NONBANKS AND THE SOCIAL CONTRACT*

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Traced back to the Age of Enlightenment, social contract theory rationalizes civil authority by asserting that individuals consent to this authority in exchange for protection or other benefits. In the context of banking regulation, scholars have applied the theory and posited that banks and the government exchange mutually beneficial promises. From this agreement, the government protects banks, and in return, banks provide a reliable banking system that allows the economy to flourish. This Article evaluates this purported contract and then compares it with the benefits flowing to and from nonbank financial institutions, which provide an increasing share of financial services in the United States.

The primary assertion of this Article is that an implicit contract between such nonbanks and society now also exists, but this contract is unbalanced. As the financial crisis demonstrated, nonbanks pose systemic risks to our financial system and have thus received the benefits of federal safety nets such as liquidity assistance, loan insurance, and loan purchases. Yet, they are subject to less oversight and fewer duties than banks. Designations as systemically important financial institutions ("SIFIs") had the potential to bring some balance to this social contract by imposing heightened prudential standards on certain nonbanks, but they have yet to do so. Due to de-designations, shifting standards, and litigation, no entities are currently designated as systemically important. Recognizing this continuing asymmetry, this Article considers alternatives for balancing the contract between nonbanks and society.

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INTRODUCTION

Traced back to the Age of Enlightenment, social contract theory rationalizes civil authority by asserting that individuals consent to this authority in exchange for protection or other benefits.[1] The writings of early proponents of social contract theory heavily influenced Thomas Jefferson and other framers of the U.S. Constitution.[2] This influence persists, with courts applying social

1. Thomas Hobbes, a seventeenth century English philosopher, is known for his development of what became known as social contract theory. *See* THOMAS HOBBES, LEVIATHAN 132–33 (Michael Oakeshott ed., MacMillan 1977) (1651) ("The attaining to this Soveraigne Power, is by two wayes. One, by Naturall force; as when a man maketh his children, to submit themselves, and their children to his government, as being able to destroy them if they refuse, or by Warre subdueth his enemies to his will, giving them their lives on that condition. The other, is when men agree amongst themselves, to submit to some Man, or Assembly of men, voluntarily, on confidence to be protected by him against all others."). For other formative social contract theory texts, see John Locke, *An Essay Concerning the True, Original, Extent and End of Civil Government: Second Treatise on Government*, *in* SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME, AND ROUSSEAU 3, 10–11 (Oxford Univ. Press 1962) (1690); Jean-Jacques Rousseau, *On the Social Contract*, *in* THE BASIC POLITICAL WRITINGS 141, 141 (Donald A. Cress ed. & trans., Hackett Publ'g 1987) (1762). For a discussion of the evolution of social contract theory, see David C. Perry & Natalia Villamizar-Duarte, *The Social Contract: A Political and Economic Overview*, *in* REMAKING THE URBAN SOCIAL CONTRACT: HEALTH, ENERGY, AND THE ENVIRONMENT 3, 5–7 (Michael A. Pagano ed., 2016).

2. Celeste Friend, *Social Contract Theory*, INTERNET ENCYCLOPEDIA PHIL., https://iep.utm.edu/soc-cont/ [https://perma.cc/9473-RZCC].

contract theory to tort,[3] property,[4] and criminal cases[5] as a framework for establishing the reciprocal obligations between individuals and society.[6] And modern scholars have applied social contract theory to assess regulation of various industries.[7]

In the context of banking regulation, social contract theory posits that banks and the government exchange mutually beneficial promises.[8] From this agreement, the government protects banks, and, in return, banks provide a reliable banking system that allows the economy to flourish.[9] As Mehrsa Baradaran has asserted, in exchange for government support, the government should require "banks to fulfill obligations for the benefit of society."[10] More specifically, the government offers banks support in the form of deposit

3. *See, e.g.*, Fox v. Hawkins, 594 N.E.2d 493, 496 (Ind. Ct. App. 1992) ("[I]t would be a breach of the social contract for all of us to say to any one of us 'fire and police protection are available only at your peril.'").

4. *See, e.g.*, Stratford v. Altisource Sols., Inc., No. 2:17-3220, 2018 WL 1225107, at *2 (D.S.C. Mar. 7, 2018) ("Beyond those narrow exceptions, a civilized society's social contract requires law-abiding persons to rely upon public authority for the enforcement of their rights.").

5. *See, e.g.*, State v. Perry, 610 So. 2d 746, 767 (La. 1992) ("The retributory theory of punishment presupposes that each human being possesses autonomy, a kind of rational freedom which entitles him or her to dignity and respect as a person which is morally sacred and inviolate, but that an original social contract was entered by which the people constituted themselves a state." (first citing JEFFRIE G. MURPHY, RETRIBUTION, JUSTICE, AND THERAPY (1979); then citing JEFFRIE G. MURPHY, KANT: THE PHILOSOPHY OF RIGHT (A.D. Woozley ed., 1970); and then citing IMMANUEL KANT, THE PHILOSOPHY OF LAW (W. Hastie trans., 1887))). For a discussion of the use of social contract theory in case law, see generally Anita L. Allen, *Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1 (1999) (framing social contractarianism as a potentially problematic form of judicial doctrine and figurative legal rhetoric).

6. Allen, *supra* note 5, at 4–5. In 1971, John Rawls applied social contract theory to create a set of principles of justice for the basic structure of society. JOHN RAWLS, A THEORY OF JUSTICE 136 (1971). Rawls' work, in turn, has been used to provide a normative basis for arguing that regulation should be designed to benefit the least advantaged and promote fairness. *See* David M. Douglas, *Towards a Just and Fair Internet: Applying Rawls' Principles of Justice to Internet Regulation*, 17 ETHICS & INFO. TECH. 57, 58–60 (2015).

7. *See, e.g.*, Douglas, *supra* note 6, at 57–58 (applying social contract theory to the regulation of the internet); William C. Kling & Emily Stiehl, *Social Contract Theory and the Public's Health: A Vital Challenge Past and Present*, *in* REMAKING THE URBAN SOCIAL CONTRACT: HEALTH, ENERGY, AND THE ENVIRONMENT, *supra* note 1, at 91, 91–93 (applying social contract theory to healthcare regulation); Mehrsa Baradaran, *Banking and the Social Contract*, 89 NOTRE DAME L. REV. 1283, 1283–86 (2014) (applying social contract theory to banking regulation).

8. *See generally* Baradaran, *supra* note 7 (examining the historical origins of the social contract between banks and the government and how it has evolved into its current symbiotic relationship over time). *See also* Justin O'Brien, George Gilligan & Seumas Miller, *Culture and the Future of Financial Regulation: How to Embed Restraint in the Interests of Systemic Stability*, 8 LAW & FIN. MKTS. REV. 115, 118 (2014) (discussing "the implicit social contract that financial institutions have with civil society in return for the licensing privileges that permit participation in Australia's financial markets and thus access to substantial profitable activities").

9. *See* Baradaran, *supra* note 7, at 1284. The social contract framework is particularly well-suited to assess banking regulation as banks have a long history of being supported and protected by the government. *Id.* at 1285–86.

10. *Id.* at 1285.

insurance, Federal Reserve liquidity support, and bailouts.[11] In return, banks, according to Baradaran, agree to serve public interests.[12]

Baradaran's analysis reveals that this social contract should address three primary public needs: ensuring the safety and soundness of banks, protecting consumers, and providing access to credit.[13] She contends that regulatory measures should enforce these standards even if they would reduce bank profits.[14] The historical context provided in her work shows that these principles were integral to banking legislation beginning in the New Deal era but have been diluted in recent decades.[15] According to Baradaran, the erosion of these principles has led to a banking system that prioritizes profit over public service, undermining the original social contract.[16] She offers suggestions on how regulators can recognize and reinforce this contract.[17]

Even if heeded, the potential impact of Baradaran's recommendations wanes as the share of financial services provided by banks continues to decrease. Over the past forty years, the composition of the U.S. financial sector has significantly shifted, marked by the rise of nonbank financial institutions.[18] Nonbank financial institutions are businesses that provide financial services but do not hold a bank charter and are therefore not authorized to accept deposits from the public.[19] Nonbanks, such as mutual funds, private equity firms, insurance companies, and nonbank lenders, have dramatically increased their

11. *Id.* at 1314–23.

12. *Id.* at 1330–36. The social contract construct provides a framework for assessing mutual obligations between the governed and their governing institutions. *See* Allen, *supra* note 5, at 2–4 (discussing the deep roots of social contract theory as foundational to the creation and interpretation of U.S. law).

13. *See* Baradaran, *supra* note 7, at 1312.

14. *Id.* at 1330.

15. *Id.* at 1341; *see also infra* notes 84–98 and accompanying text (discussing deregulation of banking in the 1990s and then again in 2018).

16. *See* Baradaran, *supra* note 7, at 1305–08.

17. *Id.* at 1337–42.

18. *See, e.g.*, Kathryn Fritzdixon, *Bank and Nonbank Lending Over the Past 70 Years*, 13 FDIC Q. 31, 32 (2019); Robert B. Avery, Marsha J. Courchane & Peter M. Zorn, *The CRA Within a Changing Financial Landscape*, *in* REVISITING THE CRA: PERSPECTIVES ON THE FUTURE OF THE COMMUNITY REINVESTMENT ACT 30, 45 (Prabal Chakrabarti, David Erickson, Ren S. Essene, Ian Galloway & John Olson eds., 2009); Martin J. Gruenberg, Chairman, Fed. Deposit Ins. Corp., Remarks at the Exchequer Club on the Financial Stability Risks of Nonbank Financial Institutions (Sept. 20, 2023), https://www.fdic.gov/news/speeches/2023/spsept2023.html [https://perma.cc/GS2B-N7CB].

19. This Article uses the terms "nonbank," "nonbank financial intermediary," "nonbank intermediary," and "nonbank financial institution" to refer to a firm that is not a bank and is "predominantly engaged in financial activities." As an example, see the Dodd-Frank Act implementing regulations for criteria for determining if a company is qualified. 12 C.F.R. § 242.1(b)(1) (2023). A narrow definition of a nonbank financial institution is key to addressing valid concerns about a slippery slope. *See* Brief of Thirty-Three Banking Law Scholars as Amici Curiae in Support of the Appellee at 26, Lacewell v. Off. of Comptroller of Currency, 999 F.3d 130 (2d Cir. 2021) (No. 19-4271) ("Why stop with the financial sector?"). This concern is addressed more fully *infra*, Section II.B.2.

share of the financial services market.[20] In fact, nonbank mortgage lenders issued 72.1% of all first mortgages originated in the United States in 2022, up from 63.9% in 2021.[21] And, with this massive shift, there is an urgent need to closely evaluate the implicit contractual conditions that have allowed nonbank intermediaries to seize these critical markets.

To that end, this Article evaluates the social contract construct and applies this lens to nonbank financial institutions.[22] As nonbanks receive many of the same benefits from society that banks do while being subject to far fewer duties, this Article contends that nonbanks are also a party to an imbalanced contract with society. By comparison, not all benefits that are available to banks, such as deposit insurance, are available to these nonbank intermediaries. Yet, as the financial crisis demonstrated, nonbanks pose systemic risks to our financial system and have thus received the benefits of certain federal safety nets. For example, in 2008, the Federal Reserve Bank of New York ("FRBNY") agreed to loan $26.7 billion to Bear Stearns, one of the largest securities firms in the country, in an attempt to prevent its collapse.[23] Six months later, the FRBNY rescued American International Group ("AIG") with an $85 billion loan.[24] More recently, during the pandemic, the Federal Reserve created numerous credit facilities to provide liquidity for uninsured assets like commercial paper

20. For example, private equity firms have seen their assets under management soar from $579 billion in 2000 to approximately $7.8 trillion by 2022. *Private Equity*, NAT'L ASS'N INS. COMM'RS (June 28, 2023), https://content.naic.org/cipr-topics/private-equity [https://perma.cc/RCJ6-B8E2]. *See* Viral Acharya, Nicola Cetorelli & Bruce Tuckman, *Transformation of Activities and Risks Between Bank and Non-Bank Financial Intermediaries*, CTR. ECON. POL'Y RSCH. (Apr. 29, 2024), https://cepr.org/voxeu/columns/transformation-activities-and-risks-between-bank-and-non-bank-financial [https://perma.cc/PH49-88UP] ("In percentage terms, the share of the NBFI sector has grown from about 44% in 2012 to about 49% as of 2021, while banks' share has shrunk from about 45% to about 38% over the same period.").

21. *Summary of 2022 Data on Mortgage Lending*, CONSUMER FIN. PROT. BUREAU (June 29, 2023), https://www.consumerfinance.gov/data-research/hmda/summary-of-2022-data-on-mortgage-lending/ [https://perma.cc/X7CG-L3Y8] [hereinafter *Summary of 2022 Data*].

22. Nonbank financial institutions are businesses that provide financial services but do not hold a bank charter and are therefore not authorized to accept deposits from the public. *Nonbanking Financial Institution*, WORLD BANK GRP., https://www.worldbank.org/en/publication/gfdr/gfdr-2016/background/nonbank-financial-institution [https://perma.cc/M79J-EEGX]. Notable examples of nonbank financial institutions include: Rocket Mortgage, Venmo, BlackRock, Morgan Stanley, and AIG.

23. John Weinberg, *Support for Specific Institutions*, FED. RSRV. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/support-for-specific-institutions [https://perma.cc/9E32-EMFQ].

24. *The U.S. Financial Crisis 1992–2018*, COUNCIL ON FOREIGN RELS., https://www.cfr.org/timeline/us-financial-crisis [https://perma.cc/NWD5-V3JH].

and money market mutual funds.[25] Thus, society has supported, and continues to support, nonbanks in times of financial stress.

What does society get in return for this benefit? When evaluating evidence of a social contract with nonbank financial firms, as compared to banks, evidence of nonbanks serving the public interest exists but is less extensive. Whereas banks have a long history of operating as a "political machine of the greatest importance to the State,"[26] the relationship between nonbank intermediaries and the federal government has developed more recently. Yet, as far back as 1970, nonbanks have been relied upon to detect and deter money laundering, and starting in 2001, to implement procedures to block transactions with terrorists and countries subject to sanctions,[27] demonstrating the evolving relationship between the nation and nonbank financial institutions that now requires them to fulfill certain obligations for the benefit of society.

Assuming that this mutual exchange of promises forms a social contract, the next question that follows is whether nonbanks are providing *adequate* consideration for the support they receive. This Article contends that they are not. In spite of benefitting from liquidity assistance, nonbanks are not subject to uniform prudential requirements that would mitigate their contributions to systemic risks.[28] And, although they benefit from loan insurance and access to government-sponsored enterprises ("GSEs"), nonbank lenders are not subject to the obligations of the Community Reinvestment Act of 1977 ("CRA"),[29] which currently only requires *banks* to meet the credit needs of their communities.[30] In other words, the current exchange is a bad deal for society, the terms of which should be renegotiated to rebalance the benefits flowing to and from nonbank financial firms.

Relatedly, this Article also seeks to address concerns that acknowledging and recalibrating nonbanks' social contract would diminish the specialness of banks. Some scholars justify the difference in regulatory regimes based on the

25. *Unlucky: Do the Recent Changes to the Federal Reserve's Powers Under Section 13(3) of the Federal Reserve Act Inhibit Future Action?*, WHITE & CASE (Jan. 7, 2021), https://www.whitecase.com/insight-alert/unlucky-do-recent-changes-federal-reserves-powers-under-section-133-federal-reserve [https://perma.cc/TC42-K7YF].

26. Alexander Hamilton, *Final Version of the Second Report on the Further Provision Necessary for Establishing Public Credit (Report on a National Bank)*, *in* 7 THE PAPERS OF ALEXANDER HAMILTON 236, 329 (Harold C. Syrett ed., 1963).

27. *See infra* Section II.A.2 (discussing the application of the Bank Secrecy Act to nonbank financial institutions).

28. *See* Gruenberg, *supra* note 18.

29. Community Reinvestment Act of 1977, Pub. L. No. 95-128, tit. VII, 91 Stat. 1111, 1147–48 (codified as amended at 12 U.S.C. §§ 2901–09).

30. *See infra* notes 183–84 and accompanying text (discussing the Community Reinvestment Act ("CRA")).

notion that "banks are special."[31] Accepting the assumption that banks *are* special, and the specialness of banks warrants a special social contract, does not foreclose the possibility of a different contract for nonbanks. Further, imposing some additional duties on nonbanks for the benefit of society does not negate banks' special status. For example, banks' affirmative obligation to meet the credit needs of their community could be extended to nonbanks without altering banks' status.[32] After all, the same risks for redlining are present for banks and nonbanks alike.[33]

Moreover, recalibrating the social contract with nonbanks does not necessitate the provision of the same benefits, or imposition of the same duties, on banks and nonbanks alike. Again, unlike traditional banks, nonbanks do not accept deposits, which means they do not have access to federal deposit insurance.[34] On the other hand, many nonbanks issue short-term liabilities that create the same risks for runs as those created by traditional deposits.[35] And with these risks, as this Article seeks to demonstrate, nonbanks continue to require and avail themselves of section 13(3) facilities[36] as well as federal loan insurance without the proportionate oversight of their risks. While the authority from the Dodd-Frank Act[37] to designate and regulate systemically

31. As noted by Saule Omarova and Robert Hockett, "the word 'special' is something of a term of art in bank-regulatory parlance." Robert C. Hockett & Saule T. Omarova, *The Finance Franchise*, 102 CORNELL L. REV. 1143, 1158 n.43 (2017). For a discussion of banks' specialness, see *infra* Section I.A. For example, Morgan Ricks suggests that banks' role in money creation warrants "a unique relationship with the state." Morgan Ricks, *Money as Infrastructure*, 2018 COLUM. BUS. L. REV. 757, 759 (2019).

32. This duty is imposed by the Community Reinvestment Act of 1977, Pub. L. No. 95-128, tit. VIII, 91 Stat. 1111, 1147 (codified as amended at 12 U.S.C. §§ 2901–08).

33. The Consumer Financial Protection Bureau ("CFPB") defines redlining as

> an illegal practice where people living in a certain area or neighborhood are not given the same access to loans and other credit services as people in other areas or neighborhoods on the basis of race, color, national origin, or some other prohibited reason, regardless of their ability to repay their loan.

UNDERSTANDING REDLINING, CONSUMER FIN. PROT. BUREAU 1, https://files.consumerfinance.gov/f/documents/cfpb_building_block_activities_understanding-redlining_handout.pdf [https://perma.cc/BB84-PGB8] (last updated Nov. 10, 2022). For the history of redlining and the federal government's role in the practice, see generally RICHARD ROTHSTEIN, THE COLOR OF LAW (1st ed. 2017).

34. *See Banking with Third-Party Apps*, FED. DEPOSIT INS. CORP., https://www.fdic.gov/resources/consumers/consumer-news/2024-06.html [https://perma.cc/SKK5-5DG5] (last updated May 31, 2024) ("[N]onbank companies themselves are never FDIC-insured.").

35. *See generally* MORGAN RICKS, THE MONEY PROBLEM: RETHINKING FINANCIAL REGULATION (2016) [hereinafter RICKS, THE MONEY PROBLEM: RETHINKING] (discussing the prevalence of "shadow-banking," or nonbanks' reliance on the issuance of short-term debt to fund their portfolios, and how it has contributed to current financial instability).

36. Section 13(3) of the Federal Reserve Act allows the Federal Reserve ("the Fed") to also make loans to nonbanks in "unusual and exigent circumstances." 12 U.S.C. § 343(3)(A).

37. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 7, 12, and 15 U.S.C.).

important financial institutions ("SIFIs") had the potential to bring some balance to this arrangement,[38] it has yet to do so. Due to de-designations, shifting standards, and litigation, no entities are currently designated as SIFIs.[39] So, while nonbanks continue to pose systemic risks and to benefit from federal safety nets, they are subject to little to no federal oversight.

Recognizing this continuing asymmetry, this Article investigates three key avenues for balancing the deal between nonbanks and society: federal chartering, streamlining SIFI designations, and extending key existing regulatory frameworks to nonbanks. As discussed below, federal chartering offers uniform oversight but, without stringent conditions, could expand society's duties under the social contract without asking enough in return, thereby increasing the imbalance. A more streamlined SIFI designation framework could help to balance the scales, especially if additional duties are imposed on designees and federal benefits are conditioned upon these designations. Then, as a more comprehensive approach to renegotiating the terms of nonbanks' contract, this Article considers extending the CRA to nonbanks, banning nonbanks from issuing risky short-term liabilities, and subjecting nonbanks to consumer protection supervision.

While not explicitly framed within social contract theory, existing legal scholarship provides critical insights relevant to its application to nonbank financial institutions. For instance, Steven L. Schwarcz has discussed the systemic risks posed by such firms and the necessity of regulatory frameworks to mitigate these risks.[40] More recently, Hilary J. Allen addressed the regulatory challenges posed by fintechs and other nonbanks, highlighting the importance of adapting regulatory frameworks to new financial technologies.[41] These works underscore the necessity for a regulatory approach that implicitly aligns with social contract theory, balancing the benefits flowing to and from nonbank intermediaries.[42] By integrating these contemporary insights with social

38. 12 U.S.C. § 5323.

39. *See* Jeremy C. Kress, *The Last SIFI: The Unwise and Illegal Deregulation of Prudential Financial*, 71 STAN. L. REV. ONLINE 171, 171 (2018).

40. Steven L. Schwarcz, *Regulating Shadow Banking*, 31 REV. BANKING & FIN. L. 619, 631–41 (2012).

41. Hilary J. Allen, *Driverless Finance*, 10 HARV. BUS. L. REV. 157, 166–73 (2020). This Article uses the term "fintech" to refer to nonbanks that provide financial services primarily through mobile and online platforms. *See* William Magnuson, *Regulating Fintech*, 71 VAND. L. REV. 1167, 1174 (2018).

42. *See generally* John C. Coffee, Jr., *Systemic Risk After Dodd-Frank: Contingent Capital and the Need for Regulatory Strategies Beyond Oversight*, 111 COLUM. L. REV. 795 (2011) (arguing for a "bail-in" method of regulation); Kathryn Judge, *Intermediary Influence*, 82 U. CHI. L. REV. 573 (2015) (examining the influence intermediaries have on the financial industry); Erik F. Gerding, *Deregulation Pas de Deux: Dual Regulatory Classes of Financial Institutions and the Path to Financial Crisis in Sweden and the United States*, 15 NEXUS 135 (2010) (exploring the interaction between financial institutions subject to different regulatory schemes and consequences thereof); RICKS, THE MONEY PROBLEM: RETHINKING, *supra*

contract theory, this Article argues for regulatory reforms that ensure nonbanks fulfill their part of the social contract.

Part I of this Article explains what makes banks distinct from nonbank financial institutions, including their implicit social contracts and the charters that operate to formalize such contracts. Part II applies social contract theory to nonbanks, analyzing the benefits and obligations of nonbanks, and comparing them to those of traditional banks. This comparison sheds light on the evolving roles of nonbanks in the financial landscape and the potential need for redefining their social contracts. Part III shifts the focus toward practical implications, synthesizing the insights gained from the previous parts to propose policy recommendations. These suggestions aim to guide policymakers and stakeholders in addressing the challenges and opportunities presented by nonbank financial institutions, ensuring that their roles align with societal expectations and contribute positively to the financial system.

I. PRIMER ON BANKS

In her article *Banking and the Social Contract*, Mehrsa Baradaran documents the evolving relationship between banks and the state, which she frames as a social contract.[43] Foundational to an analysis that attempts to draw from Baradaran's social contract construct is an understanding of the distinction between banks and nonbank financial institutions in the United States. To build that groundwork, this part introduces the concept of a bank, provides a concise overview of the historical trajectory of bank regulation, and outlines the benefits associated with obtaining a bank charter.

A. *What Is a "Bank"?*

In a relatively famous 1983 essay, former president of the Federal Reserve Bank of Minneapolis E. Gerald Corrigan posed the question: Are banks

note 35 (urging the importance of regulating shadow banking); Lawrence G. Baxter, *"Capture" in Financial Regulation: Can We Channel It Toward the Common Good?*, 21 CORNELL J.L. & PUB. POL'Y 175 (2011) (analyzing regulatory capture theory and its influence on the development of the deregulation movement and the creation of single executive agencies); Saule T. Omarova, *The Merchants of Wall Street: Banking, Commerce, and Commodities*, 98 MINN. L. REV. 265 (2013) (discussing the existing legal and regulatory framework for the physical commodities activities of U.S. banking organizations and potential public policy concerns of such activities); Adam J. Levitin, *Safe Banking: Finance and Democracy*, 83 U. CHI. L. REV. 357 (2016) (asserting the Pure Reserve Banking theory and the consequent withdrawal of government support for shadow banking); Laura Kodres, *Shadow Banks: Out of the Eyes of Regulators*, INT'L MONETARY FUND, https://www.imf.org/en/Publications/fandd/issues/Series/Back-to-Basics/Shadow-Banks [https://perma.cc/4RT2-KCDB] (proposing that shadow banks be supervised like banks).

43. Baradaran, *supra* note 7, at 1285.

special?[44] Attempting to answer the question at hand, Corrigan first defined a bank as any institution that is *authorized* to issue deposits that are payable on demand, at par, and readily transferable to third parties.[45] This section next delves into the document that provides that authorization and forms the basis of banks' express social contract: the charter.

To even exist as a bank, an institution must first be granted either a federal or state bank charter.[46] This charter is a license that allows a bank to provide financial services, such as accepting deposits and making loans.[47] Before establishing a national bank via a federal charter,[48] an organizing group must apply to and obtain approval from the Office of the Comptroller of the Currency ("OCC") and receive deposit insurance from the Federal Deposit Insurance Corporation ("FDIC").[49] Alternatively, organizers may apply to a state banking agency to create a state bank via a state charter.[50]

Similar to articles of incorporation for a corporation, a bank's charter provides operational guidelines for a bank. Bank charters differ significantly from charters for other business organizations, however, in that access to bank

44. E. Gerald Corrigan, *Are Banks Special?*, *in* FED. RSRV. BANK OF MINNEAPOLIS, ANNUAL REPORT 5, 5 (1982) ("Are banks 'special' or are they simply another provider of financial services?"). In his essay, E. Gerald Corrigan discussed opposing views on the answer. *Id.* at 5. One view is that the financial services industry, which includes banks, brokers, investment banks, and insurers, is a single entity. *Id.* The opposing view, which Corrigan espoused in his essay, is that banks are special. *Id.* at 5, 18. The context for the essay is important. As the lines drawn by the Glass-Steagall Act were being reconsidered at the time, the essay is primarily focused on the answers' implications on banking powers, bank ownership and control, and the structure of bank organizations. FED. RSRV. BANK MINNEAPOLIS, *supra*, at 2. In other words, the specialness of banks could justify the continuation of the historical separation of banking from commerce and investment banking. Corrigan, *supra*, at 5. Because if banks aren't special, why should they be separated?

45. Corrigan, *supra* note 44, at 2. According to Corrigan, banks' specialness derives from their function in issuing these transaction accounts, providing a backup source of liquidity to other institutions, and serving as a "transmission belt" for monetary policy. *Id.* at 7.

46. *How Can I Start a Bank?*, BD. GOVERNORS FED. RSRV. SYS., https://www.federalreserve.gov/faqs/banking_12779.htm [https://perma.cc/K9WJ-KTBM] (last updated Aug. 2, 2013). Since the founding of the United States, banks have operated under a dual system of chartering wherein a bank may be chartered by either a federal or state banking agency. *See* Henry N. Butler & Jonathan R. Macey, *The Myth of Competition in the Dual Banking System*, 73 CORNELL L. REV. 677, 677 (1988); *see also* Arthur E. Wilmarth, Jr., *The Expansion of State Bank Powers, the Federal Response, and the Case for Preserving the Dual Banking System*, 58 FORDHAM L. REV. 1133, 1157–58 (1990).

47. ANDREW P. SCOTT, CONG. RSCH. SERV., R47014, AN ANALYSIS OF BANK CHARTERS AND SELECTED POLICY ISSUES 1 (2022).

48. A bank is a national bank if the "corporate entit[y] [is] chartered not by any State, but by the Comptroller of the Currency of the U.S. Treasury." Wachovia Bank v. Schmidt, 546 U.S. 303, 306 (2006).

49. David Zaring, *Modernizing the Bank Charter*, 61 WM. & MARY L. REV. 1397, 1399 (2020); *see also* 12 U.S.C. § 27. The Office of the Comptroller of the Currency ("OCC") charters national banks pursuant to authority granted by the National Bank Act of 1864, ch. 106, 13 Stat. 99 (codified as amended in scattered sections of 12 U.S.C.).

50. *See, e.g.*, Butler & Macey, *supra* note 46, at 677.

charters is subject to stringent public review and control, with the OCC and state chartering agencies granting only a limited number of charters.[51] The chartering agency audits and inspects bank records, periodically reviews the bank's compliance with regulations, and reviews financial performance.[52]

B. *The Historical Evolution of the Social Contract with Banks*

Senator William Proxmire compared the bank charter to a franchise to serve local convenience and needs, and suggested that it is fair for the public to ask something in return.[53] This section examines the historical context for the current relationship between banks and the state. Banks' social contracts have undergone significant transformations since their inception. This section highlights the key junctures and shifts that have influenced the reciprocal obligations between the government and banks, beginning with the historical context for the creation of the U.S.'s central bank.[54]

In the years following a financial crisis known as the Panic of 1907, Congress passed the Federal Reserve Act,[55] which established a system of Reserve Banks with capital provided by member banks in the Reserve Bank's geographic region.[56] The Act required member banks to hold reserves in the form of Federal Reserve notes or deposit accounts with their reserve bank.[57] A member bank could obtain additional currency or reserve deposits by borrowing

51. 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). Organizers are required to submit financial information, business plans, performance projections, and proof that the proposed bank will be sufficiently capitalized. *Id.* at 475. In 2022, the OCC received seven applications for de novo charters, approving one and conditionally approving two others. OFF. OF THE COMPTROLLER OF THE CURRENCY, 2022 ANNUAL REPORT 32 tbl.3 (2023), https://www.occ.treas.gov/publications-and-resources/publications/annual-report/files/2022-annual-report.pdf [https://perma.cc/TM99-N7QY].

52. *See, e.g.*, OFF. OF THE COMPTROLLER OF THE CURRENCY, COMPTROLLER'S HANDBOOK: BANK SUPERVISION PROCESS 1, 12 (2019), https://www.occ.gov/publications-and-resources/publications/comptrollers-handbook/files/bank-supervision-process/pub-ch-bank-supervision-process.pdf [https://perma.cc/8MH9-7C7M].

53. Warren L. Dennis, *The Community Re-Investment Act of 1977: Its Legislative History and Its Impact on Applications for Changes in Structure Made by Depository Institutions to the Four Federal Financial Supervisory Agencies* 4 (Credit Rsch. Ctr., Working Paper No. 24, 1978).

54. For an analysis of the status of banks' social contract that predates the creation of the Federal Reserve, see Baradaran, *supra* note 7, at 1287–96. Since this Article is focused on nonbanks, only a brief history of the social contract with banks is provided as a point of comparison.

55. Federal Reserve Act, Pub. L. No. 63-43, 38 Stat. 251 (1913) (codified as amended in scattered sections of 12 U.S.C.).

56. *Id.* at 251–53; David C. Wheelock, *Overview: The History of The Federal Reserve*, FED. RSRV. HIST. (Sept. 13, 2021), https://www.federalreservehistory.org/essays/federal-reserve-history [https://perma.cc/55LB-UDFQ] [hereinafter Wheelock, *The History of the Federal Reserve*].

57. Federal Reserve Act § 2, 38 Stat. at 253; Wheelock, *The History of the Federal Reserve*, *supra* note 56.

at the "discount window" of its Reserve Bank.[58] To obtain the additional reserves, though, member banks would pledge short-term commercial or agricultural loans as collateral.[59] The Federal Reserve Board's founders hoped that the discount window would make the country's money supply more elastic thereby preventing future panics.[60]

Yet, soon after the stock market crash of 1929, the U.S. banking system experienced another widespread panic.[61] As banks across the country began to fail, depositors rushed to withdraw their funds, precipitating more bank failures.[62] The Federal Reserve's "discount window" did little at that time to stop the crisis because few banks held eligible collateral and most state banks had not joined the system.[63] As part of the New Deal and in response to the crisis, Congress passed the Glass-Steagall Act of 1933,[64] which created both federal deposit insurance and the FDIC to administer the program.[65] Under the program, the federal government guarantees that depositors will be reimbursed up to a fixed amount of losses in the event of a bank failure.[66] The program effectively stabilized the banking system by greatly reducing the number of bank runs.[67]

The Glass-Steagall Act also forced the division of commercial and investment banks by restricting broker-dealers from accepting deposits, disallowing Federal Reserve member banks from forming affiliations with investment banks, preventing member banks from engaging in equity and noninvestment grade securities investments, and prohibiting employee interlocks.[68] The separation was aimed at preventing banks from speculating

58. Wheelock, *The History of the Federal Reserve*, *supra* note 56. Reserve banks also provided check clearing services for their members. *Id.*

59. *Id.*

60. *Id.* The Federal Reserve Act also created the national check clearing system at the Federal Reserve, which reduced clearing times and costs for member banks. *Our Historical Role in Payments*, FED. RSRV., https://fedpaymentsimprovement.org/about/who-we-are/our-historical-role-in-payments/ [https://perma.cc/6AJ4-RFP4]. In 1918, the Federal Reserve established a network that allowed for the secure transfer of funds via Morse code. *Id.* This system evolved into Fedwire, the interbank funds transfer system for wholesale payments. *Id.*

61. MICHAEL S. BARR, HOWELL E. JACKSON & MARGARET E. TAHYAR, FINANCIAL REGULATION: LAW AND POLICY 51 (3d ed. 2021).

62. *Id.* at 52.

63. David C. Wheelock, *The Fed's Formative Years*, FED. RSRV. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/feds-formative-years [https://perma.cc/CNM2-L57J].

64. Glass-Steagall Act (Banking Act of 1933), Pub. L. No. 73-66, 48 Stat. 162 (codified in part as amended in scattered sections of 12 U.S.C.) (repealed in part 1999).

65. BARR ET AL., *supra* note 61, at 53.

66. *Id.* at 256.

67. *Id.* at 259.

68. *Id.* at 53. Section 32 of the Act prohibited officer, director, and employee interlocks between member banks and securities firms. Glass-Steagall Act § 32. This prevented officers, directors, or employees of securities firms from serving as an officer, director, or employee of bank. *Id.*

with customers' deposits by establishing clear boundaries between true banking and investment activities, aiming to foster stability in banking.[69]

The third pillar of the New Deal contract with banks was using banks as a means to promote home ownership. In 1933, one percent of all housing units in the United States went into foreclosure.[70] President Roosevelt worked with Congress to create the Federal Home Loan ("FHL") Bank System, the first government-sponsored housing finance entity, to promote home ownership.[71] FHL Banks were intended to provide inexpensive financing to member banks in order to lower the cost of home ownership for borrowers.[72]

As part of these continuing efforts to promote home ownership by enhancing liquidity in the mortgage market, Congress also passed the National Housing Act of 1934,[73] which created the Federal Housing Administration ("FHA") to insure loans, and the Housing and Urban Development Act of 1968,[74] which created the Federal National Mortgage Association ("Fannie Mae") to purchase those loans.[75] Under the program, if a borrower defaulted, FHA would fund the lender for the remaining balance of the loan.[76] Then, Fannie Mae allowed lenders to issue more loans by purchasing loans made by lenders, which it then pooled and sold as guaranteed mortgage-backed securities ("MBS").[77]

According to Baradaran, the New Deal reforms established a quid pro quo "between banks and the government that assured that banks would do what the

69. Julia Maues, *Banking Act of 1933 (Glass-Steagall)*, FED. RSRV. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/glass-steagall-act [https://perma.cc/5EHC-GCW5].

70. BARR ET AL., *supra* note 61, at 54.

71. *Id.*

72. Herbert Hoover, President of the United States, Statement About Signing the Federal Home Loan Bank Act (July 22, 1932), https://www.presidency.ucsb.edu/documents/statement-about-signing-the-federal-home-loan-bank-act [https://perma.cc/4DZ8-RHVN]. For a modern critique of the Federal Home Loan Bank System, see Kathryn Judge, *The Unraveling of the Federal Home Loan Banks*, 41 YALE J. ON REGUL. 1011 *passim* (2024) [hereinafter Judge, *The Unraveling*].

73. National Housing Act, Pub. L. No. 73-479, 48 Stat. 1246 (1934) (codified as amended in scattered sections of 12 U.S.C.).

74. Housing and Urban Development Act of 1968, Pub. L. No. 90-448, 82 Stat. 476 (1968) (codified as amended in scattered sections of 12, 15, and 42 U.S.C.).

75. Marshall Lux & Robert Greene, *What's Behind the Non-Bank Mortgage Boom?* 4 (Mossavar-Rahmani Ctr. for Bus. & Gov't Assoc. Working Paper Series, No. 42, 2015), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/working.papers/42_Nonbank_Boom_Lux_Greene.pdf [https://perma.cc/W3GL-CCYN]. The Federal Housing Association ("FHA") created the Mutual Mortgage Insurance Fund, which is a federal fund that acts as the insurer of mortgages guaranteed by the FHA. MAGGIE MCCARTY, KATIE JONES & LIBBY PERL, CONG. RSCH. SERV., RL34591, OVERVIEW OF THE FEDERAL HOUSING ASSISTANCE PROGRAMS AND POLICY 2 (2019).

76. MCCARTY ET AL., *supra* note 75, at 2.

77. *About Us*, FANNIE MAE, https://www.fanniemae.com/about-us [https://perma.cc/59Q2-MTQV]. Later, in 1970, Congress chartered Freddie Mac to purchase mortgages from savings and loans associations. Lux & Greene, *supra* note 75, at 5.

government needed them to do, and the government's return promise [was] to provide a safety net and restore public trust in banking."[78] Since the New Deal Era, this deal has been amended several times. During the Civil Rights Era, for example, Congress passed a set of laws aimed at eliminating discrimination in banking, including the Fair Housing Act of 1968,[79] the Equal Credit Opportunity Act of 1974 ("ECOA"),[80] the Home Mortgage Disclosure Act of 1975 ("HMDA"),[81] and the CRA.[82] As a result, these legislative measures marked a significant shift in the financial landscape, ushering in an era where banks were not only prohibited from discriminatory practices but were also

78. Baradaran, *supra* note 7, at 1300.

79. Fair Housing Act, Pub L. No. 90-284, tit. VIII, 82 Stat. 73, 81–89 (1968) (codified as amended at 42 U.S.C. §§ 3601–19).

80. Equal Credit Opportunity Act, Pub. L. No. 93-495, tit. V, 88 Stat. 1500, 1521 (1974) (codified as amended at 15 U.S.C. § 1691).

81. Home Mortgage Disclosure Act of 1975, Pub. L. No. 94-200, tit. III, 89 Stat. 1124, 1125–28 (codified as amended at 12 U.S.C. §§ 2801–10).

82. Community Reinvestment Act of 1977, Pub. L. No. 95-128, tit. VIII, 91 Stat. 1111, 1147–48 (codified as amended at 12 U.S.C. §§ 2901–09). Some critics have blamed the CRA for the last financial crisis. *See, e.g.*, Charles Krauthammer, *Catharsis, Then Common Sense*, WASH. POST (Sept. 26, 2008), https://www.washingtonpost.com/archive/opinions/2008/09/26/catharsis-then-common-sense/fbcb8e39-af7d-4e7f-ac51-ba24c4011b1f/ [https://perma.cc/3BQR-HNHW (staff-uploaded, dark archive)] (attributing the crisis to subprime lending influenced by the CRA); Vahid Saadi, *Role of the Community Reinvestment Act in Mortgage Supply and the U.S. Housing Boom*, 33 REV. FIN. STUD. 5288, 5288 (2020). However, this criticism has been largely debunked because CRA loans represented a very small fraction of the subprime loans leading up to the financial crisis. *See, e.g.*, CAROLINA REID, UNC CTR. FOR CMTY. CAP., DEBUNKING THE CRA MYTH—AGAIN 1 (2013), https://communitycapital.unc.edu/wp-content/uploads/sites/340/2013/01/DebunkingCRAMyth.pdf [https://perma.cc/8RD3-YEB5 (staff-uploaded archive)] (finding there is "no credible research to support the assertion that CRA contributed to an increase in risky lending during the subprime boom"). Also undermining the notion that the CRA contributed to the financial crisis, three key studies suggest that the CRA did not play an important role in the subprime mortgage boom, neither through banks' direct originations nor their secondary market purchases. Neil Bhutta & Daniel Ringo, *Assessing the Community Reinvestment Act's Role in the Financial Crisis*, FED. RSRV. (May 26, 2015), https://www.federalreserve.gov/econresdata/notes/feds-notes/2015/assessing-the-community-reinvestment-acts-role-in-the-financial-crisis-20150526.html [https://perma.cc/62XY-QYS6] (concluding that the CRA was not a significant contributor to the financial crisis). The three key studies cited therein are: Neil Bhutta & Glenn B. Canner, *Did the CRA Cause the Mortgage Market Meltdown?*, FED. RSRV. BANK MINNEAPOLIS (Mar. 1, 2009), https://www.minneapolisfed.org/article/2009/did-the-cra-cause-the-mortgage-market-meltdown [https://perma.cc/VZ4C-2BHX] (finding that six percent of subprime loans were CRA-related); Neil Bhutta & Glenn B. Canner, *Mortgage Market Conditions and Borrower Outcomes: Evidence from the 2012 HMDA Data and Matched HMDA-Credit Record Data*, FED. RSRV. BULL., Nov. 2013, at 3–4 (finding that CRA-related loans experienced a delinquency rate that was less than half the overall rate for loans in lower-income neighborhoods and was lower than the overall delinquency rate across all 2006-vintage mortgages); Robert B. Avery & Kenneth P. Brevoort, *The Subprime Crisis: Is Government Housing Policy to Blame?*, 97 REV. ECON. & STAT. 352, 362 (2015) (finding "little evidence to support the view that either the CRA or the GSE goals resulted in worse loan outcomes").

mandated to counteract the lingering consequences of historical discrimination.[83]

Another change that occurred in the 1970s was the passage of the Bank Secrecy Act of 1970 ("BSA"),[84] which established recordkeeping and reporting requirements for financial institutions, including national banks, federal savings associations, federal branches, and agencies of foreign banks.[85] After a period of resistance and inaction, banks eventually began complying with the BSA's requirements.[86] The Financial Crimes Enforcement Network ("FinCEN") was established as the primary administrator of the BSA, but the federal banking agencies were entrusted with reviewing banks' compliance therewith as part of their regulation examination processes.[87]

Under mounting pressure to deregulate in the late 1970s and 1980s, banks' social contract changed again. It was in this environment that Corrigan contemplated the specialness of banks. Although Corrigan does not frame the issue in terms of a transaction or contract, a contract is implicit in his logic. According to Corrigan, if an institution met the definition of a bank, then it would have access to deposit insurance and the Federal Reserve's discount window and payment services.[88] Corrigan also contended that the institution would be subject to reserve requirements.[89] The implicit contract is that for the benefit of access to government assistance, the bank would be subject to "safety and soundness" regulation.

But even safety and soundness measures came under attack, as regulation was blamed for banks' waning profitability. In reaction to these developments, Congress enacted seven laws within a span of two decades that collectively

83. Baradaran, *supra* note 7, at 1301. *But see* Winnie F. Taylor, *Eliminating Racial Discrimination in the Subprime Mortgage Market: Proposals for Fair Lending Reform*, 18 J.L. & POL'Y 263, 273 & n.38 (2009) (reviewing the ongoing challenges in eradicating racial discrimination in housing and lending, highlighting the shortcomings of existing legal frameworks).

84. Bank Secrecy Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114 (codified as amended at 12 U.S.C. §§ 1951–60). The BSA has been modified several times through various pieces of legislation, including the USA Patriot Act, which criminalized financing of terrorism and strengthened the existing BSA framework. Julie Stackhouse, *What is the Bank Secrecy Act, and Why Does It Exist?*, FED. RSRV. BANK ST. LOUIS (Apr. 23, 2018), https://www.stlouisfed.org/on-the-economy/2018/april/what-bank-secrecy-act-why-exist [https://perma.cc/MTP4-5DNS (staff-uploaded archive)]; Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act), Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 8, 15, 18, 22, 31, 34, 42, 49, and 50 U.S.C.).

85. *Bank Secrecy Act (BSA)*, OFF. OF THE COMPTROLLER OF THE CURRENCY, https://www.occ.treas.gov/topics/supervision-and-examination/bsa/index-bsa.html [https://perma.cc/8KHX-TEB8].

86. Courtney J. Linn, *Redefining the Bank Secrecy Act: Currency Reporting and the Crime of Structuring*, 50 SANTA CLARA L. REV. 407, 407 (2010).

87. Stackhouse, *supra* note 84.

88. Corrigan, *supra* note 44, at 2.

89. *Id.*

resulted in the deregulation of deposit interest rates, the removal of geographic constraints on bank expansion, the repeal of Glass-Steagall barriers between banking and securities activities, and the authorization of the formation of large financial institutions.[90] As Mehrsa Baradaran has contended, these changes created a "lopsided arrangement" that reduced banks' obligations but did not take away the government safety nets such as FDIC insurance or access to the Federal Reserve's discount window.[91]

In the wake of the 2008–09 financial crisis, Congress passed the Dodd-Frank Act, aiming to address weaknesses exposed by the crisis.[92] One of its key provisions was the establishment of the Consumer Financial Protection Bureau ("CFPB"), which was granted the authority to enforce the Act's prohibition of unfair, deceptive, or abusive acts or practices ("UDAAP").[93] Dodd-Frank also introduced enhanced prudential standards for large banks, including stress testing and living will requirements.[94] Moreover, the Volcker Rule, a component of Dodd-Frank, restricted banks' ability to engage in proprietary trading and limited their investments in hedge funds and private equity funds.[95] With these measures, Congress attempted to ensure stability and accountability, but Baradaran considers Dodd-Frank a "missed opportunity for the government to reassert its relationship with the nation's banks."[96]

Further decreasing Dodd-Frank's potential to recalibrate this relationship, the threshold for the applicability of key provisions of that Act was raised with the passage of the Economic Growth, Regulatory Relief and Consumer Protection Act in 2018.[97] The 2018 law also eliminated the Volcker Rule for banks with less than $10 billion in assets.[98] The reach of the Volcker Rule has since been further diminished. In 2020, the bank regulators proposed to allow banks to invest in venture capital and securitized loans once again.[99] Especially

90. Baradaran, *supra* note 7, at 1305.

91. *Id.* at 1309.

92. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 7, 12, and 15 U.S.C.) ("An Act [t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail', to protect the American taxpayer by ending bailouts, [and] to protect consumers from abusive financial services practices."); *accord* S. REP. NO. 111-176, at 1, 4–6 (2010).

93. Dodd-Frank Act §§ 1011, 1021.

94. *Id.* §§ 165(i)(2), 165(d).

95. *Id.* § 619.

96. Baradaran, *supra* note 7, at 1324.

97. *See* Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub L. No. 115-174, §§ 401–03, 132 Stat. 1296, 1356–61 (2018) (codified in scattered sections of 12 U.S.C.) (raising the threshold for the applicability of enhanced prudential regulations from banks with $50 billion in assets to banks with $250 billion in assets).

98. *Id.* § 203.

99. *See, e.g.*, 12 C.F.R. §§ 44.1 to .21 (2025).

in light of these changes, "the post-crisis reforms [did] not fundamentally change[] the status quo with respect to banks' duties to the public."[100]

C. *Benefits of Bank Charters Today*

The bank charter is a literal embodiment of the bank's contract with the government. In spite of the ebb and flow of bank regulation described in Section I.B. above, a bank charter still offers considerable benefits to banks that are unavailable to nonbank financial institutions. First, the charter allows the bank to engage in lending and money transmission without obtaining the relevant licenses in each state.[101] Second, and perhaps more importantly, the charter allows the bank to export the usury laws of its home state.[102] Third, only chartered banks can become members of the Federal Reserve, FDIC,[103] and Federal Home Loan Bank System.[104] Each benefit is described in more detail in this section.

With a state or federal charter, banks are exempt from numerous state lending licensing and money transmission requirements. An OCC-issued charter permits nationwide lending and avails the bank of broad preemption benefits.[105] Most states also permit nationwide lending by their state-chartered banks,[106] and some state laws exempt out-of-state banks from lending licensing as well.[107] Similarly, most states exempt regulated banks from their money transmission licensing requirements.[108] Thus, charters, and especially federal charters, save banks the time and expense associated with meeting state-by-state licensing requirements.

100. Baradaran, *supra* note 7, at 1323.

101. U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-254, FINANCIAL TECHNOLOGY: ADDITIONAL STEPS BY REGULATORS COULD BETTER PROTECT CONSUMERS AND AID REGULATORY OVERSIGHT 44 (2018).

102. *See infra* Section I.C.

103. *How Can I Start a Bank?*, *supra* note 46.

104. Judge, *The Unraveling*, *supra* note 72, at 1018–29.

105. 12 U.S.C. § 24; 12 C.F.R. § 7.4008(d) (2025).

106. Randall S. Kroszner & Philip E. Strahan, *What Drives Bank Deregulation? Economics and Politics of the Relaxation of Bank Branching Restrictions*, 114 Q.J. ECON. 1437, 1441 (1999). For a history on the deregulation of state banks, see *id.* 1439–42.

107. *See, e.g.*, ALA. CODE § 5-19-22 (a)(3) (2024) ("Banks chartered by this state or any other state, banks chartered by the United States . . . shall be exempt from [consumer loan] licensing."); ARIZ. REV. STAT. ANN. § 6-602 (2024) (listing banks as being exempt from consumer loan licensing requirements); CONN. GEN. STAT. § 36a-557 (2024) (listing out-of-state banks as being exempt from small loan licensing).

108. *See, e.g.*, ARIZ. REV. STAT. ANN. § 6-1235(C) (2024); COLO. REV. STAT. § 11-110-106 (2024); CONN. GEN. STAT. § 36a-609(1)-(2) (2024); D.C. CODE § 26-1003(a)(4) (2024); FLA. STAT. § 560.104(1) (2024); GA. CODE ANN. § 7-1-682(1) (2024).

Bank charters also reduce usury law applicability.[109] Prior to 1978, each state's usury laws dictated the maximum rate of interest that any lender could charge borrowers in the borrowers' state.[110] Interpreting the National Bank Act ("NBA") that year, the Supreme Court held that federally chartered banks could charge any borrower the highest interest rate allowed in the state where the bank's main office is located.[111]

After that decision, states began allowing their state-chartered banks to charge the same interest rates that federally chartered banks doing business in their state could charge.[112] Then, in 1980, Congress acted to allow any state-chartered bank that was federally insured to charge out-of-state borrowers the same interest rate allowed for in-state borrowers.[113] The result of all of this was that virtually all banks only have to follow the usury laws of their home state, while nonbanks must take care not to charge any borrower a higher rate of interest than the borrower's state permits.

In summary, Part I explained how banks differ from nonbanks, traced the historical evolution of bank regulation, and outlined the relative advantages associated with obtaining a bank charter. The next part will shift the focus to nonbank financial institutions, exploring the status of their relationship with the government and society at large.

II. A SOCIAL CONTRACT FOR NONBANK FINANCIAL INSTITUTIONS

In her article *Banking and the Social Contract*, Mehrsa Baradaran carefully documents the evolving relationship between banks and the state, which she frames as a social contract.[114] As she notes, this concept traces back to Alexander Hamilton, who viewed a national bank as a vital political tool rather than merely a private entity.[115] Baradaran argues that this relationship has historically been characterized by mutual benefits and responsibilities, where the state supports the banking system and, in return, banks serve the public interests.[116]

109. Usury laws dictate the maximum interest rate that can be charged to borrowers in their state. *Usury*, BLACK'S LAW DICTIONARY (12th ed. 2024). With a few exceptions, usury is a state law matter. ADAM J. LEVITIN, CONSUMER FINANCE: MARKETS AND REGULATION 458–59 (2018) [hereinafter LEVITIN, CONSUMER FINANCE].

110. Todd J. Zywicki, Geoffrey A. Manne & Kristian Stout, *Behavioral Economics Goes to Court: The Fundamental Flaws in the Behavioral Law & Economics Arguments Against No-Surcharge Laws*, 82 MO. L. REV. 769, 785 n.72 (2017).

111. Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp., 439 U.S. 299, 314–18 (1978).

112. LEVITIN, CONSUMER FINANCE, *supra* note 109, at 468.

113. Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (codified as amended in scattered sections of 12, 15, 22, 38, and 42 U.S.C.).

114. Baradaran, *supra* note 7, at 1285.

115. *Id.* at 1287.

116. *Id.*

As Baradaran contends, the public needs a safe and reliable financial system, without which the economy cannot function effectively.[117] While at one time a narrow focus on balancing the relationship between banks and society would have produced this desired result, this is no longer the case, as nonbanks are increasingly providing the financial services once provided by banks.[118] In fact, nonbank mortgage lenders issued 72.1% of all first mortgages originated in the United States in 2022.[119] These trends hold true in other arenas as well; according to a 2023 analysis by the International Monetary Fund, nonbank financial firms represent nearly 80% of the U.S. financial system's assets in 2021.[120] With this shift in the financial services market, society cannot be assured of a safe and sound financial system without also examining society's relationship with nonbanks.

A. *What Is the Current Social Contract for Nonbanks?*

This section attempts to mirror Baradaran's analysis, documenting the evolving relationships between nonbank intermediaries and society. Like banks, nonbank financial institutions benefit significantly from the implicit contract they share with society, particularly in the privileges and support extended to them by the federal government. In return for this support, though, nonbanks should be expected to operate responsibly, ensuring the stability and integrity of the financial system while serving societal needs. This section explores the current "deal" that nonbanks have with society and concludes, based on the asymmetrical benefits flowing to and from nonbanks, that it too requires rebalancing.

1. Extensive Federal Benefits to Nonbanks

Although nonbanks are primarily regulated at the state level, they are eligible to receive certain benefits at the federal level. As described in Section I.B. above, Congress created the Federal Reserve ("the Fed") in 1914, in part, to provide loans to its member banks.[121] Years later, in the midst of the Great Depression, the Emergency Relief and Construction Act of 1932 added section 13(3) to the Federal Reserve Act, in order to allow the Fed to also make

117. *Id.* at 1285.

118. Fritzdixon, *supra* note 18, at 32.

119. *Summary of 2022 Data*, *supra* note 21.

120. INTL. MONETARY FUND, GLOBAL FINANCIAL STABILITY REPORT 36 (2023), https://www.imf.org/en/Publications/GFSR/Issues/2023/10/10/global-financial-stability-report-october-2023 [https://perma.cc/PSQ6-Y8EH].

121. *See supra* notes 55–60 and accompanying text.

loans to nonbanks in "unusual and exigent circumstances."[122] In other words, the Fed could loan money to nonbanks in crisis—a power that would remain unused for seventy years.[123]

That changed during the Financial Crisis of 2008–09, when the Fed's use of section 13(3) was extensive, peaking at $710 billion in November 2008.[124] Pursuant to this authority, the Federal Reserve Bank of New York ("FRBNY") agreed to loan $29 billion to Bear Stearns, one of the largest securities firms in the country, in an attempt to prevent its collapse in March of 2008.[125] As the firm's financial condition worsened, the FRBNY facilitated a deal for JPMorgan Chase to purchase Bear Stearns for $2 per share by providing a $29 billion government-backed guaranty.[126] Just six months later, the FRBNY acted to rescue American International Group ("AIG"), a global financial services company, with an $85 billion loan.[127]

Because these loans were widely criticized, Congress later amended section 13(3) to prohibit loans to individual firms unless they applied through a program that was broadly available to many firms.[128] The amendment also required the Secretary of the Treasury's approval before establishing a lending program under section 13(3).[129] During the COVID-19 pandemic, with the Secretary of Treasury's approval, the Federal Reserve again invoked section 13(3) to create twelve emergency lending programs between March 17

122. Emergency Relief and Construction Act of 1932, ch. 520, § 210 47 Stat. 709, 715–16 (codified as amended at 12 U.S. Code § 343(3)(A)); *see* Wheelock, *The History of the Federal Reserve*, *supra* note 56; Parintha Sastry, *The Political Origins of Section 13(3) of the Federal Reserve Act*, FED. RSRV. BANK N.Y ECON. POL'Y REV., Sept. 2018, at 1.

123. David C. Wheelock, *Emergency Lending to Nonbank Borrowers*, FED. RSRV. HIST. (May 10, 2022), https://www.federalreservehistory.org/essays/emergency-lending-13-3 [https://perma.cc/3NRQ-8J4X]. The Fed used section 13(3) to make 123 loans to nonbanks totaling $1.5 million from 1932 to 1936, but did not invoke section 13(3) again until 2008. MARC LABONTE, CONG. RSCH. SERV., R44185, FEDERAL RESERVE: EMERGENCY LENDING 7 (2020).

124. LABONTE, *supra* note 123, at 10.

125. Press Release, Fed. Rsrv. Bank of N.Y., Statement on Financing Arrangement for JPMorgan Chase & Co. Acquisition of Bear Stearns Companies Inc. (Mar. 24, 2008), https://www.newyorkfed.org/newsevents/news/markets/2008/rp080324b.html [https://perma.cc/MDU2-J3R9].

126. Robert K. Rasmussen & David A. Skeel, Jr., *Government Intervention in an Economic Crisis*, 19 U. PA. J. BUS. 7, 13 (2016); *see also* Andrew Ross Sorkin & Landon Thomas Jr., *JPMorgan Acts to Buy Ailing Bear Stearns at Huge Discount*, N.Y. TIMES (Mar. 16, 2008), https://www.nytimes.com/2008/03/16/business/16cnd-bear.html [https://perma.cc/8CGB-V9GS (staff-uploaded, dark archive)].

127. *The U.S. Financial Crisis 1992–2018*, *supra* note 24. American International Group's troubles stemmed from its inability to post collateral to guarantee its performance of credit default swaps. Weinberg, *supra* note 23.

128. Press Release, Bd. of Governors of the Fed. Rsrv., Federal Reserve Board Approves Final Rule Specifying Its Procedures for Emergency Lending Under Section 13(3) of the Federal Reserve Act (Nov. 30, 2015), https://www.federalreserve.gov/newsevents/pressreleases/bcreg20151130a.htm [https://perma.cc/JL5S-ZC7R].

129. *Id.*

and April 9, 2020.[130] The Treasury committed $195 billion to four of the Fed's programs.[131]

As an example, on March 17, the Fed announced the establishment of the Primary Dealer Credit Facility ("PDCF"), which would lend to primary securities dealers at the discount window rate for a term of up to ninety days.[132] Through the PDCF alone, the Fed extended 256 loans to twenty-one primary dealers totaling $132 billion.[133] The dealers used the loans to finance their inventory of securities.[134] The borrowers under the PDCF included dealer affiliates of banks such as Wells Fargo Securities and J.P. Morgan Chase Securities, as well as other dealers such as TD Securities and Mizuho Securities.[135] Borrowers under other section 13(3) facilities included affiliates of Blackrock, Invesco, MacKay Shields, and Goldman Sachs.[136]

This renewed use of section 13(3) highlighted the evolving role of government-backed programs in stabilizing financial markets, a trend also evident in earlier initiatives aimed at increasing home ownership. Also as explained in Section I.B. above, Congress created the FHA as part of the New Deal and later created Fannie Mae to increase home ownership in the United States by insuring and purchasing home loans from lenders.[137] These benefits were extended not only to bank lenders, though. Nonbank lenders can avail themselves of these resources by originating loans that conform with FHA and Fannie Mae's standards.[138] In fact, a study conducted by the American Enterprise Institute's International Center on Housing Risk found that

130. FED. RSRV. BANK OF N.Y., FEDERAL RESERVE 13(3) FACILITIES ANNOUNCED DURING COVID-19 PANDEMIC (Apr. 9, 2020), https://www.newyorkfed.org/medialibrary/media/research/blog/2020/LSE_2020_COVID-fed-response_fleming [https://perma.cc/CX94-5LGH]. For a discussion of how the Fed's response to the COVID crisis exceeded the steps taken during the 2008–09 financial crisis, see David Zaring, *The Government's Economic Response to the COVID Crisis*, 40 REV. BANKING & FIN. L. 315, 317 (2020).

131. Steven Kelly, *Redux: Outlook for 13(3) and Fed Crisis Response*, YALE SCH. MGMT. (Dec. 22, 2020), https://som.yale.edu/blog/redux-outlook-for-133-and-fed-crisis-response [https://perma.cc/P75N-YR2B].

132. Carey K. Mott, *United States: Primary Dealer Credit Facility*, 4 J. FIN. CRISES 1933, 1935 (2022). A primary dealer is a bank or securities broker-dealer that is permitted to trade directly with the Fed. *Primary Dealers*, FED. RSRV. BANK N.Y., https://www.newyorkfed.org/markets/primarydealers.html [https://perma.cc/Y8H4-29JM].

133. Mott, *supra* note 132, at 1936.

134. *Id.* at 1937.

135. *Disclosures Regarding the Emergency Lending Response to COVID-19, Pursuant to Section 11(s) of the Federal Reserve Act*, FED. RSRV., https://www.federalreserve.gov/publications/disclosures-in-response-to-covid-19-pursuant-to-section-11-s.htm [https://perma.cc/98XL-6NJN] (last updated Nov. 05, 2024).

136. *Id.*

137. *See supra* notes 75–79 and accompanying text.

138. Lux & Greene, *supra* note 75, at 5.

nonbanks accounted for 62.2% of FHA-backed mortgages in the United States.[139]

As described in this section, nonbanks are eligible for certain federal benefits, but other benefits are unavailable or inapplicable to them. For example, as nondepository institutions, nonbanks are ineligible for FDIC insurance.[140] Customer funds held by the nonbank Venmo, for instance, are not federally insured.[141] Then, while nonbanks have benefitted from emergency loans from the Federal Reserve, nonbanks are ineligible to directly access the Federal Reserve's payment systems.[142] And, while some nonbanks, such as insurance companies, are eligible to join the Federal Home Loan Bank System, not all are.[143] Thus, the federal government supports nonbanks, but not as extensively as it does banks.

2. Limited Federal Regulation of Nonbanks

Different from banks, the obligations on nonbank financial intermediaries are primarily imposed by state laws, state regulations, and state agencies. Without a bank charter, nonbank financial intermediaries are required to obtain licenses from each state to provide specific financial services.[144] For example, every state requires lenders to obtain a license to issue loans to borrowers in its state.[145] State regulators conduct examinations of these lenders to assess compliance with their laws and regulations.[146] Likewise, forty-nine states require a license to provide money transmission services within their state.[147]

139. Kate Berry, *Banks Cede FHA Market Share to (Gulp) Thinly Capitalized Nonbanks*, AM. BANKER (Apr. 6, 2015, 2:15 PM), https://www.americanbanker.com/news/banks-cede-fha-market-share-to-gulp-thinly-capitalized-nonbanks [https://perma.cc/K22L-TDCX (staff-uploaded, dark archive)].

140. *Analysis of Deposit Insurance Coverage on Funds Stored Through Payment Apps*, CONSUMER FIN. PROT. BUREAU (June 1, 2023), https://www.consumerfinance.gov/data-research/research-reports/issue-spotlight-analysis-of-deposit-insurance-coverage-on-funds-stored-through-payment-apps/full-report/ [https://perma.cc/XND2-K3AC].

141. *Id.*

142. *See, e.g.*, *Payment Services*, FED. RSRV. BANK N.Y., https://www.newyorkfed.org/banking/payment_services.html [https://perma.cc/44K8-SQ6Q] ("Federal Reserve Banks offer a variety of services to depository institutions, including check processing, automated clearing houses (ACHs), Fedwire Funds Service, Fedwire Book-Entry Securities Service, and National Settlement Service.").

143. Membership is limited to thrift institutions, commercial banks, credit unions and insurance companies. *Federal Home Loan Bank Membership Data*, FED. HOUS. FIN. AGENCY (May 2, 2023), https://www.fhfa.gov/data/federal-home-loan-bank-membership-data [https://perma.cc/N74E-4YJU].

144. Lenore Palladino, *Small Business Fintech Lending: The Need for Comprehensive Regulation*, 24 FORDHAM J. CORP. & FIN. L. 77, 96 (2018); Christopher K. Odinet, *Predatory Fintech and the Politics of Banking*, 106 IOWA L. REV. 1739, 1768–69 (2021).

145. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 101, at 34 n.86.

146. *Id.* at 35.

147. *Id.* at 34.

To obtain a license, the intermediary must self-insure through bonding, hold reserves, and meet minimum net worth requirements.[148]

While nonbanks are primarily regulated at the state level, certain federal laws do now impose duties on nonbank financial institutions, demonstrating the evolving relationship between the federal government and such intermediaries. For example, the robust anti-money laundering ("AML") requirements under the BSA mentioned in Section I.B. apply to banks and nonbanks alike. As Kathryn Judge has written, "[t]hrough today's anti-money laundering regime and sanctions obligations, banks and other financial institutions increasingly operate as mechanisms of statecraft."[149] In other words, the United States government relies on these financial institutions to deter money laundering and terrorism and enforce sanctions through Know Your Customer protocols and transaction reporting.[150] It should be noted, however, that unlike banks which are examined by their primary federal regulator, AML compliance examinations are delegated to the Internal Revenue Service for nonbanks.[151]

Nonbank financial institutions are also subject to the CFPB's and Federal Trade Commission's ("FTC") authority to enforce their respective laws that prohibit fraud, deception, and unfair business practices.[152] Under this authority, the CFPB or FTC may investigate and take enforcement actions against nonbank entities engaged in unfair or deceptive acts or practices ("UDAP") related to consumer financial products or services.[153] The efficacy of the agencies' UDAP authority is limited, though, by their case-by-case enforcement approach as well as resource-related constraints, limiting the agencies' ability to

148. *Id.* at 18.

149. Kathryn Judge, *Brandeisian Banking*, 133 YALE L.J.F. 916, 927 (2024).

150. *See* FIN. CRIMES ENF'T NETWORK, U.S. DEP'T OF THE TREASURY, MONEY LAUNDERING PREVENTION: A MONEY SERVICES BUSINESS GUIDE 11, 36, 43, https://www.fincen.gov/sites/default/files/shared/prevention_guide.pdf [https://perma.cc/KS83-ZSZJ] (describing the AML, sanction, and anti-terrorism requirements on financial institutions).

151. Paul T. Clark & Casey J. Jennings, *The Fintech War Between the States and the OCC Is Redefining What It Means to Be a Bank in the United States*, SEWARD & KISSEL LLP (Oct. 15, 2020), https://www.sewkis.com/publications/the-fintech-war-between-the-states-and-the-occ-is-redefining-what-it-means-to-be-a-bank-in-the-united-states/ [https://perma.cc/X4MZ-L9GP].

152. *Institutions Subject to CFPB Supervisory Authority*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/compliance/supervision-examinations/institutions/ [https://perma.cc/CSQ3-J4CC]. Unlike banks though, nonbanks are also subject to the Federal Trade Commission's ("FTC's") authority to enforce section 5 of the Federal Trade Commission Act, which prohibits unfair or deceptive acts or practices. Federal Trade Commission Act, ch. 49, sec. 3, § 5(b), 52 Stat. 111, 112 (1938) (codified as amended at 15 U.S.C. § 45(b)).

153. "Under Section 5(b) of the FTC Act, the Commission may challenge 'unfair or deceptive act[s] or practice[s],' 'unfair methods of competition,' or violations of other laws enforced through the FTC Act, by instituting an administrative adjudication." *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/mission/enforcement-authority [https://perma.cc/G54S-Z3LJ] (last updated May 2021).

address systemic issues.[154] Further, although nonbanks could face enforcement action from the FTC or CFPB for violations of the laws the agencies enforce, they are not subject to ongoing examination and supervision to confirm compliance with the respective laws, as large banks are.[155]

The AML obligations combined with the enforcement authority described above could be fairly described as "limited federal oversight of non-bank providers,"[156] leaving the regulation thereof primarily to the individual states. One concern about state-based regulation of nonbank intermediaries is that it will create conditions for a race-to-the-bottom, where states compete for business by offering the most business-friendly regulations.[157] Michael S. Barr, who is now Vice Chair for Supervision of the Board of Governors of the Federal Reserve System, has voiced such concerns in the "under-regulated, non-bank sector."[158] For example, with "inadequate rules, inadequate monitoring, and inadequate enforcement on all levels of the mortgage market," underwriting standards were greatly relaxed prior to the 2008–09 financial crisis.[159] In this environment, loans were made with little to no documentation and often with increasing interest rates beyond what borrowers could afford.[160] Nonbank originators led in these "unsafe practices" because, as nonbank intermediaries, the "federal government did not supervise these firms and conducted limited enforcement."[161]

This lack of uniform oversight led to widespread economic consequences. These nonbank originators had assumed that rising home prices would mitigate

154. *See* Prentiss Cox, Amy Widman & Mark Totten, *Strategies of Public UDAP Enforcement*, 55 HARV. J. ON LEGIS. 37, 80–83 (2018) (analyzing all the FTC's UDAP cases over a period). The CFPB does have the authority to subject nonbanks that pose risks to consumers to UDAAP supervision, but this authority has largely been unused with one recent exception. *See infra* notes 317–27 and accompanying text.

155. Clark & Jennings, *supra* note 151.

156. Press Release, Michael S. Barr, Assistant Sec'y for Fin. Insts., U.S. Dep't of the Treasury, Assistant Secretary for Financial Institutions Michael S. Barr Remarks to the Credit Union National Association as Prepared for Delivery Washington, D.C. (Feb. 23, 2010), https://home.treasury.gov/news/press-releases/tg559 [https://perma.cc/5ZHM-WJ9C].

157. *See* William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 663–68 (1974) (documenting the race to the bottom in corporate law). Payday lenders, for example, often prefer to locate in states with lower regulatory costs, fewer restrictions, and more lenient enforcement. David Berman, *Lending Experimentation: A New Regulatory Approach to Payday Loans*, 31 GEO. J. ON L. & POL'Y 237, 250 (2024) ("This variability between states creates an opportunity for jurisdictional arbitrage: where one state attempts to restrict payday loans, lenders can successfully escape regulation by submitting themselves to a more permissive state's regulation.").

158. Press Release, Michael S. Barr, Assistant Sec'y for Fin. Insts., U.S. Dep't of the Treasury, Assistant Secretary for Financial Institutions Michael S. Barr Remarks to the Mortgage Bankers Association as Prepared for Delivery (Apr. 13, 2010), https://home.treasury.gov/news/press-releases/tg638 [https://perma.cc/LB2U-DC7E].

159. *Id.*

160. *Id.*

161. *Id.*

the risks of their lax underwriting standards.[162] As housing prices began to decline in 2006, though, many borrowers were unable to refinance or sell their homes to cover their mortgage debt, leading to a significant increase in delinquencies and foreclosures.[163] As investment firms had heavily invested in mortgage-backed securities, these losses were unbearable, triggering a broader financial meltdown.[164] The wave of foreclosures not only destabilized the housing market but also eroded consumer wealth, leading to a severe recession marked by diminished consumer spending and tightened credit conditions.[165] In short, a lack of uniform oversight of nonbanks in the financial sector has contributed to extensive negative externalities.[166]

3. The Unbalanced Social Contract with Nonbank Intermediaries

The primary assertion of this Article is that the arrangement between nonbank financial institutions and the federal government described above should be recognized as a social contract and that this contract should be rebalanced and reinforced via regulatory measures. As Baradaran built upon the historical relationship between the United States and its banks to demonstrate the existence of a social contract, so too this Article has described the evolving relationship between nonbank intermediaries and the government. As discussed in more detail above, with the passage and extensive continuing use of section 13(3) of the Federal Reserve Act, nonbanks have come to rely on the central bank for liquidity assistance in times of stress. And, as nonbanks provide a growing share of financial services, the federal government relies increasingly on nonbanks to detect and deter financial crimes. This increasing reciprocal reliance has formed an implicit contract.[167]

162. FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES 214–15 (2011).

163. In 2009, 2.2% of houses, or one out of forty-five, received at least one foreclosure filing. *Id.* at 402. Historically, the foreclosure rate was less than one percent. *Id.* In the fall of 2010, one out of eleven residential mortgage loans in the United States was at least one payment past due but not yet in foreclosure. *Id.*

164. *Id.* at xix ("By one measure, their leverage ratios were as high as 40 to 1, meaning for every $40 in assets, there was only $1 in capital to cover losses.").

165. *Id.* at 23, 389–401 (detailing the economic fallout from the 2008–09 recession that officially ended in June of 2010).

166. *See* MARTIN NEIL BAILY, ROBERT E. LITAN & MATTHEW S. JOHNSON, THE INITIATIVE OF BUS. & PUB. POL'Y, THE ORIGINS OF THE FINANCIAL CRISIS 41 (2008), https://www.brookings.edu/wp-content/uploads/2016/06/11_origins_crisis_baily_litan.pdf [https://perma.cc/PV5K-QHCX] (reporting that over half of the subprime mortgages that were originated prior to the financial crisis were originated by institutions outside the purview of federal regulation).

167. Although one could argue that the arrangement is an illusory promise rather than a contract since little is asked of nonbanks, "the law is not at all interested in the adequacy of the consideration." CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 29 (1989).

In her article, Baradaran provides extensive evidence to support the existence of a social contract with banks. To make the case that banks are a party to a social contract, she cites extensive relational history[168] and statutory support,[169] and she describes banks' unique role in deposit-taking.[170] By contrast, the relationship between the federal government and nonbank intermediaries does not date back as far as the relationship chronicled by Baradaran. Yet, as far back as 1932, Congress gave the Federal Reserve the authority to assist nonbanks in times of stress, and since 1970, nonbanks have been relied upon to detect and deter money laundering. And under this mutually beneficial system, nonbanks have flourished, providing an ever-increasing share of financial services. Then, the financial crisis of 2008–09 represented a tipping point in the evolution of nonbanks' relationship with society. As nonbank intermediaries teetered on the brink of failure, many were bailed out under section 13(3) to the tune of $2.0057 trillion.[171]

As there was growing recognition of nonbank financial institutions' contribution to the financial crisis, Congress provided statutory support for a social contract with such nonbanks with the passage of the Dodd-Frank Act in 2010. The Act aimed "to promote the financial stability of the United States by improving accountability and transparency in the financial system,"[172] which included identifying and supervising nonbank financial companies that could pose risks to financial stability.[173] Specifically, the Act empowered the Financial Stability Oversight Council ("FSOC") to designate nonbank financial companies as systemically important, thereby subjecting them to enhanced prudential standards.[174] This reflects a societal expectation that these institutions adhere to higher standards of oversight and accountability due to their potential impact on the economy. Thus, although not as extensive, there is statutory evidence of the social contract with nonbanks.

Lastly, in comparing banks' and nonbanks' roles in deposit-taking, much ado has been made of banks' unique role in accepting deposits and how this role creates money.[175] Yet, while nonbanks do not technically accept deposits, they

168. Baradaran, *supra* note 7, at 1287–1312.

169. *Id.* at 1337–42.

170. *Id.* at 1313–14.

171. James Felkerson, *$29,000,000,000,000: A Detailed Look at the Fed's Bailout by Funding Facility and Recipient* 15 (Levy Econ. Inst., Working Paper No. 698, 2011), https://www.levyinstitute.org/pubs/wp_698.pdf [https://perma.cc/V4JU-TV3Q].

172. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended at 12 U.S.C. §§ 5301–5641).

173. *Id.* § 113.

174. *Id.* § 113.

175. *See, e.g.*, Brief of Thirty-Three Banking Law Scholars as Amicus Curiae in Support of the Appellee, *supra* note 19, at 5–23.

do still play a role in money creation by issuing deposit-like products.[176] Morgan Ricks has described "money creation" as "issuing large quantities of short-term or demandable debt (denominated in the standard unit of account) that is continuously rolled over."[177] Indeed, many nonbanks issue such deposit-like products in the form of money market mutual funds, overnight repurchase agreements, asset-backed commercial paper, and other short-term liabilities.[178] And when this "money" is issued by a nonbank, it is not insured by the FDIC like bank deposits are.[179] But this "money" is subject to potential "runs" when customers' confidence wanes, potentially creating liquidity crises and the need for section 13(3) funding. Thus, although not to the same extent, evidence supporting a social contract with nonbanks exist in the form of a historical relationship involving exchange, statutory support, and money creating activities.

But, just as Baradaran points to elements of the bank-society contract that make it a "lopsided arrangement,"[180] so too does this Article demonstrate an imbalance in the social contract with nonbanks. In fact, as discussed herein, the social contract with nonbanks may be even more asymmetrical than the social contract with banks. First, nonbanks have access to emergency funding from the Federal Reserve, yet they are not subject to uniform prudential measures to reduce their systemic risks. Without recalibration, this arrangement presents moral hazard risks.[181] When nonbank financial intermediaries can rely on the Federal Reserve in times of financial distress, they may take on excessive risk, knowing they have a safety net.[182] To mitigate this risk and balance the

176. Todd Phillips & Matthew Adam Bruckner, *Consumer Shadow Banks*, 35 STAN. L. & POL'Y REV. 226, 240–41 (2024).

177. Morgan Ricks, *The Money Problem: A Rejoinder*, ACCT. ECON. & L., July 2018, at 1 [hereinafter Ricks, *The Money Problem: A Rejoinder*]. But, as noted in Section II.B.3. below, Ricks is a strong proponent of limiting "money creation" to chartered banks. RICKS, THE MONEY PROBLEM: RETHINKING, *supra* note 35, at 243–45.

178. RICKS, THE MONEY PROBLEM: RETHINKING, *supra* note 35, at 243–45.

179. *See Banking with Third-Party Apps*, *supra* note 34. For a discussion of how customer funds stored on payment apps like Venmo are largely uninsured, see *Analysis of Deposit Insurance Coverage on Funds Stored Through Payment Apps*, CONSUMER FIN. PROT. BUREAU (June 1, 2023), https://www.consumerfinance.gov/data-research/research-reports/issue-spotlight-analysis-of-deposit-insurance-coverage-on-funds-stored-through-payment-apps/full-report/ [https://perma.cc/BVX4-XJHB].

180. Baradaran, *supra* note 7, at 1309.

181. The term "moral hazard" means that "if you cushion the consequences of bad behavior, then you encourage that bad behavior." Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 238 (1996) (citing Jamea K. Glassman, *Drop Budget Fight, Shift to Welfare*, ST. LOUIS POST-DISPATCH, Feb. 11, 1996, at B3). The term is borrowed from insurance where moral hazard refers to loss increasing behavior caused by insurance. David Rowell & Luke B. Connelly, *A History of the Term "Moral Hazard*,*"* 79 J. RISK & INS. 1051, 1051 (2012).

182. *See* Arthur E. Wilmarth, Jr., *The Dodd-Frank Act: A Flawed and Inadequate Response to the Too-Big-to-Fail Problem*, 89 OR. L. REV. 951, 981 (2011) (stating that evidence confirms that too-big-to-fail

arrangement, a regulatory framework must be established to ensure nonbanks adhere to rigorous risk management standards.

As further evidence of the imbalance, nonbanks benefit from access to government-sponsored enterprises such as Fannie Mae as well as FHA insurance but are not subjected to affirmative duties under the CRA.[183] FHA insurance provides nonbanks with a safety net, reducing their risk in mortgage lending and enabling them to expand their lending activities. However, without the obligations of the CRA, which requires banks to meet the credit needs of all communities, including low- and moderate-income neighborhoods, nonbanks are not held accountable for ensuring equitable access to financial services.[184] This disparity allows nonbanks to reap the benefits of federal support without contributing to the social goals of financial inclusivity and community development.

Baradaran's analysis of banks reveals that their social contract should address three primary public needs: ensuring safety and soundness, protecting consumers, and providing access to credit.[185] She contends that regulatory measures should enforce these standards even if they might reduce profits.[186] To restore the social contract with banks, Baradaran suggests a renewed focus on these public needs.[187] She emphasizes the importance of regulatory frameworks that not only stabilize the financial system but also ensure that banks contribute to broader societal goals.[188]

Having established herein that nonbank intermediaries are also parties to an imbalanced social contract, it stands to reason that nonbanks' contract could be similarly rebalanced by focusing—although not necessarily to the same extent—on these same elements. Further, with the benefits provided to nonbank financial intermediaries, these firms have been able to provide an increasing share of financial services that were once provided by banks. As such, to maintain a stable and equitable financial system, society should require a regulatory framework for nonbanks that ensures they too are operating safely and soundly, not taking advantage of consumers, and providing access to financial services. The contract should be recalibrated to ensure that the programs benefit the individuals, families, and communities that they were

subsidies create significant economic distortions and promote moral hazard). *But see* Steven L. Schwarcz, *Too Big to Fool: Moral Hazard, Bailouts, and Corporate Responsibility*, 102 MINN. L. REV. 761, 764 (2017) (disputing the notion that the excessive risk-taking that lead to the financial crisis was caused by "bailout-induced moral hazard").

183. 12 U.S.C. § 2903(a)(1).

184. *See* Lindsay Sain Jones & Goldburn Maynard, Jr., *Rebooting the Community Reinvestment Act*, 61 AM. BUS. L.J. 167, 169 (2024) (advocating for the application of the CRA to nonbanks).

185. Baradaran, *supra* note 7, at 1286.

186. *Id.* at 1330.

187. *Id.*

188. *Id.*

originally intended to benefit.[189] Ultimately, recognizing the fact that a social contract has been formed with nonbank intermediaries provides a lens through which to view proposed regulatory regimes for such nonbanks. In that vein, the next part explores alternatives for effectuating a recalibration.

III. REBALANCING THE SOCIAL CONTRACT WITH NONBANKS

As the previous part demonstrated, a lopsided agreement between nonbank financial institutions and society has developed. Bearing this asymmetry in mind, this part investigates three key avenues for balancing this deal: federal chartering, streamlining SIFI designations, and expanding existing regulatory frameworks to nonbanks. As discussed below, federal chartering offers uniform oversight but, without stringent conditions, could expand society's duties under the social contract without asking enough in return, thereby increasing the imbalance. A more streamlined SIFI designation framework could balance the contract, especially if additional duties are imposed on designees and federal benefits are conditioned upon these designations. Alternatively, as a broader approach to recognizing and reinforcing the social contract with nonbanks, expanding existing frameworks such as the CRA, aspects of the Glass-Steagall Act, and the CFPB's supervisory authority are considered.

A. *Creating a Federal Charter for Nonbank Financial Institutions*

As described in Section I.A., banks have the option to seek a federal charter from the OCC, while nonbanks must seek licenses in each state where they offer services. While a federal charter for nonbanks would allow for more regulatory uniformity and enhanced oversight of nonbanks, it would also confer unprecedented preemption benefits to nonbanks and continue to blur the lines between these entities. Federal charters for nonbanks also face hurdles to implementation that would likely require legislative action to overcome. This section examines these issues in the context of the proposed fintech charter as a case study and then considers how a charter could shift the balance of the social contract.

189. This raises the question of whether consumers would ultimately benefit from recalibrating the social contract with nonbanks. Nonbanks may offer cheaper services in the short term, but their reduced regulatory burden can lead to practices that increase long-term costs for consumers. For example, some nonbanks engage in riskier lending practices, such as issuing loans to borrowers with lower creditworthiness, which can result in higher default rates. These defaults often lead to increased interest rates, fees, or even financial crises. *See* John V. Duca, *Subprime Mortgage Crisis*, FED. RSRV. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/subprime-mortgage-crisis? [https://perma.cc/NRK4-PCVB] (explaining the subprime mortgage crisis).

1. The Fintech Charter: A Case Study in Federal Chartering of Nonbank Financial Institutions

In December of 2016, the OCC released a white paper that introduced the concept of the fintech charter and proposed a framework for granting these charters.[190] According to the OCC, the agency's authority allowed it to charter special purpose national banks as long as the applicant conducted at least *one* of the three core banking functions of receiving deposits, paying checks, or lending money.[191] Notably, unlike bank applicants, fintech charter applicants would not be *required* to accept deposits and would thus not be obliged to obtain FDIC approval or insurance.[192]

Even with a change in presidential administrations and Comptrollers, the OCC continued to pursue the fintech charter, ultimately announcing that it would accept applications from "nondepository financial technology (fintech) companies engaged in the business of banking" in July of 2018.[193] As a chartered nondepository institution, a fintech would be subject to safety and soundness regulations, but would not be subject to the restrictions that separate banking from commerce or to CRA obligations.[194] The primary benefit to the chartered fintechs would be the ability to export the usury laws of their home states and avoid state-by-state licensing requirements.[195] As originally proposed, no deposit insurance or FDIC approval would be required since the fintechs were nondepository institutions.[196]

New York's Department of Financial Services ("NYDFS"), the state's financial licensing agency, sued to challenge the OCC, arguing that the OCC did not have the authority to grant charters to institutions that do not accept

190. OFF. OF THE COMPTROLLER OF THE CURRENCY, EXPLORING SPECIAL PURPOSE NATIONAL BANK CHARTERS FOR FINTECH COMPANIES 4–8 (2016), https://www.occ.gov/topics/responsible-innovation/comments/special-purpose-national-bank-charters-for-fintech.pdf [https://perma.cc/8YQG-PBMM] [hereinafter FINTECH CHARTER WHITE PAPER].

191. *Id.* at 3.

192. *Id.* at 6.

193. Press Release, Off. of the Comptroller of the Currency, OCC Begins Accepting National Bank Charter Applications from Financial Technology Companies (July 31, 2018), https://www.occ.gov/news-issuances/news-releases/2018/nr-occ-2018-74.html [https://perma.cc/KG7C-BNU8] [hereinafter Press Release, Off. of the Comptroller of the Currency, OCC Begins]. The OCC maintained that the business of banking included receiving deposits, paying checks, or lending money, and the agency had the authority to grant a charter to a company engaged in "one or more of those core banking activities." OFF. OF THE COMPTROLLER OF THE CURRENCY, POLICY STATEMENT ON FINANCIAL TECHNOLOGY COMPANIES' ELIGIBILITY TO APPLY FOR NATIONAL BANK CHARTERS 2 (2018), https://www.occ.gov/news-issuances/news-releases/2018/pub-other-occ-policy-statement-fintech.pdf [https://perma.cc/WB5E-XZQN].

194. FINTECH CHARTER WHITE PAPER, *supra* note 190, at 6–8.

195. Nikita Q. Cuttino, *The Rise of "Fringtech": Regulatory Risks in Earned-Wage Access*, 115 NW. U. L. REV. 1505, 1536 (2021).

196. Press Release, Off. of the Comptroller of the Currency, OCC Begins, *supra* note 193.

deposits.[197] The district court agreed, stating that the NBA's "'business of banking' clause, read in the light of its plain language, history, and legislative context, unambiguously requires that, absent a statutory provision to the contrary, only depository institutions are eligible to receive national bank charters from the OCC."[198] In its order, the district court set aside the OCC's regulations "with respect to all fintech applicants seeking a national bank charter that do not accept deposits."[199]

The OCC appealed the decision.[200] Without addressing the underlying legal question of whether the OCC had the authority to grant the special purpose charter, the Second Circuit reversed the district court's decision, determining that NYDFS lacked standing to sue and that the plaintiff's claims were unripe.[201] According to the court, because the OCC had not received or granted an application from a nondepository fintech, the court lacked jurisdiction to decide the issues on appeal.[202] And with this decision, the fintech charter was reinstated.

With the question of authority unanswered, though, firms have been hesitant to apply for the fintech charter.[203] Instead some fintechs have opted to pursue an industrial loan company ("ILC") charter,[204] a state charter that enables the recipient to engage in the same activities as a state bank.[205] Although providing for exemptions from much of the same federal regulation as fintech charters,[206] an applicant must still obtain FDIC insurance and be subjected to FDIC supervision to receive an ILC charter.[207]

With the legal uncertainty of fintech charters, other fintechs have instead pursued traditional bank charters. In July of 2020, the OCC approved a national

197. Vullo v. Off. of the Comptroller of the Currency, 378 F. Supp. 3d 271, 280 (S.D.N.Y. 2019), *rev'd and remanded sub nom.* Lacewell v. Off. of Comptroller of Currency, 999 F.3d 130 (2d Cir. 2021).

198. *Id.* at 298.

199. Lacewell v. Off. of the Comptroller of the Currency, No. 18 CIV. 8377, 2019 WL 6334895, at *1 (S.D.N.Y. Oct. 21, 2019), *rev'd and remanded*, 999 F.3d 130 (2d Cir. 2021).

200. *Lacewell*, 999 F.3d at 134.

201. *Id.* at 150.

202. *Id.* at 148–50.

203. *See* Saule T. Omarova, *Dealing with Disruption: Emerging Approaches to Fintech Regulation*, 61 WASH. U. J.L. & POL'Y 25, 45 (2020).

204. Nine applications for industrial loan charters ("ILC") were filed with the Federal Deposit Insurance Cooperation ("FDIC") from 2017 to March of 2020. Memorandum from Cleary Gottlieb, FDIC Approves Two New ILCS and Proposes Supervision of ILC Parents 2 (Mar. 26, 2020), https://www.clearygottlieb.com/-/media/files/alert-memos-2020/fdic-approves-two-new-ilcs-and-proposes-supervision-of-ilc-parents.pdf [https://perma.cc/58JA-P7B2].

205. *Id.*

206. *Id.*

207. *Id.* Ending a long-standing moratorium on ILC approvals, the FDIC approved both Square and Nelnet as ILCs in March of 2020. *Id.*; *see also* Press Release, Fed. Deposit Ins. Corp., FDIC Approves the Deposit Insurance Application for Nelnet Bank, Salt Lake City, Utah Area (Mar. 18, 2020), https://www.fdic.gov/news/press-releases/2020/pr20034.html [https://perma.cc/F5CX-FBXZ].

bank charter for Varo Bank, N.A., a wholly owned subsidiary of the fintech Varo Money.[208] Both SoFi Technologies and LendingClub obtained traditional bank charters by receiving regulatory approval to acquire a chartered bank.[209] Taking a different approach, Figure Technologies applied for a national banking charter as an uninsured deposit-taking bank.[210] After legal challenges by state bank regulators, though, Figure amended its application to apply for FDIC deposit insurance.[211] Even as it announced Figure's application amendment, the OCC maintained that it had the authority to charter nondepository institutions.[212]

Since the change in presidential administrations in 2020, the chartering program announced under Comptroller Joseph Otting in 2018 has been neglected.[213] With another Trump administration, though, the chartering program has the potential to be revived again. Thus, this is an important time to consider how the program could be restored without adding further imbalance to the social contract with nonbanks.

2. Rebalancing with a Federal Charter

Putting aside the issue of the OCC's authority,[214] whether a federal nondepository charter could bring balance (or further imbalance) to the social

208. Mindy Harris & Scott A. Coleman, *Varo Is First FinTech to Receive Full-Service Charter from the OCC*, BALLARD SPAHR (Aug. 7, 2020), https://www.consumerfinancemonitor.com/2020/08/07/varo-is-first-fintech-to-receive-full-service-charter-from-the-occ/ [https://perma.cc/89RG-EJ7G].

209. Press Release, Off. of the Comptroller of the Currency, OCC Conditionally Approves SoFi Bank, National Association (Jan. 18, 2022), https://www.occ.gov/news-issuances/news-releases/2022/nr-occ-2022-4.html [https://perma.cc/YU9B-73X3]; Letter from Stephen A. Lybarger, Deputy Comptroller for Licensing, to Sara Lenet, Couns., Hogan Lovells & Tim Bogan, Chief Banking Integration Officer, LendingClub Corp. (Dec. 30, 2020), https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2021/ca1258.pdf [https://perma.cc/Q8KH-8UCU].

210. Scott A. Coleman & Ballard CFS Group, *CSBS Withdraws Lawsuit Seeking to Block OCC Approval of Figure Technologies Charter Application*, BALLARD SPAHR (Jan. 19, 2022), https://www.consumerfinancemonitor.com/2022/01/19/csbs-withdraws-lawsuit-seeking-to-block-occ-approval-of-figure-technologies-charter-application/ [https://perma.cc/9FPX-DY3A].

211. *Id.*

212. Press Release, Off. of the Comptroller of the Currency, CSBS Withdraws Legal Challenge to OCC Chartering Figure Bank, N.A. (Jan. 14, 2022), https://www.occ.gov/news-issuances/news-releases/2022/nr-occ-2022-3.html [https://perma.cc/YD7N-33ZV]. The OCC continues with this position despite recent cases to the contrary. For example, on June 1, 2021, the Fifth Circuit reiterated that for an institution to be considered a bank under the United States tax code, it must "be a bank under the common understanding of that term" and therefore must receive "deposits from the general public, repayable to the depositors on demand or at a fixed time." MoneyGram Int'l, Inc. v. Comm'r of Internal Revenue, 999 F.3d 269, 274 (5th Cir. 2021).

213. Dan Awrey, *Money and Federalism*, 75 DUKE L.J. (forthcoming 2025) (manuscript at 58 n.296).

214. For academic commentary on the authority issues, see Brief of Professor David Zaring as Amicus Curiae in Support of Appellants, at 9–14, Lacewell v. Off. of the Comptroller of the Currency, 999 F.3d 130 (2d Cir. 2021) (No. 19-4271); Brief of Thirty-Three Banking Law Scholars as Amicus Curiae in Support of the Appellee, *supra* note 19, at 5–22.

contract with nonbanks will depend upon the conditions attached thereto. As mentioned earlier, the fintech charter was originally proposed by the Obama administration and ultimately rolled out under Trump. There were key differences between the initial proposal and the final rule, however. The proposed charter aimed to establish a national regulatory framework for fintech firms that would apply the same "standards of safety and soundness, fair access, and fair treatment of customers that apply to all national banks . . . ."[215] By contrast, the final fintech charter provided for "tailored" standards based on the business model of the applicant and "commitment to financial inclusion" rather than imposing full CRA obligations.[216] As with its other initiatives, the Trump administration's approach focused on deregulation.[217]

Viewing the charter as a potential tool to recalibrate the social contract with nonbanks, the charter could only serve such a purpose if it subjected the recipient nonbank intermediaries to safety and soundness measures, supervision by a federal regulator, and CRA duties. Fortunately, both the proposed and final fintech charter did include safety and soundness requirements for fintech charter recipients.[218] To mitigate the moral hazard risk described above, these measures must include risk-based capital requirements, stress-testing, risk management rules, risk concentration limits, and requirements for living wills and credit exposure reports.[219]

To reconfigure the fintech chartering program so as not to create more financial risks, though, it would also be necessary to address concerns about entities that issue short-term liabilities that are economically equivalent to deposits applying for the fintech charter. For example, Lev Menand has described stablecoins and Venmo balances as "retail deposit substitute[s]" that

215. FINTECH CHARTER WHITE PAPER, *supra* note 190, at 2.

216. OFF. OF THE COMPTROLLER OF THE CURRENCY, COMPTROLLER'S LICENSING MANUAL SUPPLEMENT: CONSIDERING CHARTER APPLICATIONS FROM FINANCIAL TECHNOLOGY COMPANIES 1, 3 (2018) [hereinafter COMPTROLLER'S LICENSING MANUAL SUPPLEMENT].

217. Keith B. Belton & John D. Graham, *Deregulation Under Trump*, CATO INST. (2020), https://www.cato.org/regulation/summer-2020/deregulation-under-trump? [https://perma.cc/P7RT-VHGS].

218. *See* FINTECH CHARTER WHITE PAPER, *supra* note 190, at 2 ("If the OCC decides to grant a charter to a particular fintech company, the institution would be held to the same rigorous standards of safety and soundness . . . that apply to all national banks . . . ."); COMPTROLLER'S LICENSING MANUAL SUPPLEMENT, *supra* note 216, at 3 ("[A]ll [fintech charter recipients] will be subject to the same high standards of safety and soundness and fairness that all federally chartered banks must meet.").

219. *But see* Daniel K. Tarullo, *Reconsidering the Regulatory Uses of Stress Testing* 1–3 (Brookings Inst., Working Paper No. 92, May 2024), https://www.brookings.edu/articles/reconsidering-the-regulatory-uses-of-stress-testing/ [https://perma.cc/AY6E-UBSG] (questioning the wisdom of linking stress tests and capital regulation).

are "highly susceptible to runs and panics."[220] The concern is that granting Venmo or stablecoin issuers a nondepository federal charter would allow them preemption benefits without providing their customers (and the broader financial system) with the protections of deposit insurance.[221] In social contract theory terms, this would create a further imbalance in the social contract with the nonbank charter recipients.

Relatedly, and as described above, the proposed fintech charter and the final fintech charter differed in scope. The charter proposed under the Obama administration was aimed at fintech lenders and payment processors,[222] whereas the final fintech charter was expanded to include a wider range of fintech activities like cryptocurrency and blockchain-based services.[223] And this policy debate remained unsettled under the Biden administration, as the President's Working Group on Financial Markets recommended legislation that would limit stablecoin issuance to "insured depository institutions."[224] Legislation was subsequently proposed to create a new "national limited payment stablecoin issuer" charter that would not require deposit insurance.[225] Thus, the parameters of available chartering options have the potential to significantly alter cryptocurrency markets as we know them.

Making the issue more contentious, the OCC granting a charter to a nontraditional financial intermediary like a stablecoin issuer has signaling implications, as it could be viewed as the OCC's "Seal of Approval" for a particular coin or cryptocurrencies more generally.[226] Understanding that, some issuers are seeking charters to indicate to their customers that their coins are as safe as bank deposits.[227] With the stablecoin runs of 2022 and 2023 still

220. *Building a Stronger Financial System: Opportunities of a Central Bank Digital Currency: Hearing Before the Subcomm. on Econ. Pol'y of the S. Comm. on Banking, Hous., and Urban Affs.*, 117th Cong. 51 (June 9, 2021) (Statement of Lev Menand) [hereinafter Statement of Lev Menand].

221. Arthur E. Wilmarth, Jr., *It's Time to Regulate Stablecoins as Deposits and Require Their Issuers to Be FDIC-Insured Banks*, 41 BANKING & FIN. SERV. POL'Y REP. 1, 9–13 (Feb. 2022) [hereinafter Wilmarth, *It's Time to Regulate Stablecoins*].

222. FINTECH CHARTER WHITE PAPER, *supra* note 190, at 2.

223. SCOTT, *supra* note 47, at 19–20.

224. *Id.* at 24.

225. Keith J. Barnett, Kalama Lui-Kwan, Ethan G. Ostroff, Joseph Goldman & Carlin McCrory, *Digital Asset Federal Legislation and Regulatory Developments: Wrap Up of First Quarter 2022*, CONSUMER FIN. SERVS. L. MONITOR (Apr. 18, 2022), https://www.consumerfinancialserviceslawmonitor.com/2022/04/digital-asset-federal-legislation-and-regulatory-developments-wrap-up-of-first-quarter-2022/ [https://perma.cc/6HXT-P6YF].

226. John Adams, *Crypto Firm Circle Eyes Bank Charter to Bolster Stablecoin Venture*, AM. BANKER (Aug. 9, 2021, 3:25 PM), https://www.americanbanker.com/news/crypto-firm-circle-eyes-bank-charter-to-bolster-stablecoin-venture [https://perma.cc/U6W7-2FC6 (staff-uploaded, dark archive)]; *see also* PAUL TIERNO, CONG. RSCH SERV., IF12450, STABLECOIN POLICY ISSUES FOR THE 118TH CONGRESS 1 (2023) ("Stablecoins are digital financial instruments that use technology underpinning cryptocurrencies (e.g., Bitcoin and Ether) but attempt to eliminate volatility by pegging their value to a stable asset (e.g., one U.S. dollar).").

227. *See* Adams, *supra* note 226.

relatively recent, these signals are sought as a means to legitimize and stabilize these markets—a controversial outcome.[228]

A potential solution to this sticking point can be found in Morgan Ricks's proposal to more broadly define "deposits" to include short-term liabilities that function like deposits.[229] Stablecoins, for example could be treated as deposits, and thus stablecoins issuers would have to seek a traditional bank charter (rather than a fintech charter) to be granted preemption benefits.[230] After all, potentially legitimizing an industry that has been criticized for increasing financial instability without the appropriate safety and soundness standards and deposit insurance could lead to more severe market disruptions.[231]

To ensure that a fintech charter would not add further imbalance, the recipients must also be subjected to supervision at the federal level. The federal agency would monitor and assess how well the recipient manages and controls its risk as well as the strength of its financial and managerial resources.[232] Beyond ensuring compliance with safety and soundness measures, the examiner would conduct AML compliance reviews and supervise the recipient for consumer protection purposes. As described in Section II.A.2, nonbank financial institutions are supervised by state agencies and although they are subject to the BSA and UDAP/UDAAP authority, they are not proactively supervised for compliance.[233] By subjecting chartered nonbanks to such

228. For a discussion of the 2022 and 2023 stablecoin runs, see KENECHUKWU ANADU, PABLO D. AZAR, MARCO CIPRIANI, THOMAS M. EISENBACH, CATHERINE HUANG, MATTIA LANDONI, GABRIELE LA SPADA, MARCO MACCHIAVELLI, ANTOINE MALFROY-CAMINE & J. CHRISTINA WANG, FED. RSRV. BANK OF N.Y., RUNS AND FLIGHTS TO SAFETY: ARE STABLECOINS THE NEW MONEY MARKET FUNDS? 17–27 (2024), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr1073.pdf [https://perma.cc/67SC-FEXS].

229. RICKS, THE MONEY PROBLEM: RETHINKING, *supra* note 35, at 243.

230. *See generally* Wilmarth, *It's Time to Regulate Stablecoins*, *supra* note 221 (proposing regulating stablecoins as deposits).

231. During a debate, Stephen Cecchitti argued that regulating crypto would confer legitimacy on crypto that it does not deserve. Brookings Inst., *A Debate: Should Crypto Be Regulated by the Federal Government?*, YOUTUBE, at 9:00 (Dec. 20, 2022), https://www.youtube.com/watch?v=JujTzlKQ-rU [https://perma.cc/T7C7-EUHM] (on file with the North Carolina Law Review) (debate between Peter Conti-Brown and Stephen Cecchetti). For a discussion of cryptocurrencies' risks, see generally Hilary Allen, *The Superficial Allure of Crypto*, INT'L MONETARY FUND FIN. & DEV. MAG., Sept. 2022, https://www.imf.org/en/Publications/fandd/issues/2022/09/Point-of-View-the-superficial-allure-of-crypto-Hilary-Allen [https://perma.cc/87GR-365B]. On the other hand, chartering would subject stablecoin issuers to stringent regulatory oversight, ensuring they adhere to robust standards for capital requirements, risk management, and consumer protection. TIERNO, *supra* note 226, at 1. This could mitigate risks related to financial stability and prevent fraudulent activities.

232. *See Understanding Federal Reserve Supervision*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (Apr. 27, 2023), https://www.federalreserve.gov/supervisionreg/understanding-federal-reserve-supervision.htm [https://perma.cc/Y28Y-X8X6] (explaining the purposes of supervision).

233. The CFPB does have the authority to subject nonbanks that pose risks to consumers to UDAAP supervision, but this authority has largely been unused with one recent exception. *See infra* notes 317–27 and accompanying text.

supervision, the charter could mitigate systemic risks and safeguard the interests of consumers.

For a charter to effectively rebalance the social contract with nonbank financial institutions, it must also subject these entities to CRA obligations.[234] Nonbanks, benefiting from FHA insurance and other programs, hold a significant stake in the housing finance market. By imposing CRA obligations, the charter would impose affirmative obligations on these entities to actively invest in the communities they serve. In the words of Senator William Proxmire, who championed the CRA, "a public charter conveys numerous economic benefits and in return it is legitimate for public policy and regulatory practice to require some public purpose . . . ."[235]

Relatedly, as entities chartered by the OCC, it is possible, if not likely, that they would have access to the Federal Home Loan Bank ("FHLB") System described in Section I.B. Currently, membership is limited to thrift institutions, commercial banks, credit unions, and insurance companies.[236] If the membership was expanded to include nondepository institutions by virtue of a new federal charter, though, the system itself would have to be reformed as described below. Otherwise, the charter would exacerbate the imbalance in the social contract with nonbanks.

Although she does not use the social contract construct, Kathryn Judge has argued that the FHLB system has strayed away from its original mission.[237] The FHLBs were established during the Great Depression with the purpose of supporting mortgage lending and community investment.[238] Judge argues now, though, that the system primarily serves large financial institutions as a source of liquidity rather than the individuals, families, and communities that it was designed to help.[239] According to Cornelius Hurley, only about 5% of the $6.3 billion spent on the banks each year is directed to housing and community development.[240] So, as it is, the FHLB system is a bad deal and expanding the beneficiaries under a chartering program would only make it a worse deal.

234. The CRA has faced criticism over the years. For a discussion of the claim that the CRA contributed to the last financial crisis, see *supra* note 82.

235. *Community Credit Needs: Hearings on S. 406, Senate Committee on Banking, Housing, and Urban Affairs*, 95th Cong. 1958 (1977) (statement of William Proxmire).

236. *Federal Home Loan Bank Membership Data*, *supra* note 143.

237. Judge, *The Unraveling*, *supra* note 72, at 1015.

238. *Id.* at 1018–19.

239. *Id.* at 1030–43.

240. Cornelius Hurley, *Weighing the Costs and Benefits of Federal Home Loan Banks*, AM. BANKER (Nov. 23, 2022, 10:14 AM), https://www.americanbanker.com/opinion/weighing-the-costs-and-benefits-of-federal-home-loan-banks [https://perma.cc/8XAF-JYTA (staff-uploaded, dark archive)]. Hurley has referred to the FHLB System as "Corporate Welfare." Kate Berry, *Critics Call Federal Home Loan Bank System 'Corporate Welfare*,*'* AM. BANKER (Nov. 11, 2022, 1:08 PM), https://www.americanbanker.com/news/critics-allege-federal-home-loan-bank-system-amounts-to-

Judge has proposed several reforms to address the issues plaguing FHLBs that are informative. One key suggestion is to clarify and refocus the mission of the FHLBs to ensure that their activities align more closely with promoting housing finance.[241] This includes imposing stricter limits on the types of institutions eligible for FHLB advances and the specific uses of these funds, ensuring they support housing and community development rather than other ventures such as cryptocurrency.[242]

The significance of Judge's calls for stronger regulation and oversight of the FHLB system is magnified when considering the implications of a new class of beneficiaries. A more rigorous examination of the FHLBs' practices and their alignment with public policy objectives for which she advocates[243] would prevent further imbalance with chartered nonbanks. This would include potentially limiting the FHLBs' role as a liquidity provider of last resort,[244] which would reduce the potential moral hazard risks for the new charter. By tightening eligibility criteria and focusing on the core mission of supporting housing finance, the reforms could reduce the systemic risks posed by the current operations of the FHLBs[245] and limit these risks for the new charter participants. Without these reforms to the system, however, a new charter that provides access to the system would only exacerbate the imbalance in the social contract with nonbanks.

Admittedly, too, any solution that augments the OCC's chartering authority raises federalism arguments as old as the nation itself. Still relevant are James Madison's reservations about granting the federal government the authority to charter banks, as it would inevitably lead to chartering other businesses along with the directly correlated erosion of the states' jurisdiction over such entities.[246] These same concerns animate the state agencies' suit that challenged the fintech charter, as they argued that the OCC's fintech charter undermined the states' enforcement of their own laws and impeded "the states'

corporate-welfare [https://perma.cc/8H3F-8ZSA (staff-uploaded, dark archive)] (quoting Hurley as saying, "Bestowing a government benefit on private enterprises without expecting a commensurate public return. You boil it all down and that's what it is: corporate welfare.").

241. Judge, *The Unraveling*, *supra* note 72, at 1016.

242. *Id.* at 1016–17. Signature Bank and Silvergate Bank were two regional banks that failed in Spring of 2023. *Id.* at 1060. Both banks had relied on FHLB advances to stay afloat and both had provided financial services to crypto firms. *Id.* This point is particularly salient in the context of contemplating a new charter for nonbanks, as chartering options have become inextricably intertwined with debates about stablecoin regulation as well. *See supra* notes 220–21 and accompanying text.

243. Judge, *The Unraveling*, *supra* note 72, at 1076.

244. *Id.* at 1061–63.

245. *Id.*

246. RICHARD TIMBERLAKE, MONETARY POLICY IN THE UNITED STATES: AN INTELLECTUAL AND INSTITUTIONAL HISTORY 8 (1993).

ability to continue their existing regulation of financial services companies within their borders."[247]

Such federalism concerns highlight again the importance of narrowly defining the institutions that would be eligible for such charters. As thirty-three banking law scholars noted in their amicus brief filed in opposition to the fintech charter, without proper limitations, the OCC could "assume the mantle of plenary chartering agency and promulgator of corporate law for America's nondepository financial sector and perhaps even large portions of its nonfinancial sector."[248] Luckily though, this concern is addressable. In other contexts, like SIFI designation for example, regulations can be drafted to carefully distinguish between nonbanks generally and nonbank financial institutions.[249]

Given the uncertainty around the OCC's authority to charter nondepository institutions, though, legislative action would likely be needed to validate this option. Further, as seeking a charter would be at the option of the nonbank, it would only affect those nonbanks that applied for and received a federal charter. And if all the changes suggested above were implemented, the pool of applicants would likely be quite small. Given these limitations, the next section explores how streamlining SIFI designations could help to balance the social contract with nonbank intermediaries.

B. *Streamlining Systemically Important Financial Institution ("SIFI") Designations*

As discussed above, nonbank financial institutions are primarily regulated at the state level. Following the Financial Crisis of 2008–09, though, mechanisms were put in place to allow federal oversight of certain nonbanks.[250] Despite these measures, they have not yet balanced society's implicit agreement with nonbank financial institutions. This section explores how more streamlined SIFI designations can help balance the social contract with nonbanks.

While the Financial Stability Oversight Council ("FSOC") still has the ability to designate certain nonbanks for heightened regulatory oversight, there are no active designations.[251] Due to fluctuating designation criteria, efforts by institutions to be de-designated, and lawsuits to challenge designations, the

247. Complaint at 36–38, Conf. State Bank Supervisors v. Off. of the Comptroller of the Currency, No. 1:18-cv-02449, 2019 WL 4194541 (D.C. Oct. 25, 2018).

248. Brief of Thirty-Three Banking Scholars as Amici Curiae in Support of Appellee, *supra* note 19, at 27.

249. *See* 12 C.F.R. § 242.1(b)(1) (2013) (implementing Dodd-Frank through regulations for determining if a company is "predominantly engaged in financial activities").

250. *See supra* Section II.A.2.

251. *See* Kress, *supra* note 39, at 172–75.

heightened regulatory oversight of nonbanks available under Dodd-Frank is currently unused.[252] Yet the same reasons that the designations were created persist. Many nonbanks continue to contribute to systemic risks, but they are not subjected to sufficient prudential measures to mitigate such risks. This section explores the rise and fall of these designations and draws upon this history to recommend changes to the framework that could help to rebalance the social contract with nonbanks.

In the wake of the Financial Crisis of 2008–09, consensus emerged that nonbanks had contributed to the crisis.[253] With the enactment of the Dodd-Frank Act, Congress authorized the FSOC to identify nonbanks that could pose a threat to financial stability (referred to as systemically important financial institutions or SIFIs).[254] Pursuant to Dodd-Frank, if FSOC identifies an organization as a SIFI, then it would be subject to risk-based capital requirements, stress-testing, risk management rules, risk concentration limits, and requirements for living wills and credit exposure reports.[255]

Using its authority under Dodd-Frank, FSOC initially established a three-stage process for identifying and designating SIFIs.[256] Applying this framework, FSOC designated Prudential, AIG, and GE Capital as SIFIs and then added MetLife the following year.[257] In designating these firms as SIFIs, FSOC concluded that the potential failure of the companies could destabilize the financial system by "(1) inflicting losses on counterparties with direct exposures to the firm and (2) triggering asset fire sales that might spread through the financial sector."[258]

FSOC has since de-designated each of the SIFIs, though, with the last one, Prudential, being de-designated in October of 2018.[259] Prudential's de-designation was part of a broader regulatory shift away from entity-based regulation of nonbanks.[260] In 2019, the Trump-era FSOC also voted

252. *Id.*

253. Jeremy C. Kress, Patricia A. McCoy & Daniel Schwarcz, *Regulating Entities and Activities: Complementary Approaches to Nonbank Systemic Risk*, 92 S. CAL. L. REV. 1455, 1458 (2019) [hereinafter Kress, et al., *Regulating Entities and Activities*].

254. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 113, 124 Stat. 1376, 1398 (2010) (codified at 12 U.S.C. § 5323(a)(1)).

255. *Id.* § 165(b)(1)(A).

256. Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, 77 Fed. Reg. 21637, 21660 (Apr. 11, 2012).

257. *See Nonbank Financial Company Designations*, U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/fsoc/designations [https://perma.cc/8M7H-KL5D].

258. *See* Kress, *supra* note 39, at 173.

259. *Id.* at 171.

260. *See* John Heltman, *Prudential, the Last Nonbank SIFI, Sheds the Label*, AM. BANKER (Oct. 17, 2018, 9:08 AM), https://www.americanbanker.com/news/prudential-the-last-nonbank-sifi-sheds-the-label [https://perma.cc/WSA8-7WRJ (staff-uploaded, dark archive)] (discussing the political history of SIFI designations).

unanimously to shift its approach to regulating nonbank systemic risks away from an entity-based approach to an "activities-based" approach.[261] Under this 2019 guidance, designation of an individual firm would only occur after FSOC exhausted all available alternatives, performed a cost-benefit analysis, and assessed the company's material financial distress.[262]

As this approach was considered by some, such as Biden's Secretary of the Treasury Janet Yellen, as a "flawed view of how financial risks develop and spread," it was reversed in 2023.[263] Returning again to a focus on individual firm designation, the 2023 rules shifted away from the Trump-era activities-based approach.[264] The 2023 guidance allows for the designation of individual firms based on their potential impact on financial stability without first exhausting activities-based regulation, "put[ting] the Council's designation authority on equal footing with its other powers."[265]

The 2023 guidance sets out a two-stage designation process.[266] During Stage One, FSOC engages in a preliminary analysis of any nonbank identified for review based on quantitative and qualitative data.[267] In assessing potential risks, FSOC considers the nonbank's leverage, liquidity risk, maturity mismatch, interconnections, operational risks, complexity, opacity, inadequate risk management, concentration, and destabilizing activities.[268] FSOC also considers how these risks could be transmitted to financial markets and

261. Press Release, U.S. Dep't of the Treasury, Financial Stability Oversight Council Issues Final Guidance on Nonbank Designations (Dec. 4, 2019), https://home.treasury.gov/news/press-releases/sm844 [https://perma.cc/FTH6-8D58].

262. Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, 84 Fed. Reg. 71740, 71753–55 (Dec. 30, 2019).

263. Pete Schroeder, *US Regulators Agree to Ramp Up Oversight of Systemically Risky Non-Banks*, REUTERS, https://www.reuters.com/business/finance/us-financial-regulators-approve-process-revive-systemically-important-non-bank-2023-11-03/ [https://perma.cc/X9EK-HYT7 (staff-uploaded archive)] (last updated Nov. 3, 2023, 4:14 PM). For an argument that activities-based approaches are insufficient to address the systemic risks caused by nonbanks, see Jeremy Kress, Patricia McCoy & Daniel Schwarcz, *Activities Are Not Enough! Why Nonbank SIFI Designations Are Essential to Prevent Systemic Risk*, *in* SYSTEMIC RISK IN THE FINANCIAL SECTOR: TEN YEARS AFTER THE GREAT CRASH 165, 165–66 (Douglas W. Arner, Emilios Avgouleas, Danny Busch & Steven L. Schwarcz eds., 2019).

264. SULLIVAN & CROMWELL, FINANCIAL STABILITY OVERSIGHT COUNCIL FINALIZES REVISED GUIDANCE ON NONBANK SIFI DESIGNATIONS 1 (2023), https://www.sullcrom.com/SullivanCromwell/_Assets/PDFs/Memos/FSOC-Finalizes-Revised-Guidance-Nonbank-SIFI-Designations.pdf [https://perma.cc/QWV2-3ZZG].

265. Guidance on Nonbank Financial Company Determinations, 88 Fed. Reg. 80110, 80111 (Nov. 17, 2023) (codified at 12 C.F.R. pt. 1310, App. A).

266. *Id.* at 80128.

267. *Id.*

268. Analytic Framework for Financial Stability Risk Identification, Assessment, and Response, 88 Fed. Reg. 78026, 78033–34 (Nov. 14, 2023).

participants through exposures, asset liquidations, critical functions or services, and contagion.[269]

After these assessments, FSOC must notify a nonbank before it intends to vote on whether to recommend the company to move to Stage Two.[270] Stage Two involves a deeper evaluation of information provided by the nonbank, the outcome of which would determine whether the firm is designated as a SIFI.[271] This review will focus on whether the material financial distress of the nonbank or the nature, scope, size, scale, concentration, interconnectedness, or the mix of its activities could pose a threat to financial stability.[272] Following a vote for designation, the nonbank is supposed to be notified and provided a hearing to contest the potential designation.[273]

While the 2023 rules have been described as a reversal of the Trump-era rules,[274] the new rules are not identical to the original 2012 framework that was jettisoned under Trump.[275] For one, the 2023 framework eliminates an entire step, the original Stage One, which applied quantitative thresholds to determine which nonbanks should be considered in later stages.[276] Instead, it adopts a more qualitative approach, focusing on broader systemic risks.[277] The new process also emphasizes transparency, providing more opportunities for engagement with the potential designee.[278]

While the sum of these changes could allow more designations, FSOC has yet to designate a new SIFI, and a wave of designations is not expected due to several factors.[279] First, the framework emphasizes transparency and

269. *Id.* at 78034–35.

270. Guidance on Nonbank Financial Company Determinations, 88 Fed. Reg. at 80129.

271. *Id.* at 80129–30.

272. *Id.* at 80130. A proposed designation requires a two-thirds vote of the FSOC members. *Id.*

273. *Id.* The 2023 guidelines do address some scholarly criticisms. *See* Kress, et al., *Regulating Entities and Activities*, *supra* note 253, at 1462 (arguing that an entity-based approach is better suited to prevent individual firms from transmitting systemic risks); Drita Dokic, Note, *Challenging Nonbank SIFI Designations: GE, MetLife, and the Need for Reform*, 11 BROOK. J. CORP. FIN. & COM. L. 565, 580–81 (2017) (contending that the procedures should be more transparent).

274. *See, e.g.*, Ebrima Santos Sanneh, *FSOC Finalizes Nonbank Designation Rule, Reversing Trump-Era Move*, AM. BANKER (Nov. 3, 2023, 3:26 PM), https://www.americanbanker.com/news/fsoc-finalizes-nonbank-designation-rule-reversing-trump-era-move [https://perma.cc/F7YC-VPAB (staff-uploaded, dark archive)].

275. Luigi L. De Ghenghi, Randall D. Guynn, Eric McLaughlin, David L. Portilla & Margaret E. Tahyar, *Davis Polk Discusses FSOC Revision to Nonbank SIFI Designation Framework*, COLUM. L. SCH. BLUE SKY BLOG (Nov. 17, 2023), https://clsbluesky.law.columbia.edu/2023/11/17/davis-polk-discusses-fsoc-revision-to-nonbank-sifi-designation-framework/ [https://perma.cc/8C6A-6QQC].

276. *Id.*

277. *See id.*

278. *Id.*

279. SULLIVAN & CROMWELL, *supra* note 264, at 6; *see also* Kathryn Judge & Dan Awrey, *The Administrative State, Financial Regulation, and the Case for Commissions*, 35 STAN. L. & POL'Y REV. 49, 75–79 (2024) (discussing the anti-administrative movement and how no designated SIFIs currently exist nor is it likely "that any financial institution will be designated as one in the foreseeable future").

engagement, which means companies have opportunities to mitigate identified risks during the review process, potentially avoiding designation.[280] Second, the FSOC's qualitative approach, while more flexible, requires significant evidence that a company's distress could materially impact financial stability, a high threshold that may limit the number of entities deemed systemically important.[281] Additionally, the new guidelines still involve a comprehensive and deliberative process, including consultations with primary regulators and a requirement for a two-thirds majority vote of FSOC members, which could impede the designation process.[282]

The simplest solution, eliminating the factor-based analysis in favor of a simple size threshold for SIFI designation, could yield several benefits. First, a size-based threshold aligns the regulatory standards for nonbank financial institutions with those already established for banks, promoting consistency across the financial sector.[283] Second, by providing a clear and objective criterion for designation, this approach reduces the potential for prolonged disputes and litigation, as seen with the complex and often contentious factor-based evaluations.[284] As an example, in 2016, MetLife, a major insurer, sued to challenge its SIFI designation. FSOC's 2014 designation related to concerns that MetLife's failure would have significant ripple effects across the financial markets due to its involvement in complex financial products.[285] After legal battle two years later, a federal court rescinded the designation, taking the view that FSOC had not adhered to its own standards.[286]

Finally, implementing a size threshold can have positive antitrust effects by discouraging excessive growth and consolidation within the financial

280. SULLIVAN & CROMWELL, *supra* note 264, at 6.

281. *See* Memorandum from Paul Weiss, FSOC Finalizes Guidance on Nonbank Systemically Important Financial Institution Designations 5 (Nov. 15, 2023), https://www.paulweiss.com/media/3983987/fsoc_finalizes_guidance_on_nonbank_systemically_important_financial_institution_designations.pdf [http://perma.cc/7WC5-KWQG] (describing the risk assessment as "highly fact-specific").

282. *See FSOC Overhauls SIFI Designation Process*, MDFD (Nov. 14, 2023), https://www.mfdf.org/news-resources/news/2023/11/14/fsoc-overhauls-sifi-designation-process [https://perma.cc/9CRX-EARJ] (describing the prerequisites for designation which include: a chance for the firm to respond, discussions with the firm's primary regulator, and two-thirds vote of FSOC members).

283. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 165, 124 Stat. 1376, 1423–32 (2010) (codified as amended at 12 U.S.C. § 5365) (mandating that the Federal Reserve Board apply enhanced prudential standards to bank holding companies with total consolidated assets of $50 billion or more). For counterarguments, see OFF. OF FIN. RSCH., 17-04, SIZE ALONE IS NOT SUFFICIENT TO IDENTIFY SYSTEMICALLY IMPORTANT BANKS (2017), https://www.financialresearch.gov/viewpoint-papers/files/OFRvp_17-04_Systemically-Important-Banks.pdf [https://perma.cc/7LXB-TGQH].

284. Judge & Awrey, *supra* note 279, at 76 (describing the long process of designating MetLife as a SIFI and the legal battle that followed and resulted in its de-designation).

285. Press Release, U.S. Dep't of the Treasury, Financial Stability Oversight Council Announces Nonbank Financial Company Designation (Dec. 19, 2014), https://home.treasury.gov/news/press-releases/jl9726 [https://perma.cc/YJ8J-7TY2].

286. Judge & Awrey, *supra* note 279, at 76.

industry, thereby mitigating the risk of "too big to fail" institutions and fostering a more competitive market environment.[287] Overall, a size-based threshold would simplify the designation process, enhance regulatory clarity, and support broader financial stability objectives.[288]

In addition to simplifying the SIFI designation process, further adjustments to the overall framework are necessary to recalibrate the social contract with nonbanks. First, access to federal safeguards, such as emergency funding under section 13(3), should be contingent upon a SIFI designation. This change is crucial because it establishes a clear prerequisite for nonbanks to receive federal support. Without this condition, nonbanks will continue to fight being designated. By making SIFI designation a requirement for emergency funding, only those institutions that have met stringent oversight criteria would be eligible for federal aid, thereby enhancing the overall stability of the financial system.

Secondly, requiring a SIFI designation to access these funds is logical. If a nonbank is not "too big to fail," federal intervention to save the firm is not justifiable. The designation process identifies institutions whose failure could pose significant risks to the broader financial system. Therefore, it is only reasonable that federal resources are reserved for those institutions whose collapse would have widespread and severe repercussions. In turn, by subjecting these firms to stricter prudential requirements, it reduces the likelihood that the firm will need federal assistance. Together, if implemented, these changes could potentially bring an end to the era of "too big to fail" bailouts, the problem that Dodd-Frank aimed to solve.

Even with these significant changes, the contract would remain imbalanced. Designated nonbank lenders would still have access to the benefits of FHA insurance and government-sponsored entities to repurchase their loans without the corresponding duties to provide equitable access to credit. By applying the CRA's framework to SIFIs, these nonbanks would bear a

287. *See generally* Saule T. Omarova & Graham S. Steele, *Banking and Antitrust*, 133 YALE L.J. 1162 (2024) (contending that U.S. bank regulation can operate as an antimonopoly regime to prevent excessive concentration of private power); Ted Mann, *GE Files to End Fed Oversight After Shrinking GE Capital*, WALL ST. J., https://www.wsj.com/articles/ge-files-to-end-fed-oversight-after-shrinking-ge-capital-1459423851 [https://perma.cc/H2WL-Y3B5 (staff-uploaded, dark archive)] (last updated Mar. 31, 2016, 3:28 PM) (reporting that General Electric cut its total assets in half and eliminated the majority of U.S. operations to rid itself of the SIFI label).

288. Legislation has been proposed that would automatically designate nonbank financial institutions of a certain size if they also engage in certain risky activities, such as having large amounts of credit default swaps outstanding, derivative liabilities outstanding, or total debt outstanding, or based on certain leverage ratios. Systemic Risk Mitigation Act of 2020, H.R. 6501, 116th Cong. § 3 (2020). To read the report this legislation was based on, see Gregg Gelzinis, *Strengthening the Regulation and Oversight of Shadow Banks*, CTR. AM. PROGRESS (July 18, 2019), https://www.americanprogress.org/article/strengthening-regulation-oversight-shadow-banks/ [https://perma.cc/P9M5-NNUL (staff-uploaded)].

"continuing and affirmative obligation to help meet the credit needs" of their communities.[289] This alignment of responsibilities creates a more balanced deal, where such nonbanks are not only beneficiaries of federal support but also active contributors to the broader social goals of economic stability and equitable access to financial services.

As discussed above, streamlining SIFI designations would help to bring balance to the social contract with nonbanks but would only impact the nonbanks that are designated as SIFIs. Given this limitation, the next section explores how existing legal frameworks could be amended to ensure that society is asking enough in return from nonbanks for the benefits they receive.

C. *Expanding Existing Regulatory Framework to Nonbank Intermediaries*

This section explores how existing legal frameworks could be amended to recognize, rebalance, and reinforce the social contract with nonbanks. First, focusing on the public's need for equitable access to credit, this section evaluates calls to expand the CRA to include nonbanks. Then, shifting the focus to the public's need for a safe and sound financial system, it considers proposals to ban nonbank money creation. Lastly, with the goal of improving consumer protection, it proposes an expansion of the CFPB's authority. Together, if implemented, these changes could rebalance the contract with nonbanks by having them fairly serve the public's needs for access to credit, a safe and sound financial system, and protection of consumers.

Expanding the CRA to include nonbank financial institutions is one change that could make society's bargain with them fairer, in that nonbanks would be obligated to serve the credit needs of their communities. Enacted in 1977, the CRA was viewed as a means to counter the persistent effects of redlining.[290] The CRA was to achieve this aim by imposing a "continuing and affirmative obligation" on banks that requires them "to help meet the credit needs of the communities in which they are chartered,"[291] including "low- and moderate-income neighborhoods."[292] As enacted, this obligation applies

289. 12 U.S.C. § 2901(a)(3).

290. Senator William Proxmire, who authored the CRA, expressed that the law's intent was to "eliminate the practice of redlining by lending institutions." 123 Cong. Rec. 17604 (1977); *see also* S. REP. No. 95-175, at 33 (1977) ("[T]he Committee is aware of amply documented cases of red-lining, in which local lenders export savings despite sound local lending opportunities."); James M. Lloyd, *Community Development, Research, and Reinvestment: The Struggle Against Redlining in Washington, DC, 1970–1995*, 88 PROGRESS IN PLAN. 1, 24–25 (2014) (documenting the redlining research that informed the drafting and enactment of the CRA). Redlining is the term used for FHA policies that steered private mortgage lenders away from predominantly Black neighborhoods. ROTHSTEIN, *supra* note 33, at 63–65.

291. 12 U.S.C. § 2901(a)(3).

292. *Id.* § 2903(a)(1).

exclusively to banks.[293] This limited application was not problematic because, at the time the CRA was enacted in 1977, banks were the primary source of loans.[294] Now, though, a growing percentage of lending comes from nonbank lenders. In fact, nonbank mortgage lenders issued 72.1% of all first mortgages originated in the United States in 2022, up from 63.9% in 2021.[295]

Nonbanks have been able to become such integral players in the mortgage lending and servicing markets, in part, because of the federal support they receive such as FHA insurance and access to Fannie Mae.[296] Their exemption from the CRA creates an asymmetry in the social contract, allowing them to enjoy the advantages of government-backed programs without fulfilling corresponding obligations to serve their communities. Although this Article is the first to view this asymmetry as an imbalanced social contract, it is far from the first to call for the CRA to be applied to nonbanks.[297] In fact, New York, Illinois, and Massachusetts have each enacted state Community Reinvestment Acts that apply to nonbank mortgage lenders.[298]

And evidence suggests that, like banks in the pre-CRA era, nonbank lenders are making "scant effort" to do business in the same communities that have been consistently burdened by the persistent effects of redlining.[299] As an example, a report by the New York Department of Financial Services ("NYDFS") found a "distinct lack of lending" by mortgage lenders in communities that were redlined historically—particularly nonbanks in Buffalo,

293. *Id.* § 2902(1). Federal bank regulators are charged with periodically examining banks and assigning them a rating to indicate their level of compliance with this duty. *Id.* § 2906(a)–(b).

294. *See* Fritzdixon, *supra* note 18, at 32.

295. *Summary of 2022 Data*, *supra* note 21.

296. *See supra* notes 137–39 and accompanying text.

297. *See* Raymond H. Brescia, *Part of the Disease or Part of the Cure: The Financial Crisis and the Community Reinvestment Act*, 60 S.C. L. REV. 617, 662–63 (2009) (recommending the expansion of the CRA to all financial institutions); Ren S. Essene & William C. Apgar, *The 30th Anniversary of the CRA: Restructuring the CRA to Address the Mortgage Finance Revolution*, *in* REVISITING THE CRA: PERSPECTIVES ON THE FUTURE OF THE COMMUNITY REINVESTMENT ACT 12, 27 (Prabal Chakrabarti, David Erickson, Ren S. Essene, Ian Galloway & John Olson eds., 2009); Josh Silver, *Why the Community Reinvestment Act Should Be Expanded Broadly Across the Financial Industry*, NAT'L CMTY. REINVESTMENT COAL. (Aug. 17, 2020), https://www.ncrc.org/why-the-community-reinvestment-act-should-be-expanded-broadly-across-the-financial-industry/ [https://perma.cc/2R6A-DMPE]. For an argument that the CRA should be applied to not only nonbank lenders but also other nonbank financial service providers, see Jones & Goldburn, *supra* note 184, at 169.

298. Hannah Lang, *Will States Lead the Way on Expanding CRA to Nonbanks?*, AM. BANKER (July 26, 2021, 12:15 PM), https://www.americanbanker.com/news/will-states-lead-the-way-on-expanding-cra-to-nonbanks [https://perma.cc/8L87-XPQ9 (staff-uploaded, dark archive)]; Bob Jaworski, *New York Imposes Community Reinvestment Act Requirements on Mortgage Bankers*, HOLLAND & KNIGHT (Nov. 4, 2021), https://www.hklaw.com/en/insights/publications/2021/11/new-york-imposes-community-reinvestment-act [https://perma.cc/945T-2M57]; N.Y. BANKING LAW § 28-b (McKinney 2021); 205 ILL. COMP. STAT. 735 / 35-1 (2021); MASS. GEN. LAWS ch. 167, § 14 (2021).

299. N.Y. STATE DEP'T OF FIN. SERVS., REPORT ON INQUIRY INTO REDLINING IN BUFFALO, NEW YORK 16 (2021).

which remains one of the most segregated cities in America.[300] Thus, the contract with nonbanks is not addressing the public's need for equitable access to credit, even though the benefits they receive are supposed to be for that purpose.[301] To address this imbalance, this Article proposes applying the CRA's obligations to nonbank lenders.

Applying the CRA to nonbanks helps to address the public's need for access to financial services but would fall short of completely rebalancing their social contract. As discussed in Section II.A.1, nonbanks increasingly rely on government support in the form of liquidity assistance such as the emergency lending facilities established to stabilize the financial system during the pandemic in 2020.[302] The liquidity crises that spur the need for such assistance are caused by "runs," where claimants seek to redeem the nonbanks' short-term liabilities.[303] Given this, one way to rebalance the social contract would be to reduce nonbanks' reliance on this assistance by banning them from issuing short-term liabilities, which Morgan Ricks refers to as "deposit substitutes."[304]

Ricks views deposit substitutes as financial instruments that, although not traditional bank deposits, effectively serve similar functions in the financial system.[305] These instruments include money market mutual funds, overnight repurchase agreements, asset backed commercial paper, and other short-term liabilities.[306] Ricks argues that deposit substitutes pose significant risks to financial stability because they can contribute to runs on the financial system, similar to bank runs, if confidence in their value diminishes.[307] Unlike bank deposits, which are insured by government programs, deposit substitutes lack such protections, making them more vulnerable during periods of financial stress.[308]

To address these risks, Ricks proposes restricting the issuance of deposit substitutes to regulated banks only.[309] He argues that centralizing issuance of short-term liabilities, which he refers to as money creation, within the banking sector would enhance financial stability by making it easier to monitor and

300. *Id.* at 3.

301. The National Housing Act of 1934 created the FHA insurance program with the stated purpose of "improvement in housing standards and conditions." National Housing Act, Pub. L. No. 73-479, 48 Stat. 1246 (1934) (codified as amended in scattered sections of 12 U.S.C.).

302. Gruenberg, *supra* note 18.

303. David Beckworth & Morgan Ricks, *Morgan Ricks on "The Money Problem," Financial Regulation, and Shadow Banking*, MERCATUS CTR. (Sept. 26, 2016), https://www.mercatus.org/macro-musings/morgan-ricks-money-problem-financial-regulation-and-shadow-banking [https://perma.cc/4MF3-S47J (staff-uploaded archive)]; RICKS, THE MONEY PROBLEM: RETHINKING, *supra* note 35, at 4.

304. Beckworth & Ricks, *supra* note 303.

305. *Id.*

306. *Id.*

307. *Id.*

308. *See id.*

309. Ricks, *The Money Problem: A Rejoinder*, *supra* note 177, at 1.

control the money supply, reducing the likelihood of systemic crises.[310] Ricks proposes to more broadly define "deposits" under the Glass-Steagall Act, which restricts deposit liabilities to chartered banks, to include "various kinds of short term debt."[311] Implementing such a change would be one way to bring balance to the social contract with nonbanks, as it would reduce the likelihood that they need liquidity assistance, and in turn, fulfill society's need for a safe and sound financial system.

Although Ricks's solution is textually simple—redefining deposits under the Glass-Steagall Act[312]—it could effectively represent "an entire rewrite of financial regulation" depending on how broad the definition is.[313] His proposed definition of deposits includes "money-claims" which means "any debt instrument that is payable in cash or its equivalent and that has a maturity of less than one year, including any such instrument that is styled as a 'deposit.'"[314] This definition seems to be broad enough to include both customer funds held by payment companies like Venmo as well as stablecoins.[315] Thus, if Ricks's proposal was enacted, Venmo and stablecoin issuers would have to apply for traditional bank charters and FDIC approval to continue operating.

Further, restricting "money creation" to chartered banks would raise a related issue with respect to the new chartering options described above. On the one hand, this would seem like a nonissue because the charters are for nondepository institutions. On the other hand, if "deposits" is broadly defined to include all types of short-term liabilities, then "nondepository" takes on a new meaning. Companies like Venmo and stablecoin issuers *could not* apply for the new charter, thus likely making the option less appealing.[316]

The third component of Baradaran's proposed social contract is consumer protection. Congress did attempt to ask more of nonbanks in this regard, as the Dodd-Frank Act created the CFPB and granted the agency the authority to supervise nonbank financial institutions that "it has reasonable cause to

310. Beckworth & Ricks, *supra* note 303.

311. *Id.* In his book, Morgan Ricks provides example statutory text. RICKS, THE MONEY PROBLEM: RETHINKING, *supra* note 35, at 243–45.

312. Margaret M. Blair, *A Simple Fix for a Complex Problem? Comments on Morgan Ricks, the Money Problem: Rethinking Financial Regulation*, ACCT. ECON. & L., July 2018, at 1.

313. Philippe Moutot, *Morgan Ricks: "The Money Problem: Rethinking Financial Regulation*,*"* ACCT. ECON. & L., July 2018, at 1.

314. RICKS, THE MONEY PROBLEM: RETHINKING, *supra* note 35, at 243.

315. In implementing a Ricksian-type solution, entities receiving the new charter would likely be excluded from accepting the more broadly defined "deposits." For example, Lev Menand, who has co-authored with Morgan Ricks, has described stablecoins and Venmo balances as "retail deposit substitutes." Statement of Lev Menand, *supra* note 220, at 50–51.

316. If, on the other hand, the new charter allowed the entities to "accept deposits," it would decrease the impact of Ricks's proposal.

determine pose risks to consumers."[317] Until recently though, this power had gone unused.[318] In 2022, the CFPB announced plans to invoke this "dormant authority" and promulgated procedural rules for determining which nonbank financial institutions pose risks to consumers.[319]

Pursuant to the finalized rules, this process begins with the issuance of a Notice of Reasonable Cause if there are grounds to believe that a nonbank is engaging in risky conduct, based on consumer complaints or other information sources.[320] The nonbank then has thirty days to respond, providing evidence to counter the CFPB's claims and potentially requesting an oral response.[321] Following this, the CFPB's Associate Director reviews the response and recommends whether to subject the nonbank to supervision, with the final decision made by the CFPB Director.[322] The Director's decision is subject to judicial review, and nonbanks can petition for termination of this supervision after two years.[323]

Using this process, the CFPB published an order establishing supervisory authority over World Acceptance Corp., a small-loan consumer finance company, in February 2024.[324] In designating this company for supervision, the Bureau described the "reasonable cause" standard as a "relatively lenient burden of persuasion," that stands in contrast to "more demanding" standards such as the preponderance of the evidence standard or a clear and convincing standard.[325] The order explains that the determination was largely based on consumer complaints received by the CFPB.[326] Based on these complaints, the CFPB determined that World Acceptance Corp. failed to sufficiently inform consumers that certain insurance coverage is optional, engaged in excessive harassment and coercive collection practices, and provided inaccurate information to consumer reporting agencies, among other issues.[327]

While establishment of this dormant authority represents an important step toward requiring more of nonbanks in terms of consumer protection, the

317. Christa L. Bieker, Tori K. Shinohara & Joy Tsai, *CFPB Issues Order Establishing Supervisory Authority over Nonbanks*, MAYER BROWN (Mar. 5, 2024), https://www.mayerbrown.com/en/insights/publications/2024/03/cfpb-issues-order-establishing-supervisory-authority-over-nonbanks [https://perma.cc/4WS4-MG7F].

318. *Id.*

319. Press Release, Consumer Fin. Prot. Bureau, CFPB Invokes Dormant Authority to Examine Nonbank Companies Posing Risks to Consumers (Apr. 25, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-invokes-dormant-authority-to-examine-nonbank-companies-posing-risks-to-consumers/ [https://perma.cc/Q42N-GPAA].

320. 12 C.F.R. § 1091.102 (2025).

321. *Id.* § 1091.105.

322. *Id.* § 1091.108.

323. *Id.* §§ 1091.109(b)(4), .113.

324. World Acceptance Corp., CFPB No. 2023-CFP.B-SUP-0001 (Nov. 30, 2023).

325. *Id.* at 3.

326. *Id.* at 18.

327. *Id.* at 7.

designation process suffers from many of the same problems as the SIFI designation process noted above. First, in order to begin the designation process, even under the relatively lenient "reasonable cause standard," the process of gathering and verifying sufficient evidence to justify supervision is resource-intensive and time-consuming, limiting the number of firms the CFPB can designate. Further, evidence suggests that many consumer abuses are not reported. For example, a 2019 report found that fewer than one-third of incidents of suspected elder financial exploitation are reported.[328] The result of all this is that this enforcement authority will likely remain underutilized, as evidenced by the fact that only one nonbank is being supervised for consumer protection purposes.

Second, companies are likely to vigorously contest these classifications throughout the proceedings and appeals, challenging the agency's decisions and potentially stalling or even reversing supervisory measures. Consequently, this could further diminish the pool of firms subject to oversight. In the CFPB's order, several of World Acceptance's arguments against its designation were cited and rebutted. For example, World Acceptance disputed the Bureau's authority and procedural fairness in its designation of the company for supervision.[329] It argued that the CFPB lacked substantial evidence demonstrating that their practices posed unique risks to consumers.[330] Additionally, World Acceptance disputed the accuracy or relevance of the CFPB's risk assessment, emphasizing their ongoing efforts in compliance and operational enhancements.[331] The CFPB rebutted each of these arguments, ultimately issuing the order that subjected the firm to supervision.[332] World Acceptance may still seek judicial review of this decision though.[333] The agency will likely spend more time justifying its designations than supervising the designees.

To remedy this problem, this Article proposes a bright line rule for supervising nonbanks for customer protection purposes based on their size. The benefits of a size-based threshold are similar to those associated with the proposed streamlined SIFI threshold above. First, a size-based threshold aligns the regulatory standards for nonbank financial institutions with those already established for banks, as the CFPB already has authority to supervise banks,

328. CONSUMER FIN. PROT. BUREAU, SUSPICIOUS ACTIVITY REPORTS ON ELDER FINANCIAL EXPLOITATION: ISSUES AND TRENDS 23 (2019), https://files.consumerfinance.gov/f/documents/cfpb_suspicious-activity-reports-elder-financial-exploitation_report.pdf [https://perma.cc/L7D9-V54U].

329. World Acceptance Corp., *supra* note 324, at 21–22.

330. *Id.* at 19.

331. *Id.* at 18.

332. *Id.* at 1.

333. 12 C.F.R. §§ 1091.109(b)(4), .113 (2025).

thrifts, and credit unions with over $10 billion in assets.[334] Further, establishing clear and objective criteria for designation minimizes the risk of extended disputes and litigation, which are common with complex and contentious factor-based evaluations. Additionally, implementing a size threshold can have positive antitrust effects by discouraging excessive growth and consolidation within the financial industry. This, in turn, reduces incentives to create "too big to fail" institutions and promotes a more competitive market environment. Overall, a size-based threshold would simplify the designation process, enhance regulatory clarity, and support broader financial stability objectives.

As discussed above, our current legislative and regulatory frameworks can be amended to fix the problems with society's contract with nonbank financial institutions. As it stands, nonbanks provide next to nothing in return for the benefits they receive. To rebalance the deal with nonbanks, this section proposes extending the full range of CRA duties to nonbanks, banning nonbanks from issuing short-term liabilities, and subjecting all large nonbank financial institutions to the CFPB's consumer protection supervision. The cumulative effect of these changes would ensure that in return for the benefits nonbanks receive, they are fulfilling the public's needs for access to credit, consumer protection, and a safe and sound financial system.

CONCLUSION

Applying the social contract construct to nonbanks reveals a glaring imbalance in the financial sector's accountability to society. While banks are subject to regulatory frameworks and supervision aimed at ensuring safety and soundness as well as consumer protection, nonbanks have largely operated outside these constraints. Yet, as increasingly integral components of the financial system, nonbanks have benefited from federal safety nets, including massive bailouts. Regulatory philosophy should be informed by the recognition of this asymmetrical relationship, thus animating regulatory measures on nonbank financial institutions that would safeguard against systemic risks, protect consumers, and support financial inclusion.

This Article considered three recalibration methods to address this disparity. First, the establishment of a federal charter for nonbanks, which could only rebalance the social contract if the charter was conditioned upon federal supervision for safety and soundness and consumer protection purposes as well as affirmative obligations under the CRA. Alternatively, a streamlined designation process for SIFIs would help to balance the arrangement, especially if receipt of federal benefits was conditioned upon the designation. These options, however, would only help to balance the social contract with those that opt-in in the case of the charter or are designated as SIFIs. A solution that

334. 12 U.S.C. § 5515.

would touch more nonbanks would be to subject all nonbanks to the CRA, ban them from money creation, and subject all nonbanks of a certain size to CFPB supervision for consumer protection purposes.