William & Mary Law Review

Volume 61 (2019-2020)
Issue 5

Article 5

4-2020

Modernizing the Bank Charter

David Zaring

MODERNIZING THE BANK CHARTER

DAVID ZARING*

ABSTRACT

The banking charter—the license a bank needs to obtain before it can open—has become the centerpiece of an argument about what finance should do for the rest of the economy, both in academia and at the banking agencies. Some advocates have proposed using the charter to pursue industrial policy or to end shadow banking. Some regulators have proposed giving financial technology firms bank charters, potentially breaking down the traditionally high walls between banking and commerce. An empirical survey of chartering decisions by the Office of the Comptroller of the Currency suggests that chartering is best understood as an ultracautious licensing regime for "fit and proper" applicants. It would not and probably should not be easily adapted to realize the policies the advocates propose, or to mix banking with big business. The modern charter should be paired with more transparent administration by agencies and more standard review by courts. These policies could appropriately be paired with the careful and narrow fintech chartering program that regulators have created.

* Associate Professor, The Wharton School. Thanks to Thomas Curry, Brian Feinstein, Anna Gelpern, Jeremy Kress, Ron Levin, Sarah Light, Saule Omarova, Veronica Root, Andrew Tuch, Adam White, and participants at presentations at the ALSB Annual Meeting, George Mason University, Villanova University, Washington University, and The Wharton School.

TABLE OF CONTENTS

INTRODUCTION

One of the consequences of the 2007-2008 financial crisis was that it became all but impossible to start a new bank in the United States, although this policy was never publicly articulated by anyone. To found a bank, you must obtain deposit insurance and a bank charter, both of which require approval by the government.[1] However, stung by the number of relatively young banks that failed during the crisis, the Federal Deposit Insurance Corporation (FDIC) stopped giving out deposit insurance and the Office of the Comptroller of the Currency (OCC), the main federal regulator that charters banks, did not formally respond to any charter application for years.[2]

The prohibition against start-up banking could not last forever, and—again, without notice—recently, the FDIC has grudgingly started to do something about granting deposit insurance to newly chartered banks, or at least say something about the subject.[3] The OCC has cautiously moved towards granting new charters for banks, and even for some technology firms that are not banks.[4] The Chair of the FDIC said in a speech that a "priority of mine is encouraging *de novo* bank formation;"[5] in all, this led to fifteen approvals for new banks in 2018 and nine more in 2019.[6]

---

1. *How Can I Start a Bank?*, BD. OF GOVERNORS OF THE FED. RES. SYS., https://www.federalreserve.gov/faqs/banking_12779.htm [https://perma.cc/HA9K-F2BW].

2. While more than 800 commercial banks vanished between 2007 and 2013, "[t]he OCC granted only six bank charters in that period," and between then and 2017, only three more. The FDIC granted "even fewer deposit insurance applications." MICHAEL S. BARR ET AL., FINANCIAL REGULATION: LAW AND POLICY 168 (2d ed. 2018).

3. The current chair of the FDIC, Jelena McWilliams, told the Senate Banking Committee that "[i]n order for us to replenish the ranks of the specialty community banks, we need to encourage de novo application[s]." Rachel Witkowski, *Floodgates Open? De Novo Applications Surge at FDIC*, AM. BANKER (Oct. 3, 2018, 4:34 PM), https://www.americanbanker.com/news/floodgates-open-de-novo-applications-surge-at-fdic [https://perma.cc/UCM4-4B7B].

4. *See infra* notes 234-36 and accompanying text (reviewing the press conference held by the Comptroller of the Currency upon the grant of the OCC's first charter in years in 2017).

5. Jelena McWilliams, Chairman, Fed. Deposit Ins. Corp., Florida Bankers Association Leadership Dinner: Banking on the American Dream (Jan. 31, 2019), https://www.fdic.gov/news/news/speeches/spjan3119.html [https://perma.cc/7CUT-6K85].

6. Dan Ennis, *De Novo Activity Fell in 2019 Despite FDIC Plea*, BANKING DIVE (Jan. 3, 2020) https://www.bankingdive.com/news/de-novo-activity-fell-2019-fdic/569775/ [https://

The apparent end of the no-charter era calls for a reassessment. How should the government use its charter-granting powers, now that it has apparently decided that new banks are permitted? Academics and regulators have come to entirely different views. A number of banking law scholars have argued that the charter should be given out parsimoniously and in exchange for a commitment by new banks (and old ones for that matter) to various public goals.[7]

The OCC has taken the opposite view. Rather than using the charter to narrow and direct the banking industry, it has announced that defining "that which we call a bank"[8] should be broadened to make room for financial technology (or "fintech") companies as well as regular, brick-and-mortar banks.[9] That means, as the Obama White House put it, companies making use of a "wide spectrum of technological innovations which impact a broad range of financial activities, including payments, investment management, capital raising, deposits and lending, insurance, regulatory compliance, and other activities in the financial services space," might also be able to obtain a banking license.[10]

Unlike other corporations, which are entitled to a corporate charter essentially on demand, bank charters have always been

---

perma.cc/2M7A-R5CQ].

7. *See infra* Part III.B.

8. The quote is from an article by a leading banking scholar and a high-profile financial institutions lawyer. *See generally* Saule T. Omarova & Margaret E. Tahyar, *That Which We Call a Bank: Revisiting the History of Bank Holding Company Regulation in the United States*, 31 REV. BANKING & FIN. L. 31 (2011) (coining the phrase "that which we call a bank").

9. *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, SUPPORTING RESPONSIBLE INNOVATION IN THE FEDERAL BANKING SYSTEM: AN OCC PERSPECTIVE 2 (Mar. 2016), http://consumerbankers.com/sites/default/files/OCC%20whitepaper%20fin%20inno%282%29.pdf [https://perma.cc/A2GS-SM34].

10. NAT'L ECON. COUNCIL, A FRAMEWORK FOR FINTECH 2 (Jan. 2017), https://obamawhitehouse.archives.gov/sites/obamawhitehouse.archives.gov/files/documents/A%20Framework%20for%20FinTech%20_FINAL.pdf [https://perma.cc/8Q3E-N46D] (defining fintech as a "wide spectrum of technological innovations which impact a broad range of financial activities, including payments, investment management, capital raising, deposits and lending, insurance, regulatory compliance, and other activities in the financial services space"). The OCC has merely defined fintech firms as those engaged with "financial technology." *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 9, at 4. For a discussion, see William Magnuson, *Regulating Fintech*, 71 VAND. L. REV. 1167, 1173 (2018) ("Despite this explosion in the size and importance of fintech, the industry itself is surprisingly ill defined.").

difficult to obtain.[11] While corporate charters today permit corporations to operate for "any lawful purpose,"[12] bank charters are only available for companies engaged in the "business of banking"[13]—to the OCC that means taking deposits, making loans, or offering checking services—and only after considering the "convenience and needs of the community to be served."[14] Those are only the start of the requirements. To even apply for a charter, as Bob Hockett and Saule Omarova have explained, "[b]ank organizers are required to submit detailed financial information, business plans, and performance projections in order to convince chartering authorities of their ability to provide banking services in a safe and sound manner."[15]

This involved application process presents a challenge for anyone hoping to start up a "normal" bank. The OCC has occasionally experimented with the chartering of "special" banks—banks that perform some, but not all, of the functions of a normal bank.[16] These banks might hold money in trust, but not make loans or issue credit cards.[17]

On July 31, 2018, the OCC began accepting applications for its newest proposal for a special bank—the fintech charter.[18] Joseph

11. *See* Peter C. Carstensen, *Restricting the Power to Promote Competition in Banking: A Foolish Consistency Among the Circuits*, 1983 DUKE L.J. 580, 608 (discussing the policy implications of charter approval, including that "in the broader social view, the decision whether to have one hundred or one thousand decisionmakers controlling access to credit seems important").

12. *What Are Articles of Incorporation?*, HARBOR COMPLIANCE, https://harborcompliance.com/information/what-are-articles-of-incorporation [https://perma.cc/66RB-FS8J].

13. The OCC's rules may be found at 12 C.F.R. § 5.20 (2019).

14. 12 U.S.C. § 1816 (2018).

15. Robert C. Hockett & Saule T. Omarova, *"Special," Vestigial, or Visionary? What Bank Regulation Tells Us About the Corporation—and Vice Versa*, 39 SEATTLE U. L. REV. 453, 474-75 (2016). For a government explanation of the requirements, see *supra* note 1; *see also* Anna Gelpern & Erik F. Gerding, *Inside Safe Assets,* 33 YALE J. ON REG. 363, 394 (2016) ("[A] firm cannot simply call itself a bank and start selling demand liabilities to the public.").

16. *See infra* Part V.C.

17. *See infra* Part V.C. So far, the largest credit card networks have required banks to obtain deposit insurance to participate in the network. *See* Andrew Kahr, *Why Allow Only Banks to Issue Credit Cards?,* AM. BANKER (Aug. 22, 2012, 11:26 AM), https://www.americanbanker.com/opinion/why-allow-only-banks-to-issue-credit-cards [https://perma.cc/9N9L-TF4R].

18. On that day, the OCC issued a supplement to its licensing manual that "provides detail on how the OCC would evaluate applications for a special purpose national bank charter from fintech companies." OFFICE OF THE COMPTROLLER OF THE CURRENCY, LICENSING MANUAL SUPPLEMENT: CONSIDERING CHARTER APPLICATIONS FROM FINANCIAL TECHNOLOGY

Otting, the head of the Agency, said that "[t]he decision to consider applications for special purpose national bank charters from innovative companies helps provide more choices to consumers and businesses, and creates greater opportunity for companies that want to provide banking services in America."[19] The nascent national fintech charter has support from the Democrat and Republican Comptrollers of the Currency who preceded Otting.[20] The Treasury Department has also expressed support, predicting that peer-to-peer lenders and payments processors might be particularly well served by the charter.[21]

The fintech charter has opponents as well, especially those who are concerned that fintech charters could obliterate the traditional distinction between banking and commerce. Some of the largest fintech operations in the country include PayPal, Amazon's payment system, and Apple and Google's wallets.[22] Should these firms have bank charters? They could then compete against banks in every way, rather than only through payment processing, which would make them ultimate "shadow banks."[23] Senators Sherrod Brown

---

COMPANIES 1 (July 2018), https://www.occ.gov/publications-and-resources/publications/comptrollers-licensing-manual/files/pub-considering-charter-apps-from-fin-tech-co.pdf [https://perma.cc/L4YW-E5VY].

19. *OCC Begins Accepting National Bank Charter Applications from Financial Technology Companies*, OFFICE COMPTROLLER CURRENCY (July 31, 2018), https://www.occ.gov/news-issuances/news-releases/2018/nr-occ-2018-74.html [https://perma.cc/KE2N-VE8K].

20. *See infra* notes 355-60 and accompanying text (reviewing supportive statements by Comptroller Thomas Curry and Acting Comptroller Keith Noreika).

21. *See infra* notes 280-81 and accompanying text.

22. Or they would be the largest if spun off. *See* Jim Marous, *Google, Apple, Facebook and Amazon Should Terrify Banking*, FIN. BRAND (Aug. 6, 2014), https://thefinancialbrand.com/41484/google-apple-facebook-amazon-banking-payments-big-data/ [https://perma.cc/4DHT-P2H2]. PayPal, a subsidiary of eBay, has been recently valued at $61.6 billion. Luke Christou, *PayPal Net Worth Has Surpassed Parent Company eBay*, NS BUS. (Feb. 1, 2018), https://www.ns-businesshub.com/popular/paypal-net-worth/ [https://perma.cc/5XH8-2DA8]. The largest standalone fintechs by estimated market capitalization are Stripe, the payments processor, at $9.2 billion, and SoFi, the peer-to-peer lender, at $4.3 billion. Sally French, *These Are the Most Valuable Fintech Companies in America*, MARKETWATCH (Nov. 16, 2017, 2:47 AM), https://www.marketwatch.com/story/these-are-the-most-valuable-fintech-companies-in-america-2017-11-15 [https://perma.cc/75AK-M2GB].

23. *See* Gary Gorton & Andrew Metrick, *Regulating the Shadow Banking System*, BROOKINGS PAPERS ON ECON. ACTIVITY 261, 279-80 (Fall 2010), https://www.brookings.edu/wp-content/uploads/2010/09/2010b_bpea_gorton.pdf [https://perma.cc/3VGY-FJ84]; *see also* JOHN ARMOUR ET AL., PRINCIPLES OF FINANCIAL REGULATION 445-48 (2016); ZOLTAN POZSAR ET AL., FEDERAL RESERVE BANK OF NEW YORK STAFF REPORTS: SHADOW BANKING 2-3 (Feb. 2012), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr458.pdf [https://

(D-OH) and Jeff Merkley (D-OR) have argued that "[o]ffering a new charter to nonbank companies seems at odds with the goals of financial stability, financial inclusion, consumer protection, and separation of banking and commerce."[24] State banking supervisors have posited that "[a]n OCC fintech charter is a regulatory train wreck in the making" and have sued, with some success, to stop it from happening.[25] Karen Petrou, a leading financial policy analyst,

---

perma.cc/4EJM-VGYP]. Gary Gorton and Andrew Metrick define shadow banking with reference to three factors: a business relying on (1) short-term liabilities and (2) backing potentially illiquid assets (3) when the traditional restrictions and backstops of bank regulation are not present. *See* Gorton & Metrick, *supra*, at 280. In their relatively popular view, shadow banks are, by definition, not regulated like banks, but provide financing like banks. *See* Gorton & Metrick, *supra*, at 261. In the past decades the shadow banks have taken market share from conventional institutions. *See* Tom C.W. Lin, *The New Investor*, 60 UCLA L. REV. 678, 691 (2013) ("Partially as a result of private exchanges and dark pools, a 'shadow banking' infrastructure now casts a large penumbra over the financial system."). These shadow banks include money market funds that finance the day-to-day operations of large firms with their appetite for commercial paper, venture capital funds that finance and develop new businesses, business development corporations that invest in small and midsize firms, and hedge funds that can take on any of these functions, along with others. *See* Edward McBride, *Shadow and Substance*, ECONOMIST, May 10, 2014, at 3, https://www.economist.com/sites/default/files/20140510_international_banking.pdf [https://perma.cc/83RJ-T8CE] (reviewing the various sorts of firms that can be characterized as shadow banks and the sort of services they provide).

24. Lalita Clozel, *OCC Fintech Charter Sparks Opposition from Senate Dems*, AM. BANKER (Jan. 9, 2017, 1:15 PM), https://www.americanbanker.com/news/occ-fintech-charter-sparks-opposition-from-senate-dems [https://perma.cc/SKX3-E9EM] (quoting statement and reviewing the opposition to the mooted charter).

25. John W. Ryan, *CSBS Responds to Treasury, OCC Fintech Announcements*, CONF. ST. BANKING SUPERVISORS (July 31, 2018), https://www.csbs.org/csbs-responds-treasury-occ-fintech-announcements [https://perma.cc/L5V8-FGXX]. For one complaint, see Complaint for Declaratory and Injunctive Relief, Conference of State Bank Supervisors v. Office of the Comptroller of the Currency, No. 18-cv-02449, 2019 WL 4194541 (D.D.C. Oct. 25, 2018). For the New York Department of Financial Services statement about its lawsuit against the OCC, see *Statement by Acting Financial Services Superintendent Linda A. Lacewell Regarding the Court's Decision to Allow DFS's Lawsuit Against the OCC to Move Forward*, N.Y. ST. DEP'T FIN. SERVS. (May 2, 2019), https://www.dfs.ny.gov/reports_and_publications/statements_comments/2019/st1905021 [https://perma.cc/Q2VM-ZZUU]. For a collection of opposing perspectives, see Ed Mierzwinski, *Leading Groups Oppose OCC Proposal to Charter Fintechs,* U.S. PUB. INT. RES. GRP. (Aug. 1, 2018), https://uspirg.org/blogs/eds-blog/usp/leading-groups-oppose-occ-proposal-charter-fintechs [https://perma.cc/HU59-4TNF] (collecting statements of opposition and noting that "we joined leading consumer organizations to criticize a proposal by the chief national bank regulator known as the Office of the Comptroller of the Currency"). In three of the four cases, the suits against the fintech charter have been dismissed as premature. *See* Conference of State Bank Supervisors v. Office of Comptroller of Currency, No. 18-CV-2449 (DLF), 2019 WL 4194541, at *1 (D.D.C. Sept. 3, 2019) (discussing two suits filed in Washington, D.C., seeking to dismiss the litigation; "because" nothing alleged in a

has concluded that people are likely to get "hurt" by the fintech charter.[26]

The banking charter has thus become the centerpiece of an argument about what chartered institutions should do for the rest of the economy. The chartering process also illustrates a remarkable divergence—worryingly common in banking regulation—between the law as written and the law as it is actually applied.

I argue that the best way to understand the OCC's chartering practice, at least as expressed through its written orders, is that it is engaged in "fit and proper" regulation, determining whether the promoters of a new bank are sufficiently experienced, adequately capitalized, and disinclined to break the law.[27] Chartering as practiced is not a philosophical debate about what banking is and should be, but a business viability analysis. When the OCC does grant a charter, it does so in a pro forma letter, without many conditions (though there are usually some) or even applications of the law to the facts of the submission.[28] It does not suggest that it is making decisions on policy grounds.[29]

But while writing an order approving or denying a chartering application looks easy, the actual application process is, it turns out, quite hard. Lawyers will tell you that behind the orders there is also a searching inquiry into the quality and viability of the business plan of the would-be bank and the track record of its managers. While the test is best characterized as a fit and proper

---

second complaint "cure[s] the original jurisdictional deficiency" identified in CSBS I "[i]ssue preclusion bars [the court] from reconsidering whether [CSBS] suffered Article III injury."). *See also* Vullo v. Office of Comptroller of the Currency, No. 17 CIV. 3574 (NRB), 2017 WL 6512245, at *1 (S.D.N.Y. Dec. 12, 2017) ("[P]laintiff's claims are not ripe"). In one district court decision, now on appeal, the states won their substantive case. Vullo v. Office of Comptroller of Currency, 378 F. Supp. 3d 271, 296 (S.D.N.Y. 2019) (finding the proposed fintech charter to exceed OCC's authority to only regulate banks).

26. Penny Crosman, *'A Lot of People Are Going to Get Hurt': Petrou on Fintech Risk,* AM. BANKER (Feb. 4, 2019, 1:25 PM), https://www.americanbanker.com/news/a-lot-of-people-are-going-to-get-hurt-petrou-on-fintech-risk [https://perma.cc/ZQH2-3GT8] (discussing a report by a well-known financial services analyst worrying about "new forms of bias, threats to data privacy, security violations, misleading marketing and even systemic risk").

27. *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, COMPTROLLER'S LICENSING MANUAL: CHARTERS 4 (Sept. 2016), https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-licensing-manual/files/charters.pdf [https://perma.cc/YD3F-TP2H].

28. *See id.* at 39.

29. *See id.*

test,[30] because it focuses on the management team and the business plan, it is certainly fit and proper with teeth.

This caution on chartering new banks also applies—it seems so far—to the OCC's approach to fintech. Rather than fully committing to the revolutionary promise of the fintech charter, the OCC has moved slowly in developing it.[31] Previous special charters have not exactly transformed the financial industry; they have largely gone to subsidiaries of already extant banks, offering established incumbents the chance to add services such as credit cards or trust deposits to their customers.[32] Nor has the OCC dispensed these charters easily or broadly. The OCC's approach to the fintech charter should be welcomed.

In documenting these practices, this Article provides the first comprehensive account of how chartering works on the ground since Kenneth Scott's government-funded analysis of the charter in 1975 appeared in the *University of Chicago Law Review*.[33]

It also offers four actionable prescriptions to policymakers. The first is directed to the OCC and FDIC, which should issue guidance reflecting their willingness to entertain charter applications by new banks, guidance that they can update when they feel that conditions warrant. The ban on start-up banking from 2010-2018 has been nothing less than secret law, and there is no good reason not to publicly announce a halt on accepting banking applications if regulators feel economic conditions warrant it—and, by the same token, to publicly update that guidance when conditions have improved.

The second is directed at courts, which should, the next time they hear a dispute over a charter grant, definitively apply *Chevron* deference and "hard look" review to the decision by the regulators. This is the ordinary standard for licensing decisions, but one that

---

30. *See id.* at 4.

31. *See infra* Part V.E.

32. *See infra* Part V.D.

33. The last comprehensive empirical account was provided by Kenneth Scott in his comprehensive article *In Quest of Reason: The Licensing Decisions of the Federal Banking Agencies*. *See generally* Kenneth E. Scott, *In Quest of Reason: The Licensing Decisions of the Federal Banking Agencies*, 42 U. CHI. L. REV. 235 (1975). The article, and its conclusion that charter acquisitions should be liberalized, generated a frustrated response from an OCC official. *See* C. Westbrook Murphy, *What Reason for the Quest?: A Response to Professor Scott*, 42 U. CHI. L. REV. 299, 300-01 (1975).

has not been articulated or applied to chartering decisions by the OCC, where instead lawyers have apparently concluded that a vague super-deference is the appropriate standard.[34]

The third is also directed at courts, which should conclude that the fintech charter, as OCC has articulated it, should be deemed to be within the power of the Agency and a reasonable interpretation of its statutory authority, with some promise to offer consumers inexpensive access to financial services. Once the actual practice of federal bank chartering is understood, the decision by the OCC to proceed with a fintech charter looks sober and defensible. Fintechs are not dissimilar to the credit card banks that OCC already charters, and that do not, like fintech charters, take much in the way of deposits.[35]

The fourth is directed at Congress, which should, if it wishes to have firms such as Amazon enter the business of banking (as Amazon's Chinese equivalent has done in China),[36] pass a fintech chartering act expressing its permission.

Extending the banking charter to big tech would be the sort of major question for which banking regulators alone should not be responsible. The OCC has been given the power to define what a bank should do—the Supreme Court has held that "the 'business of

34. At least not until a recent and unpersuasive district court decision concluded that the Agency could not charter fintechs that did not take deposits. *See* Vullo v. Office of Comptroller of Currency, 378 F. Supp. 3d 271, 298 (S.D.N.Y. 2019) (applying the *Chevron* test to the OCC's decision to accept fintech charter applications). The *Chevron* standard is the one most often applied by courts reviewing legal decisions by agencies. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). The standard of review under *Chevron* consists of two steps. For the first step, the reviewing court must ask whether, after "employing traditional tools of statutory construction," it is evident that "Congress had an intention on the precise question at issue." *Id.* at 843 n.9. If so, the statute is "unambiguou[s]," and the agency must not differ from Congress's clearly expressed command. *Id.* at 842-43. If, however, the court decides that the statute is ambiguous, it then moves to step two of the inquiry. That step requires the court to uphold the agency's interpretation so long as it is "based on a permissible construction of the statute." *Id.* at 843. Appellate courts have interpreted this to mean that they must defer to any reasonable interpretation of the statute offered by the agency. *See id.* at 845. "Hard look" review looks at the way the agency made its decision, including how it applied the law to the facts of the case. *See* Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 54-57 (1983).

35. *See infra* notes 331-33.

36. Frank Tong, *Alibaba and Partners Obtain a Banking License in China*, DIGITAL COM. 360 (Oct. 2, 2014), https://www.digitalcommerce360.com/2014/10/02/alibaba-and-partners-obtain-banking-license-china/ [https://perma.cc/EZ2T-M8P8].

banking' is not limited to the enumerated powers" listed in the OCC's governing statute "and that the Comptroller therefore has discretion to authorize activities beyond those specifically enumerated."[37] But the OCC has never given out charters willy-nilly; it has insisted that its charter holders perform "at least one of the following three core banking functions: receiving deposits; paying checks; or lending money,"[38] and it has almost always prohibited firms engaged in other businesses from offering some of those core banking functions.[39]

As Chief Justice John Marshall observed, there are differences between "those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."[40] Chartering fintechs that only do finance—a hot but small part of the financial marketplace[41]—is consistent with the OCC's legal authority to define the details of the business of banking. Chartering Amazon's payment system, however, would be a major question requiring congressional authorization before being undertaken by the OCC.

In what follows, I first review the law of charter applications.[42] I then consider the recent calls for more constraints on the bank charter and pair them with a broader critique of licensing that has spurred litigation and criticism of anticompetitive and bureaucratic state occupational licensing components.[43] I suggest that banking—a dangerous, but heavily regulated activity[44]—offers a good test of

37. NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 258-59 n.2 (1995).

38. 12 C.F.R. § 5.20(e)(1)(i) (2019).

39. *See, e.g.*, Garrett Fischer & Sarah Wade, *OCC Won't Allow Fintech National Bank Charters for Commercial Firms, Addressing Potential Walmart Fintech Bank Concerns*, THOMPSON COBURN LLP (Mar. 17, 2017), https://www.thompsoncoburn.com/insights/blogs/bank-check/post/2017-03-17/occ-won-t-allow-fintech-national-bank-charters-for-commercial-firms-addressing-potential-walmart-fintech-bank-concerns [https://perma.cc/4S7R-H9G9] (discussing how nonbank commercial businesses such as Walmart are not usually permitted to offer banking services).

40. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825).

41. *See* French, *supra* note 22.

42. *See infra* Parts I and II.

43. *See infra* Part III.

44. *See* J. Alfred Broaddus, Jr., *Choices in Banking Policy*, 80 ECON. Q. 1, 2 (1994)

the general value of licensing in the modern administrative state. I then turn to the empirical account of the actual practice of the OCC when it comes to charter grants using legal, qualitative, and mildly quantitative methods.[45] After that, I turn to the Agency's efforts to create a fintech charter, nascent though they are, and conclude with an evaluation of the policy benefits and costs of that charter.[46] A brief conclusion follows.

I. THE LAW OF CHARTERING

Chartering creates a bank, and with it, an intensely regulated relationship with the government that begins with the searching examination of charter applicants and continues with the high-touch supervision bank regulators impose on banks during their existence. Holding a charter nonetheless has its appeal, especially because it, and it alone, offers "the ability to take deposits from the public, which provides an extremely cheap source of funding," as Michael Barr, Howell Jackson, and Margaret Tahyar have put it.[47] Banks pay depositors—especially these days—very little by way of interest, while other businesses cannot hope to borrow as inexpensively.[48]

The OCC's authority to grant charters comes from the National Banking Act, which outlines the Agency's powers, and the Federal Deposit Insurance Act, which requires banks seeking deposit insurance to obtain a charter.[49] The Agency's practice for assessing charter applications follows two steps.[50] First, it considers whether to grant preliminary conditional approval for organizers who seek to create a new bank.[51] Second, final approval requires that the organizers establish over the course of a year that they have met the standards of the OCC, as set forth in its regulations, and the

("Banking is one of the most heavily regulated of all industries.").

45. *See infra* Part IV.

46. *See infra* Part V.

47. BARR ET AL., *supra* note 2, at 184.

48. *See id.*

49. *See, e.g.*, 12 U.S.C. §§ 21, 22, 24, 26, 27 (2018); *id.* § 1814.

50. *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 27, at 3.

51. *See id.*

conditions imposed in the conditional approval order, if any.[52] Final approval means that "the bank can begin to conduct banking business."[53] Preliminary approval allows the organizers of a would-be bank to raise capital and begin to meet the Comptroller's regulatory requirements.[54]

The OCC has said that in evaluating a charter application, it considers whether the organizers are familiar with OCC regulations, are competent, have created a board of directors with the ability to understand the types of services that the bank seeks to provide, and that the bank has provided for sufficient capital to meet the requirements of the organizers' business plan.[55] It rejects applications where there is a risk of immediate recourse to the Federal Deposit Insurance Fund.[56] More controversially, it also is required to consider "[t]he convenience and needs of the community to be served."[57] This public interest standard is one of the chief legal hooks on which bank reformers have hung the idea that banks should be compelled to take on public duties—though meeting it has not appeared to induce regulators to gesture at such a conclusion in the past.

The most important factors for the Agency—both as evidenced in its orders and application materials and as sensed by would-be applicants—concern the business plan of the bank and the experience of the promoters behind it.[58] Unlike the case with corporate chartering, where anyone can create a corporation for any lawful purpose, the OCC expects the organizing group behind a bank charter application to include promoters with diverse business and financial interests and even a degree of community involvement.[59] Factors that may be considered in assessing the quality of the application include size of the organizing group, the history of that group, and the group's choice of chief executive officer.[60]

52. *See id.*
53. *Id.*
54. *See id.*
55. *Id.* at 4. For a discussion, see MICHAEL P. MALLOY, BANKING LAW AND REGULATION § 2.02 (2d ed. Supp. IV 2019).
56. *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 27, at 4.
57. 12 U.S.C. § 1816 (2018); *see also* 12 C.F.R. § 5.20(h)(5)(i) (2019).
58. *See infra* Part IV.A.
59. *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 27, at 6.
60. *See id.* at 4, 6-7.

In all, the OCC's licensing manual on charters amounts to 131 pages of requirements that banks must meet, making it fair to say that the ability to create a bank is considerably more constrained than the ability to create a nonbank corporation.[61] Moreover, the manual is no checklist—would-be charter holders must meet with OCC officials and present their case for the chartering application.[62] Feedback will be given, making the application process a meeting-oriented and iterative one.[63] Moreover, received applications are opened for a period of public comment, meaning that potential competitors can weigh in with criticism of the application.[64]

Once the meetings are concluded, the application completed, and the data provided, the OCC renders its decision without any trial-type process or opportunity for discovery or cross-examination.[65] The Comptroller is not required to hold a hearing on the record or make findings of fact in assessing charter applications.[66]

All of this results in a relatively concise order either granting or denying the charter application offered in a letter format, as we will see in Part III. The Supreme Court once called this sort of decision "curt" as it affirmed it.[67]

In addition to obtaining a charter from the OCC, the FDIC also must agree to insure any depositary institutions;[68] its willingness to do so is also a constraint, and the application process for deposit insurance is intensive and document heavy.[69] The Federal Deposit Insurance application is a forty-three-page-long list of

61. *See infra* Part IV.A. *See generally* OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 27.

62. *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 27, at 31-32.

63. *See id.*

64. *See id.* at 65.

65. *See id.* at 64-65.

66. BARR ET AL., *supra* note 2, at 169.

67. Camp v. Pitts, 411 U.S. 138, 143 (1973).

68. *FDIC Statement of Policy on Applications for Deposit Insurance*, FED. DEPOSIT INS. CORP., https://www.fdic.gov/regulations/laws/rules/5000-3000.html [https://perma.cc/6WRP-MJ5L].

69. The FDIC's recent caution on approving charters has led to some consternation in Congress: "[S]ince 2011, the FDIC has only approved three de novo bank applications and no industrial loan company applications. The agency approved only one of two new bank applications in 2015. Ten years earlier, in 2005, the FDIC approved 237 of 299 de novo applications." Steven Harras, *House Republicans, FDIC Chief Spar Over Dearth of New Banks*, CONG. Q. ROLL CALL, July 14, 2016, 2016 WL 3751710, at *1.

requirements, including requests for information about management, capital, the needs of the community, the assets held by the financial institution, its information systems, and a set of certifications and pledges by the promoters of the institution, including oaths that must be taken by the directors of the bank that they will see to their "legal responsibility and ... fiduciary duty to shareholders to administer the depository institution's affairs faithfully and to oversee its management."[70] All of this is in some ways duplicative of the charter application—but there is no question that any would-be national bank has two hurdles to surmount from the different regulators: charter approval and deposit insurance approval.

Judicial review of the OCC's denial of a charter is available, though that review has traditionally been limited—Barr, Tahyar, and Jackson have called it "extraordinary deference."[71] As the Eighth Circuit has explained,

> [T]he trend is for courts to grant some type of judicial review in many of these administrative type proceedings which concern the granting of licenses .... a brand of limited review.... The action of the Comptroller [to deny a charter application] herein would seem to fall into the general commercial area where discretionary actions are subject to limited review.[72]

But the actual standard of review has never been articulated satisfactorily, partly because banks have stopped contesting chartering decisions, given they always seem to lose. The Eighth Circuit has upheld a Comptroller chartering decision that was "certainly not without some support in the record."[73] Other courts have concluded that "the Comptroller's decision is entitled to a presumption of regularity,"[74] and the Supreme Court affirmed that "curt" letter

---

70. FED. DEPOSIT INS. CORP., INTERAGENCY CHARTER AND FEDERAL DEPOSIT INSURANCE APPLICATION 2-7, 10-14, 16-17 https://www.fdic.gov/formsdocuments/interagencycharter-insuranceapplication.pdf [https://perma.cc/327F-9GFQ].

71. *See, e.g.*, BARR ET AL., *supra* note 2, at 169.

72. Webster Groves Tr. Co. v. Saxon, 370 F.2d 381, 386-87 (8th Cir. 1966); *see also Pitts*, 411 U.S. at 142 (reaffirming the judicial reviewability of OCC decisions, but doing so very deferentially).

73. First Nat'l Bank of Fayetteville v. Smith, 508 F.2d 1371, 1376 (8th Cir. 1974).

74. First Nat'l Bank of Southaven v. Camp, 333 F. Supp. 682, 686 (N.D. Miss. 1971), *aff'd*, 467 F.2d 944 (5th Cir. 1972).

rejecting an application in *Camp v. Pitts*.[75] It all means, as Margaret Tahyar has put it, that "a generation has grown to accept that the granting of bank charters is so up to the discretion of the bank regulators that the regulator need not even give reasons for a denial."[76]

The Supreme Court has given the OCC *Chevron* deference on its other interpretations of the National Banking Act suggesting—though it has never held—that *Chevron* deference would be applied to chartering decisions too.[77] The D.C. Circuit has also counselled deferring to the "expert financial judgment" of the Comptroller.[78]

The litigation risk of a reversal of chartering decisions by the OCC is, it is fair to say, low, though not nonexistent.[79] One court has held, applying (as is appropriate) *Chevron* deference, that the OCC cannot issue bank charters to fintechs unless they take deposits (a less appropriate conclusion, as we will see).[80] All told, this record of administrative law deference to the OCC, which has been (though it should not be) expressed as almost super deference, has arguably led some claimants aggrieved by a chartering decision to pursue constitutional claims against the agency, in lieu of administrative law arguments, without any more success.[81]

---

75. *Pitts*, 411 U.S. at 143.

76. Margaret E. Tahyar, *Are Bank Regulators Special?* CLEARING HOUSE, https://www.theclearinghouse.org/banking-perspectives/2018/2018-q1-banking-perspectives/articles/are-bank-regulators-special [https://perma.cc/4U8E-T3CC].

77. NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 257, 260 (1995) (holding that the National Banking Act is consistent with permitting a bank to sell annuities). In *Clarke v. Securities Industry Association*, the Court observed that the statutory phrase "[t]he general business of each national banking association" was ambiguous, warranting deference to regulatory interpretations of the statute. 479 U.S. 388, 404 (1987). As the Court observed in *Clarke*, national banks engage in many activities. *See id.* at 406-09. It was accordingly reasonable for the OCC to conclude that incidental services that national banks could be authorized to provide could be interpreted by the agency to include new sorts of services. *Id.* at 409.

78. Am. Ins. Ass'n v. Clarke, 865 F.2d 278, 282 (D.C. Cir. 1988) (concluding that the municipal bond insurance business was part of the business of banking).

79. As Michael Malloy has observed, "*Camp v. Pitts* has been widely interpreted as severely limiting judicial review of the Comptroller's decisions." MALLOY, supra note 55, at § 1B.02.

80. Vullo v. Office of Comptroller of Currency, 378 F. Supp. 3d 271, 298 (S.D.N.Y. 2019) (finding it unambiguous that receiving deposits is an indispensable part of the "business of banking").

81. *See, e.g.*, Conference of State Bank Supervisors v. Office of Comptroller of Currency,

If anything, constitutional doctrine has empowered the OCC more than it has checked it. A number of courts have held that the Constitution's Supremacy Clause supports the National Bank Act's preemptive provision overriding state rules that prevent or significantly interfere with national bank powers, meaning that OCC charters come with a safe harbor against many state regulatory requirements.[82]

The law of chartering, in sum, gives the OCC a great degree of latitude in defining the charter, a fact which has not led the agency to take a "long-arm" or "wildcat"[83] view of its powers. Recently, it bestowed charters unwillingly, despite the flexibility it has been given.[84]

The disconnect between unfettered discretion to grant charters and an unwillingness to do so is always interesting, surprisingly common in bureaucratic practice, and something of a rebuke to those who believe that agencies always try to expand their turf. The OCC has not suggested a desperation to lord over more and more banks or to stretch the definition of banking to give it jurisdiction over an ever-greater number of nonbanks, semibanks, or banks-by-another-name.[85]

This leads to my first prescription—my recommendation that the courts explicitly apply *Chevron* deference and ordinary "hard look"

---

313 F. Supp. 3d 285, 293 (D.D.C. 2018) (making a Tenth Amendment argument that the court declined to address as premature); Vullo v. Office of the Comptroller of the Currency, No. 17 Civ. 3574 (NRB), 2017 WL 6512245, at *4 (S.D.N.Y. Dec. 12, 2017) (same).

82. *See, e.g.*, Barnett Bank of Marion Cty., N.A. v. Nelson, 517 U.S. 25, 32-35 (1996); Smiley v. Citibank (S.D.), N.A., 517 U.S. 735 (1996); Fidelity Fed. Savs. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 170 (1982); Franklin Nat'l Bank of Franklin Square v. New York, 347 U.S. 373, 378-79 (1954). Moreover, for what it is worth, "[r]egulation of national bank operations is a prerogative of Congress under the Commerce and Necessary and Proper Clauses." Watters v. Wachovia Bank, N.A., 550 U.S. 1, 22 (2007).

83. Lewis D. Solomon, *Local Currency: A Legal and Policy Analysis*, 5 KAN. J.L. & PUB. POL'Y 59, 62 (1996).

84. *See infra* Part IV.B.

85. The OCC has not tried to establish jurisdiction over payday lenders, mortgage originators, or title loan companies, for example, even though an empire-building thesis might predict that it would. *See* Daryl J. Levinson, *Empire-Building Government in Constitutional Law,* 118 HARV. L. REV. 915, 920 (2005) (questioning the theoretical "basis for believing that government pervasively seeks to build empire[s] of either the imperialistic or avaricious variety"); David Zaring, *Informal Procedure, Hard and Soft, in International Administration,* 5 CHI. J. INT'L. L. 547, 601 n.256 (2005) ("I am, as are many observers, very skeptical of simplistic claims that agencies attempt to maximize turf.").

review, not anything "more" than that, to OCC chartering decisions.[86] The leading cases setting forth the standard of review for those decisions were decided before *Chevron*, and, although they found that OCC decisions were susceptible to review, they made that review highly deferential.[87] But distinguishing between the various sorts of deference is difficult, at best, and the Supreme Court has generally preferred to apply simple and consistent standards to all agencies.[88] Rather than characterizing review of OCC chartering decisions as barely extant, the better approach would be to treat the Agency the way other agencies are treated—there is nothing in its statute or its area of regulation that provides for anything different.[89] *Chevron* deference and "hard look" review are the appropriate standard of review of the Agency's bank-chartering decisions.

II. MAKING SENSE OF THE CHARTER

If Part I of this Article offers a black-letter account of the law of chartering, this Part situates the charter in two different ways—first, as an old-school kind of government grant and second, as the tool that separates banks from other commercial enterprises. Once these two critical lenses of chartering are understood, the debate among scholars and regulators about what a modern banking charter should look like will make more sense. That is the project of Part III. Part IV turns from theory to the actual practice of the Agency in chartering.

A. Charters as Throwback Regulation

A surprising amount of the scholarship critical of the financial industry in the wake of the financial crisis has sought to recast

86. *See supra* note 34 and accompanying text for the basic requirements of *Chevron* and hard look review.

87. *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1120 (2008).

88. *See, e.g.*, *id.* at 1169.

89. Aaron Saiger, Chevron *and Deference in State Administrative Law,* 83 FORDHAM L. REV. 555, 579 (2014) ("*Chevron* accords deference to all agencies, not just 'expert' ones.").

banking from a private sector endeavor to a public sector grant. To these observers, the crisis revealed what we should have known all along: that the business of finance is essentially a public service only possible because of the public support that undergirds the financial system.[90] The essential publicness of the provision of finance justifies an intrusive regulatory hand when it comes to supervising banks.[91] In fact, these scholars see the existence of a viable banking system as something that is fundamentally derived from public power.[92]

This view says banks only work because people believe that they are safe, and people only believe they are safe because of the government guarantees provided by deposit insurance, the existence of the Federal Reserve as a lender of last resort, and the likelihood that, if all else fails, banks will be bailed out at taxpayer expense.[93] The most important event in a bank's life, then, is the moment that the government agrees to allow it to provide banking services—the day it receives a charter, and with it, the government guarantees that back up the business of banking.

The implications of the importance of the charter allow for a much larger government role in directing or supervising banks. Some scholars wish to replace the relatively unconstrained charters that national banks currently have with more constrained ones that would encourage banks to follow government priorities.[94] Others

90. As David Millon has observed, "At least through the mid-19th century, incorporation primarily for private business objectives was relatively unusual. Instead, the typical corporation was chartered to pursue some sort of public function. These corporations included charitable and municipal corporations as well as privately-owned banking, insurance, and public utility enterprises." David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 207.

91. *See, e.g.*, Adam J. Levitin, *Safe Banking: Finance and Democracy,* 83 U. CHI. L. REV. 357, 389 (2016) ("While some measure of the 'safety' of 'safe assets' comes from private ordering, government intervention is what actually facilitates the 'safety' of these assets.").

92. *See id.* at 389-90.

93. *See id.* at 383, 386-88.

94. *See supra* note 15; for background the outer limits of these charter constraints, see, U.S. DEP'T OF THE TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: NONBANK FINANCIALS, FINTECH, AND INNOVATION 83-84 (July 31, 2018), https://home.treasury.gov/sites/default/files/2018-08/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financials-Fintech-and-Innovation.pdf [https://perma.cc/82VN-6XV8].

would rely on the charter to do away with the growing prominence of shadow banks.[95]

The turn to charters to do the job makes everything old new again; my observation about those who believe that charters are central is that they are emphasizing a way that banking administrative law differs from contemporary administrative practice.[96] Charters and licenses were the principal ways that pre-nineteenth-century governments raised money or allocated economic resources.[97] But now there is no need for royally chartered trading companies to exploit trade with India or the South Seas, nor to build bridges and turnpikes to be financed with tolls in the nineteenth-century manner. Instead, after passage of the Administrative Procedure Act (APA), courts have increasingly urged agencies to prefer broad, prospectively applied rules to individualized treatments of particular firms.[98] In 1973, the D.C. Circuit exulted over the Federal Trade Commission's decision to turn away from its adjudication model of policy making when it promulgated an octane-labelling rule, observing that "courts are recognizing that use of rulemaking to make innovations in agency policy may actually be fairer to

95. *See* Greg Buchak et al., *Fintech, Regulatory Arbitrage, and the Rise of Shadow Banks* 5-6 (Nat'l Bureau of Econ. Research, Working Paper No. 23288, 2017), https://www.nber.org/papers/w23288.pdf [https://perma.cc/Y58H-FDKT]; *see also* Kristin N. Johnson, *Macroprudential Regulation: A Sustainable Approach to Regulating Financial Markets,* 2013 U. ILL. L. REV. 881, 910 (pointing to examples that illustrate "the challenges that the rise of the shadow banking system creates, the dangers of regulatory arbitrage in the shadow banking system, and the systemic risk concerns that emerge as shadow banks become more significant market participants").

96. The difference is somewhat historical. Don Mayer, *Community, Business Ethics, and Global Capitalism*, 38 AM. BUS. L.J. 215, 234 (2001) ("[H]istorically, corporations were chartered only for public purposes, not just for profit.").

97. *See* BARR ET AL., *supra* note 2, at 170 ("Kings often granted exclusive licenses or monopolies to favored nobles."). The history is a long one. "During Queen Elizabeth's very long reign she oftentimes found herself in need of more money than Parliament had allotted for her use. As a result, she sometimes tried to supplement her subsidy from Parliament by selling royal monopolies." Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism,* 36 HARV. J.L. & PUB. POL'Y 983, 989 (2013).

98. *See, e.g.*, Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 681-83 (D.C. Cir. 1973). Though one can overstate the differences between nineteenth-century administrative law and what we recognize as administrative law today. As Jerry Mashaw has observed, "The national government of the United States was an administrative government from the very beginning of the Republic." Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age,* 119 YALE L.J. 1362, 1366 (2010).

regulated parties than total reliance on case-by-case adjudication."[99] Chartering is an old school example of adjudication—an individualized determination after a review of the record.

Outside of finance, for regulated industries in ongoing relationships with their regulators, regularly passed rules are the much more common regulatory mechanism and, indeed, probably the more modern approach.[100] Most scholars would say that one of the most important developments in administrative law since the 1980s has been the rise and rise of the White House's Office of Information and Regulatory Affairs (OIRA), which reviews major rules before agencies are permitted to promulgate them; that review is generally perceived to be searching and important.[101] The ascent of OIRA illustrates the importance of the rule in the modern administrative state.

But its evolution also underscores the independence of the OCC—OIRA does not review its rules or its licensing decisions.[102] The OCC's chartering determinations are elaborate permitting processes that it, and it alone, assesses.[103] This is not to say that chartering is wrong—or that there are not other parts of the government that

---

99. *Nat'l Petroleum*, 482 F.2d at 681.

100. *See, e.g.*, M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1383-85, 1404 n.69 (2004) ("To say that there was a debate, however, implies more diversity of opinion than can be found in that literature.... [T]he drift of these articles [in administrative law scholarship] was fairly uniform: agencies should use rulemaking more often than they did."). As Donald Hornstein has put it,

> [T]he triumph of rulemaking also reflected the growing conviction that the world was better understood and policy better made through the analytical approach of "comprehensive rationality," by which goals and means would be fully specified, compared, and chosen synoptically via techniques such as formal decision theory or cost-benefit analysis, as opposed to a world view shaped "incrementally" through a pattern of case-by-case experimentation and adjustment.

Donald T. Hornstein, *Resiliency, Adaptation, and the Upsides of Ex Post Lawmaking*, 89 N.C. L. REV. 1549, 1561 (2011).

101. *See, e.g.*, Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1262 (2006) ("[M]any of the features of OMB review create a profound institutional bias against regulation.").

102. This is a recent development, however, "prior to the Dodd-Frank Act, all OCC rule making that constituted a significant regulatory action included a formal assessment of the action's costs and benefits, which was submitted to OIRA for review." Robert P. Bartlett III, *The Institutional Framework for Cost-Benefit Analysis in Financial Regulation: A Tale of Four Paradigms?,* 43 J. LEGAL STUD. S379, S385 (2014).

103. *See id.*

rely on licensing regimes that generally evade White House supervision, ranging from nuclear power to telecommunications. Rather, it is a reminder of how atavistic these sorts of licensing regimes can be.

B. Banking Versus Commerce

There is a classic debate about financial regulation that turns on a business model question: whether the business is being operated as a bank or as some other sort of commerce. Would-be banks are entitled to banking charters, while commercial enterprises are not.[104]

This effort to police the divide between banking and commerce goes back to the original federal banking charter statute, which limited eligibility for the charter to those engaged in the "business of banking."[105] Ever since, the OCC has insisted that national charter holders be "banks"; it has refused, with limited exceptions, to let nonbanks hold national banking charters, while even tough regulators such as the FDIC have allowed this on occasion.[106] When, after the financial crisis, the OCC was given responsibility over a number of thrifts owned, by a quirk of history, by nonbanks, it encouraged these firms to rid themselves of the charter.[107] As Saule Omarova has observed, the "separation of banking and commerce is one of the fundamental principles underlying the U.S. system of bank regulation," and has been justified by the "needs to preserve the safety and soundness of insured depository institutions, to ensure a fair and efficient flow of credit to productive economic enterprise, and to prevent excessive concentration of financial and economic power in the financial sector."[108]

---

104. *See* 12 U.S.C. § 24 (2012).

105. *Id.*

106. *See infra* Part V.D.

107. Congress was not too enamored of the prospect that nonbanks could operate thrift subsidiaries; it forbade holding companies the right to purchase or operate thrifts without first converting to thrift holding companies, which would be subject to supervision by federal regulators, though it permitted firms that already held a single thrift charter to hold on to them. Gramm-Leach-Bliley Act, Pub. L. No. 106-102, § 401, 113 Stat. 1435 (1999) (codified at 12 U.S.C. § 1467a(c)(9) (2012)).

108. Saule T. Omarova, *The Merchants of Wall Street: Banking, Commerce, and Commodities*, 98 MINN. L. REV. 265, 273, 275 (2013); Lina M. Khan, Note, *Amazon's Antitrust*

At the same time, policymakers have often wondered whether the separation of banking and commerce makes sense. President Trump's first head of the OCC, Acting Comptroller Keith Noreika, argued that "[t]he recent financial crisis actually demonstrated that there is nothing inherently safer about separating banking and commerce."[109] He argued that extending the charter to nonbanks "has the virtue of bringing technology oriented financial companies that provide banking services out of the shadows."[110] The veteran financial free marketeer Peter Wallison is all for erasing the barrier and thinks it possible: "Thankfully, current policy makes removing the line between banking and commerce, once and for all, relatively straightforward."[111]

The separation between banking and commerce is, moreover, threatened by facts on the ground. The rise of so-called shadow banks, firms that provide some of the services of banks without holding bank charters, is the second most consequential development of finance this century, after the financial crisis and its fallout.[112] "By 2007, the shadow banking system had total assets of roughly $6.5 trillion—compared to $4 trillion for the then five major securities firms and $6 trillion for the top five U.S. bank holding

---

Paradox, 126 YALE L.J. 710, 794 (2017) (the reasons for the separation of banking and commerce have "included the needs to preserve the safety and soundness of insured depository institutions, to ensure a fair and efficient flow of credit to productive [businesses], and to prevent excessive concentration of financial and economic power in the financial sector").

109. Keith A. Noreika, Acting Comptroller of the Currency, Remarks at The Clearing House Annual Conference 7 (Nov. 8, 2017), https://www.occ.treas.gov/news-issuances/speeches/2017/pub-speech-2017-134.pdf [https://perma.cc/B857-Q83Y]. For a more general discussion of the issues, see Mehrsa Baradaran, *Reconsidering the Separation of Banking and Commerce*, 80 GEO. WASH. L. REV. 385, 388-89 (2012) ("[S]eparating banking and commerce through the BHCA has caused and exacerbated the precarious structure of modern banking.").

110. Sylvan Lane, *Bank Regulator Defends National Fintech Charter Plan,* THE HILL (July 19, 2017, 5:47 PM), http://thehill.com/policy/finance/342810-bank-regulator-defends-national-fintech-charter-plan [https://perma.cc/3Y3C-CTNJ].

111. Peter J. Wallison, *Why Are We Still Separating Banking and Commerce?*, AM. BANKER (July 27, 2017, 9:30 AM), https://www.americanbanker.com/opinion/why-are-we-still-separating-banking-and-commerce [https://perma.cc/RHP7-CRMM]; *see also* Brian Knight, *Federalism and Federalization on the Fintech Frontier*, 20 VAND. J. ENT. & TECH. L. 129, 136 (2017) (discussing the way that fintech avoids traditional categorization).

112. It certainly led to a sea change in the approach to the regulation of the financial sector, as the D.C. Circuit has recognized. *See* Loan Syndications & Trading Ass'n v. SEC, 818 F.3d 716, 718 (D.C. Cir. 2016) ("Enacted two years after the financial crisis of 2008, the Dodd-Frank Act spelled a sea change in the regulation of the nation's financial markets.").

companies," Chuck Whitehead has observed.[113] John Coffee contends that "[t]he pervasive underregulation of 'shadow banking,' which continued for decades, was a leading cause of the 2008 financial debacle and the current economic stagnation."[114] As Adam Levitin has observed, the shadow banking sector has survived the crisis and is diverse and growing:[115]

> Several distinct but interconnected shadow banking markets have emerged in recent years, including asset-backed commercial paper (ABCP), auction-rate securities (ARS), hedge funds, money market mutual funds (MMMF), repurchase agreements (repos), and credit derivatives like credit default swaps (CDS) and total return swaps (TRS).[116]

Today, the shadow banking component of the global economy has been estimated at forty-five trillion dollars by the Financial Stability Board, a network of regulators.[117]

Perhaps the most interesting parts of this new financial sector are those firms seeking to combine finance and technology in some way that would permit them to offer financial services to customers over the Internet.[118] Some fintech shadow banks provide loans, peer-to-peer lenders being the most prominent example.[119] Others service debt, such as student loan debt.[120] And many online platforms

---

113. Charles K. Whitehead, *Reframing Financial Regulation*, 90 B.U. L. REV. 1, 27 (2010).

114. John C. Coffee, Jr., *The Political Economy of Dodd-Frank: Why Financial Reform Tends to Be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019, 1079 (2012).

115. *See* Levitin, *supra* note 91, at 359-61.

116. Adam J. Levitin, *In Defense of Bailouts*, 99 GEO. L.J. 435, 464-65 (2011) (footnote omitted); *see also* J. Christopher Kojima, *Product-Based Solutions to Financial Innovation: The Promise and Danger of Applying the Federal Securities Laws to OTC Derivatives*, 33 AM. BUS. L.J. 259, 282 (1995) (describing the way that banks have entered in the derivatives market and how they are regulated there).

117. For the FSB's account, see Jun Luo, *Shadow Banking*, BLOOMBERG (Sept. 24, 2018, 1:10 AM), https://www.bloomberg.com/quicktake/shadow-banking [https://perma.cc/H43Y-9F5D].

118. The examples below are discussed in more detail in Part V.A.

119. One such peer-to-peer lender is SoFi. *See, e.g.*, *Leading Peer-to-Peer Lender SoFi Surpasses Half a Billion Dollars in Loans Funded*, SOFI (May 1, 2014), https://www.sofi.com/press/leading-peer-to-peer-lender-sofi-surpasses-half-a-billion-dollars-in-loans-funded/ [https://perma.cc/8R7D-4SVZ].

120. *See* Robert Farrington, *New FinTech Companies Aim to Help Student Loan Borrowers*, FORBES (Mar. 19, 2015, 8:44 AM), https://www.forbes.com/sites/robertfarrington/2015/03/19/new-fintech-companies-aim-to-help-student-loan-borrowers/#14a7d32d7b38 [https://perma.cc/

are willing to hold money and make payments.[121] This is the strategy of the various online wallets, PayPal and its subsidiary Venmo being the most prominent.[122] Because these are the kinds of services that banks offer their clients, the ability of online institutions to offer the services without holding a bank charter makes them businesses that do bank-like things without the official designation of a bank or the regulatory protections and requirements to which banks must adhere.

The actual practice of the OCC is instructive in figuring out how that Agency plans to deal with the rise and rise of shadow banking. Its recent fintech charter practice, which is still very much in the nascent stages, suggests that it will grant charters to nonbanks, even with the fintech model that the OCC has chosen to welcome cautiously, as we will see in Part V of this Article.

III. THE GREAT CHARTERING DEBATE

The academic and legal debate over charters can be segmented into contemporary and historical camps. Today, we see a recent spate of banking law scholars arguing that the way the license works justifies turning banks into tools of the state, while government-skeptical observers worry about the development of an increasingly intrusive "License Raj" in all things, including banking.[123] This maps onto a historical debate that also had two sides. On one side were the free bankers, seeking loosened credit and suspicious of the powers of incumbent banks.[124] They sought to broaden access to charters.[125] Others, worried about bank collapses, have tried to limit charter access, meaning that they have been

4CTH-EZCC].

121. *See* Anne Sraders, *Venmo vs. PayPal: What's the Difference in 2019?*, THESTREET (Apr. 7, 2019), https://www.thestreet.com/technology/venmo-vs-paypal-14916417 [https://perma.cc/45AX-VU69] (discussing similarities and differences between Venmo and PayPal).

122. *See id.*

123. Afra Afsharipour, *Rising Multinationals: Law and the Evolution of Outbound Acquisitions by Indian Companies*, 44 U.C. DAVIS L. REV. 1029, 1053 (2011) ("Between 1950 and 1990, the Indian government imposed a system of strict licensing and 'red tape' regulations, commonly referred to as the 'License Raj,' to govern business development in India." (footnotes omitted)).

124. *See infra* notes 158-62 and accompanying text.

125. *See infra* note 159 and accompanying text.

much more demanding in their approach to charter awards.[126] A final way to make sense of the chartering arguments is to see them as a case study in the broad debate over licensing in general and whether the United States has too much of it.

A. Could Charters Make for a Better Financial System?

The case for constrained chartering turns on the problems unique to banks.[127] Many think that regularly arriving financial crises bespeak a combination of problems, including inadequate controls inside financial institutions and aggressive entry into new, poorly understood financial markets.[128] Sometimes, the internal controls miss rogue traders—for example, Nicolas Leeson's hidden trades, carried out in the Singapore office of one of Britain's oldest banks, Barings, brought down that firm in 1995.[129] Bruno Iksil's 2012 unhedged derivatives trades cost J.P. Morgan $6.2 billion in losses in 2012 and, following investigations by regulators, $920 million more in fines.[130] Sometimes the controls miss bad strategies.[131]

---

126. The link between modern libertarians and historical free bankers is incomplete partly because free banking gave away charters liberally, but, in other ways, rather strictly regulated banks. For example, "[b]ecause free banking laws also obliged banks to fold upon the first sign of insolvency and tap a sequestered capital reserve, the evidence of bank failure is actually evidence of a simple sort of discipline that is curiously absent from modern banking." David G. Oedel, *Private Interbank Discipline*, 16 HARV. J.L. & PUB. POL'Y 327, 342-43 (1993).

127. Kevin V. Tu, *Regulating the New Cashless World*, 65 ALA. L. REV. 77, 126 (2013) ("The banking industry, in particular, has constantly addressed the regulatory implications of new ways of conducting the very old business of banking.").

128. Consider, for example, Robert F. Weber, *Structural Regulation as Antidote to Complexity Capture,* 49 AM. BUS. L.J. 643, 705-08 (2012) (criticizing the regulatory architecture designed to address banker incentives and calling instead for structural regulation, or "restrictions on firm size or the scope of activities in which firms are permitted to engage that have the effect of removing the incentives for undesirable behavior").

129. As Charles Samuelson has explained, "Leeson disappeared from Singapore on February 23, 1995. By the end of the following day, the 227 year-old bank did not have enough assets to meet its short-term obligations." Charles A. Samuelson, *The Fall of Barings: Lessons for Legal Oversight of Derivatives Transactions in the United States*, 29 CORNELL INT'L L.J. 767, 767 (1996) (footnotes omitted).

130. *See In re* JPMorgan Chase & Co. Sec. Litig., No. 12 Civ. 03852 (GBD), 2014 WL 1297446, at *1, *3 (S.D.N.Y. Mar. 31, 2014) (describing the so-called "London Whale" affair in dismissing shareholder litigation over the losses sustained); Simone M. Sepe & Charles K. Whitehead, *Paying for Risk: Bankers, Compensation, and Competition*, 100 CORNELL L. REV. 655, 656 (2015) ("Bruno Iksil, nicknamed the 'London Whale' for the size of his trading portfolio, was a JPMorgan proprietary trader in his late thirties who realized losses of up to $6.2 billion in 2012."); Dominic Rushe, *Whale of a Fine: After Blowing $6bn, JP Morgan's*

These are business failures, but they do give little credit to regulators charged with monitoring financial institutions for safety and soundness. The institutions turned out to be unsafe and unsound, and that fact surprised both managers of the businesses, and the government agencies who oversaw them.[132] A search has unsurprisingly gone on for better mechanisms of supervision. Some think strict constraints on the business of charter holders might help.[133]

Recent financial regulatory scholars have tried to do more with chartering. Omarova and Hockett would use the charter as the legal and conceptual basis for imposing a broader set of responsibilities on banks.[134] Morgan Ricks would heighten the policing of chartering and regulating banks defined as money creators (who create money by making loans) and forbid shadow banks from occupying any space like it—he would defend the charter wall.[135] Claire Hill and Richard Painter make the case for "covenant banking," which would expose managers to liability to shareholders for risky practices; this would modify the charter to manifest this new business relationship between shareholders and risk committees at the director level.[136] This Part of the Article reviews both these proposals in turn; they make the case for intensive regulation through charters and thus pose a question: Could the OCC provide this sort of intensive regulation?

Hockett and Omarova have called the chartering process the operative feature of the "finance franchise," arguing that the traditional public interest component of bank charters could be used to justify some ends-based oversight of banks, such as requiring

Trader Costs Another $920m, GUARDIAN (Sept. 19, 2013, 3:57 PM), https://www.theguardian.com/business/2013/sep/19/jp-morgan-london-whale-fine-blow [https://perma.cc/29X3-7DJM] (describing the fines and penalties).

131. For example, the messy fall of Lehman Brothers is reviewed in Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 491-93 (2009).

132. *See id.* at 476.

133. *See infra* notes 137-48 and accompanying text.

134. *See supra* note 15 and accompanying text.

135. *See infra* notes 146-49 and accompanying text.

136. CLAIRE A. HILL & RICHARD W. PAINTER, BETTER BANKERS, BETTER BANKS 146-51 (2015).

them to align their business models with policies designed to foster the overall efficiency of the economy.[137]

They have argued that finance is best understood as a "public-private franchise" system, in which banks are licensed to engage in the creation of credit-money, ultimately backed by the sovereign.[138] In their view, this makes banks quasi-public institutions providing a public good—access to credit.[139] The analogy is to utilities and railroads, which are sometimes owned by the state and, when privatized, are subject to regulation of prices, activities, and the like.[140] The charter is the mechanism through which much of this control is realized.[141] It is a basis to put banks to the service of industrial policy, or anything, really.

Consider the private cognate of the charter, the licensing purchased from an intensively regulatory business. McDonald's franchisees, for example, control almost nothing about the businesses they run.[142] Instead, McDonald's corporate headquarters produces each uniform, menu item, store design, and equipment.[143] By analogy, the franchisees who help the government generate and underwrite sufficient amounts of credit to support the economy could be regulated just as intensively, possibly towards publicly beneficial ends, such as the direction of investment towards public

---

137. Robert C. Hockett & Saule T. Omarova, *The Finance Franchise*, 102 CORNELL L. REV. 1143, 1149 (2017) (arguing that "redefining the financial system's core dynamics along the proposed lines allows for more accurate, less superficial diagnoses of that system's present dysfunctions, which fundamentally constitute manifestations of an underlying failure on the part of the franchisor to modulate and oversee the allocation of credit").

138. *See id.*

139. *Id.* at 1213.

140. As they have explained, the category of such institutions "included telegraph, railroad, gas, and then electric lighting firms, as well as banks, insurance companies, and mutual loan firms." Hockett & Omarova, *supra* note 15, at 468-69.

141. *Id.* at 475.

142. As the mayor of Seattle has said, "Franchise restaurants have menus that are developed by a corporate national entity, a food supply and products that are provided by a corporate national entity, training provided by a corporate national entity, and advertising provided by a corporate national entity." Int'l Franchise Ass'n v. City of Seattle, 97 F. Supp. 3d 1256, 1270 (W.D. Wash. 2015), *aff'd but criticized*, 803 F.3d 389 (9th Cir. 2015) (quoting the mayor).

143. *See, e.g.*, Sarah Whitten, *Owners of McDonald's Aren't Happy with Headquarters as Promotions Pick Up and Remodeling Costs Rise*, CNBC (Jan. 24, 2018, 9:12 AM), https://www.cnbc.com/2018/01/23/owners-of-mcdonalds-arent-happy-with-headquarters.html [https://perma.cc/7XZK-SF3M] (discussing how McDonald's is requiring franchisees to adopt a new menu and equipment).

priorities.[144] Ultimately, this would use the charter to enact a form of industrial policy, a controversial thing to do among economists who trust laissez-faire and free markets more than dirigiste direction from the state.[145]

Ricks has also focused on the charter; he thinks it should be carefully policed to eliminate shadow banking (or at least any government guarantee backing institutions providing bank-like services without a bank charter).[146] In his view, "entry restriction" through charter protection is a critical component of well-done financial regulation.[147] As he has argued, "[F]inancial and macroeconomic instability, monetary control, and private seigniorage.... supply a compelling justification for entry restriction."[148]

In Ricks's view, the control of the bank chartering process has financial stability advantages because it establishes a clear government role over insured depository and loan-making institutions and a clear delineation from other forms of financial intermediation (which, if they involved the expansion of the monetary supply, would not be permitted).[149]

The implication of Ricks's theory of money creation could lead to prohibitions of various sorts of shadow-banking ways to raise

---

144. Robert C. Hockett & Saulte T. Omarova, *Private Wealth and Public Goods: A Case for a National Investment Authority*, 43 J. CORP. L. 437, 469-70 (2018).

145. *See* Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L. 1, 2, 4, 6 (1997) (discussing the balance between free trade and industrial policy). Hockett and Omarova know this, of course. They have argued, explicitly against laissez-faire economists, that

> [o]ur government is more than merely a market overseer and regulator—it is also a direct market participant, acting not only to correct market failures or to provide vital public goods but also to create, amplify, and guide private markets in ways that enhance these markets' potential to serve important long-term public interests.

Robert C. Hockett & Saule T. Omarova, *Public Actors in Private Markets: Toward a Developmental Finance State*, 93 WASH. U. L. REV. 103, 105 (2015). Anna Gelpern and Erik Gerding are less interested in the charter but view it as one of the mechanisms for the government designation (and therefore the creation) of "safe" assets, underscoring the importance of the government's role vis a vis the private role. Anna Gelpern & Erik F. Gerding, *Inside Safe Assets*, 33 YALE J. ON REG. 363, 394 (2016).

146. *See* Morgan Ricks, *Entry Restriction, Shadow Banking, and the Structure of Monetary Institutions*, 2 J. FIN. REG. 291, 292, 294-95 (2016).

147. Morgan Ricks, *Money as Infrastructure*, 2018 COLUM. BUS. L. REV. 757, 851.

148. Ricks, *supra* note 146, at 294; *see also* MORGAN RICKS, THE MONEY PROBLEM: RETHINKING FINANCIAL REGULATION 4-7 (2016).

149. Ricks, *supra* note 146, at 294.

capital, including money market funds, securities lending businesses, and commercial paper—multibillion dollar businesses that would be under regulatory threat. By the same token, the fintech businesses that make loans—Amazon extending credit to vendors on its site and other peer-to-peer lenders—would also be under serious regulatory threat.

Others are much less sure. Acting Comptroller Noreika argued instead that the chartering "narrative persists to keep commercial interests from owning or having controlling interest in banks, in part, because many view them as 'public interests' rather than the 'private businesses' they are."[150] In his view, banking is a business, not a contract-out government function. In the wake of the financial crisis, some academics have also questioned whether the licensing requirements of the Agency rule out too many potentially beneficial owners. Mehrsa Baradaran, for example, has made the case for "possible alternatives to the strict separation of banking and commerce, such as commercial ownership of traditional banks."[151] These scholars and policymakers find the insistence on the separation of banking and commerce to be inefficient, bad for consumers, or both. And although the antiseparation crowd hails from across the regulatory spectrum, they have much in common with libertarian and free-market-oriented economists who have protested the overlicensing of American commerce, a group we will discuss in more detail in Part III.C.

B. The Chartering Debate Has Long Been with Us

The view that financial institutions are essentially providing a public service and should be treated as quasi-arms of the government is controversial, though, as we have seen, fair game these days. But treating bank charters as different and more precious than corporate charters is a view that has plenty of historical and contemporary support.[152] The battle over whether to give out

150. Steven Harras, *Acting OCC Chief Says Time to Revisit Separation of Banking and Commerce*, 2017 WL 5166575 (Nov. 8, 2017); *see also* Elizabeth J. Upton, *Chartering Fintech: The OCC's Newest Nonbank Proposal*, 86 GEO. WASH. L. REV. 1392, 1434 (2018) (reviewing this debate).

151. Baradaran, *supra* note 109, at 389.

152. *See supra* notes 104-06 and accompanying text.

banking charters freely or parsimoniously today echoes a nineteenth-century fight that only emphasizes how deep the worries over new banks go.[153]

No less than the American Bankers Association has observed that "[t]he seal of approval conferred by the OCC when it charters a national bank is an important marker of trust to customers," suggesting that bankers, at least, think it is something special.[154]

Historically, that seal of approval has almost always been tightly controlled.[155] The first state banks were usually chartered by a special bill of the legislature.[156] The National Bank Act of 1864, which created both a federal charter for banking, as well as the OCC, reflected a theory of bank regulation premised on the importance of a controlled charter, even though it would control the federal charter less than some states controlled theirs.[157]

Loosening the constraints on access to bank charters has a long pedigree as well, though. The question as to whether banks are special, and should, therefore, be subject to special charter constraints, or whether they ought to be treated like other corporations is not only being debated today. In the mid-nineteenth century there was a great deal of attention paid to the promise of "free banking."[158]

153. *See infra* Part V.D.

154. Comment Letter from Robert A. Morgan, Vice President, Emerging Techs., Am. Bankers Ass'n, to Office of the Comptroller of the Currency 3 (Jan. 17, 2017), https://www.occ.treas.gov/topics/responsible-innovation/comments/comment-amer-bankers-assn.pdf [https://perma.cc/Y66R-EKHL].

155. *See id.* at 1, 3.

156. As Franklin Jones observed in 1926, "Most of the original thirteen colonies were founded by commercial companies, which secured trade monopolies and concessions as to taxes in their charters from the king." Franklin D. Jones, *Historical Development of the Law of Business Competition*, 36 YALE L.J. 42, 42 (1926); *see also* Thomas C. Martin, *Haunted by History: Colonial Land Trusts Pose National Threat*, 48 WM. & MARY L. REV. 303, 321 (2006) ("With this vision of the economic potential of the Americas, King James granted charters to various companies of investors, allowing them to colonize the Americas as financial ventures.").

157. The control was provided by regulators, as well as legislators. As Arthur Wilmarth has put it, "The absence of any general provision in the National Bank Act authorizing national banks to establish branches reflected Congress' decentralized approach in the 1860s." Arthur E. Wilmarth, Jr., *Too Big to Fail, Too Few to Serve? The Potential Risks of Nationwide Banks*, 77 IOWA L. REV. 957, 972 (1992). But the Comptroller then interpreted the congressional lacuna to mean that national banks could not branch, limiting their size and risk—but also their ability to grow. For a discussion, see Christian A. Johnson & Tara Rice, *Assessing a Decade of Interstate Bank Branching*, 65 WASH. & LEE L. REV. 73, 79-80 (2008).

158. Solomon, *supra* note 83, at 62 ("Free banking, as previously noted, meant a system

As Kenneth Scott has explained, many bank regulators and state legislators thought that charters "should be readily available to anyone who complied with relatively simple and specific statutory requirements, rather than be grants of special privilege by the legislature."[159] New York and Michigan passed free-banking laws in the 1830s, and by the 1860s, half of the states had adopted similar policies.[160] Free banking was designed to facilitate credit access in a time when banks were viewed with suspicion and desire to create competition in the sector was strong. It allowed—at least in theory—states to develop a close-to-home financing channel that could be regulated with branch restrictions, capital ratios, and interest rate oversight.[161] At the same time, the free banking era featured unstable banks and wildcat start-ups that have led some to conclude that the era was a financially chaotic one.[162]

Charter expansionists, such as Noreika and Baradaran, and proponents of free banking are roughly on the same side of an age-old debate—they want more banking services offered by more people, to more people, on the assumption that doing so will lower costs and increase efficiency.[163] Traditionalists are more likely to take the perspective of those who believe that the charter must be zealously guarded either for reasons of financial stability, or because the finance franchise is a valuable government program that should condition participation on the provision of various public-spirited goods.[164]

C. Bank Charters as an Overlicensing Case Study

If history shows that restrictive banking licenses have long been a part of banking, one might take the free banking critique further. Licensing is ubiquitous in the federal administrative state and has come under criticism for being overly burdensome and

---

that eliminated the need to obtain a special charter from a state government to organize a bank.").

159. Scott, *supra* note 33, at 239.

160. *Id.*

161. *See* Solomon, *supra* note 83, at 61-62.

162. *See id.* at 62.

163. *See supra* notes 150-51.

164. *See supra* Part III.A.

understudied.[165] As Richard Epstein has observed, despite being the "focal point of enormous public discontent, [licensing (or permitting)] has received scant attention in the academic literature."[166] One way to take the measure of licensing is to look at financial regulation, where no institution can operate as a bank without first obtaining government preapproval.[167] J.B. Ruhl and Eric Biber describe such a regime as an "extreme specific permit[ting]" regime, the sort of permitting most susceptible to administrative abuse.[168] But banking regulation has always had a chartering component accepted by both liberal skeptics of state capture and by conservative free market economists.[169] The banking charter offers a test of the case for and against licensing more generally.

The ideas of special charters and special responsibilities for businesses are often unconvincing in many contexts. It is one thing if a business is engaged in particularly dangerous activities; then professional licenses make sense.[170] Licenses might also make sense for professions where public service is a component of the job—doctors, with their public health mission, and lawyers, with their responsibility to serve as officers of the court, might be examples of this.[171] And, some sort of mechanism of professional discipline probably must exist if an industry is required to put the interests of its clients ahead of its own, as is the case for investment advisors

165. *See* John Blevins, *License to Uber: Using Administrative Law to Fix Occupational Licensing*, 64 UCLA L. REV. 844, 847-48 (2017) ("While libertarians have challenged licensing laws for years, political progressives (including the Obama administration) are joining the calls for reform.").

166. Richard A. Epstein, *The Permit Power Meets the Constitution*, 81 IOWA L. REV. 407, 407 (1995).

167. *See* Eric Biber & J.B. Ruhl, *The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State*, 64 DUKE L.J. 133, 140 (2014).

168. *Id.* at 140, 158.

169. *See, e.g.*, John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882, 888 (2015); John H. Cochrane, *Challenges for Cost-Benefit Analysis of Financial Regulation*, 43 J. LEGAL STUD. S63, S71 (2014).

170. Even the night-watchman state advocate Philip Hamburger admits this. "The government could even (within its enumerated powers) license dangerous activities, as it does with the distribution and development of pharmaceuticals." Philip Hamburger, *The New Censorship: Institutional Review Boards*, 2004 SUP. CT. REV. 271, 312-13.

171. Gwendolyn Gordon & David Zaring, *Ethical Bankers*, 42 J. CORP. L. 559, 562-63 (2017).

and other sorts of professionals who put their licenses at risk if they betray their clients.[172]

But financial firms occupy an uneasy place in this set of concerns and that part of the case for licensing fits well with this worry. It is true that financial firms are dangerous.[173] Runnable financial firms count as risky, with the prospect of contagion. However, they are not exactly fiduciaries, especially when they are making markets, selling financial products, or even making plain vanilla commercial loans.

More generally, licensing has become a source of real controversy, especially as, at the state and local level, it has expanded beyond the professions to the trades, where a straightforward story about economic protectionism and rent-seeking can be told. Louisiana has tried to shut down some monks who dared to sell funeral caskets without a license.[174] Utah has required hair-braiders to obtain cosmetology licenses, meaning, as one judge put it, that a hair-braider "cannot legally braid hair for money unless she spends thousands of dollars for hundreds of hours of classes that have nothing to do with her occupation of natural braiding."[175] There has been litigation over the District of Columbia's tour guide licensing.[176] The literature is openly skeptical that this sort of licensing is doing much good, and there is no shortage of other outlandish examples at which to point.[177]

---

172. *See id.*

173. *See supra* notes 129-31 and accompanying text.

174. *See* St. Joseph Abbey v. Castille, 712 F.3d 215, 217-18 (5th Cir. 2013) (refusing to enforce the requirement against the monks on rational basis review).

175. Clayton v. Steinagel, 885 F. Supp. 2d 1212, 1213 (D. Utah 2012) (holding the requirement as unconstitutional for being unrelated to a rational government interest).

176. *See* Edwards v. District of Columbia, 755 F.3d 996, 998 (D.C. Cir. 2014) (holding the requirement to be a free speech violation). As the D.C. Circuit put it, "In Washington, D.C., it is illegal to talk about points of interest or the history of the city while escorting or guiding a person who paid you to do so—that is, unless you pay the government $200 and pass a 100-question multiple-choice exam." *Id.* For a discussion, see Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133, 152.

177. *See, e.g.*, MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION? 20-21 (2006); Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1100-01 (2014) (arguing for "stopping cartel-like abuses of antitrust immunity" by subjecting licensing boards to constrained antitrust).

All of this has motivated free-market types to take an especially close look at licensing—it is regulation, after all, and a heavy-handed sort at that, creating barriers to entry. Reputable economists dating back to Milton Friedman have argued that there ought to be no licensing at all—that surgeons should not be required by the government to attend medical school, that scuba divers should not be certified, and so on.[178]

And the case against licensing can go even further. Doing something about licensing abuses might not only lead to less-regulated markets, it might also give courts a greater role in policing the substance of economic regulations, a role they have stayed out of since the era of *Lochner v. New York* came to a close.[179] Libertarians confident in the wisdom of judges might want to bring back *Lochner*-style scrutiny to the regulatory state.

In this way, the long-accepted licensing requirements of banking offer something of a test case for the claims of over licensing that have marked other, different areas of regulation. If the banking licensing regime looks problematic, then the case for licensing may be as bad as Friedman thought it was. In banking, where licensing has generally been accepted as appropriate, there is some indication of a desire for somewhat less rigor, at least when it comes to ownership, and, as we will see in Part V (the fintech Part) of this Article, perhaps also in business models as well.[180] Nonetheless, as we will see in the next Part, the chartering regime in banking does

---

178. A particular opposition to medical licenses animated Milton Friedman. MILTON FRIEDMAN, CAPITALISM & FREEDOM 35, 37, 158 (1962) (listing "some activities currently undertaken by government in the U.S., that cannot, so far as I can see, validly be justified" including "[l]icensure provisions in various cities and states which restrict particular enterprises or occupations or professions to people who have a license," meaning that, inter alia, "licensure should be eliminated as a requirement for the practice of medicine"); *see also* Jonathan B. Berk & Jules H. van Binsbergen, *Regulation of Charlatans in High-Skill Professions* 38 (Stanford Univ. Graduate Sch. of Bus., Research Paper No. 17-43, 2019), https://ssrn.com/abstract=2979134 [https://perma.cc/68T2-7H5C] (arguing that licensing for doctors, lawyers, and financial professionals increases costs); Uwe E. Reinhardt, *The Dubious Case for Professional Licensing*, ECONOMIX (Oct. 11, 2013, 12:01 AM), https://economix.blogs.nytimes.com/2013/10/11/the-dubious-case-for-professional-licensing/ [https://perma.cc/RJM7-85U9].

179. 198 U.S. 45, 56-57 (1905); *see also* Joseph Sanderson, *Don't Bury the Competition: The Growth of Occupational Licensing and a Toolbox for Reform*, 31 YALE J. ON REG. 455, 457 (2014) (describing the prospect of judicial review of protectionist licensing as "a return to *Lochner*-esque intensive judicial review of economic regulation").

180. *See infra* Part V.A.

not look like regulation unmoored from the values that Congress created for the regime. The chartering decisions made by the OCC are technocratic, if not particularly well-explained. Concerns, if any, arise from the intensity of the nonpublic parts of the review of charter applications, and the corresponding difficulties in obtaining a charter.

IV. FEDERAL CHARTERING IN PRACTICE

This Part of the Article reviews how the OCC comes by and exercises its charter authority in practice. It is based on a review of all the charter denials by the Agency since 2003, no particularly difficult task given that there are so few. Although what goes into a denial is the most interesting way to analyze OCC's charter parsimony, the charter grant orders were reviewed as well, as were the Agency's applications, materials, and guidances. Lawyers who had successfully applied for charters were also interviewed, as were regulators.

In practice, the OCC makes obtaining a charter costly by insisting on a searching application process, and by discouraging marginal cases from proceeding.[181] However, once that process is concluded, it almost never denies charter applications and has made noises about trying hard to grant them.[182] This practice indicates that the charter is not an instrument of government control—at least, not because of the charter decision itself, which is given or not given based on the facts of the application rather than on the potential of the future activities of the bank and its competitors. Deposit insurance applications submitted with the charter application underscore the point—the FDIC does not make deposit insurance easy to get, but it never interacts with national banks seeking

181. *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 27, at 4-5; *see also* OFFICE OF THE COMPTROLLER OF THE CURRENCY, POLICY STATEMENT ON FINANCIAL TECHNOLOGY COMPANIES' ELIGIBILITY TO APPLY FOR NATIONAL BANK CHARTERS 3 (July 2018) [hereinafter OFFICE OF THE COMPTROLLER OF THE CURRENCY, POLICY STATEMENT], https://www.occ.treas.gov/news-issuances/news-releases/2018/pub-other-occ-policy-statement-fintech.pdf [https://perma.cc/B6PA-BD52].

182. *See* OFFICE OF THE COMPTROLLER OF CURRENCY, POLICY STATEMENT, *supra* note 181, at 1, 3.

insurance ever again after doling the insurance policy out.[183] The OCC's ordinary supervision of an existing bank is without question rigorous, and can be used to send banks toward particular causes and to keep them out of certain businesses.[184] But there is little indication that any of this is related to the chartering decision itself.

A. The Practice of Chartering

The odd result of the OCC's searching charter application requirements is that, while navigating the OCC's approval process is no easy thing, the Agency rarely denies applications for bank charters.

When it denies applications, the denials come in short letters with little reference to the law and somewhat routine conclusions.[185] Charter approvals look quite similar to rejections—two- to five- page letters, generally, reciting a rote set of facts, the occasional legal reference, and an indication that the application has been approved or denied.[186] If anything, charter approvals and merger approvals are more elaborate than the denials, as the Agency often describes the proposed business in detail and outlines some conditions for approval, where appropriate.[187] Nonetheless, even with grants, the discussion section of approval letters is sometimes only a paragraph long.[188]

---

183. *See, e.g.*, FEDERAL DEPOSIT INSURANCE CORPORATION, DEPOSIT INSURANCE APPLICATIONS: PROCEDURES MANUAL 11-12 (Oct. 2018), https://www.fdic.gov/regulations/applications/depositinsurance/procmanual.pdf [https://perma.cc/64NA-NFLF]. Unless the bank is subject to resolution (the term for bankruptcy), of course. *See* FEDERAL DEPOSIT INSURANCE CORPORATION, RESOLUTIONS HANDBOOK 2 (Jan. 2019), https://www.fdic.gov/bank/historical/reshandbook/resolutions-handbook.pdf [https://perma.cc/3BMN-HW82] (discussing the resolution process).

184. *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, OCC BULLETIN 2013-29, THIRD-PARTY RELATIONSHIPS: RISK MANAGEMENT GUIDANCE 3-4 (Oct. 2013), https://www.occ.gov/news-issuances/bulletins/2013/bulletin-2013-29.html [https://perma.cc/5K58-CHKG].

185. *See, e.g.*, OFFICE OF THE COMPTROLLER OF THE CURRENCY, CORPORATE DECISION NO. 2004-4 1 (Feb. 2004), https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2004/cd04-4.pdf [https://perma.cc/6SDZ-B59F].

186. *See, e.g.*, OFFICE OF THE COMPTROLLER OF THE CURRENCY, CORPORATE DECISION NO. 2015-02 1-2 (Mar. 2015), https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2015/cd15-02.pdf [https://perma.cc/UXP2-WHXA].

187. *See id.* at 2.

188. *See, e.g.*, *id.* at 1-2 (showing a discussion section that amounts to one paragraph plus one sentence, and 160 words, in approving charter conversion).

1. Illustrating the Approval Process: The Online-Only Bank

The OCC divides its charter applicants into two groups. De novo applications are for start-up banks, while charter conversion applications seek to change state-chartered banks, state- or federally chartered thrifts, or credit unions into nationally chartered banks.[189] The lawyers who represent clients approved for national charters are often sophisticated, including experienced practitioners from the financial regulatory groups of the highly profitable and well-known New York firms of Wachtell, Lipton, Rosen & Katz, and Sullivan & Cromwell.[190] Because these firms are expensive, and would be unlikely to be hired for easily obtainable licenses, their presence in the application process suggests that navigating charter approvals at the federal level is complex, that bank charters are valuable, or both.

One way to make sense of how the Agency handles these sorts of applications is to investigate an illustrative charter application in some detail. The highest profile recent de novo application also helps to illustrate one way that fintech is finding its way into the banking space. Varo Money is an online-only lender that may serve as an example of how de novo charters are sought, as well as an example of a fintech shadow bank that hopes to come out of the shadows.

Varo's business model, as the bank put it in a press release, is to be the "first national bank in American history designed for people who want to bank on their smart phones."[191] The firm seeks to provide a full panoply of banking services to customers comfortable with banking without ever visiting a bank branch; it has already

---

189. *See* OFFICE OF COMPTROLLER OF CURRENCY, COMPTROLLER'S LICENSING MANUAL: CONVERSIONS TO FEDERAL CHARTER 1 (2019), https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-licensing-manual/files/conversi.pdf [https://perma.cc/XBD4-PKN2]; OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 27, at 1.

190. *See, e.g.*, Elizabeth Olson, *Wachtell, Sullivan & Cromwell Lead on BB&T, SunTrust Deal*, BLOOMBERG (Feb. 7, 2019, 1:44 PM), https://news.bloomberglaw.com/corporate-law/wachtell-sullivan-cromwell-lead-on-bb-t-suntrust-deal [https://perma.cc/E52W-5VSF].

191. Connor McSheffrey, *Varo Bank, N.A. Applies for National Bank Charter*, VARO MONEY (Nov. 15, 2017), https://www.varomoney.com/press_release/varo-bank-n-applies-national-bank-charter/ [https://perma.cc/53DA-UG48].

built up a customer base by partnering with a duly chartered bank through which it can route deposits.[192]

Varo is a start-up supported by private equity—former Treasury Secretary Timothy Geithner's firm, Warburg Pincus, has led the fundraising for it.[193] Varo's second financing round, in which it raised forty-five million of the seventy-eight million dollars in capital it had obtained at the point in which it applied for the banking charter, was premised on the pending application by the bank for a national bank charter, as it noted in its announcement closing the financing round.[194] As Colin Walsh, the CEO of the company, has said,

> [T]he foundational banking products that we offer are the checking account, the interest bearing savings account, a form of short term sort of revolving credit and installment loans and those make up kind of the core of the banking products.
> ...
> [B]ecause we're in a mobile platform, we don't own branches, we have a partnership on our ATM networks as opposed to having our own ATMs, we don't do expensive cash handling, we don't have legacy technology; we're able to offer our products at very low cost.[195]

But Varo has suggested that a charter offers the promise of potential expansion abroad and at home, as well as regulatory simplicity.[196] As Varo's CEO has put it, without a charter, Varo was "having deposits sitting with a sponsor bank and having lending through a series of state lending licenses," effectively giving the

---

192. Katie Roof, *Varo Money Raises $45 Million from Mobile Banking Without Fees*, TECHCRUNCH (Jan. 18, 2018, 9:47 PM), https://techcrunch.com/2018/01/18/varo-money-raises-45-million-for-mobile-banking-without-fees/ [https://perma.cc/R5H4-Z8RV] ("Varo offers an FDIC-backed bank account backed by The Bancorp Bank.").

193. Telis Demos, *Silicon Valley Looks at Something New: Starting a Bank*, WALL ST. J. (May 1, 2016, 7:40 PM), https://www.wsj.com/articles/silicon-valley-looks-at-something-new-starting-a-bank-1462146047 [https://perma.cc/MB56-9YW2] (describing Varo Money's model).

194. *Varo Money Closes $45 Million Series B Financing Round*, BUS. WIRE (Jan. 18, 2018, 9:00 AM), https://www.businesswire.com/news/home/20180118005410/en/Varo-Money-Closes-45M-Series-Financing [https://perma.cc/M73Z-DASU].

195. *Lend Academy Podcast: Episode No. 142*, LEND ACADEMY 2-3 (Mar. 9, 2018), https://www.lendacademy.com/wp-content/uploads/2018/03/Podcast-142-Colin-Walsh.pdf [https://perma.cc/3RFQ-WB6L].

196. *See id.* at 6.

company twenty-one regulators.[197] If the OCC gives a final approval of its charter application, it will probably only have one—the national charter preempts most state consumer protection laws and all money transmitter requirements and usury limits.[198]

Obtaining a charter for Varo has proven to be a lengthy process, and, at the time of writing, it is still ongoing. The prefiling contact with the Agency began in 2017 with an application for a provisional charter filed on July 21, 2017.[199]

The application process for a national charter, which requires approval from both the OCC (for the charter) and FDIC (for the deposit insurance the bank must obtain if it is to take deposits), has been described by Varo's officers as a "high hurdle" that "is incredibly demanding and complicated," because of the novelty of the business model.[200] "The OCC is not going to relax their standards, so it's been a rigorous process. They're definitely not just sitting on it. We speak regularly," Varo's Walsh told the *American Banker* in January of 2018.[201]

No online-only banks had received charter approval from the OCC or FDIC before Varo.[202] In fact, the most high-profile, recent effort by an Internet firm to obtain such a charter, by the peer-to-

197. *Id.*

198. *See infra* notes 280-81 and accompanying text.

199. *See* McSheffrey, *supra* note 191.

200. Lalita Clozel, *Mobile-Only Fintech Makes Play for (Regular) Bank Charter*, AM. BANKER (July 25, 2017, 8:00 AM), https://www.americanbanker.com/news/mobile-only-fintech-makes-play-for-regular-bank-charter [https://perma.cc/7RFA-RUME] ("[I]t remains to be seen whether regulators—particularly the FDIC, which has granted deposit insurance to just a trickle of new banks since the crisis—are ready for a mobile-only bank.").

201. Penny Crosman, *Mission-Driven Varo Money Secures $45 Million from Investors*, AM. BANKER (Jan. 18, 2018, 9:00 AM), https://www.americanbanker.com/news/mission-driven-varo-money-secures-45-million-from-investors [https://perma.cc/8KJ6-ZQSB] ("[C]harter would give Varo the ability to offer deposits and thereby gain low-cost funds, and it would enable it to report to one regulator rather than myriad state and national agencies."). Varo recently received approval for deposit insurance with the FDIC, leaving final approval from the OCC as its final hurdle. FED. DEPOSIT INS. CORP., ORDER RE: VARO BANK, NA (Feb. 7, 2020), https://www.fdic.gov/regulations/laws/bankdecisions/depins/varo-bank-na-draper-utah.pdf [https://perma.cc/97RX-DB5P].

202. *See* Anna Irrera, *SoFi Withdraws U.S. Banking Application, Citing Leadership Change,* REUTERS (Oct. 13, 2017, 4:38 PM), https://www.reuters.com/article/us-sofi-future/sofi-withdraws-u-s-banking-application-citing-leadership-change-idUSKBN1CI2XC [https://perma.cc/GTH6-XV82].

peer lender SoFi, concluded with a withdrawn application after its CEO resigned in a sexual harassment scandal.[203]

Varo's application for a national charter was filed by Sullivan & Cromwell, a well-known New York law firm with plenty of banking expertise, on July 21, 2017.[204] The eighty-eight-page application, including exhibits, with an even larger confidential appendix attached (but not released to the public), follows a template consisting of responses to a series of questions set forth on an OCC form.[205] The questions range from the fundamental to the obscure, from how the bank expects to obtain sufficient capital to whether the bank's physical manifestations would be handicap accessible or would be located in historically significant buildings (in the case of Varo—a mobile-only bank that would have only a headquarters in Salt Lake City and a business office in San Francisco—the requirements would only apply to its headquarters and business offices).[206]

All told, the form application included twenty-five pages of responses to preset OCC inquiries with seven of those pages being devoted to the largest single response category, the management and ownership of the bank.[207]

Attached with the application were a number of public exhibits including the bank's bylaws, its plan to comply with the Community Reinvestment Act, and other forms of paperwork.[208] A larger set of confidential exhibits listed Varo's shareholders, its business plan, its management policies, and its prefiling financial statements—Varo began its application with two pages making the case for the confidential treatment of this information.[209]

---

203. *See id.* ("[The CEO's] departure in September had complicated SoFi's banking application, a source familiar with the matter told Reuters earlier this month, because regulators assess whether a company has a capable CEO before allowing it to accept deposits.").

204. *See* Varo Bank, N.A.: Interagency Charter and Federal Deposit Insurance Application 1 (July 21, 2017), https://foia-pal.occ.gov/App/ReadingRoom.aspx [https://perma.cc/79N2-L6J4] (search for "Varo" in the "Folder Name" search box).

205. *See generally id.*

206. *See id.* at 22, 27.

207. *See id.* at 5-29.

208. *See id.* at 36-82.

209. As Varo said in its application, "Disclosure of this information would reveal to competitors the internal strategies, future plans and competitive position of the Applicant and would place the Applicant at a competitive disadvantage with respect to their competitors who do not publicly reveal such information." *Id.* at 1-3.

After receiving the submission, the OCC published the nonconfidential components of the application and the fact that the filing had been made and invited comments for a thirty-day period. Varo got a positive comment from a Salt Lake City resident and a nine-page-long negative comment from the National Community Reinvestment Coalition, speculating that the bank would not meet Community Reinvestment Act (CRA) priorities.[210] Despite the concerns that regulators and potential competitors have expressed with fintechs receiving bank charters, no comments were received from either regulators or competitors (partly this may be explained by the fact that Varo is seeking a standard national bank charter, rather than the special purpose charter that state regulators have argued is beyond the power of the OCC to offer).

Varo may have decided to apply when it did on the basis of a speech by the OCC's acting comptroller encouraging fintechs to apply for national bank charters.[211] The decision to apply was wise as to one regulator and unfortunate as to another. Varo received conditional approval from the OCC in a five-page letter that addressed, but ultimately dismissed, the comments that the bank would fail to meet its CRA obligations.[212] "The Bank has demonstrated in its charter application and through discussions with OCC staff that it understands the requirements of the CRA and has begun to develop a CRA plan," the Agency observed.[213]

As is usual for grant letters, the references to legal authority were limited; but the OCC imposed conditions on Varo, most significantly that Varo would be required to raise $104 million in capital to obtain final approval for the charter, but also that it enter into an

210. *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, CONDITIONAL APPROVAL NO. 1205 2 (Sept. 2018), https://www.occ.treas.gov/topics/charters-and-licensing/interpretations-and-actions/2018/ca1205.pdf [https://perma.cc/6W5H-8MET].

211. *See OCC Invitation Prompts Fintech to Apply for Traditional Bank Charter*, WESTLAKE LEGAL, http://www.lawyerinloudoun.com/occ-invitation-prompts-fintech-to-apply-for-traditional-bank-charter/ [https://perma.cc/MD7F-WEK2] ("Varo instead opted to apply for the traditional national bank charter through the OCC and the Federal Deposit Insurance Corp.—a step some attorneys view as a direct result of the OCC acting comptroller's July 19 speech to the Exchequer Club in Washington, D.C., that encouraged fintechs to act as banks.").

212. *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 210, at 1-2.

213. *Id.* at 2.

operating agreement with the Agency and obtain approval for the addition of any principals to the leadership of the bank.[214]

The conditional approval was dramatic—the OCC has engaged in so little postcrisis chartering. However, Varo was unable to obtain deposit insurance from the FDIC until February 7, 2020.[215]

Varo does not yet have final approval from OCC, though it is likely to get it, and accordingly remains unlicensed and dependant on its correspondent bank for banking services pending its passage of its final hurdle.[216]

2. Charter Denials

A review of every charter denial by the Agency between 2003 and 2017 is a straightforward recounting of the application of a fit and proper standard, but with teeth, to would-be bankers who appear to be inexperienced, criminal, or some combination of both. This describes the entirety of the Agency's denial oeuvre.

The OCC does not make overt policy choices with its denials, regarding, say, an oversupply of banking or the failure to serve a needed growth industry seeking funding, but rather objects to the experience or quality of the team behind the application or the prospects of the bank's business plan.[217] For example, it told one would-be California bank that it denied the bank's charter application because of a "lack of banking experience on the proposed board of directors" and because "the two most senior members of the management team do not meet our standards for approval of the charter application."[218] It told another that the management team was not "sufficiently strong," which warranted rejection of the

---

214. *See id.* at 3-4.

215. *See* FED. DEPOSIT INS. CORP., *supra* note 201.

216. Bill Streeter, *Varo Money Launching First True Mobile-Only National Bank*, FIN. BRAND (Sept. 4, 2019), https://thefinancialbrand.com/87849/fintech-varo-money-mobile-national-bank-charter-challenger-neobank/ [https://perma.cc/R6ZU-929N]; *see also* OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 9 and accompanying text.

217. *See, e.g.*, OFFICE OF THE COMPTROLLER OF THE CURRENCY, CORPORATE DECISION 2003-8 1-2 (July 2003), https://www.occ.treas.gov/topics/charters-and-licensing/interpretations-and-actions/2003/cd03-8.pdf [https://perma.cc/9H9W-X6VC] ("[W]e concluded that the management team was not sufficiently strong because the members lacked demonstrated and relevant experience.").

218. OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 185, at 2.

charter application.[219] Sometimes it does not explain the reasons for its denial.[220]

Underlying these sorts of objections is often a sense that the applicants are naïve, or, possibly, up to no good. In a South Dakota case, the Agency objected to the proposal by an acquiring bank to transition into a subprime credit card business.[221] As the OCC explained, the "proposed business plan for the Bank to become an issuer of general purpose credit cards represents not only a significant change to the Bank's previous business, but also a shift to an intensely competitive segment of the credit card market, in which the Bank ... [has] no discernable experience."[222] When ExTran Bank sought a federal charter in Florida, the OCC rejected the application in perhaps its longest denial letter, amounting to 1666 words, or three and a half pages,[223] because it believed that "the nature of the proposed activities ... pos[ed] particularly high supervisory and regulatory risks, including risks surrounding [the] Bank Secrecy Act and anti-money laundering."[224] Moreover, "the application ... provided no explanation or justification to demonstrate that the proposed level of staffing of the compliance department would be sufficient given the high supervisory and regulatory risks raised by the application."[225] The Agency apparently had doubts that ExTran would have had the capability, or even the desire, to catch illegal activity inside the bank.[226]

---

219. OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 217, at 2-3.

220. This appears to be the case with the proposed Western Development Bank of Fresno, whose denial was published in a chart in 2004, and nowhere else that I could find. *See* Julie L. Williams, *Corporate Structure of National Banking System*, 24 OFF. COMPTROLLER CURRENCY Q.J. 1, 100 (2005); *see also Details for OCC Control Number: 2004-WE-01-004*, OFF. COMPTROLLER CURRENCY, https://apps.occ.gov/CAAS_CATS/CAAS_Details.aspx?FilingTypeID=2&FilingID=93318&FilingSubtypeID=1101 [https://perma.cc/S2BP-TKBQ].

221. *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, CORPORATE DECISION NO. 2003-11 3-4 (Oct. 2003), https://www.occ.treas.gov/topics/charters-and-licensing/interpretations-and-actions/2003/cd03-11.pdf [https://perma.cc/2V9C-6ZKL].

222. *Id.* at 3.

223. *See generally* OFFICE OF THE COMPTROLLER OF THE CURRENCY, CORPORATE DECISION NO. 2008-10 (Dec. 2008), https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2008/cd08-10.pdf [https://perma.cc/AD86-P4KZ].

224. *Id.* at 1 (quoting Letter from Lawrence E. Beard, Deputy Comptroller, Licensing, to Herbert D. Haughton, Drafter of ExTran's charter application (Mar. 31, 2008)).

225. *Id.* at 2.

226. *See id.* at 3.

B. All Applications Analysis

Between 2003, the year during which the OCC first indicated its willingness to consider special purpose charters, and 2010, the OCC received 236 new charter applications and approved or conditionally approved 190 of those applicants.[227] From 2011 to 2017, charter applications declined dramatically—less than ten were received for those six years.[228] For applications for charters between 2003 and 2017, only four were denied, and three of those denials were in 2003 and 2004.[229] In sum, so-called "de novo" charter applications, for banks starting from scratch, all but disappeared, as Figure 1 below indicates (as we have observed, they have begun to rebuild steam in 2018-2019, after the period of study here).[230] The difference is apparent to the eye; moreover, the difference in means between 2005-2008 (roughly before and during the financial crisis) and 2009-2012 (during and after the financial crisis) are statistically significant at the $p<.05$ level for de novo charter applications received and for conditional approvals of conditional charter applications.[231]

227. *See infra* fig.1.

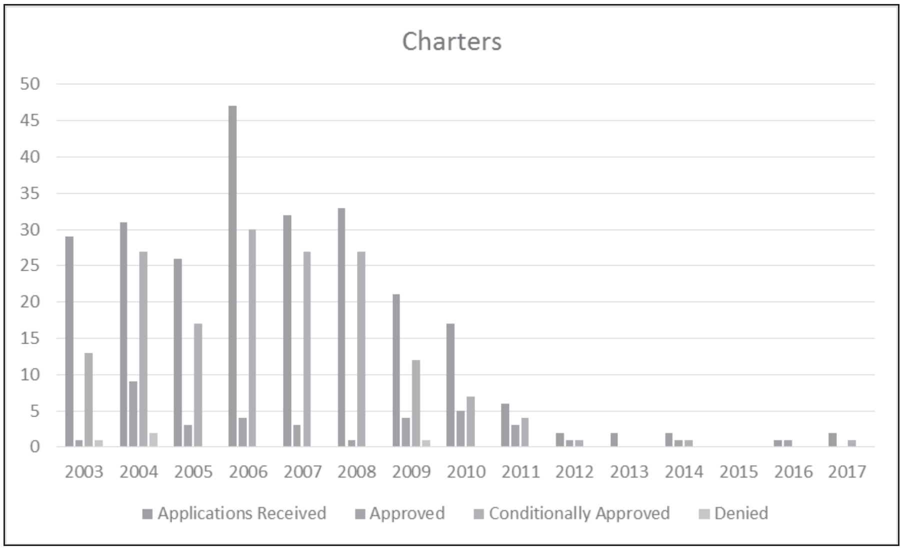
228. *See infra* fig.1.

229. *See infra* fig.1.

230. The sources for Figure 1 are OCC's annual reports. OFFICE OF THE COMPTROLLER OF THE CURRENCY, ANNUAL REPORTS, https://www.occ.treas.gov/publications-and-resources/publications/annual-report/index-annual-report.html [https://perma.cc/5CSY-6Z3J] (click on each report to view the data used to compile Figure 1).

231. The means for the four-year periods 2005-2008 and 2009-2012 are also significantly different for charter approvals plus conditional approvals at the $p<.05$ level. Differences in means were calculated using Welch's two-sample t-test, which is appropriate where the samples have unequal variances (as is the case for several variables here) and which performs comparably to the Student's t-test otherwise. *See Welch T-Test*, STATISTICAL TOOLS FOR HIGH-THROUGHPUT DATA ANALYSIS, http://www.sthda.com/english/wiki/welch-t-test [https://perma.cc/K4BN-QFVZ].

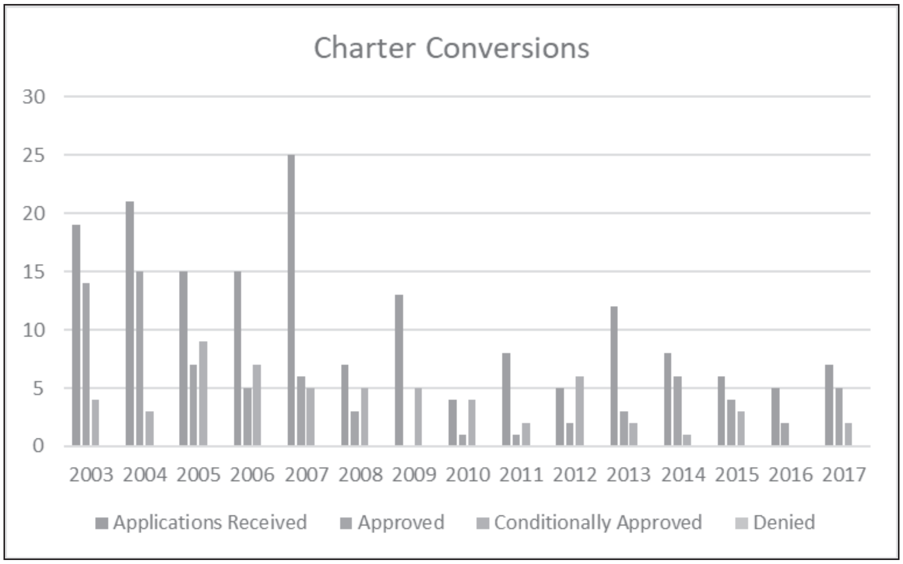
Figure 1.



Nor has the situation been alleviated by charter conversions, or applications to turn state or federal non-OCC banking licenses into OCC licenses. Charter conversions also show a decline since the financial crisis, as Figure 2 below establishes, though the difference between precrisis applications or approvals and postcrisis applications or approvals is not statistically significant.[232]

232. The sources for Figure 2 are the OCC's annual reports. *See supra* note 231. Again, Welch's two-sample *t*-test was employed to see if the means between 2005-2008 and 2009-2012 were significantly different. It is unsurprising that they were not, as most conversions are accompanied by a merger, and in the wake of the crisis, regulators often encouraged troubled, but not failing, banks to find a healthier strategic partner. Marcelo Rezende, *The Effects of Bank Charter Switching on Supervisory Ratings* 14 (Fed. Reserve Bd., Working Paper No. 2014-20, 2014), https://www.federalreserve.gov/pubs/feds/2014/201420/201420pap.pdf [https://perma.cc/AP7X-B6TG]; Mike McIntire, *Bailout Is a Windfall to Banks, If Not to Borrowers*, N.Y. TIMES (Jan. 17, 2009), https://www.nytimes.com/2009/01/18/business/18bank.html [https://perma.cc/YCD9-WAWG]. Moreover the samples were small (though this makes the significant difference between the precrisis and postcrisis means for de novo applications all the more surprising). *Compare supra* fig.1, *with infra* fig.2.

Figure 2.



The comparative vibrancy of charter conversions is probably related to the disappearance of de novo applications for charters;[233] because many banks struggled through the financial crisis, existing charters for cheap, small, and all-but-shell banks are available for conversion at an inexpensive rate.

The paucity of new entrants into the banking system prompted the 2017 approval of a national charter for a de novo bank to be greeted with hosannas from the Acting Comptroller himself, who pronounced himself "encouraged that we are seeing increasing interest in becoming new banks and that de novo activity appears to be thawing slowly as the economy warms."[234] The Acting Comptroller welcomed the bank—a relatively small institution based in Winter Park, Florida—to national supervision, but cautioned that "de novo banks are still exceedingly rare."[235] He recommended

233. *See supra* note 231 and accompanying text.

234. *First National Bank Charter Granted Since Financial Crisis,* FED. BANKING L. REP. NO. 2744, Nov. 7, 2017, at 5 (quoting Keith Noreika).

235. *Id.* (quoting Keith Noreika). Since then, a small bank headquartered in Hollywood, Florida, has also won conditional approval to hold a national charter—a development that suggests that the OCC is still acting parsimoniously when it comes to de novo applications.

deregulation: "Making the process of establishing de novo banks more efficient can only accelerate the recent positive trend and create more economic opportunity for consumers, businesses, and communities across the nation."[236]

The secret halt in the chartering of new lending institutions is not unique to the OCC. The FDIC also ceased entertaining applications from two different kinds of banks during the same period. First, it ceased approving applications from de novo industrial loan companies (ILCs) in 2008 and glanced a relatively skeptical eye on those applications from 2000 to 2007.[237] ILCs are lending institutions owned by commercial firms and mostly chartered by the state of Utah—a rare breach in the wall separating banks from commercial activities, but a relatively modest one in size.[238]

Second, between 2000 and 2007, the years leading up to the financial crisis, the FDIC received more than 1600 de novo charter applications for deposit insurance and granted approximately 75 percent of the applications.[239] But the crisis meant that applications, and grants, ground to a halt. Between January 2011 and July 2016, the FDIC received only ten applications for deposit insurance for de novo institutions, of which it approved three (all of which were from state-charted institutions).[240] The FDIC's caution won it the ire of former Acting Comptroller Noreika, who said that it was holding up

---

See OFFICE OF THE COMPTROLLER OF THE CURRENCY, CONDITIONAL APPROVAL NO. 1197 1 (July 2018), https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2018/ca1197.pdf [https://perma.cc/Y53M-TA4H].

236. *First National Bank Charter Granted Since Financial Crisis*, *supra* note 234, at 5.

237. *See The Reemergence of De Novo Bank Charters*, ARNOLD & PORTER (Oct. 4, 2017), https://www.arnoldporter.com/en/perspectives/publications/2017/10/the-reemergence-of-de-novo-bank-charters [https://perma.cc/9VUS-YK7S].

238. As Aaron Klein has explained, "While the FDIC between 2000 and 2008 approved 28 new ILCs, none have been approved since then. Between 2011 and 2016 there were no applications to the FDIC to create new ILCs." Aaron Klein, *FinTechs, Lending and Banking: Can All Three Co-Exist*? 20 No. 5 FINTECH L. REP. NL 1 (Sept./Oct. 2017). This unsurprisingly makes the ILC an unattractive—or possibly unavailable—option for new entrants such as fintech firms. Cinar Oney, *Fintech Industrial Banks and Beyond: How Banking Innovations Affect the Federal Safety Net*, 23 FORDHAM J. CORP. & FIN. L. 541, 544 (2018) ("[T]he industrial bank charter is not the only option for the FinTech firms that seek to engage in the business of banking.").

239. *Oversight of the FDIC Application Process: Hearing Before the Committee on Oversight and Government Reform*, 114th Cong. 10 (2016) (statement of Martin J. Gruenberg, Chairman, Fed. Deposit Ins. Corp.).

240. *See id.* at 12.

a process in cases where the OCC was willing to charter banks.[241] In 2017, he complained, "We, ourselves, since 2001 have chartered 14 institutions, and the FDIC hasn't acted on a single—any of those 14 applications .... They just let it hang out there forever, so that the organizers wasted all their money trying to get insurance, and then they gave up."[242]

In this way, Noreika suggested that the OCC, or at least he, was still a friend to the start-up bank community. But whatever its views of the FDIC, in all, the practice of the Agency indicates that it is certainly not doing what the charter reformers would like it to do.[243] The Agency spends no time evaluating the public interest in a new bank or nudging a bank towards policy priorities of the government.[244] Instead, it takes the measure of the management team, using a complex application and an ultimately low bar, and grants those applications that have managed their way through the process and met that bar.[245]

The OCC's searching application decisions have created some problems for its bottom line. Start-up banks have a choice of government agencies to turn to when they make their de novo applications.[246] State banks, assuming they can obtain FDIC deposit insurance, offer most of the features that national banks do, meaning that the OCC must balance its skepticism of business models against its desire for the examination fees that any new member of its system would provide.[247] Moreover, state charter holders have found that they are generally able to access the broader national market when it comes to obtaining clients and

241. Rob Tricchinelli, *OCC's Noreika Knocks FDIC Pace on New Bank Charters*, BLOOMBERG BNA (Aug. 4, 2017), https://web.archive.org/web/20170807183913/https://www.bna.com/occs-noreika-knocks-n73014462803/ [https://perma.cc/TZ5S-X48C].

242. *Id.* (quoting Noreika). It means that these firms got provisionally approved by the OCC, assuming they could obtain deposit insurance; when they could not, those applications were withdrawn. *See id.*

243. *See* Hilary Burns, *Will De Novo Activity Pick Up in 2019? Don't Bet on It*, AM. BANKER (Dec. 21, 2018), https://www.americanbanker.com/news/will-de-novo-activity-pick-up-in-2019-think-again [https://perma.cc/H32C-QJDC].

244. *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 27, at 3-6.

245. *See id.*

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

247. *See id.* at 3, 18.

depositors,[248] meaning that what the OCC offers them amounts to either high-quality supervision or low-touch regulation.[249] OCC examination fees tend to be higher than state fees, meaning that state charters usually have a cost advantage.[250] Perhaps for this reason, since 2003, most bank start-ups have obtained state charters, which has led to outright worry by the OCC, as the Agency depends upon examination fees to fund its budget.[251]

C. What Should Be Done?

As we have observed, the OCC's practice when it comes to chartering banks has been extraordinarily secretive. For most of the past decade, it has refused to charter any banks; for the decade before that, it chartered many.[252] The change in policy has been unannounced and unexplained.[253] Nor has the FDIC done anything public to suggest that it is no longer willing to grant deposit insurance to start-up banks, although that appears to be its practice.[254] Moving from a licensing regime to a no-license-is-permitted regime without any sort of transparency about the

---

248. For example, "[p]rior to 1980, state-chartered banks were not able to export interest rates across state lines like their nationally chartered competitors. Concerns about competitive equity caused Congress to provide state banks with equal powers." Brian Knight, *Why State-by-State Fintech Oversight Doesn't Work,* AM. BANKER (Sep. 6, 2016, 11:00 AM), https://www.americanbanker.com/opinion/why-state-by-state-fintech-oversight-doesnt-work [https://perma.cc/5RE5-PJQ3].

249. For a discussion, see David Zaring, *Administration by Treasury*, 95 MINN. L. REV. 187, 209 (2010) (reviewing the closeness of the relationship between banks and their regulators, which means, among other things, that banks rarely sue under the APA, for fear that the regulators will retaliate).

250. As two FDIC economists have put it, "[T]he assessments for supervision paid by state-chartered banks are significantly less than those paid by comparably sized OCC-supervised banks." Blair & Kushmeider, *supra* note 246, at 6; *see also* OFFICE OF THE COMPTROLLER OF THE CURRENCY, OCC BULLETIN 2018-43, FEES AND ASSESSMENTS: CALENDAR YEAR 2019 FEES AND ASSESSMENTS STRUCTURE (Nov. 30, 2018), https://www.occ.treas.gov/news-issuances/bulletins/2018/bulletin-2018-43.html# [https://perma.cc/CA35-WERT].

251. Gary W. Whalen, *Why Do De Novo Banks Choose a National Charter?* 2 fig.1, 5-7 (OCC Econ., Working Paper No. 2010-2, 2010), https://www.occ.treas.gov/publications/publications-by-type/occ-working-papers/2012-2009/wp2010-2.pdf [https://perma.cc/3X4T-S8PG].

252. *Supra* fig.1.

253. *See supra* Part IV.A.2.

254. *See* Tricchinelli, *supra* note 241 (quoting Noreika).

decision and why it has been made looks like entirely arbitrary administrative law.[255]

Moreover, the solution is not particularly difficult. The OCC could issue a guidance document indicating that it would treat new applications for new banks in the wake of a financial crisis or troubled economy with "enhanced scrutiny." That guidance would put regulated industry on notice without going through the complexities of rulemaking required by the APA.[256] In 2018, it, or the FDIC, could have announced that a new approach to de novo applications was being taken.[257] That it has chosen not to announce its new chartering policies, except perhaps obliquely in speeches, so suggests that the Agency feels particularly unencumbered by the regulatory requirements that most of its peer agencies must honor.[258] It is secret law, and secret law is bad law.[259] The OCC should publicize and update its willingness to consider charter applications.

V. THE FINTECH CHARTER

The conservative practice of the OCC when it comes to chartering actual banks has changed—maybe—with its new willingness to charter certain businesses that rely on the Internet to provide financial services to their customers.[260] The so-called fintech charter would expand the reach of both the Agency and the reach of the bank charter—a different practice from the OCC's recent unwillingness to expand the number of chartered banks at all.[261] The proposed fintech charter has occasioned consternation and lawsuits, but the concern is, while not unreasonable, largely misplaced.

255. *See supra* Parts IV.A.2-3.

256. *See* MAEVE P. CAREY, CONG. RESEARCH SERV., THE FEDERAL RULEMAKING PROCESS: AN OVERVIEW 5-6 (2013) (discussing the rulemaking process).

257. *See supra* note 5 and accompanying text.

258. *See* Zaring, *supra* note 249, at 200.

259. "The law cannot be a secret hidden from the public." Jonathan Manes, *Secret Law*, 106 GEO. L.J. 803, 805 (2018).

260. For some examples of businesses that rely on the Internet to provide financial services, see Farrington, *supra* note 120 (discussing companies that provide debt services); Sraders, *supra* note 121 (discussing Venmo and PayPal).

261. *See supra* fig.1.

After situating the state of play in the fintech marketplace, and in the existing regulation of it, I examine the Agency's practice when it comes to special charters. I then evaluate the costs and benefits of a fintech charter. With the preemption of state banking and usury laws, national charters offer the promise of a single regulator and the possibility of a technically superior, if more expensive, form of supervision. So far, the OCC has treaded extremely cautiously when it comes to fintech, and my normative conclusion is that this is appropriate and should be vindicated in court. Anything more elaborate than cautious approval on non-deposit-holding, Internet-based financial institutions of modest size should be a matter for Congress. The OCC's practice—so far consistent with this approach—also suggests that the charter-as-policy crowd are putting too much hope into the licensing mechanism as a promoter of broad financial sector reform.

A. The State of Fintech

Online providers of financial services, ranging from exchanges matching buyers and sellers of cryptocurrencies to peer-to-peer lenders, provide bank-like services without holding bank charters. They are examples of the broadest definitions of shadow banks, even if they do not, in every case, fit the Gary Gorton and Andrew Metrick borrow-short-to-lend-long-without-a-charter model in every particular.[262] Start-up exchanges can hold money for clients who wish to trade cryptocurrencies (or anything else),[263] which looks a bit like the taking of deposits. Social lenders take money from individuals and firms and match them with borrowers.[264] They are extending credit, which is something that banks do. So are online platforms such as Amazon and Alipay that make loans or extend trade credit to vendors on their sites.[265]

---

262. *See* Gorton & Metrick, *supra* note 23, at 279-80.

263. *See* Naveen Saraswat, *How Do Cryptocurrency Exchanges Work? And What Technologies Are Driving Disruption.*, HACKERNOON (Oct. 14, 2019), https://hackernoon.com/how-do-cryptocurrency-exchanges-work-and-what-technologies-are-driving-disruption-33d0007eb018 [https://perma.cc/LC5Y-383K] (explaining cryptocurrency exchanges).

264. *See, e.g.*, *About Social Lender*, SOCIAL LENDER, https://sociallenderng.com/ [https://perma.cc/HL3V-224Q].

265. *See* Spencer Soper & Selina Wang, *Amazon's Lending Business for Online Merchants*

Some fintechs are money transmitters such as Western Union—they do not take deposits or make loans, but do hold money for customers, which is something that banks do.[266] Others are payment processors such as PayPal, but do not really let their customers hold balances.[267] Others are online lenders such as SoFi, Prosper, and Lending Club, and still others partner with chartered banks to provide the full panoply of banking services, including (for now) Varo.[268] Finally, there are all those technology firms associated with cryptocurrencies, including exchanges, hedge funds, and would-be wallets. As a matter of technology, these fintechs need not distinguish between any states in making business decisions—they exist on the Internet and can serve anyone with Internet access, and the Internet does not respect state boundaries.[269]

Gains Momentum, BLOOMBERG (June 8, 2017, 12:00 AM), https://www.bloomberg.com/news/articles/2017-06-08/amazon-s-lending-business-for-online-merchants-gains-momentum [https://perma.cc/X2QE-TECL]; *Alipay Rolls Credit for Consumers*, PYMNTS.COM (Jan. 5, 2015), https://www.pymnts.com/news/2015/alipay-rolls-credit-for-consumers/ [https://perma.cc/Z8PK-FUDM].

266. *See* Corinne Abrams, *Fintech Startups Seek to Shake Up Money-Transfer Industry*, WALL ST. J. (Dec. 19, 2017), https://www.wsj.com/articles/fintech-startups-seek-to-shake-up-money-transfer-industry-1513679401 [https://perma.cc/W28K-NEJR] (describing the money transfer industry, which enjoys some regulatory barriers to entry). "Money transmitter laws are essentially 'safety and soundness' laws aimed at protecting consumers from suffering losses, and have traditionally governed money transfers services like Western Union." Tu, *supra* note 127, at 82.

267. Though, to be sure, "PayPal is regulated by numerous states as a money transmitter or money service business." FREDERICK H. MILLER & SARAH JANE HUGHES, 10A UNIFORM COMMERCIAL CODE SERIES § 6:51 (2019). A review of these electronic payment services may be found in Eric Pacifici, *Making PayPal Pay: Regulation E and Its Application to Alternative Payment Services*, 13 DUKE L. & TECH. REV. 89, 95 (2015) (describing them as "designed to allow consumers to send payments from account to account securely via email, text message, over the web and sometimes by social media").

268. "The global market for peer-to-peer lending, which the SEC defines as using websites that help borrowers and lenders find one another, surged 145 percent in 2013 to $2.8 billion." *International Warning Issued on Crowdfunding Risks*, 8 ACCOUNTING & COMPLIANCE ALERT, Feb. 7, 2014, 2014 WL 9885749.

269. For this reason, the Community Reinvestment Act, which requires banks to consider the community in which they operate, would be tricky to apply to social lenders. 12 U.S.C. §§ 2901-2908 (2012). As Michael Barr has explained, the "CRA encourages federally insured banks and thrifts to meet the credit needs of the entire communities that they serve, including low- and moderate-income areas, consistent with safe and sound banking practices." Michael S. Barr, *Credit Where It Counts: The Community Reinvestment Act and Its Critics*, 80 N.Y.U. L. REV. 513, 517 (2005).

This sector is already big and has experienced rapid growth. The Cambridge Centre for Alternative Finance has speculated that the worldwide fintech credit market in 2016 amounted to $284 billion, up from $11 billion in 2013.[270] Because these platforms are making loans and holding money, they are performing some of the features of the business of banking.[271] The OCC has proposed that they be awarded a banking charter for these reasons—creating a controversy.[272]

The OCC has observed that these and other start-ups are doing the things that banks do: "[D]iscounting notes, purchasing bank-permissible debt securities, engaging in lease-financing transactions, and making loans are forms of lending money. Similarly, issuing debit cards or engaging in other means of facilitating payments electronically are the modern equivalent of paying checks."[273]

While the Obama Administration's comptroller Thomas Curry is the Agency head who began consideration of the special purpose fintech charter, it is the Trump Administration's Joseph Otting who helmed the Agency when it "announced it will begin accepting applications for national bank charters from nondepository financial technology (fintech) companies engaged in the business of banking"

---

270. Stijn Claessens et al., *Fintech Credit Markets Around The World: Size, Drivers and Policy Issues*, BIS Q. REV., Sept. 2018, at 33, https://www.bis.org/publ/qtrpdf/r_qt1809e.htm [https://perma.cc/2DJL-VC4M]. For this reason, Rory Van Loo thinks that competition regulation should be part of the toolkit applied to fintechs who could get big or join enormous firms. Rory Van Loo, *Making Innovation More Competitive: The Case of Fintech*, 65 UCLA L. REV. 232, 234-36 (2018).

271. The OCC's own interpretation as to what counts as the "business of banking" is set forth in OFFICE OF THE COMPTROLLER OF THE CURRENCY, ACTIVITIES PERMISSIBLE FOR A NATIONAL BANK, CUMULATIVE (Apr. 2012), https://media2.mofo.com/documents/bankact.pdf [https://perma.cc/NG4R-AHJN]. For a discussion of the OCC's flexibility when it comes to interpreting the "business of banking," see Saule T. Omarova, *The Quiet Metamorphosis: How Derivatives Changed the "Business of Banking*", 63 U. MIAMI L. REV. 1041, 1077 (2009) (criticizing "the infinitely elastic concept of the 'business of banking' that emerged from the OCC's recent interpretations").

272. *See* Steve Cocheo, '*Amazon Bank' Is Already Here, Without a Charter or Regulatory Approval*, FIN. BRAND (Aug. 20, 2018), https://thefinancialbrand.com/74543/amazon-bank-checking-account-regulators-charter/ [https://perma.cc/P7JM-YYAH].

273. OFFICE OF THE COMPTROLLER OF THE CURRENCY, EXPLORING SPECIAL PURPOSE NATIONAL BANK CHARTERS FOR FINTECH COMPANIES 4 (Dec. 2016), https://www.occ.gov/topics/responsible-innovation/comments/special-purpose-national-bank-charters-for-fintech.pdf [https://perma.cc/WN7D-7YUW].

on July 31, 2018.[274] The Agency observed that its decision to accept applications was "consistent with bi-partisan government efforts at federal and state levels."[275] That interest includes the current Treasury Department, which, also in July 2018, recommended that "the OCC move forward with prudent and carefully considered applications for special purpose national bank charters."[276]

Complying with varying state charter requirements poses challenges for fintech firms. Some states require a brick and mortar presence before a state banking charter can be obtained, but fintech lenders have business plans premised on the ability to avoid these sorts of institutional investments.[277] Moreover, for a firm that is doing business across state lines, compliance with varying rules concerning interest rates, payment terms, and other consumer-protection-oriented services poses problems.[278] An OCC fintech charter would preempt these various state laws, conditional on some limitations on federal preemption created by Congress in the wake of the financial crisis.[279]

A variety of tech firms have considered applying for a special charter, but the Treasury Department has forecasted that two sorts might be particularly interested in the license. Marketplace lenders, including peer-to-peer and other unorthodox lenders, might be "attracted to an OCC special purpose national bank charter because it would reduce licensing and regulatory cost[s] by consolidating supervision under one primary national regulatory structure."[280] Payments companies such as Stripe, Square, and PayPal/Venmo

---

274. *OCC Begins Accepting National Bank Charter Applications From Financial Technology Companies*, *supra* note 19.

275. *Id.*

276. U.S. DEP'T OF THE TREASURY, *supra* note 94, at 73.

277. *See, e.g.*, Victoria Pallien, *The Modern-Day Banking Experience: Brick & Mortar vs. Digital*, FINTECH NEWS (July 12, 2019), https://www.fintechnews.org/the-modern-day-banking-experience-brick-mortar-vs-digital/ [https://perma.cc/K6P6-TVMX] (discussing how to market fintech without a brick and mortar building).

278. *See* Garrett Fischer & Sarah Wade, *Fintech: Internet Banking Across State Borders Triggers Compliance Challenges for State Banks*, THOMPSON COBURN LLC (Jan. 20, 2017), https://www.thompsoncoburn.com/insights/blogs/bank-check/post/2017-01-20/fintech-internet-banking-across-state-borders-triggers-compliance-challenges-for-state-banks [https://perma.cc/73QR-NSNX] (discussing types of interstate compliance issues).

279. Under that statute, consumer protection laws are generally not preempted, and preemption of such laws may be done on a case-by-case basis. *See* 12 U.S.C. § 25b (2012).

280. U.S. DEP'T OF THE TREASURY, *supra* note 94, at 71.

might "look to the charter to obviate the need to obtain money transmission licenses in all 50 states."[281]

As Faisal Khan has observed, "Obtaining money transmitter licenses is no easy feat. It involves a large amount of paperwork, money and time. It can take up to two years to amass all 50 state licenses."[282] Money transmitters "touch" money that is exchanged between two private parties, so a bill paid by a consumer to a cable company through a direct deposit bank account would require a money transmission license, as would a mortgage payment to any firm to which a mortgage originator had sold the mortgage.[283] This requirement means that almost all fintechs need these licenses—unless they obtain a banking charter that would preempt the requirements.

B. Revolutionaries in Waiting

The most serious disrupters of the business of banking—potentially Amazon, Apple, Facebook, and Google—are firms that would combine big commerce and finance, a combination that has not been permitted by regulators or legislatures since the founding of the republic.[284]

For example, Amazon Loans already extends short-term credit to businesses selling on its marketplace and has lots of data on how those businesses are doing, allowing it to make smart loan decisions.[285] Apple and Google are handling payments; Google has set up

---

281. *Id.*

282. Faisal Khan, *How to Get Money Transmitter License Coverage for Your Startup?*, BLOG FAISAL KHAN (Sept. 9, 2016), https://blog.faisalkhan.com/money-transmitter-license-application-d9dd32286871 [https://perma.cc/MJ2U-XRB6].

283. For a definitive account of the problems of electronic payment transmission, see Tu, *supra* note 127, at 86 ("[A]ny person engaging in an activity that constitutes 'money transmission' must be licensed under state law and comply with a host of regulatory requirements involving financial security, recordkeeping, reporting, and examination.").

284. The competition risks for banks from commercial entrants are longstanding. "The entry of nonbank competitors into the field of banking is not new either. Western Union leveraged its telegram business to introduce money transfers in the nineteenth century. Securities firms are active lenders and provide numerous deposit products through their money market funds and other offerings." John L. Douglas, *New Wine into Old Bottles: Fintech Meets the Bank Regulatory World*, 20 N.C. BANKING INST. 17, 20 (2016).

285. *Amazon Loans Just the Start for 'Techbanking'*, FIN. TIMES (June 11, 2017), https://www.ft.com/content/4d357d36-4d0c-11e7-919a-1e14ce4af89b [https://perma.cc/8GCB-WRXS].

a mobile wallet in India that lets users link phones to bank accounts to pay for goods in stores and online and to make person-to-person money transfers.[286] Facebook is installing person-to-person PayPal payments into its Messenger app, and Apple is doing something similar with its own instant message program.[287] These Internet platforms have enormous balance sheets and could fund financing operations with other revenue-generating arms, making them both commercial firms who sell eyeballs to advertisers and financial service providers who hold money (albeit often only for very brief periods) and make loans.[288]

That makes them look like tech giants increasingly engaged in the business of banking, but the American firms are nothing compared to their Chinese peer, Ant Financial, which has almost instantly become an enormous financial firm largely by processing payments for Alibaba, the Chinese online retailer, and adding almost all of the financial services that the Internet can make possible.[289] Ant originates loans, manages money, and offers customers access to a money market fund with assets that amounted to $228 billion in 2017.[290] It also offers consumer loans to millions of users on Alibaba's e-commerce platforms; it does not yet take deposits, but will when the Chinese central bank grows comfortable with

286. Ingrid Lunden, *Google Debuts Tez, a Mobile Payment App for India That Uses Audio QR to Transfer Money*, TECHCRUNCH (Sept. 17, 2017, 9:01 PM), https://techcrunch.com/2017/09/17/google-debuts-tez-a-mobile-wallet-and-payments-app-for-india/ [https://perma.cc/BUU2-LSXB].

287. *See* John Detrixhe, *Big Tech Firms Like Amazon Are Eager to Eat the Banking Industry's Lunch*, QUARTZ (Oct. 26, 2017), https://qz.com/1112460/banks-are-under-threat-from-big-tech-firms-like-apple-amazon-and-facebook-according-to-mckinsey/ [https://perma.cc/EP9M-NUGS].

288. *See* Nat Levy, *Amazon's Advertising Arm Is Getting So Big It Held a Major Conference for Brands*, GEEKWIRE (Oct. 9, 2019, 7:02 AM), https://www.geekwire.com/2019/amazons-advertising-arm-getting-big-held-major-conference-brands/ [https://perma.cc/9LEX-UHGV].

289. John Detrixhe, *Ant Financial's $100 Billion Valuation Would Put It in the Same League as the World's Biggest Banks*, QUARTZ (Feb. 12, 2018), https://qz.com/1204717/chinas-ant-financial-plans-to-raise-5-billion-reportedly-at-a-valuation-of-100-billion/ [https://perma.cc/6CT7-82Q8] ("[I]nvestors think prospects for next-generation companies like Ant Financial are comparable to top-tier institutions like Goldman Sachs, which had a $94 billion market cap at the time of writing.").

290. Shuli Ren, *Ant's Quiet Kingpin in the Storm*, BLOOMBERG (Dec. 26, 2017, 7:00 PM), https://www.bloomberg.com/gadfly/articles/2017-12-27/lucy-peng-must-bend-with-the-wind-to-get-ant-financial-its-break [https://perma.cc/5E6X-XTXU].

electronic compliance with know-your-customer requirements.[291] Chinese regulators have already given the firm an online banking license; regulators from Hong Kong are in the process of doing the same.[292] It is, as the *Wall Street Journal* has put it, "the world's largest unicorn," with an equity value of $150 billion—a level that, until recently, may have qualified it as "systemically important"—that is, potentially too big to fail if it were located in the United States.[293] It is also, as Martin Chorzempa has observed, very much a component of Chinese policymaking, reflecting the desire of a government dissatisfied with its young, enormous, and inflexible banks to explore new ways to extend credit to its growing consumer class.[294]

C. The Fight to Charter Fintechs

1. State Outreach to Fintechs

There is already competition for charters in the fintech space—both New York and Utah are offering licenses that may meet the needs of fintech firms.[295] Two virtual currency exchanges—Gemini,

291. *See id.*

292. *See id.* For a discussion of the issues surrounding developing world fintechs, see Douglas W. Arner et al., *The Evolution of Fintech: A New Post-Crisis Paradigm?*, 47 GEO. J. INT'L L. 1271, 1295-1300 (2016). For a discussion of Hong Kong's fintech receptivity, see Nisha Gopalan, *Hong Kong's Ripe for the Virtual Banking Wave*, WASH. POST (Mar. 28, 2019, 8:05 AM), https://www.washingtonpost.com/business/hong-kongs-ripe-for-the-virtual-banking-wave/2019/03/28/657045ac-512e-11e9-bdb7-44f948cc0605_story.html [https://perma.cc/9T9C-LDQZ].

293. Julie Steinberg, *Jack Ma's Ant Financial to Raise $9 Billion, Become World's Biggest Unicorn*, WALL ST. J. (Apr. 10, 2018, 5:42 AM), https://www.wsj.com/articles/jack-mas-ant-financial-to-raise-9-billion-become-worlds-biggest-unicorn-1523353351 [https://perma.cc/P8TV-TDDY]. The United States recently revised its regulations to regulate most intensively banks with above $250 billion in assets. Donna Borak, *Fed: Banks Under $250 Billion Threshold Get Break on Stress Tests*, WALL ST. J. (Jan. 30, 2017, 6:23 PM), https://www.wsj.com/articles/fed-banks-under-250-billion-threshold-get-break-on-stress-tests-1485812085 [https://perma.cc/X47J-YAE3]; *see also* Ren, *supra* note 290 (discussing how Ant is expected to earn more than 20 billion yen in profit in 2019).

294. *See* Martin Chorzempa, *How China Leapfrogged Ahead of the United States in the Fintech Race*, PETERSON INST. FOR INT'L ECON. (Apr. 26, 2018, 3:15 PM), https://piie.com/blogs/china-economic-watch/how-china-leapfrogged-ahead-united-states-fintech-race [https://perma.cc/GZ4T-48T7].

295. *See* Lalita Clozel, *Fintech Firms Look to Enter Banking Via Century-Old Tactic*, WALL ST. J. (Feb. 8, 2018, 5:30 AM), https://www.wsj.com/articles/fintech-firms-look-to-enter-

owned by the Winklevoss twins involved in the founding of Facebook, and itBit—have obtained trust company charters from the State of New York and hope to operate their firms through that regulatory channel.[296] Square, the small-business-focused payment processor, has applied for an ILC charter in order to get direct access to the payments system.[297] SoFi, a peer-to-peer lending business, asked the FDIC (but later withdrew the request) to approve its application for an ILC charter, in which it raised the possibility that its business would offer credit cards and take demand deposits.[298]

State regulators, led by New York, have already sued to keep federal regulators from issuing a special fintech banking charter as something beyond the authority of the OCC, in one case successfully.[299] In addition to the lawsuits, state regulators have sought to appeal to fintechs, in part through an expansion of the National

banking-via-century-old-tactic-1518085801 [https://perma.cc/GT6G-22GB] ("The industrial loan company charter, available in a handful of states and particularly popular in Utah, allows nonfinancial companies to enter the banking sector without being subject to many of its restrictions, including oversight by the Federal Reserve."); Press Release, N.Y. Dep't of Fin. Servs., DFS Superintendent Vullo Submits Comment Letter to OCC in Opposition of Proposed Special Purpose National Bank Charter for "Fintech" Companies (Jan. 17, 2017), https://www.dfs.ny.gov/reports-and-publications/press_releases/pr1701171 [https://perma.cc/95JW-6YWS] ("[Department of Financial Services], as successor to the New York State Banking Department, for decades has licensed nonbank financial services companies, including money transmitters, online lenders, and virtual currency exchanges under state law.").

296. Lalita Clozel, *Are Trust Charters the Key to Simplifying Fintech Regulation?*, AM. BANKER (Nov. 8, 2016, 11:29 AM), https://www.americanbanker.com/news/are-trust-charters-the-key-to-simplifying-fintech-regulation [https://perma.cc/NH3B-REQY].

297. Will Healy, *Will the Square Ecosystem Upend the Digital Payments Market?*, THE MOTLEY FOOL, Jan. 10, 2020, https://www.fool.com/investing/2020/01/10/will-the-square-ecosystem-upend-the-digital-paymen.aspx [https://perma.cc/D4TD-KXDY]; Catherine Shu, *Square Will Apply for an Industrial Loan Company License This Week*, TECHCRUNCH (Sept. 7, 2017, 1:24 AM), https://techcrunch.com/2017/09/06/square-will-apply-for-an-industrial-loan-company-license-this-week/ [https://perma.cc/LX2A-F9K5]. It currently works through a bank, which charges for the service. For a discussion, see Klein, *supra* note 238.

298. *See* Brena Swanson, *Will Sexual Harassment Claims Cost SoFi Its Bank Charter?*, HOUSINGWIRE (Sept. 18, 2017, 4:59 PM), https://www.housingwire.com/articles/41330-will-sexual-harassment-claims-cost-sofi-its-bank-charter [https://perma.cc/TDP6-B6AL].

299. *See* Conference of State Bank Supervisors v. Office of the Comptroller of the Currency, 313 F. Supp. 3d 285, 291 (D.D.C. 2018); Vullo v. Office of the Comptroller of the Currency, No. 17 Civ. 3574 (NRB), 2017 WL 6512245, at *1 (S.D.N.Y. Dec. 12, 2017). The successful decision has been appealed. *See generally* Vullo v. Office of Comptroller of Currency, 378 F. Supp. 3d 271, 296 (S.D.N.Y. 2019).

Multistate Licensing System (NMLS).[300] Founded by the Conference of State Bank Supervisors, the NMLS is meant to harmonize various licensing requirements and facilitate data exchanges.[301] State bank supervisors have vowed to expand the NMLS to nonbanks and to come up with a harmonized approach to money transmission licenses to spare fintechs the burden of acquiring such licenses in every state in which they do business.[302]

These state responses amount to the latest challenge to the not-so-neat boundary between banking and commerce, which both state and federal regulators take quite seriously—both states and the OCC want to give nonbank fintechs something like bank charters.[303] The question is whether they should both be able to do so.

2. The Federal Fintech Lawsuits

The intuition behind the litigation against OCC's fintech charter has some appeal to those deeply immersed in banking law. Banks take deposits and fintech firms—at least those eligible for a national fintech charter—would not.[304] This means that the fintech charter would be given to businesses that are not entirely engaged in every aspect of the "business of banking," which is not unprecedented but rare.[305]

Or so federal practice suggests. Federal regulators have, in the past, guarded the line between banking and commerce. The government did not let the commercial giant Walmart get into banking in 2005, though Walmart customers might have appreciated

---

300. *See* John D. Socknat & Stacey L. Valerio, *CSBS Agrees to Implement Recommendations from Fintech Advisory Panel*, CONSUMER FIN. MONITOR (Feb. 20, 2019), https://www.consumerfinancemonitor.com/2019/02/20/csbs-agrees-to-implement-recommendations-from-fintech-advisory-panel/ [https://perma.cc/J4CW-83K5].

301. *See id.*

302. *See id.*

303. Mehrsa Baradaran, *The ILC and the Reconstruction of U.S. Banking*, 63 SMU L. REV. 1143, 1143 (2010).

304. *See* Kate Patrick, *Fintech Companies, Community Banks Just Want a 'Level Playing Field'*, INSIDESOURCES (Jan. 22, 2019), https://www.insidesources.com/fintech-companies-community-banks-just-want-a-level-playing-field/ [https://perma.cc/FE8J-M3XX]; Rachel Witkowski, *Google and PayPal Explored OCC's Fintech Charter, Then Walked Away*, AM. BANKER (June 16, 2019, 9:50 PM), https://www.americanbanker.com/news/google-and-paypal-explored-occs-fintech-charter-then-walked-away [https://perma.cc/D2QT-AN6K].

305. Patrick, *supra* note 304.

the ability to do their banking where they did their shopping.[306] It has made it difficult for insurance and other financial companies to hold federal thrift charters as well.[307] Recently it encouraged commercial entities such as General Electric and insurers such as

---

306. Baradaran, *supra* note 303, at 1143-44 ("The ILC, which is the only banking charter that a commercial firm can operate and is authorized by only a few states, came under intense scrutiny in 2005 when Wal-Mart applied for an ILC charter and attempted to enter the banking industry."). For discussions, see Christopher L. Peterson, *Preemption, Agency Cost Theory, and Predatory Lending by Banking Agents: Are Federal Regulators Biting Off More Than They Can Chew?*, 56 AM. U. L. REV. 515, 524 (2007) ("[W]ith the likes of Wal-Mart pushing for its own industrial loan corporation, fringe lenders with a history of predatory lending seeking the same thing may have an extremely powerful ally."); Arthur E. Wilmarth, Jr., *Wal-Mart and the Separation of Banking and Commerce*, 39 CONN. L. REV. 1539, 1539 (2007) ("[C]ommercial ownership of ILCs conflicts with the policy of separating banking and commerce, which has been generally followed in the United States since 1787."). Wal-Mart had considered seeking a banking subsidiary for some time. For a discussion, see Elizabeth R. Schiltz, *The Amazing, Elastic, Ever-Expanding Exportation Doctrine and Its Effect on Predatory Lending Regulation*, 88 MINN. L. REV. 518, 604 (2004) ("Wal-Mart also applied to acquire a thrift, but its application arrived after the deadline for closing the unitary thrift loophole set by Gramm-Leach-Bliley.").

307. In particular, it forbade commercial firms from holding thrift charters in 1999, unless they held one already. As Arthur Wilmarth has explained, "Federal legislation has closed both loopholes to any new entry, but leading securities firms and life insurers retain control of grandfathered depository institutions." Arthur E. Wilmarth, Jr., *The Transformation of the U.S. Financial Services Industry, 1975-2000: Competition, Consolidation, and Increased Risks*, 2002 U. ILL. L. REV. 215, 423. For a discussion, see Dain C. Donelson & David Zaring, *Requiem for a Regulator: The Office of Thrift Supervision's Performance During the Financial Crisis*, 89 N.C. L. REV. 1777, 1793 (2011). In the Dodd-Frank Wall Street Reform Act, the regulation of these financial companies that owned banks changed in a way that some have found discouraging. As one treatise author has put it,

> [I]nsurance companies that raced to obtain unitary thrift holding company status and those that acquired small thrifts so that they could obtain TARP funds found that there was consideration to be paid for the goodies. They found themselves under the supervision of the Federal Reserve and subject to what they claimed were "impossible" capital requirements, financial statement requirements and other regulatory burdens, including the Volcker Rule.

KAROL K. SPARKS, INSURANCE ACTIVITIES BANKS § 5.04[D] (Supp. 2018). For example, the CEO of Thrivent Financial explained that

> [i]n the past, Thrivent was regulated by the Office of Thrift Services (OTS), which got absorbed into the OCC, so today the bank is regulated by the OCC. At the same time, at the holding company level it went from the OTS to the Federal Reserve. And there are additional costs and a burden associated with dealing with two regulators.

Ruth McCambridge, *Thrivent Financial Bank Applies to Become Credit Union: Very Rare But Will It Catch On?*, NONPROFIT Q. (Jan. 18, 2012), https://nonprofitquarterly.org/2012/01/18/thrivent-financial-bank-plans-to-become-credit-union-very-rare-but-will-it-catch-on/ [https://perma.cc/U5J7-6MPZ]. Thrivent accordingly gave up its thrift charter and exchanged it for a credit union charter. *See id.*

MetLife with long-standing lending arms to divest or restructure them.[308] And, more broadly, the government has fallen back in love with the traditional activity restriction, the original form of banking regulation, exemplified by the congressionally required promulgation of the Volcker Rule precluding banks from engaging in hedge-fund-like proprietary trading.[309]

And yet, federal regulatory practice is not uniform. During this period, the rise of so-called "shadow banks," or institutions that offer the same sorts of services as banks, but that do not hold bank charters, has continued apace; firms and even individuals can obtain financing from money market funds, mortgage originators, mutual and hedge funds, the commercial paper market, or from peer-to-peer lenders over the Internet.[310]

The OCC should win the fintech charter lawsuits due to the deference it should be afforded to define the business of banking;[311] the decision to create a fintech charter has a reasonable basis in policy. It could improve access to services and rationalize the regulation of Internet-only businesses. Additionally, the cautious approach of the Agency does not suggest that big tech such as Google and Amazon will be able to make use of the charter.

As a general matter, courts have given the Agency deference when it has expanded the activities in which charter holders may engage.[312] The Supreme Court held as much when it deferred to the

308. *See MetLife Completes Spin-Off of Brighthouse Financial*, METLIFE (Aug. 7, 2017), https://www.metlife.com/about-us/newsroom/2017/august/metlifecompletesspin-off-of-brighthouse-financial/ [https://perma.cc/GTX6-FSAA]; Kaja Whitehouse, *GE Dismantles GE Capital, Plans $90B to Investors*, USA TODAY (Apr. 10, 2015, 6:58 AM), https://www.usatoday.com/story/money/business/2015/04/10/ge-selling-real-estate-assets/25564855/ [https://perma.cc/2PRR-3488]. It did so in part by designating GE Capital as systemically significant, a warning to other commercial financing firms, and an incentive for GE Capital to restructure itself. *See id.* For a discussion, see Daniel Schwarcz & David Zaring, *Regulation by Threat: Dodd-Frank and the Nonbank Problem*, 84 U. CHI. L. REV. 1813, 1834-35 (2017).

309. *See* Schwarcz & Zaring, *supra* note 308, at 1834; *see also* Kathleen A. Scott, *Implications of the Volcker Rule for Foreign Banking Entities*, NORTON ROSE FULBRIGHT (Mar. 2014), https://www.nortonrosefulbright.com/en-us/knowledge/publications/ce3b3aa3/implications-of-the-volcker-rule-for-foreign-banking-entities [https://perma.cc/9EBJ-VXFD].

310. "Shadow banks that are not regulated like banks, but provide financing like banks, have taken market share from conventional institutions." Gordon & Zaring, *supra* note 171, at 564.

311. *See supra* note 77 and accompanying text.

312. *See, e.g.*, NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 259-60 (1995) (holding that the National Banking Act is consistent with permitting a bank to

Agency's decision to permit banks to sell annuities;[313] we have already seen that lower courts almost always leave untouched Agency charter decisions (although they unfortunately do not always apply *Chevron* deference to those decisions).[314] In *Clarke v. Securities Industry Association*, for example, the Court held that the statutory term "[t]he general business of each national banking association" could reasonably be construed, as the OCC did, to allow a bank to establish a discount brokerage affiliate.[315]

Admittedly, there is modest precedent for the idea that expanding the sort of businesses that could hold charters would be inconsistent with the OCC's mandate.[316] A Florida district court once held that "the core of the business of banking as defined by law and custom is accepting demand deposits and making commercial loans," meaning that operating a business that did not do both things would be inconsistent with the National Bank Act.[317] Another district court held that an institution that did not make loans could not be chartered as a national bank because it was not engaged in the business of banking.[318]

These few district court cases have been overwhelmed by the majority of cases deferring to the OCC's chartering decisions because those decisions have been cautious and reasonable, and remain that way today.

So far, most of the antifintech charter lawsuits have been dismissed as premature, with one exception.[319] One trial court has

---

sell annuities).

313. *See id.*

314. *See supra* Part I.

315. 479 U.S. 388, 404, 409 (1987).

316. For the deference cases, see *NationsBank*, 513 U.S. at 259-60 (holding that the National Banking Act is consistent with permitting a bank to sell annuities); *Clarke*, 479 U.S. at 404, 409 (finding "[t]he general business of each national banking association" to be ambiguous, warranting deference).

317. Indep. Bankers Ass'n of Am. v. Conover, No. 84-1403-CIV-J-12, 1985 U.S. Dist. LEXIS 22529, at *30 (M.D. Fla. Feb. 15, 1985).

318. *See* Nat'l State Bank of Elizabeth v. Smith, No. 76-1479, 1977 U.S. Dist. LEXIS 18184, at *20, *24 (D.N.J. Sept. 16, 1977), *rev'd as superseded by statute*, 591 F.2d 223 (3d Cir. 1979).

319. *See, e.g.*, Conference of State Bank Supervisors v. Office of the Comptroller of the Currency, 313 F. Supp. 3d 285, 291, 298 (D.D.C. 2018) ("The OCC's national bank chartering program does not conflict with state law until a charter has been issued."); Vullo v. Office of the Comptroller of the Currency, No. 17 Civ. 3574 (NRB), 2017 WL 6512245, at *9 (S.D.N.Y. Dec. 12, 2017) (finding claims to be "unripe" as the OCC had not reached a decision).

ruled that the OCC can only regulate deposit-taking institutions, and so offering a charter to fintechs that do not take deposits is beyond its powers.[320] But because the agency already regulates credit card banks that essentially do not take deposits, the decision is unpersuasive.[321]

3. Policy Implications of the Fintech Charter Fight

Social lenders and electronic payments processors are different from brick-and-mortar banks, to be sure, but there are good policy reasons to support the fintech charter. One is mere consistency: if the business of banking can include investment management and document storage (which banks offer through their safe deposit boxes), then it could also include peer-to-peer loans and loan servicing, and also investment accounts at online exchanges. The latter businesses are no more different from the business of taking deposits and making loans than are the former ones.

Moreover, as we will see, the OCC-proposed fintech charter would charter firms that are not taking all of the risks of a bank, that are not a threat to the deposit insurance fund, and yet, that want to extend credit in a bank-like way that makes the OCC's oversight understandable.[322] To explore why this is the case, and to make sense of the OCC's charter expansion ambitions, a deeper understanding of its historical approach and fintech charter rollout is called for; that consideration follows in Part V.D.

Giving fintechs a federal special purpose charter does not quite allow them to do all the things that banks do, including, most notably, taking deposits.[323] But it does federalize the law that these businesses must comply with in a way that is consistent with their Internet presence, which knows no state borders. Moreover, as we will see, the OCC's cautious approach to fintech chartering is

---

320. Vullo v. Office of the Comptroller of the Currency, 378 F. Supp. 3d 271, 278-82 (S.D.N.Y. 2019).

321. For a discussion, see Lissa L. Broome, *Banking on Blockchain*, 21 N.C. J.L. & TECH. 169, 187-90 (2019).

322. *See infra* Part V.D.

323. *See* Patrick, *supra* note 304.

consistent with its regulatory mandate, at least when afforded *Chevron* deference.[324]

The fintech charter looks less reasonable, however, if the worst is assumed over who might be eligible for it. The largest Internet giants increasingly all have a payments processing arm, as we have seen.[325] Given these potentially enormous bigtech businesses, a special purpose charter would go a long way towards eliminating the line between banking and the bulk of e-commerce and is the sort of major question that should be left to Congress, rather than to an agency, which is the final policy recommendation of the Article.[326]

The business of banking is capacious enough to apply to lending done through the Internet—at least provided that lending or loan servicing through the Internet is the only thing that the Internet firm does.

Permitting an enormous payments system to obtain a bank charter is not a totally unreasonable (at least as a matter of textual construction) interpretation of the National Banking Act—other countries have already offered online banking licenses to their Internet payments giants, and nothing in the statute requires new entrants into the banking services market to be small.[327] But it would undo the traditional separation of banking and commerce. In a *Chevron* deference era where financial agencies have broad statutory authority—the President has mused about doing a centibillion dollar capital gains tax cut through a Treasury Department letter—there must a place for the "major questions" exception to the doctrine if it has any hope of stabilizing the administrative state, as well as allowing for policy innovation.[328]

Awarding the Internet's biggest firms—firms engaged in search, social networking, and telecommunications—with banking charters really would erase the boundaries between banking and commerce,

---

324. *See infra* Part V.D.

325. *See supra* Part V.B.

326. The controversial doctrine provides that "an agency can issue a *major* rule—i.e., one of great economic and political significance—only if it has clear congressional authorization to do so." U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n, 855 F.3d 381, 383 (D.C. Cir. 2017).

327. *See supra* note 49 and accompanying text (discussing National Banking Act), and notes 289-94 and accompanying text (discussing China's Ant Financial).

328. *See* Alan Rappeport & Jim Tankersley, *Trump Administration Is Divided Over Tax Cut for Investors*, N.Y. TIMES (July 30, 2019), https://www.nytimes.com/2019/07/30/us/politics/trump-capital-gains-tax-cut.html [https://perma.cc/FD2R-BZ2L].

and such a big change in policy really is a matter for Congress, rather than the OCC.

D. The OCC's Cautious Expansion of the National Charter

The OCC charter extension model is best understood as one that cautiously enables established financial institutions to obtain licenses for new lines of business that do not fit within the Agency's regulatory model—in that sense it is a little different from the fintech charter, which would allow new entrants to make loans and process payments. This Part shows that the Agency has never used the special purpose charter to upend what banks can do; instead it is a cautious charter innovator. Credit cards, trust holdings, and shelf charters represent a relaxation of regulatory requirements for already trusted investors or banks who wish to expand their banking businesses. The fact that there are so few special charters suggests that the Agency views its evolutionary responsibilities circumspectly.

The OCC claimed authority for special purpose banks in a regulation promulgated in 2003, which provides:

> The OCC charters a national bank under the authority of the National Bank Act of 1864, as amended, 12 U.S.C. 1 *et seq*. The bank may be a special purpose bank that limits its activities to fiduciary activities or to any other activities within the business of banking. A special purpose bank that conducts activities other than fiduciary activities must conduct *at least one* of the following three core banking functions: Receiving deposits; paying checks; or lending money.[329]

The Agency, along with Congress, has insisted on participation in the "business of banking" as a criterion for charter eligibility since

329. 12 C.F.R. § 5.20(e)(1)(i) (2019) (emphasis added). For a discussion of this regulation, which was surprisingly never challenged in court, see Conference of State Bank Supervisors v. Office of the Comptroller of the Currency, 313 F. Supp. 3d 285, 292 (D.D.C. 2018) (discussing the rule and observing that pursuant to the regulation, "the OCC could charter a special purpose bank that does not receive deposits, so long as the bank pays checks or lends money"); Rules, Policies, and Procedures for Corporate Activities; Bank Activities and Operations; Real Estate Lending and Appraisals, 68 Fed. Reg. 70122 (Dec. 17, 2003) (adopting the regulation).

its founding.[330] Its special purpose charters have reflected this insistence.

Its oldest special charter has been used by the subsidiaries of ordinary banks that want to offer their customers credit cards in addition to the usual deposit and loan offerings. Credit card banks were permitted to obtain federal charters if they engaged only in credit card operations and did not, for the most part, accept deposits, meaning that they would not need to obtain deposit insurance from the FDIC and be subject to its regulations.[331] The credit card bank usually exists as a bank affiliate that can get around state usury laws, which set maximum rates of interest for loans—rates that credit card issuers are capable of exceeding because of the OCC's national preemption power.[332] As of January 2018, only nine banks had taken the opportunity to become credit card banks and most of these are affiliates of other OCC-regulated banks.[333]

More popular has been the special trust charter—although it has not been much more popular. Fifty-five banks hold the trust charter; again, these are usually affiliates of other banks.[334] Trust banks are special purpose entities designed to hold assets identified in a contract between two private parties (in this way they "take deposits" and are thus engaged in the business of banking, but they do not loan out the resources entrusted to them).[335] Their profits

---

330. *See* 12 U.S.C. § 24 (2012).

331. PAULINE B. HELLER & MELANIE L. FEIN, FEDERAL BANK HOLDING COMPANY LAW 2-27 (rev. ed. 2011). For a guide on the supervision that credit card banks face, see generally OFFICE OF THE COMPTROLLER OF THE CURRENCY, COMPTROLLER'S HANDBOOK: CREDIT CARD LENDING (2017), https://www.occ.treas.gov/publications/publications-by-type/comptrollers-handbook/credit-card-lending/pub-ch-credit-card.pdf [https://perma.cc/49V4-82GC].

332. "BHCs have historically used specialized credit card banks to 'seek relief from onerous usury restrictions' in their home state." Omarova & Tahyar, *supra* note 8, at 170.

333. For the current list of credit card banks, see *Financial Institution Lists*, OFF. COMPTROLLER CURRENCY, https://www.occ.treas.gov/topics/licensing/national-banks-fed-savings-assoc-lists/index-active-bank-lists.html [https://perma.cc/ZP97-DSE4]. Moreover, the OCC is permitted to charter a credit card bank that is exempt from requirements of the Bank Holding Company Act. *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 27, at 51-54.

334. For the current list of national trust banks, see *Financial Institution Lists*, *supra* note 333.

335. As Omarova and Tahyar have put it, "Trust companies generally engage in the business of holding and managing money in a fiduciary or representative capacity." Omarova & Tahyar, *supra* note 8, at 173.

come from fees charged to manage the assets held in trust; trust companies have a fiduciary obligation to put the interests of the beneficiaries of the trust ahead of their own.[336] Trust banks are not insured by the FDIC in most cases, a fact that may have induced the OCC to stop chartering trust banks for years, worried about the prospect of being on the hook for their failure.[337] The real advantage for trusts, as with federal credit card companies, is that the national charter preempts many state banking laws, enabling the trust to operate essentially nationwide.[338]

The OCC has occasionally evinced a willingness to charter "bankers' banks," and has asserted the power to do so, though no such banks have yet received a federal charter.[339] A banker's bank is like a nineteenth-century clearinghouse in that it is owned by the banks and is intended to make cross-bank payments easier and to serve as a backstop for banks that find themselves illiquid, but not insolvent.[340]

Finally, in the wake of the financial crisis, the OCC created a "shelf charter," allowing investor groups to prequalify for a national bank charter so that the group could compete in an auction for a failed bank, "assured that the group already has preliminary approval for a national charter into which it could fold the acquired entity."[341]

The shelf charter, like the other special charters issued by OCC, did not enjoy much take-up, perhaps because the OCC made

---

336. *See id.* at 173-74.

337. For the FDIC's approach to trust banks, see *Trust Examination Manual*, FED. DEPOSIT INS. CORP., https://www.fdic.gov/regulations/examinations/trustmanual/section_10/section_x.html [https://perma.cc/K8KP-XP4Z].

338. *See* 12 U.S.C. § 1841(c) (2012).

339. OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 27, at 1 ("New banks may be chartered for full-service or special purpose operations, such as ... bankers' banks.").

340. 12 C.F.R. § 5.20(d)(1) (2019) ("Bankers' bank means a bank owned exclusively (except to the extent directors' qualifying shares are required by law) by other depository institutions or depository institution holding companies (as that term is defined in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. 1813), the activities of which are limited by its articles of association exclusively to providing services to or for other depository institutions.")

341. MALLOY, *supra* note 55, § 2.02. The Agency also permitted "inflatable charters," whereby a very small national bank would be acquired with the presumption that it would acquire other failing institutions; both the shelf charter and the inflatable charter (which is less easy to track, as the Agency does not announce the awarding of it) are designed to make it easier for private equity firms to take over failing financial institutions. OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 273, at 15.

obtaining a shelf charter quite difficult—managing officers of the would-be bank had to be identified and available and shelf charter applicants underwent rigorous oversight.[342] Nonetheless, in 2010, the Agency allowed Bond Street Bank to acquire two failing Florida banks via a shelf charter.[343] The OCC authorized another shelf-chartered bank to acquire two small banks in Florida and one in South Carolina that year as well.[344] These shelf charters assisted federal regulators with their crisis cleanup and were essentially the last new-ish charters given out by the Agency for years.

In the past, the OCC also chartered community development banks, which are designed to encourage growth in underserved or low-income areas, and cash management banks, which are banking subsidiaries that manage the cash flow of larger business customers.[345]

These modest success stories should not obscure a pattern and practice that disfavors unconventional charters. The OCC has met the needs of credit card banks and trust banks, or, more accurately, the need of nationally chartered banks to operate credit card or trust affiliates, and the market for those needs is admittedly not large. However, it has not waded into shadow banking with charters available to all who wish, suggesting that it is unlikely to change things with the special purpose fintech charter.

---

342. Thomas P. Vartanian & Gordon L. Miller, *2009 Developments in FDIC Failed Bank Resolutions*, BANKING L. COMMITTEE J. (A.B.A. BUS. L. SECTION), Nov. 2009, at 5-6, https://www.americanbar.org/content/dam/aba/administrative/business_law/newsletters/CL130000/full-issue-200910.pdf [https://perma.cc/77RE-N9K8].

343. *OCC Approves First Use of "Shelf Charter" to Acquire Failed Bank*, OFF. COMPTROLLER CURRENCY (Jan. 22, 2010), https://www.occ.treas.gov/news-issuances/news-releases/2010/nr-occ-2010-8.html# [https://perma.cc/NPG8-CTJU]; *OCC Approves Premier American Bank, National Association to Acquire Second Failed Bank*, OFF. COMPTROLLER CURRENCY (Jan. 29, 2010), https://www.occ.gov/news-issuances/news-releases/2010/nr-occ-2010-12.html# [https://perma.cc/264G-FQJD].

344. *OCC Approves Use of Second Shelf Charter to Acquire Three Failed Banks*, OFF. COMPTROLLER CURRENCY (July 16, 2010), https://www.occ.gov/news-issuances/news-releases/2010/nr-occ-2010-82.html# [https://perma.cc/75VJ-VXT9].

345. OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 273, at 3 n.5.

E. The Slow Adoption of the Fintech Charter

On July 31, 2018, the OCC invited fintech firms to apply for a special purpose fintech charter.[346] In evaluating applications, the OCC indicated that it "will use its existing chartering standards and procedures for processing applications," but that it would not require fintech charter applicants to take deposits and obtain deposit insurance.[347]

The decision by the Agency to accept charters has been one of long gestation. In 2013, Comptroller Thomas Curry indicated that he was interested in using the special purpose charter to offer fintech companies federal banking oversight. In 2016, the OCC published a white paper on the possibility, in which it indicated that it saw three potential advantages for fintech companies in obtaining a charter.[348] The first was reassurance: "[A]pplying a bank regulatory framework to fintech companies will help ensure that these companies operate in a safe and sound manner so that they can effectively serve the needs of customers."[349] The second was the advantage of the nationwide preemption of state banking laws, which simplifies regulation, and, as the OCC put it, "will help promote consistency in the application of law and regulation across the country and ensure that consumers are treated fairly."[350] Third, the Agency thought that new charterholders, with their different business models, might be good for banking and cause banking innovation, which could "make the federal banking system stronger."[351] The OCC mused in the white paper about which fintech firms might be eligible for licenses—they would have to be engaged in one aspect of the business of banking—and how the Agency might modify its capital, business plan, and other regulatory requirements

346. *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, POLICY STATEMENT, *supra* note 181, at 1.

347. *Id.* at 3; OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 18, at 2 (considering applications by fintech firms that did not take deposits).

348. OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 9, at 2; *see also* OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 273, at 2.

349. OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 273, at 2.

350. *Id.*

351. *Id.*

to suit the specialized charter market.[352] The Agency requested comments on the white paper.[353]

The OCC then proposed a rule indicating that it "may charter other special purpose banks with business models that are within the business of banking," and that "[a]s part of the agency's initiative on responsible innovation in the Federal banking system, the OCC [was] considering how best to implement a regulatory framework that [was] receptive to responsible innovation, such as advances in financial technology."[354]

The OCC also sought comments from the public as to "whether it would be appropriate for the OCC to consider granting a special purpose national bank charter to a fintech company."[355] The OCC explained that it was considering various categories of fintech companies, including marketplace lenders that provide loans to consumers and small businesses, companies that provide payment-related services, businesses that engage in digital currencies and distribute-ledger technology, and companies that provide financial planning and wealth management products and services.[356] For his part, Comptroller Curry waxed enthusiastic: "We will be issuing charters to fintech companies engaged in the business of banking because it is good for consumers, businesses, and the federal banking system."[357]

Curry's successors have agreed. One of them has said that using the special purpose charter for fintech companies would be a "good idea."[358] Acting Comptroller Noreika said that fintech charterholders would not be subject to the Bank Holding Company Act, which means that they would not be subject to supervision by the Federal

352. *See id.* at 5-14.

353. *See id.* at 15-16.

354. Receiverships for Uninsured National Banks, 81 Fed. Reg. 62,837 (Sept. 13, 2016).

355. OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 273, at 2.

356. *Id.*

357. Thomas J. Curry, Comptroller of the Currency, Remarks at LendIt USA 2017 5 (Mar. 6, 2017), https://www.occ.treas.gov/news-issuances/speeches/2017/pub-speech-2017-27.pdf [https://perma.cc/EP6W-2RPM].

358. Keith A. Noreika, Acting Comptroller of the Currency, Remarks before the Exchequer Club 5 (July 19, 2017), https://www.occ.gov/news-issuances/speeches/2017/pub-speech-2017-82.pdf [https://perma.cc/N6CC-ETVC] ("[C]ompanies that offer banking products and services *should* be allowed to apply for national bank charters so that they can pursue their businesses on a national scale if they choose, *and* if they meet the criteria and standards for doing so.").

Reserve (the Fed).[359] His successor, Joseph Otting, has said that although he was "not sure what it looks like and how it's funded," for fintech charters, "there's a space there that a technology solution can solve."[360]

The Agency then invited fintech firms interested in obtaining a special purpose charter to "maintain an open dialogue" with the OCC beginning with exploratory precharter meetings.[361] It considered a "regulatory sandbox," or pilot program, waiving certain regulations that would permit some banks to explore some fintech applications in a safe harbor from regulatory enforcement.[362] The OCC ultimately rejected the idea that fintech might be exempted from the most serious requirements that normal banks have.[363]

Amazon, Google, and Apple have been taking those meetings and have banded together to form a Washington lobbying group, Financial Innovation Now, which is on the record as supporting the fintech charter.[364]

In a draft supplement to its licensing manual designed to handle new special charters, the OCC indicated that firms that might be eligible for the fintech charter could not "inappropriate[ly] comming[e] banking and commerce."[365] The OCC has indicated that the

359. Lalita Clozel, *Why Are Amazon, PayPal Meeting with Bank Regulators?*, AM. BANKER (Sept. 29, 2017, 12:00 PM), https://www.americanbanker.com/news/why-are-amazon-paypal-meeting-with-bank-regulators [https://perma.cc/SU2B-QGTY] ("An institution with a fintech charter, 'wouldn't be a bank for purposes of the Bank Holding Company Act.'").

360. Dan Cohen, *Comptroller Otting: A New Ally for a Fintech Charter?*, FINTECH L. BLOG (Jan. 10, 2018), https://www.fintechlawblog.com/2018/01/comptroller-otting-a-new-ally-for-a-fintech-charter/ [https://perma.cc/AK6H-C7BM].

361. OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 18, at 4.

362. Sara Merken, *OCC Fintech Pilot Goes On After Curry Makes Way for Trump Team*, BLOOMBERG BNA (Aug. 25, 2017, 5:43 PM), https://news.bloomberglaw.com/tech-and-telecom-law/occ-fintech-pilot-goes-on-after-curry-makes-way-for-trump-team [https://perma.cc/57XF-NZYS].

363. Todd H. Baker, *OCC Can't Claim Victory Despite Dismissal of Fintech Charter Suit*, AM. BANKER (Sept. 16, 2019, 9:00 AM), https://www.americanbanker.com/opinion/occ-cant-claim-victory-despite-dismissal-of-fintech-charter-suit [https://perma.cc/4EA9-2KMK] (discussing that fintech banks remain subject to most of the regulatory oversight of a full-service bank).

364. *See* JD Alois, *Financial Innovation Now: We Support the OCC Fintech Charter*, CROWDFUND INSIDER (Jan. 17, 2017, 12:32 PM), https://www.crowdfundinsider.com/2017/01/94847-financial-innovation-now-support-occ-fintech-charter/ [https://perma.cc/8WK7-YZDK]; Clozel, *supra* note 359.

365. OFFICE OF THE COMPTROLLER OF THE CURRENCY, OCC SUMMARY OF COMMENTS AND EXPLANATORY STATEMENT: SPECIAL PURPOSE NATIONAL BANK CHARTERS FOR FINANCIAL

special purpose charter will not be available to fintechs that seek to take deposits.[366] The Treasury Department agrees that this should not be the case, as fintechs "should not be permitted to accept FDIC-insured deposits, to reduce risks to taxpayers."[367]

However, there have not yet been any fintech charter applicants, as this Article goes to publication, perhaps because of the OCC's circumspect vision, litigation risk, or external conditions.

F. Policy Implications

The OCC is funded by fees assessed on charter holders, and so the Agency always has an incentive to grow its charter and customer base. But regulatory budget building is not the only reason for fintech charters.[368] In an era where regulators worry about the growing importance of "shadow banking" and firms that offer bank-like services without actually holding a bank charter, the idea of bringing fintech lenders into the fold has regulatory appeal.[369] Capital requirements could be imposed on these firms, making them capable of surviving an economic or other shock.[370] Also, enabling new entries into the financial system should increase competition and impose market discipline on financial firms, an outcome which has long been a goal of regulatory policy and one espoused by all regulators who, like the OCC, signed on to the second version of the Basel Capital Adequacy accord, which made "market discipline" one of the three pillars on which it based market supervision.[371]

Obtaining whatever licenses are necessary to operate across state lines offers the prospect of regulatory complexity, meaning that these sorts of fintech firms might want a federal charter to

---

TECHNOLOGY COMPANIES 15 (2017), https://www.occ.gov/topics/supervision-and-examination/responsible-innovation/summary-explanatory-statement-fintech-charters.pdf [https://perma.cc/6EG8-SH4D].

366. OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 273, at 7.

367. U.S. DEP'T OF THE TREASURY, *supra* note 94, at 73.

368. *See About Us*, OFF. COMPTROLLER CURRENCY, https://occ.treas.gov/about/index-about.html [https://perma.cc/9D7J-DSXW].

369. *See supra* note 23 and accompanying text.

370. *See* BANK FOR INT'L SETTLEMENTS, OVERVIEW OF THE NEW BASEL CAPITAL ACCORD 12-13 (2001), https://www.bis.org/publ/bcbsca02.pdf [https://perma.cc/B6HL-P8UR].

371. For a discussion of Basel II, see *id.* at 1.

essentially swap many regulators for one.[372] Although it would be inaccurate to call OCC regulation particularly "light touch," the Comptroller does not have a maximum interest rate or the sort of usury provisions that many state regulators do impose.[373] Moreover, a charter could come with (though it need not) access to the Fed's payment systems, which might offer efficiencies for fintech lenders.[374] Currently, fintech firms rely on partnerships with suitably chartered banks to access the national payment system managed by the Fed; the firms may wish to cut out the middleman.[375]

The facts on the ground appear to indicate that the OCC is going to be a slow mover in the race to regulate fintech, and the early charter interest still leaves open the question about what to do with Amazon's payments processor and Google and Apple's wallet payment processors. This record offers comfort that the OCC's fintech charter would be incremental.

The change a different kind of fintech charter could make to the business of banking would involve a change in the traditional separation of banking and commerce, which, as the Acting Comptroller said in 2017, "reaches back to the origins of banking in the United States."[376] Acting Comptroller Noreika indicated that he may be willing to rethink this very traditional separation, because "mixing banking and commerce can generate efficiencies that deliver more value to customers and can improve bank and commercial company performance with little additional risk."[377] But this position was resisted. Community banks have feared the entrance of nonbank commercial businesses into the business of banking, and, although the Agency has not committed itself to offering a fintech charter to a nonbanking company, underlying some of the debate over fintech chartering is this central question of whether banking should continue to be so separate from commerce, given that, in the technology space, commercial firms are increasingly doing things that banks used to do.[378]

---

372. *See supra* notes 196-98.
373. *See supra* note 332 and accompanying text.
374. *See supra* note 297 and accompanying text.
375. Varo is an example. *See supra* Part IV.A.1.
376. Noreika, *supra* note 109, at 3.
377. *Id.* at 10.
378. *See, e.g.*, *The Industrial Bank Holding Company Act of 2007: Hearing Before the H.*

That is why my prescription follows from this state of affairs. The OCC should not leap to give charters to any fintech firm. This would demolish the boundary between commerce and banking in a way that would be ill-considered and insufficiently democratic. Doing so would challenge the constraint on regulators that is not always covered by their legal obligations, in that it would upend the settled expectations of regulated industry in a relatively dramatic fashion. Once regulatory initiatives have been institutionalized in a way that has affected investments, it is often better for Congress to do the upending, with its political accountability, than it is for regulators to change everything.

Such legislation would undo the separation of banking and commerce, a principle that banking regulators have carefully observed for centuries.[379] Whether the Internet's commercial giants should be able to offer their customers banking services is the sort of "major question" that an agency cannot and should not answer with an interpretation of its existing regulatory authority.[380] The chartering of Amazon's, Google's, or Apple's payment subsidiaries should only be permitted upon the passage of a fintech chartering act, and even then, Congress may want to think carefully about whether these instant financial giants, who can rely on the enormous balance sheets of their parent companies, should be permitted to enter the business of banking.

Finally, this fulsome review of the state of the bank charter suggests two broader conclusions about the state of licensing today. The first is that agencies will not always seek to expand their

---

Comm. on Fin. Servs., 110th Cong. 38 (2007) (statement of James P. Ghiglieri, Jr., President, Alpha Community Bank, on behalf of the Independent Community Bankers of America) ("[Nonbank] charter[s] threaten[ ] our Nation's historic separation of banking and commerce and undermine[ ] our system of holding company supervision.").

379. *See* Noreika, *supra* note 109, at 3 (acknowledging that this separation principle "reaches back to the origins of banking in the United States").

380. Accordingly, this Article endorses the controversial-to-some "major question" exception to *Chevron* deference. Critics have said that "the major questions doctrine has the potential to broadly empower the judiciary to strike down any executive action that it deems sufficiently 'major,' even if the action in no way implicates the Constitution." Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 328-29, 328 n.3 (4th Cir. 2018) (Wynn, J., concurring), *vacated*, 138 S. Ct. 2710 (2018). But while the major questions exception to *Chevron* does not really seem to have a great logical basis, it is entirely necessary given that the logic of *Chevron* could permit agencies to engage in almost any kind of regulation provided it could establish that doing so would be in the "public interest."

regulatory turf by continually expanding the scope of the license. The OCC has hesitated to expand its charter to cover new kinds of financial firms, and only recently refused to give out any charters at all, missing out on the licensing fees that would have contributed to the Agency's bottom line. Licensing can, no doubt, be inefficient, bureaucratic, and opaque. But it does not always lead to mission creep. The second is that the high-end licensing of dangerous businesses—and banks can be dangerous—is often elaborate and complicated, requiring an investment in legal talent, compliance resources, and requiring sophistication in Washington as well as in the underlying business. Licensing is its own sort of big business, especially when it comes to cases where the costs of a mistake are high.

CONCLUSION

Reform of the financial charter in the United States is on the table. The actual practice of the Agency that makes national charter grants suggests that neither policy will be easy to realize. Because that cautious approach is consistent with the development of a fintech industry that would not undo the separation of banking from commerce, the OCC's special purpose fintech charter should be embraced. The OCC—and the courts—should make clear that the Agency's chartering decisions are reviewable subject to *Chevron* deference and a hard look at the facts—a standard that is probably best expressed as a requirement that the Agency make a reasonable decision. Once the OCC clarifies its approach to chartering—and updates it if it decides to modify its standards for charter grants—the chartering regime will stand on firm enough ground. Only Congress, however, should make the decision to vastly expand the ground of chartering to the payment systems of the biggest technology firms.