

4-20-2021

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Recommended Citation

Richard Cordray, *Cooperative Federalism in Consumer Finance: Remarks at the James R. Browning Symposium on Consumer Law in the 21st Century at Alexander Blewett III School of Law at the University of Montana, September 25, 2020*, 82 Mont. L. Rev. 1 (2021).

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TRANSCRIPT

**COOPERATIVE FEDERALISM IN CONSUMER FINANCE:
REMARKS AT THE JAMES R. BROWNING
SYMPOSIUM ON CONSUMER LAW IN THE 21ST
CENTURY AT ALEXANDER BLEWETT III
SCHOOL OF LAW AT THE UNIVERSITY OF
MONTANA, SEPTEMBER 25, 2020**

Richard Cordray*

Thank you for inviting me to the Symposium. I am sorry not to be in Montana with you, but I have registered my personal complaints about the pandemic with Professor Cowie, who will, I am sure, take effective action to address them.

I. INTRODUCTION

My topic today is “Cooperative Federalism in Consumer Finance.” That is, in fact, an accurate description of the framework now in place for consumer financial regulation and enforcement, which builds on the inviting scaffold produced by the Dodd-Frank Act.¹ In several respects, that scaffold has provided a robust role for both federal and state officials—neither to the exclusion of the others—and we will explore the current state of that interesting relationship further along our way. But I would also like to proceed more broadly and schematically, by positioning developments in

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1. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (the portion of the law that concerns consumer financial protection is Title X, which is known in its own right as the Consumer Financial Protection Act of 2010, is codified at 12 U.S.C. §§ 5301-5641).

the field of consumer finance against the history and context of judicial and political federalism in this country.

To start, I will begin by defining the rather vague phrase “cooperative federalism” with more specificity. By this I mean two things: both “concurrent” federalism and “collegial” federalism. Together, these two approaches are helping to optimize joint activity toward the objective of ensuring that consumers are treated fairly in the financial marketplace. Here I will provide a brief overview as a roadmap of the discussion, and we will return to reinforce these points at the end.

The spirit of federalism that pervades this area of government action is “concurrent” in the sense that it preserves the dual spheres of federal and state action through the distinct mechanisms of standard-setting (legislation and regulation) and standard-enforcement (litigation and supervision). The standards guiding private conduct may be established by judges, legislators, or administrative officials, operating at either level—federal or state. Each has the authority to operate in parallel with the others.² Even where the standards set by federal and state officials may conflict with one another in some respects, they will be validated and respected as long as they are pursued on behalf of a shared objective: namely, affording more protection to consumers in the financial marketplace. This is not ordinarily how the reconciliation of federal and state law works, but it reflects an enhanced form of federalism in this particular field.³

Second, the nature of federalism in this area is also “collegial.” In that regard, it goes beyond parallel action. If federal officials were able to establish and enforce federal laws protecting consumers in the financial marketplace, and state officials were able to establish and enforce state laws protecting those same consumers, the result would be a robust regime with the aim of *maximizing* consumer financial protection. But unless those officials made it a point to collaborate with one another through joint strategic planning, conscious sharing of information, and working together to address certain problems of mutual interest, the resulting parallel scheme would fail to *optimize* consumer financial protection. Indeed, such collegial action is

2. This gives rise to six distinct potential sources of law: federal statutes (including agency and court interpretation), federal regulations (including agency and court interpretation), federal common law, state statutes (including agency and court interpretation), state regulations (including agency and court interpretation), and state common law. I do not address treaties, which have limited application here, or constitutional law, which generally imposes limits on government action but does not provide rules of conduct to govern the private behavior of persons and companies.

3. This description of “concurrent federalism” thus harmonizes with standard principles of preemption analysis as follows. First, it does not involve “express preemption,” which holds that supreme federal law negates state law whenever Congress explicitly says so (because Congress has not said so). Second, it does not involve “implied preemption” of state law that conflicts with federal law because Congress has specified as a “meta-principle” of judicial interpretation that state law *may* conflict with federal law if it affords *more* protection to consumers.

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necessary to avoid three problems: (1) conflicting activity that would hinder officials from achieving their intended goals; (2) uncoordinated activity that undermines the teamwork needed to make the best use of pooled resources; and (3) the resulting disrepute from chaotic or failed efforts that would jeopardize the continued practice of cooperative federalism.⁴

Take, for example, the federal consumer financial law known as the Fair Debt Collection Practices Act (“FDCPA”).⁵ This statute sets various standards for debt collection practices as a matter of federal law. Under the more recent Dodd-Frank Act, the Consumer Financial Protection Bureau (“CFPB”) also has the authority to adopt regulations that set federal standards.⁶ Other standards for debt collection practices have been prescribed over the years as a matter of state law—by judicial decision, by statute, and by regulations imposed on licensees.

How do these federal and state standards relate to one another? We know because Congress has spoken directly to this point. The FDCPA expressly articulates that it “does not annul, alter, or affect, or exempt any person . . . from complying with the laws of any State with respect to debt collection practices” *except* where the state laws are inconsistent with the FDCPA “and then only to the extent of the inconsistency.”⁷ It then sets up a system of concurrent federalism by adding as follows: “a State law is not inconsistent with [the FDCPA] if the protection such law affords any consumer is greater than the protection provided by [the FDCPA].”⁸ The established practice in this area has also reflected “collegial federalism,” insofar as both the Federal Trade Commission and the CFPB have engaged in joint investigations and enforcement actions with state attorneys general and state regulators to address harmful debt collection practices, as well as devised joint strategies for attacking certain problems through regular and periodic meetings, trainings, hearings, and conferences.⁹

4. The distinction between “maximizing” and “optimizing” the amount of work done in the field of consumer finance thus reflects lingering concerns about the kinds of issues that are usually considered in terms of conflict preemption. It is entirely plausible, for example, that simply expanding activity will not do more to protect consumers if federal and state officials lack any strategic focus on how to achieve their shared goal.

5. An Act to amend the Consumer Credit Protection Act to prohibit abusive practices by debt collectors, Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified at 15 U.S.C. §§ 1692–1692p).

6. See Dodd-Frank Wall Street Reform and Consumer Protection Act § 1089(4).

7. 15 U.S.C. § 1692n (1977).

8. *Id.*

9. See, e.g., Tom Carter, *Partners bring more than 100 debt collection actions*, CONSUMER.FTC.GOV (Nov. 4, 2015), <https://perma.cc/XC3B-2VCT> (joint action by more than 70 federal, state, and local government agencies); CFPB Web Team, *We’re ordering JP Morgan Chase to refund \$50 million and stop collecting on 528,000 accounts*, CONSUMERFINANCE.GOV (July 8, 2015), <https://perma.cc/6BQV-Z5PK> (joint action by CFPB and 48 state attorneys general).

II. AMERICAN FEDERALISM: A BRIEF HISTORY

But now let's move away from the narrow field of consumer finance, broaden our lens, and consider how these matters can be squared against a historical account of American federalism. Is cooperative federalism as I have just briefly described it a workable doctrine, and is it compatible with accepted constitutional principles that govern federal-state relations?

Our system of dual sovereignty was devised as an unusual response to practical necessity—given an existing confederacy of separate states—and as an experimental departure from previous mechanisms for governing a large area with a large population. Empire, federation, and alliances of various kinds had risen and fallen over many centuries, and the Founders had canvassed the historical record, which they found wanting in its instability.¹⁰ So they now sought to undertake something new and more lasting. They introduced two new conceptual innovations with antecedents in recent political thinkers: separation of powers and federalism. The latter idea required them to “split the atom of sovereignty” by establishing a new federal government alongside a multiplicity of state governments, both operating on the same citizenry in ways that were certain to spawn conflicts.¹¹ Those conflicts would require appropriate and consensual resolution through the courts and peaceful political channels, rather than through violence, revolution, or open warfare.

To begin with, the concept of the “police power” was recognized as the basis for states to regulate the behavior of private individuals and enforce order within their territorial boundaries so as to promote and maintain the health, safety, morals, and general welfare of the public as a whole.¹² This was viewed as a residual power, inherent in the nature of government, which existed in the states prior to the institution of the federal government.¹³ By contrast, the new central government was granted only enumerated powers and was limited in its ability to dictate constraints on individual behavior unless expressly authorized to do so in the narrow fields thus enu-

10. See *THE FEDERALIST PAPERS* (C. Rossiter ed. 1961), especially Nos. 6-10 (on extent of union as safeguarding liberty); Nos. 15-22 (on defects of current confederation and historical antecedents); Nos. 32-33 (on concurrent taxation power and the Supremacy Clause); and Nos. 45-46 (comparison of the powers of the state and federal governments).

11. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). See also *Gibbons v. Ogden*, 22 U.S. 1, 204-05 (1824) (“In our complex system, presenting the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers; and of numerous State governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise.”).

12. See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (“[T]he police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.”).

13. *Id.* at 25 (“[T]he police power [is] a power which the state did not surrender when becoming a member of the Union under the Constitution.”).

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merated (and as later extended through interpretation of the Necessary and Proper Clause).¹⁴

The *manner* of setting binding standards for citizens to follow was not entirely spelled out in either the federal or the state constitutions. Both established the procedures for exercising legislative power, which is the overarching source of rules controlling private conduct in our government. But neither government was limited in its power only to statutory enactments; it is also accepted (and thus implicit) that the courts were another source of judgments that are binding on individual liberty. Even in the absence of positive legislation, American courts were thus understood to be able to devise rules of decision that could govern private behavior by specifying what can and cannot be done within the bounds of the common law developed by the judges themselves.¹⁵ Quite a large body of common law already existed, encompassing the terms of contracts and rights of property, and devising the details of civil wrongs (tort law) and criminal violations. Without the state legislatures or the Congress even breathing a word on these subjects, the judicial process provided a means of ordering private conduct in these areas.

But this prompts an immediate question: do both federal and state courts have this implicit judicial authority to the same extent? If federal courts can develop their own federal common law, then are we still adhering to the principles of a limited federal government that governs citizens only in the areas of enumerated legislative power?

In the first few decades of the new republic, the federal courts answered this question in different ways. It seems to me that one of those answers was right, and the other was wrong. In the field of criminal law, the Supreme Court held that the federal courts cannot “exercise . . . common law jurisdiction in criminal cases.”¹⁶ The case was one that admittedly touched on federal interests, since a criminal indictment was brought for libel against those who published a claim that the President and U.S. Congress had secretly voted a “present” (that is, a bribe) of two million dollars to Napoleon Bonaparte for leave to make a treaty with Spain.¹⁷ Declining to narrow the grounds of its decision, the Court concluded that the “powers of the general Government are made up of concessions from the several states—whatever is not expressly given to the former, the latter expressly reserve.”¹⁸ Since the Congress had not exercised its enumerated powers to define such an offense or confer such jurisdiction, the federal courts could

14. See U.S. CONST. art. I.

15. See, e.g., MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* (1988).

16. *United States v. Hudson & Goodwin*, 11 U.S. 32, 32 (1812).

17. *Id.*

18. *Id.* at 33.

not invoke the common law to arrogate such power for themselves.¹⁹ “The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offense.”²⁰

By contrast, when the Supreme Court ultimately reached the question of whether the federal courts possessed the authority to interpret and apply federal common law in civil cases—rather than being bound to follow state law—it erred by holding that they could do so. The issue in *Swift v. Tyson*²¹ involved principles of general commercial law.²² The Court rested its holding on its interpretation of the Judiciary Act of 1789, which stated that “the laws of the several states, except where the [C]onstitution, treaties, or statutes of the United States shall otherwise recognize or provide, shall be regarded as rules of decision in trials at common law in the Courts of the United States.”²³ The Court read this language, rather dubiously, to cover only the state court interpretation of state *statutes*, in matters that were “immovable and intra-territorial in their nature and character.”²⁴ That decision opened the floodgates for federal courts to apply federal common law to plaintiffs engaged in interstate commerce who believed their interests would be better served by repairing to the federal courts rather than having their interests determined by the state courts applying potentially more parochial state common law.

The effects of the ruling were felt for almost a century; from 1842 until the unfortunate precedent was finally overruled by the Supreme Court in 1938.²⁵ Yet the Judiciary Act should never have been read in this way, and even if it had, it should have been found unconstitutional insofar as it authorized federal courts to apply federal common law in civil cases even where no controlling legislation had been enacted pursuant to Congress’s enumerated powers. Instead, state law (whether grounded in the common law or state statutes) should have continued to govern all civil matters—including interstate commercial matters—unless or until a federal law on the subject had been properly enacted. As the Court ultimately and succinctly held: “There is no federal general common law.”²⁶ And the Consti-

19. *Id.*

20. *Id.* at 34.

21. 41 U.S. 1 (1842).

22. *Id.* at 1–2.

23. *Swift*, 41 U.S. at 1. With minimal modifications, the same language continues to govern state laws as rules of decision in civil actions in the federal courts today. *See* 28 U.S.C. § 1652 (1948).

24. *Swift*, 41 U.S. at 18.

25. *See* *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78–80 (1938).

26. *Id.* at 78 (as Justice Brandeis, speaking for the Court, continued: “Congress has no power to declare substantive rules of common law applicable in a State, whether they be local in their nature or ‘general’ . . . [a]nd no clause in the Constitution purports to confer such a power upon the federal courts.”).

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tution has not granted to either the Congress or the federal courts the power to authorize it in derogation of state law.

In one other respect, our federal system was also distorted by an unfortunate line of Supreme Court precedents that interfered with the application of state law. In cases such as *Lochner v. New York*,²⁷ the Court held that the Due Process Clause of the U.S. Constitution protects the liberty of private contract rights so completely that even state statutes were struck down if they impaired contracts.²⁸ Over the years, the laws that were invalidated included child labor laws, unionization laws, maximum-hours laws, minimum-wage laws, and pension laws.²⁹ The arena for state regulation of private conduct was thus stunted even at the height of the Progressive Era. Not only were states prevented from addressing these categories of problems by passing their own laws, but nothing else could be done about those problems, based on the constitutional obstacle. Progress gave way to stalemate. This too proved to be a wrong turn, as after four decades these precedents were finally and decisively overruled by the New Deal Court.³⁰

What do we learn about the structure of federalism from these cases? First, they reveal that from the outset of the republic, the substrata of civil and criminal ordering of individual behavior occurred largely at the state level. For the first century or more, this occurred through the mechanisms of the common law, eventually supplemented by a growing body of state statutes. To the extent that the federal courts interfered with this regime—either by advancing the doctrine of federal common law or by erecting constitutional barriers to state authority—those efforts were conceptually flawed and later abandoned. Constitutional review of state social and economic measures, especially, became highly deferential.³¹

27. 198 U.S. 45 (1905).

28. *Id.* at 64–65.

29. *See, e.g.*, *Hammer v. Dagenhart*, 247 U.S. 251, 268, 273–74 (1918) (child labor law); *Adair v. United States*, 208 U.S. 161, 171, 179 (1908) (unionization law); *Coppage v. Kansas*, 236 U.S. 1, 26 (1915) (unionization law); *Lochner*, 198 U.S. at 64 (maximum-hours law); *Adkins v. Children’s Hosp. of D.C.*, 261 U.S. 525, 535, 561 (1923) (minimum-wage law); *Railroad Ret. Bd. v. Alton R. Co.*, 295 U.S. 330, 344, 374 (1935) (pension law).

30. The decision marking the turn away from *Lochner*, though the Supreme Court did not yet overrule that precedent, was *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), where the Court upheld a minimum-wage law. By the end of the next decade, however, the Court was comfortable declaring, as it upheld a state unionization law, that it had absolutely rejected the “*Allgeyer-Lochner-Adair-Coppage* constitutional doctrine.” *Lincoln Fed. Labor Union No. 19129 v. Northwest Iron & Metal Co.*, 335 U.S. 525, 535 (1949).

31. *See, e.g.*, *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993) (“In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”); *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 (1938) (“[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or

The remaining legitimate means of constraining state governance was through legislative action, by statutes enacted within the enumerated powers of Congress or, increasingly common in recent decades, by Congress delegating rulemaking authority to federal agencies and executive departments to supplement its own lawmaking efforts. It is settled that either type of federal law can have preemptive effect under the Supremacy Clause by nullifying conflicting state laws.³² Congress can specify the extent of its intrusion into the realm of state law either by expressly proclaiming its intention to do so (whether by occupying the entire field of conduct or by specifying a narrower scope of negation) or by detailing a scheme of federal law that would be undermined or frustrated by conflicting state laws that interfere with the federal scheme.³³

But, crucially, the displacement of state law is to be determined entirely as a matter of congressional intent.³⁴ And though this puts the determination in the hands of federal officials in the first instance, it is notable that those legislators often have prior background in state government and are cautious about exercising their power to restrict the state authority to govern. In particular, where it is understood that achieving the desired objectives will require ample attention and resources, they can specify that the federal and state relationship should take the form of cumulative and coordinated efforts to serve the same core purposes.

An excellent example is the field of criminal law. Recall that in the Supreme Court's early days, it held that federal courts lacked authority to develop federal common-law principles of crime and punishment. Legislative action was required to produce federal criminal law.³⁵ But when Congress began to do so, it took pains to make clear that federal criminal law would not be construed to preempt state criminal law. In the same statute where it provides that the federal courts shall have exclusive jurisdiction over the laws defining federal criminal offenses, Congress also stated that nothing in the federal criminal code "shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof."³⁶

generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.").

32. See, e.g., *Geier v. American Honda Motor Co.*, 529 U.S. 861, 865 (2000) (state lawsuit impermissibly conflicted with federal law and regulation); *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153 (1982) ("Federal regulations have no less pre-emptive [sic] effect than federal statutes.").

33. See, e.g., *International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987).

34. See, e.g., *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("[A]nalysis of the scope of the statute's pre-emption is guided by our oft-repeated comment . . . that '[t]he purpose of Congress is the ultimate touch-stone' in every pre-emption [sic] case (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963))."

35. See *United States v. Hudson & Goodwin*, 11 U.S. 32, 32–34 (1812).

36. 18 U.S.C. § 3231 (1948).

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As Justice Reed noted, “That declaration springs from the federal character of our Nation. It recognizes the fact that maintenance of order and fairness rests primarily with the States. The section was first enacted in 1825 and has appeared successively in the federal criminal laws since that time.”³⁷

It essentially goes without saying, then, that federal criminal laws are almost never understood to preempt state criminal laws.³⁸ Even if the definition of a federal crime conflicts or overlaps with the definition of a state crime of the same or similar nature, the one traditionally does not nullify the other.³⁹ Indeed, the congeniality of federal and state criminal law is made more emphatic by the fact that the courts have long sanctioned parallel prosecutions by federal and state governments for the very same conduct, holding also that they do not violate the Double Jeopardy Clause.⁴⁰ This seems to reflect an overriding determination that both federal and state officials shall fulfill their respective roles in maintaining public order and protecting the public safety—objectives that lie at the core of the nature of the police power. Over the years, this federal-state relationship has been further strengthened by accustomed processes that foster close coordination in many criminal investigations, strategic working groups, and joint task forces.⁴¹

37. *Pennsylvania v. Nelson*, 350 U.S. 497, 519 (1956) (Reed, J., dissenting).

38. *See, e.g., Cohens v. Virginia*, 19 U.S. 264, 443 (1821) (“To interfere with the penal laws of a State, where they . . . have for their sole object the internal government of the country, is a very serious measure, which Congress cannot be supposed to adopt lightly or inconsiderately.”). *But see Nelson*, 350 U.S. at 499 (a state law that prohibits sedition defined as the knowing advocacy of the overthrow of the U.S. government by force and violence is prohibited by a federal criminal law that “proscribes the same conduct”); *cf. Uphaus v. Wyman*, 360 U.S. 72, 76–77 (1959) (no preemption of state law prohibiting sedition against the state government itself).

39. *See, e.g., Gilbert v. Minnesota*, 254 U.S. 325, 329 (1920) (state criminal law banning interference with federal military enlistment is valid and does not conflict with federal law addressing the same subject because “this country is one composed of many, and must on occasions be animated as one, and that the constituted and constituting sovereignties must have power of cooperation”); *Fox v. Ohio*, 46 U.S. 410, 434–35 (1847) (state criminal law prohibiting the counterfeiting of federal money is not preempted by federal criminal law governing the same act).

40. *See, e.g., United States v. Lanza*, 260 U.S. 377, 382 (1922) (explaining and upholding the “dual sovereignty” doctrine prior to incorporation of the Double Jeopardy Clause against the state governments); *Gamble v. United States*, 139 S. Ct. 1960, 1980 (2019) (reaffirming “dual sovereignty” doctrine after incorporation of the Double Jeopardy Clause).

41. *See, e.g., William A. Geller & Norval Morris, Relations Between Federal and Local Police*, 15 *CRIME AND JUSTICE* 231, 231 (1992) (describing considerable progress that has been made to deepen connections between federal and nonfederal police through information exchange, technical assistance, and multijurisdictional operational task forces); Harry Litman & Mark D. Greenberg, *Dual Prosecutions: A Model for Concurrent Federal Jurisdiction*, 543 *ANNALS AM. ACAD. POL. & SOC. SCI.* 72, 72 (1996) (empirical analysis of Justice Department’s “*Petite* policy” for determining when to pursue dual prosecution of the same matter under federal law after prior state prosecution).

III. APPLICATION TO CONSUMER FINANCE

What does all of this have to do with consumer finance? I would argue that it sets the parameters for a robust version of federalism that will protect consumers in the financial marketplace. The mere fact of dissimilarities or conflicting provisions in federal and state law, even governing the same categories of conduct, need not result in state law being displaced under the Supremacy Clause. Of course, private actors who are governed by those laws will likely complain that they are being subjected to confusing, duplicative, and burdensome obligations. And they will have a point: it is much easier to comply with one set of standards than with multiple discordant sources of coercion. But there is no constitutional mandate of the greatest simplicity in governing a federal republic. Companies, and individuals, already comply with distinct and overlapping legal regimes governing taxation, property rights, contract terms, torts, conditions of employment, and many other items. We have parallel federal and state antitrust laws, securities laws, and unfair competition laws. How federal and state law should intersect in consumer finance, as in any other area of law, depends entirely on what Congress has to say.

And in the Dodd-Frank Act, Congress spoke very clearly by declaring for the same kind of vigorous federalism in protecting consumers in the financial marketplace that it has provided in the realm of criminal law. It did so by embracing language that evoked the provisions quoted earlier from the FDCPA. In a section entitled “Relation to State Law,” Congress stated that the entire Consumer Financial Protection Act, except in a few limited particulars, “may not be construed as annulling, altering, or affecting, or exempting any person subject to [its provisions] from complying with the statutes, regulations, orders, or interpretations in effect in any State, except to the extent that any such provision of law is inconsistent with the provisions of this [Act], and then only to the extent of the inconsistency.”⁴² This, again, is a careful and narrow preemption provision. But almost immediately it is narrowed further, by specifying that “a statute, regulation, order, or interpretation in effect in any State is not inconsistent with the provisions of this [Act] if the protection that such statute, regulation, order, or interpretation affords to consumers is greater than the protection provided under this [Act.]”⁴³ In other words, state consumer financial law is valid even if it conflicts with federal consumer financial law, so long as it goes further toward the same fundamental objective of protecting consumers in the financial marketplace.

42. 12 U.S.C. § 5551(a)(1) (2010).

43. 12 U.S.C. § 5551(a)(2) (2010).

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To make an analogy to constitutional law, Congress here is speaking the language of “rights.” The candid principle can be restated to say that consumers have a right to greater financial protection, and it does not matter if it emanates from federal or state sources. More “rights” are better, and if that occurs because federal law so extends them, then all well and good, but if states wish to extend them still further, they are free to do so. This is comparable to the fundamental principle of state constitutional law—that rights are a “one-way ratchet,” and if state constitutions seek to expand even the same or similar individual rights beyond their federal counterparts, the resulting limitations on the powers of their state governments will be upheld, despite any apparent substantive conflict.⁴⁴

Congress thus provided a meta-principle of interpretation here, which has the effect of overriding standard preemption analysis by stipulating that the matter at issue is so important that the combined efforts of federal and state law are to be prized even at the cost and confusion of the difficulties they may create for private individuals in conducting their affairs. This principle bolsters the concurrent nature of federalism in consumer finance.

In addition, the Dodd-Frank Act contains another unusual provision that authorizes state attorneys general as well as state regulators to bring appropriate actions “to enforce provisions of [the Consumer Financial Protection Act] or regulations issued under this [Act]” and “to secure remedies under provisions of this [Act] or remedies otherwise provided under other provisions of law with respect to such an entity.”⁴⁵ In other words, state officials are granted the authority directly to enforce federal law, along with their federal counterparts. To underscore the collegial nature of the ways that federal and state officials are intertwined in their work, Congress enabled a majority of states to petition the CFPB to initiate proceedings to establish or modify consumer protection regulations and laid out a process for state officials to notify and consult with the CFPB whenever they decide to file an action to enforce federal consumer financial law.⁴⁶

Why would Congress push so hard to insist on cooperative federalism to this degree in the realm of consumer finance? One reason may be a frank recognition that enforcing fairness in the marketplace, as a means of promoting the general welfare, has always been at the heart of the police power reserved to the states.⁴⁷ For over a century, this task was accomplished

44. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) (describing how state constitutional provisions on the same subject can extend greater protection of individual rights against state governments than is conferred by the analogous provisions of the U.S. Constitution).

45. 12 U.S.C. § 5552(a)(1) (2010).

46. See 12 U.S.C. §§ 5551(c), 5552(b) (2010).

47. See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (expounding on the police power reserved to the states and noting: “Real liberty for all could not exist under the operation of a principle

mostly by state judges applying the common law of fraud—which, as codified in a great variety of federal and state statutes and regulations, is still the primary basis for most consumer financial law—though the narrower limitations imposed by the common law were loosened over time by state statutes defining unfair and deceptive practices that were deemed necessary to provide greater protection against economic oppression and injustice.⁴⁸ Legal and political theorists have long affirmed that consent freely given, which is a basic principle regulating private conduct in a market-based economic system that rests on consumer choice, is vitiated by force and fraud.⁴⁹ Just as Congress has long preserved a robust system of federalism for criminal law, so it may find it warranted today to ensure a similarly potent form of federalism for consumer financial law.

The expanded role of consumer finance in our everyday lives over the past two generations, due to the financialization of the economy, has correspondingly increased the vulnerability of individual consumers of household credit and payment products.⁵⁰ At the time when the Dodd-Frank Act was passed, Congress was enacting more than 150 pages of additional federal statutes and authorizing a new federal agency to focus on this subject and write additional regulations. In light of those developments, Congress no doubt found it advisable to go out of its way to state clearly its intention to maintain all the same protections of state law, without letting them be sacrificed, consciously or inadvertently, in the name of conflict preemption.

Joint enforcement of consumer financial law by federal and state officials has become the norm in this field. It can be extremely hard to link arms across the separate spaces created by different parts and levels of our government. Those efforts encounter tremendous logistical and cultural challenges, the reality of distinct duties and responsibilities, and the natural impulse to preserve and protect one's own turf unobstructed. The Federal Trade Commission had paved the way for many years through its practice

which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.”); *cf.* *Pennsylvania v. Nelson*, 350 U.S. 497, 519 (1956) (Reed, J., dissenting) (“the maintenance of order and fairness rests primarily with the States”).

48. See generally Carolyn Carter, *Consumer Protection in the States: A 50-State Evaluation of Unfair and Deceptive Practices Laws*, NCLC.ORG (Mar. 2018), <https://perma.cc/9BVG-79Q6>.

49. See, e.g., *Fairbanks v. Snow*, 13 N.E. 596, 598 (Mass. 1887) (the effect on a contract is the same whether consent is induced by duress or fraud, for “whether it springs from a fear or from a belief, the party has been subjected to an improper motive for action”); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, Second Treatise § 181 (P. Laslett ed. 1960) (“For whether by force he begins the injury, or else having quietly and by fraud done the injury, he refuses to make reparation, and by force maintains it, (which is the same thing as at first to have done it by force) ’tis unjust use of force that [puts a man into the state of war].”).

50. See RICHARD CORDRAY, *WATCHDOG: HOW PROTECTING CONSUMERS CAN SAVE OUR FAMILIES, OUR ECONOMY, AND OUR DEMOCRACY* 17–18, 32–33 (2020).

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of conducting “sweeps” aimed at specific categories of consumer abuse and inviting state and local officials to join them in announcing either parallel or coordinated actions.⁵¹ The Justice Department took this kind of coordination to new heights with the national mortgage servicing settlement, a mega-action that overhauled an entire industry and provided tens of billions of dollars in consumer redress for fraudulent conduct by the big banks.⁵² The CFPB took its cue from these antecedents and mounted blanket efforts to strategize and work closely with both state attorneys general and state financial regulators. Many of its enforcement actions involved state partners, ranging from solitary officials to larger matters that garnered participation from all fifty states.⁵³ Furthermore, Congress’s decision to authorize the states to enforce federal consumer financial law has looked positively prescient in the current era, which has seen a retreat from aggressive activity by the CFPB and other federal agencies.⁵⁴

Another reason to preserve the protections of state law is the recognition that the historic grounds of consumer financial protection, before the modern era of federal attention, rested chiefly on state law as declared and interpreted in private actions. Again, the federal role really started with the Federal Trade Commission’s enforcement of unfair competition law and later was greatly expanded by Congress as it has passed dozens of consumer financial laws since 1968.⁵⁵ But government enforcement of consumer financial law has always been strongly supplemented by a mass of private litigation, mostly under state law but now increasingly under federal law. That longstanding source of consumer financial law is now threatened, however, by the Supreme Court’s demolition of private litigation through

51. See, e.g., Federal Trade Commission, *FTC, State, and Federal Law Enforcement Partners Announce Nationwide Crackdown on Phantom and Abusive Debt Collection*, FTC.GOV (Sept. 29, 2020), <https://perma.cc/7LKG-Z2RC> (announcing more than 50 coordinated enforcement actions taken by federal and state officials).

52. See U.S. Department of Justice, *Federal Government and State Attorneys General Reach \$25 Billion Agreement with Five Largest Mortgage Servicers to Address Mortgage Loan Servicing and Foreclosure Abuses*, JUSTICE.GOV (Feb. 9, 2012), <https://perma.cc/AWB7-TRXV>.

53. See, e.g., Consumer Financial Protection Bureau, *CFPB, State Authorities Order Ocwen to Provide \$2 Billion in Relief to Homeowners for Servicing Wrongs*, CONSUMERFINANCE.GOV (Dec. 19, 2013), <https://perma.cc/KRM8-C5RQ>. See generally Christopher Lewis Peterson, *Consumer Financial Protection Bureau Law Enforcement: An Empirical Review*, 90 TULANE L. REV. 1057, 1096 (2016) (analyzing first four years of CFPB enforcement actions and finding that virtually all consumer relief was obtained in cases involving collaboration with other state or federal law enforcement partners).

54. See, e.g., U.S. House of Representatives, Report of the Committee on Financial Services, *Settling for Nothing: How Kraninger’s CFPB Leaves Consumers High and Dry*, FINANCIALSERVICES.HOUSE.GOV 7–8 (Oct. 2019), <https://perma.cc/4GT2-4KDT> (“Enforcement Activity Declines Dramatically Under Trump-Appointed Leadership”).

55. See Andrea Ryan, Gunnar Trumbull & Peter Tufano, *A Brief Postwar History of U.S. Consumer Finance*, 85 BUS. HIST. REV. 461, 488 (2011) (listing approximately forty key legal events, mostly legislative enactments, in consumer finance between 1968–2009, prior to enactment of the Dodd-Frank Act).

its creative and expansive reading of the Federal Arbitration Act.⁵⁶ The CFPB sought to walk back the use of arbitration clauses to override private rights of action by adopting a regulation that would have preserved consumer class actions, but this initiative was defeated in the Congress in 2017 by a margin of one vote in the Senate.⁵⁷ These restrictions on private litigation have struck a great blow to consumer financial protection. This development further amplifies the need for federal and state officials to work closely together to make the best possible use of their limited resources to address the acknowledged problem of “under-enforcement” of these laws.⁵⁸

At the same time, Congress went further in the Dodd-Frank Act, by frankly encouraging and inviting the states to do even more if they thought greater consumer financial protections would be justified to look out for the welfare of their own citizens. A growing number of states are accepting that invitation. Several states have enacted statutes to address the problem of student loan servicing, which has been an area where federal action has diminished.⁵⁹ California has just passed a new law requiring debt collectors to be licensed in order to corral abuses.⁶⁰ More states are considering or adopting laws to rein in high-cost payday lending, even as the CFPB is seeking to roll back the regulation that had imposed the first-ever federal controls on this industry.⁶¹ And less than a month ago (in fact, the signing

56. See, e.g., Colorado Proposition 111, Limits on Payday Loan Charges, [BALLOTOPIA.ORG](https://perma.cc/A89Z-XSGF) (2018), <https://perma.cc/A89Z-XSGF> (same; passed with 77% of the vote); South Dakota Payday Lending Initiative, Initiated Measure 21, [BALLOTOPIA.ORG](https://perma.cc/SWTR-FLDB) (2016), <https://perma.cc/SWTR-FLDB> (voter-initiated ballot measure proposed to impose a 36% interest rate cap on payday loans; passed with 76% of the vote).

57. See *CORDRAY*, *supra* note 50, at 193–98 (discussing the arbitration rule and how it was overridden by Congress under the Congressional Review Act); see also Consumer Financial Protection Bureau, *Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)*, [FILES.CONSUMERFINANCE.GOV](https://perma.cc/FA7G-JGWM) (Mar. 2015), <https://perma.cc/FA7G-JGWM> (exhaustive study commissioned by Congress on the nature and use of mandatory pre-dispute arbitration clauses in the field of consumer finance).

58. See, e.g., Jenny Tansey, *Voices from the Corporate Enforcement Gap*, PUBLIC RIGHTS PROJECT, <https://perma.cc/85C5-W2UX> (July 2019) (identifying and describing underutilized authority of state and local governments to vindicate public rights).

59. See, e.g., An Act Concerning a Student Loan Bill of Rights, P.A. No. 15-162 (Conn. 2015) (codified at *CONN. GEN. STAT.* §§ 36a-846 to 36a-854); Student Loan Servicing Rights Act, P.A. No. 100-540 (Ill. 2017) (codified at 110 *ILL. COMP. STAT.* 992/1-1 to 99-99); Student Loan Servicing, A.B. No. 376 (Cal. 2019) (codified at *CAL. CIV. CODE*, Div. 3, Part 4, Title 1.6C.10).

60. This measure passed the legislature on August 31, 2020. See Debt Collection Licensing Act, S.B. No. 908 (Cal. 2020) (codified at *CAL. CIV. CODE*, Div. 25).

61. See, e.g., *American Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013) (same even where plaintiff’s cost of individually arbitrating a federal statutory claim exceeds the potential recovery); *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333 (2011) (Federal Arbitration Act of 1925 preempts state laws that forbid agreements to forestall class action arbitration). See generally, *CORDRAY*, *supra* note 50, at 198–204, 207–09 (recounting background to CFPB’s adoption of federal “ability to repay” rule applicable to payday and motor vehicle title loans and further controversies over its implementation); Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 *Fed. Reg.* 54,472 (Nov. 17, 2017) (federal payday regulation adopted); Payday, Vehicle Title, and Certain High-Cost Installment Loans, 85 *Fed. Reg.* 44,382 (July 22, 2020) (rescinding portions of prior regulation).

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ceremony will be held later today), the California General Assembly adopted a major overhaul measure to transform its current Department of Business Oversight into a new Department of Financial Protection and Innovation, with a new pro-consumer mission, expanded powers, and comprehensive oversight over all types of consumer financial products and services without regard to licensing.⁶²

IV. CONCLUSION

Federalism as a practical concept comprises a set of arrangements and doctrines about the structure and powers of different levels of government. In itself, federalism is a neutral principle that can be used or misused in different areas and distinct historical contexts. At the time of the Founding, it emerged as an ingenious solution to the problem of creating and maintaining a large commercial republic. It has helped secure and preserve individual liberties against the growing threat posed by a strong central government. But it also has long impeded this country's progress toward broader and more universal civil rights. Here we have traced aspects of its development in yet another area, where it may prove to have beneficent effects in bolstering the role and status of the individual in our common market economy. In the field of consumer finance, at least, we can see that the enduring principles of American federalism remain vital and vibrant.

62. See California Consumer Financial Protection Law, A.B. No. 1864 (Cal. 2020) (codified at CAL. FIN. CODE, Div. 24).

