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Cuomo v. Clearing House Association: The Latest Chapter in the OCC's Pursuit of Chevron Deference

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I. INTRODUCTION

Contrary to popular belief, the government agency that regulates the activities of national banks is not funded by individual taxpayers. In fact, nearly all of the fees and assessments that the Office of the Comptroller of the Currency (OCC) collects to fund its operations come from the federally chartered banks that it regulates. Some critics call this a conflict of interest that makes the OCC a puppet of national banks used to promulgate regulations to evade state consumer protection laws and lessen competitive equality with state banks. Indeed, such regulations often have the force to preempt inconsistent state banking and consumer protection laws under the Supremacy Clause of the Constitution. In response, state financial regulators and attorneys general have in recent years contested OCC’s preemptive regulations but have been subjected to litigation when attempting to enforce state banking and consumer protection laws. Litigation has involved both the extent of the OCC’s

1. See OCC, About the OCC, http://www.occ.treas.gov/aboutocc.htm (last visited Jan. 7, 2010) (“The OCC does not receive any appropriations from Congress. Instead, its operations are funded primarily by assessments on national banks. National banks pay for their examinations, and . . . for the OCC’s processing of their corporate applications. The OCC also receives revenue from its investment income, primarily from U.S. Treasury securities.”).

2. Id.


4. “[F]ederal preemption” is “[t]he principle (derived from the Supremacy Clause) that a federal law can supersede or supplant any inconsistent state law or regulation.” BLACK’S LAW DICTIONARY 1216 (8th ed. 2004); see also infra note 33 (discussing the three types of state law preemption).

“visitorial powers” over national banks under the National Bank Act (NBA) and how much deference courts should generally give to the OCC’s interpretations of the NBA.

Two factors can determine the preemptive impact of an OCC regulation or an interpretation of the NBA – its impact on federalism and the clarity of the interpreted statutory provision.

The Supreme Court has alternately considered each of these issues without definitively reconciling them. Prior to 2007, the Court consistently granted Chevron deference to the OCC’s interpretations of the NBA. Granting a federal agency Chevron deference means allowing an agency’s interpretation of a federal

Preemption of State Regulation of National Banks: Hearing on Congressional Review of OCC Preemption Before the Subcomm. on Oversight and Investigations, H. Comm. on Fin. Serv., 109th Cong. 3 (2004) (statement of Diana L. Taylor, N.Y. Superintendent of Banks, on behalf of the Conference of State Bank Supervisors) (“The OCC’s new regulations usurp the powers of the Congress, stifle state efforts to protect their citizens, and threaten not only the dual banking system but also public confidence in our financial services industry.”); infra Part II (describing the OCC’s 2004 preemption rules).

6. A general definition of “visitorial power” is “[t]he power to inspect or make decisions about an entity’s operations.” BLACK’S LAW DICTIONARY 1209 (8th ed. 2004). In Cuomo v. Clearing House Ass’n, the meaning of the phrase “visitorial powers” in NBA statute 12 U.S.C. § 484 was at issue. Cuomo v. Clearing House Ass’n, L.L.C., 129 S. Ct. 2710, 2715 (2009); see infra pp. 484-90 and note 110.

7. See generally Clearing House Ass’n, L.L.C., 394 F. Supp. 2d 620 (deciding whether New York State’s attorney general could enforce the Fair Housing Act against national banks under 12 U.S.C. § 484(a)); Wachovia Bank, N.A., 334 F. Supp. 2d 957 (deciding whether an OCC regulation preempts a Michigan law that would require a national bank operating subsidiary to register with the State, making the subsidiary subject to state visitation).

8. See generally Cuomo, 129 S. Ct. 2710 (addressing both the clarity of the relevant NBA “visitorial powers” statute and the federalism concerns arising from an OCC interpretation of it); Watters v. Wachovia Bank, N.A., 550 U.S. 1 (2007) (Stevens, J., dissenting) (discussing the federalism concerns surrounding a preemptive OCC regulation relating to national bank operating subsidiaries).

9. Compare Cuomo, 129 S. Ct. 2710 (ruling not to uphold an OCC regulation that would prohibit states from enforcing their non-preempted state banking laws against national banks), with Watters, 550 U.S. 1 (upholding an OCC regulation that would preempt state licensing and registration laws from applying to national bank operating subsidiaries).

statute to prevail when it is either consistent with Congress's "clear" intent in the statute (referred to as "Step One"), or if Congress's intent is not clear and the statute is ambiguous, when the agency's interpretation is based on a "permissible construction of the statute" (referred to as "Step Two"). Once granted deference under either Step One or Step Two, an agency's interpretation of a federal statute can preempt state law. Since the enactment of the OCC's final preemption rules in 2004 and the subsequent Supreme Court rulings in Watters v. Wachovia Bank and Cuomo v. Clearing House Ass'n, Chevron continues to be the test to apply in cases involving OCC interpretations of NBA statutes. However, the test is now applied less deferentially when federalism implications are of greater concern.

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11. See Chevron, 467 U.S. at 842-43. Chevron U.S.A. v. Natural Resources Defense Council involved the Environmental Protection Agency's construction of a term in the Clean Air Act that was not "explicitly defined" by Congress and not specifically addressed in the Act's legislative history. Id. at 837. The Court, through Justice Stevens, established a test to be applied in situations where a federal agency makes a determination on the meaning of ambiguous language in a federal statute. See id. at 842-43. The two-step framework was described by the Court as follows:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43. The Court ultimately held that "[t]he EPA's . . . definition is a permissible construction of the statutory term[.]" Id.


15. See infra Part IV.

16. See infra Part IV. Compare Cuomo, 129 S. Ct. at 2720 ("We have not invoked the presumption against pre-emption, and think it unnecessary to do so in giving force to the plain terms of the National Bank Act. Neither, however, should the incursion that the Comptroller's regulation makes upon traditional state powers be minimized.") with Watters, 550 U.S. at 41 (Stevens, J., dissenting) ("Even if the OCC did intend its regulation to pre-empt the state laws at issue here, it would still
This Comment will trace the evolution of the Supreme Court's *Chevron* jurisprudence with respect to cases involving OCC interpretations of NBA provisions, and it will consider the effects of federalism concerns on how *Chevron* is applied. First, the Comment will provide some background on the preemption of state banking laws in Part II and briefly describe the OCC's 2004 final preemption rules. Then, Part III of the Comment will explore two Supreme Court cases decided before the issuance of these rules and two decided after, with an emphasis on the most recent case, *Cuomo v. Clearing House Ass'n.* Finally, Part IV will further discuss *Cuomo* to understand where *Chevron* analysis presently stands as it relates to the OCC.

II. THE OCC'S FINAL PREEMPTION RULES

In 1996, the Supreme Court in *Barnett Bank of Marion County v. Nelson* decided whether a federal statute that permits national banks to sell insurance in small towns preempts a Florida statute that prohibited the practice. *Chevron* did not apply in this case, because the dispute did not involve a federal agency's interpretation of a federal statute. Instead, the Court applied what it called "ordinary legal principles of preemption" in ruling that the federal statute preempts the conflicting Florida law. A key aspect of these "principles of preemption" is that states should...
have the ability to regulate national banks insofar as their regulations do not "prevent or significantly interfere with" the exercise of national bank powers under the NBA.\textsuperscript{24} The Court qualified this by adding that "[l]egislative grants of both enumerated and incidental 'powers' to national banks historically have been interpreted as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law."\textsuperscript{25} Furthermore, the Court explained, when the NBA has not "expressly conditioned" a national bank power on a state's approval or permission, then the Court has typically found no condition or limitation on the exercise of the national bank power.\textsuperscript{26}

The language used by the Court in \textit{Barnett Bank} to clarify the preemptive force of the NBA gave the OCC some firm grounding for new regulations.\textsuperscript{27} In 2004, in an effort to clarify its authority over national banks under the NBA, the OCC issued two final regulations: one concerning its ability to preempt state laws ("preemption rule") and another clarifying its visitorial powers over national banks ("visitorial powers rule").\textsuperscript{28} The preemption rule was adopted "to specify the types of state laws that [do and] do not apply to national banks' lending and deposit taking activities."\textsuperscript{29} Under the new regulations, the OCC repeatedly stated that unless federal law makes an exception, "state laws that obstruct, impair, or condition a national bank's ability to fully exercise its powers" would not apply to national banks.\textsuperscript{30} This language stands in contrast to the language used in \textit{Barnett Bank}—that States should not be impeded in their attempts to regulate national banks if their regulations do not "prevent or significantly

\textsuperscript{24} \textit{Id.} at 33.
\textsuperscript{25} \textit{Id.} at 32.
\textsuperscript{27} See 12 C.F.R. §§ 7.4000, 7.4007, 7.4008, 7.4009, 34.4 (2009).
\textsuperscript{29} \textit{Bank Activities and Operations; Real Estate Lending and Appraisals}, 69 Fed. Reg. at 1904.
\textsuperscript{30} See 12 C.F.R. §§ 7.4000, 7.4007, 7.4008, 7.4009, 34.4.
interfere with" the exercise of national banks’ powers. The OCC justified the lower bar of “obstruct, impair, or condition” in its regulations by arguing that the Court used “a variety of formulations” in Barnett Bank to describe when state laws should not apply, and these formulations “defeat[] any suggestion that any one phrase constitutes the exclusive standard of preemption.” The OCC also insisted that the preemption rule did not amount to “field preemption,” as does the Office of Thrift Supervision’s (OTS) lending regulation.

The second 2004 regulation, the visitorial powers rule, clarifies “the scope of the OCC’s visitorial powers” and places limitations on states’ abilities to enforce their laws against national banks. Under the visitorial powers rule, the OCC interprets a statute in the NBA to give itself “exclusive power to inspect, examine, supervise, and regulate the business activities of national banks,” in addition to having the exclusive power to enforce state laws against national banks. Thus, the visitorial powers rule

31. See Barnett Bank of Marion County, N.A., 517 U.S. at 33.
33. Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. at 1911 (“[W]e decline to adopt the suggestion . . . that we declare that these regulations ‘occupy the field’ of national banks’ real estate lending, other lending, and deposit-taking activities.”). The preemption rule provides a description of the three different types of preemption, including “field preemption”:

State laws are preempted by Federal law, and thus rendered invalid with respect to national banks, by operation of the Supremacy Clause of the U.S. Constitution. The Supreme Court has identified three ways in which this may occur. First, Congress can adopt express language setting forth the existence and scope of preemption. Second, Congress can adopt a framework for regulation that “occupies the field” and leaves no room for states to adopt supplemental laws. Third, preemption may be found when state law actually conflicts with Federal law. Conflict will be found when either: (i) compliance with both laws is a “physical impossibility;” or (ii) when the state law stands “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”

Id. at 1910 (citations omitted). See also 12 C.F.R. § 560.2(a) (2009) (“[The OTS] occupies the entire field of lending regulation for federal savings associations.”).
suggests that even if a state law is not preempted under the preemption rule, enforcement of that state law will lie exclusively with the OCC. 36 Indeed, the OCC made the point that the new regulations would not preempt substantive state laws but would "clarify the appropriate agency for enforcing those state laws that are applicable to national banks." 37 Considering what appeared to be the OCC's expansion of its visitatorial powers at the expense of states being able to enforce their own banking laws and regulations against national banks, the visitatorial powers rule became a point of contention in Cuomo. 38

III. CHEVRON DEFERENCE AND THE OCC

The cases presented trace the evolution of the Supreme Court's granting of Chevron deference to the OCC, culminating in the most recent case, Cuomo v. Clearing House Ass'n. 39 In Cuomo, for the first time, the Court did not find the OCC's construction of ambiguous statutory language to be permissible under Chevron. 40

A. NationsBank of North Carolina v. Variable Life Insurance Co. (VALIC) 41

In 1995, the Supreme Court in VALIC upheld the OCC's interpretation of the NBA that would allow NationsBank to broker annuities. 42 VALIC made two main arguments in its effort to bar national banks from brokering annuities. 43 The first was that the OCC's interpretation of a provision in the NBA that describes national bank powers was "contrary to the clear intent of

38. See Cuomo, 129 S. Ct. at 2710, 2715.
40. See id.
42. Id. at 264.
43. Id. at 257-58, 260-61.
Congress.\textsuperscript{44} Second, VALIC argued that annuities are a type of insurance and, therefore, should be regulated under an NBA provision placing limitations on national bank insurance activities.\textsuperscript{45} The Court framed the \textit{Chevron} analysis for determining whether the OCC's interpretation of the NBA should be given deference as follows:

[W]hen we confront an expert administrator's statutory exposition, we inquire first whether "the intent of Congress is clear" as to "the precise question at issue." If so, "that is the end of the matter." But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." If the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give the administrator's judgment "controlling weight."\textsuperscript{46}

In \textit{VALIC}, the Court first decided that the OCC's interpretation of the NBA statute was "in accord with the legislature's intent, that 'the business of banking' . . . covers brokerage of financial investment instruments."\textsuperscript{47} Then, the Court deferred to the OCC's judgment that annuities are "financial investment instruments" and not a type of insurance covered by the NBA statute.\textsuperscript{48} Both conclusions were reached by applying

\textsuperscript{44} Id. at 257-58 (referring to the OCC's interpretation of national bank powers under 12 U.S.C. § 24 (Seventh)).
\textsuperscript{45} Id. at 260-61 (referring to the NBA provision 12 U.S.C. § 92).
\textsuperscript{46} Id. at 257 (citing \textit{Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc. et al.}, 467 U.S. 837, 842-44 (1984)).
\textsuperscript{47} NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 258-59 (1995) ("The second sentence of § 24 Seventh, in limiting banks' 'dealing in securities,' presupposes that banks have authority not circumscribed by the five specifically listed activities."); \textit{see also} 12 U.S.C. § 24 (Seventh) (2006) ("The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account[.]").
\textsuperscript{48} \textit{See} 12 U.S.C. § 92 (2006); \textit{Variable Annuity Life Ins. Co.}, 513 U.S. at 263-64 ("The Comptroller's classification of annuities, based on the tax deferral and
Chevron's Step Two to find that the OCC's statutory construction was reasonable in light of congressional intent and should be given controlling weight. Therefore, the Court readily granted Chevron deference to the OCC to allow national banks to expand their activities to include fixed and variable annuities.\(^5\)

VALIC did not involve the preemption of a state law on annuity sales by national banks.\(^5\) Nevertheless, the Court's characterization of annuities as financial investment instruments subsequently had a preemptive effect on a Texas Insurance Code provision that regulated annuities as insurance products and prohibited banks from selling them.\(^5\) Surely, the Court was aware that its decision could have a preemptive effect on some state laws, yet it was not deterred from granting Chevron deference to the OCC in VALIC.\(^5\) No federalism concerns arising from such preemptive effects were addressed by the Court.\(^5\) By negative implication, states' inability to regulate annuities as insurance for investment features that distinguish them from insurance, in short, is at least reasonable.)

49. Variable Annuity Life Ins. Co., 513 U.S. at 257-64 (citing Chevron, 467 U.S. at 842-44); see also U.S. v. Mead Corp., 533 U.S. 218, 231-32 (2001) (stating that "notice and comment" rulemaking or other "administrative formality" is not required in order to consider granting Chevron deference).

50. See Variable Annuity Life Ins. Co., 513 U.S. at 262-64 ("The Comptroller has concluded that the federal regime is best served by classifying annuities according to their functional characteristics. Congress has not ruled out that course; courts, therefore, have no cause to dictate to the Comptroller the state-law constraint VALIC espouses." (citing Chevron, 467 U.S. at 842)).

51. See Serious Threat, supra note 3, at 293 ("OCC's ruling did not contain a preemptive determination and was not offered as a justification for overriding state law. Accordingly, VALIC simply did not address the question of whether an OCC ruling should receive Chevron deference when the ruling either contains, or is used to support, a preemption claim.").


53. Professor Arthur Wilmarth argues that "deference granted to the OCC by the Supreme Court in VALIC has encouraged lower courts in subsequent cases to accept the OCC's interpretations of the 'incidental powers' of national banks," as described in 12 U.S.C. § 24 (Seventh). Serious Threat, supra note 3, at 289 n. 260. These federal district and circuit court decisions, "have generally deferred to the OCC under step two of Chevron unless another federal statute clearly indicates that the OCC lacks authority to approve the activity in question." Id.

the purpose of prohibiting or conditioning annuity brokerage by national banks would not adversely affect the balance of regulatory power between the states and the OCC. The following case involves a statutory interpretation of the NBA where federalism concerns are potentially greater and where actual preemption of a state law results from the decision.

B. Smiley v. Citibank (South Dakota)

In the 1996 opinion, Smiley v. Citibank (South Dakota), the NBA statute at issue permits a national bank to charge interest at the rate allowed by the state where the national bank is located. The question presented in Smiley was “whether the statutory term ‘interest’ encompasses late-payment fees.” The Court declared the meaning of the word “interest” to be ambiguous and explained that it is its “practice to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes they are charged with administering.” It also explained why Chevron deference is given in situations where there lies ambiguity:

We accord deference to agencies under Chevron, not because of a presumption that they drafted the provisions in question, or were present at the hearings, or spoke to the principal sponsors; but rather because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by

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55. See id.
58. Id. at 737; see also 12 U.S.C. § 85 (2006) (“Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located[,]”) (emphasis added).
59. Smiley, 517 U.S. at 737.
the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.61

The Court applied *Chevron's* Step Two to reach its conclusion.62 It upheld as reasonable the OCC's regulation interpreting the term "interest" in the statute to include late-payment fees.63 The Court elaborated somewhat on its *Chevron* analysis in *Smiley*, stating that "arbitrary [or] capricious" interpretations of the NBA or interpretations that are "manifestly contrary to the statute" will not be entitled to *Chevron* deference.64 But, even if the OCC took a particular position regarding the meaning of an NBA statute in the past, a new regulatory position taken in the future could still be entitled to deference.65

In contrast to VALIC, the *Smiley* decision directly resulted in the preemption of a state consumer protection law,66 but the Court did not find a preemption issue.67 Rather, the Court

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61. *Id.* at 740-41 (citing *Chevron*, 467 U.S. at 843-44).

62. *Id.* at 744-45 ("Since we have concluded that the Comptroller's regulation deserves deference, the question before us is not whether it represents the best interpretation of the statute, but whether it represents a reasonable one. The answer is obviously yes."). Whereas in VALIC there was not an OCC interpretive regulation, in *Smiley* there was one (the OCC regulation interpreting the word "interest" in the statute was proposed after litigation had already begun and just prior to the Court's hearing of the case), yet the Court used *Chevron* in both cases. Compare *Smiley*, 517 U.S. at 741 ("Nor does it matter that the regulation was prompted by litigation, including this very suit. Of course we deny deference to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice.") (citation and internal quotations omitted), with *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995) (OCC arguing for its construction of 12 U.S.C. § 24 (Seventh) on the basis of its own interpretive letters).

63. *Smiley*, 517 U.S. at 744-47 ("The definition of 'interest' that we ourselves set out in *Brown v. Hiatts*, 82 U.S. 177, 15 Wall. 177, 185, 21 L. Ed 128 (1873), decided shortly after the National Bank Act, likewise contained no indication that it was limited to charges expressed as a function of time or of amount of owing.").

64. *Smiley*, 517 U.S. at 742; see also *Variable Annuity Life Ins. Co.*, 513 U.S. at 258 n.2 (making a similar point that "[t]he exercise of the Comptroller's discretion . . . must be kept within reasonable bounds.").


66. *Id.* at 738 (stating that the California law against late-payment fees preempted by the OCC's interpretation of 12 U.S.C. § 85 was a state consumer protection law).

67. *Id.* at 744 ("[W]hether a statute is pre-emptive . . . is not the question at issue here; there is no doubt that § 85 pre-empts state law." (emphasis in original)). In deciding whether a statute is preemptive, the Court said "[w]e may assume (without
considered the case to be about the meaning of a word in a statute already known to be preemptive and not about whether the statute itself is preemptive. Actually, the NBA statute at issue specifically defers to state law; however, if the bank is “located” (i.e. incorporated in) in a particular State, Territory, or District, it may “export” the interest rate of that location to another state in which it does business. Thus, the state law of one state could have a preemptive effect on the state law of another state under the NBA statute. But, the Court did not address the aspect of the OCC’s interpretation that would increase the “scope” of the statute’s preemption by including late-payment fees and potentially other types of fees as “interest.” Therefore, the federalism question relating to the preemption of bank-fee-related consumer protection laws never truly arose. Professor Arthur Wilmarth has argued that “[i]n summarily dismissing the petitioner’s Chevron argument, the Court in Smiley overlooked the rather obvious fact that the OCC’s regulation adopted a very broad definition of ‘interest,’ thereby increasing the effective scope of preemption[.]” Another critic has argued that the Court’s
deciding) that the . . . question must always be decided de novo by the courts.” Smiley, 517 U.S. at 744. This means that if it were doubtful that a section of the NBA was intended to preempt state law, then a court should perhaps not automatically grant Chevron deference to the OCC on that question. See id.

68. See id. (stating that Petitioner’s argument “confuses the question of the substantive (as opposed to pre-emptive) meaning of a statute with the question of whether a statute is pre-emptive.”). The Court dismissed arguments in a prior case before it “that the ‘exportation’ of interest rates from the bank’s home State would ‘significantly impair the ability of States to enact effective usury laws’ with the observation that ‘this impairment . . . has always been implicit in the structure of the National Bank Act[,]’” Id. (citing Marquette Nat’l Bank of Minneapolis v. First of Omaha Serv. Corp., 439 U.S. 299, 318-19 (1978)).


72. Though the Court did not frame the question in terms of a state’s potential inability to enforce state laws on late payment fees against national banks to protect its residents, the obvious result takes power away from the states and grants it to the OCC. See Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 743-44 (1996).

73. See Serious Threat, supra note 3, at 294.
willingness to grant deference to the OCC so long as a statute itself is clearly intended by Congress to preempt state law goes too far in allowing the “agency to range far and wide from congressional intent” relating to the actual “scope” of preemption.\textsuperscript{74} This potential for overreaching by the OCC would have federalism implications that the Court did not consider, manifesting itself in the 2004 visitorial powers rule at issue in \textit{Cuomo}.\textsuperscript{75}

In \textit{Watters}, the Court was faced with a similar question to those in \textit{VALIC} and \textit{Smiley} about ambiguous language in the NBA that would result in the preemption of state auditing and licensing laws related to mortgage lending, but the Court found that \textit{Chevron} was not essential to deciding the case.\textsuperscript{76}

\textbf{C. Watters v. Wachovia Bank\textsuperscript{77}}

In the 2007 case, \textit{Watters v. Wachovia Bank},\textsuperscript{78} the issue was whether a national bank’s operating subsidiary conducting mortgage lending activities should be subject to a state’s auditing and licensing requirements for mortgage lenders.\textsuperscript{79} The Court affirmed the judgment, but not the reasoning, of the Sixth Circuit Court of Appeals that ruled in favor of Wachovia Bank.\textsuperscript{80}

The Sixth Circuit found, under \textit{Chevron’s} Step Two, that an OCC regulation serves to resolve an ambiguity in the NBA

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\textsuperscript{74} \textit{Federal Preemption, supra} note 71, at 1605. The critic further explains:

\textit{[O]nce Congress makes express its desire to preempt state law, the scope of that preemption suddenly widens to encompass any agency interpretation that can satisfy the requirement of ‘reasonableness...’ [U]nrestrained interpretation of a preemptive statute is equivalent to unrestrained preemption; and thus \textit{Smiley}'s distinction, coupled with \textit{Chevron} deference, opens the door to sweeping preemption of state law.}

\textit{Federal Preemption, supra} note 71, at 1605.


\textsuperscript{76} \textit{See} \textit{Watters v. Wachovia Bank, N.A.}, 550 U.S. 1, 20-21 (2007).

\textsuperscript{77} \textit{Watters v. Wachovia Bank, N.A.}, 550 U.S. 1 (2007). Justice Ginsburg wrote the opinion for a five-three Court in which Justice Thomas took no part. \textit{Id.}


\textsuperscript{79} \textit{Id.} at 7. The state statute exempts national and state banks from its requirements. \textit{Id.} at 8.

relating to states’ “visitorial powers” over national bank operating subsidiaries. Specifically, the circuit court reasoned that the OCC’s regulation, which asserts that “[s]tate laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank,” reflects “the eminently reasonable conclusion that when a bank chooses to utilize the authority it is granted under federal law, it ought not be hindered by conflicting state regulations.” The Sixth Circuit held that the regulation “reflects a ... well-reasoned approach to preempting state regulation of operating subsidiaries so as to avoid interference with national banks’ exercise of their powers ... and their ability to use operating subsidiaries in the dynamic market of bank and real estate lending.

Consequently, despite the absence in the NBA of an express preemption of state laws concerning national bank operating subsidiaries, the Sixth Circuit found the OCC’s regulation to be reasonable. The circuit court explained that national banks have been permitted to use operating subsidiaries “for decades” to conduct business that the national banks themselves could conduct. It appeared to view operating subsidiaries as organizational units of national banks, not as separate entities. Thus, by invoking the precedent in VALIC, the circuit court granted Chevron deference to the OCC in its interpretation of the NBA, allowing for the preemption of state laws regulating national bank operating subsidiaries if those state laws would be preempted for the parent national bank. The Sixth

82. Wachovia Bank, 431 F.3d at 562 (citation omitted); 12 C.F.R. § 7.4006.
83. Wachovia Bank, 431 F.3d at 562 (citing Wachovia Bank v. Burke, 414 F.3d 305, 321 (2d Cir. 2005)).
84. Id. at 563.
85. Id. at 562 (citing 66 Fed. Reg. 34, 788 (July 2, 2001) (“[F]or decades national banks have been authorized to use the operating subsidiary as a convenient and useful corporate form for conducting activities that the parent bank could conduct directly.”)).
86. See id. at 562-63 (citations omitted).
Circuit did not reference Smiley in its opinion, though its Chevron analysis was also consistent with that case. 88

In affirming the Sixth Circuit’s holding, the Supreme Court stated that “[t]he NBA is thus properly read by OCC to protect from state hindrance a national bank’s engagement in the ‘business of banking’ whether conducted by the bank itself or by an operating subsidiary, empowered to do only what the bank itself could do.” 89 Yet, the Court found the question of Chevron deference to be one of little practical importance, because the OCC’s regulation “merely clarifies and confirms what the NBA already conveys.” 90 The Court’s avoidance of Chevron is unusual because if a case can be decided under Chevron’s Step One (where the intent of Congress is “unambiguously expressed”), then the NBA would not necessitate any clarification by an OCC regulation. 91 On the other hand, if the relevant NBA statutes are ambiguous and require clarification, then Chevron’s Step Two should be applied. 92

Having set aside Chevron, the Court explained that national banks’ “authority to engage in the business of mortgage lending comes from the NBA[,] . . . as does the authority to conduct business through an operating subsidiary[,]” which is allowed to engage in the same activities as the parent national bank. 93 It follows that operating subsidiaries can engage in the

88. Compare id. at 562 (“If the Comptroller’s interpretation is reasonable, we must defer to its construction of the statute.”), with Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 744-45 (1996) (“Since we have concluded that the Comptroller’s regulation deserves deference, the question before us is not whether it represents the best interpretation of the statute, but whether it represents a reasonable one.”).

90. Id. at 20-21 (citations omitted); 12 C.F.R. § 7.4006 (2009).
92. See id. at 843.
93. Watters, 550 U.S. at 21 (citing 12 U.S.C. §§ 24 (Seventh), 24a(g)(3)(A), 371 (2006)). Essentially, the majority found that operating subsidiaries are alluded to by implication under 12 U.S.C. § 24a(g)(3)(A), because “financial subsidiaries” defined under this section do not include “a subsidiary that . . . engages solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that govern the conduct of such activities by national banks.” See 12 U.S.C. § 24a(g)(3)(A); Watters, 550 U.S. at 20-21. The dissent maintained that “Congress itself has never authorized national banks to use subsidiaries incorporated under state law to perform traditional banking functions[.]”
business of mortgage or real estate lending in the same manner that their national bank parents can. Because "real estate lending, when conducted by a national bank, is immune from state visitorial control[,]" it follows that the NBA "vests visitorial oversight [over operating subsidiaries conducting real estate lending] in OCC, not state regulators." The Court reached the same conclusion as the Sixth Circuit by brushing away the ambiguity in the NBA to find application of the "visitorial powers" statute to the activities of national bank operating subsidiaries.

The dissent in Watters contended that the OCC's justifications for adopting its regulation on operating subsidiaries

and that "the OCC's expansive interpretation of its authority" should not allow preemption. Watters, 550 U.S. at 30-31 (Stevens, J., dissenting).

94. See, e.g., Watters, 550 U.S. at 18 ("It was not material [in VALIC] that the function qualifying as within ‘the business of banking,’ . . . was to be carried out not by the bank itself, but by an operating subsidiary[.]" (citing 12 U.S.C. § 24 (Seventh))); NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251 (1995).


96. Watters, 550 U.S. at 21 (citing 12 U.S.C. § 484(a)).

97. See 12 U.S.C. § 484(a); Watters, 550 U.S. at 20-22; cf. Merrill, supra note 16, at 22 (finding it "untenable" that it was unnecessary to consider Chevron). Professor Merrill made the point that:

[t]he proposition that a state-chartered subsidiary has the same status as its national bank parent corporation for purposes of visitorial authority was established by a regulation adopted by the OCC, not by the "Act itself." So the Court, at least implicitly, had to determine whether this regulatory equation of parent and sub was a reasonable interpretation of the Act.

Merrill, supra note 16, at 22.

An interesting point about the majority opinion in Watters is its use of precedent. The Court wrote, "[a] national bank has the power to engage in real estate lending through an operating subsidiary, subject to the same terms and conditions as the national bank itself; that power cannot be significantly impaired or impeded by state law." Watters 550 U.S. at 21 (citing Barnett Bank of Marion County v. Nelson, 517 U.S. 25, 33-34; 12 U.S.C. §§ 24 (Seventh), 24a(g)(3)(A), 371) (emphasis added). It is notable that the Court cited Barnett Bank, referring to its own heightened threshold, and not the language from the OCC's 2004 preemption rule of "obstruct, impair, or condition." See id.; 12 C.F.R. §§ 7.4007, 7.4008, 7.4009, 34.4 (2009). The Watters Court did not expressly adopt the OCC's language, which could potentially sweep under it more state laws. See Watters 550 U.S. at 21; Barnett Bank, 517 U.S. at 33-34. This suggests that an argument made by the OCC that a particular non-preempted state law should be preempted because it "conditions" the activity of a national bank may not be enough to meet the "significantly interfere" bar set by Barnett Bank. See Barnett Bank, 517 U.S. at 33-34.
should not have been entitled to *Chevron* deference because the regulation had serious federalism implications. Justice Stevens wrote for the dissent that “the primary advantage of maintaining an operating subsidiary as a separate corporation is that it shields the national bank from the operating subsidiaries’ liabilities. . . . It is about whether a *state* corporation can avoid complying with *state* regulations, yet nevertheless take advantage of *state* laws insulating its owners from liability.”\(^9\)

Moreover, “[i]t is especially troubling that the Court so blithely pre-empts Michigan laws designed to protect consumers. Consumer protection is quintessentially a ‘field which the States have traditionally occupied.’”\(^9\)\(^9\)

Perhaps one reason why the majority chose not to rely on *Chevron* is because, as the dissent pointed out, the OCC regulation determined the extent to which state laws apply to operating subsidiaries even though the NBA never expressly mentions operating subsidiaries.\(^1\)\(^0\) Alternatively, the dissent explained that “when an agency purports to decide the scope of federal pre-emption, a healthy respect for state sovereignty calls for something less than *Chevron* deference.”\(^\)\(^°\)\(^2\) Though the dissent and the majority seemed to agree that *Chevron* did not apply, the dissent was far more willing to give weight to federalism implications of state law preemption.\(^1\)\(^0\)

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98. See *Watters*, 550 U.S. at 41-42 (Stevens, J., dissenting) (“Even if the OCC did intend its regulation to pre-empt the state laws at issue here, it would still not merit *Chevron* deference. No case from this Court has ever applied such a deferential standard to an agency decision that could so easily disrupt the federal-state balance.”); 12 C.F.R. § 7.4006 (2009).


100. Id. at 35-36 (Stevens, J., dissenting) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); see also id. at 38 (“State law has always provided the legal backdrop against which national banks make real estate loans[,]”).

101. See id. at 30-31 (Stevens, J., dissenting) (“Congress itself has never authorized national banks to use subsidiaries incorporated under state law to perform traditional banking functions. . . . The fact that it may have acquiesced in the OCC’s expansive interpretation of its authority is a plainly insufficient basis for finding preemption.”); 12 C.F.R. § 7.4006; *supra* note 93 (explaining that the majority “reads in” that operating subsidiaries are permitted under 12 U.S.C. § 24a).

102. *Watters*, 550 U.S. at 41 (Stevens, J., dissenting) (“[u]nlike Congress, administrative agencies are clearly not designed to represent the interests of States, yet with relative ease they can promulgate comprehensive and detailed regulations that have broad pre-emption ramifications for state law.” (quoting *Geier v. American Honda Motor Co.*, 529 U.S. 861, 908 (2000))).

103. See id. (“[T]he OCC’s regulation may drive companies seeking refuge from state regulation into the arms of federal parents, harm those state competitors who
Cuomo, in contrast to Watters, did not directly involve the preemption of a particular state law; rather, it involved the ability of states to enforce their valid, non-preempted state banking laws against national banks.\textsuperscript{104} The Court revived Chevron analysis in its opinion of the case.\textsuperscript{105}

D. Cuomo v. Clearing House Association\textsuperscript{106}

In 2005, the Attorney General of New York State sent letters to several national banks requesting private information about their lending practices under threat of subpoena\textsuperscript{107} to determine if New York’s fair lending laws had been violated.\textsuperscript{108} The Clearing House Association (CHA), a banking trade group, and the OCC filed suit to help the banks avoid the release of information to the attorney general.\textsuperscript{109}

Respondents OCC and CHA argued that the OCC’s visitorial powers rule, which prohibited the states from enforcing their own banking laws against national banks, correctly interpreted the nineteenth-century NBA statute describing the


\textsuperscript{105} See id.

\textsuperscript{106} Cuomo v. Clearing House Ass’n, L.L.C., 129 S. Ct. 2710 (2009). Justice Scalia authored the opinion for a five-four Court, in which Justice Thomas also wrote dissenting in part and concurring in part. Id.

\textsuperscript{107} Id. at 2714. The non-public information sought by New York’s attorney general concerned whether lenders were engaging in discriminatory practices. Clearing House Ass’n, L.L.C. v. Cuomo, 510 F.3d 105, 109 (2d Cir. 2007), aff’d in part, rev’d in part, 129 S. Ct. 2710.

\textsuperscript{108} Cuomo, 129 S. Ct. at 2714; N.Y. EXEC. LAW § 296-a (2009). The statute “broadly prohibits creditors from discriminating on the basis of sex, national origin, or other protected grounds.” Clearing House Ass’n, L.L.C., 510 F.3d 105, 109 n.3.

"visitorial powers" that apply to national banks. The OCC contended that the phrase "vested in the courts of justice" in the statute refers to the inherent power of the courts to gather information during litigation and does not reserve a state's right to visitation. These interpretations of "visitorial powers" and the "courts of justice" exception would effectively preclude the states from prosecuting law enforcement actions of non-preempted state banking laws against national banks in state courts.

The Court framed the question presented as "whether the [OCC's] regulation purporting to pre-empt state law enforcement can be upheld as a reasonable interpretation of the National Bank Act." The Court then acknowledged that normally "an agency's reasonable interpretation of a statute it is charged with administering" is given deference under Chevron. Because the Court construed the term "visitorial powers" in the NBA statute as ambiguous, it applied Chevron, stating that the OCC can give "authoritative meaning to the statute within the bounds of th[e] uncertainty." It concluded under Chevron's Step Two that the OCC's interpretation of "visitorial powers," which included "ordinary enforcement of the law," was not permissible because the interpretation exceeded "the outer limits of the term."

110. See Cuomo, 129 S. Ct. at 2714-15. The NBA's "visitorial powers" statute reads as follows:

No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.


113. Id. at 2714-15.


115. Id. at 2715.

116. See id. at 2715; but see Merrill, supra note 16, at 23 (asserting that the majority was unclear in its application of Chevron, acknowledging both that "'visitorial authority' is ambiguous" and insisting "that the 'outer limits' of the meaning of that term could be discerned 'through the clouded lens of history'").
Moreover, the Court declared that "[a]ny interpretation of 'visitorial powers' necessarily 'declares the pre-emptive scope of the NBA,'" implying that the OCC created a new preemptive authority for itself without Congressional mandate.117

According to the Court, precedent in First National Bank in St. Louis v. Missouri118 demonstrated that the Court had previously viewed the rights of "visitation," or "the right to oversee corporate affairs," as distinct from the power to enforce laws.119 The Court also pointed to historical evidence to demonstrate that when the NBA was written in 1864, "visitation" was regarded as only a sovereign's ability to "examine into the affairs of," "inspect," or "control" a corporation.120 Considering that in Watters, the Court described "visitation" as "the act of a superior or superintending officer, [visiting] a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations," the subsequent separation of law enforcement from the term "visitorial powers" in Cuomo came as a surprise.121 But the Cuomo majority found Watters as not inconsistent with its position, because Watters only concerned the states' power to generally supervise, oversee, and control national bank operating subsidiaries and did not speak to the states' power to enforce their non-preempted laws against them.122 Indeed, the Court referred to as "bizarre" the states' inability to enforce their own valid and non-preempted banking laws against national banks.123 Further, the Court did not accept the Respondents' view of the "courts of

117. See Cuomo, 129 S. Ct. at 2721 (citation omitted).
119. Cuomo, 129 S. Ct. at 2717 (citing First Nat'l Bank, 263 U. S. 640, which “upheld the right of the Attorney General of Missouri to bring suit to enforce a state anti-bank-branching law against a national bank”). "St. Louis is relevant to proper interpretation of 12 U.S.C. § 484(a) not because it is authoritative on the question whether States can enforce their banking laws, but because it is one in a long and unbroken line of cases distinguishing visitation from law enforcement." Id. at 2717 n.2.
120. Id. at 2716.
122. Cuomo, 129 S. Ct. at 2717.
123. Id. at 2718.
justice” exception as prohibiting “normal civil and criminal lawsuits” in state courts. The Court concluded that the OCC reasonably interpreted the term “visitorial powers” to include “‘conducting examinations [and] inspecting or requiring the production of books or records of national banks,’ . . . when the State conducts those activities in its capacity as supervisor of corporations,” but that it was not reasonable for the OCC to include “prosecuting enforcement actions in state courts” as part of the term. The Court expressed concern for the federalism implications of the OCC’s regulation, though it did not go so far as to invoke a “presumption against preemption” as the Watters dissent advocated. The Cuomo majority found, however, that the OCC’s interpretation of

124. Id. (“[V]isitation was normally conducted through use of the prerogative writs of mandamus and quo warranto. The exception could not possibly exempt that manner of exercising visitation, or else the exception would swallow the rule. Its only conceivable purpose is to preserve normal civil and criminal lawsuits.”).  
125. Id. at 2721 (citing 12 C.F.R. § 7.4000 (2009)).  
126. See id. (quoting 12 C.F.R. § 7.4000). But compare Merrill, supra note 16, at 23:  
Whether this was a [Chevron] “step one” decision, finding that the OCC had exceeded the “clear” limits of the statute, a “step two” decision, finding that the statute was ambiguous but the OCC’s interpretation was “unreasonable,” or conceivably even a “step zero” decision, finding that Chevron does not apply because the OCC had exceeded the bounds of its delegated authority, was left completely obscure.  
127. The Cuomo majority stated:  
[T]he dissent concludes, this case does not raise the sort of federalism concerns that prompt a presumption against pre-emption. We have not invoked the presumption against pre-emption, and think it unnecessary to do so in giving force to the plain terms of the National Bank Act. Neither, however, should the incursion that the Comptroller’s regulation makes upon traditional state powers be minimized . . . .  
The dissent seeks to minimize the regulation’s incursion upon state powers by claiming that the regulation does not “declare the pre-emptive scope of the [National Bank Act]” but merely “interpret[s] the term ‘visitorial powers.’”  

Cuomo, 129 S. Ct. at 2720-21; see also Watters v. Wachovia Bank, N.A., 550 U.S. 1, 32 (2007) (Stevens, J., dissenting) (“Consistent with our presumption against pre-emption -- a presumption I do not understand the Court to reject -- I would read § 484(A) to reflect Congress’ considered judgment not to preempt the application of state visitorial laws to national bank ‘affiliates.’”).
"'visitorial powers' necessarily 'declar[ed] the pre-emptive scope
of the [National Bank Act][.]."" The Watters dissent
recommended that "when an agency purports to decide the scope
of federal pre-emption, a healthy respect for state sovereignty calls
for something less than Chevron deference," but the Cuomo
majority instead used Chevron's Step Two to determine that the
OCC's interpretation of a legislative term was impermissible.130

Despite the fact that the Chevron analysis came out in
favor of New York's attorney general, the Court ruled that a
request for information by the attorney general under threat of
subpoena did not constitute "the exercise of the power of law
enforcement" in a court setting that the NBA contemplated.131
The Court upheld the district court's injunction of the attorney
general's information request, but reversed the prohibition placed
on the attorney general "from bringing judicial enforcement
actions" against national banks.132 This decision makes it possible
for attorneys general, and perhaps state banking commissioners, to
obtain private information from national banks through formal
enforcement actions of non-preempted state laws.133 State officials
will, however, face challenges in obtaining information to assist in
investigations of national bank activities because most state
examination laws have been preempted either by the courts or by
the OCC's preemption rule.134

128. See Cuomo, 129 S. Ct. at 2721 (citation omitted).
129. Watters, 550 U.S. at 41 (Stevens, J., dissenting) (citations omitted).
130. See Cuomo, 129 S. Ct. at 2715 ("We can discern the outer limits of the term
'visitorial powers' even through the clouded lens of history. They do not include, as
the Comptroller's expansive regulation would provide, ordinary enforcement of the
law.").
131. Id. at 2722 ("That is not the exercise of the power of law enforcement 'vested
in the courts of justice' which 12 U.S.C. § 484(A) exempts from the ban on exercise of
supervisory power.").
132. Id.
133. See Arthur E. Wilmarth, Jr., Cuomo v. Clearing House: A Crucial Victory for
the Dual Banking System and Consumer Protection, LOMBARD STREET, Aug. 17,
Victory].
134. See 12 C.F.R. §§ 7.4007, 7.4008, 7.4009, 34.4; Serious Threat, supra note 3, at
291; cf. Robert A. Long & Keith A. Noreika, Cuomo v. Clearing House Association:
A Misguided Decision That Could Have Been Worse, LOMBARD STREET, Aug. 17,
association-a-misguided-decision-that-could-have-been-worse ("While state authority
The dissenting opinion in *Cuomo*, written by Justice Thomas, considered "the only disputed question" to be "whether the statutory term 'visitorial powers' is ambiguous and, if so, whether OCC's construction of it is reasonable." Thus, the dissent also analyzed this case under *Chevron*'s two-step framework, finding ambiguity in the statutory term "visitorial powers" and giving evidence for why the term is subject to differing interpretations. According to the dissent, as long as the OCC's interpretation of an ambiguous term in the NBA is reasonable, the Court should grant *Chevron* deference, "even if the agency's reading differs from what the court believes is the best statutory interpretation." The dissent attempted to establish that the common law history of the term "visitorial powers" supports the sovereign's right to enforce laws against "civil corporations," such as banks. Because the Court typically defers to the "reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering," the dissent contended that the OCC is entitled to its interpretation of the relevant provision in the NBA for purposes of formulating its regulations.

In the regulation at issue in *Cuomo*, the OCC interpreted the term "visitorial powers" to allow itself to be the sole governmental body that could enforce state fair lending or other banking-related laws against national banks. In response to Attorney General Cuomo's claim that the OCC interpreted "visitorial powers" so as to preempt state laws, the dissent

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135. *Cuomo*, 129 S. Ct. at 2723 (Thomas, J., dissenting).
136. *Id.* at 2722-23 ("In *Chevron*, this Court held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion." (quoting Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv., 545 U.S. 967, 980 (2005))); *id.* at 2723-24 ("OCC's interpretation of 'visitorial powers' . . . fits comfortably within this broad dictionary definition of 'visitation[.]'" and "common-law tradition . . . suggests that visitorial powers were broader with respect to civil corporations, including banks.").
137. *Id.* at 2723 (quoting *Brand X*, 545 U.S. at 980).
138. *Id.* at 2727.
139. *Id.* at 2723 (citing U.S. v. Mead Corp., 533 U.S. 218, 229-30 (2001)), 2732-33.
140. *Id.* at 2715 (majority opinion); 12 C.F.R. § 7.4000(a) (1-2) (2009).
references Smiley, asserting that the attorney general is "confus[ing] the question of the substantive (as opposed to pre-emptive) meaning of a statute with the question of whether a statute is pre-emptive." Moreover, to contest the majority's claim that "any interpretation of 'visitorial powers' necessarily 'declares the preemptive scope of the NBA,'" the dissent wrote: "a federal agency's construction of an ambiguous statutory term may clarify the pre-emptive scope of enacted federal law, but that fact alone does not mean that it is the agency, rather than Congress, that has effected the pre-emption." The dissent concluded under Chevron's Step Two that "[h]ere, the text, structure, and history of 'visitorial powers' support the agency's reasonable interpretation" of the NBA statute.

IV. CONCLUSION

These four cases show that the Supreme Court has offered varied levels of deference to OCC interpretations of the NBA. VALIC and Smiley suggest that the Court is likely to grant Chevron deference when federalism implications are not at issue. In Watters, where federalism concerns were abundant, the Court did not affirm the Sixth Circuit's decision by granting Chevron deference. Instead, the Court snubbed the ambiguities and omissions in the NBA to find a clear Congressional purpose and avoided applying Chevron. Indeed, the Watters majority was aware that Congress could not have contemplated the application of the "visitorial powers" statute to operating subsidiaries of

142. Cuomo, 129 S. Ct. at 2721.
143. Id. at 2733.
144. Id.
145. See Merrill, supra note 16, at 25 (asserting that in Smiley, Watters, and Cuomo, the Court offered very little guidance on how Chevron deference should generally apply to preemptive agency interpretations of federal statutes).
146. See supra pp. 475-76, 478-79.
148. See id. at 20-21 (majority opinion).
national banks when the statute was written in 1864.149 In that way, granting *Chevron* deference based on the OCC's interpretation of the statute is like granting the OCC a license to write preemptive legislation.150 In *Cuomo*, the Court reaffirmed applying *Chevron* to cases involving the OCC.151 Though the *Cuomo* majority did not go as far as the *Watters* dissent had suggested, the high level of deference granted to the OCC in *Smiley* has been tempered.152 Also, *Cuomo* puts in question the Court's former view in *Smiley* that OCC regulations should not be scrutinized for whether they are the "best" interpretations of NBA statutes, but rather, for their reasonableness.153 The *Cuomo* dissent, however, still embraces the approach set out in *Smiley*.154

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149. See id. at 19 ("[O]ne cannot ascribe any intention regarding operating subsidiaries to the 1864 Congress that enacted §§ 481 and 484 . . . . That is so because operating subsidiaries were not authorized until 1966.").

150. Cf. id. at 32 (Stevens, J., dissenting) ("That Congress lavished such attention on national bank affiliates and conferred such far-reaching authority on the OCC without ever expanding the scope of § 484(A) speaks volumes about Congress' preemptive intent, or rather its lack thereof.").

151. Cf. Long & Noreika, supra note 134, at 20 (arguing that "in *Cuomo*, the Court did not alter the *Chevron* framework").


153. See *Cuomo*, 129 S. Ct. at 2715; *Smiley*, 517 U.S. at 744-45; *Majority Victory*, supra note 152, at 54-55.

154. See *Cuomo*, 129 S. Ct. at 2723 (Thomas, J., dissenting) (quoting Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Serv., 545 U.S. 967, 980 (2005)); id. at 2732 (citing *Smiley*, 517 U.S. at 744); *Majority Victory*, supra note 152, at 54-55. At this point, the dynamics of the Court regarding the series of four cases discussed is worthy of mention. Both *Watters* and *Cuomo* were closely decided. See supra notes 77, 106. Justice Ginsburg wrote the opinion in *Watters* and was joined by Justices Kennedy, Souter, Breyer, and Alito (Justice Thomas did not take part). *Watters*, 550 U.S. 1. In *Cuomo*, Justice Scalia wrote the five-four opinion in which Justices Ginsburg, Souter, Stevens, and Breyer joined. *Cuomo*, 129 S. Ct. 2710. Justice Ginsburg authored both *VALIC* and *Watters*, though she joined with the majority in *Cuomo*. Id.; *Watters*, 550 U.S. 1; *NationsBank of N.C.*, N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251 (1995). The author of *Chevron*, Justice Stevens, is now playing a role in softening the analysis that he invented, exemplified by his dissent in *Watters* and his joining with the majority in *Cuomo*. See *Cuomo*, 129 S. Ct. 2710; *Watters*, 550 U.S. 1 (Stevens, J., dissenting); *Chevron U.S.A.*, Inc. v. Natural Res. Def. Council, Inc. et al., 467 U.S. 837 (1984); c.f. *Wyeth v. Levine*, 129 S. Ct. 1187, 1190 (2009) ("Where, as here, Congress has not authorized a federal agency to pre-empt state law directly, the
Though at first glance Cuomo might seem like a rebuke of the approach to Chevron used in Smiley, it is not likely that Smiley would have been decided differently today.\(^{155}\) The Smiley opinion was unanimous, perhaps because the federalism implications of the OCC's interpretation of the word "interest" were not as great as the implications of its interpretation of the term "visitorial powers" in Cuomo. The former would only preempt those state laws disallowing national banks from charging certain fees on accounts, whereas the latter has the potential to preempt the enforcement of a whole host of state banking laws—particularly those relating to consumer protection. Because the OCC has not been known to eagerly enforce state laws against national banks,\(^ {156}\) the Cuomo Court likely considered that granting Chevron deference could potentially be too detrimental to a state's ability to effectively monitor businesses operating within its borders.\(^ {157}\) In other words, the Court seems to have indirectly expressed some of the federalism concerns of the Watters dissent.\(^ {158}\) Professor Wilmarth attributes this about-face partially to the subprime mortgage crisis which occurred after Watters was decided and prior to the Cuomo decision.\(^ {159}\) However, the Court was also likely influenced by many of the federalism concerns expressed by Judge Cardamone in his dissenting opinion for the Second Circuit.\(^ {160}\)

weight this Court accords the agency's explanation of state law's impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness.\(^{155}\) Justice Scalia's position is also interesting, as he authored the opinion in Smiley, but took a dissenting position in Watters and authored the opinion in Cuomo. Cuomo, 129 S. Ct. 2710; Watters, 550 U.S. 1; Smiley, 517 U.S. 735. It appears that he too believes that Chevron deference should not have full force in situations where the OCC's interpretation of the NBA can expand the preemptive scope of a federal statute and where federalism implications are of a greater concern. See infra p. 492.

155. Cf. Majority Victory, supra note 152, at 54-55 (stating that "Justice Scalia essentially repudiated his prior reasoning in Smiley").

156. See Serious Threat, supra note 3, at 232 ("[D]uring the past decade the OCC has not initiated a single public prosecution of a major national bank for violating a consumer protection law.").

157. See Cuomo, 129 S. Ct. at 2721.

158. See id. at 2721; supra pp. 482-83 and notes 98, 102-03.

159. See Majority Victory, supra note 152, at 19.

160. Clearing House Ass'n, L.L.C. v. Cuomo, 510 F.3d 105, 127, 130-33 (2d Cir. 2007) (Cardamone, J., dissenting) (maintaining that the OCC regulation should not have been entitled to Chevron deference, as the "principal issue" on appeal was federalism, the OCC visitorial powers regulation placed the Tenth Amendment "in peril," and the regulation "erode[d] a key aspect of state sovereignty, confuse[d] the
Another perspective applicable to this string of cases is that "the Roberts Court seems to be moving away from Chevron (even when its opinions cite it) and back to the earlier Skidmore test . . . call[ing] for a case-by-case, facts-and-circumstances review of agency interpretation[.]" 161 Professor Thomas Merrill argues that Watters and Cuomo were decided "without giving anything more than Skidmore deference" to the OCC. 162 Still, the Supreme Court did not discard the Chevron analysis all together; 163 rather, it said that "the presence of some uncertainty does not expand Chevron deference to cover virtually any interpretation of the NBA." 164 By this, the Court likely meant that in certain situations, e.g. when federalism concerns are greater, it would be more critical in its analysis to determine if an OCC interpretation of the NBA is reasonable. 165

With respect to the OCC’s 2004 preemption rules, the approach to Chevron in Cuomo should be followed going forward. Hence, a court should be more critical in its Chevron analysis if an OCC interpretation of the NBA in the 2004 preemption rules seems to broaden the scope of preemption and potentially shut out a wide range of state banking or consumer protection laws from paths of political accountability, and allow[ed] a federal regulatory agency to have a substantial role in shaping state public policy”); see also Major Victory, supra note 152, at 37 n.155 (referring to Judge Cardamone’s dissent).


We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.


164. Cuomo, 129 S. Ct. at 2715.

165. See Cuomo, 129 S.Ct. at 2715 (proceeding to “discern the outer limits of the term ‘visitorial powers’ even through the clouded lens of history.”); id. at 2720-21.
applying to national banks. On the other hand, if the scope of preemption is broadened, as in *Smiley*, but the potentially affected state consumer protection laws have a more limited range, a court can be more deferential to the OCC in conducting its *Chevron* analysis. To some extent, this approach relieves the concern that the OCC's preemption standard of "obstruct, impair, or condition" may be more preemptive of state laws than the former *Barnett Bank* standard of "significantly interfere."\(^{166}\) It has now been tempered by the Supreme Court's *Chevron* methodology in cases where the scope of preemption is affected and federalism concerns are greater.\(^ {167}\)

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166. *See supra* pp. 470-72.
167. But compare *Preemption of State Law Enforcement, supra* note 16, at 331:

In *Cuomo*, a more sensitive application of *Chevron* would have surveyed the historical sources and possible interpretations and recognized that reasonable judicial minds differ on the ambiguity question. Thus, the discerning judge would recognize that an opinion phrased entirely in terms of reconstructing the meaning of "visitorial powers" (such as the *Cuomo* opinions) would be overly contentious, in light of *Chevron* deference, and lose persuasive force. The bulk of the opinion would instead consist of a consideration of the functional federalism factors indicated, and whether the OCC's interpretation was reasonable in light of these factors.

Professor Wilmarth advocates a "four part test" in approaching preemption cases:

First, *Chevron* deference is inapplicable absent an explicit delegation of preemptive rulemaking authority to the agency. In his opinions in *Watters* and *Wyeth*, Justice Stevens indicated that a federal agency's preemptive regulation should not receive *Chevron* deference unless Congress has expressly granted preemptive rulemaking power to the agency . . . .

Second, no deference should be given to agency interpretations of statutes, judicial precedents and other legal authorities that do not require specialized agency expertise . . . .

Third, "some weight" may be given to an agency's expert analysis of the ways in which state laws conflict with the statutory scheme administered by the agency, but courts should carefully scrutinize agency claims of "obstacle" preemption . . . .

Fourth, a presumption against preemption applies whenever an agency seeks to preempt a traditional state function.

*Major Victory, supra* note 152, at 36-44 (citations and underlining omitted).