Federal Corporate Law and the Business of Banking

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We thank Dan Awrey, Jeff Gordon, David Grewal, Bob Hockett, Rob Jackson, Lina Khan, Joshua Macey, Gillian Metzger, Saule Omarova, Ganesh Sitaraman, Joe Sommer, Art Wilmarth, and the participants in the 22nd Annual Law & Business Conference at Vanderbilt Law School, the Wharton Financial Regulation Workshop, and the Columbia Law School Blue Sky Workshop for their helpful comments and insights.

Abstract

The only profit-seeking business enterprises chartered by a federal government agency are banks. Yet, there is barely any scholarship justifying this exception to state primacy in American corporate law.

This Article addresses that gap. It reinterprets the National Bank Act (NBA) — the organic statute governing national banks, the heavyweights of the financial sector — as a corporation law and recovers the reasons why Congress wrote this law: not to catalyze private wealth creation or to regulate an existing industry, but to solve an economic governance problem. National banks are federal instrumentalities charged with augmenting the money supply — a delegated sovereign privilege. Congress recruited private shareholders and managers to run these instrumentalities as a check on monetary overissue and to prevent politicized asset allocation by government officials — a form of premodern agency independence.

Viewing the NBA as a corporation law yields surprising dividends. First, it exposes a major flaw at the heart of U.S. banking jurisprudence. In recent decades, the Supreme Court and the Office of the Comptroller of the Currency (OCC), the chartering authority for national banks, have interpreted national banks' corporate powers expansively, allowing them to enter a vast range of new business lines. But the corporate powers provision of the NBA is not a "regulatory" statute to which courts should apply Chevron deference, nor is it part of the OCC's enabling act. It is part of the corporate charters of national banks. Accordingly, the opposite, settled rule of construction applies; ambiguity is construed strictly against the corporation. Second, it reveals that the OCC's current campaign to unhitch national bank charters from the deposit business lacks a statutory basis and threatens an unprecedented colonization of American enterprise law by a federal government agency that is ill-suited to this mission and was never congressionally tasked with it.

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FEDERAL CORPORATE LAW AND THE BUSINESS OF BANKING

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The only profit-seeking business enterprises chartered by a federal government agency are banks. Yet, there is barely any scholarship justifying this exception to state primacy in American corporate law.

This Article addresses that gap. It reinterprets the National Bank Act (NBA)—the organic statute governing national banks, the heavyweights of the financial sector—as a corporation law and recovers the reasons why Congress wrote this law: not to catalyze private wealth creation or to regulate an existing industry, but to solve an economic governance problem. National banks are federal instrumentalities charged with augmenting the money supply—a delegated sovereign privilege. Congress recruited private shareholders and managers to run these instrumentalities as a check on monetary overissue and to prevent politicized asset allocation by government officials—a form of premodern agency independence.

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INTRODUCTION

It is a bedrock (though still controversial) principle of American business law that corporate formation and governance are the province of state, not federal, law. While reformers have repeatedly urged Congress to federalize corporate law, Congress has repeatedly declined.[1] Recognizing this principle, federal courts will not override "established state policies of corporate regulation" absent clear congressional intent.[2] And some scholars have hailed leaving American corporate law to the states as the linchpin of its "genius."[3]

[1] *See* LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, 1 SECURITIES REGULATION 1.C (6th ed. 2018) (describing such proposals from the Progressive Era to today). We do not take a position here on the merits of these proposals.

[2] Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977); *see also* Business Roundtable v. SEC, 905 F.2d 406 (D.C. Cir. 1990) (rejecting SEC's incursion into an area "that is concededly a part of corporate governance traditionally left to the states").

[3] *See* ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW (1993).

But for more than a century and a half there has been one giant exception to this basic principle of American federalism: around 1,200 national banks, which hold $13 trillion in assets.[4] National banks aren't just federally licensed; they are federally chartered. And as the federal government's creations, they reside outside the jurisdiction of any state's corporate laws. The Office of the Comptroller of the Currency (OCC), a century-and-a-half old federal government agency, issues national bank charters and promulgates rules governing national bank formation, governance, and dissolution.[5] By contrast, other federally regulated businesses—including stock exchanges, broker-dealers, investment companies, and bank holding companies—although licensed by federal agencies, owe their corporate existence to the states.[6]

Surprisingly, there is barely any scholarship addressing this corporate law anomaly.[7] Textbooks on corporate law fail to consider national banks, often omitting them altogether.[8] And although some

[4] OCC, *Annual Report* (2019). During the Great Depression, Congress created the Federal Home Loan Bank Board (FHLBB), 47 Stat. 725 (1932), and authorized it to charter and supervise federal savings and loan associations or thrifts, 48 Stat. 132 (1933) ("the Home Owners' Loan Act"). Because the OCC has now succeeded the FHLBB as chartering authority, *see* 12 U.S.C. § 5412, and because thrift regulation has largely converged with bank regulation, this Article treats thrifts as a species of national bank, *see infra* Part I.A.

[5] *See infra* Part I.B.

[6] There are a wide range of other federal corporations, including not-for-profit credit unions and dozens of organizations chartered by special act of Congress. We discuss these in Part I.A *infra*.

[7] In an insightful exploratory essay, Robert Hockett and Saule Omarova examine a number of historical and conceptual parallels between banking regulation and corporate law in the United States. *See* Robert C. Hockett & Saule T. Omarova, *"Special," Vestigial, or Visionary? What Bank Regulation Tells Us about the Corporation—and Vice Versa*, 39 SEATTLE U. L. REV. 453 (2016). Their main takeaway—that the corporation is a hybrid public-private entity and that there may be merit in reviving parts of this "'forgotten' franchise view" in corporate law, *id.* at 454—falls outside the scope of the issues we consider in this Article.

[8] *See, e.g.*, WILLIAM T. ALLEN & REINER KRAAKMAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATIONS (5th ed. 2016); WILLIAM KLEIN, J. MARK RAMSEYER, STEPHEN BAINBRIDGE, BUSINESS ASSOCIATIONS: CASES AND MATERIALS ON AGENCY, PARTNERSHIPS, LLCS, AND CORPORATIONS (10th ed. 2018); JAMES D. COX & THOMAS LEE HAZEN, CORPORATIONS § 2.11 (2d ed. 2003) (noting in a single sentence the existence of national banks).

banking law textbooks examine selected aspects of the corporate law of national banks,[9] others barely touch on it.[10]

This Article addresses that gap. It reinterprets the National Bank Act (NBA)—the organic statute governing the OCC and national banks—as a corporation law and analyzes the business of banking through a corporate law lens. It reveals that national banks are a *corporate governance solution* to an *economic governance problem*. And it argues that this governance rationale, and the NBA's corporate law design, impose definite limits on national banks' corporate powers and the OCC's chartering authority.

The stakes are high. Since 1980, the federal courts (and legal scholars) have lost sight of the NBA's purpose, allowing the OCC to extend its unusual and understudied body of federal corporate law to an ever-wider range of business activities. Now, the most important banking law case of the century—and one of the two most important of the past one hundred and fifty years[11]—is before the U.S. Court of Appeals for the Second Circuit.[12] At issue is the definition of "banking" and, accordingly, the extent of the OCC's chartering authority. The OCC argues for an expansive definition that would permit it to offer federal charters to "fintech" companies that lend money but do not take deposits.[13] If the OCC prevails, it will be able to offer something approaching *general* incorporation at the federal level for most financial and many nonfinancial businesses.

This Article proceeds in three parts. Part I describes the corporate law of national banks, situating it in the context of federal incorporation

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[9] *See, e.g.*, RICHARD S. CARNELL, JONATHAN R. MACEY & GEOFFREY P. MILLER, THE LAW OF FINANCIAL INSTITUTIONS 71–85 (6th ed. 2017).

[10];*See, e.g.,* MICHAEL S. BARR, HOWELL E. JACKSON & MARGARET E. TAHYAR, FINANCIAL REGULATION: LAW AND POLICY (2nd ed. 2018). Barr, Jackson and Tahyar do give extensive attention to the corporate *powers* of national banks, *see id.* at 189-216, but one of this Article's key points is that national banks' corporate powers have been largely transmogrified in legal analysis into a regulatory rather than a corporate law topic.

[11] Apart from NationsBank of North Carolina v. Variable Annuity Life Insurance Co., 513 U.S. 251 (1995), one must reach back to Veazie Bank v. Fenno, 75 U.S. 533 (1869) to find a banking law case of comparable significance.

[12] Vullo v. Office of the Comptroller of the Currency, 378 F.Supp.3d (S.D.N.Y. 2019), *appealed sub nom.*, Lacewell v. Office of the Comptroller of the Currency ["Lacewell"], No. 19-4271 (2d Cir. 2020).

[13] Brief for Defendants-Appellants, *in* Lacewell (2d Cir. Apr. 23, 2020). The OCC first outlined its plans in a white paper. OCC, *Exploring Special Purpose National Bank Charters for Fintech Companies*, Dec. 2016.

more generally and comparing it with state corporate law.[14] It reveals that the NBA and its twentieth century cousins, the Federal Reserve Act and the Home Owners' Loan Act, are unique in American law: these acts—and only these acts—empower a federal government agency to issue corporate charters to profit-seeking business organizers.[15] It shows that the corporate law of national banks is strikingly board-friendly, that many of its provisions are antiquated, and that, apparently alone in American enterprise law, many of its key rules are promulgated through agency rulemaking. It further reveals that in the past several decades, both the OCC and the courts have sought to fill the NBA's corporate law gaps by borrowing from state law. The result is a peculiar amalgam, with up to four separate sources of corporate law for any given national bank.

Part II explains *why* Congress created this federal corporate law regime for national banks and national banks alone. Drawing on government archives and heretofore unexamined sources, it shows that national banks were designed as federal instrumentalities charged with creating money—a delegated sovereign privilege. Congress recruited private shareholders and managers as an economic governance device: to serve as a check on monetary overissue as well as to avoid politicized asset allocation within the federal government's monetary framework. The quasi-governmental status of national banks explains why they have been largely ignored in corporate and administrative law: national banks have both public and private features, leading both fields to see them as outside their domain.[16]

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[14] Although there is a sizeable literature on the "federalization" of corporate law, it focuses on the interface between federal securities laws and state corporate law—not federal incorporation proper—and the key contributions make no mention of national banks. *See, e.g.,* Arthur Fleischer, Jr., *"Federal Corporate Law": An Assessment,* 78 HARV. L. REV. 1146 (1965); Lucian A. Bebchuk & Assaf Hamdani, *Federal Corporate Law: Lessons from History,* 106 COLUM. L. REV. 1793 (2006). In forthcoming work, Caitlin Tully addresses this lacuna, exploring the constitutional dimensions of federal incorporation from the founding to the present period. "The Silent Power: The Law of Federal Corporations" (working paper).

[15] The Home Owners' Loan Act authorizes the OCC to create thrifts, which this Article treats as a species of national bank, *see supra* note 4. The Federal Reserve Act, as amended in 1919, 41 Stat. 378, allows the Fed to charter banks to operate overseas (including in dependencies and insular possessions of the United States), *see* 12 U.S.C. § 611. These foreign banking organizations are sometimes called Edge Corporations after the senator who sponsored the legislation. We do not examine them here.

[16] This Part provides historical ballast for theoretical arguments we have made in other work. *See* Lev Menand, *Why Supervise Banks? The Foundations of The American Monetary Settlement*, 74 VAND. L. REV. __ (2021) (describing bank chartering and supervision as a solution to a governance problem); Morgan Ricks, *Money as Infrastructure*, 2018 COLUM. BUS. L. REV. 757 (2018) (describing banks as federal

Part III explores three dramatic implications of reconstructing the NBA's corporate law design. First, it exposes a fundamental error at the heart of U.S. banking jurisprudence. In recent decades, in an effort to expand the range of economic activity subject to its purview, the OCC has adopted increasingly broad interpretations of national banks' corporate powers, and the federal courts, including the Supreme Court, have deferred. Thus, whereas national banks were once mostly confined to managing deposit accounts, lending, and bond investing,[17] they are now permitted to conduct a wide range of financial activity as well as many nonfinancial businesses. But this expansion rests on faulty foundations. The corporate powers provision of the NBA is not a regulatory statute to which the Court should apply *Chevron* deference, nor is it part of the OCC's enabling act. It is part of the corporate charters of national banks and therefore subject to the opposite, settled rule of construction: ambiguity cuts strictly against the corporation.[18]

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instrumentalities charged with augmenting the money supply). It also builds off of Joe Sommer's pioneering work on the origins of U.S. corporate law in debates about banking during the founding era. *See* Joseph H. Sommer, *The Birth of the American Business Corporation: Of Banks, Corporate Governance, and Social Responsibility*, 49 BUFF. L. REV. 1011 (2001). And it deepens efforts to recover the long continuity of administrative governance and the diversity of administrative forms, *see, e.g.*, Jerry L. Mashaw, *Recovering American Administrative Law: Federalism Foundations*, 115 YALE L. J. 1256 (2006); MICHELLE DAUBER, THE SYMPATHETIC STATE: DISASTER RELIEF AND THE ORIGINS OF THE AMERICAN WELFARE STATE (2012); Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*, 167 U. PA. L. REV. 1699 (2019); Karen Tani, *Administrative Constitutionalism at the Borders of Belonging*, 167 U. PA. L. REV. 1603, 1609 n.26 (2019) (collecting historical sources on the development of the administrative state), efforts that have thus far overlooked banks, *see* Menand, *supra* (discussing this oversight and resituating banking in administrative law).

[17] Mark Roe analyzes how statutory limits on national banks' powers shaped the history of American finance. *See* MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE 55 (1994) (noting how the fact that the "the National Bank Act of 1864 gave national banks only limited powers" influenced corporate finance around the turn of the twentieth century). *See also* Jeffrey N. Gordon & Kathryn Judge, *The Origins of a Capital Market Union in the United States*, 395 European Corporate Governance Institute (2018).

[18] This Part builds off Saule Omarova's groundbreaking work tracing the transformation of banks from special purpose monetary institutions to full service financial intermediaries. *See* Saule T. Omarova, *The Quiet Metamorphosis: How Derivatives Changed the "Business of Banking,"* 63 U. MIAMI L. REV. 1041 (2009). It has long been assumed by scholars and commentators that Congress delegated to the OCC the power to interpret "the business of banking" as part of the statutory scheme. *See, e.g.*, *id.* at 1055 ("It is clearly within the discretion of the OCC, as the primary federal regulatory agency charged with the administration of the National Bank Act, to determine what business national banks should be permitted to conduct and what those 'reasonable bounds' are."); CARNELL, MACEY & MILLER, *supra* note 10, at 113

Second, it shows why the OCC's current campaign to expand its reach even further by opening up its chartering power is also inconsistent with the NBA. Congress enacted the NBA not to "regulate finance" in some generic sense but to establish federal instrumentalities to augment the money supply. Uncoupling national bank chartering from depository activities would thus contravene the NBA's monetary purpose, a purpose reflected not just in the NBA itself but in the broader corpus of federal banking law that Congress has built up around it over the past century. Time and again, Congress has legislated against a background understanding that national banks are depository, and hence monetary, institutions.

Third, it reveals how the OCC's current attempt to abandon depository activities as essential to the "business of banking"—coupled with its successful expansion of the outer bounds of national banks' permissible activities—could portend a radical transformation in the organization of American enterprise. Were the courts to permit the OCC to charter nondepository "banks," they would make the OCC's chartering authority coextensive with the full range of national banks' permissible activities.[19] The OCC would be free to offer federal "bank" charters to most types of nondepository financial enterprises and many traditionally commercial enterprises too. A huge portion of the American economy would be eligible to opt into the NBA's peculiar body of federal corporate law. And companies would face major enticements to do so, because charters from the OCC come with highly valuable perks, including exemption from many state consumer lending laws, access to "discount window'" loans from the Federal Reserve, attractive Fed "master accounts" and payment services, governance rights over the Fed's twelve Reserve Banks, and special exemptions from federal securities and investment company laws. Hence, something approaching federal general incorporation may be on the horizon—but not through congressional deliberation and adoption of state-of-the-art corporate law provisions as its proponents have long intended, but rather due to the efforts of a quasi-independent bureau in the Treasury Department.

(noting that "[i]n deferring to the Comptroller [on questions of bank powers], the Court followed well-established administrative law"). But Part III reveals that, to the contrary, Congress never intended for the Comptroller to have this power or for courts to interpret bank powers in this way.

[19] This section elaborates on arguments we advanced along with thirty-one other banking law scholars in an amicus brief filed in July. Brief of Thirty-Three Banking Law Scholars as Amici Curiae in Support of Appellee in *Lacewell v. OCC*, No. 19 Civ. 4271 (2d Cir. July 29, 2020). *See also* Lev Menand & Morgan Ricks, *Policy Spotlight: Lacewell v. OCC*, JUST MONEY (Aug. 4, 2020).

To be clear, this Article takes no position on the merits of extending federal regulatory oversight to "fintech" and other parts of the financial sector that are currently regulated primarily at the state level. A reasonable case can be made that such an extension would be desirable. But, while it is *possible* the OCC's approach would improve prudential regulation, it is by no means assured. Because the proposed charter would be purely voluntary, coupling it with onerous regulation would discourage uptake. At the same time, the charter would allow companies opting into it to sidestep key state consumer protection laws. Accordingly, the effect of the OCC's proposed charter expansion on prudential regulatory outcomes is ambiguous. The Article concludes that these speculative benefits are not compelling enough to justify stretching U.S. banking law past the breaking point.

I. FEDERAL CORPORATE LAW

There are many federal corporations, but national banks (and thrifts) are unique.[20] They are the only profit-seeking domestic business enterprises that are chartered by a federal government agency. This Part situates national banks within the broader context of federally chartered corporations. It then scrutinizes the corporate law of national banks, describing its statutory, administrative, and judicial sources and comparing it to state corporation laws.

This explication supplies the essential backdrop for the rest of the paper. Why does Congress retain this body of corporate law at all, instead of just adopting a licensing regime for national banks? And if there is an identifiable rationale, what limits does it imply for the scope of business activity that should be eligible for a federal charter?

A. National Bank Exceptionalism

Although national banks and thrifts are the only *administratively* chartered, for-profit federal corporations, there are many *legislatively* chartered federal corporations. Since the founding, Congress has

[20] *See supra* note 4.

chartered over 350 corporations by special act.[21] They fall into three basic categories.[22]

The first category, sometimes referred to as "government corporations," are controlled by the United States, i.e., most or all of their board members are appointed by the President or other federal officials.[23] The first such organization, the War Finance Corporation, was chartered in 1918.[24] Many more followed during the Great Depression,[25] including the Reconstruction Finance Corporation and the Federal Deposit Insurance Corporation.[26] Today, government

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[21] We are not aware of any repository that catalogues all federal corporations. For a list of those chartered by special act through 1947, see *Establishing and Effectuating a Policy with Respect to the Creation or Chartering of Certain Corporations by Act of Congress*, S. Rep. No. 30, 80th Cong., 1st Sess. (1947). For a study of 56 federally chartered organizations, see U.S. GENERAL ACCOUNTING OFFICE, GOVERNMENT CORPORATIONS: PROFILES OF EXISTING GOVERNMENT CORPORATIONS ["GAO REPORT"] 21-22 (1995).

[22] For a helpful overview of various types of federally-chartered organizations, see Kevin R. Kosar, Federal Government Corporations: An Overview, *Congressional Research Service* (2011); Kevin R. Kosar, Congressionally Chartered Nonprofit Organizations ("Title 36 Corporations"): What They Are and How Congress Treats Them, *Congressional Research Service* (2011); Kevin R. Kosar, The Quasi Government: Hybrid Organizations With Both Government and Private Sector Legal Characteristics, *Congressional Research Service* (2011); Kevin R. Kosar, Congressional or Federal Charters: Overview and Enduring Issues, *Congressional Research Service* (2013).

[23] This definition is broader than Congress's in the Government Corporation Control Act, *see infra* note 27, which designates just 26 federal corporations for special constraints as "government corporations," 31 U.S.C. § 9101. It also uses a different definition from Leonard White who, in his pioneering textbook, distinguishes between three types of federal corporations: (1) those wholly owned by the government, which he calls "government corporations," (2) those in which the government "has an investment or board representation or both," but control is vested in the hands of private parties, which he calls "mixed enterprises," and (3) those established by private parties "in which there is no element of government investment or board representation." INTRODUCTION TO THE STUDY OF PUBLIC ADMINISTRATION 128-29 (2d ed. 1942). What White calls "mixed enterprises," this Article treats as federal business corporations and federal nonprofit corporations. And this Article treats corporations with government-controlled boards as government corporations, even if there is private ownership.

[24] 40 Stat. 506-514 (1918).

[25] *See, e.g.*, The Federal Crop Insurance Act, 52 Stat. 72 (1838) at § 508 ("there is hereby created as an agency of and within the Department of Agriculture a body corporate with the name "The Federal Crop Insurance Corporation"); *id.* at 504 (providing for stock subscribed by the government).

[26] 47 Stat. 5 (1932) (Reconstruction Finance Corporation Act); 48 Stat. 162 (Banking Act of 1933, which established the FDIC).

corporations are a fairly common administrative device.[27] Their corporate law is thin. It is mostly written into the relevant acts of incorporation,[28] and most provisions focus on corporate purposes and powers and the processes federal officials must follow to appoint and remove officers and directors.[29]

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[27] Some are explicitly agencies of the United States. *See* 5 U.S.C. § 105 (defining "executive agency" to include "government corporation[s]"); 5 U.S.C. § 103 (defining government corporation as a "corporation owned or controlled by the Government of the United States"). Some are establishments within the executive branch. *See, e.g.*, 29 U.S.C. § 1302(a) (establishing the Pension Benefit Guarantee Corporation as a body corporate "within the Department of Labor"); 42 U.S.C. § 17352(a)(1) (establishing the International Clean Energy Foundation "in the executive branch"). Some are explicitly *not* agencies of the United States, even though private interests play no role in their operation. *See, e.g.*, 42 U.S.C. § 2996b (establishing the Legal Services Corporation as a "private membership nonprofit corporation"), *id.* at 2996c (providing that the Corporation's Board be appointed by the President, by and with the advice and consent of the Senate but that Board members not be deemed officers or employees of the United States by virtue of their appointment); 22 U.S.C. § 4601 (establishing the United States Institute of Peace as "an independent nonprofit corporation"); *id.* at 4605 (providing that the Institute's board consist of three federal officials and twelve individuals appointed by the President with the advice and consent of the Senate). Other enabling acts are not explicit on the point. *See* Kosar, Federal Government Corporations, *supra* note 22, at 3. Others, like the Federal Home Loan Banks, *see* 12 U.S.C. §§ 1421-49, have privately-owned "members" who play a role in governance (alongside government appointees) but are still subject to the Government Corporation Control Act, 59 Stat. 597 (1945), 31 U.S.C. § 9101(2), the unsung corporate counterpart to the Administrative Procedure Act. Still others, such as the Securities Investor Protection Corporation or SIPC, are nominally private nonprofits, but controlled by boards appointed by federal officials and charged with quasi-regulatory responsibilities. Securities Investor Protection Act, 84 Stat. 1636 (1970) at § 3 (establishing the SIPC as a nonprofit with private members and a seven-person board appointed by federal officials); GAO REPORT, *supra* note 21, at 22 (identifying SIPC as a "nonprofit, private, membership corporation").

[28] In some cases, Congress has incorporated by reference provisions of D.C. corporation law. *See, e.g.*, The Rail Passenger Service Act of 1970 at § 301, Pub. L. 91-518, 84 Stat. 1327, 1330 (1970) (creating the National Railroad Passenger Corporation popularly known as "Amtrak" and subjecting it, where consistent, with the D.C. Business Corporation Act); Securities Investor Protection Act at § 3, Pub. L. 91-598, 84 Stat. 1636, 1637 (1970) (creating the Securities Investor Protection Corporation (SIPC) and subjecting it, except as otherwise provided, to the D.C. Nonprofit Corporation Act).

[29] These organizations generally have no shareholders. *See, e.g.*, 29 U.S.C. § 1302 (creating the Pension Benefit Guarantee Corporation); 12 U.S.C. § 1812 (providing for the management of the Federal Deposit Insurance Corporation); 31 U.S.C. § 9101(2) (*see also* GAO at 5 (describing "[g]overnment corporation[s]" as "[o]wned and controlled by the public sector").

A second class consists of a smattering of private nonprofit corporations with educational or charitable missions.[30] With the exception of federal credit unions, a type of limited purpose national bank,[31] the corporate law for these nonprofits is also thin, consisting of statutory provisions regarding membership and powers and delegating to boards of directors the power to codify further safeguards and procedures in their bylaws.

The third group consists of federal *business* corporations—organizations with private shareholders that are operated, at least in part, for profit. Legislatively chartered federal business corporations were common up until the 1930s. Congress chartered many of them in its capacity as local legislature for the District of Columbia; mirroring

[30] For example, Congress has chartered a handful of "patriotic and national organizations" known as "Title 36 Corporations," including the American Academy of Arts and Letters, *see* 36 U.S.C. §§ 20301–20307, the American Legion, *see id.* at §§ 21701–21708, the Boy Scouts of America, *see id.* at §§ 30901–30908, the Foundation of the Federal Bar Association, *see id.* at §§ 70501–70512, the National Academy of Sciences, *see id.* at §§ 150301–150304, and the U.S. Olympic Committee, *see id.* at §§ 220501–220543. In 1906, Congress even chartered a labor union, the National Education Association. 34 Stat. 804-808 (1906). Exercising its power as the legislature for the District of Columbia, Congress has also chartered a series of D.C. area organizations such as the Columbian Library Company in 1802, Georgetown University, and the Smithsonian. U.S. Const. Art. 1, § 8, cl. 17. Chartering for D.C. non-profits is now done administratively, pursuant to the D.C. Nonprofit Corporation Act.

[31] Federal credit unions, like thrifts, *see supra* note 4, are a special type of national bank created during the Great Depression. *See* 48 Stat. 1216 (1934). But unlike thrifts, credit unions are 501(c)(1) nonprofits. They are chartered and supervised by a separate bureaucracy: The National Credit Union Administration, which succeeded the Bureau of Credit Unions, originally part of the Farm Credit Administration. 12 U.S.C. § 1752a.

the states, it created banks,[32] insurance firms,[33] turnpike companies,[34] bridge companies,[35] canal companies,[36] ferry services,[37] and railroads.[38]

But Congress also chartered *national* business corporations. Most famously, it incorporated the Bank of the United States in 1791 and

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[32] *See* 2 Stat. 621-625 (1811) (the Bank of Alexandria); 2 Stat. 625-628 (1811) (the Bank of Washington); 2 Stat. 629-633 (1811) (the Farmers' Bank of Alexandria); 2 Stat. 633-636 (the Bank of the Potomac); 2 Stat. 636-640 (1811) (the Union Bank of Georgetown); 2. Stat. 735-741 (1812) (the Mechanics' Bank of Alexandria); 3 Stat. 384 (1817) (the Farmers & Mechanics' Bank of Georgetown); 3 Stat. 387 (1817) (the Central Bank of Georgetown and Washington); 3 Stat. 387 (1817) (the Bank of the Metropolis); 3 Stat. 388 (1817) (the Patriotic Bank of Washington); 3 Stat. 388 (1817) (Franklin Bank of Alexandria); 3. Stat. 388, (Union Bank of Alexandria); 8 Stat. 618 (1821) (the Bank of Columbia); 13 Stat. 17-18 (1864) (the Washington City Savings Bank); 15 Stat. 137-139 (1870) (the National Savings Bank of the District of Columbia).

[33] 6 Stat. 129-136 (1814) (Fire Insurance Co. of Alexandria); 6 Stat. 198-20 (1818 (Columbian Insurance Co. of Alexandria); 6 Stat. 203-205 (1818) (Franklin Insurance Co.); 6 Stat. 218-22 (1819) (The Provident Association of Clerks); 6 Stat. 460-463 (1831) (Potomac Insurance Co.); 6 Stat. 694-698 (1837) (Fireman's Insurance Co. of Washington and Georgetown); 10 Stat. 836-838 (1855) (Mutual Fire Insurance Co. of the D.C.); 11 Stat. 497 (1857) (Washington Insurance Co.); 13 Stat. 428-429 (1865) (National Union Insurance Co. of Washington); 14 Stat. 556-55 (1867) (National Capital Insurance Co.); 15 Stat. 184-186 (1868) (National Life Insurance Co. of the U.S.); 16 Stat. 165, (1870) (National Life Assurance and Trust); 19 Stat. 38-40 (1876) & 33 Stat. 622-625 (1905) (Mutual Protection Fire Insurance Co. of the District of Columbia).

[34] 2. Stat. 486 (1808) (Washington & Alexandria Turnpike Co.); 2 Stat. 539 (1809) (Georgetown & Alexandria Turnpike Road); 2 Stat. 571 (1810) (Columbia Turnpike Roads); 3 Stat. 6-12 (1813) (Alexandria & Leesburg Turnpike Co.); 3 Stat. 12-18 (1813) (Georgetown & Leesburg Turnpike Co.).

[35] 2 Stat. 457 (1808) (Washington Bridge Co.); 6 Stat. 225-228 (1819) (Navy Yard Bridge Co.); 26 Stat. 268-271 (1890) (North River Bridge Co.).

[36] 2 Stat. 177 (1802), 2 Stat. 518 (1809) (Washington Canal Co.); 6 Stat. 419-423 (1830) (Alexandria Canal Co.).

[37] 13 Stat. 331 (1864) (Potomac Ferry Co.).

[38] 12 Stat. 388-392 (1862) (Washington & Georgetown Railroad Co.); 13 Stat. 326-331 (1864) (Metropolitan Railroad Co.); 15 Stat. 85-88 (1868) (Connecticut Avenue and Park Railway Co.); 16 Stat. 3-6 (1869) (National Junction Railway Co.); 16 Stat. 133-137 (1870) (Columbia Railway Co.); 18 Stat. 328 (1875) (Anacostia & Potomac River Railroad Co.); 18 Stat. 498-501 (1875) (Capitol, North O Street, and South Washington Railway Co.); 26 Stat. 789-79 (1891) (Washington & Arlington Railway Co.); 27 Stat. 66-72 (1892) (District of Columbia Suburban Railway Co.); 27 Stat. 32-33 (1892) (Washington & Great Falls Electric Railway Co.); 27 Stat. 841-45 (1892) (Maryland & Washington Railway Co.); 28 Stat. 721-727 (1895) (Capital Railway Co.).

1816.[39] Later it incorporated several national railroads.[40] In 1865, it chartered the Freedman's Savings & Trust Company to bank former slaves.[41] And a couple of federally incorporated canal companies emerged at the end of the century.[42]

Today, legislatively chartered, federal business corporations, sometimes referred to as "quasi-governmental organizations" or "government-sponsored enterprises," are rare. They consist of the Federal National Mortgage Association (Fannie Mae), Federal Home Loan Mortgage Corporation (Freddie Mac), and the Federal Agricultural Mortgage Corporation (Farmer Mac); the National Railroad Passenger Corporation (Amtrak); and a series of banks: eight Farm Credit Banks, five cooperative banks,[43] and the twelve Federal Reserve Banks, the operating arms of the Federal Reserve System nominally owned by its "member banks."[44] (Although the Federal Reserve Banks were clearly business corporations when they were created in 1913, subsequent legislation has made them hybrid creatures with features of both business and government corporations.[45])

The corporate law governing these for-profit business organizations is somewhat thicker than that governing the federal corporations described above. Their enabling acts tend to specify procedures governing the rights of shareholders and other corporate governance rules as well as their enumerated powers and limited purposes. Recent litigation arising out of the 2008 financial crisis[46] and

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[39] 1 Stat. 192 (1791); 3 Stat. 266 (1816).

[40] 12 Stat. 489-498 (1862) (Union Pacific); 13 Stat. 365-372 (1864) (Northern Pacific); 14 Stat. 292-297 (1866) (Atlantic & Pacific); 16 Stat. 573-579 (1871) (Texas Pacific). [Also the Chocktaw, Oklahoma & Gulf Railroad Company in 1894.]

[41] 13 Stat. 510-513 (1865).

[42] 25 Stat. 673-675 (1889) (the Maritime Canal Company of Nicaragua); 34 Stat. 809-814 (1906) (the Lake Erie & Ohio River Ship Canal Company). *See also* 17 Stat. 412 (1873) (incorporating the Loomis Aerial Telegraph Co.).

[43] 48 Stat. 261 (1933) (the Central Bank for Cooperatives).

[44] 12 U.S.C. §§ 281-308. Member banks also control the boards of the Federal Reserve Banks, appointing six of the nine directors. *See also* U.S. ex rel. Kraus v. Wells Fargo, 943 F.3d 588 (2d Cir. 2019). But shares of the Federal Reserve Banks confer rights of fixed claimants (and are non-transferrable) while the United States is the residual claimant and enjoys de facto control through its ability to remove directors and control the appointment of the chief executive officer.

[45] *See generally id.*

[46] Perry Capital v. Mnuchin, 864 F.3d 591 (D.C. Cir. 2017), *cert denied*, 138 S. Ct. 978 (2018) (rejecting claims against the government of private shareholders of Fannie Mae and Freddie Mac).

suits involving the applicability to these organizations of the First Amendment[47] and the False Claims Act[48] have attracted attention to federal business enterprises from scholars and other commentators for the first time in generations.[49]

But left out of the conversation entirely—absent from the leading modern administrative law[50] and corporate law[51] textbooks alike—are national banks.[52] In 1863 and 1864, Congress passed the National Bank Act,[53] establishing administrative procedures for creating federally chartered business enterprises through a new arm of the Treasury Department known then as the Currency Bureau and now known as the OCC. The OCC is a unicorn: a federal government agency with the power to incorporate domestic federal business enterprises.

There is no other agency like it. When states turned to general incorporation laws with administrative chartering for other sorts of business enterprises, Congress did not.[54] When, at the end of the

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[47] Lebron v. National Railroad Passenger Corporation, 513 U.S. 374 (1995) (concluding that Amtrak is subject to the First Amendment).

[48] U.S. ex rel. Kraus v. Wells Fargo, 943 F.3d 588, 591 (2d Cir. 2019) (concluding that the Federal Reserve Banks are not government agencies within the meaning of the False Claims Act).

[49] Scholars once examined corporate chartering as a mechanism of public administration, especially the government corporations established in the 1930s. *See, e.g.*, White, *supra* note 23, at 124-141; F. TROWBRIDGE VOM BAUR, 1 FEDERAL ADMINISTRATIVE LAW 97-99, 101-124 (1942); WALTER GELLHORN, ADMINISTRATIVE LAW: CASES AND COMMENTS 323-330 (1940); S. E., *The Corporation as a Federal Administration Device*, 83 U. PENN. L. REV. 346 (1935); John A. McIntire, *Government Corporations as Administrative Agencies: An Approach*, 4 GEO. WASH. L. REV. 161 (1936); Maurice S. Culp, *Creation of Government Corporations by the National Government*, 33 MICH. L. REV. 473 (1935).

[50] *See, e.g.*, STRAUSS, RAKOFF, METZGER, BARRON & O'CONNELL, ADMINISTRATIVE LAW: CASES AND COMMENTS (12th ed. 2017); BREYER, STEWART, SUNSTEIN, VERMEULE & HERZ, ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES, (8th ed. 2017); MASHAW, MERRILL, SHANE, MAGILL, CUELLAR & PARRILLO, ADMINISTRATIVE LAW, THE AMERICAN PUBLIC LAW SYSTEM: CASES AND MATERIALS (7th ed. 2014); BERNARD SCHWARTZ, ADMINISTRATIVE LAW (3d ed. 1991); GARY LAWSON, FEDERAL ADMINISTRATIVE LAW (7th ed. 2016).

[51] *See supra* note 8.

[52] *But see* Richard G. Handler & Thomas F. Liotti, *An Historical Survey of Federal Incorporation*, 1 DEL. J. CORP. L. 370 (1976) (discussing national banks); Paul E. Lund, *National Banks and Diversity Jurisdiction*, 46 U. LOUISVILLE L. REV. 73 (2007); Hockett & Omarova, *supra* note 7.

[53] 12 Stat. 665 (1863) (National Currency Act); 13 Stat. 99 (National Bank Act).

[54] Congress did establish general incorporation procedures for the District of Columbia in its capacity as local legislature. It also authorized, in 1922, the Secretary of State

century, states further liberalized their general incorporation laws, offering charters not just administratively but for any lawful purpose, Congress did not. Today the OCC remains the only part of the federal government that regularly considers applications for corporate charters and grants them to profit-seeking organizers along with all of their attendant benefits, including the power to preempt contrary law and escape not only the enterprise law of whatever state the incorporators would otherwise choose to incorporate in but many of the licensing and regulatory requirements of every state in the union.

B. The Corporate Law of National Banks

This Section recovers the corporate law of national banks, revealing an elaborate, heretofore unexamined body of rules concerning formation, duties, mergers, and resolution. (We defer powers and chartering to Part III.) The law is derived from three sources: (1) the NBA, (2) OCC regulations (which sometimes also permit national banks to incorporate by reference "corporate governance procedures" from state law or the Model Business Corporation Act (MBCA)), and (3) the federal courts (which have incorporated by reference fiduciary duties from the law of the state in which national banks are headquartered).

1. Statutory Corporate Law

Aside from establishing the OCC to act as the chartering authority for national banks,[55] the original Act was largely devoted to enacting corporate law. It included provisions on: formation and articles of association (§ 5); organization certificates (§ 6); required capital (§ 7); ability to make contracts and sue and be sued "as fully as natural persons," director elections, officer appointments and dismissals, corporate powers, and bylaws (§ 8); directors (§ 9); director tenures, shareholder meetings, and board vacancies (§ 10); votes per share (one) and proxy voting (§ 11); capital stock, stock transfers, and shareholder liability (§ 12); increases in capital (§ 13); pay-in of capital (§§ 14-15);

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for D.C. to incorporate for-profit "China Trade Corporations" to be supervised by the Secretary of Commerce. *See* 15 U.S.C. §§ 141 et seq. Similarly, Congress provided for general incorporation of Indian tribes, which is done by the Department of the Interior. 25 U.S.C. § 5203 ("Any recognized tribe or band of Indians residing in Oklahoma shall have the right to organize for its common welfare and to adopt a constitution and bylaws, under such rules and regulations as the Secretary of the Interior may prescribe"). During the Great Depression, the Reconstruction Finance Corporation, a government corporation, was permitted to create other government corporations, but this practice was halted by the Government Corporation Control Act and is now permissible only if there is an explicit federal law specifically authorizing the action. *See* 31 U.S.C. § 9102.

[55] NBA at §§ 1-3.

dividends (§ 33); stockholder lists and inspection rights (§ 40); liquidation procedures (§ 42); and procedures for existing banks to convert to federal charters (§ 44). These provisions are all standard fare in state business organization law.[56]

In the subsequent century and a half, Congress periodically modified and augmented these provisions. In 1918, it amended the law to allow national banks to merge with one another.[57] (Here it lagged the states by a couple of decades; New Jersey and Delaware liberalized their corporation laws to permit mergers with less than unanimous shareholder approval in 1896 and 1899, respectively.[58]) In March of 1933, Congress authorized national banks to issue preferred stock upon a majority vote of common shareholders.[59] Later that year, Congress eliminated the individual liability of national banks' shareholders.[60] Congress also allowed for cumulative voting of national banks' shares[61] and established a twenty-five member limit for national banks' boards of directors.[62] In 1950, Congress authorized national banks to convert into state banks and granted appraisal rights to shareholders voting against conversions, mergers, and consolidations.[63] In 1959, it added a provision allowing national banks to amend their articles of association[64] and permitted national banks to sell assets with a view toward liquidation upon a two-thirds vote of shareholders (waivable by the OCC in an emergency).[65] In 1991, Congress updated and liberalized

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[56] The original Act also included quasi-corporate sections on receivership (§ 50) and fraudulent conveyance (§ 52).

[57] Nov. 7, 1918, ch. 209, 40 Stat. 1043.

[58] *See* Robert Thompson, *Why New Corporate Law Arises: Implications for the 21st Century*, *in* THE CORPORATE CONTRACT IN CHANGING TIMES: IS LAW KEEPING UP? (Steven Davidoff Solomon & Randall Thomas eds., 2019).

[59] Mar. 9, 1933, ch. 1, title III, §301, 48 Stat. 5.

[60] June 16, 1933, ch. 89, §22, 48 Stat. 189.

[61] June 16, 1933, ch. 89, §19, 48 Stat. 186.

[62] June 16, 1933, ch. 89, §31, 48 Stat. 194.

[63] Aug. 17, 1950, ch. 729, §2, 64 Stat. 455.

[64] Pub. L. 86–230, §13, Sept. 8, 1959, 73 Stat. 458. It also allowed national banks to adjust their annual meeting date if it would otherwise fall on a legal holiday.

[65] Pub. L. 86–230, §15, Sept. 8, 1959, 73 Stat. 458.

the NBA's merger provisions.[66] It further liberalized them in 2000[67] while also authorizing national banks to stagger their boards.[68]

As a result of these and other amendments—most importantly, Congress has repealed the original NBA's numerous provisions concerning the printing and circulation of bank notes—the NBA today is even more of a corporation law statute than it was in 1864. The NBA consists of 119 extant sections, of which 53 (or 45%) are pure corporate law of the type found in today's state corporation laws. Another 22 (or 18%) are quasi-corporate, pertaining to insolvency and similar matters. Only 14 (or 12%) of the NBA's provisions are regulatory in any normal sense of that term, with the remaining 30 (or 26%) relating to the OCC's administrative organization and miscellaneous matters.

Two features of national banks' statutory corporate law stand out. First, when it comes to governance, national bank boards enjoy a remarkable degree of insulation from shareholders. Shareholders have no statutory right to remove directors before their terms expire—either with or without cause—and even if they did, the law makes no provision for shareholders to call special meetings. In addition, national banks can adopt staggered boards by bylaw amendment, with each director going up for election every three years. Because the board of directors and only the board of directors may amend the bylaws,[69] the board can stagger itself with no shareholder action.

Second, compared to modern corporation law statutes, the NBA is quite primitive. Consider what's missing. The NBA has no provisions for: exculpation of directors for breaches of the duty of care;[70] shareholder access to proxy solicitation materials;[71] board committees;[72] multiple share classes, apart from preferred shares;[73] director removal;[74] transactions between the corporation and its directors or

[66] Federal Deposit Insurance Corporation Improvement Act, 105 Stat. 2236 (1991).

[67] American Homeownership and Economic Opportunity Act of 2000 (AHEOA), Pub. L. 106–569, title XII, §1204(2), Dec. 27, 2000, 114 Stat. 303.

[68] *See id.* at §§ 1204-1206.

[69] By contrast, Delaware law gives shareholders an inalienable right to amend the bylaws. *See* DGCL § 109(a).

[70] *Cf.* DGCL § 102(b)(7).

[71] *Cf.* DGCL §112.

[72] *Cf.* DGCL § 141(c).

[73] *Cf.* DGCL § 151.

[74] *Cf.* DGCL § 141(k).

officers (statutory safe harbor);[75] authorizing force-the-vote provisions in contracts;[76] considering non-shareholder constituencies;[77] special meetings of stockholders;[78] indemnification or insurance of directors and officers;[79] stockholder inspections of books and records apart from the stockholder list;[80] stockholder consent in lieu of a meeting;[81] or short-form mergers.[82]

The NBA's gaps can create real problems. For instance, until Congress amended the NBA's merger provisions in 2000, it was unclear whether squeeze-out mergers (in which minority shareholders receive cash) were permissible for national banks. The federal courts were divided on the question.[83]

2. Administrative Corporate Law

Unlike the rest of American corporate law, much of the corporate law of national banks is promulgated by administrative rulemaking. Over the past century or more the OCC has issued dozens if not hundreds of interpretive rulings regarding the "corporate practices" of national banks.[84] It codified these rulings for the first time in 1971, classifying them into four categories: shareholder meetings (including notices thereof, quorum, and proxy solicitation); boards (including number of directors, director election, filling of vacancies, and quorum);

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[75] *Cf.* DGCL § 144.

[76] *Cf.* DGCL § 146.

[77] *Cf.* PA. CONS. STAT. ANN. § 1715 (Pennsylvania's constituency statute).

[78] *Cf.* DGCL § 211(d).

[79] *Cf.* DGCL § 145.

[80] *Cf.* DGCL § 220.

[81] *Cf.* DGCL § 228.

[82] *Cf.* DGCL § 253.

[83] The 11th Circuit concluded that the NBA did not authorize squeeze-out mergers. Lewis v. Clark, 911 F.2d 1558 (11th Cir. 1990). The 8th circuit concluding that it did. NoDak Bancorp v. Clarke, 998 F.2d 1416 (8th Cir. 1993). Whereas the 11th Circuit construed the NBA's merger provisions in the context of general corporate law as it existed in 1918 (when those provisions were adopted), the 8th Circuit purported to "embrace the modern view" of squeeze outs and criticized the 11th Circuit's "outmoded view of merger law." *Id.* at 1424. As the dissenting judge in the 8th Circuit pointed out, why the "modern view" should control the interpretation of a statute enacted in 1918 is far from clear.

[84] Although the NBA does not grant the OCC any specific authority to prescribe corporate law rules for national banks, the OCC claims the power to do so under its general authority to "prescribe rules and regulations to carry out the responsibilities of the office." 12 U.S.C. § 93a.

personnel (including employee benefit plans and director and officer (D&O) indemnification); and shares and dividends (including record dates, books and records, fractional shares, preemptive rights, and dividends in kind).[85]

The OCC has frequently amended and supplemented these rules to keep up with prevailing state practices, albeit usually with a time lag. D&O indemnification and insurance are one example. As noted above, the NBA makes no provision for D&O indemnification or insurance. But state legislatures started adopting such provisions in the mid-twentieth century. Delaware led the way in 1943, and its D&O provision was mirrored in the MBCA in 1950.[86] After the threat of director and officer liability became more salient in the 1960s,[87] both the Delaware General Corporation Law (DGCL) and the MBCA were amended in 1967 to bolster D&O indemnification (including mandatory indemnification under some circumstances) and to explicitly authorize D&O insurance.[88]

Around the same time, the OCC issued an interpretive ruling that, for the first time, allowed national banks to include in their articles of association provisions for permissive (though not mandatory) indemnification of directors and officers and for corporate purchases of D&O insurance policies.[89] In 1984, the OCC significantly liberalized these provisions.[90] Noting "significant differences" between its standards and "general corporate law principles," the OCC underscored "the importance of enabling national banks to function, in general, in accordance with the standards observed elsewhere in the business community."[91] Among other things, it observed that "indemnification provisions based largely upon general corporate law would enable the national banks to successfully compete for the prime candidates for

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[85] 36 Fed. Reg. 17000, Aug. 26, 1971. The OCC undertook a major revamp and reorganization of these rules in 1996. 61 Fed. Reg. 4849, Feb. 9, 1996.

[86] James J. Hanks Jr. & Larry P. Scriggins, *Protecting Directors and Officers from Liability: The Influence of the Model Business Corporation Act*, 56 BUS. L. 3, 14 (2000).

[87] *See* Roberta Romano, *What Went Wrong with Directors and Officers Liability Insurance*, DEL. J. CORP. L. (1989).

[88] *See* Hanks & Scriggins, *supra* note 86.

[89] *See* COMPTROLLER'S MANUAL FOR NATIONAL BANKS: RULINGS (PART 3) at 29 (Apr. 1969 supp.). Exactly when the OCC adopted the D&O indemnification and insurance provision is unclear, but we are trying to pin it down. It definitely had not adopted it as of 1960. *See* DIGEST OF OPINIONS OF THE COMPTROLLER OF THE CURRENCY RELATING TO OPERATIONS AND POWERS OF NATIONAL BANKS (1960) (Part V: Directors).

[90] 49 Fed. Reg. 30920, Aug. 2, 1984.

[91] *Id.*

positions as bank directors and officers."[92] Accordingly, the OCC allowed national banks to adopt indemnification standards from the law of the state in which the bank is headquartered, the law of the state in which the bank's parent holding company is incorporated, or as provided in the MBCA.[93]

The OCC again imported external law in 1996, when it revamped its corporate practices rules. First, it promulgated a rule on "directors' responsibilities," stating for the first time that "[t]he business and affairs of the bank shall be managed by or under the direction of the board of directors."[94] This provision was copied practically word-for-word from the DGCL.[95] Second, it adopted a provision allowing national banks to follow "corporate governance procedures" from either state law or the MBCA.[96] In adopting this rule the OCC stated its desire to "provide national banks with maximum flexibility to structure their corporate governance procedures."[97] In practice national banks have relied on this rule for decidedly nonprocedural purposes. For example, the OCC has let national banks issue blank check preferred stock[98] and conduct reverse stock splits,[99] share exchanges,[100] and share reclassifications[101] under this provision.

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[92] *Id.*

[93] *See id.*

[94] 12 C.F.R. § 7.2010 (directors' responsibilities).

[95] *See* DGCL § 141.

[96] "To the extent not inconsistent with applicable Federal banking statutes or regulations, or bank safety and soundness, a national bank may elect to follow the corporate governance procedures of the law of the state in which the main office of the bank is located, the law of the state in which the holding company of the bank is incorporated, the Delaware General Corporation Law, Del. Code Ann. tit. 8 (1991, as amended 1994, and as amended thereafter), or the Model Business Corporation Act (1984, as amended 1994, and as amended thereafter). A national bank shall designate in its bylaws the body of law selected for its corporate governance procedures." 12 C.F.R. § 7.2000 (corporate governance procedures).

[97] 61 Fed. Reg. 4849, Feb. 9, 1996.

[98] OCC Interpretive Letter No. 921 (Dec. 13, 2001) (a national bank that had elected in its bylaws to be governed by California law may issue blank check preferred stock).

[99] OCC Interpretive Letter No. 879 (November 10, 1999) (Virginia law); OCC Interpretive Letter No. 891 (April 26, 2000) (MBCA).

[100] Conditional Approval No. 670 (December 27, 2004) (Delaware law); Conditional Approval No. 562 (December 9, 2002) (Mississippi law); Conditional Approval No. 541 (July 30, 2002) (Alabama law).

[101] OCC Interpretive Letter No. 1125 (February 11, 2010) (Tennessee law).

3. Judge-Made Corporate Law

Judicially created equitable principles play a less prominent role in the corporate law of national banks than in the rest of American business organization law. For example, we are aware of no corporate veil-piercing cases involving national banks.[102] Fiduciary duty claims brought by shareholders against national bank directors and officers are also comparatively infrequent, probably because most banks are wholly owned subsidiaries of parent holding companies.[103] Most fiduciary duty actions against directors and officers of national banks are brought by receivers of insolvent national banks, standing in the shoes of the bank's creditors.[104]

[102] It is difficult to imagine how the elements of veil-piercing could be met for a national bank. Veil piercing cases typically involve sham entities that have negligible capital and that fail to observe basic corporate formalities, where the entity is operated as an "alter ego" of the owner. *See, e.g.,* Kinney Shoe Corp. v. Polan, 939 F.2d 209 (4th Cir. 1991). *See also* Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036 (1991). The OCC's oversight of national banks' chartering, operations, and capital likely pose insurmountable hurdles to veil-piercing claims by national banks' creditors. (Until 1933 national bank shareholders were subject to double liability under the National Bank Act, but this is different from veil-piercing, which involves judicial override of statutory limited liability.)

[103] *But see* Fleischhacker v. Blum, 109 F.2d 543 (9th Cir. 1940) (derivative suit by national banks' stockholders against its president to recover profits for loan to business venture in which he was interested); Joy v. North, 692 F.2 880 (2nd Cir. 1982) (derivative suit brought by shareholders of the bank holding company against the board of directors of the subsidiary national bank, alleging breach of fiduciary duty arising from imprudent lending).

[104] *See* Ronald W. Stevens & Bruce H. Nielson, *The Standard of Care for Directors and Officers of Federally Chartered Depository Institutions*, 13 ANN. REV. BANKING L. 169, 170 (1994) (noting that the FDIC and RTC "sued hundreds of directors and officers of failed thrifts and banks" in the aftermath of the S&L debacle); Julie Andersen Hill & Douglas K. Moll, *The Duty of Care of Bank Directors and Officers,* 68 ALA. L. REV. 965 (2017) ("In the aftermath of the 2008 financial crisis, the Federal Deposit Insurance Corporation (FDIC) brought numerous lawsuits against directors and officers of failed banks asserting that they had breached their fiduciary duty of care."). *See, e.g.,* Briggs v. Spaulding, 141 U. S. 132 (1891) (action by OCC-appointed receiver of national bank against its directors for negligence and inattention to duty); Gibbons v. Anderson, 80 F. 345 (W.D. Mich. 1897) (action by receiver of national bank against its directors for negligence); Bowerman v. Hamner, 250 U.S. 504 (1919) (action by receiver of national bank; held that NBA does not relieve directors from the common-law duty to diligently and honestly manage the affairs of the bank); Atherton v. Anderson, 99 F.2d 883 (6th Cir. 1930) (action by receiver of national bank against directors for breach of duty of care); FDIC v. Castetter, 184 F.3d 1040 (9th Cir. 1999) (FDIC as receiver brought suit alleging directors were negligent and should be personally liable for losses; held that California business judgment rule insulated directors from liability).

For over a century these fiduciary duties were a matter of "federal common law."[105] But in 1997 the Supreme Court announced that "there is no federal common law that would create a general standard of care" for directors of federally chartered depository institutions.[106] Somewhat perplexingly, the Court suggested that "courts . . . could find . . . that the State closest analogically to the State of incorporation of an ordinary business is the State in which the federally chartered bank has its main office or maintains its principal place of business."[107] And this seems to be what federal courts have done.[108] But this location-based approach is difficult to square with the formal structure of corporate law. It is one thing for corporate managers to be subject to state-based agency law, but corporate directors (in their capacity as directors) are not agents; formally, the board of directors acts as principal.[109] Boards of directors' duties are thus classic "internal affairs,"[110] determined by the chartering sovereign rather than by the law of some other jurisdiction.

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To summarize: The NBA is predominately a corporation statute—an antiquated and board-friendly one. Unique in American enterprise law, much of the corporate law of national banks is promulgated by agency rulemaking. The corporate law of national banks is also strange, in that a given national bank can be governed by corporate law derived from up to four sources: federal statutory law, rules promulgated by the OCC, corporate governance "procedures" imported from a particular state or the MBCA, and fiduciary duty standards imported from the state where the bank is headquartered. Presumably, neither Congress

[105] *See Briggs v. Spaulding, supra. But see Fleischhacker v. Blum, supra* (applying California law); *Joy v. North, supra* (looking to Connecticut law).

[106] Atherton v. FDIC, 519 U.S. 213, 226 (1997). *See also* Jonathan R. Macey & Maureen O'Hara, *The Corporate Governance of Banks*, FRBNY ECON. POLICY REV. (Apr. 2003).

[107] *Id.* at 224.

[108] *See* Castetter, 184 F.3d at 1043 ("Although the defendants are directors of a federally-insured national bank, their [fiduciary] liability is determined by California state law;" citing *Atherton*; concluding that California business judgment rule applied). *See also* Am. Nat. Ins. Co. v. JPMorgan Chase & Co., 893 F. Supp. 2d 218, 230 (D.D.C. 2012) (applying Washington state law as "the State closest analogically to the State of incorporation," quoting *Atherton*); FDIC v. Grant, 8 F.Supp.2d 1275, 1281 (N.D. Okla. 1998) (applying Oklahoma law, citing *Atherton*).

[109] "An individual director, as such, has no power to act on the company's behalf, but only as one of the body of directors acting as a board. As for the board, when it acts collectively, the board functions as principal rather than as agent." STEPHEN M. BAINBRIDGE, AGENCY, PARTNERSHIPS & LLCS (2004).

[110] *See* Edgar v. MITE Corp. 457 U.S. 624, 645 (1982) (internal affairs doctrine).

nor the states intended for their rules and principles to be mixed and matched in this way. Moreover, from the standpoint of political economy, the presence of the OCC—a federal administrative agency that has no particular expertise in enterprise law and that in its supervisory capacity maintains continuous communications with national banks' boards of directors and management teams—as a key promulgator of national banks' corporate law raises questions about the optimal locus of decisionmaking when it comes to, for example, agency conflicts between shareholders and management teams. What is the point of this exceptional body of law?

II. WHY NATIONAL BANKS?

This Part explains why the federal government supplies corporate charters and promulgates corporate law for national banks. It shows that the NBA's framers sought to furnish a sound currency to the public by using the corporate form to enlist private actors. They chartered national banks to solve a *governance problem*, to prevent inflation, corruption, and instability. Each national bank to them was a mini-central bank with a government "franchise," and the system as a whole was not a series of private ventures but a unitary piece of public infrastructure. Congress never considered merely licensing banks already chartered by the states because it was deliberately *bypassing* the states: Congress and the Lincoln administration enacted the NBA for the explicit purpose of reclaiming the sovereign privilege of money creation, which, as they saw it, state-chartered banks had (unconstitutionally[111]) usurped.

A. Monetary Origins of the National Bank Act

The NBA—a corporate governance solution to an economic governance problem—emerged out of severe monetary dysfunction. The demise of the Second Bank of the United States in 1836 at the hand of President Andrew Jackson left the country with a "heterogeneous, unequal, and unsafe" money supply.[112] Thousands of state-chartered banks issued circulating bank notes. These notes' soundness depended on the financial condition of these banks. Their values fluctuated wildly against one another, inhibiting trade. Moreover, overissue and competitive deregulation fueled instability, with major banking panics

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[111] Briscoe v. Bank of Commonwealth of Kentucky, 36 U.S. 257 (1837) ruled that states could charter note-issuing banks without running afoul of the constitutional prohibition on states issuing bills of credit. But many of the NBA's framers, including Salmon Chase, thought the case was wrongly decided. *See, e.g.,* U.S. TREASURY SECRETARY, REPORT ON THE FINANCES (Dec. 9, 1861).

[112] *Id.*

tanking the economy in 1837, 1839, and 1857, and minor panics doing the same in the 1840s and early 1850s.[113] The situation was so dire that in 1846 the federal government stopped using banks altogether, transacting instead in specie (gold and silver coin) that it kept in its own vaults.[114]

When the Civil War erupted, monetary dysfunction morphed into acute crisis. The Union urgently needed unprecedented sums to prosecute the war, and in the course of borrowing specie, it drained reserves from state banks. In late 1861, state banks suspended the convertibility of their bank notes: they no longer had enough specie to meet redemptions. In response, Congress authorized the Treasury Department to issue paper money as a measure necessary to carry on wartime spending. While these "greenbacks" solved the immediate problem of paying soldiers and buying munitions, they created a new problem: state banks used greenbacks as legal tender reserves to issue even more paper money, leading to inflation as well as exorbitant bank profits.[115] The federal government had no control over monetary conditions, imperiling its ability to win the war.

The NBA was the solution. Its objective was to "restore to the federal authority . . . control over the monetary function,"[116] and to create, for the first time in American history, a "uniform national currency."[117] As Treasury Secretary Salmon Chase explained, "The central idea of the proposed measure is the establishment of one sound,

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[113] Andrew J. Jalil, *A New History of Banking Panics in the United States, 1825–1829: Construction and Implications*, 7 AM. ECON. J.: MACROECONOMICS 295 (2015). *See also* Hockett & Omarova, *supra* note 7, at 477 (noting that the NBA emerged from "multiple currency over-issuances by privately owned banking institutions, followed by system-wide panics and crashes").

[114] *See* An Act to Provide for the Better Organization of the Treasury, 9 Stat. 59 (1846).

[115] Secretary Chase later explain in a letter to Horace Greeley that the "issues of greenbacks and the indisposition of Congress to tax the State Bank Currency out of circulation caused almost all the inflation that took place under my administration." Salmon Chase to Horace Greeley, Nov. 19, 1867

[116] BRAY HAMMOND, BANKS AND POLITICS IN AMERICA, FROM THE REVOLUTION TO THE CIVIL WAR 724 (1957); *see also id.* at 734 ("In principle and intent" the NBA "was a resounding victory for the federal control of the monetary supply."); ANDREW MCFARLAND DAVIS, THE ORIGIN OF THE NATIONAL BANKING SYSTEM 103 (1910) (noting that "securing of a uniform currency was [Salmon Chase's] uppermost thought" in championing the NBA).

[117] 13 Stat. 99 (1864) ("An Act to provide a National Currency"); Salmon P. Chase, Letter to William P. Mellen (Jan. 27, 1863) *in* 3 THE PAPERS OF SALMON P. CHASE 374 (1996) (describing the NBA as "the Uniform Currency and Banking Bill").

uniform circulation."[118] Senator John Sherman, the NBA's floor leader in the Senate, said the law was "designed to establish a uniform national currency" and described national banks as having "the power to issue or to coin money."[119] Senator Charles Sumner remarked, "The primary object of this bill is . . . to secure the national currency. For the sake of the currency a system of national banks is to be established; . . . the end sought is an improved currency."[120] Representative Samuel Hooper, who drafted much of the legislation and guided it through the House, said it restored the "sovereign right of furnishing and controlling the currency."[121]

National banks were the means through which these monetary ends would be achieved. The NBA created a new system of federally chartered banks to issue a new money supply: bank notes printed at the Treasury Department, bearing the imprint of the United States, and distributed to national banks for circulation and redemption. National banks were required to back these notes with U.S. Treasury securities posted with the Treasury Department as collateral. Simultaneously, Congress taxed the notes of state banks out of existence.[122]

While previous literature has described these basic features of the NBA, it has neglected other critical provisions that forced national

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118 U.S. TREASURY SECRETARY, REPORT ON THE FINANCES 17 (1862). *See also* Salmon P. Chase, *Letter to Horace Greeley* (Nov. 19, 1867) *in* 4 THE PAPERS OF SALMON P. CHASE 177 (1997) ("The National Banks were certain to be useful in many ways but my main object was the establishment of a National Currency.").

119 CONG. GLOBE, Feb. 10, 1863, at 840, 844. This was the same Senator Sherman that drafted the famous Antitrust Act. At the time, Sherman was best known for his role in passing the NBA and was Congress's point person on monetary affairs for much of the second half of the nineteenth century. Indeed, the NBA was the original "Sherman Act." ANDREW MCFARLAND DAVIS, THE ORIGIN OF THE NATIONAL BANKING SYSTEM 56 (1910) ("the law which was passed the next February after this was known as the Sherman act"). *See also From Washington: Senator Sherman's Bank Bill*, N.Y. TRIBUNE (Feb. 4, 1863); *The Latest by Telegraph: Our Special Dispatches*, DETROIT FREE PRESS (Feb. 13, 1863) ("Sherman's Bank Bill Passes the Senate and Said to Have Majority in the House"). And Sherman described "the establishment of uniform national currency" in his memoirs as "the *highest object of legislation*." JOHN SHERMAN, REFLECTIONS OF FORTY YEARS IN THE HOUSE, SENATE, AND CABINET 287 (1895) (emphasis added).

120 CONG. GLOBE, May 5, 1864, at 2128.

121 CONG. GLOBE, Apr. 6, 1864, at 1451. Hooper wrote an important treatise on money before the war, prefiguring the act in certain respects. *See* A MERCHANT OF BOSTON, CURRENCY OR MONEY; ITS NATURE AND USES AND THE EFFECTS OF THE CIRCULATION OF BANK-NOTES FOR CURRENCY (1855).

122 13 Stat. 469, 484 (1865) (levying prohibitory ten percent tax); 14 Stat. 98, 115 (1866) (modifying tax).

banks to function as an integrated, horizontally networked system rather than as a mere collection of standalone enterprises. For example, the NBA imposed limits on the dollar value of notes issued by each national bank[123] and capped the total dollar value of notes issued by all of them.[124] It required national banks to receive each other's notes at par and required the federal government to do the same.[125] It created an administrative receivership system for failed national banks so that their notes would continue to be paid out promptly in insolvency.[126] It mandated that national banks in remote locales maintain correspondent banking relations with national banks in population centers, to ensure that national bank notes would trade at par in every corner the country.[127] It required national banks to serve as depositories and financial agents for the U.S. government.[128] And it required that all national banks pay a portion of their revenues to Treasury[129]—a crucial and neglected provision, the implications of which we discuss below.

As many commentators have noted, the NBA was not without precursors; it drew heavily on the "free banking" statute enacted in New York in 1838, a statute that also formed the basis for similar laws in over a dozen other states.[130] Although it is true that the NBA mirrored these laws—including by using administrative chartering, requiring governmental printing of bank notes, requiring banks to post government bonds as collateral for bank notes, and establishing a supervisory framework—state free banking laws contained none of the features just described that bound national banks into an integrated system.[131] Additionally, banks organized under state free-banking laws were designed to operate *alongside* existing state-chartered banks of issue, whereas the NBA aimed to forcibly displace all other money

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[123] NBA at § 21.

[124] *Id.* at § 22 (capping circulation at $300 million).

[125] *Id.* at §§ 23, 32.

[126] *Id.* at §§ 47-52.

[127] *Id.* at §§ 31-32.

[128] *Id.* at § 45.

[129] *Id.* at § 41.

[130] *See, e.g.*, Bray Hammond, *Free Banks and Corporations: The New York Free Banking Act of 1838*, 44 J. OF POL. ECON. 184, 184 (1936) ("The principles embodied in the [New York Free Banking Act] and the language in which it was expressed have been taken over by nearly every state and by the federal government.").

[131] *See* CONG. GLOBE, Apr. 6, 1864 (Hooper) (noting that while the New York free banking law had "many excellent features," the NBA was based on different principles).

issuing businesses. The NBA sought to occupy the field—something that not even the legislation authorizing the First and Second Banks of the United States had contemplated.[132]

The NBA was thus an audacious exercise of federal power. Its supporters viewed it as momentous and stressed its supreme importance. President Lincoln described the legislation as "almost, if not quite indispensable"[133] while Chase called it a "legislative measure without which the President can hardly expect to carry on the war or any thing else very successfully."[134] Congressional supporters were equally emphatic. "So strong is my conviction on this subject that I believe the passage of this bill . . . by which we shall have what has always been desired by the statesmen of America, a sound national currency, is more important than any measure that we can pass," said Senator Sherman.[135] Rep. Hooper expressed his belief that "the existence of the nation is at stake upon this issue."[136]

The legislation's opponents in Congress were equally emphatic, characterizing the legislation as radical, utopian, and dangerous. They described it as a "grand scheme of consolidation" that was bound to be "dangerous to the public liberties";[137] a "pecuniary revolution" that would "remodel society and recast the order of business";[138] a "sweeping and extraordinary experiment";[139] a "general revolution in the banking and currency system";[140] a "government system of banking upon the grandest scale that has ever yet been conceived among any people of the world";[141] "the most extravagant and gigantic system of banking upon the most spurious principles";[142] "the most stupendous and the most

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[132] *See* CONG. GLOBE, Feb. 11, 1863 (Collamer) ("When our predecessors were making the U.S. Bank . . . did they undertake to . . . extinguish[] the state banks? Did they propose the exercise of a power of that kind? No. It was never heard of before.").

[133] Abraham Lincoln, *Message to Congress* (Jan. 17, 1863), *in* 6 COLLECTED WORKS OF ABRAHAM LINCOLN.

[134] Salmon P. Chase, *Letter to Horace Greeley* (Jan. 28, 1863), *in* 3 THE SALMON P. CHASE PAPERS 375 (1996).

[135] CONG. GLOBE, Feb. 10, 1863.

[136] CONG. GLOBE, Apr. 6, 1864.

[137] CONG. GLOBE, Feb. 10, 1863 (Powell).

[138] CONG. GLOBE, Feb. 11, 1863 (Collamer).

[139] *Id.*

[140] CONG. GLOBE, Feb. 11, 1863 (Howard).

[141] CONG. GLOBE, Feb. 11, 1863 (Davis).

[142] *Id.*

dangerous scheme of policy that was ever introduced into any deliberative assembly";[143] a "great monster" that would produce "calamity and ruin";[144] a "monster of our own creation" with "power such as never yet existed on earth" against which "a whole army of Jacksons would be impotent";[145] a "mammoth institution" that would undermine "the foundations of free government";[146] and a "grand stride in the direction of consolidated government and centralization of power."[147]

B. The National Bank Act as an Outsourcing Scheme

The NBA's framers referred to national banks not as private businesses subject to federal regulation but as "agencies" or "instruments" of the federal government. "The national banking system is an instrument in the public service," said Senator Sumner. "Is it not an instrument? Is it not as much an instrument as your navy yard, your arsenal, or your mint?"[148] According to Rep. Hooper, the national banking system would be tantamount to a set of mini-central banks spread around the country:

> [National banks will secure] all the benefits of the old United States Bank without many of those objectionable features which aroused opposition. … [T]he Government enabled that bank to monopolize the business of the country. Here no such system of favoritism exists. … It will be as if the Bank of the United States had been divided into many parts, and each part endowed with the life, motion, and similitude of the whole.[149]

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[143] *Id.*

[144] *Id.*

[145] CONG. GLOBE, Apr. 5, 1864 (Steele).

[146] *Id.*

[147] *Id.*

[148] CONG. GLOBE, Apr. 27, 1864. *See also* Cong. Globe, May 10, 1864 (Collamer) (referring to national banks as "essential instruments" of the government). *Cf.* Mehrsa Baradaran, *Banking and the Social Contract*, 89 NOTRE DAME L. REV. 1283, 1290 (2014) (examining and reinterpreting the "federal instrumentality" doctrine as it pertains to national banks).

[149] CONG. GLOBE, Feb. 5, 1862.

National banks would be "franchises" of the federal government,[150] a term that was used twice in the original legislation[151] (and remains there today[152]). In establishing national banks, Congress understood that it was outsourcing the public function of money creation.[153]

But why outsource? Why not have the federal government issue all money directly—greenbacks on steroids? This question occupied much of the congressional debate over the NBA. One congressman noted that the people were well satisfied with greenbacks, so what was the point of authorizing national banks to issue their equivalent?[154] "How can you have a more uniform currency than greenbacks?" he asked.[155] Senator Thaddeus Stevens said he would rather just issue more greenbacks than create national banks.[156] Another congressman opined

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[150] *See, e.g.,* CONG. GLOBE, Apr. 4, 1864 (Pruyn) (noting that national banks operate under a "franchise granted by the government"); CONG. GLOBE, May 10, 1864 (Cowan) (noting that national banks possess a "franchise" granted by the federal government).

[151] NBA at § 53 ("[I]f the directors . . . shall knowingly violate, or knowingly permit any of the officers, agents, or servants . . . to violate any of the provisions of this act all the rights, privileges, and *franchises* of the association . . . shall be thereby forfeited.") (emphasis added); *id*. at § 8 ("Such association shall have power to adopt a corporate seal, and shall have succession by the name designated in its organization certificate . . . *unless the franchise shall be forfeited* by a violation of this act; by such name may it make contracts, sue and be sued, complain and defend, in any court of law as fully as natural persons; it may appoint directors, and by its board of directors, appoint a president, vice president, cashier, and other officers, define their duties require bonds of them and fix the penalty thereof, dismiss said officers or any of them at pleasure, and appoint others to fill their places, and exercise under this act all such incidental powers as shall be necessary to carry on the business of banking . . .") (emphasis added).

[152] 12 U.S.C. § 24 (second) (noting that the "franchise becomes forfeited by reason of violation of law").

[153] Hockett & Omarova recover this conceptual apparatus and extend it to nonmonetary financial activity in *Finance Franchise*, Cornell L. Rev. (2017). *See also* Robert Hockett, *Money's Past is Fintech's Future: Wildcat Crypto, the Digital Dollar, and Citizen Central Banking*, 2 STANFORD J. OF BLOCKCHAIN L. & POL. (Jun. 28, 2019) ("It is almost as if Congress and President Lincoln understood, at least implicitly, that they were establishing a sort of national sovereign money franchise.").

[154] CONG. GLOBE, Mar. 30, 1864 (Pike).

[155] CONG. GLOBE, Mar. 31, 1864 (Pike).

[156] CONG. GLOBE, Apr. 5, 1864 (Stevens).

that all money should be "made by the government and not by banks."[157] Others expressed similar sentiments.[158]

Indeed, the primary question before Congress was not whether state banks or national banks should issue the circulating medium, but rather whether national banks or the Treasury Department should do so. Few if any supporters of the NBA appeared to favor state bank notes over greenbacks. President Lincoln surely didn't. In 1862, he vetoed legislation that would have allowed banks in the District of Columbia to issue small-denomination notes. In his veto message, he advised Congress that the federal government should do it itself. "During the existing war it is peculiarly the duty of the national government to secure to the people a sound circulating medium," he wrote.[159] Issuing greenbacks would do the trick: "Such an issue would answer all the beneficial purposes of the bill; would save a considerable amount to the treasury in interest; would greatly facilitate payments, to soldiers and other creditors, of small sums; and would furnish to the people a currency as safe as their own government."[160] Secretary Chase likewise expressed his "unhesitating preference" for a currency issued directly by the government over "a currency furnished by numerous and unconnected banks in various states."[161]

But the key figures in the NBA's passage believed that outsourcing would be better than direct government provisioning. All cited the risks of wholly public money. Those risks were twofold. First, overissue. As Chase put it, the "hazards" of direct governmental issue included temptation to overissue, depreciating paper, and national bankruptcy. "All these are possible consequences of the adoption of a system of government circulation," he wrote.[162] Issuing too many

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[157] CONG. GLOBE, Apr. 5, 1864 (Brooks). See also CONG. GLOBE, Apr. 26, 1864 (Henderson) (asking why the government should not continue to issue legal tender notes); CONG. GLOBE, May 6, 1864 (Doolittle) (noting that it would be better to substitute greenbacks for state bank notes); Horace Greeley, *Banking and Finance,* N.Y. DAILY TRIBUNE, Apr. 8, 1864 (supporting an exclusively greenback currency and suppression of all bank notes).

[158] CONG. GLOBE, Apr. 5, 1864 (Steele).

[159] Abraham Lincoln, *To the Senate* (June 23, 1862), in *in* 6 COLLECTED WORKS OF ABRAHAM LINCOLN.

[160] *Id.*

[161] U.S. TREASURY SECRETARY, REPORT ON THE FINANCES (Dec. 4, 1862).

[162] U.S. TREASURY SECRETARY, REPORT ON THE FINANCES (Dec. 9, 1861). Chase's argument echoed those of Alexander Hamilton seven decades earlier. *See* Alexander Hamilton, *Report on a National Bank [1790], in* THE WORKS OF ALEXANDER HAMILTON

greenbacks would "be as injurious as it would be easy,"[163] and greenbacks should not be adopted as a permanent system. Senator Sherman said much the same.[164] To the question "why look at all to the interests of the banks; why not directly issue the notes of the Government," he said, the "only answer . . . is that history teaches us that the public faith of a nation alone is not sufficient to maintain a paper currency. There must be a combination between the interests of private individuals and the Government."[165]

The second risk of direct government issuance had to do with the other side of the balance sheet—the asset rather than the liability side. Chase foresaw a future in which the federal fiscal stance returned to a "healthy normal" condition, with receipts exceeding expenditures, and under those conditions it would be impossible for the federal government, by spending money, to provide greenbacks "in sufficient amounts for the wants of the people."[166] In other words, the federal government might not be in a position to *spend* enough greenbacks into circulation to accommodate the economy's need for money. The government might then have to resort to lending greenbacks into circulation; but "this would convert the treasury into a government bank, with all its hazards and mischiefs."[167] While he recognized that the same problem could happen under the national banking system—because national bank notes had to be secured by Treasuries—Chase predicted that if this happened, Congress would just allow other assets to serve as collateral for national bank notes. "But these considerations may be for another generation," he wrote.[168] Rep. Hooper shared the same concern. He worried that if the government's fiscal stance made it

(1810), at 82 (noting that direct government issuance of paper money is "liable to abuse"); *id.* at 95 (describing danger of government-directed credit).

[163] U.S. TREASURY SECRETARY, REPORT ON THE FINANCES (Dec. 4, 1862).

[164] CONG. GLOBE, Feb. 10, 1863.

[165] *Id. See also* John Sherman, *The National Banking Project: The Certainty with Which It Will Give Us a Sound National Currency*, N.Y. TIMES (Feb. 2, 1863) ("The well-guarded Free Banking system proposed by Mr. Chase, commends itself in that it promises the needed currency. The central idea of that measure is the establishment of one sound, uniform circulation, of equal value throughout the country, upon the foundation of National credit, combined with private capital.").

[166] U.S. TREASURY SECRETARY, REPORT ON THE FINANCES 16 (1862).

[167] *Id.* at 17.

[168] *Id.*

impossible to spend greenbacks into circulation, the government would have to lend them into circulation, which could lead to corruption.[169]

The NBA's framers thus enlisted private shareholders not out of a desire to create private businesses and generate shareholder returns, nor to "regulate" an existing industry, but rather as a governance mechanism. Outsourcing was a commitment device to insulate the monetary framework from the danger of political interference, whether it be in the area of overissue (liability side) or political favoritism in lending decisions (asset side). With respect to the liability-side issue, outsourcing was a premodern form of administrative independence, established before the advent of the commission system. Half a century after the NBA, when Congress created the Federal Reserve System it placed operational control in the hands of twelve Federal reserve banks, each similarly insulated from political direction.[170]

Finally, one critical feature of the original NBA, overlooked by scholars, underscores the fact that Congress did not think of national banks primarily as private businesses: it required them to share their revenues with the federal government. The revenue share came in the form of a fee applied to national banks' notes in circulation and deposits. This provision was debated extensively. According to Chase:

> The whole of [state bank] circulation constitutes a loan without interest from the people to the banks, costing them nothing except the expense of issue and redemption and the interest on the specie kept on hand for the latter purpose; and it deserves consideration whether sound policy does not require that the advantages of this loan be transferred, in part at least, from the banks, representing only the interests of the stockholders, to the government, representing the aggregate interests of the whole people.[171]

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[169] CONG. GLOBE, Apr. 6, 1864.

[170] Federal Reserve Act, 38 Stat. 251 (1913).

[171] U.S. TREASURY SECRETARY, REPORT ON THE FINANCES (Dec. 9, 1861). English statesmen had reached exactly this conclusion a half century earlier. As Christine Desan notes in her astounding book, MAKING MONEY: COIN, CURRENCY, AND THE COMING OF CAPITALISM (2014), in 1810 the Select Committee on the High Price of Gold Bullion, appointed by the House of Commons, observed that private banks' exorbitant profits from issuing bank notes was "unnatural, and teeming … with ultimate consequences [that are] prejudicial to the public welfare" and that "some mode ought to be devised of enabling the State to participate much more largely in the profits accruing from the present system." Select Committee on the High Price of Gold Bullion, House of Commons, Great Britain, *Report* 71–72 (1810).

One of the advantages of the planned national banking system, he noted, is that it would not have this problem: it would give the people "a participation in the profit of circulation." "The people," he noted, "claim, at least, part of the benefit of debt without interest, made into money, hitherto enjoyed exclusively by banks."[172] He noted that the system would "give to the government a fair seignorage of about two percent of the circulation."[173]

The proper size of these fees was contested, but there was general consensus on the objective: as one congressman put it, "the people are entitled" to the profit from money creation, and "the government is really the party who should have all the profit of the circulation" and is "entitled to the whole benefit."[174] Another said that national banks should be assessed duties "to the fullest extent of their ability to bear them."[175] Sherman agreed[176] and expected this fee stream to yield "a very large sum of money to the national government."[177]

The revenue split meant that national banks were, in effect, joint ventures with the federal government. They were not merely private businesses but generators of seigniorage—government revenue from money creation—much like today's Federal Reserve Banks. Indeed, when the Federal Reserve Banks were established in 1913, Congress applied a similar, although more significant, "franchise tax" to their earnings.[178] In outsourcing money issuance the federal government sought to retain part of the revenue from money creation; it relinquished only enough revenue to attract private capital into the system. Private shareholders were a structural means to a public end.

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[172] U.S. TREASURY SECRETARY, REPORT ON THE FINANCES (Dec. 4, 1862).

[173] Salmon P. Chase, *Letter to John Bigelow* (Oct. 7, 1862), *in* 3 THE PAPERS OF SALMON P. CHASE 293 (1996).

[174] CONG. GLOBE, Feb. 20, 1863 (Alley).

[175] CONG. GLOBE, Apr. 4, 1864 (Morrill).

[176] CONG. GLOBE, Apr. 27, 1864.

[177] CONG. GLOBE, Apr. 26, 1864.

[178] Federal Reserve Act § 7 ("After all necessary expenses of a Federal reserve bank have been paid or provided for, the stockholders shall be entitled to receive an annual dividend of six per centum on the paid-in capital stock, which dividend shall be cumulative. After the aforesaid dividend claims have been fully met all the net earnings shall be paid to the United States as a franchise tax, except that one-half of such net earnings shall be paid into a surplus fund until it shall amount to forty per centum of the paid-in capital stock of such bank.").

C. The Rationale for Federal Chartering

Against this backdrop, there is nothing mysterious about federal chartering of national banks. Congress created national banks to exercise a delegated sovereign power: to augment the money supply on behalf of the federal government.[179] It used private shareholders as a governance device—as it had done before, with the first and second Banks of the United States—but generating private profits was not their purpose. National banks were federal instrumentalities, and Congress did not even consider letting the states charter them because it aimed to push the states out of the money-augmentation business altogether. Indeed, the NBA meant "war" on state banks.[180] The "object and design of this system," one of its opponents decried, was "to destroy the state banks."[181]

The NBA's constitutional basis derived not from Congress's power to regulate interstate power but rather its power to coin money and regulate its value.[182] In many ways the NBA had much more in common with the Post Office Act of 1792—a statute governing another federal government activity with explicit constitutional status—than with regulatory statutes like the Interstate Commerce Act of 1887.[183] The Interstate Commerce Commission was designed to regulate existing railroads, not create new ones. By contrast, the NBA was an act of state-building: it erected public infrastructure. And like the Post Office Act, it relied on entry restriction to prohibit private businesses from making inroads into its domain.[184] George Washington's foremost objective in signing the Post Office Act "binding the nation;"[185] likewise, the NBA's

[179] For a masterful historical examination of money creation as a sovereign prerogative, see DESAN, *supra* note 171.

[180] CONG. GLOBE at 878 (Feb. 11, 1863) (Sen. Howard) ("I regard this moment as the most unpropitious for inaugurating this warfare upon the state institutions."); *id.* at 879 (explaining that the bill will lead to a "dangerous war upon state institutions"). *See also* CONG. GLOBE at 2148 (May 6, 1864) (Sen. Doolittle) (objecting to the "war upon the State banks and the determination to abolish and destroy all State institutions"). Or as Senate Collamer of Kentucky put it, seemingly unaware of the irony, "Is there any great national necessity that compels us to drive the chariot of state roughshod over these institutions?" CONG. GLOBE at 874 (Feb. 11, 1863).

[181] CONG. GLOBE at 846 (Feb. 10, 1863) (Sen. Powell).

[182] U.S. CONST. Art. 1, § 8, cl. 5.

[183] U.S. CONST. Art. 1, § 8, cl. 7.

[184] *See* Private Express Statutes, 18 U.S.C. §§ 1693–99.

[185] *See* Richard John, SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE (1995).

framers speculated that had national banking system already existed, it would have prevented the Civil War.[186]

Although Congress phased out national bank notes in the early twentieth century, by that time deposit balances, and checks written on deposit accounts, had already taken their place as the primary form of money in the economy.[187] Commentators have long understood the functional equivalence of deposits and notes,[188] as did the NBA's framers; they viewed deposits as part of the "circulation."[189] Congress

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[186] U.S. TREASURY SECRETARY, REPORT ON THE FINANCES (Dec. 4, 1862) ("Had the system been possible and had it actually existed two years ago, can it be doubted that the national interests and sentiments enlisted by it for the Union would have so strengthened the motives for adhesion derived from other sources that the wild treason of secession would have been impossible?"); Cong. Glob, Feb. 10, 1863 (Sherman) ("I believe [a national banking system] would have done very much indeed to maintain the federal government and to prevent the great crime of secession.")

[187] Deposits and notes are functionally equivalent. This is textbooks economics. N. GREGORY MANKIW, PRINCIPLES OF MACROECONOMICS 347 (5th ed. 2009) ("*[B]anks create money*." (emphasis in original)). *See also United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 326 (1963) ("[B]anks do not merely deal in[,] but are actually a source of, money."); *id.* at 374 (Harlan, J., dissenting on other grounds) ("The unique powers of commercial banks to accept demand deposits, provide checking account services, and lend against fractional reserves permit the banking system as a whole to create a supply of 'money[]'. . . . Many other services are also provided by banks, but in these more or less collateral areas they receive more active competition from other financial institutions.").

[188] *See, e.g.,* Albert Gallatin, *Considerations on the Currency and Banking System of the United States (1831), in* 3 THE WRITINGS OF ALBERT GALLATIN 231, 267–8 (Henry Adams ed. 1879) ("The bank-notes and the deposits rest precisely on the same basis. . . . We can in no respect whatever perceive the slightest difference between the two."); 1 HENRY DUNNING MACLEOD, THE THEORY AND PRACTICE OF BANKING 330–31 (4th ed. 1883) ("It is … a fundamental error to divide banks into 'Banks of Deposit' and 'Banks of Issue.' All banks are 'Banks of Issue.'"); Charles F. Dunbar, *Deposits as Currency*, 1 Q. J. ECON. 401, 402–3 (1887) ("The ease with which we ignore deposits as a part of the currency seems the more remarkable, when we consider that … it is a circulating medium in as true a sense and in the same sense as the bank-note, and that, like the bank-note, it is created by the bank and for the same purposes."); LUDWIG VON MISES, THE THEORY OF MONEY AND CREDIT 53 (H. E. Batson trans., Yale Univ. Press 1953) (1912) ("[B]anknotes, say, and cash deposits differ only in mere externals, important perhaps from the business and legal points of view, but quite insignificant from the point of view of economics."); A. Mitchell Innes, *What is Money?*, 30 BANKING L. J. 377, 407 (1913) ("A bank note differs in no essential way from an entry in the deposit register of a bank."); CHARLES F. DUNBAR, THE THEORY AND HISTORY OF BANKING 63 (3rd ed. 1917) ("Legislators have generally failed to perceive the similarity of the two kinds of liability."); JOSEPH SCHUMPETER, HISTORY OF ECONOMIC ANALYSIS 1115 (1954) ("[T]he obvious truth [is] that deposits and banknotes are fundamentally the same thing.").

[189] *See, e.g.*, REPORT ON THE FINANCES, *supra*, at 14 (explaining that deposits "answer very many of the purposes of circulation" and grouping them with bank notes in the

recognized the relative importance of deposit money by directing the Fed to issue paper money itself and to operate as a clearinghouse for checks drawn on national banks by their depositors.[190] Later, in the New Deal, Congress established the Federal Deposit Insurance Corporation (FDIC)—transforming most bank deposits into sovereign money, or something close to it—and restricted entry into the deposit business, making it a crime for unregulated entities to receive deposits.[191] The latter provision was the direct descendant of the NBA prohibition on unauthorized bank notes, and it contained no exception for purely intrastate businesses, indicating that Congress based its legislative authority on the Constitution's monetary provisions rather than the Commerce Clause.[192] Deposits thus took the place of bank notes as the defining attribute of a "bank" in federal law.[193] And when Congress bolstered the OCC's enforcement powers over national banks a century after it first enacted the NBA,[194] it noted that the OCC's powers are justified because the "banking system is a fundamental part of our monetary system and the Nation's $130 billion of demand deposits represents the principal element in the Nation's money supply."[195]

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nation's money supply); CONG. GLOBE, Apr. 26, 1864, at 1874 (Sherman) (noting that in large cities "deposits are really the circulation"). And they grouped bank notes and deposits together by requiring that each national bank maintain base money reserves in proportion to "its notes in circulation *and* its deposits," NBA § 31, 13 Stat. at 108, and that it remit revenue to the federal government as a function of its notes *and* deposits outstanding, *id.* at § 41.

[190] *See* Federal Reserve Act § 16, 38 Stat. 251, 268 (1913) (codified at 12 U.S.C. § 411 *et seq*.); H.R. Rep. No 63-69, at 55–56.

[191] Banking Act of 1933 § 21(a)(2), 48 Stat. 162, 189 (codified at 12 U.S.C. § 378(a)(2)).

[192] We are indebted to Joe Sommer for this observation.

[193] *See* Cynthia Crawford Lichtenstein, *Defining Our Terms Carefully and in Context: Thoughts on Reading (and in One Case, Rereading) Three Books*, 31 REV. BANKING & FIN. L. 695, 698 (2012) (explaining that the "Banking Act of 1933 [in § 21(a)(2)] . . . clearly defines the word 'bank' as an institution that takes 'deposits' and is regulated by and examined by either a state or federal banking authority"); RICHARD S. CARNELL, JONATHAN R. MACEY & GEOFFREY P. MILLER, THE LAW OF FINANCIAL INSTITUTIONS 124 (6th ed. 2017) (explaining that accepting deposits is "an activity off limits to [nonbank] firms"). *See also* Philadelphia Nat'l Bank, 374 U.S. at 326 ("Commercial banks are unique among financial institutions in that they alone are permitted by law to accept demand deposits.").

[194] Financial Institutions Supervisory Act of 1966, 80 Stat. 1028.

[195] *See* S. Rep. No. 1482, 89th Cong., 2nd Sess., 5 (1966). S*ee also* 1966 Cong. Rec. 24983 (Rep. Wright Patman) (arguing in favor of robust enforcement powers for the OCC on the grounds that "we in Congress, [must] carry[] out our mandate under article I, section 8, clause 5, of the Constitution to assure the public of a sound monetary system").

III. THE COLLAPSE OF BANKING LAW

This Part considers the NBA's provisions governing corporate powers and corporate chartering—the twin and the *only* barriers to the OCC's offering federal corporate charters to any American business that wants one—in light of the purpose of national banks and their place in American law. First, it recounts the OCC's protracted and ultimately successful battle to break down the first barrier over the past half century, and it exposes that the OCC's victory rests on faulty legal foundations. Section 24 (Seventh), the NBA provision which governs national banks' powers, is not a delegation by Congress to the OCC to define the permissible activities of national banks, as the Supreme Court held in its famous *VALIC* decision in 1995.[196] Indeed, it is not even part of the enabling act of the OCC at all: It is part of the federal charter of national banks, to be construed strictly against the corporation under settled *ultra vires* doctrine.

Second, this Part shows why the OCC's current effort to tear down much of the second barrier—the constraints in Section 21 governing corporate chartering—is also inconsistent with the NBA. The ongoing debates over the OCC's proposed nondepository bank chartering initiative have largely neglected the fundamental question of *why* Congress created this exceptional body of enterprise law in the first place. Those congressional purposes—reinforced by the larger body of federal banking law in which the NBA is embedded—cast doubt on the OCC's expansive interpretation of its chartering authority.

Third, this Part shows that if the courts defer to the OCC's views of its chartering authority, they will open up an astonishing range of economic activity to federal incorporation, giving the federal government vast new inroads into American enterprise law—not through considered congressional deliberation and adoption, but rather under the purview of a quasi-independent bureau in the Treasury Department that was never tasked with this mission. The result would be an alternative, OCC-controlled system of business organization that could, over time, fundamentally reshape corporate law federalism.

A. Contorting Corporate Powers

Unlike corporations chartered under state general incorporation laws—virtually all of which are authorized to conduct any lawful

[196] NationsBank of North Carolina v. Variable Annuity Life Insurance Co. ["VALIC"], 513 U.S. 251 (1995).

business[197]—national banks' corporate powers are circumscribed. Section 24 (Seventh) provides that national banks may 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; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes.[198] Activities that transgress these statutory boundaries are *ultra vires*.

From 1863 until the 1920s,[199] and again from the Great Depression to the early 1960s, national banks' activities were largely confined to the basics: taking deposits, issuing payment instruments such as teller's checks or letters of credit, lending money, and purchasing bonds and other debt instruments and holding them to maturity. But in 1963 Comptroller James Saxon launched a series of "bold and radical changes in established bank policy,"[200] authorizing national banks to, among other things, engage in the travel agency business, engage in the insurance agency business, underwrite government securities offerings, and set up mutual funds and underwrite their shares. For a time, the federal courts shot down these maneuvers,[201] seeking, as one court described it, to "keep[]the Comptroller from being a free-wheeling agency dispensing federal favors."[202]

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[197] *See, e.g.,* DGCL § 102(a)(3) (noting that "all lawful acts and activities shall be within the purposes of the corporation" so long as the certificate of incorporation so provides). It is notable that Delaware corporations, like those of many other states, are expressly denied the power to engage in "the business of banking," defined as issuing bank notes or "receiving deposits of money." DGCL § 126 ("Banking power denied.").

[198] 12 U.S.C. § 24 (Seventh). A variety of further clauses added in the twentieth century permit national banks to deal in securities and invest in various other assets. *Id.* at § 24 (Seventh) – (Eleventh).

[199] National banks pushed the limits of the business of banking during the 1910s and 1920s, exceeding their corporate powers, often with the support of the Comptroller and sometimes with the support of Congress, to compete with state banks and trusts. These efforts were the subject of great controversy at the time. *See also* Arthur E. Wilmarth, Jr., TAMING THE MEGABANKS (forthcoming 2020).

[200] Arnold Tours Inc. v. Camp, 472 F.2d 427 (1st Cir. 1972).

[201] *See id.* (travel agency); Georgia Ass'n of Independent Ins. Agents, Inc. v. Saxon, 268 F. Supp. 236 (N.D.Ga.1967), aff'd, 399 F.2d 1010 (5th Cir. 1968) (insurance agency); Baker, Watts & Co. v. Saxon, 261 F. Supp. 247 (D.D.C.1966) (government securities underwriting); Investment Company Institute v. Camp, 401 U.S. 617 (1971) (mutual funds).

[202] Webster Groves Trust Co. v. Saxon, 370 F.2d 381 (8th Cir. 1966). Sometimes national banks succeeded in shielding activities from judicial scrutiny until those activities were firmly established. Kenneth Kettering has documented how national

But in the 1980s, the courts assumed a more deferential posture toward the OCC's efforts to expand the range of activities it considered part of the "business of banking."[203] With this newfound latitude, the OCC dramatically upped the ante. One of its major initiatives was in derivatives.[204] Before 1987, national banks' derivatives activities were strictly confined to hedging interest-rate risk in their loan and securities portfolios.[205] But that year the OCC began allowing them to enter into commodity derivatives on a matched book basis.[206] This was not hedging of existing risks; it was derivatives *dealing* or investment banking. The OCC explicitly stated that it was moving beyond the "textbook sense" of banking (the monetary sense) and toward a "modern concept of banking as funds intermediation."[207]

With this conceptual abstraction the floodgates were open. In 1988, the OCC allowed national banks to issue "deposits" with returns linked to stock market indexes and to hedge the associated risks in the equity swaps markets.[208] In the early 1990s, the OCC dropped the

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banks started issuing standby letters of credit—a form of guarantee—in the 1950s. It was well understood that guarantees were ultra vires for national banks; but by styling their guarantees as letters of credit (a well-established component of the business of banking) national banks managed to avoid legal challenges, including challenges by the OCC—which for some time "oblivious[ly]" failed to recognize the economic substance of these instruments. Kenneth C. Kettering, *Securitization and Its Discontents: The Dynamics of Financial Product Development*, 29 CARDOZO L. REV. 1553, 1666 (2007–2008). Although the FDIC and the Fed put up some resistance in the late 1960s and early 1970s, they soon folded. The OCC accepted the industry's argument that standby letters of credit were within national banks' powers and in 1974 circulated a legal opinion to that effect prepared by one of the industry's most prominent lawyers. Predictably, these events broke down the barrier between banking and insurance. In 1988, the D.C. Circuit upheld national banks' issuance of bond insurance, reasoning that such insurance is analogous to a standby letter of credit, "which the court (with an irony that surely was unconscious) stated '[b]anks have long been permitted to provide.'" *Id.* at 1670–71 (quoting Am. Ins. Ass'n v. Clarke, 865 F.2d 278, 282 (D.C. Cir. 1988)).

[203] *See, e.g.,* Securities Industry Association v. Board of Governors of the Federal Reserve System, 807 F.2d 1052 (D.C. Cir. 1986) (Bork, J.) (permitting national banks to engage in distribution of commercial paper). *Cf.* Hockett & Omarova, *supra* note 7, at 480–81 (describing trends in banking law in recent decades resembling the trajectory in corporate law from special to general incorporation).

[204] *See* Omarova, *supra* note 17 (tracing these developments in detail).

[205] *See* OCC Banking Circular 79 (November 2, 1976).

[206] *See* OCC No Objection Letter 87-5 (July 20, 1987).

[207] *Id.*

[208] *See* OCC Interpretive Letter re: Chase Market Index Investment Deposit Account (August 8, 1988).

matched book requirement for derivatives positions and allowed national banks to hedge on a portfolio basis.[209] In 1993, the OCC allowed national banks to take physical delivery of commodities to hedge derivatives risks—an activity that had previously been viewed as inconsistent with the separation of banking and commerce.[210] In 2000, the OCC even allowed national banks to purchase equity securities to hedge derivatives exposures, notwithstanding the specific statutory prohibition on national banks' purchases of stock.[211] As a result of these OCC initiatives, the derivatives business migrated out of licensed broker-dealers: today, derivatives dealing is dominated by a handful of FDIC-insured national banks.

In 1996, the Supreme Court cleared the way for further expansion of national banks' corporate powers. It held that the "business of banking" in Section 24 (Seventh) is not limited to the specific powers enumerated there and that the OCC "has discretion to authorize activities beyond those specifically enumerated," subject to the proviso that its discretion "must be kept within reasonable bounds."[212]

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[209] *See* OCC No Objection Letter 90-1 (February 16, 1990); OCC Interpretive Letter to First National Bank of Chicago (March 2, 1992).

[210] *See* OCC Interpretive Letter 632 (June 30, 1993); OCC Interpretive Letter 684 (August 4, 1995).

[211] *See* OCC Interpretive Letter 892 (September 13, 2000). The Dodd-Frank Act sought to partially turn back the clock on these developments. Dodd-Frank's "swaps push-out rule" would have required insured banks to cease some, though not all, of their derivatives dealing. See Dodd-Frank Act § 716, 124 Stat. at 1648–51. The provision was very controversial, prompting criticism and ambivalence even from otherwise staunch defenders of financial regulation. For example, during the Dodd-Frank legislative process, Sheila Bair, then chair of the FDIC, expressed concerns about an early draft of the push-out, noting that "insured banks play an essential role in providing market-making functions" for certain derivatives. Letter from Sheila Bair to Senators Christopher Dodd and Blanche Lincoln (April 30, 2010), CONG. RECORD 156, May 4, 2010 (daily ed.): S3069–70. Bair subsequently opposed the repeal of the enacted version of the push-out. *See* Mike Konczal, "Sheila Bair: Dodd-Frank Really Did End Taxpayer Bailouts," *Wonkblog,* WASH. POST, May 18, 2013. Paul Volcker, usually known as a traditionalist on banking matters, criticized the rule too. *See* Letter from Paul Volcker to Senator Christopher Dodd (May 6, 2010), *Congressional Record* 159, October 30, 2013 (daily ed.): H6922. Ben Bernanke likewise criticized the provision for "essentially prohibit[ing] all insured depository institutions from acting as a swap dealer." Letter from Ben S. Bernanke to Senator Christopher Dodd (May 12, 2010), *Congressional Record* 159, October 30, 2013 (daily ed.): H6922. The swaps push-out was later substantially repealed. *See* Consolidated and Further Continuing Appropriations Act, 2015, H.R. 83, 113th Cong. § 630 (2014).

[212] NationsBank of North Carolina v. Variable Annuity Life Insurance Co. ["VALIC"], 513 U.S. 251 (1995).

("Ventures distant from dealing in financial investment instruments," it noted, "may exceed those bounds."[213])

But in reaching this seemingly straightforward conclusion the Court committed a simple error: it mischaracterized Section 24 (Seventh) as a "regulatory"[214] provision subject to agency deference under the familiar *Chevron* standard,[215] rather treating it as the corporate law provision it plainly is.[216] Had the Court recognized that Section 24 was *not* a "regulatory provision," or part of the OCC's enabling act, but rather part of the federal charter of national banks,[217] it would have been compelled to apply precisely the opposite rule of construction:

> The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and

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[213] *Id.*

[214] *Id.* at 256 (quoting Clarke v. Securities Industry Assn., 479 U.S. 388, 403-404 (1987), quoting Investment Company Institute v. Camp, 401 U.S. 617, 626-27 (1971), for the proposition that "courts should give great weight to any reasonable construction of a *regulatory* statute adopted by the agency charged with the enforcement of that statute" and that the OCC "is charged with the enforcement of the banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws") (emphasis added). *ICI* and *Clarke* involved the OCC's interpretation of Section 21 of the Banking Act of 1933—not a corporate powers provision—eliding the corporate law nature of the question. (The *ICI* language was also dicta.).

[215] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984).

[216] Specifically, the Court explained that, under *Chevron*, "when we confront an expert administrator's statutory exposition, we inquire first whether the intent of Congress is clear as to the precise question at issue" and if so "that is the end of the matter" and if not, if "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. If the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give the administrator's judgment controlling weight'" VALIC, 513 U.S. at 257 (internal quotation marks and citations omitted). The Court further concluded that the OCC's conclusion that the brokerage of annuities was an "incidental powe[r] . . . necessary to carry on the business of banking" was "reasonable." *Id.* at 264.

[217] FLETCHER ON CORPORATIONS § 765 (1917) ("when a corporation is created under a general corporation law authorizing the formation of such corporations, its charter consists of the law under which it is organized . . ."); 6 FLETCHER CYC. CORP. § 2483 (2020) ("any ambiguity respecting the extent of the powers will be strictly construed against the corporation").

> doubt is fatal to the claim. The doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court.[218]

Nothing in the NBA overturns the settled corporate law principle that "ambiguities operate against the corporation and in favor of the public,"[219] which was well understood at the time the NBA was enacted and has never changed.[220] And the Supreme Court and other courts once

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218 Nw. Fertilizing Co. v. Vill. of Hyde Park, 97 U.S. 659, 666 (1878). *See also* Cent. Transp. Co. v. Pullman's Palace Car Co., 139 U.S. 24, 48–49 (1891) ("By a familiar rule, every public grant of property, or of privileges or franchises, if ambiguous, is to be construed against the grantee, and in favor of the public."); *id.* ("An intention, on the part of the government, to grant to private persons, or to a particular corporation, property or rights in which the whole public is interested, cannot be presumed, unless *unequivocally* expressed or necessarily to be implied in the terms of the grant." (emphasis added)); *id.* ("The enumeration of [corporate] powers implies the exclusion of all others not fairly incidental."); Perrine v. Chesapeake & Delaware Canal Co., 50 U.S. 172, 184 (1850) (citing, *inter alia*, Dartmouth College v. Woodward, 17 U.S.C. 518 (1819); Charles River Bridge v. Warren Bridge, 36 U.S. 420 (1837); Bank of Augusta v. Earle, 38 U.S. 519 (1839)) ("A corporation created by statute is a mere creature of the law, and can exercise no powers except those which the law confers upon it, or which are incident to its existence."); *id.* at 184 (explaining that a substantial corporate power "should not be inferred where the slightest doubt could arise, and the words are capable of any other construction"). This is the law in England. Proprietors of the Stourbridge Canal v. Wheeley, 2 B. & Ad. 792, 109 E.R. 1336 (1831) ("[T]he rule of construction in all such cases is now fully established to be this—that any ambiguity in the terms of the contract must operate against the adventurers, and in favor of the public."). As well as the states. *See, e.g.*, American Loan & Trust Co. v. Minnesota & N. W. R. Co., 157 Ill. 641 (1895) ("Every power that is not clearly granted (to a corporation) is withheld and any ambiguity in the terms of the grant must operate against the corporation and in favor of the public."); Davis v. Mattawamkeag Log Driving Co., 82 Me. 346, 19 A. 828, 828 (1890) ("No rule is better settled than that charters of incorporation are to be construed strictly against the corporators."); Penn. Railroad Co. v. Canal Commissioners, 21 Pa. 22 (1852) ("In the construction of a charter, to be in doubt is against the corporation; and every resolution which springs from doubt is against the corporation. This is the rule sustained by all the courts in this country and in England. No other has ever received the sanction of any authority to which we owe much deference.").

219 Fletcher, *supra* note 217, at § 773; *see also id.* ("When there is any doubt as to the intention of the legislature, the rule of construction, for the purpose of determining what powers are conferred upon a corporation by its charter, is that the charter, like other grants from the state, is to be construed more strictly against the corporation and in favor of the public, and that powers not clearly granted are to be regarded as impliedly withheld").

220 Herbert J. Hovenkamp claims that by the 1880s and '90s courts had "retreated from the view that a corporation's powers were defined by a strict construction of its charter." *The Classical Corporation in American Legal Thought*, 76 GEORGETOWN L. REV. 1593, 1663 (1988). For this Hovenkamp cites: Lawrence Friedman; *Jacksonville, Mayport, Pablo Ry. & Nav. Co. v. Hooper*, 160 U.S. 514 (1896); and an 1894 treatise by William W. Cook. Friedman claims in passing that in the second half of the nineteenth century courts "began to 'imply' powers much more freely." A HISTORY OF AMERICAN

LAW 502 (4th ed. 2019). But Friedman cites only *Hooper*. *See id. Hooper* was an opinion written by the staunchly pro-business justice, George Shiras, who spent 37 years in private practice as a corporate lawyer before joining the Court in 1892. GEORGE SHIRAS III, JUSTICE GEORGE SHIRAS, JR. OF PITTSBURGH: A CHRONICLE OF HIS FAMILY, LIFE, AND TIMES (1953). *Hooper* was an outlier. It held that the Jacksonville Railroad could operate a hotel in Florida. And while in reaching this result *Hooper* did not state the well settled rule of construction, instead suggesting a looser principle, *see* 160 U.S. at 523 ("Courts may be permitted, where there is no legislative prohibition shown, to put a favorable construction upon such exercise of power by a railroad company as is suitable to promote the success of the company, within its chartered powers, and to contribute to the comfort of those who travel thereon."), the opinion hardly endorses an expansive conception of corporate powers. First, the question presented in the case was whether the defendant could escape liability to the railroad for a fire that destroyed the hotel—a situation in which the equities weighed strongly in favor of a more liberal construction. *See id.* at 529-30. Second, as the Court emphasizes, the railroad's charter permitted it "to erect and maintain all convenient buildings for the accommodation and use of their passengers." *Id.* at 523-24. Third, the hotel was situated "distant from any town" in an unpopulated part of the country. *Id.* at 524. Finally, and most importantly, the Court limited its holding to situations, "as in the present case," where the hotel is "*not for the purpose of making money* out of such business, but to furnish reasonable and necessary accommodations to its passengers and employees." *Id.* at 526 (emphasis added). Not only did *Hooper* not repudiate the strict-construction doctrine, but just ten weeks later, in a case involving another railroad company, the Court held that:

> grants by the state [of corporate powers] are to be construed strictly against the grantees, and . . . nothing will be presumed to pass, except it be expressed in clear and unambiguous language. As was said by Mr. Justice Swayne in *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 666: 'The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court."

Pearsall v. Great N. Ry. Co., 161 U.S. 646, 664 (1896). Neither Hovenkamp nor Friedman cite *Pearsall* or any of the dozens of state and federal cases stretching from the 1870s well into the twentieth century that apply the settled rule. *See, e.g.*, First M. E. Church of Chicago v. Dixon, 178 Ill. 260, 272 (1899); Richmond, F. & P.R. Co. v. Richmond, Fredericksburg & Potomac R.R. Connection Co., 145 Va. 266, 287, (1926); In re Am. Transfer Co., 237 Pa. 241, 245 (1912); German-Am. Bank of Baltimore v. Kopp, 103 A. 1009, 1010 (Md. 1918).

Nor does Cook's treatise buttress their claim. Cook—a wealthy corporate lawyer who worked for a telegraph company—cites no authority at all for his assertion that "[t]he courts are becoming more liberal, and many acts which fifty years ago would have been held to be *ultra vires* would now be held to be *intra vires*." A TREATISE ON STOCK AND STOCKHOLDERS, BONDS, MORTGAGES, AND GENERAL CORPORATION LAW 971-73 (3rd ed. 1894). In fact, in its section on corporate powers Cook's treatise recites the settled rule: "Every public grant . . . if ambiguous, is to be construed against the grantee and in favor of the public." *Id.* at 6 (quoting *Central. Trans. Co.*).

construed the powers provisions of the NBA without so much as acknowledging *any* role for the OCC in their interpretation, let alone one entitled to agency deference.[221]

Moreover, even if *Chevron* deference applied to the OCC's interpretations of national banks' corporate powers, the reasonableness of the OCC's interpretations must still be evaluated against the background corporate law principle that ambiguities are to be construed strictly against the corporation. The OCC has completely discarded this principle while litigants and judges have failed to hold it to account.[222]

Not surprisingly, the latest edition of the OCC's *Activities Permissible for National Banks* includes among national banks' corporate powers activities far afield from the enumerated banking powers Congress specified. These include management consulting, "finder activities" for both financial and nonfinancial products, health care records management, courier services, inventory management

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Hovenkamp also cites Cook, as well as Morton Horwitz, for the proposition that "ultra vires doctrine was disappearing rapidly" in the late nineteenth century. *Classical Corporation* at 1664. But relaxing "ultra vires doctrine" is different from construing corporate powers more liberally. Indeed, ultra vires doctrine often *protected* corporations from liability by voiding transactions that exceeded corporate powers. (Incidentally, like Hovenkamp and Friedman, Horwitz suggests that by the turn of the twentieth century "the definition of legitimate corporate powers had for a long time been expanding." Santa Clara *Revisited: The Development of Corporate Theory*, 88 W.V. L. REV. 173, 187 (1986). But Horwitz cites only Cook for this proposition, and as mentioned Cook cites nothing at all.)

[221] *See* First National Bank of Charlotte v. National Exchange Bank of Baltimore, 51 How. Pr. 320 (N.Y. 1875) (concluding that "[d]ealing in stocks [i.e. equity and debt securities] is not expressly prohibited; but such a prohibition is implied from the failure to grant the power"); McCormick v. Market National Bank of Chicago, 165 U.S. 538, 550-51 (1897); Logan Country Nat. Bank v. Townsend, 139 U.S. 67, 73 (1891) (holding, inter alia, that "a national bank cannot rightfully exercise any powers except those expressly granted by that act, or such incidental powers as are necessary to carry on the business of banking, for which it was established"); Western Nat. Bank of New York v. Armstrong, 152 U.S. 346 (1894) (questioning whether borrowing money is within the powers of national banks, because "the power to borrow money … is not expressly given by the act" and that such transactions, if permissible, would be "out of the course of ordinary").

[222] Assessing the implications of the Court's error in *VALIC* for bank powers generally is beyond the scope of this Article. We note, however, that no one has yet challenged expanded national bank powers on these grounds and so the argument is not necessarily foreclosed by *VALIC* and its progeny. Colorable arguments can be made under existing precedent that Congress has acquiesced in at least some of the expanded activities of national banks. If future decisions by the OCC to interpret the business of banking as a broad and independent grant of corporate power are challenged on the grounds outlined herein, federal courts will have an opportunity to correct the error identified herein.

services, various types of insurance underwriting, annuity sales, asset securitization, "many types of broker-dealer activities" including full-service securities brokerage, investment advisory and investment management services, computer and telecommunications equipment leasing, providing electronic marketplaces for nonfinancial products (including offering "virtual malls"), commercial website hosting and associated web design and development services, electronic document storage and retrieval, and software development and production for financial services.[223]

Thus the outer limits of the "business of banking" now encompass a large proportion of the financial industry and a wide range of nonfinancial activities as well.[224] And under the prevailing precedent these perimeters are not fixed; the OCC can continue to designate additional activities as part of "banking" and thus within the corporate powers of national banks.

B. Expanding Corporate Chartering

The OCC has also sought to make national bank charters more readily available in two ways. First, starting in 1980, it jettisoned "convenience and needs of the community" as a consideration in national bank chartering. Second—in its latest and boldest maneuver—it claimed the authority to supply federal charters to *non*depository businesses. These moves, in conjunction with the expansion of national banks' corporate powers, portend a new and unprecedented federal presence in the organization of American enterprise—not through Congress's considered promulgation of general-purpose corporate law but through the OCC's unilateral expansion of its purview.

1. Outsourcing versus Licensing

For most of its history, the OCC was very selective in dispensing national bank charters. Not only did it scrutinize the organizers' backgrounds, qualifications, and business plans, but it also reviewed information on economic conditions and existing banks in the relevant

[223] OCC, *Activities Permissible for National Banks and Federal Savings Associations, Cumulative* (Oct. 2017).

[224] Much of this transformation was justified on the grounds that technological developments had eviscerated traditional distinctions between banks and nonbanks and that liberalization was necessary to rescue the commercial banking industry from obsolescence. *See* Jonathan R. Macey, *The Business of Banking: Before and After Gramm-Leach-Bliley*, 25 J. OF CORP. L. 691, 692-93 (2000) (describing the role this dynamic played in the passage of Gramm-Leach Bliley and critiquing the justification).

locality.[225] Prior to the New Deal, most Comptrollers followed this policy even though it wasn't clearly authorized by the NBA. But Congress endorsed the practice in 1935 by requiring the OCC, when chartering a new bank, to certify that "consideration ha[d] been given" to the factors that the FDIC was required to consider when evaluating deposit insurance applications.[226] By far the most important factor was the "convenience and needs of the community to be served by the bank."[227]

This meant that a bank charter was much more than a business license. Licensing systems typically admit all applicants that meet the requisite standards, but Congress expected the OCC *not* to do this; it was to be selective. Congress borrowed the convenience and needs factor from public utility law, in which infrastructure providers have long been required to obtain certificates of "public convenience and necessity" (PCN) before commencing service.[228] Analysts have emphasized that "licensing" is too generic to capture this regulatory allocation function.[229] The PCN certificate is different in that otherwise qualified

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[225] *See* MICHAEL S. BARR, HOWELL E. JACKSON & MARGARET E. TAHYAR, FINANCIAL REGULATION: LAW AND POLICY 162 (2016). Although at least one comptroller in the late nineteenth century suspended this policy based on a perceived lack of statutory basis, the OCC resumed the policy following the Panic of 1907 amid concerns that too many national banks had been chartered. *See id.* at 163.

[226] *Id.* § 101, 49 Stat. 687.

[227] *Id.* at 688. A decade later, when the OCC formalized its chartering standards by rulemaking, it adopted the six statutory factors as a basis for passing on charter applications. Bureau of the Comptroller of the Currency, Functions and Procedures, 11 Fed. Reg. 177A-13, 177A-14 (Sept. 11, 1946). Subsequent case law confirmed the OCC's broad discretion to reject charter applications based on the six statutory factors, including the "convenience and needs" factor. *See, e.g.,* Camp v. Pitts, 411 U.S. 138 (1973). For a thorough, highly critical analysis of federal banking agencies' chartering decisions from the New Deal to the early 1970s, see Kenneth E. Scott, *In Quest of Reason: The Licensing Decisions of the Federal Banking Agencies*, 42 U. CHI. L. REV. 235 (1975).

[228] William K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870–1920*, 79 COLUM. L. REV. 426, 426 (1979); Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation in Regulated Industries Law*, 98 COLUM. L. REV. 1323 (1998).

[229] *See id.* at 427 ("Certificates of public convenience and necessity differ from most forms of government licensing of business activity. Under the typical licensing statute any number of applicants may receive authorizations if each of them satisfies applicable licensing criteria. … [T]he essence of the certificate of public convenience and necessity is the exclusion of otherwise qualified applicants from a market."); STEPHEN BREYER, REGULATION AND ITS REFORM 71 (1982) (noting that "public interest allocation, while sometimes involving 'licensing,' cannot be equated with this term").

applicants may be excluded;[230] It isn't so much licensing as procurement.[231] By embracing the PCN standard for national bank chartering, Congress underscored the fact that the national banking system was as an outsourcing regime. The OCC understood this too: in 1976, it asserted that "[t]he vital relationship of banking to the monetary system precludes complete free market operation with unlimited entry."[232] In evaluating bank charter applications, it said, "[t]he current economic condition or growth potential of the market in which the new bank proposes to locate is an important consideration."[233]

In 1980, though, apparently under pressure from Congress,[234] the OCC announced a major "shift in emphasis."[235] It would no longer deny bank charters due to "the distressed condition of a market [or] the existence of an 'adequate' number of banking offices."[236] The "convenience and needs of communities for banking services," it opined, "are best served by a high degree of competition."[237] Accordingly, "market conditions alone will rarely provide the basis for denial."[238] No doubt influenced by the prevailing deregulatory ethos of the time, the OCC stated that "the marketplace normally is the best regulator of economic activity; and competition allows the marketplace to function."[239] Far from being a mere shift in emphasis, this was statutory nullification. By equating convenience and needs with competition—

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230 *See* BREYER, *supra* note 229, at 194; RICHARD J. PIERCE, JR. & ERNEST GELLHORN, REGULATED INDUSTRIES 256, 278 (1999).

231 JOSÉ A. GÓMEZ-IBÁÑEZ, REGULATING INFRASTRUCTURE: MONOPOLY, CONTRACTS, AND DISCRETION 3 (2003) (noting that infrastructure regulation is "analogous to contracting in private sector procurement."); Harold Demsetz, *Why Regulate Utilities*, 11. J. L. & ECON. 55 (1968) (analyzing public utility regulation as a procurement problem).

232 Bank Charters, Branches, Conversions, Etc.: Policy Statements on Corporate Activities, 41 Fed. Reg. 47,964, 47,964 (Nov. 1, 1976). *See also* EUGENE N. WHITE, THE COMPTROLLER AND THE TRANSFORMATION OF AMERICAN BANKING, 1960–1990, at 53–4 (1992); CARNELL ET AL., *supra* note 193, at 75–6.

233 *Id.* at 47,965.

234 *See* White, *supra* note 232, at 77.

235 Clarification and Revision of Charter Policy, 45 Fed. Reg. 68,603, 68,603 (Oct. 15, 1980).

236 *Id.*

237 *Id.*

238 *Id.*

239 *Id.* at 68,604.

which can only militate *in favor of* approving a charter application—the OCC in effect read the convenience and needs factor out of the statute.[240]

The OCC thus moved from a procurement model to something resembling a licensing model. Where it once had been selective, it would now admit all qualified applicants.

2. Permissible versus Essential Activities

The dramatic liberalization of national bank powers and the abandonment of the PCN chartering standard, while momentous for banking law, did not unleash a revolution in corporate formation in the United States for a simple reason: the OCC supplies charters only to depository institutions.[241] And depository institutions are subject to an array of onerous regulatory standards and limits arising from sources external to the NBA—most notably, the Federal Reserve Act and the Federal Deposit Insurance Act.[242] Most businesses want no part of that. Confining national bank charters to depository institutions is thus the key remaining constraint on their availability.

But the OCC has now taken aim at this constraint. The OCC argues that it has the authority to charter entities that "conduct[] at least one of the following core banking functions: Receiving deposits, paying checks, or lending money."[243] And this limitation, such as it is, is wholly self-imposed. If deposits were deemed nonessential, nothing in the NBA would stop the OCC from declaring its chartering authority to be coextensive with national banks' statutory powers, in other words,

[240] In 1991, Congress followed the OCC's lead: it unceremoniously deleted the provision, originally adopted in the 1935 Act, requiring the OCC when chartering a new bank to certify to the FDIC that it had considered the six statutory factors *See* Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 115(b), 105 Stat. 1126, 2249. The OCC's chartering standards now place primary emphasis on the organizing group and its operating plan; "convenience and needs of the community" is no longer a factor. The OCC still considers whether the bank "[c]an reasonably be expected to achieve and maintain profitability." *See* 12 C.F.R. § 5.20. The OCC "may" also consider the six statutory factors required of the FDIC in deposit insurance application decisions, but the OCC's current licensing manual omits any mention of convenience and needs of the community. *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, COMPTROLLER'S LICENSING MANUAL: CHARTERS (2016).

[241] There is one narrow exception: the OCC has chartered several dozen nondeposit trust companies pursuant to explicit statutory authorization. *See* 12 U.S.C.§ 27(a). In addition, 12 U.S.C. § 36 gives national banks the power to establish *branches* that do not take deposits. But a branch is a *subset* of a bank, and section 36 merely authorizes a branch to exercise a subset of banking powers.

[242] 12 U.S.C. §§ 221 et seq. (Federal Reserve Act); *id.* §§ 1811 et seq. (FDIC Act).

[243] *See* 12 C.F.R. § 5.20(e)(1).

claiming the power to supply federal charters to all businesses that merely stick to activities that are *permissible* for national banks.

The merits of the OCC's legal position, and its potential consequences for federal preemption of state consumer laws, have received extensive analysis. Many commentators are concerned that the proposed charter will allow fintech companies to acquire federal status so that they can ignore state consumer protection laws.[244] Others have argued that the charter could provide a way to "extend" federal regulation to the fintech industry, improving the quality of oversight.[245] Still others have noted that the charter would lower regulatory expenses for fintech firms by obviating the need to procure licenses in numerous states.[246]

Overlooked in these debates is *why* Congress established this system of federal incorporation in the first place. As Part II showed, Congress did not enact the NBA as a regulatory measure. In authorizing the OCC to charter new entities engaged in the "business of banking," Congress was outsourcing a discrete sovereign function: it was creating a new system to circulate publicly backed money. Congress provided for national banks to be federally chartered because it created them as federal monetary instrumentalities. The extensive congressional debates over the national bank were devoted almost exclusively to how best to furnish the money supply; there is no hint that Congress sought to "regulate finance" in some generic sense,[247] much less that it intended

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[244] *See, e.g.,* Kristin Johnson, Frank Pasquale & Jennifer Chapman, *Artificial Intelligence, Machine Learning, and Bias in Finance*, 88 FORDHAM L. REV. 499 (2019).

[245] *See, e.g.,* David Zaring, *Modernizing the Bank Charter*, 61 WM. & MARY L. REV. 1397 (2020).

[246] *See, e.g.,* Saule T. Omarova, *Dealing with Disruption: Emerging Approaches to Fintech Regulation,* 61 WASH. U. J. L. & POL'Y 25 (2020).

[247] Indeed, this helps explains the myriad sources that date the rise of federal administrative regulation to 1887, when Congress established the Interstate Commerce Commission, and not to 1863, when Congress established the OCC. *See, e.g.*, Bruce Wyman, *The Rise of the Interstate Commerce Commission*, 24 YALE L. J. 529, 530-31 (1915) ("The passing of the Act to Regulate Commerce by the Congress of 1887 marks the beginning of an epoch in the exercise of the power of the federal government over interstate commerce. . . A fundamental change was wrought by the establishment of a body of experts to effect the administration of a statute by deciding whether its general provisions were so applicable to particular facts as to call for action of the government. The constitution of the Interstate Commerce Commission in 1887 marks the beginning of federal regulation in this intimate way."); ROSCOE POUND, ADMINISTRATIVE AGENCIES AND THE LAW 8-9 (1946) (dating the rise of federal administrative agencies to 1887); Collins v. Mnuchin, 938 F.3d 553, 562 (5th Cir. 2019), cert. granted, No. 19-563, 2020 WL 3865249 (U.S. July 9, 2020) ("The Constitution's 200th birthday coincided with a centennial, the 100th birthday of the federal

to create a parallel system of business organization to rival state corporation laws. Detaching national bank chartering from depository activities contravenes the NBA's monetary purpose.[248]

Moreover, again and again since the NBA's enactment, Congress has legislated with the understanding that the NBA does not permit nondepository national banks.[249] The Federal Deposit Insurance Act (FDIA) requires national banks to obtain deposit insurance, presupposing that they are in the deposit business.[250] The Federal Reserve Act (FRA) mandates that federal reserve notes (cash) "shall be receivable by all national and member banks,"[251] and Congress designed this provision to ensure that cash would be "payable . . . to any [national or state member] bank *for deposit purposes*."[252] Congress thus understood that "all" national banks were depository institutions. The FRA's lender-of-last-resort powers also presuppose that national banks are depository institutions. Those provisions allow the Fed to extend so-called "discount window" loans to "any member bank"[253]—a status that nondepository firms chartered by the OCC would automatically enjoy[254]—but the statutory *limits* on these discount window lending powers, including the prohibition on lending to undercapitalized institutions and the proviso that the Fed has "no obligation" to lend, apply only to loans *to depository institutions*.[255] It is highly doubtful that Congress intended for there to be a class of nondepository member "banks" that would enjoy *more* access to central bank credit than

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administrative state. Congress's passage in 1887 of the Interstate Commerce Act, making railroads the first industry subject to federal regulation, and the Act's creation of the nation's first federal regulatory body, the Interstate Commerce Commission, profoundly altered the Framers' tripartite structure."). *See also* Menand *supra* note 16.

[248] The past few decades have seen staggering growth in "deposit substitutes" issued by nondepository financial institutions. These instruments, like deposits, serve a monetary function. Extending the OCC's chartering authority to issuers of these instruments might be consistent with the NBA's monetary purpose, but this is not what the OCC is proposing to do.

[249] There is one and only one exception. In 1978, Congress amended the NBA to empower the OCC to charter nondeposit trust companies. *See* Pub. L. 95-630, Title XV § 1504, 92 Stat. 3713 (Nov. 10, 1978). This alone defeats the OCC's claim that it can charter other types of nondepository institutions. *Expressio unius est exclusio alterius*.

[250] *See* 12 U.S.C. §§ 222, 501a.

[251] 12 U.S.C. § 411.

[252] H.R. Rep. No. 63-69, at 26, 54-55 (1913) (emphasis added).

[253] 12 U.S.C. § 347b(a).

[254] S*ee id.* § 222.

[255] *See id.* §§ 347b(b)(1) & (b)(4).

depository institutions have. Congress simply equated member banks (and hence national banks) with depository institutions. Also, the Supreme Court has concluded that the Banking Act of 1933's prohibitions on national banks from doing investment banking[256] and on investment banks from taking deposits[257] "seek to draw the same line,"[258] which presupposes that national banks are depository institutions.

The structure of the Federal Reserve System provides further support for this conclusion. National banks and other member banks enjoy a special relationship with the Fed. The Fed conducts monetary policy by setting a target "federal funds" rate, the interest rate at which depository institutions borrow and lend to each other for short periods.[259] To control this rate, the Fed adjusts the rate of interest it pays on the balances in the bank accounts, called "master accounts," that depository institutions maintain with it.[260] Depository institutions are so central to monetary policy that the Fed considers them to play "important roles in the Federal Reserve System's core functions."[261] But the OCC's proposal would bring *non*depository firms that play no role in monetary policy into the core of this system. The Fed would be obligated to treat nondepository national "banks" chartered by the OCC just like other (depository) member banks.[262] Such firms would be entitled to Fed master accounts[263] as well as access to the Fed's real-time "Fedwire" payments system. These perks would give OCC-chartered nondepository "banks" major advantages over any of their competitors that did not have the charter.

As noted above, nondepository firms chartered by the OCC would also be eligible for discount window loans from the Fed.[264] Indeed, the Fed would arguably be legally obligated to extend these loans to firms,

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[256] *See* Banking Act of 1933 § 16, 48 Stat. 162, 184–85 (codified at 12 U.S.C. § 24 (Seventh)).

[257] *See id.* § 21, 48 Stat. at 189 (codified at 12 U.S.C. § 378(a)(1)).

[258] Securities Industry Ass'n v. Board of Governors of the Federal Reserve System, 468 U.S. 137, 149 (1984).

[259] FEDERAL RESERVE SYSTEM, PURPOSES & FUNCTIONS 23 (10th ed. 2016).

[260] *See id.* at 40.

[261] *Id.* at 17.

[262] *See* 12 U.S.C. § 301 (requiring the Fed to administer its affairs "fairly and impartially and without discrimination in favor of or against any member bank").

[263] *See* 12 U.S.C. § 342 (authorizing the Fed to supply its accounts to member banks).

[264] *See* 12. U.S.C. § 347b(a); *id.* at § 301 (nondiscrimination provision).

even when it would not make the same loan to a depository institution.[265] Public sector support via the discount window is designed to support the liquidity of institutions with runnable deposits, not nondepository fintech companies. Today, nondepository institutions can receive loans from the Fed only under "unusual and exigent circumstances."[266] The OCC's proposal would upend this vital distinction, giving federally chartered fintech firms unmatched access to central bank credit. Moreover, member banks elect six of the nine directors of each of the twelve regional Federal Reserve Banks ("FRBs").[267] They thus wield influence over monetary policy and national economic policy. The OCC's proposed charter would give nondepository firms that play no role in monetary policy a say in selecting FRB presidents, five of whom vote on the Federal Open Market Committee (the body that sets interest rates and makes other monetary policy decisions).

In addition, the federal securities laws presume that national banks are depository institutions. Securities issued or guaranteed by national banks are exempt from registration under the federal securities laws,[268] and their securities offerings are exempted from the civil liability provisions of Section 11 and Section 12(a)(2) of the Securities Act.[269] Because registered offerings are one of the triggers for periodic reporting obligations under the Securities Exchange Act of 1934,[270] and because the Exchange Act itself gives banks lenient size thresholds for registering and deregistering,[271] national banks also receive special treatment when it comes to the panoply of reporting and other obligations imposed by the Exchange Act. These exemptions from the federal securities laws are predicated on the stringent regulatory and safety and soundness standards that apply to national banks. But the most important of these standards, including the crucial safety and soundness obligations and capital requirements, are limited to depository institutions and therefore would not apply to the nondepository "banks" that the OCC seeks to charter.[272]

[265] *See id.* at § 347b(b)(4).

[266] *Id.* at § 343.

[267] *See id.* at § 304.

[268] *See* Securities Act of 1933 § 3(a)(2), 15 U.S.C. § 77c(a)(2).

[269] *See* 15 U.S.C. §§ 77k & 77l(a)(2).

[270] *See* Exchange Act § 15(d), 15 U.S.C. § 78o(d).

[271] *See* Exchange Act §§ 12(g), 15(d), 15 U.S.C. §§ 78l(g), 78o(d)

[272] *See* 12 U.S.C. §§ 1831p-1 & 1818(b) (safety and soundness); *see* 12 U.S.C. §§ 3907 & 3902 (capital requirements). Although the OCC has chosen to impose securities-

The FDIA and the Bank Holding Company Act—landmark banking laws that are *in pari materia* with the NBA—explicitly define "bank" in terms of deposits.[273] Federal courts have understood that "the power to receive deposits . . . is generally recognized as the essential characteristic of a banking business."[274] The Fed likewise uses the terms bank and depository institution "interchangeably."[275] Even the OCC not so long ago identified "depository . . . services" as an "essential attribute[]" of the "business of banking."[276] Overturning these settled understandings could have enormous consequences for the organization of American enterprise.

C. The Rise of Federal General Incorporation?

The OCC's latest effort to wield *Chevron* deference to expand its reach threatens to reshape American enterprise law. The emergence of general incorporation statutes in the states in the nineteenth century was a watershed development. These statutes were "general" in three distinct respects. First, they provided for administrative chartering as opposed to chartering through special acts of the state legislature (an enormous obstacle to accessing the corporate form, and one that was prone to cronyism). Second, they required that charters be granted freely rather than based on selective criteria. Third, over time they allowed corporations to be formed for any lawful business purpose.[277]

National bank charters have always been offered administratively upon application from private organizers, so the NBA has always been "general" in the first sense. And with the OCC's abandonment of the PCN chartering standard in 1980, federal incorporation under the NBA became "general" in the second sense, i.e.,

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offering rules on national banks that mirror those under the Securities Act, *see* 12 C.F.R. § 16.1-16.33, it is under no statutory obligation to do so.

[273] Under the Bank Holding Company Act, a "bank" is as an entity whose deposits are insured by the FDIC or that "accepts demand deposits or deposits that the depositor may withdraw by check or similar means for payment to third parties or others." 12 U.S.C. § 1841(c)(1). The FDIA distinguishes between two types of banks: "insured banks" whose deposits are insured and "noninsured banks," defined not as any bank without insured deposits but as "any bank *the deposits of which* are not insured." 12 U.S.C. § 1813(h) (emphasis added).

[274] *See In re Prudence Co.*, 79 F.2d 77, 79 (2d Cir.), cert. denied, 296 U.S. 646 (1935).

[275] FEDERAL RESERVE SYSTEM, PURPOSES & FUNCTIONS 38 (10th ed. 2016).

[276] Reply Br. for the Fed. Pet., Robert L. Clarke, Comptroller of the Currency, in *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388 (1987), 1986 WL 728049, at *5–6.

[277] Hockett and Omarova aptly call this "ultra" general incorporation. Hockett & Omarova, *supra* note 7.

selective criteria under which the OCC evaluated community needs were abandoned.[278] It has therefore been the third sense of "general"—what business activities can be conducted with the charter—that has been the main bulwark against the NBA becoming a general incorporation statute. But the OCC's current attempt to abandon depository activities as essential to the "business of banking"—coupled with its successful expansion of the outer bounds of national banks' permissible activities—now threatens to transform the NBA into something approaching a general incorporation statute in the third sense as well.

Underappreciated in the debates over the OCC's proposed fintech charter is the full range of business activities that, under the OCC's interpretation of its own powers, would be eligible for federal charters. As shown above, national banks' corporate powers now encompass most financial activities and many nonfinancial activities as well. Thus, if the OCC were empowered to charter nondepository firms, it would have carte blanche to invite much of the finance, insurance, and real estate sector—the single largest industry in the U.S. economy, comprising 21.7% of GDP[279]—into a federal charter. Payment processors, credit card networks, investment advisers, hedge funds, private equity funds, securities exchanges, derivatives clearinghouses, finance companies, payday lenders, securitization vehicles, and mortgage Real Estate Investment Trusts, to name just some of the categories, could all seek federal charters as "banks."[280] Indeed, the OCC has already proposed a new charter for payment processors.[281]

Consider also the investment company industry. U.S. bond mutual funds and bond exchange traded funds ("ETFs") manage over $5.5 trillion in assets, and equity mutual funds and ETFs manage another $13.9 trillion.[282] Although hardly anyone would refer to

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[278] Of course, the OCC has continued to review the fitness of bank organizers and their business plans before issuing national bank charters, in contrast to modern general incorporation statutes.

[279] FIRE is larger than the entire manufacturing sector and larger than the retail, transportation, health care, and entertainment sectors combined. *See* Bureau of Economic Analysis, News Release: 2019 Gross Domestic Product by Industry, April 6, 2020.

[280] *See generally* OCC, Activities Permissible for National Banks and Federal Savings Associations, Cumulative (Oct. 2017)

[281] *See* ABA Banking Journal Podcast, *OCC's Brooks Plans to Unveil 'Payments Charter 1.0' This Fall*, June 25, 2020.

[282] *See* Investment Company Institution, Investment Company Fact Book (60th ed. 2020), tbls. 3 & 11.

investment companies as "banks"—they do not accept deposits but instead issue redeemable equity claims—there is no doubt that bond investing is a permissible activity for a national bank. And the OCC claims that national banks may invest in stocks in connection with financial intermediation activities.[283] Under the OCC's interpretation of its chartering authority, it would have free rein to offer federal charters for mutual funds and ETFs, which are currently organized under state law as corporations or business trusts. (Incidentally, any investment company that the OCC organized as a nondepository national bank would be exempted from the entire edifice of federal investment company regulation.[284])

The OCC need not stop with the financial sector. It has long claimed that "the business of banking" includes the power to "act as a finder, bringing together interested parties to a transaction."[285] Offering an electronic marketplace or "virtual mall" for nonfinancial products—such as used cars—is such a finder activity, in its view.[286] Taken at face value, this covers a large swath of Silicon Valley. Uber and Lyft are finders. So is Amazon. Would these businesses be eligible for federal charters under the OCC's interpretation of its chartering authority? And what about commercial and industrial firms that lend to their customers: could their commercial and industrial activities be deemed "incidental" to their lending, making them eligible too?[287] To be sure, the OCC is unlikely to take things quite this far, at least in the foreseeable future. But the seeming outlandishness of this scenario only reinforces how doubtful it is that Congress ever gave the OCC such extravagant chartering powers, while counting on agency self-restraint, and nothing more, to keep them from being exercised.

But why would nondepository institutions want such a charter in the first place? While the charter might come with regulations—the shape and stringency of which would be wholly up to the OCC—it would also come with the valuable perks described above: expansive preemption of state consumer lending laws, privileged access to Fed loans, accounts, and payment services, a role in Fed governance, and exemptions from federal securities and investment company laws.

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[283] *See* OCC Interpretive Letter No. 892 (Sept. 2000).

[284] *See* 15 U.S.C. § 80a-3(c).

[285] 12 C.F.R. § 7.1002.

[286] *See* Activities Permissible for National Banks, *supra* note 223, at 74.

[287] We are once again indebted to Joe Sommer for these points. We also make a version of this argument along with thirty-one other banking law scholars, including Sommer, in the Brief of 33 Banking Law Scholars, *supra* note 19.

Accordingly, given the green light to do so, no one should be surprised to see the OCC assume the mantle of plenary chartering agency and promulgator of corporate law for much of the U.S. financial sector and perhaps some portions of the nonfinancial sector as well. Should the OCC prevail in the courts, the peculiar corporate law of national banks could soon establish a major presence in the organization of American business.

CONCLUSION

This Article reinterpreted the NBA as corporation law. It situated national banks within the broader universe of federal corporate law and revealed that they are an extraordinary exception to state primacy. It gave a purposivist explanation for this exception, showing that Congress created national banks to augment the money supply (a delegated sovereign power) and that it used private shareholders as a governance device to prevent the government from abusing its monetary powers. By recovering the NBA's identity as corporate law, it further revealed that modern banking powers jurisprudence rests on faulty foundations and that the OCC is poised to break down the remaining legal barriers that restrain it from inviting an enormous range of business enterprises into a federal charter.

There is a deep but unrecognized irony in the OCC's current position. Jettisoning the monetary rationale for national banks raises questions for the agency that are nothing short of existential. If banks are not federal instrumentalities, why is a federal government agency incorporating them in the first place? Banking law has always been a type of structural law.[288] But as with any separations regime, the integrity of banking law cannot be sustained if administrative agencies and courts allow structural barriers to collapse.[289] Restoring coherence to U.S. banking law means recovering its corporate law identity.

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[288] *See* Jeffrey N. Gordon & Kathryn Judge, *The Origins of a Capital Market Union in the United States*, 395 European Corporate Governance Institute (2018) (discussing the importance of "financial structure law" in shaping business activity and advancing public policy goals); Jeffrey Gordon, *The Empty Call for Benefit-Cost Analysis in Financial Regulation,* 43 J. LEGAL STUD. S351 (2014) (explaining why cost-benefit analysis is ill suited to constitutive legal systems like structural banking law); Howell E. Jackson, *Regulation in a Multisectored Financial Services Industry: An Exploratory Essay*, 77 WASH. U. L. Q. 319 (1999).

[289] *See generally*, Lina Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973 (2019)

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