



# Lombard Street

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*The collapse of the world's financial markets has resulted in intense examination of how to restructure and reform regulation for banking, securities, insurance, and other parts of the financial services industry. Various regulatory proposals are already being circulated in academic and public policy circles. Governments around the world are considering reforms. The conversation and decisions surrounding these proposals will fundamentally impact how financial services is structured and conducted across the globe throughout the 21st century.*

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## About Lombard Street

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Overseen by a multi-disciplinary editorial board led by David S. Evans of the University of Chicago and University College London, Lombard Street delivers original articles that will shape and chronicle the evolution of the impending 21st century financial services regulation reform.

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## The Supreme Court, the Economy, and Bank Regulation

Ronald J. Mann<sup>†</sup>

To those interested in the law, one of the most interesting threads of the economic crisis of the last few years has been the incessant finger-pointing back and forth among different regulators attempting to avoid blame for the collective failure to monitor the activities of mortgage originators leading up to the housing bubble. Federal regulators claim that most of the bad actors were regulated by the States. State regulators, on the other hand, claim that their hands were tied by the generous shelter federal regulators provide to the entities that they regulate.

The dispute is crystallized in a pair of Supreme Court decisions from the last two summers. To the non-lawyer, their subject matter (the extent to which the federal National Bank Act preempts state law) might seem technical. But in truth they shed a great deal of light on the role judges have played in this area—light that does not reflect well on the Supreme Court’s contribution to the crisis and its resolution. The first case, *Watters v. Wachovia Bank, N.A.*<sup>1</sup>, involved Michigan’s efforts to regulate nonbank mortgage originators extending credit to her residents. When Wachovia acquired the originator in question, it took the position that its own status as a national bank sheltered the newly acquired subsidiary from Michigan’s regime of licensing and regulation. Federal regulators at the OCC—typically skeptical of the value to be added by state regulation—took the position that federal law sheltered not only Wachovia itself, but also the newly acquired subsidiary. Although nothing in the National Bank Act speaks directly to the question, the Supreme Court sided with the OCC. Essentially, the decision established a roadmap for any mortgage originator seeking to avoid burdensome state regulation—seek an acquisition by a national bank or its holding company.

This spring, when the economic crisis had turned even darker than it was when the Court decided *Watters*, the Justices heard arguments in *Cuomo v. Clearing House*<sup>2</sup>. That case involved the ability of New York regulators to enforce lending laws that prohibit discrimination on the basis of race and other similar characteristics. New York regulators took the position that they were entitled to use ordinary procedures to enforce those laws, even against national banks—seeking the discovery of relevant documents by subpoena, to be followed by litigation if it seemed appropriate to New York’s attorney general. The major

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<sup>1</sup> *Watters v. Wachovia Bank, N.A.* 550 U.S. \_\_\_\_ (2007)

<sup>2</sup> *Cuomo v. Clearing House Assn., L.L.C.*, 557 U.S. \_\_\_\_ (2009).

New York banks (backed again by the OCC) admitted that New York's rules against lending discrimination were valid, but they argued that only the OCC had the power to enforce them. The Court split 5-4, with Justice Scalia writing for a majority that held that the state can enforce its fair lending laws against the national banks in its jurisdiction.

The cynic might say that the Court simply backed down, unwilling to continue to fetter banking regulators as the recession deepens. But even a cursory reading of the opinion suggests much deeper legal and practical questions, which make it quite difficult to assess what the case means for banks and regulators in the years to come. Responding to that concern, we have put together a special issue collecting an assortment of views on the case. Professor Arthur Wilmarth is a noted banking law scholar on the law faculty at George Washington University who filed an amicus brief in this case on behalf of state financial regulators. In "*Cuomo v. Clearing House: A Crucial Victory for the Dual Banking System and Consumer Protection*," he lays out the background of the case in detail and offers an optimistic perspective on the benefits that will flow from the decision. Conversely, Bob Long and Keith Noreika are attorneys at Covington, Burling who have been deeply involved in both *Watters* and *Cuomo*. In "*Cuomo v. Clearing House Association: A Misguided Decision That Could Have Been Worse*," they emphasize some of the problems with Justice Scalia's reasoning and underscore some key reasons to think the decision's future impact might be limited. Finally, Tom Merrill is a distinguished academic and advocate, one of my colleagues at Columbia Law School and formerly a Deputy Solicitor General in the Department of Justice. He filed amicus briefs in both *Watters* and *Cuomo*, arguing in both cases that fundamental principles of administrative law required the Court to rein in the OCC's efforts to preempt state regulation. In "*Cuomo v. Clearing House Association: Why We Are Still in the Dark About Agency Preemption*," he points out the basic legal problem that the Court has faced and left unanswered in both of these cases: how to deal with the decisions federal agencies make about what federal laws mean when those decisions affect the preemption of state laws. As he explains, the Court's failure to think coherently about that basic question leaves us little more certain than we were before about how far federal regulators can go to shelter national financial institutions from state law.



## ***Cuomo v. Clearing House: A Crucial Victory for the Dual Banking System and Consumer Protection***

Arthur E. Wilmarth, Jr.<sup>†</sup>

In *Cuomo v. Clearing House*,<sup>1</sup> the Supreme Court held that the Office of the Comptroller of the Currency (“OCC”) exceeded its authority when it adopted a regulation (12 C.F.R. § 7.4000) that prevented state officials from filing lawsuits to enforce applicable state laws against national banks. However, the Court upheld the OCC’s regulation to the extent that it bars state officers from bringing administrative enforcement proceedings against national banks. The Court thus drew a sharp distinction between “administrative oversight” of national banks by state officials—which the Court viewed as preempted by the National Bank Act (“NBA”)—and “judicial enforcement actions” against national banks by state officials, which the Court found to be consistent with the NBA and the Court’s prior decisions.<sup>2</sup>

*Cuomo* represents a much-needed triumph for the dual banking system and consumers of financial services. The decision upholds the states’ authority to protect their citizens by enforcing valid, non-preempted state laws against national banks. *Cuomo* will almost certainly lead to future cases challenging the OCC’s substantive preemption rules, which purport to preempt a broad range of state consumer protection laws. In addition, *Cuomo* supports current legislative proposals that seek to preserve the states’ historic role in protecting consumers of financial services.

### **I. Factual and Legal Background of *Cuomo v. Clearing House***

In 2005, New York Attorney General Eliot Spitzer sent informal letters of inquiry to several large national banks that are members of The Clearing House Association, L.L.C. (“Clearing House”). Spitzer’s letters were based on his office’s preliminary analysis of residential mortgage lending data published by the

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<sup>1</sup> *Cuomo v. Clearing House Assn., L.L.C.*, 557 U.S. \_\_\_\_ (2009).

<sup>2</sup> *Id.* at 2721-22.

national banks pursuant to the Home Mortgage Disclosure Act (“HMDA”). The banks’ HMDA data “appeared to indicate that a significantly higher percentage of high-interest home mortgage loans [were] issued to African-American and Hispanic borrowers than to white borrowers.”<sup>3</sup> Spitzer’s letters declared that such disparities “are troubling on their face, and unless legally justified, may violate . . . New York State Executive Law § 296-a.”<sup>4</sup> Spitzer stated that his letters were sent “[i]n lieu of issuing a formal subpoena,” and he requested that the recipients voluntarily provide non-public information concerning their residential mortgage lending policies and practices in New York.<sup>5</sup>

The OCC and the Clearing House acknowledged that N.Y. Executive Law § 296-a was not preempted by federal law and therefore applied to national banks. However, the OCC and the Clearing House sued to enjoin Spitzer from enforcing § 296-a against national banks through either administrative or judicial proceedings. Both parties alleged that any investigative or enforcement efforts by Spitzer would constitute “visitorial” activities and would be preempted by 12 C.F.R. § 7.4000. The district court granted the requested injunctive relief, and its decision was affirmed by a divided panel of the Second Circuit Court of Appeals.<sup>6</sup> The Supreme Court subsequently granted the petition for certiorari filed by Spitzer’s successor, New York Attorney General Andrew Cuomo.

## II. The OCC’s Regulation and the Definition of “Visitorial Powers”

The OCC’s regulation at issue in *Cuomo* prohibited state officials from exercising “visitorial powers” over national banks. The regulation defined “visitorial powers” to include any attempt by state officials to enforce state laws concerning “activities authorized or permitted [to national banks] pursuant to federal banking law.” 12 C.F.R. § 7.4000(a).<sup>7</sup> In 2004, the OCC amended § 7.4000 by extending the regulation’s ban on state enforcement actions to reach judicial as well as administrative proceedings. The OCC thus claimed authority to bar state officials from using any forum—including the courts—to enforce applicable state laws against national banks.

<sup>3</sup> Clearing House, 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 (2009). See *Id.* at 109 n.2 (stating that the recipients of Attorney General Spitzer’s letters included Citigroup, HSBC, JP Morgan Chase and Wells Fargo).

<sup>4</sup> *Id.* at 109. See *Id.* at 109 n.3 (noting that § 296-a “broadly prohibits creditors from discriminating on the basis of race, sex, national origin, or other protected grounds”).

<sup>5</sup> *Id.* at 109.

<sup>6</sup> *Id.* at 109-10. The district court also enjoined Attorney General Spitzer from suing national banks on behalf of New York citizens as *parens patriae* under the Federal Housing Act (“FHA”). The Second Circuit vacated that portion of the district court’s decision, concluding that the district court did not have jurisdiction to decide the FHA issues due to lack of ripeness. *Id.* at 110, 121-26.

<sup>7</sup> The regulation included a few narrow exceptions for state enforcement that the OCC found to be authorized by federal law. See 12 C.F.R. § 7.4000(b).

The question presented in *Cuomo* was whether the OCC's expansive definition of "visitorial powers" was permissible under the NBA. In answering that question, the Supreme Court applied "the familiar *Chevron* framework" to determine whether the Court should defer to the OCC's regulation as a "reasonable interpretation" of the NBA.<sup>8</sup> The Court held, in a 5-4 decision authored by Justice Scalia, that the OCC's regulation exceeded the agency's authority to the extent that it barred state officials from filing lawsuits to enforce state laws against national banks.

The relevant provision of the NBA, 12 U.S.C. § 484(a), states that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or . . . exercised or directed by Congress or by either House thereof or by [an authorized congressional committee]." The NBA has included a provision similar to § 484(a) since its original enactment in 1864. Neither § 484(a) nor any other section of the NBA defines the term "visitorial powers." The majority opinion acknowledged that "[t]here is necessarily some ambiguity as to the meaning of the statutory term 'visitorial powers,' especially since we are working in an era when the prerogative writs—through which visitorial powers were traditionally enforced—are not in vogue."<sup>9</sup> However, the majority concluded that "[w]e can discern the outer limits of the term 'visitorial powers' even through the clouded lens of history," based on "[e]vidence from the time of the statute's enactment, a long line of our own cases, and application of normal principles of construction to the [NBA]."<sup>10</sup>

The majority and dissenting opinions in *Cuomo* sharply disagreed over the historical understanding of the term "visitorial powers." In the majority's view, "[o]ur cases have always understood 'visitation' as [the] right to oversee corporate affairs, quite separate from the power to enforce the law."<sup>11</sup> As support for this historical distinction, the majority cited Justice Story's concurring opinion in *Dartmouth College*. In that case, Justice Story observed that chancery courts possessed "a general jurisdiction . . . to redress grievances and fraud" committed by a corporation, but Story explained that the jurisdiction of chancery courts was not a "visitorial power" and was separate from the "controlling authority of [the corporation's] legal visitor."<sup>12</sup>

In his dissenting opinion, Justice Thomas attempted to distinguish *Dartmouth College* on the ground that the college was a charitable rather than a for-profit corporation. Justice Thomas argued that visitors of charitable corporations historically did not have law enforcement powers, while visitors of civil corporations did possess such powers. Therefore, he contended, Justice Story's opinion did not contradict

<sup>8</sup> 129 S. Ct. at 2715 (citing *Chevron U.S.A. Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984)).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 2716.

<sup>12</sup> *Id.* at 2716 (quoting *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 676 (1819) (Story, J., concurring)).

the OCC's position that all law enforcement activities directed at for-profit corporations (including national banks) should be viewed as "visitorial."<sup>13</sup> Justice Scalia's majority opinion denied the significance of any difference between visitors of charitable and for-profit corporations. Justice Scalia concluded that "whether or not visitors of charitable corporations had law-enforcement powers, the powers that they *did* possess demonstrate that visitation is different from ordinary law enforcement."<sup>14</sup>

The majority opinion in *Cuomo* also relied heavily on two Supreme Court decisions from the first quarter of the twentieth century—*Guthrie v. Harkness*<sup>15</sup> and *First National Bank in St. Louis v. Missouri*.<sup>16</sup> Justice Scalia explained that *Guthrie*—which upheld a shareholder's right to sue a national bank— "drew a contrast between the nonvisitorial act of 'su[ing] in the courts of the State' and the visitorial 'supervision of the [OCC].'"<sup>17</sup> *St. Louis* upheld the right of a state attorney general to sue a national bank for violating state law. In Justice Scalia's view, *St. Louis* affirmed that "only the United States may perform visitorial administrative oversight" over national banks, but "if a state statute of general applicability is not substantively pre-empted, then 'the power of enforcement must rest with the [State] and not with' the National Government."<sup>18</sup> Justice Scalia concluded that "*St. Louis* is one of a long and unbroken line of cases distinguishing visitation from law enforcement."<sup>19</sup>

The majority opinion next turned to the Court's 2007 decision in *Watters v. Wachovia Bank, N.A.*<sup>20</sup> *Watters* held that the NBA preempted the application of state mortgage lender registration and supervision requirements to operating subsidiaries of national banks. Justice Scalia maintained that *Watters* "is fully in accord with the well established distinction between supervision and law enforcement. . . . All parties to the case agreed that Michigan's general oversight regime could not be imposed on national banks; the sole question was whether operating subsidiaries of national banks enjoyed the same immunity from state visitation."<sup>21</sup> Justice Scalia emphasized that *Watters* "addresses and answers no other question."<sup>22</sup>

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<sup>13</sup> *Id.* at 2724-25 & n.1 (Thomas, J., concurring in part and dissenting in part).

<sup>14</sup> *Id.* at 2716 n.1 (majority opinion).

<sup>15</sup> 199 U.S. 148 (1905).

<sup>16</sup> 263 U.S. 640 (1924).

<sup>17</sup> 129 S. Ct. at 2717 (quoting *Guthrie*, 199 U.S. at 159).

<sup>18</sup> *Id.* (quoting *St. Louis*, 263 U.S. at 660).

<sup>19</sup> *Id.* at 2717 n.2.

<sup>20</sup> 550 U.S. 1 (2007).

<sup>21</sup> *Cuomo*, 129 S. Ct. at 2717.

<sup>22</sup> *Id.*

The majority opinion's declaration as to the narrow scope of *Watters* echoed statements made by Justice Ginsburg, the author of *Watters*, during the *Cuomo* oral argument. Justice Ginsburg told counsel for Clearing House that "[t]he sole question [in *Watters*] was whether . . . the national bank's operating subsidiary was to be equated with a division of the national bank. That was the only question provided the Court."<sup>23</sup> She subsequently advised counsel that "I do not think that excerpts from [the *Watters*] opinion should be taken out of that context."<sup>24</sup> The majority opinion in *Cuomo* and Justice Ginsburg's comments at oral argument seemed designed to limit the future precedential impact of *Watters*.

Based upon its review of previous cases dealing with "visitorial powers," the majority opinion in *Cuomo* concluded that "the unmistakable and utterly consistent teaching of our jurisprudence, both before and after enactment of the [NBA], is that a sovereign's 'visitorial powers' and its power to enforce the law are two different things. . . . [C]ontrary to what the [OCC's] regulation says, the [NBA] pre-empts only the former."<sup>25</sup>

In Justice Scalia's view, "[t]he consequences of the regulation also cast doubt on its validity."<sup>26</sup> While all parties agreed that the NBA "leaves in place some substantive state laws affecting banks," the OCC's regulation asserted that "the State may not *enforce* its valid, non-preempted laws against national banks. The bark remains, but the bite does not."<sup>27</sup> Justice Scalia described this result as "[b]izarre," particularly in view of the Court's declaration in *St. Louis* that it would be a "fallacy" to acknowledge "the binding quality of a statute but deny the power of enforcement," because "such power is essentially inherent in the very conception of law."<sup>28</sup> In contrast to the OCC's regulation, Justice Scalia explained that an "entirely commonplace result" would be produced if § 484(a) were construed as "[c]hanneling state attorneys general into judicial law enforcement proceedings . . . [in order to] preserve a regime of exclusive administrative oversight by the [OCC]."<sup>29</sup> Justice Scalia concluded that such an outcome "echoes many other mixed state/federal regimes in which the Federal Government exercises general oversight while

<sup>23</sup> Transcript of Oral Argument in *Cuomo v. Clearing House*, at 37, available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/08-453.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-453.pdf).

<sup>24</sup> *Id.* at 38.

<sup>25</sup> *Cuomo*, 129 S. Ct. at 2717. In this regard, the majority opinion cited cases finding that "law enforcement by federal agencies" against national banks did not constitute a prohibited exercise of "visitorial powers." *Id.* (citing two lower court opinions). The majority opinion subsequently cited additional cases to show that "States . . . have always enforced their general laws against national banks – and have enforced their banking-related laws against national banks for at least 85 years, as evidenced by *St. Louis*." *Id.* at 2720-21 (citing, inter alia, *Anderson Nat'l Bank v. Lockett*, 321 U.S. 233, 237, 248-49 (1944)).

<sup>26</sup> *Id.* at 2717.

<sup>27</sup> *Id.* at 2717-18.

<sup>28</sup> *Id.* at 2718 (quoting *St. Louis*, 263 U.S. at 660).

<sup>29</sup> *Id.*

leaving state substantive law in place.”<sup>30</sup> In this regard, the majority opinion cited the Court’s recent decision in *Wyeth v. Levine*,<sup>31</sup> discussed below, in which the Court held that the federal statutory regime governing labeling of drugs did not preempt failure-to-warn claims under state tort law.

Justice Scalia also observed that allowing state officials to file lawsuits was “suggested” by § 484(a)’s exception for powers “vested in the courts of justice.”<sup>32</sup> In Justice Scalia’s view, that exception’s “only conceivable purpose is to preserve normal civil and criminal lawsuits. . . . [I]t is explicable only as an attempt to make clear that the court’s ordinary powers of enforcing the law are not affected.”<sup>33</sup>

In sum, the majority opinion in *Cuomo* held that “visitorial powers . . . include any form of administrative oversight that allows a sovereign to inspect books and records on demand.”<sup>34</sup> In contrast, a lawsuit by a state attorney general to enforce state law “is not an exercise of ‘visitorial powers’ and thus the [OCC] erred by extending the definition of ‘visitorial powers’ to include ‘prosecuting enforcement actions’ in state courts.”<sup>35</sup> Accordingly, *Cuomo* upheld the Second Circuit’s judgment “as applied to the threatened issuance of executive subpoenas” by the New York Attorney General, but *Cuomo* reversed and vacated the lower court’s judgment “insofar as it prohibits the Attorney General from bringing judicial enforcement actions.”<sup>36</sup>

Justice Scalia emphasized the “pragmatic” significance of the majority opinion’s distinction between visitation and judicial enforcement. The OCC as visitor “may inspect books and records at any time for any or no reason.”<sup>37</sup> In contrast, a state “attorney general acting as a civil litigant must file a lawsuit, survive a motion to dismiss, endure the rules of procedure and discovery, and risk sanctions if his claims are frivolous or his discovery tactics abusive.”<sup>38</sup> Courts could also enter protective orders to prevent unreasonable expense or prejudice to national banks. In Justice Scalia’s view, courts could be “trusted to prevent ‘fishing expeditions’ or an undirected rummaging through bank books” by state officials.<sup>39</sup>

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<sup>30</sup> *Id.*

<sup>31</sup> 129 S. Ct. 1187 (2009).

<sup>32</sup> *Cuomo*, 129 S. Ct. at 2718.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 2721.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 2722.

<sup>37</sup> *Id.* at 2718.

<sup>38</sup> *Id.* at 2718-19.

<sup>39</sup> *Id.* at 2719.

### III. The Applicability of *Chevron* Deference in Preemption Cases

*Cuomo* addresses, but does not fully resolve, two recurring questions dealing with the issue of whether preemptive rulings by federal agencies should receive judicial deference. First, should courts give *Chevron* deference or a lower degree of deference to an agency regulation or order that includes a declaration of preemption? Second, can an agency's claim for deference in interpreting federal statutes be overcome by a presumption against preemption of state law in areas of traditional state concern?

Prior to *Cuomo*, both issues were raised in *Watters* and *Wyeth*. In *Watters*, three dissenting Justices – including Justices Stevens and Scalia, who joined the majority opinion in *Cuomo* – argued that “when an agency purports to decide the scope of federal preemption, a healthy respect for state sovereignty calls for something less than *Chevron* deference.”<sup>40</sup> The dissenters argued that an agency's views on preemption should be entitled to “some weight” but only to the extent that the agency provided an “expert” opinion about the ways in which state law conflicted with the federal statutory scheme.<sup>41</sup> In addition, the dissenters contended that the Court should have applied a presumption against preemption in *Watters*, because the state mortgage lending laws in question were “designed to protect consumers” and “[c]onsumer protection is quintessentially ‘a field which the States have traditionally occupied.’”<sup>42</sup> Based on that presumption, the OCC's preemptive regulation should have been struck down in the absence of any “clear and manifest purpose of Congress” to preempt the states' authority to regulate nonbank operating subsidiaries of national banks.<sup>43</sup>

The majority opinion in *Watters* carefully avoided the issue of *Chevron* deference. The majority opinion determined that the statutory provisions of the NBA preempted any exercise by state officials of “visitorial powers” over operating subsidiaries of national banks. The majority opinion therefore concluded that “the level of deference owed to the [OCC's] regulation is an academic question,” because “the NBA itself—independent of the OCC's regulation—preempts the application of the pertinent Michigan laws to national bank operating subsidiaries.”<sup>44</sup>

In *Wyeth*, the majority opinion was written by Justice Stevens, who authored both *Chevron* and the dissenting opinion in *Watters*. Justice Stevens declared that a presumption against preemption applies “[i]n all preemption cases, and particularly those in which Congress has ‘legislated in a field which the

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<sup>40</sup> *Watters*, 550 U.S. at 41 (Stevens, J., dissenting). The third dissenting justice in *Watters* was Chief Justice Roberts, who joined the dissenting opinion in *Cuomo*.

<sup>41</sup> *Id.* (quoting *Geier v. American Honda Motor Co.*, 529 U.S. 861, 883 (2000)).

<sup>42</sup> *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

<sup>43</sup> *Id.* at 35-36 (quoting *Rice*, 331 U.S. at 230).

<sup>44</sup> *Id.* at 20, 21 n.13 (majority opinion).

States have traditionally occupied.”<sup>45</sup> In addition, Justice Stevens maintained that *Chevron* deference does not provide the appropriate framework for reviewing agency claims of preemption, except in cases where agencies possess “special authority to pronounce on preemption [through an express] delegation by Congress.”<sup>46</sup> Justice Stevens explained that, in past cases involving claims of preemption by federal agencies, “the Court has performed its own conflict determination, relying on the substance of state and federal law and not on agency proclamations of pre-emption.”<sup>47</sup> Justice Stevens emphasized that “in such cases . . . we have not deferred to the agency’s *conclusion* that state law is pre-empted.”<sup>48</sup> Instead, the Court has “given ‘some weight’ to an agency’s views . . . about how state requirements may pose an ‘obstacle to the accomplishment of the full purposes and objectives of Congress.’”<sup>49</sup> Justice Stevens explained that “[t]he weight we accord to the agency’s explanation of state law’s impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness.”<sup>50</sup>

The majority opinion in *Wyeth* did not define the precise degree of “weight” that courts should give to agency claims of preemption. However, the opinion’s citation to *Skidmore* and its recitation of the *Skidmore* factors of “thoroughness, consistency, and persuasiveness” suggest that agency preemptive determinations should receive *Skidmore*’s relatively low level of deference.<sup>51</sup> For two reasons, the majority opinion in *Wyeth* refused to give any deference to the preemption claim made by the Food and Drug Administration (“FDA”). First, the FDA did not incorporate its claim in a regulation that was adopted after notice and opportunity for comment. Instead, the FDA inserted its claim, without prior notice, into a preamble when it published a final rule.<sup>52</sup> Second, the FDA’s preemption claim “is at odds with what evidence we have of Congress’ purposes, and it reverses the FDA’s own longstanding position without

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<sup>45</sup> *Wyeth*, 129 S. Ct. at 1194 (quoting *Metronic v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice*, 331 U.S. at 230)).

<sup>46</sup> *Id.*; see also *Watters*, 550 U.S. at 38 & n.21 (Stevens, J., dissenting) (stating that “Congress knows how to authorize executive agencies to preempt state laws” and giving examples of federal statutes that expressly authorize agencies to adopt regulations preempting state law).

<sup>47</sup> *Wyeth*, 129 S. Ct. at 1201.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* (quoting *Geier*, 529 U.S. at 883, and *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

<sup>50</sup> *Id.* (citing *United States v. Mead Corp.*, 533 U.S. 218, 234-35 (2001), and *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

<sup>51</sup> See *Skidmore*, 323 U.S. at 140 (stating that “[t]he weight of [the agency’s] 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”).

<sup>52</sup> *Wyeth*, 129 S. Ct. at 1201 (concluding that “[t]he agency’s views on state law are inherently suspect in light of this procedural failure”).

providing a reasoned explanation, including any discussion of how state [tort] law has interfered with the FDA's regulation of drug labeling during decades of coexistence."<sup>53</sup>

Taken together, the dissenting opinion in *Watters* and the majority opinion in *Wyeth* set forth a promising four-part framework for evaluating agency preemption claims. First, agency preemption determinations are not entitled to *Chevron* deference unless Congress has expressly authorized the agency to issue preemptive regulations. Agencies without explicit preemptive rulemaking power should not receive *Chevron* deference because they should not be allowed to issue preemptive rules based on mere congressional ambiguity. Second, courts should not defer to an agency's legal conclusions about preemption based on the agency's reading of Supreme Court precedents and other legal authorities. Third, courts may properly give "some weight" to an agency's analysis of alleged conflicts between state law and the governing federal statute, to the extent that such analysis is supported by the agency's expertise and otherwise has "power to persuade" under *Skidmore*. Fourth, an agency's claim to *Skidmore* deference regarding its analysis of conflict preemption can be overcome by the presumption that Congress does not intend to preempt state law in areas of traditional state concern.

Unfortunately, the majority opinion in *Cuomo* did not adopt the *Wyeth* framework for preemption analysis. Instead, as noted above, Justice Scalia said that he was applying "the familiar *Chevron* framework."<sup>54</sup> As a practical matter, however, Justice Scalia's application of *Chevron* gave little deference to the OCC and was closer to the heightened scrutiny applied by Justice Stevens in *Wyeth*.

With regard to the first step of *Chevron*—determining whether "the intent of Congress is clear"<sup>55</sup> — Justice Scalia stated that the existence of "some ambiguity" in § 484(a) "does not expand *Chevron* deference to cover virtually any interpretation of the [NBA]."<sup>56</sup> Justice Scalia's skeptical approach to "*Chevron* step one" was similar to *Gonzales v. Oregon*,<sup>57</sup> where the Court held that "*Chevron* deference . . . is not accorded merely because the statute is ambiguous and an administrative official is involved. [Rather,] the rule must be promulgated pursuant to authority Congress has delegated to the official."<sup>58</sup>

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<sup>53</sup> *Id.* The three dissenters in *Wyeth* did not contend that the FDA's preemption claim should receive *Chevron* deference. Instead, they argued that the FDA's position was entitled to "some weight" under *Geier* and should have been upheld. They also contended that it was irrelevant that the FDA's preemption claim was not adopted through a notice-and-comment rulemaking or that it represented a change in the agency's position. *Id.* at 1227-29 (Alito, J., dissenting).

<sup>54</sup> *Cuomo*, 129 S. Ct. at 2715.

<sup>55</sup> *Chevron*, 467 U.S. at 842.

<sup>56</sup> *Cuomo*, 129 S. Ct. at 2715.

<sup>57</sup> 546 U.S. 243 (2006).

<sup>58</sup> *Id.* at 258.

In applying the second step of *Chevron*—whether the agency made a “permissible” and “reasonable interpretation” of the statute<sup>59</sup>—Justice Scalia determined (as discussed above) that historical evidence and judicial precedents enabled the Court (i) to “discern the outer limits” of § 484(a) and (ii) to conclude that the OCC exceeded its authority in defining “visitorial powers” to include “ordinary enforcement of the law.”<sup>60</sup> In contrast, Justice Thomas argued that the OCC had “selected a permissible construction of a statutory term that was susceptible to multiple interpretations.”<sup>61</sup> Justice Thomas urged the Court to use the same highly deferential approach to *Chevron* that the Second Circuit had followed. In Justice Thomas’ view, under *Chevron* “[t]he Court must decide only whether the construction adopted by the agency is unambiguously foreclosed by the statute’s text.”<sup>62</sup>

Justice Scalia found it “unnecessary” to invoke the presumption against preemption in order to strike down the OCC’s regulation.<sup>63</sup> However, he emphasized that “the incursion that the [OCC’s] regulation makes upon traditional state powers [should not] be minimized.”<sup>64</sup> He pointed out that “the [OCC] was not given authority to enforce nonpre-empted state laws [against national banks] until 1966,” and he therefore rejected Justice Thomas’ claim that the “historic police powers of the States” were unaffected by the OCC’s regulation.<sup>65</sup> By implication, Justice Scalia also rejected the dissenters’ claim, based on *United States v. Locke*,<sup>66</sup> that the presumption against preemption should never be applied in construing the preemptive scope of the NBA.<sup>67</sup>

Justices Thomas and Scalia strongly disagreed about whether the OCC’s regulation in *Cuomo* should be viewed as preemptive in the first place. In *Smiley v. Citibank (South Dakota), N.A.*,<sup>68</sup> the Supreme Court

<sup>59</sup> *Chevron*, 467 U.S. at 843-44.

<sup>60</sup> *Cuomo*, 129 S. Ct. at 2715.

<sup>61</sup> *Id.* at 2727 (Thomas, J., dissenting in part).

<sup>62</sup> *Id.* at 2733.

<sup>63</sup> *Id.* at 2720 (majority opinion).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* (quoting *Rice*, 331 U.S. at 230).

<sup>66</sup> 529 U.S. 89, 108 (2000) (holding that the presumption against preemption is inapplicable in construing the preemptive reach of federal maritime law).

<sup>67</sup> Justice Thomas argued that, because Congress has legislated with regard to national banks since “the earliest days of the Republic,” the presumption against preemption is inapplicable in interpreting the NBA for the same reason that it is inapplicable to federal maritime law. *Cuomo*, 129 S. Ct. at 2732 (Thomas, J., dissenting in part) (quoting *Locke*, 529 U.S. at 108). Justice Scalia replied that “[a] power [to enforce state laws] first exercised [by the OCC] during the lifetime of every current Justice is hardly involvement ‘from the earliest days of the Republic.’” *Id.* at 2720 (quoting *Locke*, 529 U.S. at 108).

<sup>68</sup> 517 U.S. 735 (1996).

(in an opinion written by Justice Scalia) held that an OCC regulation defining the term “interest” for purposes of 12 U.S.C. § 85 did not preempt state law and therefore was not subject to any presumption against preemption. *Smiley* held that § 85 preempted state law as a statutory matter, and the OCC’s regulation only defined “the substantive (as opposed to pre-emptive) meaning of [§ 85].”<sup>69</sup> Relying on *Smiley*, Justice Thomas argued that the OCC’s regulation was not preemptive because the OCC merely interpreted “an ambiguous statutory term” in order to “clarify the preemptive scope of enacted federal law.”<sup>70</sup>

Justice Scalia rejected the claim that the OCC’s regulation was not preemptive. As he pointed out, “[a]ny interpretation of ‘visitorial powers’ necessarily ‘declares the pre-emptive scope of the NBA,’ . . . If that is not pre-emption, nothing is.”<sup>71</sup> Thus, Justice Scalia essentially repudiated his prior reasoning of *Smiley*.<sup>72</sup> Based on *Cuomo*, states can now claim that an agency rule which defines the “meaning” of a preemptive statute in a way that expands the statute’s reach should itself be viewed as preemptive. Accordingly, such a rule should receive a lower level of judicial deference and should be subject to the presumption against preemption.

Justice Scalia and Justice Thomas also sharply differed as to the binding effect of prior Supreme Court decisions on federal agencies. Relying on *National Cable & Telecommunications Ass’n v. Brand X Internet Services*,<sup>73</sup> Justice Thomas contended that the OCC was free under *Chevron* (i) to adopt its own interpretation of “visitorial powers” and (ii) to disregard *St. Louis* and several other Supreme Court decisions upholding the authority of state officials to file lawsuits against national banks. In Justice Thomas’ view, *Brand X* made those decisions irrelevant because they did not provide an unambiguous construction of the term “visitorial powers.” Justice Thomas maintained that none of the cited decisions “addressed the meaning of “visitorial powers” for purposes of § 484(a), let alone provided a definitive construction of the statute.”<sup>74</sup>

Justice Scalia rejected Justice Thomas’ argument based on *Brand X*. In Justice Scalia’s view, “*St. Louis* is relevant to the proper interpretation of 12 U.S.C. § 484(a) . . . because it is one in a long and

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<sup>69</sup> *Id.* at 744.

<sup>70</sup> *Cuomo*, 129 S. Ct. at 2732-33 (Thomas, J., dissenting in part).

<sup>71</sup> *Id.* at 2721 (majority opinion) (quoting *Id.* at 2732 (Thomas, J., dissenting in part)).

<sup>72</sup> As Nina Mendelson has noted, the reasoning in *Smiley* was open to serious question because “the [OCC’s] interpretation [of ‘interest’] effectively broadened the statute’s preemption of state law.” Nina A. Mendelson, “*Chevron* and Preemption,” 102 *Michigan Law Review* 737, 739-40 (2004).

<sup>73</sup> 545 U.S. 967 (2005).

<sup>74</sup> *Cuomo*, 129 S. Ct. 2730 (Thomas, J., dissenting in part).

unbroken line of cases distinguishing visitation from law enforcement.”<sup>75</sup> This aspect of the debate in *Cuomo* between Justices Scalia and Thomas was effectively a replay of their dueling opinions in *Brand X*. Justice Thomas wrote the majority opinion in *Brand X* while Justice Scalia entered a vigorous dissent. In his dissent, Justice Scalia declared that *Brand X*'s concept of “judicial decisions subject to reversal by executive officers” was “bizarre” and “probably unconstitutional” as a violation of separation of powers.<sup>76</sup> In Justice Scalia's view, “Article III courts do not sit to render decisions that can be reversed or ignored by executive officers.”<sup>77</sup> Justice Scalia's dissent in *Brand X* undoubtedly informed his refusal in *Cuomo* to allow the OCC to disregard *St. Louis* and other Supreme Court decisions.

#### IV. *Cuomo*'s Implications for the Dual Banking System and Consumer Protection

For at least three reasons, *Cuomo* is likely to have a significant impact on future court cases and legislative proposals dealing with the dual banking system and consumer protection. First, the decision affirms the right of state officials to seek judicial enforcement of applicable state laws against national banks. *Cuomo* provides a very substantial boost to the dual banking system and consumer protection by ensuring that national banks, like other lenders, will be subject to judicial enforcement of non-preempted state laws by state officials. In contrast, a victory by the OCC in *Cuomo* (i) would have encouraged the remaining state banks with interstate operations to convert to national charters and (ii) would have made it much more difficult for states to enact and enforce fair lending statutes and other consumer protection laws.

Second, *Cuomo* will shift the focus of future preemption cases involving national banks to the question of which state laws apply to national banks, and it will also encourage legal challenges to the validity of the OCC's substantive preemption rules. In 2004, the OCC adopted sweeping regulations that purport to preempt state laws in four broadly-defined areas: real estate lending, other lending, deposit-taking, and other federally-authorized “activities.” In all four areas, the OCC's rules (i) preempt state laws if they “obstruct, impair, or condition a national bank's ability to fully exercise its powers to conduct activities authorized under Federal law,” and (ii) allow state laws to apply to national banks only if such laws “establish the legal infrastructure that makes [it] practicable” for national banks to conduct their federally-authorized activities.<sup>78</sup>

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<sup>75</sup> *Id.* at 2717 n.2 (majority opinion).

<sup>76</sup> *Brand X*, 545 U.S. at 1016-17 (Scalia, J., dissenting).

<sup>77</sup> *Id.* at 1017 (citing *Southern Air Lines, Inc. v. Waterman*, 333 U.S. 103 (1948)).

<sup>78</sup> 12 C.F.R. § 7.4009; 69 Fed. Reg. 1912-13 (2004); see Arthur E. Wilmarth, Jr., “The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection,” 23 *Annual Review of Banking and Financial Law* 225, 233-36 (2004) (describing the OCC's rules), available at <http://ssrn.com/abstract=577863>.

*Cuomo* strikes a significant blow at the OCC's claim of exclusive preemptive authority over the banking activities of national banks. *Cuomo* affirmed that "States . . . have always enforced their general laws against national banks—and have enforced their banking-related laws against national banks for at least 85 years, as evidenced in *St. Louis*."<sup>79</sup> Moreover, *Cuomo* addressed and rejected the OCC's assertion that the NBA generally preempts state laws that "affect the content or extent of the Federally-authorized business of banking," and that the NBA permits the application of state law only if it "establishes the legal infrastructure that surrounds and supports the ability of national banks . . . to do business."<sup>80</sup> The Court declared that the OCC's asserted "distinction between 'implementation' of 'infrastructure' and judicial enforcement of other [state] laws can be found nowhere within the text of the [NBA]. This passage . . . attempts to do what Congress declined to do: exempt national banks from all state banking laws, or at least enforcement of those laws."<sup>81</sup> *Cuomo* creates serious doubts about the validity of the OCC's substantive preemption rules, because those rules rely on the same purported distinction between state "banking" laws and state "infrastructure" laws.

Third, *Cuomo* dramatically changes the legal status quo for debates about the adoption of new federal legislation to provide greater protection for consumers of financial services. For example, Title I of H.R. 3126 would establish a new "Consumer Financial Protection Agency" ("CFPA") and would give the CFPA broad authority to issue and enforce regulations applicable to all providers of financial services, including national banks. Subtitle D of Title I would preserve the states' authority to enact laws that provide additional protections to consumers beyond those established by the CFPA's rules. In addition, Subtitle D would empower state attorneys general to bring judicial proceedings to enforce applicable federal or state laws against national banks. Before *Cuomo*, the OCC and national banks could arguably have claimed that Subtitle D would constitute a significant departure from the legal *status quo*. After *Cuomo*, state officials and consumer groups can maintain that Subtitle D would represent a proper congressional endorsement of the outcome in *Cuomo*.

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<sup>79</sup> *Cuomo*, 129 S. Ct. at 2720.

<sup>80</sup> 69 Fed. Reg. 1896 (2004), quoted in *Cuomo*, 129 S. Ct. at 2719.

<sup>81</sup> *Cuomo*, 129 S. Ct. at 2720.



## ***Cuomo v. Clearing House Association: A Misguided Decision That Could Have Been Worse***

Robert A. Long and Keith A. Noreika<sup>†</sup>

In *Cuomo v. Clearing House*,<sup>1</sup> the Supreme Court of the United States considered whether state officials have authority to enforce non-preempted state laws against national banks. By a vote of 5-4, the Court held that state officials have such authority. Indeed, the five Justices in the majority dismissed as “bizarre” the very idea that state officials could be barred from enforcing valid state laws against anyone, including national banks.<sup>2</sup> Despite the majority’s dismissive characterization, the position it rejected—which was supported by the Executive Branch of the federal government, both lower courts, and four Justices of the Supreme Court—is solidly grounded in the statutory text, as well as the historical context of state hostility to national banks. Although the majority’s decision is misguided, it does not alter the basic analytical framework that the Court applies to preemption questions involving national banks. Accordingly, the Court’s decision in *Cuomo* is less damaging than it might have been.

**The Court’s Decision.** In *Cuomo*, the Court interpreted a provision of the National Bank Act that states: “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.”<sup>3</sup> The Office of the Comptroller of the Currency (“OCC”), the federal agency responsible for regulating national banks, promulgated a regulation through notice-and-comment rulemaking that interprets the statutory term “visitorial powers” to include (i) examination of a bank, (ii) inspection of its books and records, (iii) regulation and supervision of federally-authorized banking activities, and (iv) enforcing compliance with any applicable federal or state laws concerning those activities. See 12 C.F.R. § 7.4000. The Solicitor General, representing the OCC, argued to the Supreme Court that the OCC’s interpretation of Section 484(a) was reasonable, and therefore entitled to judicial deference under *Chevron U.S.A. Inc. v. NRDC*.<sup>4</sup>

<sup>†</sup> Partners, Covington & Burling LLP. In *Cuomo v. Clearing House Assn. L.L.C.*, the authors represented the Financial Services Roundtable, which filed a brief as amicus curiae supporting the Clearing House Association and the Office of the Comptroller of the Currency.

<sup>1</sup> *Cuomo v. Clearing House Assn., L.L.C.*, 557 U.S. \_\_\_\_ (2009)

<sup>2</sup> Slip op. 7.

<sup>3</sup> 12 U.S.C. § 484(a).

<sup>4</sup> 467 U.S. 837 (1984).

Justice Scalia’s opinion for the five-justice majority acknowledged that there is “some ambiguity” in the term “visitorial powers,” and that under the *Chevron* framework “[t]he Comptroller can give authoritative meaning to the statute within the bounds of that uncertainty.”<sup>5</sup> The majority concluded, however, that the OCC’s interpretation of the statutory language is unreasonable. The majority viewed “visitation” as a “right to oversee corporate affairs” that is “quite separate from the power to enforce the law,” and insisted that there is “not a credible argument to the contrary.”<sup>6</sup> The four dissenting Justices agreed with the majority that the term “visitorial powers” is open to interpretation, but found the OCC’s interpretation of that term to be reasonable. The dissenters pointed out that, as a historical matter, visitorial power over civil corporations was exercised by the sovereign, which has authority to assure compliance with all applicable laws.<sup>7</sup> The majority’s rejection of the OCC’s interpretation contradicts the views of “venerable legal scholars” including Blackstone, Kent, and Pound, who “understood visitation of civil corporations to include the power to enforce generally applicable laws through judicial actions.”<sup>8</sup> In the view of the four dissenters, the OCC adopted a permissible construction of an ambiguous statutory term, and therefore its interpretation was entitled to judicial deference under *Chevron*.

Notably missing from the majority’s opinion in *Cuomo* is a recognition of the context out of which Section 484(a) arose. When Congress enacted the National Bank Act in the midst of the Civil War, it did so against a backdrop of state hostility to the former Banks of the United States.<sup>9</sup> Consequently, Congress protected national banks from “unfriendly State legislation” by providing for federal chartering and regulation of national banks, and by insulating national banks from attack by hostile state governments.<sup>10</sup> States “can exercise no control over [national banks], nor in any wise affect their operation, except insofar as Congress may see proper to permit.”<sup>11</sup> In this context, the OCC’s broader interpretation of Section 484(a) is not “bizarre” at all—it is entirely reasonable.

***Consequences of the Court’s Decision.*** The majority’s opinion in *Cuomo* draws a line between a state’s “enforcement of its laws in court” and state demands to “inspect books and records at any time for any or no reason.”<sup>12</sup> The majority holds that Section 484(a) permits the first action, but prohibits the

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<sup>5</sup> Slip op. 3.

<sup>6</sup> Slip op. 4, 7.

<sup>7</sup> Slip op. 6.

<sup>8</sup> Slip op. 10. These arguments are set out in the amicus brief that the authors filed in *Cuomo*.

<sup>9</sup> See *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 10 (2007) (“Nearly 200 years ago, in *McCulloch v. Maryland*, this Court held federal law supreme over state law with respect to national banking”).

<sup>10</sup> *Tiffany v. National Bank of Mo.*, 85 U.S. (18 Wall.) 409, 412 (1874).

<sup>11</sup> *Farmers’ and Mechanics Nat’l Bank v. Dearing*, 91 U.S. 29, 34 (1875).

<sup>12</sup> Slip op. 9.

second. The majority acknowledges that “in the course of exercising visitation powers the sovereign can compel compliance with the law,” but states that “[t]he critical question is not what is being compelled, but what sovereign power has been invoked to compel it.”<sup>13</sup> The majority observes that when a state attorney general acts as a litigant, he or she “must file a lawsuit, survive a motion to dismiss, endure the rules of procedure and discovery, and risk sanctions if his claim is frivolous or his discovery tactics abusive.”<sup>14</sup> The majority adds that “[j]udges are trusted to prevent ‘fishing expeditions.’”<sup>15</sup> The majority also notes that the forbidden exercise of visitorial powers by a state includes “any form of administrative oversight that allows a sovereign to inspect books and records on demand, even if the process is mediated by a court through prerogative writs or similar means.”<sup>16</sup>

In applying these principles to the parties before it in *Cuomo*, the majority agreed that if the New York Attorney General’s threatened action against the national banks was prohibited by Section 484(a), then his request for access to bank documents, coupled with a threat to pursue the unlawful action if the documents were not produced, could be enjoined. Here, the majority concluded, the New York Attorney General’s issuance of a subpoena on his own authority would have been an exercise of supervisory power, and thus is forbidden by Section 484(a). The majority added, however, that the Attorney General is permitted to bring a judicial enforcement action.<sup>17</sup>

The line the Court drew in *Cuomo* may not turn out to be as clear or practical as the majority appeared to believe. For one thing, it may not always be clear whether a state is acting in the role of “sovereign as supervisor” or “sovereign as law enforcer.”<sup>18</sup> In addition, the majority’s faith in the restraining hand of judges may be overstated. National banks are subject to suit in state court, and state courts do not always treat the State Attorney General as “just another civil litigant.”

That said, the consequences of the Supreme Court’s decision are not as harmful as they might have been. This is so for three related reasons.

1. *The Court did not invoke the “presumption against preemption.”* In recent years, the Court has often invoked a “presumption against preemption” as a way of expressing a judicial bias against preempting state laws. Indeed, just last Term the Court held that this presumption applies in cases of

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<sup>13</sup> Slip op. 11-12.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Slip op. 14.

<sup>17</sup> Slip op. 14-15.

<sup>18</sup> Slip op. 14.

implied preemption as well as express preemption.<sup>19</sup> The Court has not applied this presumption in the national banking context. To the contrary, it has applied something like the opposite presumption: it has presumed that Congress intended to preempt any state law that prevents or significantly interferes with the exercise of national banking powers. As a result, “grants of both enumerated and incidental ‘powers’ to national banks” are “not normally limited by, but rather ordinarily preempt, contrary state law.”<sup>20</sup> The court’s decision in *Cuomo* does not alter this basic approach. Instead, the majority expressly stated that it was not relying on a presumption against preemption to support its ruling against the OCC and the national banks.<sup>21</sup>

2. *The Court did not alter the Chevron framework.* In its prior decisions, the Court has held that the Comptroller’s reasonable interpretation of provisions of the National Bank Act receive *Chevron* deference. In *Smiley v. Citibank (South Dakota), N.A.*,<sup>22</sup> for example, the Court’s opinion (also written by Justice Scalia) distinguished between “the question of the substantive . . . meaning of a statute” and “the question of whether a statute is pre-emptive.”<sup>23</sup> The Court answered the first question by deferring under *Chevron* to the OCC’s interpretation of the statutory term “interest.” Because there was a clear conflict between the federal statute, as reasonably interpreted by the OCC, and the state law at issue, the Court had no need to consider whether deference was due to the OCC on the preemption question.

In *Cuomo*, the Court did not alter the *Chevron* framework. To the contrary, the Court stated that it was applying “the familiar *Chevron* framework,” that “[t]here is necessarily some ambiguity as to the meaning of the statutory term ‘visitorial powers,’” and that “[t]he Comptroller can give authoritative meaning to the statute within the bounds of that uncertainty.”<sup>24</sup> The four dissenting Justices also applied the *Chevron* framework, and would have ruled for the OCC on the basis of that framework. The majority held, however, that the Comptroller’s interpretation of visitorial authority was unreasonable, and therefore not entitled to deference under *Chevron*.

It is possible that the Justices in the majority believed that a restriction on enforcement of non-preempted state laws by state officials is so unusual (or “bizarre”) that it requires a clear statement of congressional intent to impose such a restriction. Rather than imposing such a clear-statement rule, however, the Court held that the OCC’s interpretation of the term “visitorial powers” is unreasonable

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<sup>19</sup> See *Wyeth v. Levine*, 129 S. Ct. 1187 (2009); *Altria v. Good*, 129 S. Ct. 538 (2008).

<sup>20</sup> *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 32 (1996).

<sup>21</sup> See Slip Op. 12 (“We have not invoked the presumption against preemption”).

<sup>22</sup> 517 U.S. 735 (1996).

<sup>23</sup> 517 U.S. at 744.

<sup>24</sup> Slip op. 3.

under Step 2 of the *Chevron* analysis. While the majority's arguments in support of this conclusion are unpersuasive (at least to us), the majority's approach leaves the *Chevron* framework of analysis intact.

3. *The Court's Opinion Does Not Alter the Substantive Preemption Analysis Applied to National Banks.* Perhaps most important of all, the Court's opinion in *Cuomo* does not alter the legal analysis that courts apply to determine whether state laws are substantively preempted as applied to national banks. In most of the Supreme Court's cases applying preemption principles to national banks, the issue is whether a particular state law restricting interest rates, insurance sales, or other bank activities is substantively preempted as applied to national banks. *Cuomo* differs from these decisions in that the state law at issue in *Cuomo* was *not* preempted. The issue was not whether the state fair-lending laws at issue in *Cuomo* applied to national banks—they did. Instead, the issue was whether state officials and the OCC share authority to enforce a concededly applicable state law against national banks, or whether enforcement authority rests solely with the OCC. While state authority to enforce non-preempted state laws against national banks is important and consequential, it is distinct from the authority to impose substantive requirements that prevent or significantly interfere with the exercise of federal banking powers. Because *Cuomo* is limited to state laws that, as a substantive matter, do not prevent or significantly interfere with the exercise of federal banking powers, the adverse consequences of the Court's decision are likely to be limited.



## ***Cuomo v. Clearing House: Why We Are Still in the Dark about Agency Preemption***

Thomas W. Merrill<sup>†</sup>

Twice in the last two years the Supreme Court has addressed the authority of the Office of the Comptroller of the Currency (OCC) to preempt state banking laws. In both cases, the lower courts invoked *Chevron* deference in upholding the OCC's view that preemption was appropriate. By agreeing to review these decisions, the Court seemed poised to clarify what role *Chevron* should play in resolving preemption disputes. The Court upheld the OCC's preemption ruling in the first case, *Watters v. Wachovia Bank, N.A.*<sup>1</sup> In the second and most recent decision, *Cuomo v. Clearing House*,<sup>2</sup> the Court upheld the OCC's preemptive regulation in part and reversed in part. Nevertheless, in the wake of these decisions we have no clearer idea about how *Chevron* fits into preemption picture than we did before.

In *Watters*, the Court majority, speaking through Justice Ginsburg, said it was unnecessary to consider *Chevron*, because preemption was required by the National Bank Act itself. This is untenable. It is true that Section 484(a) expressly preempts the exercise of visitorial authority by state authorities over national banks. But the question in *Watters* was whether this preemption extends to state-chartered operating subsidiaries of national banks. The 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. It would be nice to know whether *Chevron* does or does not apply in answering such a question. But the Court pretended that issue was not before it.

In *Cuomo v. Clearing House*, the majority did purport to apply *Chevron* in reviewing a regulation by the OCC that declared state enforcement of non-preempted state law to be a species of "visitorial authority." Writing for an unlikely coalition consisting of himself and the four more liberal justices, Justice Scalia concluded that the New York Attorney General could not demand information from national banks as part of an executive branch investigation into possible state law violations. But if the Attorney General

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<sup>†</sup> Professor of Law, Yale University. Merrill filed an *amicus curiae* brief in *Cuomo v. Clearing House Assn., L.L.C.* on behalf of the National Governors Association, et al.

<sup>1</sup> 550 U.S. 1 (2007).

<sup>2</sup> *Cuomo v. Clearing House Assn., L.L.C.*, 557 U.S. \_\_\_\_ (2009).

decided to file a lawsuit in state court, he could get the same information through the discovery process. Once a lawsuit is filed, Justice Scalia reasoned, the information request is covered by a statutory exception for visitorial authority that is “vested in the courts of justice.” Justice Scalia, however, was uncharacteristically imprecise about why this Solomonic resolution was consistent with *Chevron*. He acknowledged that “visitorial authority” is ambiguous. But he also insisted that the “outer limits” of the meaning of that term could be discerned “through the clouded lens of history.” Whether this was a “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. The four dissenters – Justice Scalia’s more usual conservative allies – offered a more straightforward approach. They too applied *Chevron* but would have upheld the OCC’s regulation across the board, on the ground that the statute was ambiguous and the agency interpretation reasonable.

*Watters* and *Cuomo* provide no illumination because both cases present variations on the hardest question about the role of agencies in preemption controversies. To gain a sense of what that question is and why it is so difficult to resolve, we need to step back and review four questions about agencies and preemption, and get a sense of where the law stands today with respect to each.

The first question is whether agency action can create the basis for a judgment by a court that state law is preempted. The answer to this question is clearly yes. In *Fidelity Federal Savings and Loan v. de la Cuesta*,<sup>3</sup> for example, a regulation of the Federal Home Loan Bank Board permitting federally insured S & Ls to include due on sale clauses in mortgages was held to preempt California law to the contrary. In *Geier v. American Honda Motor Co.*<sup>4</sup> a regulation of the National Highway Traffic Administration making air bags optional was held to preempt a state law tort suit that would have made them mandatory. Note that in these decisions, the Court concluded that preemption was required based on its independent analysis of the effect of the agency action. There was no *Chevron*- style deference to the agency on preemption. Implicit in these decisions is the understanding that agency action can provide the basis for preemption only if it has the force of law. The Supremacy Clause, which is the foundation of preemption, makes federal *laws* supreme, not the opinions of executive officials. So only legislative rules or binding orders can serve as the foundation for preemption based on agency action.

*Altria Group, Inc. v. Good*,<sup>5</sup> also decided this last Term, supports this inference. The Court declined to give preemptive significance to an FTC decision to suspend a rulemaking about testing the tar and

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<sup>3</sup> 458 U.S. 141 (1982).

<sup>4</sup> 529 U.S. 861 (2000).

<sup>5</sup> 555 U.S. \_\_\_\_ (2008)

nicotine in cigarettes. Unfortunately, the Court passed up an opportunity to generalize the holding and make explicit the point that agency action that does not have the force of law cannot preempt.

The second question is whether agencies can ever declare state law preempted on their own authority. Here too I think the answer is very likely yes. Congress has assumed it has the power to delegate authority to agencies to issue preemptive regulations and orders, and it has enacted a number of statutes including such provisions. For example, the Transportation Department has explicit authority to preempt state laws regulating the transportation of hazardous waste material in interstate commerce.<sup>6</sup> The Court has never considered the constitutionality of such a statute. But it has noted their existence. The key here, I would argue, is that Congress must expressly delegate such preemptive authority to an agency. Agencies should not be presumed to have the power to preempt on their own authority simply because they have some generic power to issue rules and regulations. To allow any agency with standard agency powers to start declaring state laws preempted would threaten to create runaway preemption, which would be destabilizing to our federal system.

The third question is how much deference courts should give agencies when agencies offer their opinions about the desirability of preemption. Here the answers are still somewhat tentative, but the Court has made headway in clarifying its stance. Last Term's decision in *Wyeth v. Levine*<sup>7</sup> is the most authoritative word yet on this question. The issue was whether FDA's approval of the labeling for a drug establishes a regulatory floor, or both a floor and a ceiling. If it is only a floor, then the states are free to impose tort liability on drug manufacturers for failure to warn about possible side effects. If it is both a floor and a ceiling, then imposing tort liability for failing to disclose more information would be preempted. The FDA issued an analysis in the preamble to new regulations on drug labels in which it opined that the Act is both a floor and a ceiling, and that state tort actions predicated on a duty to disclose more information are therefore preempted. In a 6-3 decision written by Justice Stevens, the Court rejected the FDA's theory about the Act it administers, and held that the Act imposes only a floor.

In considering what weight to give the FDA's views, the Court's reasoning was tightly compressed but illuminating. The FDA "Preemption Preamble" did not itself have the force of law. (Recall Question No. 1.) Congress had not delegated authority to the agency to preempt state law directly. (Recall Question No. 2.) In these circumstances, the Court said, the Court would attend to the agency's explanation of why state law's impact on the federal scheme required preemption, but the weight the Court would give that explanation depended on its "thoroughness, consistency, and persuasiveness." In other words, the agency was entitled to *Skidmore* deference, not *Chevron* deference, at least where there was no express delegation of authority to preempt. The Court also awarded demerits to the FDA for what it described as its "procedural failure." The FDA had said in the notice of proposed rulemaking that the labeling rule would

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<sup>6</sup> See 49 U.S.C. § 5125(d).

<sup>7</sup> 555 U.S. \_\_\_ (2009),

not preempt state law; then, after the comment period was over, it issued the preamble declaiming about preemption. The Court's irritation was palpable.

We come then to what I have called the hardest question about agencies and preemption, which I claim was the question that bedeviled the Court in both *Watters* and *Cuomo*. The question is this: how do we know when an agency interpretation is going to factor into a controversy about preemption? Suppose that Congress has not expressly conferred authority on the agency to preempt. Suppose too that the statute the agency administers contains an ambiguity, of the sort that would ordinarily trigger *Chevron* deference. But suppose further that the resolution of this ambiguity might determine, some day down the road, the outcome of an important preemption question. What is a court to do? If it gives *Chevron* deference to the agency on the interpretation question, it may be effectively giving the agency *Chevron* deference on the question of preemption, something *Wyeth* says it is not to do. But if it gives only *Skidmore* deference to the agency on the interpretation question, then the court is effectively denying the agency its implied authority to resolve policy choices about the statute it administers. If the court gives the agency *Chevron* deference when preemption is not immediately in the picture, and *Skidmore* deference when it is, then we may end up with inconsistent interpretations of the statute from different institutions, which seems a recipe for chaos.

As I said, this is a difficult question. In *Smiley v. Citibank (South Dakota), N.A.*,<sup>8</sup> Justice Scalia breezed by the question, saying that the Court would give *Chevron* deference to the agency on the "question of meaning," but not on the "question of preemption," as if the two inquiries were hermetically sealed. In *Watters*, Justice Ginsburg tried to bury the question, claiming that no issue of agency deference was presented when the whole case turned on an agency regulation resolving a statutory ambiguity. In *Cuomo*, Justice Scalia offered no coherent account of how the deference inquiry and the preemption inquiry were to be integrated. The only thing for sure is that he gave no meaningful deference to the OCC's regulation on visitorial authority, coming up with a clever reading of the statute that no party to the case had advocated.

What then is the answer to the most difficult question about agencies and preemption? I am not sure, although I can predict that it is not going to be a tidy process in reaching one. Let me throw out a couple of suggestions, which should be regarded as nothing more than trial balloons on my part.

With respect to express preemption cases, perhaps a distinction can be drawn between interpretation of words and phrases in preemption and/or savings clauses of a statute, and interpretation of other general provisions of the Act. An agency would never get *Chevron* deference for interpretations of preemption or savings clauses, just *Skidmore* deference. But agencies would be entitled to *Chevron* deference for interpretations of other provisions of the Act, provided those interpretations otherwise

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<sup>8</sup> 517 U.S. 735 (1996).

qualify for *Chevron* deference (the agency has been delegated authority to act with the force of law and has exercised this authority, etc.). This solution would not completely eliminate the dangers of agency overreaching or manipulation. But at least it would be workable. The level of deference would turn on the type of clause in which the ambiguity appears, and it should ordinarily be easy to distinguish preemption and savings clauses from other types of provisions. And this solution seems to describe fairly accurately what happened in *Watters* and *Cuomo*, as well as *Riegel v. Medtronic*<sup>9</sup> the Term before. Each of these decisions involved the interpretation of an express preemption clause, and the Court decided the matter without giving anything more than *Skidmore* deference to the agency.

With respect to implied preemption cases, this relatively clean solution is not available. But *Wyeth* may provide a clue about a possible way out here too. In *Wyeth*, the FDA did not offer an interpretation of any particular provision of the Food and Drug Act. Instead, it offered a theory of the Act. The floor and ceiling interpretation was a global construction about the nature of the Act, one having far reaching implications for federal–state relations. This kind of agency interpretation—a general theory of legislative intent drawn from the entire Act and designed to structure the response to a wide range of implied preemption questions—is the sort of agency interpretation that should be given *Skidmore* deference. As long as courts have the final word on implied preemption—and they will, since by definition Congress will not have expressly delegated authority to the agency to preempt (recall Question No. 2 again)—and as long as courts give only *Skidmore* deference to agency “theories” about preemptive intent, perhaps we are safe in applying *Chevron* deference to other questions of interpretation resolved by the agency that might become relevant in future preemption controversies. I have my qualms about this proposed solution. Distinguishing between theories of a statute and interpretations of specific clauses will not always be easy, and specific clauses can probably be interpreted in ways that will foreordain the outcome of the court’s preemption analysis. But it is at least worth thinking about some such solution.

Figuring out the proper role of agencies in preemption has not been easy. The faint light of dawn is beginning to glow in some areas. But *Cuomo v. Clearing House* tells us only one thing for sure: we are still in the dark on the hardest question.

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<sup>9</sup> 128 S.Ct. 999 (2008)