *supra* notes 453–54 and accompanying text.

484 Statement of John C. Dugan, *supra* note 339, at 5.

485 See, e.g., Alan Untereiner, *The Defense of Preemption: A View From the Trenches*, 84 TUL. L. REV. 1257, 1262 (2010) (“Th[e] multiplicity of government actors below the federal level virtually ensures that, in the absence of federal preemption, businesses with national operations that serve national markets will be subject to complicated, overlapping, and sometimes even conflicting legal regimes. These overlapping regulations have the potential to impose onerous burdens on interstate commerce and to disrupt and undermine federal regulatory programs.”).

486 Letter from Carper & Warner, *supra* note 120, at 3.

487 156 CONG. REC. S5889 (daily ed. July 15, 2010) (statement of Sen. Johnson).

488 Letter from Carper & Warner, *supra* note 120, at 3.

489 *Id.*

490 See *id.* (“There can be no doubt this would lead to years of litigation before the new standard was finalized in a way that enabled national banks (and state banks chartered by states with wild card statutes) to plan and deliver products and services without significant legal risk.”).

491 John C. Dugan, Comptroller of the Currency, Remarks before Women in Housing and Finance: The Need to Preserve Uniform National Standards for National Banks 7–8 (Sept. 24, 2009).

greement with the bank's determination would most likely result in "litigation in multiple jurisdictions."⁴⁹²

Ultimately, the uncertainty that would ensue as a result of the elimination or even the narrowing of the *Barnett* standard would cause banks to incur significant costs.⁴⁹³ Specifically, banks would need to review the state and local laws in all fifty states to determine compliance, adjust product development and the provision of services wherever necessary in the particular jurisdictions, and continually monitor the differing state and local laws to maintain compliance.⁴⁹⁴ These "disparate standards would impose significant compliance costs on banks seeking to operate across state lines."⁴⁹⁵ Even Senator Elizabeth Warren, a well-known consumer protection advocate, has acknowledged that "[i]n an era of interstate banking, uniform regulation of consumer credit products at the federal level may well be more efficient than a litany of consumer protection rules that vary from state to state."⁴⁹⁶

As a result of the increased cost of compliance, "some portion of these costs" will likely be passed along to consumers.⁴⁹⁷ These costs, along with the inevitable litigation costs, will likely reduce the availability of banking products and services.⁴⁹⁸ At a time when the economy depends on the ability of the banking industry to lend to consumers in need of credit, an increase in costs to banks and a resulting decrease in banking services could have a devastating effect on the economy.⁴⁹⁹ Such an effect is entirely unnecessary, especially when the benefits of eliminating federal preemption are not readily apparent. Accordingly, this analysis leads to the conclusion that the costs of eliminating federal preemption would far outweigh the supposed benefits.

492 *Id.* at 8.

493 Letter from Carper and Warner, *supra* note 120, at 3.

494 COMPTROLLER OF THE CURRENCY, THE IMPORTANCE OF PRESERVING A SYSTEM OF NATIONAL STANDARDS FOR NATIONAL BANKS 15 (2010), <http://www.occ.gov/news-issuances/speeches/2009/pub-speech-2009-112.pdf>; *see also* Mason et al., *supra* note 11, at 802 ("Eliminating preemption would create a complex regulatory environment where banks are forced to operate under a patchwork of state regulations.").

495 Mason et al., *supra* note 11, at 802.

496 Elizabeth Warren & Oren Bar-Gill, *Making Credit Safer*, 157 U. PA. L. REV. 1, 83 (2008).

497 COMPTROLLER OF THE CURRENCY, *supra* note 494, at 15.

498 *See* Letter from Carper & Warner, *supra* note 120, at 3.

499 *See id.* ("This uncertainty would clearly increase the cost and decrease the availability of bank services, including lending, at a time of economic difficulty when we can least afford it.").

CONCLUSION

The purpose of this Article is to explore the doctrine of preemption in the context of banking and to provide a critical examination of the preemption reforms in the Dodd-Frank Act. While this Article analyzes the impact of these changes on the doctrine of preemption, the ultimate effect of many of the reform provisions is yet to be seen. Notably, although many aspects of the preemption doctrine were altered by the statute, the preemption standard remains unchanged.

This Article also addresses the fallacy that federal preemption of state laws resulted in the subprime mortgage crisis and the financial crisis. Based on independent data and an analysis of the preemption doctrine, this Article argues that federal preemption did not contribute to the crises. Finally, this Article examines the costs of eliminating federal preemption and requiring national banks and federal thrifts to adhere to the differing laws of fifty states. Based on this analysis, it is clear that the costs of eliminating federal preemption far outweigh the ostensible benefits.

