

## STATE COURTS AND THE PRESUMPTION AGAINST BANKING PREEMPTION

JARED P. ROSCOE\*

*Recent Supreme Court decisions have highlighted the complexity of federal preemption of state banking law. Yet the Court has not answered a core question with which state and federal courts have struggled during at least the previous quarter century: What should be the role of the presumption against preemption in banking law, given the history of dual state and federal regulation of the banking sector? State and federal courts have provided sharply different answers to this important issue of statutory interpretation, raising the concern for litigants that different forums may not only produce different outcomes, but also employ different methods of statutory construction while interpreting the same statutes.*

*This Note first makes a policy argument for the dual banking system by highlighting the problems of regulatory arbitrage and agency capture, as recently observed during the financial crisis of 2008. I then address the salient differences between banking and other federally regulated industries also subject to preemption, arguing that the presumption against preemption is particularly apt in the banking context.*

*Next, this Note analyzes the academic literature surrounding the presumption against preemption. I argue that the presumption is best justified as a bulwark against federal intrusion into state regulatory autonomy, particularly state common law—an interest that only a few, relatively powerless interest groups advocate for at the national level.*

*Given the little-discussed role of state courts in the interpretation of federal statutes, this Note attempts to provide explanations and a theoretical framework for the apparent differences between state and federal court preemption determinations. From an institutional competence and federalism-enhancing viewpoint, state court judges may be the only institutional actor capable of voicing the unique state regulatory interests at stake in preemption determinations, and therefore it is less surprising that they adopt the presumption against preemption more often—and in stronger terms—than their federal counterparts. State judges, who are often former state legislators, frequently sit in common law and may therefore be more comfortable drawing*

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\* Managing Editor, *New York University Annual Survey of American Law*, 2010–11; J.D., New York University School of Law, 2011; B.A., Pomona College, 2005. Law clerk, Judge Roger L. Gregory, United States Court of Appeals for the Fourth Circuit. I would like to thank Professor Catherine Sharkey for her insightful comments and the staff members of the *Annual Survey* for their skillful editing.

*upon policy considerations than federal judges. Furthermore, consumer groups are substantial contributors to state judicial elections, which likely increases the pressure on state judges to not preempt state consumer lending suits. While this theory may have explanatory power, the disjunction between state and federal court approaches to banking preemption yields the troubling result that parties may come to expect different outcomes in different venues, thereby increasing pressure for the federalization and harmonization of preemption determinations. Nevertheless, it is precisely federalism and regulatory variety that is at stake in preemption litigation.*

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## INTRODUCTION

We are accustomed to hearing the principle that a law should have the same meaning whether enforced in state or federal court.<sup>1</sup> There appears to be unanimity among the federal circuit courts as to how to interpret state law: they should interpret state law as they anticipate the state's highest court would rule.<sup>2</sup> However, the practice of law suggests that the assumption of parity between state and federal courts may in fact be misguided. In a seminal article, Burt Neuborne claimed that federal courts were actually more likely to secure federal civil rights than state courts.<sup>3</sup> His article sparked a debate with wide-ranging effects on the way we conceptualize the differences between state and federal courts' approaches to constitutional issues.<sup>4</sup> Of course, the stakes were high for Neuborne, a former ACLU lawyer, who was writing when the constitutional footing of civil rights had tenuous purchase. Since the arrival of more conservatives on the Supreme Court, however, today federal civil rights may be more likely to be vindicated in state courts.<sup>5</sup>

Similarly, in Commerce Clause litigation, scholars announced the advent of a states'-rights revolution with the Rehnquist Court, following the *United States v. Lopez*<sup>6</sup> decision.<sup>7</sup> The consensus today, however, is that the picture is more nuanced: in some areas, the Court has protected state autonomy interests vis-à-vis the federal government; in others, the Court has been surprisingly pro-federal

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1. See *Guar. Trust Co. v. York*, 326 U.S. 99, 109 (1945) ("In essence . . . in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.") (Frankfurter, J.).

2. See Anthony J. Bellia, Jr., *State Courts and the Interpretation of Federal Statutes*, 59 VAND. L. REV. 1501, 1555 & n.258 (2006) (citing federal circuit court decisions holding that the courts must anticipate how the state supreme court would rule on state law).

3. See Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1119–20 (1977).

4. See Burt Neuborne, *Parity Revisited: The Uses of a Judicial Forum of Excellence*, 44 DEPAUL L. REV. 797, 797–98 (1995) (noting the continuing debate on state and federal constitutional parity).

5. See, e.g., Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329, 337 (1988); see also Neuborne, *supra* note 4, at 799 (acknowledging arguments that the federal forum is today less attractive to those seeking to validate federal rights, but arguing that federal courts are still the best forum).

6. *United States v. Lopez*, 514 U.S. 549 (1995).

7. See, e.g., Charles E. Ares, *Lopez and the Future Constitutional Crisis*, 38 ARIZ. L. REV. 825, 825–26 (1996).

government.<sup>8</sup> In contrast to the rollbacks of federal reach under the Commerce Clause,<sup>9</sup> the Rehnquist and Roberts Courts have moved by and large in the opposite direction in their preemption jurisprudence, displacing state substantive law with federal law and thereby restricting state autonomy.<sup>10</sup> The most plausible positive theory for this seeming disparity between the treatment of constitutional and statutory federalism is that the Court is not predominated by conservatives *per se*, but by business conservatives.<sup>11</sup> Since the Rehnquist Court, the conservative justices on the Court have tended toward preferring business interests over states' rights when forced to choose.<sup>12</sup> These conservatives, such as Justice Thomas, more frequently vote against preemption on the traditional federalist basis of preserving state autonomy.<sup>13</sup> The business

8. See, e.g., Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 23 (2004) ("By and large, the five Justices making up the Rehnquist Court's usual majority on federalism issues . . . have opted for federalism doctrines that aggressively protect state sovereignty. At the same time, they have displayed relatively little sympathy for state autonomy, particularly in cases involving the preemption of state regulatory authority."); Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 569–70 (2003).

9. See, e.g., *Lopez*, 514 U.S. 549 (denying the federal government the ability to criminalize gun possession on federal property); *United States v. Morrison*, 529 U.S. 598 (2000) (ruling that the Commerce Clause does not support the Violence Against Women Act's civil remedy provision).

10. See Young, *supra* note 8, at 4 ("The majority's view neglects concerns for state regulatory autonomy and overlooks the potential of 'process' limits on federal authority."); see also Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 SUP. CT. ECON. REV. 43, 57 (2006) (finding that slightly over half of the Rehnquist Court preemption cases were decided in favor of preemption); Note, *New Evidence on the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions*, 120 HARV. L. REV. 1604, 1612–13 (2007) ("Between the 1983 and 2003 Terms the Supreme Court decided 127 cases involving federal preemption of state law, finding state law preempted approximately half of the time.").

11. By "constitutional federalism," I mean the reach of the federal government's powers under the Commerce Clause to regulate a wide area of American life. By "statutory federalism," I refer to the increasing scope of types of federal law that displace state law.

12. See Bradley W. Joondeph, *Federalism, the Rehnquist Court, and the Modern Republican Party*, 87 OR. L. REV. 117, 120 (2008) (suggesting that the Rehnquist Court and the Republican party have sacrificed states' rights for pro-business regulation when the two conflict). Thomas may be the lone true states' rights federalist of the conservatives currently on the Court. See generally Catherine M. Sharkey, *Against Freewheeling, Extratextual Obstacle Preemption: Is Justice Clarence Thomas the Lone Principled Federalist?*, 5 N.Y.U. J. L. & LIBERTY 63 (2010).

13. See, e.g., *Wyeth v. Levine*, 129 S. Ct. 1187, 1211–17 (2009) (Thomas, J., concurring) (detailing his opposition to obstacle preemption on federalism grounds).

conservatives—best exemplified by Justice Scalia—often vote to preempt state law on policy grounds favoring a national, unified market.<sup>14</sup>

Preemption, the displacement of state substantive law by federal law, is based in the Supremacy Clause, which states that federal law “shall be the supreme Law of the Land.”<sup>15</sup> In making a preemption finding, a court looks at the federal command (whether from an agency regulation, federal statute, or other source) and determines whether this command should control if it conflicts with an existing state command (whether from state or local regulation or statute, or from a state court judgment).<sup>16</sup> This inquiry is difficult because the court must determine the scope of the federal and state commands: What did each issuing authority intend to cover with its language?

The toughest preemption cases are where the facts present situations on the outer edges of the arguably conflicting commands. Given the difficulty of reading the two commands together—particularly with federalism looming in the background—predicting outcomes is difficult because the result is so dependent on the specifics of the case.<sup>17</sup>

Because the facts are so important to the resolution of a preemption inquiry, deciding cases in a factually and legally complex area, such as banking regulation, is especially difficult. Banking law is filled with overlapping statutes and regulations at all levels of

14. See, e.g., *id.* at 1217–18 (Alito, J., dissenting, joined by Scalia, J. and Roberts, C.J.) (dissenting on the grounds that, despite the history of a federalism mix of regulatory power between the states and federal government in the area of pharmaceuticals, pharmaceutical tort claims for failure to warn should be preempted); see also Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 U.C.L.A. L. REV. 1353, 1357 (2006) (“Rather than standing as an ally of state autonomy against the encroachments of the federal behemoth . . . the Court appears to be a willing partner of Congress in providing federal oversight to state interference with the national market.”).

15. U.S. CONST. art. VI, cl. 2.

16. See *Altria Group v. Good*, 129 S. Ct. 538, 543 (2008) (“Consistent with that command, we have long recognized that state laws that conflict with federal law are ‘without effect.’” (citing  *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981))).

17. The contrasting factual narratives of the majority and dissent in *Wyeth v. Levine* are emblematic of the importance of facts in the preemption inquiry. Compare *Wyeth*, 129 S. Ct. at 1190–93 with *Wyeth* 129 S. Ct. at 1219 (Alito, J., dissenting). See also Robert Barnes, *Court Says Mazda Can Be Sued Over Seat-Belt Death*, WASH. POST, Feb. 23, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/23/AR2011022305856.html> (“The contrasting [preemption] decisions [of the Supreme Court] show the difficulty in predicting the court’s jurisprudence . . . and underscore the importance of the specifics of each case.”).

state and federal government. The banking preemption determination is more difficult than others because it often involves more than two conflicting sources of law. Although the complexity of the determination is daunting, it provides a fertile area for observing the different interpretive approaches between state and federal courts.

Although much attention has been given to federal court pre-emption analyses, there is a relative dearth of literature about state courts' approaches to preemption analysis.<sup>18</sup> Yet state courts carry out over 90 percent of all judicial business in the United States.<sup>19</sup> A systematic understanding of state court approaches to preemption is therefore crucial, as it has serious implications for many businesses, consumers, and citizens who appear in state court. But more importantly, preemption cases are the battleground where the line between state and federal power is drawn. In the absence of express guidance by Congress, state and federal court judges, as much as any other actor, determine the balance of regulatory power.

This Note examines the deployment of state and federal court preemption analyses in the banking context, particularly the use of the presumption against preemption. The Supreme Court has often applied the presumption against preemption as a sort of heuristic: when Congress legislates in a field "which the States have traditionally occupied," there is a presumption that "the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."<sup>20</sup> Because the Supreme Court has not definitively addressed

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18. Some empirical analysis has been done to date on the differences between state and federal courts in their approaches to products liability preemption, concluding that federal courts are "considerably more likely to find preemption than are state courts." Keith N. Hylton, *Preemption and Products Liability: A Positive Theory*, 16 SUP. CT. ECON. REV. 205, 229 (2008) ("Of the total claims, federal courts found 61 percent preempted while state courts found 42 percent preempted."). Professor Catherine Sharkey recently added to the discussion with an examination of state and federal courts' approaches to product liability preemption. See Catherine M. Sharkey, *Federalism in Action: FDA Regulatory Preemption in Pharmaceutical Cases in State Versus Federal Courts*, 15 J.L. & POL'Y 1013 (2007). A student Note has also recently contributed to the discussion in the medical device context. See Samuel Raymond, Note, *Judicial Politics and Device Preemption*, 5 N.Y.U. J. L. & LIBERTY 745, 760–64 (2010) (concluding parity exists between state and federal courts in preemption outcomes in the medical device context after *Riegel*).

19. See Shirley S. Abrahamson, Chief Justice, Wis. Supreme Court, The Ballot and the Bench, Address at the Justice William J. Brennan, Jr. Lecture on State Courts and Social Justice (Mar. 15, 2000), in 76 N.Y.U. L. REV. 973, 976 (2001).

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

how the presumption applies to banking,<sup>21</sup> lower federal courts and state courts have broader leeway in how to apply it.

This Note first examines the history of the presumption against preemption and its application to the banking sector. Part II argues that prudential concerns of agency capture and structural deficiencies in the regulatory mix point toward the value of the presumption. Part III reviews recent state and federal court decisions for differences in the applications of the presumption. Part III finds that state courts embrace the presumption against preemption in the banking context more often and in stronger language than federal courts. State courts continue to embrace the presumption even after circuit courts have held the presumption to be inapplicable in the banking context. Finally, Part IV discusses possible explanations for the discrepancy between state and federal courts. Part IV concludes that state court judges are different from their federal counterparts: they have different competencies, weaknesses, and institutional values that both explain and problematize the differences in their approach to interpretation of federal statutes. While the roles that Congress, federal agencies, and federal judges play in the legal conversation on preemption have been analyzed in great detail, this Note aims to recognize the role of state judges. This Note concludes with a review of how the recent banking reform embodied in the Dodd-Frank Act might affect banking preemption analyses in the future.

## I. HISTORICAL ANALYSIS OF BANKING PREEMPTION

### *A. A Preemption Primer*

There are two basic ways that federal law preempts state law. The first is through express preemption, in which Congress declares that the statute supersedes state law on the same subject matter.<sup>22</sup> The second is implied preemption, in which federal law displaces state law even though Congress did not expressly state its intention to do so. There are two types of implied preemption. Implied preemption may arise when Congress's legislation is so extensive as to leave no room for state legislation on the same subject—

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21. See *Cuomo v. Clearinghouse Ass'n, L.L.C.*, 129 S. Ct. 2710, 2720 (2009) (“We have not invoked the presumption against pre-emption, and think it unnecessary to do so in giving force to the plain terms of the National Bank Act.”); *Watters v. Wachovia Bank*, 550 U.S. 1 (2007) (avoiding addressing the presumption against preemption in the banking context).

22. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

or “field preemption.”<sup>23</sup> The other form of implied preemption is “obstacle preemption,” also known as “conflict preemption,” in which a judge finds the state law is an “obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>24</sup> A narrower version of obstacle preemption occurs when compliance with both state and federal law is actually impossible.<sup>25</sup>

Crucially, the Supreme Court has noted that federal regulation can preempt state law as well.<sup>26</sup> This means that even if Congress were silent on the preemption issue in its legislation, rules promulgated by the agency charged with implementing the relevant act may nonetheless preempt the state substantive law, either expressly or impliedly. An agency may also interpret the scope of the relevant act’s express preemption clause, although the amount of deference the Supreme Court should grant these agency interpretations is contested.<sup>27</sup>

A court’s analysis of the applicability of the presumption against preemption is frequently tied up in questions of agency deference. The key question is whether agency preemption statements should be granted strong *Chevron* deference—under which deference is granted if the agency’s interpretation of a statute is reasonable<sup>28</sup>—or *Skidmore* deference,<sup>29</sup> a more searching inquiry into the

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23. *Santa Fe Elevator Corp.*, 331 U.S. at 230.

24. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Fid. Fed. Sav. & Loan Ass’n v. Cuesta*, 458 U.S. 141, 153 (1982) (Field preemption exists when federal regulation of a subject is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.”). Field preemption is particularly notable in the banking sphere, in which the complexity and detail of regulation leads to many claims of field preemption. *But see Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 717 (1985) (“But merely because the federal provisions were sufficiently comprehensive to meet the need identified by Congress did not mean that States and localities were barred from identifying additional needs or imposing further requirements in the field.”).

25. *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963).

26. *Fid. Fed. Sav. & Loan Ass’n*, 458 U.S. at 153–54.

27. This is heavily contested in *Cuomo* and is likely an issue to which the Court will return. *See Cuomo v. Clearinghouse Ass’n, L.L.C.*, 129 S. Ct. 2710, 2717 (2009) (finding that the agency’s interpretation of the statute is unreasonable and not granting Chevron deference); *id.* at 2723 (Thomas, J., concurring in part and dissenting in part) (finding that the OCC’s interpretation was reasonable and should be granted Chevron deference); *Wyeth v. Levine*, 129 S. Ct. 1187, 1201 (2009) (not deferring to agency statement under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), because preamble to regulation containing statement did not pass notice and comment); *see also Sharkey, supra* note 12, at 106 n.230 (interpreting *Cuomo* as a possible *Chevron* Step One case).

28. *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842–43 (1984).

persuasiveness of the agency's position.<sup>30</sup> Many in the academic community have favored the *Skidmore* model as the proper framework for agency deference in the preemption context.<sup>31</sup> Scholars have noted which factors courts should consider in determining whether to grant deference.<sup>32</sup> Although this Note deals with matters of deference to agency preemption statements, a full treatment of state court analysis of agency deference is outside the scope of this Note, but is another area ripe for future research.

The Supreme Court has said that “[t]he purpose of Congress is the ultimate touchstone in every pre-emption case.”<sup>33</sup> Accordingly, the Court noted, “[t]he case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to ‘stand by both concepts and to tolerate whatever tension there [is] between them.’”<sup>34</sup> The first step in attempting to divine congressional intent is examining the text of the statute.<sup>35</sup> Yet statutory language created *ex ante* cannot perfectly track the myriad situations in which federal law and state law overlap. As noted above, federal law can preempt not only state statutes (and local ordinances and state regulations) but also state common law. In the products liability context, Food and Drug Administration (FDA) medical device regulatory approval, undertaken pursuant to the Food Drug and Cosmetics Act (FDCA), may preempt state tort suits based on traditional common law negligence principles.<sup>36</sup> In the case of express preemption, where Congress has signaled an at-

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29. *Skidmore*, 323 U.S. 134.

30. For articles discussing whether *Chevron* or *Skidmore* deference is appropriate for agency preemption statements, see Nina A. Mendelson, *Chevron and Pre-emption*, 102 U. MICH. L. REV. 737 (2004); Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 491–98 (2008).

31. See Mendelson, *supra* note 30, at 797–98; Sharkey, *supra* note 30, at 491–98. But see Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Pre-emption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1938–39, 1949 (2008) (arguing that an improved regulatory process is more important than state regulatory autonomy); Richard A. Nagareda, *FDA Preemption: When Tort Law Meets the Administrative State*, 1 J. TORT L. no. 4 (2006), <http://www.bepress.com/jtl/vol1/iss1/art4>.

32. See Sharkey, *supra* note 30, at 457–501 (arguing that courts should consider the agency record and determine whether the agency analyzed the precise risk at issue).

33. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks omitted).

34. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166–67 (1989) (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984)).

35. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993).

36. See, e.g., *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008).

tempt to preempt at least some state law, courts (and increasingly agencies) must define the limits of both the command to be preempted and the statutory preemptive text, often with little help from legislative history.

Further complicating the interpretive task is the fact that pre-emption clauses are frequently general and open to interpretation, giving plenty of room for a judge's substantive predispositions. Consider the preemption clause in the Employee Retirement Income Security Act (ERISA), which says the Act "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." <sup>37</sup> Courts have struggled to find a consistent interpretation of "relate to" in its ERISA preemption doctrine, and consequently ERISA cases clog the Court's docket.<sup>38</sup> Therefore, decisions rely on policy considerations, such as the cost of complying with 50 state commands, to determine the reach of "relate to."<sup>39</sup> More troubling is that, in ERISA, as in the FDCA,<sup>40</sup> Congress included both a preemption clause and a saving clause, which saves from preemption state law "which regulates insurance, banking, or securities."<sup>41</sup> The cumulative effect of vague statutes is to give courts significant berth in preemption decisions since the range of reasonable interpretations of the statute and Congress's intent is broad. Judges, therefore, allocate power between the states and the national government on a case-by-case basis with little guidance except *stare decisis* and the input of self-interested agencies.

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37. 29 U.S.C. § 1144(a) (2006).

38. See Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., 519 U.S. 316, 335–36 (1997) (Scalia, J., concurring) (arguing that the plain meaning of "relates to" is an unacceptable method to resolving cases, as it would amount to massive preemption far beyond what is sensible); see also Donald T. Bogan, *ERISA: The Savings Clause, § 502 Implied Preemption, Complete Preemption, and State Law Remedies*, 42 SANTA CLARA L. REV. 105, 182 (2001) ("ERISA preemption issues continue to befuddle attorneys and judges, and continue to clog federal court dockets."); Roderick M. Hills, *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 41 (2007) ("The gist of the whole preemption scheme, in short, hinged on a two-word phrase—"relate to"—that the Act otherwise left entirely undefined.").

39. See Egelhoff v. Egelhoff, 532 U.S. 141, 149–50 (2001) (finding preemption in part on the grounds that compliance with 50 state standards is too burdensome to be what Congress intended).

40. 21 U.S.C. § 360k(a), (b) (2006).

41. 29 U.S.C. § 1144(b)(2)(A) (2006).

It is no surprise that preemption analysis has been referred to as “a muddle.”<sup>42</sup>

Yet as complex and unmoored as the preemption inquiry generally is, the task is even more so in the area of banking regulation because of the long and complicated history of state and federal regulatory presence in which, in addition to common law causes of action, multiple statutes overlap and multiple agencies have jurisdiction of separate aspects of banking and banking-like activities.<sup>43</sup> Trying to map the reach of overlapping regulators and statutes is enough to give even the most competent court a headache.<sup>44</sup> Even though much attention has been paid to medical device and pharmaceutical preemption under the FDCA, the interpretive task is more burdensome under the various banking statutes. While in the medical preemption context there is essentially one federal regulator who regulates medical products, in the world of banking preemption,<sup>45</sup> a number of federal regulators affect the banking industry. Furthermore, the FDA is the sole *ex ante* pharmaceutical regulator in the country, federal or otherwise; in contrast, all fifty states have state banking departments and insurance departments that regulate state-chartered banks and insurers.<sup>46</sup>

### B. The Presumption Against Preemption

The presumption against preemption has existed since the mid-twentieth century, perhaps not coincidentally after the ex-

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42. See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 232 (2000) (“Most commentators who write about preemption agree on at least one thing: Modern preemption jurisprudence is a muddle.”).

43. See generally Hal S. Scott, *Federalism and Financial Regulation*, in FEDERAL PREEMPTION: STATES’ POWERS, NATIONAL INTERESTS 139 (Richard A. Epstein & Michael S. Greve eds., 2007) (describing the history of the dual banking system). “Banking-like activities” include activities by, for example, mutual funds or hedge funds that resemble loan-making, undertaken by institutions that are not banks nor regulated in the same way as banks.

44. See generally Kenneth E. Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 STAN. L. REV. 1 (1977). For a detailed map, though now outdated, representative of the complexities of overlapping jurisdictions, see *id.* at 7.

45. This is particularly true before the Dodd-Frank Wall Street Reform and Consumer Protection Act, which mandated some regulatory consolidation. Nevertheless, there remains significant regulatory overlap. A graphic representation of the overlapping jurisdictions resulting from the Dodd-Frank reform can be seen at *Dodd-Frank Infographic*, CENTER FOR CAPITAL MARKETS COMPETITIVENESS, <http://www.centerforcapitalmarkets.com/resources/dodd-frank-wall-street-reform-and-consumer-protection-act-of-2010-regulatory-authority/> (last visited Apr. 14, 2011).

46. The plethora of state and federal agencies relevant to banking interpretation make an analysis of *Chevron* deference as performed by state courts a germane area of inquiry; as noted above, it is, outside the scope of this Note.

panded reach of the federal legislative powers post-New Deal. The presumption first appeared in the Supreme Court case *Rice v. Santa Fe Elevator Corp.*,<sup>47</sup> which involved a dispute over the state laws of Illinois in setting unjust grain storage rates. The Court wrote that when Congress legislates in a field “which the States have traditionally occupied” there is a presumption that “the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”<sup>48</sup>

Courts have at times refused to apply the presumption. For example, the Supreme Court has stated that the presumption should not be applied when the “[s]tate regulates in an area where there has been a history of significant federal presence.”<sup>49</sup> Justice Thomas argues that the presumption should only apply to implied preemption cases because Congress has not spoken at all to the issue at hand.<sup>50</sup> It is therefore often claimed that the presumption is used ad hoc, or when a court sees an advantage to invoking it.<sup>51</sup> Even when it is used, commentators have argued, it may not have any real effect on the outcome.<sup>52</sup>

The exact doctrinal standing of the presumption against pre-emption is unclear.<sup>53</sup> In *Riegel v. Medtronic*, an express preemption

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47. 331 U.S. 218, 230 (1947).

48. *Id.*

49. United States v. Locke, 529 U.S. 89, 108 (2000).

50. See *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 457 (2005) (Thomas, J., concurring) (“That presumption does not apply . . . when Congress has included within a statute an express pre-emption provision.”); see also *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 545 (1992) (Scalia, J., concurring in judgment in part and dissenting in part) (“[T]hat assumption dissolves once there is conclusive evidence of intent to pre-empt in the express words of the statute itself, and the only remaining question is what the *scope* of that pre-emption is meant to be.”); see also *Nelson*, *supra* note 42, at 291–92, 298–303.

51. Sharkey, *supra* note 12, at 68 (arguing the presumption against preemption is rooted in “political or policy predilections including affinities for regulation writ large and preferences toward bureaucratic versus common law jury enforced norms”).

52. See Sharkey, *supra* note 30, at 458 (“Here, I join a veritable chorus of scholars pointing out the Court’s haphazard application of the presumption. In the realm of products liability preemption, the presumption does yeoman’s work in some cases while going AWOL altogether in others.”); see also Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1318–24 (2004) (arguing that the Court may be applying a presumption of preemption instead of a presumption against preemption).

53. Similarly contested is the level of deference a court should give an agency statement of preemption. So far, the Supreme Court has generally granted *Chevron* deference to agency preemption statements that have passed through notice and comment, and the Supreme Court in *Wyeth* rejected the notion that agency pre-emption statements that have not passed notice and comment procedures should

case in the FDCA context, the Court did not apply the presumption.<sup>54</sup> In 2009, in *Wyeth v. Levine*, an implied preemption case also in the FDCA context, the Court used the presumption,<sup>55</sup> whereas in *Geier*, nine years prior, it did not.<sup>56</sup> In the most recent implied preemption case, *Williamson v. Mazda*, a unanimous Court did not mention—let alone apply—the presumption in an automobile design defect case.<sup>57</sup>

### C. The Uniqueness of Banking Preemption: The History of Dual Banking

If the salience of the presumption against preemption is difficult to ascertain in preemption decisions generally, the difficulties are exacerbated in the banking preemption context because there is a history of dual federal and state regulation of the banking industry. In contrast, the regulation of medical devices and pharmaceuticals has been the prerogative of the federal government for over a century. No significant and comprehensive state agency regulation of medical products existed prior to the creation

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receive deference. *See Wyeth v. Levine*, 129 S. Ct. 1187, 1201 (2009). However, there are arguments that perhaps even agency preemption statements that have passed notice and comment should nonetheless be awarded only *Skidmore* deference. *See, e.g.*, Mendelson, *supra* note 30 (arguing that agencies do not have the institutional competence to decide issues of federalism and therefore should not be granted deference). Justice Scalia in particular may be caught between Scylla and Charybdis: his commitments to textualism and to preemption are at loggerheads in the obstacle preemption category. This is most evident in *Cuomo*, in which he engages in a labored *Chevron* “reasonableness” analysis in determining whether to defer to the OCC’s preemption statement. *See Cuomo v. Clearing House Ass’n*, L.L.C., 129 S. Ct. 2710, 2715 (2009); *see also Sharkey*, *supra* note 12, at 106 n.230. Importantly, Scalia did not sign on to Justice Thomas’s concurrence in *Wyeth* in which he denounces the practice of obstacle preemption as against textualism. *See Wyeth v. Levine*, 129 S. Ct. at 1204 (Thomas, J., concurring).

Professor Catherine Sharkey, focusing on institutional competence, has identified an approach that examines the exact risks that the technocratic agency has considered when determining whether the agency’s claim of preemption should be granted *Skidmore* deference. *See Sharkey*, *supra* note 30.

54. *See Riegel v. Medtronic*, 552 U.S. 312, 330 (2008). *But see id.* at 334 (Ginsburg, J., dissenting) (“The presumption against preemption is heightened ‘where federal law is said to bar state action in fields of traditional state regulation.’” (citations omitted)). *See also Sharkey*, *supra* note 12, at 78 (describing the presumption against preemption as “intellectually bankrupt” in express preemption cases).

55. *See Wyeth*, 129 S. Ct. at 1195 n.3 (“The presumption [against preemption] thus accounts for the historic presence of state law but does not rely on the absence of federal regulation.”).

56. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873–74 (2000).

57. *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131 (2011).

of the Food and Drug Administration in 1938, and any attempt to do so after the creation of the FDA would clearly be preempted.<sup>58</sup>

In contrast, the creation of the First Bank of the United States in 1791 established a federal presence in what was previously a state-dominated field.<sup>59</sup> After the charter of the First Bank expired, five years passed until the creation of the Second Bank of the United States in 1816.<sup>60</sup> The Second Bank's charter expired in 1836 because of President Jackson's opposition, which channeled populist resentment due to economic panics.<sup>61</sup> The federal government waded into banking regulation more generally when Congress passed the National Bank Act of 1864, creating a federal banking charter in addition to the already available state charters.<sup>62</sup> In 1913, right before World War I, Congress created the Federal Reserve System.<sup>63</sup> In 1933, Congress created federal agencies with oversight over both federal and state banks,<sup>64</sup> and this system of banking largely persists today.

Under the current system, state-chartered banks are subject to substantive state banking regulation and oversight by a state banking department and the Federal Reserve Board, while federally chartered banks are subject to regulation and oversight by the Office of the Comptroller of the Currency (OCC).<sup>65</sup> Federal thrifts, or savings and loan associations, were, up until recently, regulated by the Office of the Thrift Supervisor (OTS).<sup>66</sup> It bears noting that the state regulators of New York have been in place longer than their federal counterparts.<sup>67</sup> Importantly, these institutions could change

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58. See Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938) (establishing the FDA).

59. See Scott, *supra* note 44 ("When the national banking system was created during the Civil War, it was expected to replace the state bank system.").

60. Act of Apr. 10, 1816, ch. 44, 3 Stat. 266 (repealed 1836).

61. See John Yoo, *Andrew Jackson and Presidential Power*, 2 CHARLESTON L. REV. 521, 540–44 (2008).

62. Act of Feb. 25, 1863, ch. 58, 12 Stat. 665 (repealed 1864).

63. Federal Reserve Act of 1913, Pub. L. No. 43-63, 38 Stat. 251.

64. Banking Act of 1933, ch. 89, 48 Stat. 162.

65. See Scott, *supra* note 44, at 3–5.

66. This has changed with the Dodd-Frank legislation, which has eliminated the Office of the Thrift Supervisor and put supervisory and rulemaking powers over federal thrifts and savings associations with the Office of the Comptroller of Currency. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 311–313, 124 Stat. 1376, 1521 (to be codified at 12 U.S.C. § 5412) (2010).

67. See *A Brief History of Financial Regulation in New York State*, STATE OF NEW YORK BANKING DEPARTMENT, <http://www.banking.state.ny.us/auhistory.htm> (last visited Apr. 14, 2011) ("On April 15, 1851, the legislature created the Banking Department . . . . The New York State Banking Department is the oldest bank

their regulator with relative ease.<sup>68</sup> Beyond the regulations promulgated by the aforementioned agencies under their constituting statutes, a number of other federal statutes regulate lending and other banking activities. The Home Owners Loan Act (HOLA) was implemented by OTS, and HOLA sets limits on mortgage rates charged by thrifts.<sup>69</sup> The Truth in Lending Act (TILA), implemented by the Federal Reserve Board, mandates specific disclosures relating to costs and terms of consumer credit agreements.<sup>70</sup>

Despite the significant federal presence in banking that has evolved over the last two centuries, courts and Congress have recognized an important role for state regulation, even of federally chartered banks. In 1869, the Court in *National Bank v. Commonwealth* held that national banks are

subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.<sup>71</sup>

Since then, the Court has been willing to uphold state laws affecting federally chartered banks.<sup>72</sup> On the other hand, the Court has unanimously held that “grants of both enumerated and incidental powers to national banks” are “not normally limited by, but rather ordinarily preempt[ ], contrary state law.”<sup>73</sup> Even so, the Supreme Court has noted that the applicability of the presumption

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regulatory agency in the nation.”); *New York State Insurance Department’s Information Center*, NEW YORK STATE INSURANCE DEPARTMENT, <http://www.ins.state.ny.us/hp97wel.htm> (last visited Apr. 14, 2011) (“The Insurance Department was created in 1859 by the New York State Legislature and assumed the functions of the Comptroller and Secretary of State relating to insurance. The Department began operations in 1860.”).

68. See Scott, *supra* note 44, at 8 (“Perhaps less evident—but in practice much more important—is the fact that existing banks can change their laws and regulators.”).

69. See 12 U.S.C. § 1464 (2006).

70. See Consumer Credit Protection Act of 1968, Pub. L. No. 90-321, 82 Stat. 146 (codified as amended in scattered sections of 15 U.S.C.).

71. *Nat'l Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 362 (1869).

72. See *Atherton v. FDIC*, 519 U.S. 213, 222–23 (1997) (listing cases surviving preemption analysis) (“[F]ederally chartered banks are subject to state law.”).

73. *Barnett Bank v. Nelson*, 517 U.S. 25, 32 (1996) (citations and internal quotation marks omitted).

against preemption “does not rely on the absence of federal regulation,” at least in the pharmaceutical context.<sup>74</sup>

The foregoing might suggests that the presumption is disputed in the courts on doctrinal grounds. In the national bank context in particular, there is legislative evidence to support the presumption. The text of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, which allowed banks to operate across state borders without the use of separate subsidiaries, provides in relevant part,

The laws of the host State regarding community reinvestment, consumer protection, fair lending, and establishment of intra-state branches shall apply to any branch in the host State of an out-of-State national bank to the same extent as such State laws apply to a branch of a bank chartered by that State, except . . . when Federal law preempts the application of such State laws to a national bank . . .<sup>75</sup>

Further, the conference report to the Act asserts states’ “legitimate interest in protecting the rights of their consumers, businesses and communities,” and their “strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds.” Moreover, also in the conference report, “[u]nder well-established judicial principles, national banks are subject to State law in many significant respects.”<sup>76</sup>

Yet in 2004 the OCC promulgated a regulation, the preamble of which declares that “there is no presumption against preemption in the banking context.”<sup>77</sup> This preamble language contradicts the Riegle-Neale Act legislative history supporting the use of the presumption against preemption in the banking context. The FDA used a similar tactic in 2006 when it snuck its own preemption language into a regulation’s preamble.<sup>78</sup> This maneuver enabled both

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74. Wyeth v. Levine, 129 S. Ct. 1187, 1195 n.3 (2009).

75. 12 U.S.C. § 36(f)(1)(A) (2006).

76. H.R. REP. NO. 103-651, at 53 (1994) (Conf. Rep.), reprinted in 1994 U.S.C.C.A.N. 2068, 2074; see also Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 ANN. REV. BANKING & FIN. L. 225, 230 (2004).

77. Bank Activities and Operations, 69 Fed. Reg. 1895, 1896 (Jan. 13, 2004) (to be codified at 12 C.F.R. § 7.4000).

78. Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. 3922, 3934 (Jan. 24, 2006) (to be codified at 21 C.F.R. pts. 201, 314, 601).

agencies to skirt notice-and-comment rulemaking.<sup>79</sup> In the FDA context, the *Wyeth* majority refused to grant *Chevron* deference to the agency's preemption language in the preamble.<sup>80</sup> Applying the less-deferential *Skidmore* analysis, the Court found the preemption language did not have persuasive value.<sup>81</sup> In contrast, the defect in the preamble to the OCC regulations has gone unchallenged in court.

The OTS, which regulated federally chartered thrift savings institutions before the passage of Dodd-Frank, issued a preemption regulation promulgated a decade before the OCC regulation.<sup>82</sup> It included a non-exhaustive list of the types of state regulation to be preempted and a narrow saving clause.<sup>83</sup> The OTS also included a non-binding preemption-analysis guideline as part of its comments to the final rule, which reverses the presumption against preemption into a presumption of preemption; that is, the OTS recommended that “[a]ny doubt should be resolved in favor of preemption.”<sup>84</sup> Again, as in the OCC context, an agency used its regulatory power in an attempt to reverse the presumption against preemption.

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79. See Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227 (2007) (unearthing the example of the Department of Transportation preemption by preamble as well).

80. See *Wyeth v. Levine*, 129 S. Ct. 1187, 1201 (2009).

81. See *id.* at 1190 (“Under [the *Skidmore*] standard, the FDA’s 2006 preamble does not merit deference . . . . [T]he agency finalized the rule and, without offering the States or other interested parties notice or opportunity for comment, articulated a sweeping position on the FDCA’s pre-emptive effect in the regulatory preamble. The agency’s views on state law are inherently suspect in light of this procedural failure. Further, the preamble is at odds with what evidence we have of Congress’ purposes, and it reverses the FDA’s own longstanding position without providing a reasoned explanation . . . .”).

82. See 12 C.F.R. § 560.2 (1999) (“OTS hereby occupies the entire field of lending regulation for federal savings associations. OTS intends to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation. Accordingly, federal savings associations may extend credit as authorized under federal law, including this part, without regard to state laws purporting to regulate or otherwise affect their credit activities, except to the extent provided in paragraph (c) of this section or §560.110 of this part.”).

83. See *id.* (“State laws . . . are not preempted to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of paragraph (a) of this section.”).

84. *Lending and Investment*, 61 Fed. Reg. 50,951, 50,966–67 (Sept. 30, 1996) (codified at 12 C.F.R. pts. 545, 556, 560, 563, 566, 571, 590); see also *Silvas v. E\*Trade Mortg. Corp.*, 514 F.3d 1001, 1004 (9th Cir. 2008) (relying on the OTS guidelines).

Perhaps in part because of the tangled history of banking regulation, in the last four years the Supreme Court has punted twice on whether the presumption against preemption applies to the banking context. In *Cuomo v. Clearinghouse Association*, the majority declined to address the presumption in the banking context,<sup>85</sup> and the *Watters* court two years earlier left it unmentioned.<sup>86</sup> Yet at least three Justices have strong feelings on the matter. Justice Thomas, who penned the *Cuomo* dissent and was joined by Justices Roberts, Kennedy, and Alito, argued that “[n]ational banking is the paradigmatic example” of a situation in which the presumption should not apply because the federal government has legislated in this area since the “earliest days of the Republic.” Further, the fact that states have “legislated alongside Congress in this area” is not sufficient enough to invoke the presumption.<sup>87</sup>

## II. FOR THE PRESUMPTION AGAINST PREEMPTION

The presumption against preemption has sparked debate among scholars. Some have articulated fierce defenses of the presumption,<sup>88</sup> while others have been less receptive.<sup>89</sup> I argue that the presumption against preemption in the banking context promotes two values. First, dual banking regulation results in sound policy outcomes—that is, vigorous state enforcement of fair lending laws is an important complement to federal regulation. Second, the presumption against preemption acts as a procedural hurdle that can promote underrepresented interests—most prominently, *ex post* common law regulation of the banking industry.

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85. See *Cuomo v. Clearinghouse Ass'n*, L.L.C., 129 S. Ct. 2710, 2720 (2009) (“We have not invoked the presumption against pre-emption, and think it unnecessary to do so in giving force to the plain terms of the National Bank Act.”).

86. See generally *Watters v. Wachovia Bank*, 550 U.S. 1 (2007).

87. *Cuomo*, 129 S. Ct. at 2732 (2009) (Thomas, J., dissenting) (citations omitted) (noting the majority did not adopt the presumption against preemption in the banking context).

88. See Hills, *supra* note 38 (arguing for a strong presumption against preemption to preserve states’ rights); Ernest A. Young, *Federal Preemption and State Autonomy*, in *FEDERAL PREEMPTION: STATES’ POWERS, NATIONAL INTERESTS* 249 (Richard A. Epstein & Michael S. Greve, eds., 2007) (same).

89. See, e.g., Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085 (2000) (arguing for a context-specific, constrained presumption against preemption). Often, scholars’ opinions on the presumption against preemption reflect their underlying views concerning substantive preemption generally. Professors Hills and Young are seeking to counter the trend of increasing preemption of state law, see generally Hills, *supra* note 38; Young, *supra* note 88, whereas Professor Dinh appears to endorse the trend in many contexts. See generally Dinh, *supra*.

On the policy side of the ledger, the financial crisis demonstrated that federal banking regulators are prone to regulatory capture by the well-organized and well-funded financial industry.<sup>90</sup> Furthermore, the centrality of the banking system to the country's economy, coupled with the systemic risk it poses to overall financial stability, compels rigorous regulatory oversight that would be unnecessary in other industries.<sup>91</sup> Part of better regulation entails bringing states into the process. Because states are structurally underrepresented in the federal regulatory regime, the presumption against preemption can protect the states' voices. Because of structural deficiencies, the presumption against preemption can stand in as a voice for the structurally underrepresented voice at the federal level: state regulatory autonomy separate from a specific state policy and as embodied in state common law causes of action.

#### *A. Policy Considerations: Regulatory Capture and the Centrality of Banking*

In the banking sphere, a number of regulatory and prudential concerns favor the presumption. Most importantly, some evidence suggests that the financial crisis may have been diminished had state banking regulators had a greater voice in the regulation of financial institutions and predatory lending.<sup>92</sup> The lax federal regulation of predatory lending and financial institutions was exacerbated by federal regulatory arbitrage: In a race to the bottom, regulated entities, through the acquisition of subsidiaries, effectively escaped supervision by changing regulators.<sup>93</sup> The presumption would support state law, particularly *ex post* common law

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90. See generally SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN (2010) (describing regulatory capture in the financial industry and proposing regulatory changes to address it). See also Stephen Davidoff, *The Government's Elite and Regulatory Capture*, N.Y. TIMES DEALBOOK, June 11, 2010, available at <http://dealbook.nytimes.com/2010/06/11/the-governments-elite-and-regulatory-capture/> (discussing social capture).

91. For an article describing the importance of legal institutions in dealing with systemic risk, see Steven L. Schwarcz, *Systemic Risk*, 97 GEO. L. J. 193 (2008).

92. See, e.g., CTR. FOR CMTY. CAPITAL, STATE ANTI-PREDATORY LENDING LAWS, at ii (2009).

93. *Systemic Regulation, Prudential Matters, Regulation Authority, and Securitization: Hearing Before the H. Comm. on Fin. Servs.*, 111th Cong. 306-07 (2009) (statement of Governor Daniel K. Tarullo, Board of Governors of the Federal Reserve), available at <http://www.federalreserve.gov/newssevents/testimony/tarullo20091029a.htm> ("The dual banking system and the existence of different federal supervisors create the opportunity for insured depository institutions to change charters or federal supervisors. While institutions may engage in charter conversions for a variety of sound business reasons, conversions that are motivated by a hope of es-

causes of action, which would provide a higher baseline of regulation, even in the absence of strict federal oversight.

While it is true that the federal government has legislated in banking since the earliest days of the Republic, there has been a clear intent to keep banks and banking regulation decentralized—there has been a fear in the United States of the centralization of too much fiscal power. For example, a fear of centralized bank-regulatory power led to the unique regional—that is, neither state-based nor national—Federal Reserve System, which includes twelve Federal Reserve Banks situated around the country.<sup>94</sup> Congressman Ron Paul, who wants to abolish the Federal Reserve System,<sup>95</sup> has capitalized on public suspicion of centralized federal banking power to win acceptance of an amendment to Dodd-Frank that increases transparency and decreases independence of the Federal Reserve Board,<sup>96</sup> despite near universal condemnation from academics and economists who believe that threatening the Board's autonomy will impair its ability to effectuate sound monetary policy without political influence.<sup>97</sup> Centralization of fiscal power in the form of consolidation in the banking industry led to the systemic risks that made some banks “too big to fail” and therefore required federal bailouts.<sup>98</sup>

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capping current or prospective supervisory actions by the institution’s existing supervisor undermine the efficacy of the prudential supervisory framework.”).

94. See David Hammes, *Locating Federal Reserve Districts and Headquarters Cities*, THE REGION, BANKING AND POLICY ISSUES MAGAZINE (Federal Reserve Bank of Minneapolis, Sept. 2001) available at [http://www.minneapolisfed.org/publications\\_papers/pubs/display.cfm?id=3434#2](http://www.minneapolisfed.org/publications_papers/pubs/display.cfm?id=3434#2) (“Distrust of private banking interests and the strength of American populism—embodied in the political power of William Jennings Bryan, President Woodrow Wilson’s Secretary of State during the Act’s drafting and passage—was counterpoised against the fear, expressed by private financial interests, of the federal government becoming involved in monetary and financial markets. The Act was a compromise between these interests, reflecting the attempt to balance private interests with federal government assistance, protection and oversight.”). Even so, conspiracy theories abound. See, e.g., WILLIAM GREIDER, *SECRETS OF THE TEMPLE: HOW THE FEDERAL RESERVE RUNS THE COUNTRY* (1989).

95. See generally RON PAUL, END THE FED (2009).

96. See Victoria McGrane, *Ron Paul gains mainstream steam*, POLITICO (Nov. 30, 2009, 5:19 AM), <http://www.politico.com/news/stories/1109/29986.html>; see also Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1103(b), 124 Stat. 1376, 2118 (2010) (to be codified at 12 U.S.C. § 225b).

97. See Editorial, *Focus on the Fed*, WASH. POST, July 24, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/23/AR2009072303004.html> (calling the amendment “wrongheaded in the extreme”).

98. For a recent account addressing the problems of centralization and banking, see Arthur E. Wilmarth, Jr., *The Dark Side of Universal Banking: Financial Con-*

Democratic accountability has often been used to justify federal preemption. For example, in the case of state tort law, federal preemption can be characterized as favoring democratic accountability because it has the effect of substituting congressional or agency decisions with jury verdicts.<sup>99</sup> On the other hand, democratic accountability arguments that favor preemption do not hold up in the banking context, because state banking regulations are generally created by democratically responsive state institutions. In the banking regulation it is frequently state substantive law that is being preempted, often by federal agencies, which have less claim to democratic pedigree.<sup>100</sup> At times, however, common law claims, based on fraud or other similar tort and contract ideas, are brought against banks to vindicate claims of predatory lending. Similarly, consumer protection claims are often brought under color of state statute, passed by responsive and accountable state legislatures.<sup>101</sup> In these cases, the claim is based on judge-made law, and the outcome is determined by a lay jury, not an agency, so it may be that preemption and federal regulation is the more “democratic” form of regulation compared to state common law suits. As mentioned above and explained further below, for all the “democratic” responsiveness of agency regulation and federal law, it is precisely those actors that were captured in the lead up to the financial crisis. Certainly lay juries are less prone to capture by the regulated industry.

The existence of agency capture at the national level might point toward the use of the presumption against preemption to allow a diversity of regulatory forces, including ex post consumer suits.<sup>102</sup> State regulators and state consumer protection laws provide an additional layer of protection in cases of federal underregulation and underenforcement.

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*glomerates and the Origins of the Subprime Financial Crisis*, 41 CONN. L. REV. 965 (2009).

99. It may still be countered that juries themselves are a form of democracy, and in any case, it is the agency—unelected, not Congress, making the preemption determination in the pharmaceutical context.

100. See Young, *supra* note 88, at 256 (noting that presumption against preemption has the benefit of deferring to state legislatures in many cases and not judicial policy, or deference to federal agencies). This in turn means there is a democratic rationale for adopting a presumption against preemption.

101. See, e.g., Smith v. Wells Fargo Bank, 38 Cal. Rptr. 3d 653, 658 (Cal. Ct. App. 2005).

102. See Young, *supra* note 88, at 254.

In the decade leading up to the financial crisis, the OTS, the OCC, and state regulators competed for regulatory “clients,”<sup>103</sup> as banks switched to state charters to escape federal regulatory action.<sup>104</sup> On the other side, OCC officials have admitted that pre-emption was viewed as a “selling point” to convince financial institutions to hold national bank charters.<sup>105</sup> This competition has been exacerbated by the client funding system in place in the national banking sector: the OCC relies on fees paid by chartered banks to fund its operations.<sup>106</sup> The client-funding system under-

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103. Arthur E. Wilmarth, Jr., *Cuomo v. Clearing House: The Supreme Court Responds to the Subprime Financial Crisis and Delivers a Major Victory for the Dual Banking System and Consumer Protection* 20 (The George Wash. Univ. Law Sch., Pub. Law & Legal Theory Working Paper No. 479, 2010), available at <http://ssrn.com/abstract=1499216> (“Amici cited studies showing that the OCC had powerful budgetary incentives to use preemption as a marketing tool to persuade the largest banks to operate under national charters. The OCC’s budget is funded almost entirely by assessments paid by national banks, and the biggest banks pay the highest assessments. A former head of the OCC described preemption as ‘a significant benefit of the national [bank] charter—a benefit that the OCC has fought hard over the years to preserve.’ In response to the OCC’s preemption campaign, several large, multistate banks converted from state to national charters, thereby producing a significant increase in the OCC’s assessment revenues.”).

104. See Binyamin Appelbaum, *By Switching Their Charters, Banks Skirt Supervision*, WASH. POST (Jan. 22, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/21/AR2009012104267.html> (“At least 30 banks since 2000 have escaped federal regulatory action by walking away from their federal regulators and moving under state supervision . . . .”); see also *Systemic Regulation, Prudential Matters, Regulation Authority, and Securitization: Hearing Before the H. Comm. on Fin. Servs.*, 111th Cong. 306-07 (2009) (statement of Daniel K. Tarullo, Gov., Fed. Reserve Bd.), available at <http://www.federalreserve.gov/newsevents/testimony/tarullo20091029a.htm> (“The dual banking system and the existence of different federal supervisors create the opportunity for insured depository institutions to change charters or federal supervisors. While institutions may engage in charter conversions for a variety of sound business reasons, conversions that are motivated by a hope of *escaping* current or prospective supervisory actions by the institution’s existing supervisor undermine the efficacy of the prudential supervisory framework.”).

105. Catherine M. Sharkey, *Federal Agency Preemption of State Law*, at 38 (Dec. 2010) (unpublished report), available at <http://www.acus.gov/wp-content/plugins/download-monitor/download.php?id=61>; see also *American International Group: Examining What Went Wrong, Government Intervention, and Implications for Future Regulation: Hearing Before the S. Comm. on Banking, Hous. And Urban Affairs*, 111th Cong. 3–5 (2009) (statement of Eric Dinallo, Superintendent of N.Y. State Ins. Dep’t) (arguing that regulatory arbitrage that let AIG have the OTS as its consolidated supervisor led to gaps in supervision); Wilmarth, *supra* note 76, at 282 (“The most likely reason for the disintegration of the state-chartered thrift system is the aggressive preemption campaign that the FHLBB began in the late 1970s and the OTS continued after assuming the FHLBB’s functions in 1989.”).

106. Wilmarth, *supra* note 103, at 20.

mines the rationale for multiple regulators because regulators compete for limited funding.<sup>107</sup> Severe regulatory capture at the federal level increases the importance of state regulators. Further, suits based on ex post consumer lending laws also help prevent capture, because consumers who have been wronged will certainly not be captured by the banking industry. A vigorous presumption against preemption would, at the margin, allow more state consumer lending suits.

In the decade leading up to the crisis, federal banking regulatory enforcement was lax.<sup>108</sup> Over the same period, state regulators were far more proactive.<sup>109</sup> It may be that state regulators and especially state attorneys general are more responsive to the electorate than federal regulators, who are deep in the national bureaucracy. On the other hand, in the recent debate surrounding whether to eliminate the federal thrift charter—which was the center of regulatory arbitrage in the lead-up to the crisis—many argued that blame rested with one authority rather than many.<sup>110</sup> In the case of a new crisis, we would know who is responsible, which would motivate the

107. See, e.g., Richard J. Rosen, *Is Three a Crowd? Competition Among Regulators in Banking*, 35 J. MONEY, CREDIT, & BANKING 967, 969, 990 (2003) (arguing in an empirical study that multiple banking regulators lead to optimal regulation). But see Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 WM. & MARY L. REV. 503, 507–08 (2000).

108. Wilmarth, *supra* note 103, at 21 (“In addition, studies cited by amici described the OCC’s record of enforcing consumer protection laws as a ‘long history of inaction,’ ‘relatively lax,’ ‘weak’ and ‘unimpressive.’ Publicly available information indicated that, during 1995–2007, the OCC issued only 13 public enforcement orders against national banks for violations of consumer protection laws. Most of those enforcement orders were issued against small national banks, and only one order included a charge that the bank violated state laws. In that one case, the OCC took action only after the public became aware that a California prosecutor was investigating the offending bank.” (footnotes omitted)).

109. *Id.* (“The states’ record of protecting consumers presented a dramatic contrast with the OCC. Between 1999 and 2006, more than thirty states enacted laws to combat predatory lending. A recent study found that state anti-predatory laws reduced the number of mortgages with unsound or abusive features such as prepayment penalties, balloon payments, and no- and low documentation terms. In addition, state officials vigorously used their enforcement powers to prosecute financial service providers for a wide range of unlawful practices.” (footnotes omitted)).

110. See Nicholas Bagley, *Subprime Safeguards We Needed*, WASH. POST (Jan. 25, 2008), <http://washingtonpost.com/wp-dyn/content/article/2008/01/24/AR2008012402888.html>; Brady Dennis, *Born in a Previous Crisis, OTS Faces Extinction*, WASH. POST (June 18, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/17/AR2009061703548.html> (“[T]he OTS has become synonymous with ineffective and lax regulation, failing to rein in high-risk, destructive practices of some of the largest institutions it monitors. The agency’s credibility has suffered

regulator.<sup>111</sup> But this argument only leads to the conclusion that there should be one primary regulator; it is not an argument against having other, overlapping secondary regulators.<sup>112</sup>

Some scholars argue that federal regulatory consolidation is good because state regulators are prone to capture. Indeed, arguments for preemption in the banking context tend to emphasize that federal regulation is done by independent agencies that face little political pressure.<sup>113</sup>

But what looks like capture is actually accountability. Elected attorneys general—the essential state-level enforcers—are more responsive to democratic concerns than insulated bureaucrats at the federal agencies.<sup>114</sup> The objective cost-benefit analysis that is vital in some areas of federal regulation is less important to enforcement, where the focus should be on ensuring that the balance struck by regulatory agencies is not undermined by a lack of enforcement.

Nor does recent history bear out the view that state enforcers are more prone to regulatory capture—indeed, quite the opposite situation provided the grounds for the *Cuomo* case. *Cuomo* arose because then New York Attorney General Eliot Spitzer was investigating several large banks on the basis that, based on data provided by the banks, there appeared to be “a significantly higher percentage of high-interest home mortgage loans issued to African-American and Hispanic borrowers than to white borrowers.”<sup>115</sup> Such discrimination could mean the banks were in violation of federal and state

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deeply as large companies under its watch . . . have become among the biggest casualties of the financial crisis.”).

111. See *Financial Regulatory Reform: Hearing Before the Joint Econ. Comm'n*, 111th Cong. (2009) (written testimony of Timothy F. Geithner, Sec'y of the Treasury) (“The regulation of the largest, most interconnected firms requires tremendous institutional capacity, clear lines of authority and single-point accountability. This is no place for regulation for council or by committee.”). The eventual Dodd-Frank Act did not eliminate the federal thrift charter but eliminated the OTS. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 311-313, 124 Stat. 1376, 1520–23 (2010) (to be codified at 12 U.S.C. §§ 5411–13).

112. See Shelia C. Bair, *The Case Against a Super-Regulator*, N.Y. TIMES, Sep. 1, 2009, at A29 (“The risk of weak or misdirected regulation would be increased if power was consolidated in a single federal regulator. . . . One advantage of our multiple-regulator system is that it permits diverse viewpoints.”).

113. See Scott, *supra* note 43, at 156.

114. See *id.* at 156–57 (arguing that because of the political aspirations of attorneys general, independent agencies are in a better position to make objective trade-offs).

115. Clearing House Ass'n, L.L.C. v. Cuomo, 510 F.3d 105, 109 (2d Cir. 2007), *aff'd in part, rev'd in part*, 129 S. Ct. 2710 (2009).

antidiscrimination laws such as the Equal Credit Opportunity Act and the similar state statute, Section 296-a of the New York Executive Law.<sup>116</sup> Even though the OCC and the Clearing House (an organization of banks) had acknowledged that the state law was not preempted,<sup>117</sup> Clearing House filed suit nonetheless alleging that the New York Attorney General's enforcement of the law was preempted by OCC's regulation 12 C.F.R. § 7.4000 because such enforcement would be considered the exercise of a "visitorial power" within the proscription of the regulation.<sup>118</sup>

Supporters of the broad OCC enforcement preemption provision argued that there was no evidence that the OCC was not sufficiently vigilant in enforcing parallel federal law protections.<sup>119</sup> State attorneys general claimed that there had been federal abdication in banking enforcement, and had stepped up to fill the vacuum. The OCC argued that its regulation preempted state enforcement of otherwise non-preempted and valid state or federal law.<sup>120</sup> The Supreme Court, perhaps attentive to the policy considerations at play, rejected the OCC regulation as overbroad: even if not allowed to regulate banking substantively on certain subjects, states should certainly be allowed to enforce federal law.<sup>121</sup>

Unlike the enforcement preemption, the OCC's broad substantive preemption regulation went unchallenged in *Cuomo*. In the crisis postmortem, many fingers have been pointed at the Federal Reserve Board's non-regulation of mortgages in the last decade.<sup>122</sup> Others have noted OTS's supervisory abdication. Under OTS's

116. *Id.*

117. See OCC Interpretive Letter No. 998, 2004 WL 3418859 (Dec. 2004) (letter from OCC Chief Counsel Julie L. Williams to Rep. Barney Frank dated Mar. 9, 2004).

118. See Brief for the Federal Respondent at 5–9, *Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710 (2009) (No. 08-453), 2009 WL 815241.

119. Scott, *supra* note 44, at 147.

120. See *Cuomo*, 129 S. Ct. at 2717–18 (2009) ("No one denies that the National Bank Act leaves in place some state substantive laws affecting banks. But the Comptroller's rule says that the State may not enforce its valid, non-pre-empted laws against national banks . . . [This result is] bizarre." (citations omitted)); see also Bank Activities and Operations, 69 Fed. Reg. at 1904 (state authorities do not have "any right to inspect, superintend, direct, regulate, or compel compliance by a national bank respect to any law").

121. See *Cuomo*, 129 S. Ct. at 2717–18.

122. See Kat Aaron, *Predatory Lending: A Decade of Warnings: Congress, Fed Fiddled as Subprime Crisis Spread*, THE CENTER FOR PUBLIC INTEGRITY (May 6, 2009), [http://www.publicintegrity.org/investigations/economic\\_meltdown/](http://www.publicintegrity.org/investigations/economic_meltdown/) (citing Federal Reserve Board failure to regulate subprime mortgages under its authority from the Home Ownership and Equity Protection Act as exacerbating the housing bubble).

watch, some of the financial crisis's key players—IndyMac, Washington Mutual, AIG, and Countrywide Financial—went largely unmonitored as they increased the volume of risky mortgages.<sup>123</sup> State regulators were willing to fill the void, but found that they were preempted by federal regulation. New York had state laws that could have helped address predatory lending and no-down payment loans—but they were found preempted.<sup>124</sup> Similarly, New York had to ultimately abandon a derivatives regulatory proposal that would have provided some regulation and oversight of derivatives due to preemption concerns.<sup>125</sup> Recent empirical research links the explosion in subprime lending and subsequent high defaults to states that did not have anti-predatory lending laws.<sup>126</sup>

The share of high-cost loans that were preempted in APL states increased from 16 percent in 2004 to 46 percent in 2007. Considering the ever-growing share of subprime mortgages originated by national banks, thrifts, and their subsidiaries that were preempted by federal laws, there is some debate whether such preemption is to blame, at least in part, for the current foreclosure crisis.<sup>127</sup>

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123. See Dennis, *supra* note 110.

124. See Bagley, *supra* note 110; see also Eric Dinallo, Former Superintendent of Ins., N.Y. State, Comments at Panel Discussion at N.Y.U. Sch. of Law, "The Future of Regulation and the Capital Markets," (Nov. 5, 2009), available at <http://www.youtube.com/watch?v=EPMQcectNOU>.

125. See Sara A. Kelsey, Former Deputy Superintendent and Counsel to the Banking Dep't of N.Y., Panel Discussion at N.Y.U. Sch. of Law: The Future of Regulation and the Capital Markets (Nov. 5, 2009), available at <http://www.youtube.com/watch?v=EPMQcectNOU>.

126. CTR. FOR CMTY. CAPITAL, *supra* note 92, at ii ("Overall, we observe a lower default rate for neighborhoods in APL states, in states requiring verification of borrowers' repayment ability, in states with broader coverage of subprime loans with high points and fees, and in states with more restrictive regulation on prepayment penalties. We believe that these findings are remarkable, since they suggest an important and yet unexplored link between APLs and foreclosures. Moreover, given the wide range of factors influencing foreclosures, including house price declines, rising unemployment, and differences in state foreclosure processes, these descriptive statistics are likely to result in an underestimation of the positive impacts of APLs. These findings also point to the need to understand how federal preemption affected the effectiveness of state APLs."). The authors of the study note that these findings are preliminary and do not presume to address the impact of preemption on state APLs—a topic that will be tackled in the next phase of their research. *See id.* at iii. *See generally* Raymond H. Brescia, *The Cost of Inequality: Social Distance, Predatory Conduct, and the Financial Crisis*, 66 N.Y.U. ANN. SURV. AM. L. 641 (2011) (finding that social distance was a main contributor to predatory lending and thus the financial crisis).

127. See CTR. FOR CMTY. CAPITAL, *supra* note 92, at 1 (internal citations omitted).

While it is something of a stretch to say preemption was a but-for cause of the crisis, a growing literature suggests preemption exacerbated underlying structural problems.<sup>128</sup> A presumption against preemption might have preserved more consumer lawsuits using state law for their cause of action, and consumers themselves are immune to the regulatory capture that plagued federal agencies.

One objection to giving the states a greater degree of regulatory freedom is the cost associated with complying with many different state regulations.<sup>129</sup> There are, however, significant differences between banking and other industries that lessen the impact of this concern. First, as the recent crisis demonstrates, size is not necessarily a good thing in the banking world as it increases the possibility that a financial firm will become “too big to fail” and will require a government bailout to avoid catastrophic consequences. State regulation, therefore, is a regulatory insurance policy that acts as a tax on size. That is, to the extent that a bank is large enough to operate in multiple jurisdictions, there are compliance costs that correspond to different regulatory regimes.<sup>130</sup> Furthermore, the fact that the banking industry is integral to the health of the greater economy should make us less concerned that regulation is duplicative. Unlike other industries, failures in the banking sector have widespread economic effects.<sup>131</sup>

From a policy perspective, a plurality of regulators—including ex ante state regulation and ex post state consumer suits—is preferable to the broad preemption that existed in the years leading up to the financial crisis. For that reason, the presumption against preemption, acting as a thumb on the scale for greater state regulatory authority, is sound policy. Yet an analysis of the presumption is in-

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128. See, e.g., Eric S. Belsky & Ren S. Essene, *Consumer and Mortgage Credit at a Crossroads: Preserving Expanded Access While Informing Choices and Protecting Consumers* (Joint Center for Housing Studies, Paper No. UCC08-1, 2008), available at [http://www.jchs.harvard.edu/publications/finance/understanding\\_consumer\\_credit/papers/ucc08-1\\_belsky\\_essene.pdf](http://www.jchs.harvard.edu/publications/finance/understanding_consumer_credit/papers/ucc08-1_belsky_essene.pdf); Raphael W. Bostic, et al., *State and Local Anti-Predatory Lending Laws: The Effect of Legal Enforcement Mechanisms*, 60 J. ECON. & BUS. 47 (2008).

129. See *Egelhoff v. Egelhoff*, 532 U.S. 141, 149–50 (2001) (finding preemption in part on the grounds that compliance with 50 state standards is too burdensome to be what Congress intended).

130. On the other hand, this tax may hurt medium-sized banks that serve as the only real competition to large national banks that are truly too big to fail.

131. See E. Gerald Corrigan, *Are Banks Special?*, 1982 Fed. Res. Bank of Minneapolis Ann. Rep., available at [http://www.minneapolisfed.org/publications\\_papers/pub\\_display.cfm?id=684](http://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=684). A counterexample is the securities industry, which, like the banking industry, plays a central role in the greater economy’s well-being.

complete without an examination of the structural elements of federalism that justify it. The next subpart examines a series of models of the normative underpinnings of the presumption against preemption.

### *B. Models of the Presumption Against Preemption*

As demonstrated, the policy argument for the presumption is strong.<sup>132</sup> Nevertheless, we must also satisfy ourselves that the structural and constitutional reasons for adopting the presumption are sound. This subpart compares normative models for the presumption. I argue that the most justifiable view of the presumption is that the presumption should be deployed to promote federalism in targeted instances of underrepresentation of state interests in the federal regulatory debate. Specifically, the presumption against preemption is an interpretive canon that judges can apply to promote states' underrepresented interests in protecting their regulatory autonomy and common law when the states's interests have not been adequately considered in agency regulation.

#### 1. The Presumption and Spheres of Legislative Power

Traditionally, the states and the federal government have had separate spheres of legislative power:<sup>133</sup> the states controlled the police power and promoted the health and welfare of its citizens, and federal power was limited to those powers enumerated in the Constitution.<sup>134</sup> This comports with the justification the Court nominally employs in its preemption analysis: "the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."<sup>135</sup> According to this view, Congress is presumed to not preempt state law in areas that states have traditionally had regulatory authority, unless Congress clearly states its intent to do so. This clear statement rule is similar to the canon that legislatures do not alter the common law unless they specifically address it.<sup>136</sup>

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132. See *supra* Part II.A.

133. See Viet D. Dinh, *Federal Displacement of State Law: The Nineteenth Century View*, in *FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS* 27, 27–31 (Richard A. Epstein & Michael S. Greve eds., 2007).

134. See U.S. CONST. amend. X (reserving to the states all powers not delegated to the federal government).

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

136. On clear statement rules, see John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399 (2010).

Yet the federalism rationale for the presumption does not map neatly on to banking regulation. As noted in Part I, the states and the federal government have concurrently exercised regulatory and supervisory power over banking in the United States. Since these jurisdictions have long overlapped, the spheres-of-power justification provides little guidance on the fate of the presumption in the banking context.

Moreover, the spheres-of-power formulation of legitimate state authority is stale. At least since the fall of *Lochner* and the start of the New Deal, the Court has moved away from a structure-based constitutional analysis in its Commerce Clause rulings, and toward an intent-driven framework in which states and the national government have concurrent power.<sup>137</sup> The crucial difference has been the expansion of the federal government's regulatory powers—often at the expense of state autonomy—through the reach of the Commerce Clause.<sup>138</sup> The recent contraction of the federal government's power under the Commerce Clause decreases federal power and thereby assures there are areas of state authority that are not subject to concurrent federal jurisdiction.<sup>139</sup> Although it is not the purpose of this Note to investigate why this apparent contradiction exists, as noted in the Introduction, some of the same conservative Justices who support the rollback of federal power are some of the most ardent supporters of federal preemption of state law.<sup>140</sup>

## 2. The Presumption as Federalism-Enhancing

Professor Young offers a competing view of the presumption against preemption. He argues that the presumption provides a procedural obstacle that helps to preserve the under-enforced vertical separation of powers.<sup>141</sup> One advantage of this view is that it does not rely on an outmoded spheres-of-power framework—it is

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137. See Dinh, *supra* note 133, at 27 (“Displacement analysis in the nineteenth century focused on the Supremacy Clause and constitutional structure rather than congressional intent.”); see also Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516 (1992) (“[T]he purpose of Congress is the ultimate touchstone of pre-emption analysis.” (citations and internal quotation marks omitted)).

138. United States v. Morrison, 529 U.S. 598, 647 (2000) (Souter, J., dissenting) (“The defect, in essence, is the majority’s rejection of the Founders’ considered judgment that politics, not judicial review, should mediate between state and national interests . . . ”).

139. See, e.g., United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000); see also *supra* note 9.

140. For a review of the tensions present in the commitment to states’ rights in the preemption context, see generally Sharkey, *supra* note 12.

141. See Young, *supra* note 88, at 254–55.

process-based and applies to the areas in which contemporary state and federal regulation overlap. This view of the presumption is more consistent with New Federalism and the rationale underlying *Lopez* and *Morrison*: that the reach of federal government does not depend on whether the federal government is regulating in a sphere it does not traditionally regulate in, but whether the reach of the federal regulatory power exceeds its constitutional mandate.<sup>142</sup> The presumption as procedural hurdle enforces a clear statement rule that may enhance political representation and “focus[ ] the courts’ energies where they can do the most good: on protecting the basic regulatory autonomy of the states,” as courts are more able than agencies to balance federalism interests.<sup>143</sup> Furthermore, the presumption acts as procedural hurdle and avoids weighing in on subject-matter categories; that is, because the presumption is a procedural not a substantive canon, the presumption may be more easily applied,<sup>144</sup> since it does not rely on an outdated spheres-of-power view of federalism. More generally, the presumption against preemption promotes federalism: states will be more free to be laboratories of democracy,<sup>145</sup> allowing them to compete

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142. See, e.g., *Lopez*, 514 U.S. at 556-59; *Morrison*, 529 U.S. at 617; see also *supra* note 9.

Nevertheless, the procedural view also has a constitutional hurdle to jump. Stated provocatively, if the presumption against preemption essentially means deferring to state actors in the face of federal law, doesn’t this violate the Supremacy Clause? Caleb Nelson has articulated a view grounded in the text of the Supremacy Clause, claiming that the *Non Obstante* provision militates against the presumption. See Nelson, *supra* at note 43. In other words, the presumption is a small breach of originalism in support of a broader principle better suited to contemporary understandings of the Constitution. See Young, *supra* note 88, at 266-67. Moreover, as our understanding of the Commerce Clause evolves in ways not imagined by the framers, it is only natural that the non obstante clause should similarly develop. As in many constitutional disputes, the framework chosen to describe the argument is often outcome determinative.

143. See Young, *supra* note 88, at 254.

144. See *id.* at 254-57.

145. See U.S. CONST. amend. X (“[P]owers not delegated by the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”); THE FEDERALIST No. 45 (James Madison) (“The powers delegated by the proposed constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite . . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.”); see also *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“[A] single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

against the federal government and each other in the quest for efficient regulatory policies.<sup>146</sup>

Unlike the spheres-of-influence conception of the presumption, Young does not depend on a subject-matter trigger to invoke the presumption. However, the ease of application under Young's view robs the presumption of justification. Because there is no focused inquiry as to in what cases the presumption should apply, Young's view would over- and under-protect federalism. It over-protects to the extent the presumption duplicates adequate representation of states' interests in federal regulatory decisionmaking. It under-protects to the extent that the invocation of the presumption waters down its application—judges may simply recite the presumption without a sense as to why and how much it should matter.

### 3. The Presumption as Debate-Forcing

Another view, espoused by Professor Hills, takes the position that the presumption against preemption can force national legislative action on important but largely unnoticed issues. This is because affected industries, rather than be subjected to fifty sets of state standards, will effectively lobby Congress to obtain a preemptive national policy, engendering public debate and healthy democratic processes.<sup>147</sup> The debate-forcing view of the presumption does not advocate federalism for federalism's sake. Instead, it views federalism as a rhetorical strategy brandished—much like the presumption against preemption—when one side of the debate prefers a particular regulatory outcome.<sup>148</sup>

Under Hills' approach, it is not necessary for state regulations to actually be efficient. Generally speaking, states have the incentive to export the costs of regulation and internalize the benefits. Because states can externalize costs of regulation, they will frequently be overly aggressive from a national efficiency standpoint.<sup>149</sup> The

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146. See Young, *supra* note 88, at 250–51. See generally Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

147. See Hills, *supra* note 38, at 17 (“[I]f the goal is to mobilize the public to focus its attention on Congress, then it makes sense to choose a default rule that places the burden on the regulated industries to lobby for preemptive legislation, rather than one that places the burden on those anti-preemption interests to lobby for a waiver of preemption.”).

148. See *id.* at 36 (“In short, the fundamental (and plausible) premise of this argument is that rhetoric in favor of federalism as such is insincere: Few with influence in the political process care about promoting state power as an end in itself.”).

149. See Thomas W. Merrill, *Preemption in Environmental Law: Formalism, Federalism Theory, and Default Rules*, in FEDERAL PREEMPTION: STATES' POWERS, NATIONAL

presumption against preemption will encourage state regulation. The resulting over-regulation of an industry will get the attention of that industry, which will then lobby Congress in search of a national regulatory policy.<sup>150</sup> This should lead to good, efficient national policy because benefit-internalizing, cost-exporting states will not support a uniform national standard unless they are compensated for the loss of the state ability to regulate the affected industry; the regulated industry will have to compromise and accept a higher level of regulation than they would otherwise.<sup>151</sup>

The problem with the debate-forcing approach, however, is that it assumes that the opposition to federal regulation—perhaps a combination of state autonomy advocates and pro-consumer groups—will be well organized nationally, or that the conflict in Congress will be highly visible and salient to the general public. As I explain in greater detail in Part IV, the ability of financial institutions to hire lobbying firms and keep members of Congress flush with campaign donations far outstrips that of consumer groups.<sup>152</sup> This means that the financial industry's argument—that the benefits to the economy of decreased compliance costs and lower regulatory standards outweigh the cost to consumers of aggressive preemption leading to lower regulatory standards—goes unchallenged before federal legislators. Recent empirical inquiry has revealed that Congress almost never responds to the Court's preemption rulings, thereby undermining a key component of the explanatory power of the debate-forcing view of the presumption.<sup>153</sup> Nevertheless, the Dodd-Frank Act serves as an important counterexample: it does include rollbacks of the strong preemption

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INTERESTS 166, 183–85 (Richard A. Epstein & Michael S. Greve eds., 2007) (arguing in favor of preemption in cases in which states export costs of regulation and retain benefits).

150. See Hills, *supra* note 38, at 25 (“However inefficient, state regulation provides the incentive to motivate business and industry groups to place issues on the federal agenda that would otherwise be buried in committee. The argument assumes nothing about the intrinsic benefits of state law.”).

151. See *id.*; see also Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1368–71 (2006) (noting preemption is in part a response to benefit-internalizing, cost-exporting state regulations).

152. See *infra* Part IV. Additionally, Part IV notes that consumer groups, while being outspent at the federal lobbying level by banking interests, are nonetheless a significant force in local judicial elections, which may explain their preference for the presumption against preemption in the banking context, as the presumption against preemption favors state lending laws.

153. See Note, *supra* note 10, at 1605 (“The data show that Congress almost never responds to the Court’s preemption decisions, so mistaken interpretations for or against preemption are unlikely to be corrected.”).

afforded to subsidiaries of national banks in the *Watters* case and would set national consumer financial protection regulation as a floor and not a ceiling for state regulatory action.<sup>154</sup>

The debate-forcing view of the presumption is borne out only when the issue is of integral national importance: it was only after a serious financial crisis generated in part by the lax rules and strong preemption advocated by the banking industry that Congress—and more importantly, the public—took notice and reversed course. More specifically, because there are few issues salient enough to the general public to let Congress know that it is being watched, the well-organized special interests are able to transmute cost-exporting state regulation into a strong argument for federal preemption. The main point remains: the presumption as debate-forcing mechanism, without more, is likely too sanguine about the salience to the voting public of the costs and benefits of a uniform national regulatory policy.

#### 4. Underrepresented Interests: Common Law and State Statutes of General Application

The appropriate model of the presumption against preemption lies between these competing views just discussed. The presumption should be invoked in cases in which federalism values are most threatened—that is, when the court is considering the pre-emption of underrepresented state interests. A more nuanced view of the presumption, to which Professor Hills also alludes, is that the presumption can stand in for the poorly organized, disparate general good against well-organized special interests.<sup>155</sup> In order to determine when specifically the presumption should be applied, we need to determine what specific interests are underrepresented in the federal regulatory discussion.<sup>156</sup>

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154. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1044, 1046, 124 Stat. 1376, 2014–18 (2010) (to be codified at 12 U.S.C. § 25b). For insight into the debate over whether to adopt these provisions, see Brady Dennis, *Finance panel at odds over preemption*, WASH. POST (Oct. 21, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/20/AR2009102003591.html>; Damian Paletta, *Consumer-Agency Bill Moves in House*, WALL ST. J., Oct. 23, 2009, at A5.

155. See Hills, *supra* note 38, at 33–34; see also Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 Nw. U. L. REV. 695, 717 (2008) (“Possibly more importantly, agencies, unlike Congress and the courts, are specialized institutions that are not set up to consider state autonomy concerns.”).

156. See *supra* pp. 22–23 (discussing the over- and under-inclusiveness of Young’s procedural model of the presumption).

Professor Sharkey has questioned who are the representatives of state common law interests at stake in tort suits<sup>157</sup> and at the federal level in preemption-regulation promulgation.<sup>158</sup> In the banking regulatory context, it is clear that the relevant state agency can be an appropriate representative for state regulatory authority. However, there are other possible representatives for state regulatory autonomy at the federal level: the Big Seven.<sup>159</sup> For example, the National Association of Attorneys General (NAAG) files amicus briefs in state common law cases, as in *Wyeth v. Levine*.<sup>160</sup> In the banking context, every state joined the amicus brief defending New York's position in *Cuomo*, underlining their unanimous support for state enforcement of federal laws.<sup>161</sup> The Conference of State Bank Supervisors also filed a supporting brief in *Cuomo*.<sup>162</sup> But the influence of amici in cases can only go so far; the Court will only listen to amicus briefs to the extent that they are persuasive.<sup>163</sup>

The lack of representation for state regulatory interests exists beyond the courtroom.<sup>164</sup> Professor Sharkey recently completed a comprehensive survey of federal agency compliance with Executive

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157. See Catherine M. Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 DUKE L.J. 2125, 2158 (2009) ("A prerequisite to any discussion of effective agency consultation and collaboration with the states is identification of the relevant stakeholders: Who precisely represents state regulatory interests?").

158. Sharkey, *supra* note 105, at 71 n.366.

159. Adoption of Recommendation, 76 Fed. Reg. 81, 82 (Jan. 31, 2011) (adopted Dec. 9, 2010).

160. See Brief of Amici Curiae Vermont et al. in Support of Respondent, *Wyeth v. Levine*, 129 S. Ct. 1187 (2008) (No. 06-1249), 2008 WL 3851613; see also Sharkey, *supra* note 157, at 2126 ("NAAG has challenged federal agencies' decisions to preempt state law, often via amicus briefs.").

161. See Brief for the States of North Carolina, et al. at 1 n.2, *Cuomo v. Clearing House Ass'n, LLC*, 126 S. Ct. 469 (2009) (No. 08-453), 2008 WL 4887719 at \*2 n.2 ("The States are unanimous in their support for the New York Attorney General's petition for a writ of certiorari: forty-nine States have joined in this amicus brief").

162. See Brief of Conference of State Bank Supervisors as Amicus Curiae in Support of Petitioner, *Cuomo v. Clearing House Ass'n, LLC*, 126 S. Ct. 469 (2009) (No. 08-453), 2008 WL 4887718. It is interesting to note that in none of the state court cases examined were the views of the state explicitly solicited or considered by the court.

163. See Neuborne, *supra* note 3, at 1119 ("When the mandates of the Federal Constitution are clear, most state judges respect the supremacy clause and enforce them. Constitutional litigation is, however, rarely about clear law.").

164. Lack of representation of states outside of the judicial forum may have repercussions for whether an agency preemption statement is granted deference in a future judicial forum; that is, a judge may be less likely to grant deference to an agency when state viewpoints were not adequately represented in the regulatory process.

Order 13,132, the federalism order that requires agencies to have “an accountable process to ensure meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications.”<sup>165</sup> The review of federal regulation—particularly federal regulation on the subject of preemption—finds that “compliance with these provisions has been inconsistent . . .”<sup>166</sup> This failure suggests that state viewpoints are not adequately considered in the promulgation of regulations that could have preemptive effect.

State regulatory interests have gone unaddressed by federal regulators, whether because of lack of federal contact with the state regulator or because of the lack of state initiative in putting forth its views in notice and comment.<sup>167</sup> For example, a 2005 GAO Report found that “opportunities existed to enhance [OCC’s] consultative efforts” in promulgating the regulations disputed in *Watters* and *Cuomo*.<sup>168</sup> The report stated,

In the face of an executive order specifically calling for state and local consultation on preemption rules, OCC’s limited additional effort may have contributed to an impression that it did not genuinely seek or consider input from [states]. Stakeholders representing such diverse interests as consumer protection advocates, state bank regulators, state attorneys general, and some Members of Congress continue to maintain that the agency did not genuinely seek their input.<sup>169</sup>

It is helpful to separate ex ante regulatory interests—those of state regulatory bodies and state legislators—from ex post regulatory interests, by which I mean state common law, and to a lesser extent, state consumer protection law in states where no regulatory

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165. Exec. Order No. 13,132 § 6(a), 64 Fed. Reg. 43,255, 43,257 (Aug. 4, 1999).

166. Adoption of Recommendation, 76 Fed. Reg. at 82. *But see* Mendelson, *supra* note 30, at 769 (arguing that “agencies have significant incentives . . . to consider interests articulated by states or state groups”).

167. Adoption of Recommendation, 76 Fed. Reg. at 81 (“[T]he consultative process breaks down at both ends; namely, while federal agencies have rightly been criticized for bypassing consultation with the states, at the same time, it appears as though some of the state representatives have not held up their end of the bargain. Most rules with potential preemptive power receive no comments from state or local government officials or their representatives.”).

168. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-08, OCC PREEMPTION RULEMAKING: OPPORTUNITIES EXISTED TO ENHANCE THE CONSULTATIVE EFFORTS AND BETTER DOCUMENT THE RULEMAKING PROCESS (2005), available at <http://www.gao.gov/new.items/d068.pdf>; *see also* Sharkey, *supra* note 105, at 37–38.

169. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 168, at 45; *see also* Sharkey, *supra* note 105, at 37–38.

body is in charge of those laws.<sup>170</sup> Going forward, there are identifiable representatives for state ex ante regulatory interest: state regulators themselves and the “Big Seven” federal lobbying groups that represent sub-national interests.<sup>171</sup> Professor Sharkey has identified mechanisms that can be implemented through Executive Order 1312 by the Office of Information and Regulatory Affairs (OIRA) to encourage federal cooperation with states on regulations that could have preemptive effect.<sup>172</sup>

Less clear is who can represent state ex post regulatory interest going forward, namely state common law and consumer-lending suits.<sup>173</sup> There is no body that actively promotes state common law regulatory interests at the federal level. It may be normatively difficult to justify, but state court judges step in on the side of the presumption against preemption in the banking context more often than their federal counterparts.<sup>174</sup> This highlights that, absent an adequate institutional representative, state judges are the institutional actors with the closest ties to common law and ex post regulation; they are therefore the ones who see the need to preserve it.<sup>175</sup> Of course, not all state court judges will agree on preemption policy, but these judges embrace the presumption more frequently and vociferously than their federal counterparts. This suggests that state judges are approving of the presumption as a procedural hurdle that protects otherwise unrepresented common law regulatory interests.

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170. For a general overview of ex ante and ex post regulatory differences, see Catherine M. Sharkey, *Modern Complex Litigation in the United States: The Public-Private Tug of War*, in AMERICAN LAW (Japanese-American Society for Legal Studies, forthcoming 2011).

171. Adoption of Recommendation, 76 Fed. Reg. at 82 n.19 (“The Big Seven include the Council of State Governments, the National Governors Association, the National Conference of State Legislatures, the National League of Cities, the U.S. Conference of Mayors, the National Association of Counties, and the International City/County Management Association.”).

172. See Sharkey, *supra* note 105, at 63–87 (making recommendations for improved state-federal consultations).

173. See Adoption of Recommendation, 76 Fed. Reg. at 82 (discussing difficulty of identifying representatives for state common law interests).

174. See *infra* Part III.

175. See *infra* Part III. This of course is difficult to test, particularly in the banking context in which strong policy and justificatory reasons exist to adopt the presumption against preemption. See *infra* Part II.B. Furthermore, the hypothesis is difficult to test in the banking sphere given the fact that consumer groups are such large contributors to state judge election campaigns. Future research could test more areas of ex post state regulatory power; a cross-subject area study would have greater explanatory value with respect to this hypothesis.

It is tempting to conclude that stricter federal court scrutiny of agency preemption statements would more accurately take into account state regulatory interests;<sup>176</sup> however, this overlooks the underrepresentation of state common law ex post regulatory interests. Indeed, merely asking whether the Big Seven were consulted regarding a preemptive regulation presumes the Big Seven's institutional competency to represent the preempted state's common law interest. Using the presumption as a procedural hurdle evades this inadvertent means of eroding state ex post regulatory authority by creating a speed bump outside of the agency deference analysis.

Some scholars suggest that states are represented in Congress and therefore their views are considered at that level.<sup>177</sup> Perhaps state common law interests can be taken into account via electoral preferences and congressional lobbying by groups that represent state interests. However, this view ignores the immense power of business to curry congressional favor through campaign donations. For example, state attorneys general and other state regulatory interests support increased regulation of derivatives, especially in New York.<sup>178</sup> Yet these policies have little traction among the New York congressional delegation in the debate on financial-industry reform proposals. Indeed, the New York delegation is very protective of its state's financial industry interests. And it is easy to understand why: the financial industry has spent significantly more money on campaign contributions and lobbying than any other industry in the past year and with notable success.<sup>179</sup> State legislators may not be

176. See generally, Mendelson, *supra* note 155.

177. See generally Herbert Wechsler, *The Political Safeguards of Federalism: The Rôle of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). But see Mendelson, *supra* note 30, at 760–69 (finding Congress not as competent to protect states' rights post-Seventeenth Amendment as federal agencies).

178. See Leah Campbell & Robin Choi, *State Initiatives To Regulate Credit Default Swaps Deferred Pending Federal Action*, METROPOLITAN CORP. COUNS., Sep. 1, 2009, at 20 (“On September 22, 2008, New York Governor David A. Paterson announced that in January of 2009 the state would begin regulating Covered Swaps as insurance. On November 20, 2008, however, the [New York State Insurance Department] announced that it would ‘delay indefinitely its application of New York Insurance Law’ to CDS pending action at the federal level.” (internal citation omitted)).

179. See Gretchen Morgenson & Don Van Natta, Jr., *In Crisis, Banks Dig In for Fight Against Rules*, N.Y. TIMES, May 31, 2009, at A1 (“Through political action committees and their own employees, securities and investment firms gave \$152 million in political contributions from 2007 to 2008, according to the most recent Federal Election Commission data. . . . ‘The banks run the place,’ [Representative] Peterson [D-MN] said. ‘I will tell you what the problem is—they give three times

much better on this count.<sup>180</sup> While there are lobbying groups for state *ex ante* regulatory interests, such as the National Conference of Insurance Legislators and the National Association of Insurance Commissioners, they do not have the financial leverage that the banking industry has because the National Association of Insurance Commissioners and other state-interest groups, do not give campaign contributions.<sup>181</sup>

An example from the Dodd-Frank lobbying efforts on the pre-emption issue proves the point better than any abstract numbers can:

[A]n important though unheralded issue in financial reform was the extent to which various provisions governing bank reform would override state laws or regulations on the same questions. If a state has a tougher set of regulations governing, say, bank loans, would those rules be set aside by the new federal regulations? There are good arguments on both sides, with the banks coveting what is called federal pre-emption and consumer groups, backed by the White House, fiercely opposing it. One lobbyist told me of how — using the two essentials of suc-

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more money than the next biggest group. It's huge the amount of money they put into politics.'").

180. See Walter L. Updegrafe Reporter Associates, *How the Insurance Industry Collects an Extra \$65 Billion a Year from You by . . . Stacking the Deck*, MONEY MAGAZINE (Aug. 1, 1996), [http://money.cnn.com/magazines/moneymag/moneymag\\_archive/1996/08/01/215477/index.htm](http://money.cnn.com/magazines/moneymag/moneymag_archive/1996/08/01/215477/index.htm) ("To a large extent, the insurance industry writes the laws that govern it. Though insurance industry employees make up less than 2% of the American work force, at least 15% of the state lawmakers who serve on committees overseeing insurance legislation are insurance agents or company executives, or are otherwise connected to the industry."). Because of the heterogeneous nature of states, we can expect at least some to prefer benefit-internalizing and cost exporting regulations.

181. See M.B. Pell and Joe Eaton, *Five Lobbyists for Each Member of Congress*, CENTER FOR PUBLIC INTEGRITY (May 21, 2010), <http://www.publicintegrity.org/articles/entry/2096/> ("The companies and groups that lobbied on financial reform spent a total of \$1.3 billion in 2009 and the first quarter of 2010 on their overall lobbying efforts, the data showed. The exact dollar amount they devoted to financial regulation reform remains unclear because lobbyists are not required to itemize how much money in a given contract is spent on a specific issue. But if only 10 percent of that spending was targeted at financial regulation bills, lobbyists would have received \$133 million."); Steven Brill, *Government for Sale: How Lobbyists Shaped the Financial Reform Bill*, TIME (July 1, 2010), <http://www.time.com/time/politics/article/0,8599,2000880-5,00.html> ("[L]obbyists for the banking and financial-services industries simply outgunned lobbyists for consumers. 'We have three lawyers total working on this [entire bill],' says Travis Plunkett, the legislative director for the Consumer Federation of America, a lobbying and education organization representing 280 nonprofit groups. 'They can have three people working on a paragraph.'").

cessful lobbying, personal relationships and money — he got a boost from two Democrats in the House “who wanted to help us and whom we knew well through prior associations and have helped raise money for.” They provided important support for pre-emption even though they vocally backed the overall reform bill. “They said, ‘I can’t be with you on the bill,’ ” he continues, “but show me where I can help you out and then give me some backup” — which came in the form of a white paper on pre-emption, prepared by the American Bankers Association. The result was a compromise allowing limited federal pre-emption.<sup>182</sup>

There are consumer advocacy groups in the financial services sector— for example, the Center for Responsible Lending. But the resources of the Center for Responsible Lending are minimal compared to interest groups of broader appeal, such as the Environmental Defense Fund.<sup>183</sup> Groups such as the Center for Responsible Lending would perhaps be content to have a high federal standard preempt state regulation if they thought it would achieve better consumer protection. In any case, state regulatory interests do not necessarily mean pro-consumer interests. State regulatory interests operate in the sense of competitive federalism—they compete for efficient regulation, which is only pro-consumer in a broad sense because the efficient level of regulation may hurt consumers.<sup>184</sup> This leads to the further insight that, while states may have similar interests vis-à-vis vertical federalism, horizontal disagreements among states on the federal government’s proper role in banking may impede successful and vociferous lobbying.<sup>185</sup>

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182. Brill, *supra* note 181.

183. See CTR. FOR RESPONSIBLE LENDING, *CRL Spends Little on Lobbying vs Financial Services Firms* (Sept. 23, 2010), <http://www.responsiblelending.org/media-center/center-for-straight-answers/CRL-Spends-Little-on-Lobbying-vs-Financial-Services-Firms.html> (“In the first half of 2010, bailed-out banks spent 48 TIMES more on lobbying than CRL, and payday lenders spent 9 TIMES as much as we did.”); see also Marianne Lavelle, *The Climate Change Lobby Explosion*, THE CTR. FOR PUB. INTEGRITY (Feb. 25, 2009), [http://www.publicintegrity.org/investigations/climate\\_change/articles/entry/1171/](http://www.publicintegrity.org/investigations/climate_change/articles/entry/1171/) (“The Environmental Defense Fund says it spent about \$40 million on direct climate advocacy, both domestically and internationally [in 2008]—about 40 percent of the organization’s budget.”). Even so, the lobbyists for a climate change bill in 2008 were out lobbied 8 to 1 by industry lobbyists fighting tough congressional action on climate change. *Id.* (“Put the alternative energy and environmental/health lobbyists together, and they are outnumbered by all other interests, more than 8-to-1.”).

184. See generally THE FEDERALIST Nos. 39, 51 (James Madison).

185. See generally THE FEDERALIST No. 10 (James Madison); see also Hills, *supra* note 38, at 10–11 (“Familiar collective action problems might prevent citizens at

A further example is instructive. In 2001, the OCC issued regulations stating that state consumer protection laws are preempted by federal regulation.<sup>186</sup> The OCC then issued specific preemption determinations finding particular state laws preempted.<sup>187</sup> Importantly, there is no state entity charged with promulgation of rules under the state consumer lending protection laws. Therefore, the states' regulatory interest was necessarily underrepresented in the federal preemption determination process. The presumption against preemption could have served as a procedural bulwark to force careful analysis of the underlying statute and the federalism values at stake.<sup>188</sup>

The disparity in lobbying power continues today. The New York Times' Dealbook recently reported on meetings held by the Treasury Department with groups interested in the many regulations to be promulgated under Dodd-Frank.<sup>189</sup> Dealbook reported the banking industry, including "finance industry executives and lobbyists from about three dozen banks, asset management companies and trade groups," has had "dozens" of meetings with Treasury Department officials.<sup>190</sup> Representatives of consumer groups have had two meetings. Treasury officials met with the president and CEO of the National Community Reinvestment Coalition and the director of housing policy for the Consumer Federation of America. Both meetings were about Fannie Mae and Freddie Mae.<sup>191</sup> No meetings with consumer groups on the issue of lending occurred.

Given the centrality of the banking industry to the greater economy, the failure of the federal regulatory system to anticipate the financial crisis, and the long history of the dual banking system,

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any level of government from coalescing on behalf of a common but diffuse interest. However, these difficulties are exacerbated by the fact of heterogeneous preferences in a large republic.").

186. Investment Securities; Bank Activities Operations; Leasing, 66 Fed. Reg. 34,784, 34,788 (July 2, 2001) (codified at 12 C.F.R. pts. 1, 7, 23 (2002)).

187. See, e.g., Preemption Determination and Order, 68 Fed. Reg. 46,264, 46,264 (Aug. 5, 2003) (finding Georgia's consumer protection laws are preempted by federal regulation).

188. For a related argument supporting a presumption against agency preemption, see Mendelson, *supra* note 155, at 699. This model is developed further in Part IV.B of this Note in the context of state judge's affinity for the presumption against preemption.

189. Ben Protess, *Wall Street Lobbies Treasury on Dodd-Frank*, N.Y. TIMES (Apr. 5, 2011), <http://dealbook.nytimes.com/2011/04/05/wall-street-lobbies-treasury-on-dodd-frank/>.

190. *Id.*

191. *Id.*

there are strong policy reasons to adopt the presumption in the banking sphere. Furthermore, there are no actors in the national legislative system that can represent state regulatory autonomy and state common law causes of action separate from any particular policy. The presumption thus stands as a protector of structural interests that would otherwise be underrepresented in the federal process.

### III. STATE AND FEDERAL COURT USE OF THE PRESUMPTION AGAINST PREEMPTION IN BANKING

This Part analyzes state and federal decisions in the banking context pre-Dodd Frank. I will show that state courts embrace the presumption in this context more often and in stronger language than federal courts. State courts continue to embrace the presumption even after circuit courts have held the presumption to be inapplicable. Furthermore, state courts rarely analyze the rationale for the presumption, while federal courts often refer to agency statements or legislative intent regarding the applicability of the presumption against preemption. These differences appear to occur irrespective of the governing federal statute and the relevant federal agency. This study reviews cases through 2009—before the debate surrounding Dodd-Frank and its subsequent implementation could impact the courts’ decisionmaking process. Part IV considers the possible reasons why this disparity in interpretive approach exists, and Part V speculates as to the possible effects of this difference and the possible impact of Dodd-Frank on banking preemption.

#### A. *Federal Decisions on the Presumption Against Preemption*

The Ninth Circuit has decided OTS and OCC cases rejecting the use of the presumption.<sup>192</sup> In *Silvas v. E\*Trade Morg. Corp.*, a class action was brought under the state’s Unfair Competition Law (UCL)<sup>193</sup> alleging that the defendant should have allowed the re-

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192. See *Silvas v. E\*Trade Mortg. Corp.*, 514 F.3d 1001, 1005 (9th Cir. 2008) (“[B]ecause there has been a history of significant federal presence in national banking, the presumption against preemption of state law is inapplicable.”); see also *Wells Fargo Bank v. Boutris*, 419 F.3d 949, 956 (9th Cir. 2005) (no presumption against preemption in the OCC context); *Bank of America v. City and County of San Francisco*, 309 F.3d 551, 559 (9th Cir. 2002) (same); *Wilmarth, supra* note 76, at 288–89 (discussing the Ninth Circuit’s refusal to use the presumption against preemption).

193. Cal. Bus. & Prof. Code §§ 17200, 17500 (West 2008); *E\*Trade Mortg. Corp.*, 514 F.3d at 1003.

turn of a \$400 interest-rate lock-in payment when the mortgage was cancelled within the three-day period allotted by the Truth in Lending Act (TILA) for rescinding mortgages. The district court rejected the presumption<sup>194</sup> and threw the suit out, holding that plaintiff's UCL claims were preempted by TILA.<sup>195</sup> The court went on to find that OTS's regulation 12 C.F.R. § 560.2 preempted the state law claims, accepting the agency's field preemption claim without analysis.<sup>196</sup> It is instructive to compare this quick adoption of the OTS regulation as valid with the Supreme Court's laborious 2009 *Cuomo* decision, in which the Court spent 8 pages analyzing whether to defer to the OCC's overbroad preemptive regulation, ultimately deciding it did not merit deference.<sup>197</sup> By assuming deference, the Ninth Circuit nearly assumes the outcome of the case—field preemption eliminates the plaintiff's state law claim.

The Ninth Circuit casually dismissed the unfair competition and advertising claims as falling directly under the OTS's preemption of disclosures and advertising.<sup>198</sup> More interesting is the court's analysis of the "incidental affect" exception in the regulation, which states that the regulation does not preempt state laws that have only a minimal effect on the federal thrift.<sup>199</sup> The plaintiffs argued that their claim should be preserved because "they are founded on California contract, commercial, and tort law, merely enforcing the private right of action under TILA."<sup>200</sup> The context of the "incidental affect" language is instructive: "State laws of the following types are not preempted to the extent that they only incidentally affect the lending operations of Federal savings associa-

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194. *Silvas v. E\*Trade Mortg. Corp.*, 421 F.Supp.2d 1315, 1318 (S.D. Cal. 2006) ("[N]o presumption against preemption arises when a state law regulates the banking industry.").

195. *Id.* at 1321.

196. *E\*Trade Mortg. Corp.*, 514 F.3d at 1004–08; *see also* *Camps Newfound/Owatonna, Inc. v. Town of Harisson*, 520 U.S. 564, 616 (1997) (holding that "even where Congress has legislated in an area subject to its authority, our pre-emption jurisprudence explicitly rejects the notion that mere congressional silence on a particular issue may be read as preempting state law" (emphasis omitted)); *Frank Bros. v. Wis. Dep't of Transp.*, 409 F.3d 880, 891 (7th Cir. 2005) ("However, silence on the part of Congress alone is not only insufficient to demonstrate field preemption, it actually weighs in favor of holding that it was the intent of Congress *not to occupy the field*." (citing *Hillsborough Cnty. v. Automated Med. Labs.*, 471 U.S. 707, 718 (1985))).

197. *See Cuomo v. Clearinghouse Ass'n, L.L.C.*, 129 S. Ct. 2710, 2715–22 (2009).

198. *E\*Trade Mortg. Corp.*, 514 F.3d at 1006; 12 C.F.R. § 560.2(b)(9).

199. 12 C.F.R. § 560.2(c).

200. *E\*Trade Mortg. Corp.*, 514 F.3d at 1006–07.

tions.”<sup>201</sup> Among those claims listed are “contract and commercial law,” “real property law,” and “tort law.”<sup>202</sup> The court analyzed the claims under the “incidental affect” exception in dicta,<sup>203</sup> despite finding the claims were expressly preempted by the regulation’s disclosure and advertising categories.<sup>204</sup> The court’s analysis consists of reciting the definition of field preemption, stating that under field preemption a “state may not add a damages remedy unavailable under the federal law,” meaning that the plaintiff’s suit would be field preempted even if it were not expressly preempted.<sup>205</sup> But by doing this—apart from already assuming its conclusion in part by uncritically adopting the regulation wholesale—the court ignored that the “incidental affect” language was meant to cover state contract, commercial and tort law claims.

Recalling the analysis in Part II.B above, we remember that the presumption against preemption has particular value in cases where state law claims, whether codified into the state code or not, do not have a representative able to advocate for them at the federal agency level. This is true in the *E\*Trade* case because California’s UCL does not have a correlating agency to represent the state’s interest in fair lending before the relevant federal regulator in charge of TILA, which, at the time of the suit, was OTS.

Given the express carveout for some state laws, the plaintiffs’ claims merited a more thorough textual analysis, even if such claims were ultimately found preempted, particularly given that the reach of “incidental affect” is debatable. An application of the presumption may have provided a procedural hurdle for the court, focusing it on whether a conflict existed between state and federal laws rather than relying purely on principles of field preemption.<sup>206</sup> Had the court employed this analysis, it might have instead concluded that state common law claims acted as a parallel enforcement measure, not as a remedy inconsistent with federal law.

The district courts have largely followed the Ninth Circuit’s lead in rejecting the presumption in the banking context.<sup>207</sup> While

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201. 12 C.F.R. § 560.2(c).

202. *Id.*

203. *E\*Trade Mortg. Corp.*, 514 F.3d at 1006–07.

204. *Id.* at 1006.

205. *Id.* (citations and internal quotation marks omitted).

206. See *supra* Part II.B.4.

207. See *Jefferson v. Chase Home Fin.*, No. C 06-6510 TEH, 2008 WL 1883484, at \*9 (N.D. Cal. Apr. 29, 2008) (“However, the presumption does *not* apply when the state regulates in an area where there is history of significant federal presence in the field—such as national banking.”); *Montgomery v. Bank of Am. Corp.*, 515 F. Supp. 2d 1106, 1113 (C.D. Cal. 2007) (stating “from the days of *McCulloch v.*

the Third Circuit has held that banking is an area subject to dual federal and state control, it has not specifically held that the presumption should apply,<sup>208</sup> other circuit courts, including the Fourth, Sixth, and Second Circuits, have joined the Ninth in asserting the non-applicability of the presumption in the banking context.<sup>209</sup> Crucially, it is the unrepresented state common law interests that go without rigorous consideration by the federal courts or by the agency in court proceedings.

#### *B. State Decisions on the Presumption Against Preemption*

Despite the federal courts' long-standing denial of the applicability of the presumption against preemption in the banking context, a number of state courts have held that the presumption does apply.<sup>210</sup>

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*Maryland*, banking is an area where the presumption should not be used); *Augustine v. FIA Card Servs.*, N.A., 485 F. Supp. 2d 1172, 1175 (E.D. Cal. 2007) (finding that the presumption against preemption is not triggered in area of significant federal presence, including national banking).

208. See *Nat'l State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981, 985 (3d Cir. 1980). The reasoning seems to imply that the presumption should exist, although the court does not specifically mention the presumption. See *id.* ("Whatever may be the history of federal-state relations in other fields, regulation of banking has been one of dual control since the passage of the first National Bank Act in 1863. There is little doubt that in the exercise of its commerce power Congress could regulate national banks to the exclusion of state control. And unquestionably, as in other businesses, federal presence in the banking field has grown in recent times. But congressional support remains for dual regulation. In only a few instances has Congress explicitly preempted state regulation of national banks. More commonly, it has been left to the courts to delineate the proper boundaries of federal and state supervision." (citations omitted)).

209. See *Nat'l City Bank v. Turnbaugh*, 463 F.3d 325, 330–31 (4th Cir. 2006) (holding the presumption against preemption is not applicable in the national bank context); *Wachovia Bank v. Watters*, 431 F.3d 556, 558 (6th Cir. 2005), *aff'd*, 550 U.S. 1 (2007) (same); *Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F.3d 178, 183 (2d Cir. 2005) (same); see also *WFS Fin., Inc. v. Superior Court*, 44 Cal. Rptr. 3d 561, 565 n.3 (Cal. Ct. App. 2006) (stating the presumption against preemption is not necessary to reach its decision, but notes the circuit split).

210. See *Branick v. Downey Sav. & Loan Ass'n*, 24 Cal. Rptr. 3d 406, 412 (Cal. Ct. App. 2005) ("The court in *Gibson* explained that under the relevant precedents, [w]e must fairly but—in light of the strong presumption against pre-emption—narrowly construe the precise language of [the preemptive statute or regulation]." (alterations in original) (internal quotation marks omitted) (citing *Gibson v. World Sav. & Loan Ass'n*, 128 Cal. Rptr. 2d 19, 27 (Cal. Ct. App. 2002)), *aff'd*, 110 P.3d 214 (Cal. 2006); see also *Gibson v. World Sav. & Loan Ass'n*, 128 Cal. Rptr. 2d 19, 26 (Cal. Ct. App. 2002) ("Therefore, there is a strong presumption that [the OTS regulation] does not preempt the claims brought in this action.").

For example, although there is no California Supreme Court decision directly on point, California state appellate courts have held that the presumption against preemption applies, sometimes even noting that “one court”—that is, the Ninth Circuit—has found the presumption does not apply.<sup>211</sup> In *Bronco Wine Co. v. Jolly*, the California Supreme Court reaffirmed its dedication to the presumption generally by applying the presumption and ruling that the state wine labeling regulator was not impliedly preempted by the Department of Agriculture.<sup>212</sup> Lower courts have applied this decision to support employing the presumption against preemption in the banking context, as well as to support their own power to limit the scope of express preemption clauses.<sup>213</sup> One lower California state court has gone so far as to hold that the presumption is powerful enough to save certain areas of state law, even in face of “reasonable” interpretations of express preemption statutes that would otherwise sweep more broadly.<sup>214</sup>

In contrast to the Ninth Circuit *E\*Trade* case discussed in Part III.A, the state court in *Smith v. Wells Fargo Bank, N.A.*, correctly noted that “[a]n agency may preempt state law through regulations that are within the scope of its statutory authority and that are not arbitrary.”<sup>215</sup> The court in *Smith v. Wells Fargo Bank* was asked to analyze the preemptive effect of Regulation DD, which was promul-

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211. See, e.g., *Smith v. Wells Fargo Bank*, 38 Cal. Rptr. 3d 653, 666 (Cal. Ct. App. 2005) (“Considering the general presumption against preemption, we narrowly construe the precise language of the federal law or regulation to determine whether a particular state law claim is preempted.” (citations omitted)).

212. See *Bronco Wine Co. v. Jolly*, 95 P.3d 422, 429 (Cal. 2004) (“After extensively reviewing the history of state regulation of beverage and wine labels prior to Congress’s adoption of the FAA Act in 1935—a history that reveals substantial state involvement and very little federal regulation—we conclude that a presumption against preemption does indeed apply in this case.”).

213. See *Miller v. Bank of Am.*, No. CGC-99-301917, 2004 WL 3153009, at \*28 (Cal. App. Dep’t Super. Ct. 2004) (“This presumption applies both to the existence of preemption and the scope of preemption . . . and serves the purpose of assuring that the federal state balance will not be disturbed unintentionally by Congress or unnecessarily by the courts.”(citations omitted)), *rev’d on other grounds*, 51 Cal. Rptr. 3d 223 (Cal. Ct. App. 2006).

214. See *Black v. Fin. Freedom Senior Funding*, 112 Cal. Rptr. 2d 445, 456 (Cal. Ct. App. 2001) (“However, we need not conclude that this is the only reasonable interpretation of the Parity Act’s preemption language in order to reject express preemption in this case. . . . As our analysis has illustrated, the preemption language of the Parity Act does not contain a clear manifestation of congressional intent to preempt all state laws concerning the terms and marketing of alternative mortgage transactions. Absent such clear manifestation, the Parity Act does not expressly preempt claims such as those brought by the Blacks in this action.”).

215. *Smith*, 38 Cal. Rptr. 3d at 666 n.6 (citations omitted).

gated by the OCC under the authority granted to it by the Truth in Savings Act (TISA).<sup>216</sup> Similar to the regulation at stake in *E\*Trade*, promulgated under TILA, Regulation DD contains a savings clause for preemption of state laws which only “incidentally affect the exercise of national banks’ deposit-taking powers.”<sup>217</sup> The California Court of Appeals found that the UCL claims based on TISA were not preempted by Regulation DD.<sup>218</sup> By “narrowly constru[ing] the precise language of the federal law or regulation to determine whether a particular state law claim is preempted,”<sup>219</sup> the California state court slowed down its preemption analysis and conducted its own “independent construction of the plain and unambiguous language” of the regulation at stake and found that because the UCL claim essentially incorporated the TISA substantive rules, it was not preempted.<sup>220</sup> Unlike the Ninth Circuit in *E\*Trade*, the California court did not rule that the existence of another remedy meant the state cause of action should be preempted because of the complex field of regulation set forth in Regulation DD. The California court protected the interest of state ex post regulatory action through the use of the presumption against preemption.

Courts in Washington and Michigan have gone a step further and applied a “strong presumption” against preemption in the banking context.<sup>221</sup> For example, in *Konynenbelt v. Flagstar Bank*, the Michigan Court of Appeals relied on the presumption against preemption and similar canons of interpretation to limit the reach of express preemption under HOLA.<sup>222</sup> This case is instructive in its

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216. *Id.* at 667.

217. Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1916 (Jan. 13, 2004) (to be codified at 12 C.F.R. pt. 34).

218. *Smith*, 38 Cal. Rptr. 3d at 671.

219. *Id.* at 666.

220. *Id.* at 671.

221. See *Bell v. Muller*, 129 Wash. App. 177, 193 (Wash. Ct. App. 2005) (“Washington has a strong presumption against finding preemption. We will find preemption only if federal law clearly indicates a congressional intent to preempt state law or if there is a direct conflict between state and federal law that cannot be reconciled.”) (citing *Hisle v. Todd Pac. Shipyards Corp.*, 93 P.3d 108 (Wash. 2004) (discussing the presumption in the OCC preemption context)); *Konynenbelt v. Flagstar Bank*, 617 N.W.2d 706, 710 (Mich. Ct. App. 2000) (strong presumption exists in the HOLA/OTS context); see also *Pioneer First Fed. Sav. & Loan Ass’n v. Pioneer Nat'l Bank*, 659 P.2d 481, 484 (Wash. 1983) (presumption against preemption applies to state unfair competition laws and national banks) (“Moreover, although relevant, a detailed statutory scheme may reflect ‘the nature and complexity of the subject’ rather than an intent to preempt state law.” (quoting *De Canas v. Bica*, 424 U.S. 351, 359 (1976))).

222. *Konynenbelt*, 617 N.W. 2d at 712.

careful analysis and suspicion of agency preemption. There, plaintiffs argued that the defendant bank must, under Michigan state law, pay the state recording fee upon discharge of a mortgage obligation.<sup>223</sup> The defendant, on the other hand, argued that HOLA expressly or impliedly preempted these state law requirements. Specifically, the defendant argued that state law was preempted because OTS has broad authority to regulate all aspects of federal savings banks and issued a regulation preempting all state laws that “purport[ ] to address the subject of the operations of a Federal savings association.”<sup>224</sup> Relying on a California appellate case,<sup>225</sup> the Michigan court held for the plaintiffs, finding that the state statute was not preempted by federal regulation because the state law did not “address the subject of operations of a Federal savings association.”<sup>226</sup>

It is important to note that the OTS regulation is broad and vague enough that judges are left with wide berth to impose their substantive preferences in their preemption analyses. In contrast to the Ninth Circuit’s *E\*Trade* decision, which adopted agency field preemption claims without discussion, the Michigan Court of Appeals in *Flagstar* methodically addressed each preemption claim under a hard look review. The exacting review of the Michigan Court of Appeals may stem in part from the fact that in Michigan “there is a strong presumption against preemption of state law, and preemption will be found only where it is the clear and unequivocal intent of Congress.”<sup>227</sup> The Michigan court further required a clear statement from the agency demonstrating its intent to preempt the exact type of state law at issue, stating, “Preemption of state law by federal regulation is not favored. We will not find express preemption unless a regulation clearly so states.”<sup>228</sup> This type of “presumption against agency preemption” has not been articulated in federal courts, even though it has been advocated by scholars.<sup>229</sup> If anything, the Supreme Court has made clear that the same rules applying to agency preemption apply to congressional preemption, and

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223. *Id.* at 709.

224. *Id.* at 711; *see also* 12 C.F.R. § 545.2 (2010).

225. *Konynenbelt*, 617 N.W.2d at 711 (quoting *Siegel v. Am. Sav. & Loan Ass’n*, 258 Cal. Rptr. 746, 749–51 (Cal. Ct. App. 1989)).

226. 12 C.F.R. § 545.2; *see Konynenbelt*, 617 N.W.2d at 712.

227. *Konynenbelt*, 617 N.W.2d at 710.

228. *Id.* at 712.

229. *See* Mendelson, *supra* note 155, at 717.

that no additional hurdle exists for agencies above and beyond the standard presumption against preemption.<sup>230</sup>

To further illustrate the differences in approach between the Michigan state court and the Ninth Circuit, consider the fact that the Michigan court even examined the regulation at issue in *E\*Trade* and found that the saving clause in that case meant that there was no field preemption even though the title of the section of the regulation was “Occupation of field.”<sup>231</sup> The court concluded that the recording fee was merely “incidental” to the bank’s lending operation,<sup>232</sup> even though the cost of the fee could be passed on to the consumer in the form of higher rates or higher fees, meaning that the recording fee would have had an effect on lending.<sup>233</sup>

Other state courts have generally used similar approaches to those of California and Michigan detailed above. New Mexico, for example has done so in the Truth in Lending Act context.<sup>234</sup> Maryland has applied the presumption against preemption with the Depository Institutions Deregulation and Monetary Control Act of 1980.<sup>235</sup> Montana has applied it with respect to the National Bank Act’s employment discrimination clause.<sup>236</sup> Finally, the Supreme Court of Ohio has ruled that the presumption against preemption limits the reach of the “affects lending” ambiguous preemption clause of the OTS regulation.<sup>237</sup>

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230. *Hillsborough Cnty. v. Automated Med. Labs., Inc.* 471 U.S. 707, 715–16 (1985).

231. *Konynenbelt*, 617 N.W.2d at 713; 12 C.F.R. 560.2(a).

232. *Konynenbelt*, 617 N.W.2d at 713.

233. *But see id.* at 713 (accepting the trial court’s finding that the fee would not “affect interest rates and was not an up-front cost of the loan”).

234. *See Azar v. Prudential Ins. Co. of Am.*, 2003-NMCA-062, 133 N.M. 669, 68 P.3d 909 (N.M. 2003) (“Courts, however, apply a strong presumption against preemption, particularly in areas of law that are traditionally left to state regulation.” (citations omitted)).

235. *See Sweeney v. Sav. First Mortg., LLC*, 879 A.2d 1037, 1039, 1041–42 (Md. 2005).

236. *See Fenno v. Mountain W. Bank*, 2008 MT 267, 345 Mont. 161, 192 P.3d 224 (Mont. 2008). *But see Jefferson v. Chase Home Fin.*, No. C 06-6510 TEH, 2008 WL 1883484, at \*9 (N.D. Cal. Apr. 29, 2008) (holding that, in accordance with recent circuit court decisions, the presumption against preemption does not apply to national banks and employment discrimination).

237. *Pinchot v. Charter One Bank*, 99 Ohio St. 3d 390, 2003-Ohio-4122, 792 N.E.2d 1105, 1111 (Ohio 2003) (“Under the guideline, these interpretive devices do not come into play unless the court reaches the question of coverage under paragraph (c), that is, after a determination is made that ‘the law is not covered by paragraph (b)’ and that ‘the law affects lending.’” (citations omitted)).

*C. Other Considerations and Analysis*

At times, the presumption against preemption runs parallel to questions of agency deference. As discussed above in Part I.A<sup>238</sup> and Part III.C, it is an open question the amount of deference that should be granted to agency statements of preemption. The overlap between the presumption against preemption and agency deference is greatest in a regulation in which the OTS has stated in non-binding guidelines that all close calls in preemption cases “should be resolved in favor of preemption.”<sup>239</sup> It has thereby created a presumption of preemption by regulation. This statement, largely ignored by state courts,<sup>240</sup> has been followed in some federal courts.<sup>241</sup> As noted in subpart B, the Michigan court in *Konynenbelt v. Flagstar Bank* did not defer to OTS’s statement that it occupied the field in banking, although it did not undertake a traditional deference analysis. In contrast, the Ninth Circuit in *E\*Trade* accepted without analysis the OTS’s field preemption claim under the same statute. Similarly, in the Truth in Lending Act, which is administered by the Federal Reserve Board, New York’s highest court did not defer to the agency’s broad interpretation of the Act’s preemption clause. The court held that a presumption against preemption applied.<sup>242</sup> Although a full treatment of state court analysis of agency deference is outside the scope of this Note, it suffices to say that state courts are suspicious of the federal banking regulators, and state judges seem to give federal regulations a hard look review consistent with the presumption against preemption and its attendant clear statement rule.

Even after the Supreme Court’s non-rulings on the presumption,<sup>243</sup> federal courts have consistently denied its applicability in

238. See *supra* notes 27–32 and accompanying text.

239. Lending and Investment, 61 Fed. Reg. at 50,966–67 (explaining that 12 CFR § 560.2(c) is intended to be “interpreted narrowly” and that any doubt about whether a state law shall be preempted by the federal regulation “should be resolved in favor of preemption”).

240. A notable exception is *Pinchot*, 99 Ohio St. 3d at 394–95, 2003-Ohio-4122, 792 N.E.2d at 1110 (“While the OTS guidelines are ‘not [to be] treated in the same manner as binding regulations’ . . . we find no inconsistency between this guideline and the regulation.” (citations omitted)) (holding that the non-binding guidelines reverse the presumption against preemption).

241. See, e.g., *State Farm Bank v. Reardon*, 539 F.3d 336, 348 (6th Cir. 2008).

242. See *People v. Applied Card Sys., Inc.*, 894 N.E.2d 1 (N.Y. 2008); see also *infra* note 255 and accompanying text (discussing the *Applied Card* case).

243. See *supra* Part I.A.

the banking context.<sup>244</sup> This divergence is curious, given *Wyeth*'s statement, though arguably dicta, that “[t]he presumption thus accounts for the historic presence of state law but does not rely on the absence of federal regulation,” which would appear to leave the door open for the presumption, even in cases in which there is a history of a federal regulatory presence in the industry.<sup>245</sup> The California state court cases, though decided prior to *Wyeth*, have used a similar rationale to hold that the presumption against preemption exists in the banking context, arguing that banking, consumer protection, and insurance are all within the ambit of historical state powers, even if the federal government has regulated in the area.<sup>246</sup> Even in the wake of circuit court decisions to the contrary, state courts, in the post-*Watters* era, have continued to find that the presumption exists.<sup>247</sup>

Although the amount of work done by the presumption against preemption is debatable, surely the force and regularity of the invocation of the presumption by state courts, and its countervailing rejection by federal courts, signifies the underlying resistance held by state court judges toward banking preemption.<sup>248</sup>

#### IV. EXPLANATIONS FOR THE DIFFERENCES BETWEEN COURTS

Little research has been done on the role state courts play in the interpretation of federal statutes, although it appears to be a

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244. See, e.g., *Tombers v. F.D.I.C.*, No. 08 Civ. 5068(NRB), 2009 WL 3170298 (S.D.N.Y. Sep. 30, 2009); *State Farm Bank v. District of Columbia*, 640 F. Supp. 2d 17 (D.D.C. 2009).

245. *Wyeth v. Levine*, 129 S. Ct. 1187, 1195 n.3 (2009).

246. See *Gibson v. World Sav. & Loan Ass'n*, 128 Cal. Rptr. 2d 19, 26 (Cal. Ct. App. 2002) (“The states’ historic police powers include the regulation of consumer protection in general and of the banking and insurance industries in particular.” (citations omitted)); *Black v. Fin. Freedom Senior Funding*, 112 Cal. Rptr. 2d 445, 452–53 (Cal. Ct. App. 2001) (“Laws concerning consumer protection, including laws prohibiting false advertising and unfair business practices, are included within the states’ police power, and are thus subject to this heightened presumption against preemption.”) (citing *California v. ARC Am. Corp.* 490 U.S. 93, 101 (1989) (unfair business practices); *Smiley v. Citibank*, 900 P.2d 690 (Cal. 1995) (consumer protection), *aff'd*, 517 U.S. 735 (1996)).

247. See, e.g., *Applied Card Sys., Inc.*, 894 N.E.2d at 5; *Liceaga v. Debt Recovery Solutions, LLC*, 86 Cal. Rptr. 3d 876, 879 (Cal. Ct. App. 2008).

248. See *Sharkey*, *supra* note 18, at 1045 (“While, as of yet, no stark outcome-based distinction between state and federal courts has emerged, there is . . . a discernible difference in flavor in the character of the opinions, which relates to the priority accorded to the FDA’s views.”).

topic of increasing interest. Recently, Abbe Gluck contributed a defense of “modified textualism” as performed by state courts, explaining that state courts are functioning as laboratories of innovation in textualist methodology.<sup>249</sup> Anthony Bellia pointed to the history of state court interpretation of federal statutes as evidence for the “faithful agent” theory of statutory interpretation, under which state courts “appear to have uniformly understood their role in interpreting federal statutes to be to abide by the directives of Congress, as best they could discern them.”<sup>250</sup> The study of state court interpretations of preemption clauses can contribute to this fertile and underdeveloped field by exploring the role state courts play when judges are forced to balance their fidelity to congressional text and agency determinations with the importance of the traditional regulatory autonomy of states. When a state court finds preemption, it diminishes the role the state can play in the regulatory field.

Given the persistent and varied differences between state courts and federal courts in their approaches to analyzing statutory interpretation, I have two explanations for the apparent divergence. First, I offer a theoretical explanation focusing on the unique history of state court judges as common law judges and therefore as policymakers. Second, I provide something more akin to a public choice theory explanation for why state courts take a different approach to statutory interpretation: they are frequently elected and, more often than not, supported by the plaintiff bar.

Finally, I conclude that, to make sense of the state courts’ approach to preemption clauses, we need to consider state courts as independent institutional actors in the same way that we analyze Congress, state legislatures to, and state and federal agencies for their particular contributions and competencies in the federal scheme. There may be, particularly in the preemption area—precisely where federalism values are at stake—instances in which state court judges are the institutional actors best poised to defend states’ rights. Therefore, state judges provide a valuable check to federalization pressures from Congress, the agencies, and the federal courts. Furthermore, the lack of other competent defenders of state regulatory autonomy—particularly when that regulatory authority arises out of state common law or other state law unenforced by a state regulatory body—may leave state judges as the institutional actor most sympathetic to the value of state common

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249. Abbe R. Gluck, *Consensus Textualism: State as Laboratories of Statutory Interpretation*, 119 YALE L.J. 1750 (2010).

250. Bellia, *supra* note 2, at 1507.

law as a regulatory device. Because of this affinity, it is not surprising that state court judges embrace the presumption against pre-emption more often and in stronger terms than their federal counterparts.

*A. Common Law, State Courts, and the Equity of the Statute*

A number of explanations have emerged to explain the differences in state court and federal court statutory interpretation. One rationale is that state courts sit at a distance from Supreme Court commands and are relatively insulated because of the rarity of the Supreme Court granting certiorari—the main way that state cases are reviewed by a federal court. This does not have as much explanatory power in the banking sphere because the Court has not ruled on whether the presumption applies.<sup>251</sup> Nevertheless, the distance argument may explain some state court insulation from the *Chevron* deference regime that dominates the circuits. While deference does not always yield preemption, it frequently does.<sup>252</sup>

At a deeper level, one reason for state court recalcitrance regarding preemption doctrine may be that state court judges, as judges who frequently sit in common law, are closer in function to policymakers and are therefore less prone to deference than federal judges. Furthermore, Professor Hershkoff notes that, because state constitutions contain less rigorous provisions regarding separation of powers, state courts have a “willingness to cross the borders that separate the coordinate powers in the federal system.”<sup>253</sup> This suggests a fundamental difference as to the roles of state and federal judges.<sup>254</sup>

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251. See *supra* Part I.A.

252. See William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441 (2008).

253. Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1890 (2001).

254. See Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 982–83 (2000) (asserting that “state judges—especially those sitting on the highest courts—do frankly generative work in law development, resulting in at least anecdotal accounts by individuals who have held both state and federal judicial positions that they often had more power and more interesting work when they were on the state bench”).

It has also been noted that the obstacle preemption analysis bears some resemblance to common-law, balance-of-the-equities determinations. See Daniel J. Meltzer, *The Supreme Court’s Judicial Passivity*, 2002 SUP. CT. REV. 343, 376–90 (“[T]he Justices, when they recognize the importance of a particular federal objective, are alert to the need to assume a more common-law like role to ensure that the objective is not threatened and to harmonize a complex body of federal and state law.”).

As a general matter, it may be that state judges see the negative effects of rampant preemption doctrine and are inclined to inject policy grounds into their decisions, even if not intentionally. Indeed, the dissent in a recent Truth in Lending Act case in New York's Court of Appeals leveled an accusation against the majority alleging that the majority is concerned with protecting state regulatory turf and is twisting the language of the statute—even though the majority's decision makes sense on policy grounds.<sup>255</sup>

State court judges often have experience in the legislative branch, which may increase their affection for policy rationales.<sup>256</sup> Because election is a prerequisite in many states for sitting on the bench, many judges are former legislators accustomed to the demands of campaigning. While this feature of American exceptionalism certainly carries some significant negatives that have been detailed in academic literature,<sup>257</sup> some of the benefits perhaps have not been as loudly trumpeted—including the value of judges

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The differences in attitudes toward common law and policymaking is related to the longstanding debate about judicial discretion in interpretation of state law and the merits of judicial passivity. Judge Calabresi, in the former camp, has offered a particularly muscular view of the role of judges, arguing that state courts should be able to effectively overrule old federal statutes using state court judges' common law powers. *See generally* Guido Calabresi, *A COMMON LAW FOR THE AGE OF STATUTES* (1982). He adds that judges should use their powers of interpretation expansively to deal with statutes that do not adequately address anachronistic laws. *Id.* at 31–41. Similarly, Justice Cardozo thought “judges had an obligation to integrate administrative expertise and social development into common law.” Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IOWA L. REV. 545, 553 (2007); *see also* Hershkoff, *supra* note 257, at 1835–37 (citing the inapplicability of Article III’s justiciability restraints on state courts as reason for significant differences in practices between state courts and federal courts, including increased policymaking by the former).

255. *See* People v. Applied Card Sys., Inc., 894 N.E.2d 1, 23 (N.Y. 2008) (Read, J., dissenting) (“The majority’s desire to maximize our State’s regulatory reach in the area of consumer protection is unsurprising. And the Board has arguably been slow to appreciate the value to consumers of at least certain of the specific disclosures at issue in this case. But state pride and good intentions are not enough to justify this lawsuit.” (citations omitted)); *see also* *supra* note 258 and accompanying text.

256. *See, e.g.*, Hershkoff, *supra* note 253, at 1902 (“[State judges] frequently have had legislative experience, participate to some degree in the lawmaking process, and in some states, stand for election.”); Hans A. Linde, *The State and the Federal Courts in Governance: Vive La Différence!*, 46 WM. & MARY L. REV. 1273, 1286 (2005) (“Elective state courts are, however, more likely to have some members with prior legislative experience than the Supreme Court . . . . In the smaller state capitals, if not in California or New York, judges and legislators are more likely to meet informally as well as in official collaborations on law reforms.”).

257. Hershkoff, *supra* note 253, at 1891–92.

who are more intimately familiar with policy and the state policymaking process. Because of their personal experience with political horse-trading, for example, state court judges might be less willing to interpret a congressional statute as being read as broadly remedial—and therefore as broadly preemptive—as a federal court judge may. Furthermore, these judges may view state regulatory interests more favorably than their federal counterparts; after all, state judges spent their previous legislative careers working with state regulatory agencies, presumably with a belief in the importance of state regulation and a belief that these state agencies can do their work competently.

#### *B. State Judges as Representatives for State Interests or Just Captured?*

Professor Sharkey has argued that the reason that state judges have an affinity for state law in the products liability context cannot simply be that judges are protecting their turf.<sup>258</sup> There are some significant differences between the fields of banking and products liability,<sup>259</sup> such as the inapplicability of a regulatory compliance defense and the presence of a state regulatory body. Yet there are enough similarities to cause us to question why state judges may be partial to state law, whether originating from state regulatory authority or from state common law.<sup>260</sup>

One possible explanation is that there simply are no other actors as well poised to promote state interests as state court judges. Recall from Part II.D that there is a significant underrepresentation of state regulatory interests, particularly *ex post* regulatory power. To put it somewhat hyperbolically, state judges may be an institutional presumption against preemption. Even if we are troubled from a constitutional and equality-of-forum-selection perspective, state judges, particularly in the case of state common law, are the only institutional actor with an interest in protecting this unique *ex post* source of regulation. The differences in deployment of the presumption against preemption explored in Part III may simply be explained by noting that no one else can effectively advocate for the values that state court judges appear to be protecting in banking law preemption cases.

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258. See Sharkey, *supra* note 18, at 1017–18.

259. See *supra* Part I.A.

260. I am not espousing a view so strong as to suggest that state court judges are consciously putting a thumb on the scale for state regulatory interests. I believe this effect, to the extent it occurs, is due to the institutional features of state courts and their situation within the broader governmental framework.

One difficulty in demonstrating state judicial affinity for state common law, independent of outcomes, is the fact that plaintiff bars have considerable influence at the state court level.<sup>261</sup> Business interests, although still powerful at the state level, are less so when measured relative to their power over consumer groups at the federal level.<sup>262</sup> Neither is the federal judicial selection process entirely clean.<sup>263</sup> But the clear link between campaign contributions and the outcome of state judicial proceedings can scarcely be understated. A recent article by Professor Joanna Shepherd highlights this significant connection, suggesting that both retention strategy for currently elected judges and the desire to seek campaign contributions affect judges' decisions.<sup>264</sup> Shepherd notes, "[c]ontributions from lawyers' groups, whose members are mainly plaintiffs' lawyers, are associated with reductions in the probability that judges will vote for those same litigants that are typically defendants."<sup>265</sup> Meanwhile, "[c]ontributions from pro-business groups are associated with increases in the probability that a judge will vote for the business litigant in a business-versus-individual case, in a products liability case, and in tort cases generally."<sup>266</sup> The amount of the donation, therefore, increases the likelihood of an positive outcome for the litigant who has made a donation.<sup>267</sup>

Relevantly, judges are elected in many of the states whose cases are detailed above in Part III.B. For example, Washington and Ore-

261. See Anthony Champagne, *Tort Reform and Judicial Selection*, 38 Loy. L.A. L. Rev. 1483, 1484–86 (2005).

262. Of course, *Caperton* is a counterexample. See *Caperton v. A. T. Massey Coal Co.*, 129 S. Ct. 2252 (2009). A meaningful distinction can be made between cases in which a business is a party at suit and therefore has a direct interest in the outcome and cases that only indirectly affect businesses. This distinction makes sense because even if Bank *A* is party to a suit that would also impact Bank *B*'s ability to avoid state predatory lending laws, Bank *B* has countervailing incentives, as whatever is bad for Bank *A* is good for Bank *B*, although the effect of the decision would also be industry-wide. Note this is similar to the model of state action in a federalism system viewed from the public choice theory.

263. See Jonathan Remy Nash, *Prejudging Judges*, 106 COLUM. L. REV. 2168 (2006); Richard B. Saphire & Paul Moke, *The Ideologies of Judicial Selection: Empiricism and the Transformation of the Judicial Selection Debate*, 39 U. TOL. L. REV. 551 (2008).

264. Joanna Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 629 (2009).

265. *Id.* at 630.

266. *Id.* at 629.

267. See *id.* at 670 ("The results show that the impact of large contributions can be important. For example, a \$100,000 contribution would increase the average probability that a judge would vote for a business in a products liability case by 69 percent.").

gon have non-partisan elections for judges, whereas California has a retention election after appointment.<sup>268</sup> The fact that California has a retention election system lead to the conclusion that these elections are necessarily less combative or expensive than directly partisan judicial elections. In 1998 nearly \$11 million was spent in contested judicial retention elections of just three members of the California Supreme Court.<sup>269</sup> In any case, the description of a judicial election of any type as “sleepy” is outdated: “As scores upon scores of commentators have observed—and, almost to a person, lamented—we are in a new era of judicial elections. Contributions have skyrocketed; interest groups, political parties, and mass media advertising play an increasingly prominent role; incumbents are facing stiffer competition; [and] salience is at an all-time high.”<sup>270</sup>

State judges, while open to accusations of favoritism to those who contribute to their campaigns, also benefit from the fact that they have more democratic legitimacy than their federal counterparts. While the role of judges as a countermajoritarian force has been emphasized in the literature,<sup>271</sup> scholars less frequently note that the “[t]he countermajoritarian objection . . . lacks salience in the state court context, in which many judges are elected, enjoy broad common law lawmaking powers, and are subject to popular revision, reversal, and recall.”<sup>272</sup> However, it may simply be a happy coincidence that state judges in the banking context are often both democratically elected and a countermajoritarian force with respect to an industry-captured federal government.<sup>273</sup> To be sure, whatever balance elected state judges provide to federal capture, the decisions reached by state judges are deficient in legitimacy

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268. American Bar Ass’n, Fact Sheet on Judicial Selection Methods in the States, [http://www.americanbar.org/content/dam/aba/migrated/leadership/fact\\_sheet.pdf](http://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.pdf).

269. Erwin Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution*, 74 CHI.-KENT L. REV. 133, 136 (1998) (citing American Bar Ass’n, Report and Recommendations of the Task Force on Lawyers’ Political Contributions at 6 (1998)).

270. David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 267–68 (2008) (citations omitted).

271. See, e.g., ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16–23 (2d ed. 1986); Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995).

272. Hershkoff, *supra* note 253, at 1918.

273. See *supra* Part II (analyzing the extent of agency capture in the banking industry) and Part III (finding that state court judges embrace the presumption against preemption more often and in stronger terms than federal judges).

from the perspective of blind justice.<sup>274</sup> In any case, it is not necessarily likely that the special interests with influence at the federal level will be frequently different from those with influence at the state level.<sup>275</sup>

An important item for future study would be a comparison of state law preemption outcomes in states with judicial elections and those without. This would have the salutary effect of distinguishing to what degree state judge affinity for common law is due to the realities of judicial campaigning as opposed to an institutional difference between state and federal judges.

If we acknowledge the significant differences in institutional pressures of state court judges compared with federal judges, such as elections, we should not be surprised to see that state courts are pursuing statutory interpretation differently than federal courts. From a purely policy perspective, California state court judges got it right—they applied a presumption against preemption in the banking context and gave rigorous scrutiny to the federal agency's broad preemption claims.<sup>276</sup> From an institutional competence perspective, state judges may be the only actor with significant power that can stand up for the unique regulatory interests of states.<sup>277</sup>

The broader implication of the foregoing analysis is that scholars should pay more attention to how the influences specific to state courts contribute to their unique mode of statutory interpretation, beyond measuring differences in outcomes. At least in the area of preemption of state banking law, state courts approach the matter of statutory interpretation differently from their federal counterparts. For the vast majority of litigants who find themselves in state court, a richer understanding of these differences, instead of an assumption of parity, will make more apparent the normative and policy consequences of a state judiciary hostile to federal regulatory overreaching.

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274. See David Barnhizer, "*On the Make*": Campaign Funding and the Corrupting of the American Judiciary, 50 Cath. U. L. Rev. 361, 371 (2001).

275. See *supra* Part III. Although it is worth noting that state court judges tend to favor in-state parties over out-of-state parties, see Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157, 186 (1999), out-of-state status may be a decent proxy for federal political influence, assuming that the in-state party is frequently the plaintiff.

276. See *supra* Part III.

277. That is, state judges perhaps defend state regulatory interests apart from merely supporting pro-plaintiff outcomes—even if the two happily coincided in the banking preemption context.

V.  
THE EFFECTS OF DODD-FRANK & THE FUTURE OF  
BANKING PREEMPTION

The perceived differences between state and federal courts may have an impact on venue selection and certainly add pressure to some of the mechanisms of “partial federalization” of state law claims.<sup>278</sup> One avenue that is increasingly being tested is removal of suit from state court to federal court on federal question grounds.<sup>279</sup> The Supreme Court has held that a federal defense, such as preemption, is not enough to grant removal to a federal forum.<sup>280</sup> However, if there is complete preemption of an area of law such that the federal law gives the exclusive cause of action, then the claim actually arises under federal law for purposes of removal.<sup>281</sup> The Court has expanded this doctrine into a few carefully conscribed areas, such as ERISA state-enforcement claims.<sup>282</sup> More relevantly, the Court has held that state-law usury claims against national banks are completely preempted and are therefore removable to federal court.<sup>283</sup> Yet a circuit split has developed over whether the same holds true to state-chartered banks and state-law usury claims under the Depository Institutions Deregulation and Monetary Control Act.<sup>284</sup> The results of complete preemption are twofold. In addition to the federalization of venue, there may be a corresponding federalization and homogenization of substantive usury law in the state-chartered bank context, as the salient differ-

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278. See Issacharoff & Sharkey, *supra* note 151.

279. See 28 U.S.C. § 1441 (2006) (removal is eligible for actions “arising under the Constitution, laws, or treaties of the United States.”).

280. See *Tennessee v. Union & Planters’ Bank*, 152 U.S. 454, 461–63 (1894).

281. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003) (“When the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law.”).

282. See *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 209 (2004) (“Thus, the ERISA civil enforcement mechanism is one of those provisions with such extraordinary pre-emptive power that it converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.” (citations and internal quotation marks omitted)).

283. See *Beneficial Nat'l Bank* 539 U.S. at 11 (“Because §§ 85 and 86 provide the exclusive cause of action for such claims, there is, in short, no such thing as a state-law claim of usury against a national bank.”).

284. Compare *Thomas v. U.S. Bank Nat'l Ass'n*, 575 F.3d 794, 797 (8th Cir. 2009) (holding there is not complete preemption of state-law usury claims against state-chartered banks), with *Discover Bank v. Vaden*, 489 F.3d 594 (4th Cir. 2007) (holding that there is complete preemption of state-law usury claims against state-chartered banks), *rev'd on other grounds*, 129 S. Ct. 1262 (2009).

ences in preemption analyses between state and federal courts would be swept under the rug.

More recently, the Dodd-Frank Wall Street Reform and Consumer Protection Act, passed in 2010 in response to the financial crisis, sets forth a new standard for agency preemption determinations.<sup>285</sup> While the underlying standard from *Barnett Bank* remains in place,<sup>286</sup> the statute declares that courts must make a case-by-case determination as to whether a state's substantive law should be preempted, thereby overturning the broad field preemption standard from the OCC's 2004 regulation.<sup>287</sup> All future preemptive regulations will have to be reviewed under a *Skidmore* standard by reviewing courts,<sup>288</sup> suggesting congressional skepticism of the OCC's methods. This is particularly interesting given that Dodd-Frank makes the OCC an independent agency,<sup>289</sup> meaning it will no longer be subject to EO 13,132, the federalism executive order discussed above;<sup>290</sup> therefore, consultation with state interests is no longer required.<sup>291</sup> Although one might expect independence from the executive would go hand in hand with increased judicial deference due because there would be less political interference with technocratic decisionmaking,<sup>292</sup> Congress appears to have determined otherwise. Perhaps this is due in part to the fact that the independent OCC is no longer required to take state views into consideration when promulgating regulations with preemptive force.

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285. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1044, 124 Stat. 1376, 2014–17 (2010) (to be codified at 12 U.S.C. § 25b).

286. Dodd-Frank Act, §1044(a) (modifying 12 U.S.C. § 5136C(c)). Furthermore, banks can no longer rely on the National Bank Act or HOLA to shield subsidiaries, affiliates, and agents from state regulation. *Id.*; see also *Barnett Bank v. Nelson*, 517 U.S. 25, 32–33 (1996) (preempting a state law that “prevent[s] or significantly interfere[s] with the national bank’s exercise of its power”).

287. See Dodd-Frank Act, § 1044(a) (modifying 12 U.S.C. § 5136C(c)).

288. *Id.*

289. *Id.* § 314 (modifying 12 U.S.C. 1).

290. See *supra* Part II.B.4.

291. Exec. Order No. 13,132 § 1(c), 64 Fed. Reg. at 43,255 (describing scope of term “agencies”).

292. See Randolph May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 ADMIN. L. REV. 429 (2006) (arguing that independence is a reason for increased deference). Note that this view is in tension with the original rationale for *Chevron*, namely, that agencies are more accountable to voters than judges are. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 865–66 (1984).

Most pertinent, however, is the fact that courts will be forced to engage in case-by-case, detailed statutory interpretation. Thus, the presumption against preemption may end up playing a larger role in banking preemption cases post-Dodd-Frank Act. Additionally, any other differences between state court and federal court statutory interpretation will become magnified in the banking sector.

Another area of federalization pressure may come from OIRA and the EO 13,132 process. As federal agencies respond to President Obama's May 2009 Presidential Memorandum on Preemption,<sup>293</sup> it may be that state viewpoints will be considered more thoroughly in federal regulation. This could have the potential consequence that more state laws will be preempted.<sup>294</sup> As state views become incorporated into federal regulation, there will be less need for the state regulations themselves. Professor Sharkey's recommendations would have the effect of increasing the frequency of state-federal consultation, and likely increase judicial rates of deference to the federal agency, because judges would be more confident that the agency preemption statement would be a thoroughly considered regulation and not an end-run around state interests. One might also expect a decreasing reliance on the presumption against preemption to be concurrent with a future higher rate of deference as federal agencies account for state regulatory views. Granted, this view of federalization leaves out the state regulatory interest in state common law and ex post regulation through common law suits. One possible answer would be to increase the use of proxy advocates in EO 13,132 consultations with an OIRA-situated common law expert who can provide input to agencies on EO 13,132 statements about the effect on state common law a given regulation would have.<sup>295</sup> This would give the otherwise unrepresented common law, state ex post regulatory interest a voice in the federal regulatory debate.

## CONCLUSION

Significant differences between state and federal courts exist in the application of the presumption against preemption in the banking context. State court judges appear reluctant to put a thumb on

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293. Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 24,693, 24,693–94 (May 20, 2009).

294. See *supra* Part II.B.4.

295. For more on state proxy advocates in federal proceedings, see Darryl Stein, Note, *Perilous Proxies: Issues of Scale for Consumer Representation in Agency Proceedings*, 67 N.Y.U. ANN. SURV. AM. L. (forthcoming 2012).

the scale for the federal government.<sup>296</sup> They may also be more amenable to policy arguments. Furthermore, state judges' experience with judge-made common law and their distance from the Supreme Court may give them the latitude needed to preserve state laws. These differences may affect the way future litigants approach their choice of forum.

The study of state courts' interpretations of preemption clauses can contribute to the rich and largely unexplored field of their interpretations of federal statutes more generally. In preemption cases, judges are implicitly forced to balance their fidelity to congressional text and federal regulations against principles of federalism—most importantly state regulatory autonomy. The ways in which state court judges reconcile these often opposing forces will shed light on the ways in which, and reasons why, state judges perform statutory interpretation differently than federal court judges. In order to make sense of the state courts' approaches to preemptive clauses, we need to consider state courts as a separate institutional actor in the same way that Congress, state legislatures, and federal and state agencies are analyzed for their contributions to the federal scheme of regulation and the development of legal meaning. There may be, particularly in the preemption area where federalism values are most at stake, instances in which state judges are the only institutional actors poised to defend states' rights. State judges therefore provide a valuable check to pressures in Congress, the agencies, and the federal courts to federalize ever-greater swaths of state authority. Consequently, it is unsurprising that state judges adopt the presumption against preemption, which serves to protect state regulatory autonomy.

While the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act has reshaped the regulatory environment, preemption battles will likely take on elevated importance in the years to come. Notably, the Act rolls back the overbroad preemption claims by the OCC and establishes case-by-case analysis as the standard for preemption determinations, with obstacle preemption as its core. Although the Act phases out the Office of Thrift

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296. It is difficult to measure the strength of the presumption in either the state or federal context; however, the frequency of deployment and the strong language with which it is deployed, combined with the difference in outcomes, particularly in the Ninth Circuit and the west coast state courts, suggests this difference does exist. *See supra* Part III. One explanation for this difference, explored *supra* Part III, is that state judges are protecting state law because other actors are not well situated to compete with pro-preemption industry forces at the federal level.

Supervision, incentives to compete for regulatory clients will continue. In the post Dodd-Frank Act era, the differences between state and federal court statutory interpretation in the banking context will be magnified, creating a need for more scholarly attention to the other ways in which state and federal judges differ in their approaches to statutory interpretation. Given the Dodd-Frank rollbacks, the presumption will be utilized by state judges more often until they are satisfied that federalization pressures have thoroughly incorporated states' views in their preemption statements. Because of a lack of a voice for state common law at the federal level, we should expect the state judiciary—a unique institutional actor in the federal regulatory scheme—to raise the presumption against preemption for some time.