

Rereading the National Bank Act's "At Pleasure" Provision: Preserving the Civil Rights of Thousands of Bank Employees

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I. INTRODUCTION

There are several thousand national banks in the United States with tens of thousands of employees, a high percentage of whom are classified as officers.¹ It would undoubtedly surprise most of those officers to learn that a number of judicial decisions have held that a federal law passed in 1864² deprives them of the protection of a broad range of state anti-discrimination and anti-retaliation statutes. It would certainly surprise many state legislators to learn that those decisions have implicitly stripped the states of the power to protect bank employees from any form of discriminatory or retaliatory discharge except those forms already forbidden by federal law and prevent the states from providing any remedies that vary from those supplied by the federal government.³ This article argues that those decisions are wrong. Current doctrine, historic case law, legislative history, and nineteenth- and early-twentieth-century American and British legal treatises suggest that the "at pleasure" provision of the National Bank Act of 1864 was not intended to preempt state statutory employment law. This article contends that the National Bank Act does not prevent the states from protecting bank officers from forms of discrimination not covered by federal statutes or from providing stronger protections than the federal government has supplied and that the courts are wrong to infer such preemption.

Since the 1940s, state statutes have forbidden various forms of employment discrimination.⁴ The federal government enacted similar federal anti-discrimination laws beginning in the 1960s.⁵ Those federal statutes contain express anti-preemption provisions and preserve parallel state laws and state

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¹ Note, *The Standby Letter of Credit Backed by a "Contingent" Promissory Note as an Insured Deposit*: FDIC v. Philadelphia Gear, 13 S.U. L.Rev. 173, 183 (1986).

² The National Bank Act of 1864, 12 U.S.C. §§ 21-216 (2000).

³ See *infra* notes 11-31 and accompanying text.

⁴ See, e.g., Act of Mar. 12, 1945, ch. 118, 1945 N.Y. Laws 457.

⁵ Civil Rights Act of 1964, Pub. L. No. 88-353, 78 Stat. 241 (1964).

remedial machinery.⁶ As a result, a victim of discrimination can ordinarily use both federal and state prohibitions and procedures, picking whichever one better protects her interests — and she can do so even when her employer has, by implication or by contract, retained the right to discharge her at will.⁷ Federal banks, however, have argued that their officers or employees may not utilize state anti-discrimination laws. They base that argument on the so-called “at pleasure” provisions of the federal banking acts, which permit banks to dismiss their officers or employees “at pleasure.”⁸ The banks argue that the acts implicitly preempt the states’ statutes by granting banks the right to dismiss “at pleasure.” Three circuits have accepted this argument to varying degrees, but those circuits have sharply disagreed over the extent of the preemption.⁹

This article undertakes a historical analysis of the National Bank Act of 1864 to argue that the “at pleasure” provisions of the federal banking acts do not preempt state anti-discrimination law.¹⁰ Part II explains the different approaches taken by the circuit courts and discusses the assumptions that underlie each circuit’s decision. Part III discusses the National Bank Act’s limited intent: to prevent banks from entering into non-cancelable fixed-term employment contracts with their officers and to trump any common law presumption that such a contract existed. Based on an analysis of contemporaneous treatises, case law, and legislative history, Part III concludes that the provisions were not intended to prevent state legislatures from forbidding discriminatory discharge of bank officers. Subpart III.A demonstrates that, in the nineteenth century, employment “at pleasure” was the equivalent of the modern employment “at will” and referred to a hiring that did not contractually restrict the right of either party to end the relationship. Subpart III.B explains that the “at pleasure” provision of the National Bank Act was necessary because the Act was passed at a time when the courts were di-

⁶ See *infra* notes 113-115, and accompanying text.

⁷ See *infra* notes 112-118, and accompanying text.

⁸ The federal banking laws include the National Bank Act, the Federal Reserve Act, and the Federal Home Loan Bank Act. In 1864, Congress enacted the National Bank Act. 12 U.S.C. §§ 21-216 (2000). In the Act, Congress included a provision permitting a Bank’s board of directors to dismiss its officers “at pleasure.” 12 U.S.C. § 24 (Fifth) (2000). Later enacted federal banking laws copied the National Bank Act’s “at pleasure” provision. The Federal Reserve Act, 12 U.S.C. §§ 221-522 (2000), and the Federal Home Loan Bank Act, 12 U.S.C. §§ 1421-1449, contain nearly identical language. Federal Reserve Act, 12 U.S.C. § 341 (Fifth) (2000); Federal Home Loan Bank Act, 12 U.S.C. § 1432(a) (2000).

⁹ See *infra* notes 11-31, and accompanying text.

¹⁰ When Congress enacted the Federal Reserve Act several decades after the National Bank Act, it made clear that the purpose of its “at pleasure” provision was “precisely analogous to those of the national banks.” H.R. REP. NO. 63-69 (1913). Furthermore, every circuit court to interpret the “dismiss at pleasure” language in the Federal Reserve Act or the Federal Home Loan Act has looked to the interpretation of the National Bank Act’s nearly identical provision. See, e.g., *Fasano v. Fed. Reserve Bank of N.Y.*, 457 F.3d 274 (3d Cir. 2006), *cert. denied*, 127 S. Ct. 977 (2007); *Ana Leon T. v. Fed. Reserve Bank of Chicago*, 823 F.2d 928 (6th Cir. 1987), *cert. denied*, 494 U.S. 1086 (1990). Thus, the courts have universally looked to the purpose of the National Bank Act and its “dismiss at pleasure” provision to identify the preemptive scope of all three federal banking act provisions.

vided over whether employers had the presumptive right to terminate employees without just cause. Subpart III.C demonstrates that the “at pleasure” provision was intended solely to restrict national banks’ ability to contractually limit their rights to discharge officers. Subpart III.C also explains how the presumption against federal preemption of traditional state police powers and the structure of the modern civil rights acts converge to support the conclusion that the “at pleasure” provisions should not be construed to nullify state anti-discrimination laws.

II. THE CIRCUIT SPLIT

A. *Conflicting Lower Court Opinions*

Three circuits have interpreted federal banking laws as prohibiting bank employees or officers from seeking relief under state law. Those courts disagree on the extent of this prohibition, and the Supreme Court will eventually need to resolve the conflict. All courts recognize that, to the extent that the federal banking acts conflict with subsequently enacted anti-discrimination laws, subsequent *federal* anti-discrimination laws must prevail. However, all three circuits have concluded that the National Bank Act and its progeny significantly limit state regulation of discriminatory discharge on the ground that the acts authorize the banks to dismiss certain employees “at pleasure.” This article argues that the Supreme Court should reject all three circuits’ conclusions because each rests on the incorrect assumption that the “dismiss at pleasure” provisions of the acts irreconcilably conflict with state and federal anti-discrimination law.

The Sixth Circuit has endowed the “at pleasure” provision with the broadest preemptive scope. In 1987, the court held in *Ana Leon T. v. Federal Reserve Bank of Chicago*¹¹ that the “dismiss at pleasure” provision of the Federal Reserve Act preempted all state anti-discrimination claims. With no analysis, the Court concluded that the “at pleasure” provision prevented a wrongfully discharged employee from stating a claim under Michigan’s Elliott-Larsen Act,¹² an anti-discrimination statute prohibiting employers from discriminating on account of race, color, national origin, religion, age, sex, weight, height, or marital status.¹³ In a single sweeping statement, the court held that the Act “preempt[ed] any state-created employment right to the contrary.”¹⁴ The court assumed that the “at pleasure” provision was on its face “contrary” to state anti-discrimination law. The Sixth Circuit’s decision was heavily criticized, with district courts and state courts of appeals con-

¹¹ 823 F.2d 928 (6th Cir. 1987).

¹² MICH. COMP. LAWS ANN. § 37.2202(1) ((a) (West 2007).

¹³ *Id.*

¹⁴ *Ana Leon T.*, 823 F.2d at 931 (emphasis added).

demning its lack of analysis.¹⁵ The case was an outlier for nearly twenty years; no other circuit addressed the issue, and the Sixth Circuit did not reaffirm its holding. Then, in 2004, the Sixth Circuit reiterated its earlier holding that the “at pleasure” provision preempts *all* state employment laws,¹⁶ and, within two years, two other circuits addressed the issue.

In 2006, the Ninth Circuit held in *Kroske v. U.S. Banc Corp.* that the “at pleasure” provision preempts state law except when state law “substantively mirrors” federal anti-discrimination law.¹⁷ In that case, a national bank officer alleged that she had been terminated because of her age in violation of the Washington Law Against Discrimination (WLAD).¹⁸ The Ninth Circuit held that the National Bank Act did not preempt Kroske’s state claim under the WLAD.¹⁹ The court concluded that the federal Age Discrimination in Employment Act (ADEA) had impliedly amended the National Bank Act’s dismiss-at-pleasure provision to the “minimum extent necessary” to resolve the conflict between the two federal laws.²⁰ Because Ms. Kroske’s state claim “substantively mirror[ed]” a federal claim under the ADEA, it was not preempted.²¹ The court did not define its “substantively mirrors” standard but indicated that it did not intend to permit causes of action based on “state law provisions [that] prohibit termination on grounds that are more expansive than the grounds set forth in federal law.”²²

Finally, the Third Circuit in *Fasano v. Federal Reserve Bank of New York* recently held that the “at pleasure” provision preempts state laws that do not “exactly match” their federal counterparts.²³ In that case, a former bank employee brought two claims under New Jersey law. First, she alleged that the bank had retaliated against her for complaining about its illegal activity in violation of the New Jersey Conscientious Employee Protection Act (CEPA).²⁴ Second, she asserted that the bank had failed to accommodate her

¹⁵ See, e.g., *Katsiavelos v. Fed. Reserve Bank of Chicago*, 1995 WL 103308 (N.D. Ill. 1995) (criticizing “[t]he *Leon* court [for] provid[ing] no reasons or policy for its holding”); *Moodie v. Fed. Reserve Bank of N.Y.*, 831 F. Supp. 333, 336 (S.D.N.Y. 1993) (refusing to follow *Ana Leon T.* because “the Sixth Circuit’s pronouncement gives no basis for its opinion and sets forth no policy reasons for its holding”); *White v. Fed. Reserve Bank*, 660 N.E.2d 493, 495 (Ohio Ct. App. 1995) (“The Sixth Circuit . . . failed to engage in any analysis or state the basis of its decision. Therefore, we decline to rely upon the holding in *Ana Leon T.*”).

¹⁶ *Arrow v. Fed. Reserve Bank of St. Louis*, 358 F.3d 392, 393 (6th Cir. 2004).

¹⁷ *Kroske v. U.S. Banc Corp.*, 432 F.3d 976 (9th Cir. 2005), *cert. denied*, 127 S. Ct. 157 (2006).

¹⁸ WASH. REV. CODE § 49.60.010 et seq. (2006).

¹⁹ 432 F.3d at 989.

²⁰ *Id.* at 986.

²¹ *Id.* at 987.

²² *Id.* at 989.

²³ *Fasano v. Fed. Reserve Bank of N.Y.*, 457 F.3d 274 (3d Cir. 2006), *cert. denied*, 127 S.Ct. 977 (2007).

²⁴ N.J. STAT. ANN. §§ 34:19-1 (2006). Federal law also prohibits retaliation against Bank employees who complain about illegal conduct. Depository Institutions Employee Protection Act, 12 U.S.C. §1831(j) (2000).

disability under the New Jersey Law Against Discrimination (LAD).²⁵ The Third Circuit acknowledged that after *Ana Leon T.* and *Kroske* it was “wad[ing] into murky waters”²⁶ by attempting to determine the preemptive scope of the “dismiss at pleasure” provision. While the court explicitly rejected the total preemption approach advocated by the Sixth Circuit in *Ana Leon T.*, it also rejected the “retail preemption”²⁷ approach adopted by the Ninth Circuit in *Kroske*. Instead, the Third Circuit adopted what it called a “partial preemption” approach, requiring state laws to “exactly match” federal laws to avoid preemption.²⁸ Like CEPA, federal law protects bank employees from retaliation for reporting illegal activity.²⁹ Like LAD, the Americans with Disabilities Act³⁰ requires employers to accommodate the disabilities of their employees. However, the court held that LAD and CEPA were preempted in their entirety and Fasano’s state claims therefore barred because courts had not interpreted the remedies under the federal statutes *identically* to those available under state law.³¹

B. *The Implicit Assumptions Underlying the Lower Court Opinions*

This circuit split is wide.³² Thousands of employees are affected, and many lawyers wait to see how another circuit will deal with the issue and whether the Supreme Court will step in to resolve the conflict. This Article argues, however, that while the circuit split is wide, it is not wide enough because it includes no decision that wholly rejects the conclusion that state anti-discrimination laws are preempted by the federal banking laws’ “dismiss at pleasure” provisions.

²⁵ N.J. STAT. ANN. §§ 10:5-1 (2006). Federal law also prohibits employers from discriminating on the basis of disability. Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (2000).

²⁶ *Fasano*, 457 F.3d at 286.

²⁷ *James v. Fed. Reserve Bank of N.Y.*, 471 F. Supp. 2d 226, 236 (E.D.N.Y. 2007).

²⁸ *Fasano*, 457 F.3d at 287, 290.

²⁹ 12 U.S.C. § 1831(j) (2000).

³⁰ 42 U.S.C. § 12101 (2000).

³¹ The Second Circuit will likely also weigh in shortly. The Eastern District of New York has recently noted the split in authority making it likely that the Second Circuit will soon confront the issue. In *James v. Fed. Reserve Bank of New York*, the court noted the split. 471 F. Supp. 2d at 226 (“This Court adopts the ‘retail’ preemption approach of *Moodie, Peatros*, and *Shaw*, rather than ‘wholesale’ preemption as advised in *Evans* and *Fasano*.”).

³² As the Third Circuit admitted in *Fasano*, a “wide split in authority” has emerged. 457 F.3d at 279. The split widens further if we include within it the question of whether the “at pleasure” provision preempts state causes of action for wrongful termination in violation of public policy. Compare *Andrews v. Fed. Home Loan Bank of Atlanta*, 998 F.2d 214, 220 (4th Cir. 1993) (arguing that the “dismiss at pleasure” language bars state wrongful discharge claims) and *Inglis v. Feinerman*, 701 F.2d 97, 99 (9th Cir. 1983) (rejecting claim for wrongful termination in violation of public policy) with *Sargent v. Cent. Nat’l Bank & Trust*, 809 P.2d 1298 (Okla. 1991) (holding that the provision does not preempt auditors claim of wrongful discharge in violation of public policy), *White v. Fed. Reserve Bank*, 660 N.E.2d 493, 495 (Ohio Ct. App. 1995) (claiming that the provision “does not shield a defendant bank from tort liability for retaliatory discharge when state’s public policy is consistent with federal statute’s purpose”) and *Booth v. Old Nat’l Bank*, 900 F. Supp. 836 (N.D.W.Va. 1995) (same).

The circuits have assumed, with little analysis,³³ that federal anti-discrimination laws have impliedly amended the “dismiss at pleasure” provision of the National Bank Act. While the Supreme Court has long stated that amendments by implication are disfavored,³⁴ lower courts have nonetheless held that the Americans with Disabilities Act,³⁵ the Age Discrimination in Employment Act,³⁶ and Title VII³⁷ all impliedly amend the “dismiss at pleasure” provision of the National Bank Act. These holdings rest on the assumption that a bank’s statutory entitlement to dismiss its officers at pleasure “irreconcilabl[y] conflict[s]”³⁸ with federal anti-discrimination law. These courts also recognize that, when two statutes partially conflict, the earlier statute is only repealed to “the minimum extent necessary”³⁹ to reconcile it with the later law. Thus, every circuit to address the issue has created a very narrow rule within a very confined spectrum. At one end of the spectrum, the Sixth Circuit has held that bank officers can state a claim only under the federal statutes themselves. At the other, the Ninth Circuit has held that bank officers can seek relief only under those state statutes which “substantively mirror” federal anti-discrimination law.

The circuits give the National Bank Act’s “at pleasure” provision wide preemptive scope because of their erroneous conclusion that the Act conflicts with state anti-discrimination law. Although “[a] fundamental principle of the Constitution is that Congress has the power to preempt state law,”⁴⁰ Congress does not ordinarily exercise that power through silence. To determine whether a federal law preempts state law, a court’s “task is to ascertain Congress’s intent in enacting the federal statute at issue.”⁴¹ When Congress has explicitly stated its intent to preempt state law, “the courts’ task is an easy one.”⁴² Here, no argument has been made that the National Bank Act expressly preempts state anti-discrimination laws passed more

³³ See *Peatros v. Bank of America*, 990 P.2d 539, 561 (Cal. 2000) (Brown, J., dissenting).

³⁴ See, e.g., *Posadas v. Nat’l City Bank of N.Y.*, 296 U.S. 497, 503 (1936) (“The cardinal rule is that repeals by implication are not favored.”); *Universal Interpretive Shuttle Corp. v. Washington Metro. Area Transit Comm.*, 393 U.S. 186, 193 (1968) (same); *Traynor v. Turnage*, 485 U.S. 535, 547 (1988) (same); *Cook County v. U.S. ex rel. Chandler*, 538 U.S. 119, 132 (2003) (“Inferring repeal from legislative silence is hazardous at best.”).

³⁵ *Fasano*, 457 F.3d at 285 (noting that the “dismiss at pleasure” provision of the FRA is impliedly amended by the ADA).

³⁶ *Kroske v. U.S. Banc Corp.*, 432 F.3d 976, 987 (9th Cir. 2005) (holding that “the dismiss-at-pleasure provision . . . is repealed by implication only to the extent necessary to give effect to the ADEA”).

³⁷ *Peatros*, 990 P.2d at 540.

³⁸ See *Posadas*, 296 U.S. at 503 (noting that where “two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one”).

³⁹ *Kroske*, 432 F.3d at 987.

⁴⁰ *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000); see also *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989); *Savage v. Jones*, 225 U.S. 501, 533 (1912); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824).

⁴¹ *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299 (1988) (arguing that preemption is a question of congressional intent); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983).

⁴² *English v. Gen. Elec.*, 496 U.S. 72, 79 (1990).

than a century after the Act’s enactment, and Congress has never amended the National Bank Act to address the state statutes that limit the unfettered discretion of the at will employer.

Nor did Congress intend for the federal government to “occup[y] the field” of employment relations by enacting the National Bank Act of 1864.⁴³ “[T]he Supreme Court has oft reiterated that federal substantive authority over national banks is not exclusive.”⁴⁴ As the Third Circuit noted, “Whatever may be the history of federal-state relations in other fields, regulation of banking has been one of dual control since the passage of the first National Bank Act.”⁴⁵ As early as 1869, the Supreme Court had already concluded that the new national banks were “subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the Nation.”⁴⁶ The Court recently repeated this long-held position.⁴⁷ While Congress enacted a detailed regulatory regime to govern national banks, this fact alone does not suggest that it intended to preempt all state employment law.⁴⁸ Since the National Bank Act neither explicitly preempts state law nor occupies the field of banking regulation, state regulations are void only “if they conflict with federal law, frustrate the purposes of the National Bank Act, or impair the efficiency of national banks to discharge their duties.”⁴⁹

⁴³ See *Peatros v. Bank of America*, 990 P.2d 539, 550 (Cal. 2000) (“Speaking generally, we can say that the National Bank Act of 1864 as a whole ‘is not a comprehensive statutory scheme occupying the entire field relating to national banks.’”). The Supreme Court has recognized that conflict and field preemption are not “rigidly distinct” and “field preemption may be understood as a species of conflict pre-emption.” *English*, 496 U.S. at 79 n.5; *accord*, *Gade v. Nat’l Solid Wastes Management Ass’n*, 505 U.S. 88, 104 n.2 (1992). Nevertheless, the Court has continued to analyze the three categories independently. *English*, 496 U.S. at 79 n.5.

⁴⁴ *Wells Fargo Bank v. Boutris*, 419 F.3d 949, 963 (9th Cir. 2005).

⁴⁵ *Bank v. Long*, 630 F.2d 981, 985 (3d Cir. 1980); *see also*, *Idaho v. Sec. Pac. Bank*, 800 F. Supp. 922, 925 (D. Idaho 1992) (“It is clear that Congress has not completely preempted the entire banking field.”).

⁴⁶ *First Nat’l Bank v. Commonwealth of Kentucky*, 76 U.S. 353, 362 (1869) (holding that state law controls contracts executed by National Banks).

⁴⁷ *See Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 33 (1996) (stating that states may regulate national banks when “doing so does not prevent or significantly interfere with the national bank’s exercise of its powers”).

⁴⁸ *See English*, 496 U.S. at 87 (“Ordinarily, the mere existence of a federal regulatory or enforcement scheme . . . does not by itself imply pre-emption of state remedies.”); *Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 719 (1985) (“Undoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law.”).

⁴⁹ *Bank of America v. San Francisco*, 309 F.3d 551, 561 (9th Cir. 2002); *see also* *First Nat’l Bank of San Jose v. California*, 262 U.S. 366, 368-69 (1923) (The National Bank’s “contracts and dealings are subject to the operation of general and undiscriminating state laws which do not conflict with the letter or the general object and purposes of congressional legislation.”).

III. A HISTORICAL APPROACH TO THE MEANING OF “AT PLEASURE”

The belief that the “dismiss at pleasure” provision conflicts with either federal or state anti-discrimination law rests on historically inaccurate assumptions about the state of the common law in the nineteenth century. The “at pleasure” provision was intended to ensure that national bank officers would not be presumed to be annual employees and to eliminate any common law presumption that employment contracts were for a fixed term during which employees could be dismissed only for just cause. In addition, it prohibited the banks from voluntarily entering into fixed-term employment contracts in order to prevent national banks from binding themselves to retain officers whose discharge was in the best interests of the bank and its depositors. The circuits’ finding of preemption ignores the legal and linguistic context within which the National Bank Act was passed, instead interpreting the Act as if it were enacted today. The National Bank Act’s “at pleasure” provision was not an all-encompassing Congressional attempt to preclude the states from exercising their traditional police power to regulate employment relations. Rather, it was a limited effort to deal with a specific problem: the risk that national banks would, either explicitly or by common law implication, contractually restrict their ability to discharge bank officers.

A. *The Limited Scope of the “At Pleasure” Provision:
“At Pleasure” is “At Will”*

The courts have rested their assumption that the National Bank Act conflicts with anti-discrimination law on their hunch that employment “at pleasure” is different from employment “at will.” In the nineteenth century, the terms were used interchangeably, and both referred to a single concept: employment under a contract containing no express or implied contractual limit on the employer’s right to discharge.

That Congress used the term “at pleasure” instead of “at will” in the National Bank Act is not at all surprising. The term “at will” would not be employed for more than a decade after Congress passed the National Bank Act. It first appeared in H.G. Wood’s 1877 treatise on employment law, which used “at will” and “at pleasure” interchangeably. In the treatise’s oft-cited Section 134, Wood articulates his “at will” default rule, arguing that “unless their understanding was mutual that the service was to extend for a certain fixed and definite period, it is an indefinite hiring and is *determinable at the will* of either party.”⁵⁰ However, if a practitioner of the era were looking in the index to find whether the default presumption was annual hiring or at will hiring, he would find nothing under the term “at will.” Instead, he

⁵⁰ H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT: COVERING THE RELATION, DUTIES AND LIABILITIES OF EMPLOYERS AND EMPLOYEES § 134, 272 (1877) (emphasis added).

would find a section entitled “General Hiring” and a subsection entitled “may be terminated *at pleasure*,”⁵¹ and he would be instructed to refer to pages 271-274, exactly the pages where the author first explains his “at will” rule.

Wood’s conflation of “at pleasure” with “at will” does not end with his index but pervades his treatise. To support his theory of at will employment,⁵² Wood cites *Peacock v. Cummings*,⁵³ a Pennsylvania Supreme Court case decided the same year as the enactment of the National Bank Act, and describes its holding: “Plaintiff was hired for a term not exceeding five years. Held, either party could terminate at pleasure.”⁵⁴ Similarly, two pages later Wood again refers to “at pleasure” as synonymous with “at will” when he remarks that indefinite term contracts are “determinable at the pleasure of either party, and no cause therefore need be alleged or proved . . . [I]n this country, general hiring . . . is a mere hiring at will.”⁵⁵

The courts also generally used “at will” and “at pleasure” synonymously.⁵⁶ In adopting the “at will” rule, the Supreme Court of Pennsylvania held that an employer “may discharge an employee with or without cause at pleasure, unless restrained by some contract.”⁵⁷ Similarly, in announcing its default presumption of “at will” employment, the Nebraska Supreme Court stated that if no fixed-term contract existed, “the employer may discharge, or the employee stop work, at his own pleasure.”⁵⁸ In Alabama, the court has held that contracts are presumptively for “at will employment” and that “such employment may be terminated at the pleasure of the employer.”⁵⁹ In West Virginia, the Supreme Court held that employment “is rebuttably presumed to be a hiring at will, which is terminable at any time at the pleasure of either the employer or the employee.”⁶⁰ Similarly, the Maryland Court of Appeals has held that “at will employment is an employment contract of indefinite duration. It can be legally terminated at the pleasure of either party at any time.”⁶¹ In Arizona, the “general rule” is that employment is “termi-

⁵¹ *Id.* at 937 (emphasis added).

⁵² *Id.* at 263.

⁵³ 46 Pa. 434 (1864).

⁵⁴ WOOD, *supra* note 50, at 263 n.2.

⁵⁵ *Id.* at 265.

⁵⁶ *See, e.g.*, *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880, 891 (Mich. 1980) (noting that defendant could have required its “employees to acknowledge that they served at the will or the pleasure of the company”).

⁵⁷ *Henry v. Pittsburgh & Lake Erie R.R.*, 27 W.N.C. 322, 322 (Pa. 1891).

⁵⁸ *State v. Employers of Labor*, 169 N.W. 717, 718 (Neb. 1918).

⁵⁹ *Udcoff v. Freidman*, 614 So.2d 436, 438 (Ala. 1993).

⁶⁰ *Williamson v. Harvest Mgmt.*, 415 S.E.2d 271, 273-74 (W.Va. 1992).

⁶¹ *Suburban Hosp. v. Dwiggin*, 596 A.2d 1069, 1073 (Md. 1991); *see also*, *Adler v. American Standard Corp.*, 432 A.2d 464, 467 (Md. 1981) (“The common law rule, applicable in Maryland, is that an employment contract of indefinite duration, that is, at will, can be legally terminated at the pleasure of either party at any time.”).

nable at pleasure by either party.”⁶² The list of states to use the terms synonymously continues.⁶³

*B. The Limited Scope of the “At Pleasure” Provision:
The Background Common Law Presumption*

Although “[w]e are accustomed to thinking of employment law in the United States as basically a regime of employment at will . . . this was not the back-drop against which the ‘at pleasure’ language was drafted and enacted.”⁶⁴ To accurately interpret Congressional intent, the Court must not read the laws “as if they were written today, for to do so would inevitably distort their intended meaning.”⁶⁵ The belief that there was a longstanding, well-recognized uniform presumption of at will employment stems from H. G. Wood’s 1877 treatise that stated “the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will.”⁶⁶ Commentators uniformly agree that Wood *created* his “inflexible rule.”⁶⁷ “Practically every case which has held that hiring at a certain price per month or year is indefinite, and terminable at will, has, without argument, directly or indirectly, followed [Wood’s] textbook which lays down that proposition without any authority whatever to support it.”⁶⁸ Wood’s treatise was not written until a decade after the National Bank Act was enacted, and the cases that eventually supported its proposition were not decided until much later.

Despite Wood, the presumptive nature of employment contracts was still in flux in the latter half of the nineteenth century. Although Wood “stated the employment at will doctrine in absolutely certain terms,”⁶⁹ the reality was not nearly as clear.⁷⁰ In the eighteenth- and early-nineteenth-century, “[e]mployment for an unspecified term was presumed to be annual, and dismissal within that term had to be for cause.”⁷¹ However, most legal

⁶² *Dover Copper Mining v. Doenges*, 12 P.2d 288, 291-92 (Ariz. 1932).

⁶³ *See, e.g., Johnson v. Jefferson County Bd. of Health*, 662 P.2d 463, 466 (Colo. 1983).

⁶⁴ M.B.W. Sinclair, *Employment at Pleasure: An Idea Whose Time Has Passed*, 23 U. Tol. L. Rev. 531, 540 (1992).

⁶⁵ *Goldstein v. California*, 412 U.S. 546, 564 (1973).

⁶⁶ Wood, *supra* note 50, at 272.

⁶⁷ *See* Jay Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 122, 126 (1976) (“His scholarly disingenuity was extraordinary.”); Peter Shapiro, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341 (1974) (“Wood cited only four American cases as authority for his approach to general hiring, none of which supported him.”).

⁶⁸ 11 A.L.R. 469 (1921).

⁶⁹ Feinman, *supra* note 67, at 126.

⁷⁰ “Some later courts continued to rely on the customary rule of annual employment despite Wood’s pronouncement.” Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1825 n.51 (1980). Wood’s rule also ran directly counter to another American treatise that stated the one-year presumption as the rule that some courts continued to follow. *See, e.g., Adams v. Fitzpatrick*, 26 N.E. 143 (N.Y. 1891).

⁷¹ Sinclair, *supra* note 64, at 541.

historians seem to agree that by the middle of the nineteenth century, “whatever consensus [had] existed about the state of the law dissolved.”⁷² Jay Feinman argues in his history of the “at will” rule that there was a split among the states by the middle of the nineteenth century. For example, he points out that a mid-century treatise stated that no presumption of yearly hiring existed in Connecticut, while a mid-century New York Court of Appeals case held that the English rule of annual hiring still governed in New York, and yet another mid-century treatise argued that there was a rebuttable presumption of yearly hiring.⁷³

The National Bank Act, passed in the midst of this common law confusion, sought to clarify that officers were not presumptively annual employees and, in fact, could not be hired for definite terms. If enacted today, the National Bank Act’s “dismiss at pleasure” language might bestow on banks “sweeping powers of dismissal,”⁷⁴ “broad power[s] . . . to dismiss . . . without limitation,”⁷⁵ and perhaps even an “absolute, unlimited power to dismiss.”⁷⁶ However, the National Bank Act of 1864 was passed in a very different legal and linguistic context and must not be “construed in a vacuum.”⁷⁷

*C. The Limited Scope of the “At Pleasure” Provision:
Prohibiting Contractual Limitations on the Ability to Fire*

The National Bank Act’s “at pleasure” provision was intended to prevent national banks from entering into contracts that restricted their ability to fire employees. The Act accomplished this goal in two ways: First, it trumped any existing state common law presumption that contracts were for fixed annual terms during which employees could only be dismissed for cause. Second, it forbade national banks from voluntarily entering into fixed-term employment contracts, terminable only for cause. The “at pleasure” provision was enacted to give banks the latitude to hire or fire their employees; “[t]hat latitude, however, was intended in a contractual sense.”⁷⁸ This conclusion is supported by the interpretation of the “at pleasure” provision in nineteenth- and early-twentieth-century treatises and

⁷² Feinman, *supra* note 67, at 122.

⁷³ *Id.* at 122-23.

⁷⁴ *Aalgaard v. Merchants Nat’l Bank*, 224 Cal. App. 3d 674, 692 (Cal. Ct. App. 1990).

⁷⁵ *Kroske v. U.S. Banc Corp.*, 432 F.3d 976, 987 (9th Cir. 2005).

⁷⁶ *Fasano v. Fed. Reserve Bank of N.Y.*, 457 F.3d 274, 285 (3d Cir. 2006).

⁷⁷ *Davis v. Michigan Dep’t of Treasury*, 489 U.S. 803, 809 (1989) (“It is a fundamental canon of statutory construction that the words of a statute must be read in their context.”); *see also* *Robinson v. Shell Oil*, 519 U.S. 337, 341 (1997) (“The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”); *Deal v. United States*, 508 U.S. 129, 132 (1993) (It is a “fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.”).

⁷⁸ *Mueller v. First Nat’l Bank of the Quad Cities*, 797 F. Supp. 656, 663 (C.D. Ill. 1992).

cases. It is reinforced by the presumption against preemption of state police power in areas traditionally regulated by the states.

1. *Contemporaneous Case Law*

The purpose of the National Bank Act does not suggest Congressional intent to preclude state anti-discrimination laws. Passed in the midst of the Civil War, it is difficult to ascertain even the general purposes of the National Bank Act from the historical record. Nevertheless, commentators have identified three main Congressional objectives for the National Bank Act's passage: (1) to develop a national currency, (2) to create markets for federal bonds to finance the Civil War, and (3) to use these national banks as depositories of government funds.⁷⁹ None of these objectives suggest that Congress intended to preempt contemporaneous state employment legislation or preclude future state limits on at will employment. While the legislative history has provided historians with absolutely limited insight into the general purposes of the Act, it provides no help in discerning the purposes of the "dismiss at pleasure" provision because the "at pleasure" provision is not mentioned in any of the Congressional debates surrounding the Act.

Unable to rely on legislative history, the lower courts have almost unanimously looked to a single circuit court opinion, *Westervelt v. Mohrenstecher*,⁸⁰ written more than thirty years after the National Bank Act was passed. While the courts have relied too heavily upon this early case, even the case itself suggests that the "at pleasure" provision was only intended to prevent banks from entering into fixed-term contracts. In *Westervelt*, Judge Sanborn wrote that the purpose of the "dismiss at pleasure" provision was to permit banks to remove officers who had lost the public's trust, whether or not there was cause to remove these officers:

Observation and experience alike teach that it is essential to the safety and prosperity of banking institutions that the active officers, to whose integrity and discretion the moneys and property of the bank and its customers are intrusted, should be subject to immediate removal whenever the suspicion of faithlessness or negligence attaches to them.⁸¹

The lower courts have nearly universally relied on this opinion as the definitive statement of the purpose of the "dismiss at pleasure" provision.⁸²

⁷⁹ See Geoffrey P. Miller, *The Future of the Dual Banking System*, 53 BROOK. L. REV. 1, 13 (1987); Edward L. Symons, Jr., *The "Business of Banking" in Historical Perspective*, 51 GEO. WASH. L. REV. 676, 699 (1983).

⁸⁰ 76 F. 118 (8th Cir. 1896).

⁸¹ *Id.* at 122.

⁸² See, e.g., *Mackey v. Pioneer Nat'l Bank*, 867 F.2d 520, 526 (9th Cir. 1989) (arguing that the purpose of the "at pleasure" provision was to "maintain the public trust") (citing *Westervelt*); *Wells Fargo Bank N.A. v. Boutris*, 53 Cal.3d 1082, 1089 (Cal. 1991) (claiming that Congress's principle objective was to avoid public concern about officers' integrity and discre-

This reliance may be misplaced. As early as 1937, a commentator recognized that Judge Sanborn’s conclusion was a mere “conjecture” for which he provided no evidence and that it had no support in the legislative history.⁸³ Furthermore, *Westervelt* was decided in 1896, near the end of the great depression of 1893 in which bank failures were rampant. Judge Sanborn was more likely reflecting the views of those reacting to economic hard times of the mid-1890s than the intentions of those who voted for the National Bank Act in 1864.

Even assuming that *Westervelt* correctly described Congressional intent in adopting the “dismiss at pleasure” provision, its view of Congressional intent does not suggest any intent to preclude state anti-discrimination laws. Instead, *Westervelt* concerned only the bank’s ability to enter into contracts with officers that guaranteed them a fixed term of employment. The Eighth Circuit rejected the argument that a cashier’s appointment each January had “converted his term of office from a continuous term, at the will of the board of directors, into annual terms.”⁸⁴ As the court suggested by its use of “at will” and “at pleasure” synonymously, the National Bank Act’s “dismiss at pleasure” provision was intended to prevent banks from *contracting* away their ability to fire their officers “at will” and to prevent them from entering into annual contracts only terminable for cause. The Eighth Circuit held that a bank by-law that provides that a cashier shall hold his office for a stated, one-year term is void because the “at pleasure” provision prohibits the enforcement of definite term contracts.⁸⁵

Furthermore, requiring banks to comply with state anti-discrimination law does not undermine “public trust” in these institutions or tie the banks’ hands when suspicion of an officer arises, even if that suspicion does not rise to the level of just cause for discharge.⁸⁶ The public trust is not promoted by “a broad interpretation of 12 U.S.C. § 24 (Fifth) which would give a national bank the unfettered right to discharge an officer on discriminatory grounds.”⁸⁷ Instead, the underlying justification for the provision “involved the banking community’s ability to remove inefficient, incompetent, or dishonest officers ‘at will’ without contractual challenges stemming from oral representations, employee handbooks, and ambiguous contractual lan-

tion and to maintain the public trust in national banks) (citing *Westervelt*); cf. Sharon Kahn & Brian McCarthy, *At-Will Employment in the Banking Industry: Ripe for a Change*, 17 HOFSTRA LAB. & EMP. L.J. 195, 215 (1999) (“[C]ongressional intent behind the at pleasure provision of the Bank Acts was to ensure the financial stability of the banking institutions by affording them the means to discharge employees who were felt to compromise an institution’s integrity.”).

⁸³ Note, *Statutory Provision for Removal of Corporate Officer “At Pleasure,”* 50 HARV. L. REV. 518, 520 (1937).

⁸⁴ *Id.* at 523.

⁸⁵ *Westervelt*, 76 F. at 122.

⁸⁶ Firing an employee based on a mistaken belief that the employee engaged in misconduct is not discrimination.

⁸⁷ *Mueller v. First Nat’l Bank of the Quad Cities*, 797 F. Supp. 656, 663 (C.D. Ill. 1992).

guage.”⁸⁸ State anti-discrimination laws do not jeopardize the national banks’ ability to fire untrustworthy officers. They permit these employers to discharge their officers “for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of legal wrong.”⁸⁹ They proscribe only discharge for discriminatory reasons. The public trust in our nation’s banks is not promoted by an interpretation that gives them authority to discharge officers on the basis of the officers’ race, color, national origin, age, sex, or religion.

Other early cases and treatises also interpreted the “at pleasure” provision of the National Bank Act solely as a restriction on the banks’ ability to enter voluntarily into fixed-term contracts and do not suggest that the provision was intended to grant them the ability to ignore otherwise applicable state law. In 1917, the Eighth Circuit again clarified that the purpose of the “at pleasure” provision was to prevent the bank from entering into definite term contracts terminable only for cause.⁹⁰ The court held that the bank “cannot renounce or agree not to exercise its power of dismissal.”⁹¹ However, it can “contract that, subject to the free exercise of this power of *removal at will*, it will not continue [a bank officer] in office beyond a specified time without another appointment, [or] that subject to the right to exercise its power of *removal at pleasure* it will continue him until that time.”⁹² A banking treatise⁹³ described the holding of *Harrington v. First National Bank of Chittanooga*,⁹⁴ the first case to interpret the National Bank Act, as codifying bank officers’ tenure: “The officers hold their positions by the tenure specified in the statute, to wit the pleasure of the board of directors.”⁹⁵ The early-twentieth-century treatises similarly interpret the “at pleasure” provision as a limit on the bank’s ability to contract away its right to remove its officers.⁹⁶

⁸⁸ *Id.*

⁸⁹ *Payne v. Western & Allegheny R.R. Co.*, 81 Tenn. 507, 519-20 (1884).

⁹⁰ *See Rankin v. Tygard*, 198 F. 795, 795 (8th Cir. 1912).

⁹¹ *Id.* at 799.

⁹² *Id.* (emphasis added).

⁹³ A.S. PRATT, PRATT’S DIGEST OF NATIONAL BANKING LAWS, 1917.

⁹⁴ 1 Thompson & Cook 361 (N.Y.) (1873).

⁹⁵ PRATT, *supra* note 93, at 24.

⁹⁶ *See, e.g.*, JOHN TORREY MORSE, A TREATISE ON THE LAW OF BANKS AND BANKING, § 209, at 668 (5th ed. 1917) (“A national bank cannot hire its officers for any specified time, unless they are subject to removal by the board of directors.”); *see also* Note, *supra* note 83, at 518 (summarizing the courts as having “uniformly . . . construed [the National Bank Act] to permit removal of officers under employment contracts for a term of years without liability”); *cf.* R.M. Jackson, *Stipendiary Magistrates and Lay Justices*, 9 MOD. L. REV. 1 (1946) (describing the Stipendiary Magistrates Act of 1863 which stated that Stipendiaries hold their office “during pleasure” to provide for “no security of tenure”); *Tenure of Office by Colonial Judges*, 16 MOD. L. REV. 502, 506 (1953) (arguing that British judges who serve “at pleasure” do not hold their offices “by virtue of contract,” for any contract not to dismiss them for a specified period is “ultra vires and unenforceable”). Additionally, the author’s computerized search of 20,000 nineteenth and early twentieth century American and British legal treatises found not a single one suggesting that the Banking Act’s “at pleasure” provision had been

Even a few courts continue to recognize that the “dismiss at pleasure” provision only “impl[ies] the absence of a contractual relationship between employer and employee.”⁹⁷ While the circuits have ignored these cases, the District Court for the Central District of Illinois has held that “[t]he right to be free from discrimination is not a contractual right and therefore is not necessarily embodied in the dismiss at pleasure language.”⁹⁸ The Supreme Court of Oklahoma concluded that the power bestowed by the “at pleasure” provision is not unlimited and refers only to contractual obligations.⁹⁹ Many recent cases also simply hold that the “at pleasure” provision bars bank officers’ *contract* claims.¹⁰⁰ Similarly, courts that have found other claims not to be preempted reaffirm that the “at pleasure” provision preempts state contract law.¹⁰¹

2. *The Presumption Against Preemption of the States’ Historic Police Powers*

As discussed above, there is no historical basis for believing that the “at pleasure” provisions should be interpreted to prevent states from forbidding discriminatory discharge of bank officers. This conclusion is reinforced by the well-established presumption against federal preemption in areas traditionally regulated by the states.¹⁰² As the Supreme Court has instructed, the presumption is overcome and the “historic police powers of the States” are preempted only when “that [is] the clear and manifest purpose of Congress.”¹⁰³ There is no evidence that Congress intended to forbid the states

intended or was being interpreted to preempt state employment law. *Making of Modern Law, Legal Treatises 1800-1926*, available through Harvard Law Library website.

⁹⁷ *Mueller v. First Nat’l Bank of the Quad Cities*, 797 F. Supp. 656, 663 (C.D. Ill. 1992).

⁹⁸ *Id.*

⁹⁹ *Sargent v. Central Nat’l Bank & Trust*, 809 P.2d 1298, 1302-03 (Okla. 1991); *see also* *Katsiavelos v. Fed. Reserve Bank of Chicago*, 1995 WL 103308 (N.D. Ill. 1995) (“Notable is the definition of ‘pleasure’ as provided by the Oxford Universal Dictionary (3rd Ed. 1933): ‘[a]s or when one pleases, *at will*, at discretion . . . *one’s will*, desire, choice.’”) (emphasis in original).

¹⁰⁰ *See, e.g., Mahooney v. Crocker Nat’l Bank*, 571 F. Supp. 287 (N.D. Cal. 1983) (holding that the board of directors of National Bank can dismiss the bank president before expiration of his stated tenure without incurring liability); *Kemper v. First Nat’l Bank in Newton*, 418 N.E.2d 819 (Ill. App. Ct. 1981) (same).

¹⁰¹ *Citizens Nat’l Bank and Trust v. Stockwell*, 675 So.2d 584, 586 (Fla. 1996) (finding that Section 24 does not preclude enforcement of severance benefits triggered by firing even though the contract could not prevent the bank from discharging its officer); *Ambro v. American Nat’l Bank and Trust of Mich.*, 394 N.W.2d 46, 49 (Mich. Ct. App. 1986) (holding that “the National Bank Act preempts state law in the area of wrongful discharge [for breach of contract] and precludes plaintiff from making a *Toussaint*-based claim for damages against the bank”); *Rohde v. First Deposit Nat’l Bank*, 497 A.2d 1214 (N.H. 1985) (finding that Section 24 does not immunize national bank from tort claims but does immunize it from liability for breach of employment contract).

¹⁰² *DeBuono v. NYSA-ILA Med. & Clinical Services Fund*, 520 U.S. 806, 813 (1997); *Jones v. Rath Packing*, 430 U.S. 519, 525 (1977).

¹⁰³ *Cipollone v. Liggett Group*, 505 U.S. 504, 518 (1992) (noting the strong “presumption against the pre-emption of state police power regulations”); *Rice v. Santa Fe Elevator*, 331 U.S. 218, 230 (1947).

from exercising historic police power to regulate employment relations. As explained above, the early cases and treatises all interpret the dismiss-at-pleasure provision solely as a restriction on the national bank's ability to enter voluntarily into fixed-term *contracts* and do not suggest that the provision was intended to grant them the ability to ignore otherwise applicable state law. They give no indication that the National Bank Act should be interpreted to supplant the states' longstanding authority to impose *non-contractual* restrictions on the discharge of employees.

The states' historic police powers clearly extend to the field of employment regulation.¹⁰⁴ Less than a decade after the National Bank Act was passed, the Supreme Court explicitly recognized employment relations as within the police power of the states. In *Bradwell v. Illinois*,¹⁰⁵ the Court upheld a state law forbidding women from becoming lawyers. The Court cited the *Slaughter-House Cases*,¹⁰⁶ decided the same term, to support the proposition that the decision not to grant women licenses to practice law "is one of those powers which is not transferred for its protection to the Federal government."¹⁰⁷ It has long been clear that the states "possess broad authority under their police powers to regulate the employment relationship to protect workers within the State[s]"¹⁰⁸ and that state anti-discrimination statutes are within the states' police power.¹⁰⁹

Although states would not enact anti-discrimination laws until decades after the National Bank Act's enactment, they were already regulating employment relations by the mid-nineteenth century. By the 1830s, states had begun enacting child labor laws, and by the 1850s, states had begun passing "protective legislation" regulating the working conditions of women.¹¹⁰ In addition, by the end of the nineteenth century, more than a dozen states had enacted laws prohibiting "yellow dog" contracts. Congress demonstrated no "clear and manifest purpose" to intrude into the historic police powers of the states by enacting the "dismiss at pleasure" provision. The circuit court decisions run headlong into the presumption against preemption by finding preemption despite the lack of clear Congressional intention to displace the

¹⁰⁴ *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 97 (1945).

¹⁰⁵ 83 U.S. 130, 142 (1872) (Bradley, J., concurring); *see id.* at 143 ("This fairly belongs to the police power of the State; and, in my opinion . . . it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex.").

¹⁰⁶ 83 U.S. 36, 38 (1872).

¹⁰⁷ *Bradwell*, 83 U.S. at 139.

¹⁰⁸ *DeCanas v. Bica*, 424 U.S. 351, 356 (1976).

¹⁰⁹ WASH. REV. CODE ANN. § 49.60.010 (2006).

¹¹⁰ In 1852, Ohio passed the first labor law limiting women's workday to ten hours. By the time the National Bank Act passed, the debate over the constitutionality of protective legislation was intensifying. *See, e.g., Ritchie v. People*, 40 N.E. 454, 456 (Ill. 1895) (holding that the state statute limiting women's work-day violated petitioner's Fourteenth Amendment right to equal protection under the law).

states’ police power.¹¹¹ This interpretation of the National Bank Act prevents states from asserting their own interests in protecting, for example, whistleblowers who warn about illegal bank conduct, employees who file worker compensation claims, or persons who are willing to serve as jurors. Similarly, it undermines the efforts of states that protect against employment discrimination based on sexual orientation.

Moreover, the presumption against preemption is reinforced by the explicit provisions of the modern federal anti-discrimination statutes. Federal anti-discrimination laws are carefully designed to function in harmony with their state law counterparts to provide the most effective relief for the aggrieved plaintiff.¹¹² Federal anti-discrimination laws explicitly disclaim any intent to preempt state law or to “occupy the field” of employment discrimination law. Title VII provides an explicit anti-preemption provision: “Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State.”¹¹³ Similarly, the ADA preserves state law “provid[ing] greater or equal protection for the rights of individuals with disabilities.”¹¹⁴ The ADEA also contains an anti-preemption provision, specifying that the federal law will not “affect the jurisdiction . . . of any State performing like functions.”¹¹⁵

Not only do the federal statutes contain explicit anti-preemption provisions, they also utilize state procedures to lessen the federal administrative caseload and to decrease the time that a plaintiff with a meritorious claim must wait for relief. The Supreme Court noted that the anti-preemption provisions of the federal anti-discrimination laws are intended to screen from the federal courts those discrimination complaints that might be settled to the satisfaction of the grievant in state proceedings.¹¹⁶ Unlike claims at the federal level, “at the local level . . . many cases are disposed of in a matter of

¹¹¹ That, in the midst of this state regulation, Congress only empowered national banks to “dismiss at pleasure” further indicates the limited scope of the provision. If, as argued, Congress’s intention was only to limit the bank’s ability to enter into fixed-term contracts with its officers, the “dismissal” clause is sufficient. If, however, Congress had the “sweeping” intent to displace the states’ police power by preempting state employment legislation in the field of banking or to preclude the further employment legislation, Congress would have at least included “hire” or “demote” at pleasure.

¹¹² *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 757 (1979) (“[S]tate agencies must be given at least some opportunity to solve problems of discrimination.”); *cf.* *Shaw v. Delta Air Lines, Inc.* 463 U.S. 85, 102 (1983) (“Given the importance of state fair employment laws to the federal enforcement scheme, pre-emption of the Human Rights Law would impair Title VII to the extent that the Human Rights Law provides a means of enforcing Title VII’s commands.”).

¹¹³ 42 U.S.C. § 2000e-7 (2000); *see also* 42 U.S.C. 2000h-4 (2000); *California Fed. Savings and Loan Ass’n v. Guerra*, 479 U.S. 272, 288 (1964) (Title VII was intended primarily to “assert the intention of Congress to preserve existing civil rights laws.”) (quoting 110 CONG. REC. 2788 (1964) (statement of Rep. Meader)).

¹¹⁴ 42 U.S.C. § 12201(b) (2000).

¹¹⁵ 29 U.S.C. § 633(a) (2000).

¹¹⁶ *Oscar Mayer*, 441 U.S. at 755.

days, and certainly not more than a few weeks.”¹¹⁷ With the Equal Employment Opportunity Commission (EEOC) expecting to have a backlog of 47,516 charges of employment discrimination in 2007, state remedies are all the more necessary today.¹¹⁸

Furthermore, federal anti-discrimination law was intended to permit the state “laboratories of democracy” to adopt stronger regulations as local morality dictated. Even the Ninth Circuit’s relatively mild form of preemption would frustrate this intent by not permitting states to protect national bank officers or federal reserve bank employees from discrimination on the basis of sexual orientation. Although the courts have assumed that this injustice is simply a lesson in federal legislative supremacy, it is, in reality, a mistake based on historical inaccuracy.

V. CONCLUSION

The National Bank Act of 1864 conflicts with neither state nor federal anti-discrimination law. The Act’s “at pleasure” provision only restricts a bank’s right to contract away its ability to discharge and does not eliminate a bank’s duty to comply with state or federal restrictions on discharge. In sum, the National Bank Act of 1864 does not prevent the states from protecting bank officers by providing more relief than federal law supplies or by covering forms of discrimination not covered by federal statutes, and the Third, Sixth, and Ninth Circuits have erred in holding otherwise.

¹¹⁷ *Id.* at 757-58 (quoting 110 CONG. REC. 13087 (1964) (remarks of Sen. Dirksen)).

¹¹⁸ See Christopher Lee, *EEOC is Hobbled, Groups Contend*, WASH. POST, June 14, 2006, at A21.