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# OCC v. Spitzer: An Erroneous Application of Chevron that Should be Reversed

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**Preemption**

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By Arthur E. Wilmarth, Jr.

## Background of OCC v. Spitzer

In a recent article, Raymond Natter has accurately described *OCC v. Spitzer*[1] as a ''sweeping decision'' that affirms the power of the Office of the Comptroller of the Currency (''OCC'') to ''bar State Attorneys General from investigating or taking legal action against national banks and their operating subsidiaries.''[2] In *OCC v. Spitzer*, a federal district court (the ''District Court'') upheld the validity of 12 C.F.R. § 7.4000, a regulation declaring that the OCC possesses ''exclusive visitorial powers'' over national banks.[3] Visitorial powers include the right of a superior authority to examine a bank and to enforce the bank's compliance with applicable laws.[4] In upholding § 7.4000, the District Court determined that the OCC possesses exclusive governmental enforcement authority with respect to **all** laws—federal and state—that apply to national banks. Under the District Court's decision, only the OCC—**not** state officials—can file suit to enforce applicable state laws against national banks.

In 12 U.S.C. § 484(a), Congress has provided 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 such as shall be, or have been exercised or directed by Congress . . . .''[5] In 2004, the OCC amended 12 C.F.R. § 7.4000 to ''clarify'' the scope

[1] *Office of the Comptroller of the Currency v. Spitzer*, 396 F. Supp. 2d 383 (S.D.N.Y. 2005) (''*OCC v. Spitzer*'').

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[2] Raymond Natter, *OCC v. Spitzer: OCC's Exclusive Authority over National Banks Affirmed*, 81 BNA's Banking Rep. 780, 780 (2005).

[3] 12 C.F.R. § 7.4000(a), (b).

[4] *See First Union National Bank v. Burke*, 48 F. Supp. 2d 132, 144-45 (D. Conn. 1999).

[5] 12 U.S.C. § 484(a). A separate provision of § 484 allows state officials to examine the records of national banks for the sole purpose of ensuring compliance with state unclaimed property or escheat laws. *Id.* § 484(b).

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of the ''vested in the courts of justice'' clause of 12 U.S.C. § 484(a).[6] The OCC's purpose in adopting the 2004 amendment was to ensure that

'' . . . the exception for the courts of justice [in 12 U.S.C. § 484(a)] does not permit a State to use the courts to inspect, examine, regulate or compel action by a national bank. Instead, the exception simply permits **private litigants** to obtain discovery and other typical judicial relief in actions involving national banks.[7]

Thus, the 2004 amendment, codified at 12 C.F.R. § 7.4000(b)(2), embodies the OCC's claim that judicial proceedings brought by government officials to enforce state laws against national banks are matters ''within the OCC's **exclusive purview**.''[8]

As Mr. Natter has explained, *OCC v. Spitzer* arose out of ''attempts by the New York State Attorney General, Eliot Spitzer, to investigate allegations that lending institutions, including national banks, may have discriminated in the pricing of mortgage loans in violation of New York law. . . . [T]he Attorney General sent letters to national banks demanding non-public lending information as part of his 'preliminary inquiry' into potential lending discrimination violations.''[9]

The OCC conceded that New York's fair lending laws, like other state antidiscrimination laws, apply to residential mortgage loans made by national banks.[10] Thus, the OCC did not dispute the applicability of New York's fair lending laws to the national banks that received Attorney General Spitzer's requests for information.

The OCC also did not contest Attorney General Spitzer's authority **under New York law** to conduct investigations and initiate judicial proceedings to determine whether lending institutions had violated New York's fair lending laws. However, the OCC maintained that **federal law** preempted Attorney General Spitzer's authority to investigate or bring judicial actions against national banks.[11]

## District Court's Deference to OCC's 'Interpretation' of 12 U.S.C. § 484(a)

The District Court granted the OCC's motion for a permanent injunction against Attorney General Spitzer. In doing so, the District Court acknowledged that ''nowhere does the [National Bank] Act precisely define the scope of the OCC's exclusive visitorial powers or the reach of the courts of justice exception'' in 12 U.S.C. § 484(a).[12] Nevertheless, the District Court held that Attorney General Spitzer's investigative and judicial enforcement powers were preempted with respect to national banks by § 484(a) as ''interpreted'' by the OCC in 12 C.F.R. § 7.4000(b)(2).[13] Despite the lack of any explicit statutory mandate for the OCC's regulation, the District Court concluded that § 7.4000(b)(2) was entitled to ''deference—indeed, controlling weight—under the familiar framework set forth . . . in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 . . . (1984).''[14]

Under ''step one'' of the *Chevron* framework, the District Court found that Congress had not addressed the ''precise question at issue'' that the OCC decided by issuing 12 C.F.R. § 7.4000(b)(2). In the District Court's view, the National Bank Act did not ''unambiguously'' preclude the OCC from adopting a regulation that bars state officials from initiating judicial enforcement proceedings against national banks.[15]

After concluding that Congress had not foreclosed the OCC's regulation, the District Court proceeded to a highly deferential review of the OCC's rule under ''step two'' of *Chevron*. Applying ''step two,'' the District Court concluded that the OCC's regulation ''reflects a permissible construction of the statute'' and should be given ''controlling weight'' by the courts.[16]

## Was District Court Correct in Granting Deference to OCC's Regulation?

Mr. Natter has justifiably described *OCC v. Spitzer* as ''a significant victory for the OCC.''[17] However, in my view the case was wrongly decided and should be reversed. As shown below, the District Court's analysis was fundamentally flawed, because 12 C.F.R. § 7.4000(b)(2) does not qualify for *Chevron* deference and clearly exceeds the OCC's statutory authority under the National Bank Act. The reasoning of the District Court—and of three other federal courts that recently upheld another OCC preemptive rule—suggests that the OCC can rely on *Chevron* deference as a sufficient basis to expand its jurisdiction, and to alter the balance of federal-state authority, without any clear expression of supporting congressional intent. The Supreme Court's recent decision in *Gonzalez v. Oregon*,[18] which rejected a similar, open-ended claim for deference by the United States Attorney General, makes clear that all four decisions are based on an erroneous understanding of *Chevron*.

The first section of my analysis presents four reasons why the District Court should not have granted *Chevron* deference to 12 C.F.R. § 7.4000(b)(2).

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[6] Bank Activities and Operations, 69 F.R. 1895 (2004) (''2004 OCC Visitorial Powers Rule''), at 1895, 1900.

[7] Natter, *supra* note 2, at 780 (emphasis added). *See also* 2004 OCC Visitorial Powers Rule, *supra* note 6, at 1900.

[8] 2004 OCC Visitorial Powers Rule, *supra* note 6, at 1900 (emphasis added).

[9] Natter, *supra* note 2, at 780-81. As Mr. Natter also observed, ''[t]he Attorney General's concerns were based on preliminary and raw data released [by lending institutions] under the Home Mortgage Disclosure Act, that showed that members of certain minority groups were charged, on average, higher mortgage rates than whites.'' *Id.* at 780.

[10] *OCC v. Spitzer*, 396 F. Supp. 2d at 385; *see also National State Bank v. Long*, 630 F.2d 981, 985-87 (3d Cir. 1980) (holding that New Jersey's anti-redlining statute applied to mortgage loans made by national banks); *cf. Kroske v. US Bank Corp.*, 432 F.3d 976 (9th Cir. 2005) (holding that Washington's statute prohibiting age discrimination in employment applied to national banks).

[11] *See OCC v. Spitzer*, 396 F. Supp. 2d at 387-88.

[12] *Id.* at 393.

[13] *Id.* at 385, 407. For purposes of the District Court's opinion, the term ''national banks'' includes operating subsidiaries of national banks, based on a recent Second Circuit decision that upheld another OCC preemptive rule, codified at 12 C.F.R. § 7.4006. Under § 7.4006, the OCC has declared that state laws apply to operating subsidiaries only to the extent that such laws apply to national banks. *OCC v. Spitzer*, 396 F. Supp. 2d at 385 n.1 (citing *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir. 2005), *petition for cert. filed*, No. 05-431 (U.S. Sept. 30, 2005)).

[14] *OCC v. Spitzer*, 396 F. Supp. 2d at 390 (quote), 404-07.

[15] *Id.* at 393-94.

[16] *Id.* at 399, 406.

[17] Natter, *supra* note 2, at 782.

[18] No. 04-623 (U.S. Jan. 17, 2006).

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First, the OCC's regulation embodied a preemption determination, and preemption determinations by federal agencies raise sensitive issues of federalism that require *de novo* review by the courts.

Second, the OCC's regulation infringes upon the states' sovereign authority to enforce their laws and thereby raises serious issues under the Tenth Amendment. The District Court should have refused to defer to § 7.4000(b)(2) under *Chevron*, because (i) the OCC's rule was not supported by any clear statement of congressional intent to divest the states of their sovereign law enforcement authority, and (ii) the OCC's claim for *Chevron* deference must give way to the judicial canon in favor of avoiding significant constitutional questions.

Third, the Supreme Court's reasoning in *Gonzalez v. Oregon* shows that the District Court overlooked a crucial precondition for judicial deference under ''step two'' of *Chevron*. That precondition—which I call ''*Chevron* step 2.1''—requires a reviewing court to determine whether a federal agency's regulation has been ''promulgated pursuant to authority Congress has delegated to the [agency].''[19] Under *Gonzalez*, it is not proper for a court to grant deference ''merely because the statute is ambiguous.''[20] Rather, the court must carefully examine the text and structure of the governing statute to determine whether it reveals a congressional intent to delegate the full extent of the rulemaking power claimed by the agency.

Gonzalez indicates that a searching analysis of congressional intent is particularly called for when the agency asserts a ''broad and unusual authority'' based on an ''implicit delegation.''[21]. In addition, the court must keep in mind that Congress is unlikely to use ''muffled hints'' either to ''alter a statute's obvious scope'' or ''to regulate areas traditionally supervised by the States' police power.''[22] When 12 C.F.R. § 7.4000(b)(2) is scrutinized under the standards articulated in *Gonzalez*, it becomes clear that the regulation far exceeds the scope of the OCC's authority under the National Bank Act.

Fourth, the OCC was motivated by a powerful financial interest when it adopted § 7.4000(b)(2) in 2004, as one of a series of preemption rules. The OCC's preemption rules were designed to persuade large, multistate banks to operate under national charters, thereby increasing the OCC's assessment revenues and budgetary resources. In view of the OCC's obvious self-interest in adopting § 7.4000(b)(2), the District Court should not have given any deference to that regulation.

The remaining sections of my analysis demonstrate that 12 C.F.R. § 7.4000(b)(2) is contrary to the text and history of 12 U.S.C. § 484(a) and related statutes, as well as authoritative judicial constructions of the National Bank Act. The explicit language of 12 U.S.C. § 484(a) preserves, **without any limitation**, visitorial powers that are ''vested in the courts of justice.'' The ordinary meaning of the statutory text indicates a congressional intent to preserve the states' ability to enforce their laws through judicial proceedings. Nothing in the clause's unqualified terms, or in related statutes, suggests that Congress intended to restrict the availability of judicial process to private litigants, as the OCC has claimed.

Moreover, the OCC's regulation is contrary to a long series of judicial decisions. Since 1870, the Supreme Court and other federal and state courts have repeatedly upheld the authority of state officials to obtain judicial remedies to enforce state laws against national banks. In 1982, Congress reenacted the ''vested in the courts of justice'' clause without change in 12 U.S.C. § 484(a), thereby indicating its presumptive agreement with those court decisions.

In addition, the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (''Riegle-Neal Act'') expressed Congress' strong desire to maintain the balance between state and federal law which then existed within the dual banking system. Thus, the position asserted by the OCC in § 7.4000(b)(2) is unsupported by any congressional mandate and is contradicted by the great weight of judicial authorities. Given the limited scope of the OCC's rulemaking power under 12 U.S.C. § 93a, the OCC had no authority to rewrite § 484(a) in the guise of interpretation.

## Analysis

## 1. The District Court Erred in Granting Deference to 12 C.F.R. § 7.4000(b)(2) Under *Chevron*

**a. Section 7.4000(b)(2) Is a Preemptive Rule and Therefore Does Not Qualify for Judicial Deference Under *Chevron*.** Section 7.4000(b)(2) is a preemptive regulation that purports to bar state officials from suing in either federal or state courts to enforce valid state laws against national banks. In adopting § 7.4000(b)(2), the OCC relied primarily on 12 U.S.C. § 484(a), which provides that ''[n]o national bank shall be subject to any visitorial power **except as** authorized by Federal law, **vested in the courts of justice** or such as shall be, or have been exercised by Congress . . . .''[23] On its face, the ''vested in the courts of justice'' clause exempts all visitorial powers exercised by federal and state courts from the prohibition contained in 12 U.S.C. § 484(a). A common-sense reading of § 484(a) would permit all judicial proceedings that are lawfully instituted against national banks, including those initiated by state officials to enforce applicable state laws.

Thus, the OCC's regulation should be rejected for the same reason that the Supreme Court struck down the United States Attorney General's interpretive rule in *Gonzalez v. Oregon*—namely, that the regulation conflicts with the ''ordinary meaning'' and ''commonsense'' application of the governing statute.[24]

As the District Court acknowledged in *OCC v. Spitzer*, ''nowhere does the [National Bank] Act define the scope of the OCC's exclusive visitorial powers or the reach of the courts of justice exception.''[25] Hence, the text of the National Bank Act does not place any limitation on the visitorial powers that are ''vested in the courts of justice'' under 12 U.S.C. § 484(a). Nevertheless, by adopting 12 C.F.R. § 7.4000(b)(2), the OCC

[19] *Id.*, slip op. at 11.
[20] *Id.*
[21] *Id.*, slip op. at 2, 20, 28.
[22] *Id.*, slip op. at 28.
[23] 12 U.S.C. § 484(a) (emphasis added).
[24] No. 04-623 (U.S. Jan. 17, 2006), slip op. at 27-28.
[25] *OCC v. Spitzer*, 396 F. Supp. 2d at 393.

asserted that § 484(a) must be construed to preempt all judicial enforcement proceedings brought by state officials, despite the absence of any specific language to that effect in the statute itself.

The OCC's preemption determination is not entitled to deference, because the issue of whether a federal statute preempts state law is a legal question as to which courts have superior expertise, as well as an institutional responsibility to resolve sensitive issues involving the allocation of power under our federal system. Indeed, ''the whole jurisprudence of pre-emption'' is one of the important ways in which the judiciary ''has participated in maintaining the federal balance'' between national and state authority.[26]

The Supreme Court has never ruled definitively on the question of whether the *Chevron* doctrine applies to preemption determinations by federal agencies. In *Chevron* itself, the Supreme Court was not faced with any preemption issue and considered only the question of whether the federal agency's interpretation was consistent with the governing federal statute.[27]

In *Smiley v. Citibank (South Dakota), N.A.*,[28] the Supreme Court confirmed that *Chevron* establishes an ''ordinary rule of deference'' to agency interpretations of the meaning of a federal statute.[29] However, on the issue of whether *Chevron* applies to a federal agency's preemption determination, the Court assumed, without deciding, that the question of a statute's preemptive effect ''must always be decided *de novo* by the courts.''[30] The Tenth Circuit had previously decided the issue left unresolved in *Smiley*. The Tenth Circuit declared in 1991 that agency preemption determinations are **not** entitled to deference under *Chevron*, because such a determination ''involves matters of law—an area more within the expertise of the courts than within the expertise of the [agency].''[31]

## Recent Decisions Misapplied Chevron in Upholding OCC's Preemption Rules

In three recent decisions, the Second, Sixth and Ninth Circuits granted deference under *Chevron* to another OCC regulation—12 C.F.R. § 7.4006, which preempts the states' authority to regulate operating subsidiaries of national banks. However, all three decisions failed to acknowledge *Smiley* or to consider whether preemption determinations are so different in kind from other agency interpretations that they do **not** qualify for deference under *Chevron*.[32] The Supreme Court recently indicated its interest in this issue when it invited the Solicitor General to file a brief expressing the views of the United States in response to Connecticut's petition for certiorari in *Wachovia v. Burke,* requesting review of the Second Circuit's decision.[33]

The Second, Sixth and Ninth Circuits also erred when they refused to apply a presumption against preemption in determining whether the OCC had authority to adopt its rule preempting state regulation of national bank operating subsidiaries. A presumption against preemption would have precluded *Chevron* deference in all three cases, because such a presumption would have required the OCC to show that 12 C.F.R. § 7.4006 was consistent with ''the clear and manifest purpose of Congress.''[34]

In *Wachovia v. Burke,* the Second Circuit concluded that a presumption against preemption was inapplicable, because ''[r]egulation of federally chartered banks'' is an area that has been ''substantially occupied by federal authority for an extended period of time.''[35] The Sixth and Ninth Circuits adopted the same view.[36] Not surprisingly, the District Court in *OCC v. Spitzer* followed *Burke* in rejecting any presumption against preemption.[37]

The Second, Sixth and Ninth Circuits were clearly mistaken in adopting such a narrowly restricted view of the states' role in regulating national banks. In its 1997 decision in *Atherton v. FDIC*,[38] the Supreme Court affirmed that ''federally chartered banks **are** subject to state law.''[39] As support for that principle, the Court cited decisions reaching back to an 1870 case, which held that national banks

''. . . are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when State law incapacitates the [national] banks from discharging their duties to the federal government that it becomes unconstitutional.''[40]

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[26] *United States v. Lopez,* 514 U.S. 549, 578 (1995) (Kennedy and O'Connor, JJ., concurring).

[27] *See Chevron*, 467 U.S. at 840. Similarly, in a decision that granted *Chevron* deference to an OCC interpretive ruling, the Supreme Court considered only the question of whether the OCC's ruling was consistent with federal statutes limiting the powers of national banks. *Nationsbank of N.C. v. Variable Annuity Life Ins. Co.,* 513 U.S. 251 (1995) (''*VALIC*''). Thus, neither *Chevron* nor *VALIC* raised any preemption issues.

[28] 517 U.S. 735 (1996).

[29] *Id.* at 740.

[30] *Id.* at 743-44.

[31] *Colorado Pub. Utils. Comm'n v. Harmon*, 951 F.2d 1571, 1579 (10th Cir. 1991).

[32] *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 315, 318-21 (2d Cir. 2005), *petition for cert. filed,* No. 05-431 (U.S., Sept. 30, 2005); *Wachovia Bank, N.A. v. Watters,* 431 F.3d 556 (6th Cir. 2005); *Wells Fargo Bank, N.A. v. Boutris*, 419 F.3d 949, 958-62 (9th Cir. 2005).

[33] *See* 74 U.S.L.W. 3334 (2005) (quoting the Supreme Court's order in *Burke v. Wachovia Bank, N.A.,* No. 05-431 (U.S., Dec. 5, 2005)).

[34] *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 514 U.S. 645, 655 (1995) (quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947)). For evidence that 12 C.F.R. § 7.4006 was not supported by any ''clear and manifest purpose of Congress,'' *see infra* note 90 and accompanying text; 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 ANN. REV. OF BANKING & FINANCIAL L. 225, 324-48 (2004).

[35] *Wachovia v. Burke,* 414 F.3d at 314 (quoting *Flagg v. Yonkers Sav. & Loan Ass'n,* 396 F.3d 178, 183 (2d Cir.), *cert. denied,* 126 S. Ct. 343 (2005)).

[36] *Wachovia v. Watters,* 431 F.3d at 560 n.3 (quoting *Flagg* and citing *Bank of Am. v. City and County of San Francisco,* 309 F.3d 551, 558 (9th Cir. 2002)); *Boutris,* 419 F.3d at 956 (citing *Bank of Am.*).

[37] *OCC v. Spitzer,* 396 F. Supp. 2d at 392.

[38] 519 U.S. 213 (1997).

[39] *Id.* at 222 (emphasis added).

[40] *Id.* at 222-23 (quoting *National Bank v. Commonwealth of Kentucky,* 76 U.S (9 Wall.) 353, 362 (1870)).

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In its 1996 decision in *Barnett Bank of Marion County, N.A. v. Nelson*,[41] the Supreme Court held that states have ''the power to regulate national banks, where . . . doing so does not prevent or significantly interfere with the national bank's exercise of its powers.''[42] In 1999, when Congress enacted the Gramm-Leach-Bliley Act (''GLBA''),[43] Congress adopted the ''prevent or significantly interfere with'' test as the governing standard for evaluating preemption claims based on *Barnett Bank* with respect to insurance sales, solicitation or crossmarketing activities by national banks, other depository institutions or their affiliates.[44]

In both *Atherton*[45] and *Barnett Bank*,[46] the Supreme Court cited its earlier decision in *Anderson National Bank v. Luckett*.[47] In *Luckett* the Court declared that ''national banks are subject to state laws unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions.''[48] In two previous cases, the Court affirmed that ''the operation of general state laws upon the dealings and contracts of national banks'' is the ''rule'', while preemption is an ''exception'' that applies **only** when state laws ''expressly conflict with the laws of the United States or frustrate the purpose for which national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States.''[49]

## Presumption Against Preemption Should Be Applied With Regard to State Laws Regulating National Banks

All of the foregoing decisions of the Supreme Court are consistent with the presumption against preemption that the Court has applied in fields of traditional state regulation.[50] The Court has made clear that this presumption against preemption **also** applies when ''the field [of traditional state concern] is said to have been pre-empted by an agency, acting pursuant to congressional delegation.''[51] In such a case, the federal agency must show ''a conflict between a particular [state-law] provision and the federal scheme, that is strong enough to overcome the presumption that state and local regulation . . . can constitutionally coexist with federal regulation.''[52]

Congress expressed its support for the presumptive application of state laws to national banks when it passed the Riegle-Neal Act.[53] The Riegle-Neal Act requires interstate branches of national banks to comply with host state laws in four broadly-defined areas—community reinvestment, consumer protection, fair lending and intrastate branching—unless federal law preempts the application of state law to national banks. 12 U.S.C. § 36(f)(1)(A). In explaining why state laws should generally apply to national banks, the conference report on the Riegle-Neal Act declared:

''States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, **regardless of the type of charter an institution holds**. In particular, States have a legitimate interest in protecting the rights of their consumers, businesses and communities . . . .

''Under well-established judicial principles, **national banks are subject to State law in many significant respects** . . . . Courts generally use a rule of construction that avoids finding a conflict between the Federal and State law where possible. **The [Riegle-Neal Act] does not change these judicially established principles**.''[54]

By referring to ''judicially established principles'' under which ''national banks are subject to State law in many significant respects,'' the Riegle-Neal conferees clearly indicated their agreement with the Supreme Court decisions discussed above. Indeed, Congress has long followed a policy favoring the general application of state laws to national banks, in order to maintain a competitive equilibrium within the dual banking system of national and state banks.[55]

The clear error underlying the refusal of the Second and Ninth Circuits to apply a presumption against preemption is shown by their misplaced reliance on *United States v. Locke*.[56] In *Locke,* the Supreme Court declined to apply a presumption against preemption in striking down state laws that imposed restrictions on oil tankers operating in navigable waterways. The Court emphasized that the challenged state laws sought to regulate ''national and international maritime commerce,'' an area in which Congress had shown a strong desire to establish a ''uniformity of regulation.''[57] By contrast, in *Atherton*, after reviewing the long history of state regulation of national banks, the Supreme Court held that federal policy did **not** require any ''uniformity'' of regulatory treatment for federally-chartered banks.[58]

Thus, the rejection of a presumption against preemption by the Second, Sixth and Ninth Circuits finds no support in *Locke* and is plainly inconsistent with the Supreme Court's decisions in *Atherton, Luckett, St. Louis, and McClellan*, as well as the Riegle-Neal conference report. In a recent decision, *Kroske v. US Bank*

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[41] 517 U.S. 25 (1996).
[42] *Id.* at 33.
[43] Pub. L. No. 106-102, 113 Stat. 1338.
[44] *See* 15 U.S.C. § 6701(d)(2)(A); H.R. Rep. No. 106-434, at 156-57 (1999) (Conf. Rep.), *reprinted in* 1999 U.S.C.C.A.N. 245, 251.
[45] 519 U.S. at 223
[46] 517 U.S. at 33.
[47] 321 U.S. 233 (1944).
[48] *Id.* at 248.
[49] *First National Bank in St. Louis v. Missouri,* 263 U.S. 640, 656 (1924); *McClellan v. Chipman*, 164 U.S. 347, 357 (1896).
[50] *E.g., Medtronic, Inc. v. Lohr,* 518 U.S. 470, 475, 484-85 (1996); *Blue Cross,* 514 U.S. at 654-56 (1995).
[51] *Hillsborough County v. Automated Medical Laboratories, Inc.,* 471 U.S. 707, 715-16 (1985).
[52] *Id.* at 716.
[53] Pub. L. No. 103-328, 108 Stat. 2338.
[54] H.R. Rep. No. 103-651, at 53 (1994) (Conf. Rep.) (emphasis added), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074.
[55] *See* Wilmarth, *supra* note 34, at 257 (stating that ''Congress has followed a 'policy of equalization' designed to maintain a basic parity of competitive opportunities between national and state banks'') (quoting *First National Bank of Logan v. Walker Bank & Trust Co.,* 385 U.S. 252, 261 (1966), and *Lewis v. Fidelity & Deposit Co.,* 292 U.S. 559, 564-66 (1934)); *see also id.* at 266 (explaining that Congress has carried out ''its general policy of maintaining a competitive balance in the dual banking system'' in two ways—first, by ''expressly incorporating state-law standards'' into federal statutes, and second, ''through statutory silence'' that allows state laws to apply to national banks except in situations where a state law creates an ''irreconcilable conflict with federal law'').
[56] 529 U.S. 89 (2000). *See Wachovia v. Burke,* 414 F.3d at 314 (citing *Locke*); *Bank of Am.,* 309 F.3d at 558 (same).
[57] *Locke,* 529 U.S. at 108.
[58] *Atherton,* 519 U.S. at 219-26.

*Corp.*,[59] the Ninth Circuit appears to have retreated somewhat from its position in *Wells Fargo v. Boutris*. In *Kroske* the Ninth Circuit applied a presumption against preemption in determining that a national bank must comply with a Washington statute prohibiting age discrimination in employment. The Ninth Circuit concluded that the Washington statute was consistent with the Age Discrimination in Employment Act (''ADEA''), a federal statute which creates a ''cooperative state-federal anti-discrimination scheme'' allowing for supplemental state regulation and enforcement.[60]

The national bank in *Kroske* argued that the Washington statute was preempted by 12 U.S.C. § 24(Fifth), which allows national bank directors to dismiss bank officers ''at pleasure.'' However, the Ninth Circuit held—in view of the ADEA's status as a more recent federal statute—that § 24(Fifth) does not prevent national bank officers from asserting state-law claims that are consistent with the ADEA.[61]

## Existence of Preemptive Agency Rule Should Not Remove Presumption Against Preemption

*Kroske* was different from *Boutris* in one important respect. The OCC has not issued any regulation interpreting the meaning or scope of the ''dismiss . . . at pleasure'' language in 12 U.S.C. § 24(Fifth). Therefore, the national bank in *Kroske*—unlike the national bank in *Boutris*—could not argue that the Ninth Circuit should give *Chevron* deference to an OCC rule asserting that the National Bank Act preempts state law. As a consequence, the national bank in *Kroske* bore the burden of proof in establishing that federal law preempted the Washington age discrimination statute, while the state official in *Boutris* effectively bore the burden of proof in showing that the OCC's regulation was unauthorized.

It is unreasonable—and inconsistent with traditional concepts of federalism—for a court to shift the burden of proof in a preemption case simply because a federal agency has issued a regulation that allegedly preempts state law. As noted above, the Supreme Court's decision in *Hillsborough County* supports the view that the same presumption against preemption should apply whether the source for the alleged preemption is a statute or an agency rule.[62]

In *Kroske* the Ninth Circuit applied a presumption against preemption based on its explicit recognition of both ''the State's historic police powers to prohibit discrimination on specified grounds'' and ''the historic dual regulation of [national] banks by state and federal law.''[63] As discussed above, those factors are also present in *OCC v. Spitzer*.[64] Moreover, *Kroske* agrees with decisions of several other lower federal courts and state courts, which have applied a presumption against preemption in affirming the applicability of state laws to national banks.[65]

The District Court therefore erred in *OCC v. Spitzer* when it rejected a presumption against preemption. Proper application of the presumption would have precluded *Chevron* deference and would have required a decision striking down 12 C.F.R. § 7.4000(b)(2), because Congress has never expressed a ''clear and manifest purpose'' to bar the states from bringing judicial enforcement proceedings against national banks.[66] As discussed below, the text and history of 12 U.S.C. § 484(a) and related statutes demonstrate Congress' clear understanding that the states do have authority to seek judicial remedies to enforce applicable state laws against national banks.

**b. Section 7.4000(b)(2) Infringes upon the States' Sovereign Authority to Enforce Their Laws.** Section 7.4000(b)(2) unlawfully interferes with the sovereign authority of each state to enforce its laws. The Supreme Court has made clear that the ability of each state to enforce its laws is a crucial aspect of its sovereignty. In *Heath v. Alabama*,[67] the Court declared that ''[a] State's interest in **vindicating its sovereign authority through enforcement of its laws** by definition can never be satisfied by another State's enforcement of its own laws.''[68]

Similarly, in *Butkus v. Illinois*,[69] the Court held that a federal prosecution could not deprive a state of its sovereign authority to enforce its criminal code, because such a result ''would be in derogation of our federal system'' and would constitute ''a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines.''[70]

In *United States v. Wheeler*,[71] the Supreme Court declared that ''[e]ach [state] has the power, **inherent in any sovereign, independently** to determine what shall be an offense against its authority and **to punish such offenses**.''[72] Similarly, in *Heath* and *United States v. Lanza*,[73] the Court explained that the states' authority to make and enforce laws derives from powers ''originally belonging to [the states] before admission to the Union and **preserved to them by the Tenth Amendment.**''[74]

In subsequent decisions, which limited the authority of federal courts to review state court convictions in criminal cases, the Supreme Court emphasized the close connection between a state's lawmaking and law

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[59] 432 F.3d 976 (9th Cir. 2005).

[60] *Id.* at 985 (quote), 987-88.

[61] *Id.* at 985-89 (concluding that the ''dismiss . . . at pleasure'' provision of 12 U.S.C. § 24(Fifth) was repealed by implication to the extent that it conflicted with the later-enacted ADEA).

[62] *See supra* notes 51-52 and accompanying text (discussing *Hillsborough County*).

[63] *Id.* at 981-82.

[64] *See supra* note 10 and accompanying text (noting the OCC's concession that New York's fair lending laws apply to mortgage loans made by national banks).

[65] *E.g., National State Bank v. Long*, 630 F.2d 981, 985 (3d Cir. 1980); *Video Trax, Inc. v. NationsBank*, 33 F. Supp. 2d 1041, 1048 (S.D. Fla. 1998), *aff'd*, 205 F.3d 1358 (11th Cir.) (per curiam), *cert. denied*, 531 U.S. 822 (2000); *Perdue v. Crocker National Bank*, 702 P.2d 503, 519-23 (Cal. 1985), *appeal dism'd*, 475 U.S. 1001 (1986); *Peatros v. Bank of Am., NT & SA*, 990 P.2d 539, 542-43 (Cal. 2000); *North Dakota v. Liberty National Bank & Trust Co.*, 427 N.W.2d 307, 309-10, 314-15 (N.D. 1988).

[66] *Blue Cross*, 514 U.S. at 655 (quoting *Rice*, 331 U.S. at 230).

[67] 474 U.S. 82 (1985).

[68] *Id.* at 93 (emphasis added).

[69] 359 U.S. 121 (1959).

[70] *Id.* at 137.

[71] 435 U.S. 313 (1978).

[72] *Id.* at 320 (emphasis added).

[73] 260 U.S. 377 (1922).

[74] *Heath*, 474 U.S. at 89 (emphasis added); *accord, Lanza*, 260 U.S. at 382.

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enforcement powers. The Court declared: ''Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but **the power of a State to pass laws means little if the State cannot enforce them.**''[75]

As the Supreme Court explained in *Wheeler,* federal preemption of a state's authority to enforce its criminal code ''would trench upon important state interests'' and would ignore the ''settled 'dual sovereignty' concept'' that applies in the field of law enforcement.[76] Likewise, in *St. Louis* the Court emphatically rejected the claim—asserted both by a national bank and by the United States as *amici curiae*—that federal officials possessed exclusive authority to institute judicial proceedings against a national bank for a violation of state law.[77] The Court declared:

''The state statute as applied to national banks is- . . . valid, and the corollary that it is obligatory **and enforceable** necessarily results, unless some controlling reason forbids; and **since the sanction behind it is that of the State** and not that of the National Government, **the power of enforcement must rest with the former** and not with the latter. To demonstrate the binding quality of a statute but deny the power of enforcement involves a fallacy made apparent by the mere statement of the proposition, for **such a power is essentially inherent in the very conception of law**.''[78]

In *First Union National Bank v. Burke*,[79] the district court held that the OCC had exclusive authority ''to directly enforce state banking law against national banks through **administrative** orders.''[80] However, the court confirmed that ''a state may seek enforcement of its state banking laws **in either federal or state court**'' under the ''vested in the courts of justice'' clause of 12 U.S.C. § 484(a).[81] The court rejected the Connecticut Banking Commissioner's argument that the Tenth Amendment precluded the OCC from exercising exclusive **administrative** enforcement authority with regard to state laws.

At the same time, the court emphasized that § 484(a) ''expressly leaves available **judicial remedies** [allowing state officials] to compel national bank compliance with state law.''[82] The court's opinion clearly suggests that the court would have perceived a serious Tenth Amendment issue if the OCC had sought to bar state officials from seeking ''judicial remedies'' to enforce applicable state laws against national banks.[83]

## District Court Ignored States' Sovereign Law Enforcement Authority

In *OCC v. Spitzer* the District Court should not have deferred to § 7.4000(b)(2) under *Chevron*, because that regulation infringes upon the states' sovereign law enforcement powers, preserved by the Tenth Amendment. Section 7.4000(b)(2) seeks to preempt all authority of the states to enforce their laws against national banks through judicial proceedings.

The OCC has removed any doubt as to the sweep of its regulation by proclaiming that any decision on whether to enforce an applicable state law against a national bank is a matter that falls ''within the OCC's **exclusive purview**.''[84] The OCC's exercise of discretion in deciding whether to enforce a particular state law against a national bank would be ''presumed immune from judicial review'' under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2), because enforcement decisions are ''generally committed to an agency's absolute discretion.''[85] If 12 C.F.R. § 7.4000(b)(2) is upheld, it would be extremely difficult for state officials to obtain judicial review of refusals by the OCC to enforce applicable state laws against national banks. Consequently, § 7.4000(b)(2) severely impairs the states' sovereign authority to prevent violations of their laws by national banks.

In an analogous case, the Supreme Court refused to defer to a federal agency's rule, because the rule applied the governing federal statute in an aggressive manner that created ''significant constitutional and federalism questions.''[86] The Court concluded that the agency's position ''alter[ed] the federal-state framework by permitting federal encroachment upon a traditional state power,'' and the agency could not show ''a clear indication that Congress intended that result.''[87]

In the absence of any clear statement of congressional intent, the District Court should not have allowed the OCC to issue a regulation infringing upon the states' traditional law enforcement powers. Given the serious Tenth Amendment issues raised by the regulation, ''the constitutional avoidance canon of statutory interpretation trumps *Chevron* deference.''[88]

**c. The District Court Improperly Applied ''Step Two'' of *Chevron*.** In *OCC v. Spitzer*, the District Court apparently viewed the absence of a federal statute prohibiting the OCC's regulation as a sufficient basis for its decision (i) to reject New York's challenge to the regulation's validity under ''step one'' of *Chevron*, and (ii) to proceed to a highly deferential review of the regulation under ''step two'' of *Chevron*.[89]

In practical effect, the District Court's application of *Chevron* would give the OCC an unlimited authority to

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[75] *Calderon v. Thompson,* 523 U.S. 557, 566 (1998) (quoting *McCleskey v. Zant*, 499 U.S. 467, 491 (1991)).

[76] *Wheeler,* 435 U.S. at 332.

[77] *See St. Louis,* 263 U.S. at 643 (argument by counsel for national bank); *id.* at 645-48 (argument for the Solicitor General on behalf of the United States as *amici curaie*).

[78] *Id.* at 659-60 (emphasis added).

[79] 48 F. Supp. 2d 132 (D. Conn. 1999),

[80] *Id.* at 149 (emphasis added).

[81] *Id.* at 146 (emphasis added).

[82] *Id.* at 148-49 (emphasis added).

[83] *See id.* at 150-51 (explaining that ''[t]his order in no way precludes . . . the [Connecticut Banking] Commissioner from seeking enforcement of this state banking statute against the plaintiff national bank though the courts'') (emphasis added).

[84] 2004 OCC Visitorial Powers Rule, *supra* note 6, at 1900 (emphasis added).

[85] *Heckler v. Chaney,* 470 U.S. 821, 831-32 (1985); *see also Riverkeeper, Inc. v. Collins,* 359 F.3d 156, 164-66 (2d Cir. 2004).

[86] *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers,* 531 U.S. 159, 174 (2001).

[87] *Id.* at 172-73.

[88] *University of Great Falls v. NLRB,* 278 F.3d 1335, 1340-41 (D.C. Cir. 2002) (refusing to defer to an agency regulation that raised serious constitutional questions under the First Amendment). *See also United States v. Lopez,* 514 U.S. 549, 562 (1995) (declaring that ''this Court will construe a statute in a manner that requires decision of serious constitutional questions only if the statutory language leaves no reasonable alternative'').

[89] *See id.* OCC v. Spitzer, 396 F. Supp. 2d—at 393-94 (finding no reason to conclude that ''the statute unambiguously contravenes the OCC's interpretation as reflected in 12 C.F.R. § 7.4000'').

issue rules preempting state law **except** in areas where Congress **affirmatively barred** such regulations by **unambiguous** statutory language. The Second, Sixth and Ninth Circuits applied similar reasoning in upholding 12 C.F.R. § 7.4006. All three courts granted deference under ''step two'' of *Chevron* after concluding that Congress did not express a ''manifest'' or ''unambiguous'' intent to prohibit the OCC from adopting its rule preempting the states' authority to regulate operating subsidiaries of national banks.[90]

The foregoing decisions are clearly erroneous in view of the Supreme Court's recent decision in *Gonzalez v. Oregon*.[91] In *Gonzalez*, the Court declared that ''*Chevron* deference . . . is not accorded merely because the statute is ambiguous and an administrative [agency] is involved.''[92] Rather, deference is appropriate under ''step two'' of *Chevron* only if a federal agency's regulation is ''promulgated pursuant to authority Congress has delegated to the [agency].''[93]

Moreover, Gonzalez indicates that a reviewing court should be skeptical when an agency claims ''broad and unusual authority through an implicit delegation'' that is allegedly derived from ''vague terms or ancillary provisions'' in the governing statute.[94] In such a case, the reviewing court may properly conclude that ''Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.''[95]

## The Need for a 'Chevron Step 2.1' Test

*Gonzalez* makes clear that statutory silence or ambiguity is **not** a sufficient basis for granting deference under ''step two'' of *Chevron*. Before a reviewing court may defer to an agency regulation under ''step two,'' the court must first perform an analysis that I call ''*Chevron* step 2.1.'' Under this ''step 2.1,'' the court must carefully consider whether Congress has authorized the agency to adopt a regulation to clarify the ambiguity or to fill the ''gap'' that the agency has identified in the governing statute.

Only if the court answers ''yes'' at ''step 2.1'' may the court then proceed to a more deferential analysis of whether the agency has made a ''reasonable'' interpretation of the statute.[96] In addition, if the agency adopts an ''interpretation'' of a statute that significantly expands the agency's jurisdiction or encroaches upon an area traditionally regulated by the states, the reviewing court should require a clear showing that the agency's ''interpretation'' is consistent with the available evidence of Congress' intent.[97]

In *Gonzalez*, the Supreme Court struck down an interpretive rule issued by the United States Attorney General. In that rule, the Attorney General declared that physicians prescribing controlled substances for assisted suicides were not engaged in legitimate medical practice, regardless of state law to the contrary, and were subject to civil and criminal sanctions under federal law. The Supreme Court observed that the federal Controlled Substances Act (''CSA'') prohibits doctors from using drug prescriptions ''as a means to engage in illicit drug dealing and trafficking as conventionally understood.''[98] However, the Court determined that the CSA ''manifests no intent to regulate the practice of medicine generally'' and, instead, indicates a congressional purpose to ''rely upon a functioning medical profession regulated under the States' police powers.''[99] The Court therefore invalidated the Attorney General's rule, because (i) the Attorney General's claim of authority would ''effect a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality,'' and (ii) the ''text and structure of the CSA show that Congress did not have this far-reaching intent to alter the federal-state balance and the congressional role in maintaining it.''[100]

The District of Columbia Circuit followed a similar line of reasoning in a recent decision that refused to give *Chevron* deference to a ruling of the Federal Trade Commission (''FTC'').[101] The FTC's ruling sought to classify attorneys as ''financial institutions'' for purposes of Title V of GLBA—a classification that would require attorneys to comply with Title V's customer privacy provisions.[102] The D.C. Circuit found that the FTC's ''attempted turf expansion'' would enable the FTC to ''extend its regulatory authority over attorneys engaged in the practice of law,'' even though ''the regulation of the practice of law is traditionally the province of the states.''[103] In concluding that the FTC's ruling did not qualify for *Chevron* deference, the court emphasized:

> ''Federal law may not be interpreted to reach into areas of State sovereignty **unless the language of the federal law compels the intrusion** . . . . Otherwise put, if Congress intends to alter the usual constitutional balance between the States and the Federal Government, **it must make its intention to do so unmistakably clear in the language of the statute**.''[104]

The court concluded that the FTC had no authority to issue its ruling, because ''Congress has not made an in-

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[90] *See Wachovia v. Burke,* 414 F.3d at 317-18 (finding ''no manifest congressional intent to preclude the OCC regulations in this case'' because ''no [federal] statute speaks directly to the scope of federal versus state power over [operating subsidiaries]''); *Wachovia v. Watters,* 431 F.3d at 561-62 (concluding that ''Congress has not spoken precisely on the issue'' because the ''absence of any [statutory] reference'' to the allocation of federal and state authority over operating subsidiaries ''does not convey the unambiguous intent of Congress''); *Wells Fargo v. Boutris,* 419 F.3d at 961 (stating that the National Bank Act ''is silent as to the OCC's authority to regulate operating subsidiaries'').

[91] No. 04-623 (U.S. Jan. 17, 2006).

[92] *Id.*, slip op. at 11.

[93] *Id.*

[94] *Id.*, slip op. at 20.

[95] *Id.*, slip op. at 21 (internal quotation marks and citations omitted).

[96] *See id.*; *see also United States v. Mead Corp.,* 533 U.S. 218, 229 (2001) (explaining that deference under ''step two'' of *Chevron* is appropriate if it is ''apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law'').

[97] *See Gonzalez v. Oregon,* No. 04-623 (U.S. Jan. 17, 2006), slip op. at 20-21, 24-25, 28.

[98] *Id.*, slip op. at 23.

[99] *Id.*

[100] *Id.*, slip op. at 28.

[101] *Am. Bar Ass'n v. FTC,* 430 F.3d 457 (D.C. Cir. 2005) (''*ABA v. FTC*'').

[102] *See id.* at 465-66.

[103] *Id.* at 467, 468, 471-72.

[104] *Id.* (internal quotation marks and citations omitted).

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tention to regulate the practice of law 'unmistakably clear' in the language of the GLBA.''[105]

Like the Supreme Court *in Gonzalez v.* Oregon, the D.C. Circuit repudiated the notion that *Chevron* allows a federal agency to issue rules in any area over which it has arguable jurisdiction, so long as Congress has not enacted a statute that expressly forbids the agency's action. The D.C. Circuit specifically rejected the FTC's suggestion that a federal agency is entitled to highly deferential review under ''*Chevron* step two . . . any time a [federal] statute does not expressly **negate** the existence of a claimed administrative power.''[106] The D.C. Circuit declared that such an application of *Chevron* would be '' '**flatly unfaithful to the principles of administrative law** . . . and refuted by precedent.' . . . Plainly, **if we were 'to presume a delegation of power from the absence of an express withholding of such power, agencies would enjoy virtually limitless hegemony** . . . .' ''[107]

In view of *Gonzalez v. Oregon* and *ABA v. FTC,* the District Court clearly erred in *OCC v. Spitzer* when it deferred to 12 C.F.R. § 7.4000(b)(2) under ''step two'' of *Chevron*. The District Court improperly proceeded to ''step two'' based on its finding that the National Bank Act did not ''unambiguously'' foreclose the OCC's regulation.[108] As shown above, however, the OCC's regulation entrenches upon the states' sovereign law enforcement powers. Moreover, the OCC cannot point to any ''unmistakably clear'' expression of a congressional intent to prohibit the states from enforcing their laws by means of judicial proceedings against national banks.[109]

The unqualified exemption provided by § 484(a) for visitorial powers ''vested in the courts of justice'' indicates that Congress did **not** intend to bar state officials from bringing judicial enforcement proceedings.[110] As demonstrated below, the plain meaning of the ''vested in the courts of justice'' clause is supported by related statutes and judicial opinions. In light of all these factors, the OCC's extraordinary claim of authority to issue a regulation overriding a sovereign state power does **not** qualify for deference under *Chevron* and should be rejected.

**d. Section 7.4000(b)(2) Is Not Entitled to Deference in View of the OCC's Strong Self-Interest in Adopting the Rule** There is an additional reason to deny *Chevron* deference to 12 C.F.R. § 7.4000(b)(2). In recent years, the OCC has proclaimed that preemption of state law ''is a significant benefit of the national charter—a benefit that the OCC has fought hard over the years to preserve.'' In the OCC's view, a ''major advantage of the national charter'' is created by the OCC's efforts to provide a regime that will enable national banks ''to conduct a multistate business subject to a single uniform set of federal laws, under the supervision of a single regulator, **free from visitorial powers of various state authorities**.''[111]

In a newspaper interview published in 2002, Comptroller of the Currency John D. Hawke, Jr. acknowledged that the OCC's preemption of state consumer laws and state visitorial authority ''provides an incentive for banks to sign up with the OCC . . . . 'It is one of the advantages of a national charter, and I'm not the least bit ashamed to promote it.' ''[112]

Many of the largest national banks publicly supported the OCC's decision in January 2004 to adopt § 7.4000(b)(2) and to promulgate additional preemption rules. Commentators generally viewed those rules as serving the interests of big banks with extensive interstate operations.[113] In response to the OCC's aggressive preemption campaign, several large, multistate banks converted from state to national charters.[114] As a result of those conversions, the portion of the nation's commercial banking assets held by state-chartered banks fell from about 40 percent in 2003 to just over 30 percent in 2005.[115] In September 2005, FDIC Chairman Donald E. Powell described the impact of the OCC's ''sweeping'' preemption rules in the following terms:

''[T[he dual banking system is at a crossroads. The share of banking activity conducted through state-chartered banks is dwindling and there is every reason to believe that trend will continue. The issue goes well beyond market share, to fundamental issues about competitive fairness and states' ability to enforce laws protecting consumers. . . .

''The facts of life today with regard to preemption are fairly simple. A state-chartered bank that wants to do business across state lines is at a substantial disadvantage relative to a national bank . . . .''[116]

## OCC's Financial Motivation for Adopting Its Preemption Rules

The OCC has a powerful motivation to persuade large banks to operate under national charters. Virtually all of the OCC's budget is funded by assessments paid by national banks, and the biggest national banks pay the highest assessments.[117] The OCC recorded a 15 percent

[105] *Id.*

[106] *ABA v. FTC,* 457 F.3d at 468 (quoting *Ry. Labor Exec. Ass'n v. Nat'l Mediation Bd.,* 29 F.3d 655, 671 (D.C. Cir. 1994) (emphasis in original)).

[107] *Id.* (emphasis added in part) (quoting *Ry. Labor Exec. Ass'n,* 29 F.3d at 671).

[108] *OCC v. Spitzer*, 396 F. Supp. 2d at 393-94.

[109] *See ABA v. FTC,* 430 F.3d at 471-72 (declaring that ''Federal law may not be interpreted to reach into areas of State sovereignty'' without an ''unmistakably clear'' statement of congressional intent).

[110] As noted above, the District Court acknowledged in *OCC v. Spitzer* that ''nowhere does the [National Bank] Act precisely define the scope of the OCC's exclusive visitorial powers or the reach of the courts of justice exception.'' 396 F. Supp. 2d at 393.

[111] Speech by Comptroller of the Currency John D. Hawke, Jr. on Feb. 12, 2002 (emphasis added) (quoted in Wilmarth, *supra* note 34, at 236, 274).

[112] Jess Bravin & Paul Beckett, *Friendly Watchdog: Federal Regulator Often Helps Banks Fighting Consumers,* WALL ST. J., Jan. 28, 2002, at A1 (quoting Mr. Hawke in part).

[113] *See* Wilmarth, *supra* note 34, at 276 & n.201, and authorities cited therein.

[114] *Id.* at 274-79, 289-93; Laura T. Osuri, ''Trustmark of Miss. Sticking with OCC,'' *American Banker*, Sept. 20, 2004, at 5, 2004 WLNR 4060209 (reporting that J.P. Morgan Chase, HSBC and Harris Bank had converted from state to national charters in 2004).

[115] Remarks by FDIC Chairman Donald E. Powell Before the American Bankers Ass'n Annual Convention, Sept. 26, 2005, at 3 (available at www.fdic.gov/news/news/speeches/chairman/spsept2605).

[116] *Id.* at 1-2.

[117] Under 12 C.F.R. § 8.2(a), the highest assessment rates are paid by national banks with assets over $40 billion. *See also* OCC Annual Report, Fiscal Year 2005, at 7 (reporting that

increase in assessment revenues during its 2005 fiscal year, and the OCC attributed a significant portion of that increase to ''new large banks joining the national banking system.''[118]

Thus, the OCC has a compelling financial incentive to adopt preemptive regulations in order to attract large, multistate banks and thereby enhance its financial resources. The OCC's self-interest seems to be reflected in its ''relatively lax'' and ''unimpressive'' record of enforcing consumer protection laws against national banks, compared to the much more vigorous enforcement efforts of state authorities.[119] In view of the OCC's financial and empire-building motivations for promulgating its preemption rules—including 12 C.F.R. § 7.4000(b)(2)—those rules should not be given any deference by the courts.[120]

## 2. Section 7.4000(b)(2) Conflicts with Congressional Intent, as Shown by the Text and History of 12 U.S.C. § 484(a) and Related Statutes

The OCC's attempt to bar state officials from seeking judicial enforcement of state law is contrary to the text and history of 12 U.S.C. § 484(a) and related statutes. Section 484(a) was originally enacted as § 54 of the National Bank Act of 1864 (''NBA''). Section 54 authorized the OCC to examine national banks and also provided that national banks ''shall not be subject to any other visitorial powers than such as are authorized by this act, **except such as are vested in the several courts of law and chancery.**'' Thus, the earliest version of § 484(a) provided the courts with explicit and unqualified authority to exercise visitorial powers over national banks.

Section 53 of the NBA, presently codified at 12 U.S.C. § 93(a), authorized the OCC to bring suit in federal court to obtain a forfeiture of ''all the rights, privileges, and franchises of the [national banking] association'' if the directors of the bank knowingly violated the NBA or permitted the bank's officers, agents, or employees to do so.[122] In *OCC v. Spitzer*, the District Court concluded that § 53 supported the OCC's claim of exclusive authority to institute all types of judicial enforcement proceedings against national banks.[123] However, § 53 dealt **only** with court proceedings to obtain **one type** of judicial remedy—*viz.*, forfeiture of a national bank's charter for violations of **federal** law. Section 53 did **not** refer to causes of action for **other types of judicial remedies** against national banks, nor did § 53 contain any explicit prohibition against court suits by state officials to enforce **state** laws.

Section 57 of the NBA provided that ''suits, actions, and proceedings'' against a national bank could be brought in federal court or in ''any state, county, or municipal court in the county or city in which such [national bank] is located, having jurisdiction in similar cases.''[124] The only exception from § 57's general grant of concurrent jurisdiction to state courts was that federal courts would have exclusive jurisdiction over ''all proceedings to enjoin the [OCC].''[125] In a 1917 decision, the Supreme Court found that § 57 provided a strong indication of Congress' intent to allow state officials to obtain judicial remedies from state courts for the purpose of enforcing state laws against national banks.[126] That decision has never been overruled.

The provisions of §§ 53, 54 and 57 of the NBA were carried forward into §§ 5198, 5239, 5240, and 5241 of the Revised Statutes. Section 5198 (as amended in 1875) incorporated the jurisdictional provisions of § 57 of the NBA.[127] Section 5239 incorporated the provisions of § 53 of the NBA, authorizing the OCC to file suit in federal court to revoke a national bank's charter for violations of the NBA. Sections 5240 and 5241 incorporated, respectively, the OCC's examination powers and the limitation on visitorial powers ''other than such as . . . are vested in the courts of justice'', as originally provided in § 54 of the NBA. Ultimately, the same provisions were codified in 12 U.S.C. §§ 93(a), 94 (until its partial repeal in 1982), 481 and 484(a).

Congress passed additional statutes in 1882, 1887 and 1888 to regulate the jurisdiction of federal and state courts over national banks. Those statutes were ultimately codified at 12 U.S.C. § 1348. Section 1348 gives federal courts exclusive jurisdiction over actions by federal officials to wind up the affairs of a national bank or actions by a national bank to enjoin the OCC or any receiver acting under the OCC''s direction.

However, § 1348 also provides that national banks ''shall, for the purpose of **all other actions by or against them,** be deemed citizens of the States in which they are respectively located.''[128] Thus, under § 1348, national banks are subject to suit in state courts unless they can establish either diversity jurisdiction or federal question jurisdiction.[129]

In 1982, Congress repealed a portion of 12 U.S.C. § 94.[130] The repealed portion—derived from § 57 of the original NBA and Rev. Stat. § 5198—provided that a national bank could be sued in state or local courts only in the county or city in which the national bank was ''lo-

97 percent of the OCC's operations are funded by ''seminannual assessments levied on national banks''); *id.* at 62 (stating that ''the percentage of total OCC assets attributable to large banks increased from 82.4 percent to 85.6 percent'' during its 2005 fiscal year).

[118] OCC Annual Report, Fiscal Year, 2005, at 62 & tbl. 9 (reporting that the OCC's assessment revenues rose from $482.3 million in fiscal year 2004 to $557.8 million in fiscal year 2005).

[119] Christopher L. Peterson, *Federalism and Predatory Lending: Unmasking the Deregulatory Agenda* 78 TEMPLE L. REV. 1, 70-74, 77-81 (2005) (quote at 81); Wilmarth, *supra* note 34, at 232 (quote), 306-16, 348-56.

[120] Wilmarth, *supra* note 34, at 232, 276-78, 293-98; *see also* Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203, 208-11, 262-73, 282-87 (2004); Peterson, *supra* note 119, at 70-74, 77-84.

Act of June 3, 1864, c. 106, § 54, 13 Stat. 116 (emphasis added).

[122] *Id.* § 53, 13 Stat. 116.

[123] *OCC v. Spitzer*, 396 F. Supp. 2d at 394.

[124] Act of June 3, 1864, c. 106, § 57, 13 Stat. 116-17.

[125] *Id.*, 13 Stat. 117.

[126] *First National Bank of Bay City v. Fellows*, 244 U.S. 416, 428 (1917).

[127] *See Mercantile National Bank v. Langdeau,* 371 U.S. 520, 527-28 (1963) (app.); *First National Bank of Charlotte v. Morgan,* 132 U.S. 141, 144-45 (1889).

[128] 12 U.S.C. § 1348 (emphasis added). In *Wachovia Bank, N.A. v. Schmidt*, No. 04-1186 (U.S. Jan. 17, 2006), the Supreme Court held that a national bank is ''located,'' for purposes of § 1348, only in the state where it maintains its main office.

[129] *See Langdeau,* 371 U.S. at 526-27, 528-29 (app.); *Continental National Bank v. Buford,* 191 U.S. 119, 123-24 (1903).

[130] Pub. L. No. 97-320, § 406, 96 Stat. 1512.

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cated.''[131] The purpose of the 1982 repeal was to make clear that, except for cases dealing with national bank receiverships, ''judicial venue [in cases involving national banks] will lie in the appropriate federal, **state or local court**, as determined by other general venue statutes.''[132]

Thus, Congress has consistently manifested its intent to make national banks subject to suit in state courts to the same extent as other citizens of the states in which such banks are ''located,'' except for (i) suits by the OCC to revoke a national bank's charter or to wind up the affairs of a national bank, or (ii) suits to enjoin the OCC or a receiver acting under the OCC's direction.

Congress never expressed a specific intent to bar state officials from bringing judicial proceedings to enforce state laws against national banks in §§ 53, 54 and 57 of the original NBA, or in §§ 5198, 5239, 5240 and 5241 of the Revised Statutes, or in 12 U.S.C. §§ 93(a), 94, 484(a) and 1348. In the absence of any express statement of congressional intent, it must be presumed that Congress did not intend to divest the states of their sovereign authority to enforce their laws by bringing judicial proceedings against national banks. Such a presumption is consistent with (1) the Supreme Court's recognition that each state has ''the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses,''[133] and (2) the Court's admonition that ''[u]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.''[134]

## District Court's Misplaced Reliance on 12 U.S.C. § 36(f)(1)(B)

In *OCC v. Spitzer,* the District Court found support for the OCC's regulation in 12 U.S.C. § 36(f)(1)(B), a statute enacted in 1994 as part of the Riegle-Neal Act. Under § 36(f)(1)(B), host state laws that apply to interstate branches of national banks ''shall be enforced'' by the OCC.[135] However, for two reasons, § 36(f)(1)(B) does not support either the OCC's rule or the District Court's decision. First, the legislative history of § 36(f)(1(B) indicates that Congress intended to give the OCC exclusive authority to make examinations of interstate branches of national banks and to bring ''supervisory'' (*i.e.*, administrative) enforcement actions against such branches. That legislative history does not include any explicit reference to judicial proceedings.[136]

Second, the House-Senate conferees on the Riegle-Neal Act expressed their great concern with maintaining ''the balance of Federal and State law under the dual banking system.''[137] The conferees emphasized that ''Congress does not intend that the [Riegle-Neal Act] alter this balance and thereby weaken States' authority to protect the interests of their consumers, businesses, or communities.''[138] In *First Union v. Burke*, the district court concluded, after reviewing the text and legislative history of the Riegle-Neal Act, that ''the regulatory structure of Section 36(f)(1)(B) reflects Congressional intent that **the existing regulatory scheme remain unchanged.**''[139] Thus, there is no evidence indicating that § 36(f)(1)(B) was intended to change ''the balance of Federal and State law'' by weakening the states' enforcement authority as it existed in 1994 under the ''vested in the courts of justice'' clause of 12 U.S.C. § 484(a).

Moreover, the Riegle-Neal Act did not repeal or amend the ''vested in the courts of justice'' clause of § 484(a). Given the strong presumption against implied repeals of federal statutes, § 36(f)(1)(B) cannot reasonably be construed as having repealed by implication the authority of state officials to initiate judicial enforcement proceedings under the ''vested in the courts of justice'' clause of § 484(a).[140]

Congress also did not express any intent in the Riegle-Neal Act to overturn the numerous court decisions—discussed in the next section—which have upheld the states' authority to institute judicial enforcement proceedings against national banks. Indeed, the House-Senate conferees expressed their general agreement with existing court decisions governing the application of state laws to national banks. The conferees noted with approval that ''[c]ourts generally use a rule

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[131] *See Citizens & Southern National Bank v. Bougas,* 434 U.S. 35, 35-36, 41-42 (1977).

[132] S. Rep. No. 97-536, at 28 (1982) (emphasis added), *reprinted in* 1982 U.S.C.C.A.N. 3054, 3081.

[133] *Heath,* 474 U.S. at 89 (quoting *Wheeler,* 435 U.S. at 320).

[134] *Solid Waste Agency,* 531 U.S. at 173 (quoting *United States v. Bass,* 404 U.S. 336, 349 (1971)).

[135] *OCC v. Spitzer,* 396 F. Supp. 2d at 402-03 (quoting 12 U.S.C. § 36(f)(1)(B)).

[136] *See* 130 Cong. Rec. S12786 (daily ed., Sept. 13, 1994) (colloquy between Senators D'Amato and Riegle). *See also First Union v. Burke,* 48 F. Supp. 2d at 146 (stating that the text and legislative history of § 36(f)(1)(B) are ''consistent'' with the view that the OCC possesses ''exclusive **administrative** enforcement authority'' over national banks) (emphasis added).

[137] H.R. Rep. No. 103-651, at 53 (1994) (Conf. Rep.) (emphasis added), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074.

[138] *Id.* A separate provision of the Riegle-Neal Act, codified at 12 U.S.C. § 43, further manifests the intent of Congress to preserve the federal-state balance in the dual banking system that existed in 1994. Section 43 requires a federal banking agency to follow notice-and-comment procedures whenever it intends to issue a preemption ruling with regard to state laws in the areas of community reinvestment, consumer protection, fair lending, and establishment of intrastate branches. The House-Senate conferees emphasized that the notice-and-comment process mandated by § 43 was intended to help maintain the balance between federal and state authority over national banks that existed in 1994:

> This process is **not** intended to confer upon the [federal] agency any new authority to preempt or to determine preemptive Congressional intent in the four areas described, or to change the substantive theories of preemption as set forth in existing law. Rather, it is intended to help focus any administrative preemption analysis and to help ensure that any agency only makes a preemption determination when the legal basis is compelling and the Federal policy interest is clear.

H.R. Rep. No. 103-651, *supra*, at 55 (emphasis added), *reprinted in* 1994 U.S.C.C.A.N. at 2076.

[139] *First Union v. Burke,* 48 F. Supp. 2d at 146 (emphasis added).

[140] *See Watt v. Alaska,* 451 U.S. 259, 267 (1981) (holding that ''repeals by implication are not favored . . . The intention of the legislature to repeal must be clear and manifest'') (internal quotation marks and citations omitted); *Morton v. Mancari,* 434 U.S. 535, 549-51 ((1974) (refusing to conclude that a 1934 statute was repealed by implication in a 1972 statute, because (i) the argument for implied repeal relied only on ''congressional silence'', (ii) ''[t]here is nothing in the legislative history . . . that indicates affirmatively any congressional intent to repeal the 1934 [statute],'' and (iii) there was no showing that ''the earlier and later statutes are irreconcilable'').

of construction that avoids finding a conflict between the Federal and State law where possible. The [Riegle-Neal Act] **does not change these judicially established principles**.''[141]

## 3. The Courts Have Repeatedly Upheld the States' Authority to Enforce Their Laws by Bringing Judicial Proceedings Against National Banks

Section 7.4000(b)(2) is contrary to a series of cases decided since 1870, in which the courts have allowed state officials to obtain judicial remedies to prevent or punish violations of state laws by national banks. In *National Bank v. Commonwealth of Kentucky*,[142] Kentucky filed suit in state court to force a national bank to comply with a state law requiring each bank to pay, on behalf of its shareholders, the state tax due on their shares. The Supreme Court upheld a state court judgment that ordered the national bank to pay the state tax owed by its shareholders. In doing so, the Supreme Court declared:

''[W]hile Congress intended to limit State taxation to the shares of the bank, as distinguished from its capital, . . . it did not intend to prescribe to the States the mode in which the tax should be collected. . . . It is not to be readily inferred, therefore, that Congress intended to prohibit this mode of collecting a tax which they expressly permitted the States to levy.''[143]

Thus the Court did not question the authority of Kentucky officials to institute a state court proceeding to enforce the state's tax law against the national bank.

Similarly, in *Waite v. Dowley*,[144] the Supreme Court affirmed a state court judgment imposing a civil money penalty on a national bank's cashier. The cashier had refused to comply with a Vermont law requiring him to provide a list of the national bank's shareholders (and the amounts paid for their stock) to the treasurer of the town in which the bank was located. The Court held that ''[s]ome legislation of Vermont was . . . necessary to the proper exercise of the rightful [taxing] powers of the State, and, so far as it required this list, was not in conflict with any provision of the act of Congress.''[145] Again, the Court did not question the authority of the town treasurer to enforce Vermont's law by filing suit in a state court.

In *Guthrie v. Harkness*,[146] a shareholder of national bank filed suit in a Utah state court to enforce his common-law right to inspect the bank's books and records. The Utah court ordered the bank to permit inspection, finding that the shareholder's demand was made, in part, ''for the purpose of ascertaining whether the business affairs of the said bank have been conducted according to law.''[147]

In affirming the state court's decision, the Supreme Court noted that a national bank is ''subject by statute to be sued in the courts of the State.''[148] The Court also observed that ''visitorial powers'' include actions taken by ''a superior or superintending officer who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations.''[149] Thus, the Supreme Court made clear in *Guthrie* that the term ''visitorial powers'' in § 484(a) refers primarily to examinations and enforcement proceedings involving national banks.

For two alternative reasons, the Court in *Guthrie* rejected the national bank's claim that a shareholder inspection would violate the limitation on ''visitorial powers'' under Rev. Stat. § 5241, the precursor of 12 U.S.C. § 484(a). First, the Court held that the term ''visitorial powers'' did not include the ''private right of the shareholder'' to exercise his inspection rights.[150] Second, assuming *arguendo* that shareholder inspection rights should be treated as a visitorial power, the Court explained that § 5241 provided ''the full measure of visitorial power'' over a national bank ''**[e]xcept** in so far as such corporation was **liable to control in the courts of justice**.''[151] The Court therefore concluded that § 5241 ''did **not** intend . . . to take away the right to **proceed in courts of justice** to enforce such recognized rights as are here involved.''[152]

### District Court's Decision Not Supported by *Guthrie*, Refuted by *Bay City*, *St. Louis*

In *Guthrie* the Supreme Court applied § 5241 in accordance with its plain terms. The Court confirmed that national banks were ''liable to control in the courts of justice,'' and the Court upheld the authority of federal and state courts to enforce ''recognized rights'' against national banks. *Guthrie* affirmed these principles in a case where the plaintiff was seeking to determine whether a national bank's business was being ''conducted according to law.'' The plaintiff was a private shareholder, not a state official.

Consequently, the District Court in *OCC v. Spitzer* was clearly mistaken in inferring that the discussion of § 5241 in *Guthrie* was intended to question *sub silentio* the authority of state officials to bring judicial enforcement proceedings against national banks.[153] Any such inference is plainly contradicted by the Supreme Court's previous decisions in *National Bank of Commonwealth* and *Waite v. Dowley*, which affirmed state court judgments obtained by state officials to enforce valid state laws against national banks. The Supreme Court in *Guthrie* did not question the correctness of either decision, nor did the Court consider the authority of state officials to initiate judicial enforcement proceedings.

Any doubts regarding the proper interpretation of the ''vested in the courts of justice'' clause of § 5241 were removed by the Supreme Court's subsequent decisions in *Bay City* and *St. Louis*. In *Bay City*, the Court affirmed the authority of Michigan's state attorney general to bring a quo warranto action in the Supreme

[141] H.R. Rep. No. 103-651, at 53 (1994) (Conf. Rep.) (emphasis added), *reprinted in* 1994 U.S.C.C.A.N. at 2074.
[142] 76 U.S. (9 Wall.) 353 (1870).
[143] *Id.* at 363.
[144] 94 U.S. 527 (1877).
[145] *Id.* at 534.
[146] 199 U.S. 148 (1905).
[147] *Id.* at 150 (quoting Utah trial court's decision) (emphasis added); *see also id.* at 155 (opinion of the Court).
[148] *Id.* at 157.
[149] *Id.* at 158 (emphasis added) (quoting *First National Bank of Youngstown v. Hughes*, 6 Fed. 737, 740 (C.C. N.D. Ohio 1881, *appeal dism'd*, 106 U.S. 523 (1883)).
[150] *Id.* at 158.
[151] *Id.* at 159 (emphasis added).
[152] *Id.* (emphasis added).
[153] *See OCC v. Spitzer*, 396 F. Supp. 2d at 400-01, 405-06.

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Court of Michigan against a national bank whose trust business allegedly violated Michigan law.

The Court noted that the national bank's trust activities involved ''a business of a private nature'' and, accordingly, ''state regulations for the conduct of such business, if not discriminatory or so unreasonable as to justify the conclusion that they would necessarily so operate, would be controlling upon banks chartered by Congress.''[154] The Court therefore held that state officials could sue national banks in state courts to stop trust activities that violated valid state laws, particularly since the governing federal statute prohibited national banks from conducting a trust business ''in contravention of state or local law.''[155] The Court found further support for its conclusion in § 57 of the original NBA, which made ''controversies concerning national banks cognizable in state courts because of their intimate relation to many state laws and regulations.''[156]

In *St. Louis* the Supreme Court upheld the authority of Missouri's attorney general to bring a quo warranto proceeding in the Supreme Court of Missouri to compel a national bank to close a branch that violated Missouri's antibranching law. The national bank and the United States as *amici curiae* argued that federal law completely preempted the authority of state officials to bring judicial enforcement actions against national banks.

Bank counsel and the Solicitor General contended that the OCC had exclusive authority to bring judicial proceedings against the national bank for violations of law, in view of (1) Rev. Stat. § 5239, which allowed the OCC to sue for forfeiture of a national bank's charter for violations of the NBA, and (2) Rev. Stat. 5241, which limited the exercise of visitorial powers over national banks. Bank counsel, the Solicitor General and three dissenting members of the Court also maintained that only the United States, as the chartering authority for national banks, could bring a quo warranto proceeding against a national bank.[157]

However, as discussed above, the Supreme Court in *St. Louis* strongly affirmed the state attorney general's authority to enforce Missouri's antibranching law by means of a judicial proceeding. The Court stressed that Missouri's attorney general was seeking to enforce a state statute, not any provision of the NBA, and the Court upheld Missouri's quo warranto proceeding as an appropriate state remedy to enforce a valid state law against the national bank:

''The State is neither seeking to enforce a law of the United States nor endeavoring to call the bank to account for an act in excess of its charter powers. **What the State is seeking to do is to vindicate and enforce its own law,** and the ultimate inquiry which it propounds is whether the bank is violating that law . . . . Having determined that the power sought to be exercised finds no justification in any law or authority of the United States, **the way is open for enforcement of the state statute.**

''**The application of the state statute to the present case and the power of the State to enforce it being established, the nature of the remedy to be employed is a question for state determination;** and the judgment of the state court that the one employed here was appropriate is conclusive, unless it involves a denial of due process of law, which plainly it does not.''[158]

## Subsequent Decisions Affirmed States' Authority to Enforce State Laws Against National Banks

Since *St. Louis,* numerous federal and state courts have confirmed the authority of state officials to sue in federal and state courts to enforce valid state laws against national banks. In several cases, courts have upheld the authority of state officials to enforce state laws against national banks by means of suits for injunctive relief, notwithstanding challenges raised by the OCC and/or the defendant banks.[159] In a number of other cases, the courts have not questioned the power of state officials to bring judicial actions for compulsory enforcement remedies against national banks.[160]

In *National State Bank v. Long*,[161] the Third Circuit held that 12 U.S.C. § 484 preempted the authority of state officials to bring **administrative** actions for cease-and-desist orders or civil money penalties against national banks. However, the Third Circuit did not consider or question the authority of state officials to enforce state laws against national banks through **judicial** proceedings.

Subsequently, in *First Union National Bank v. Burke*,[162] the district court drew a sharp distinction between administrative and judicial enforcement proceedings. The district court agreed with the Third Circuit that the OCC has exclusive authority to bring **administra-**

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[154] *First National Bank in Bay City v. Fellows,* 244 U.S. 416, 426 (1917).

[155] *Id.* at 426-27 (referring to the precursor of 12 U.S.C. § 93a).

[156] *Id.* at 428.

[157] *See First National Bank in St. Louis v. Missouri,* 263 U.S. 640, 642-43 (1924) (argument by counsel for national bank); *id.* at 645-48 (argument by counsel for the United States); *id.* at 666-68 (Van Devanter, J., joined by Taft, C.J., and Butler, J., dissenting). Justice Van Devanter and Justice Day had previously dissented on similar grounds from the Court's decision in *Bay City. See Bay City,* 244 U.S. at 429-32 (Van Devanter and Day, JJ., dissenting).

[158] *Id.* at 660-61. The Supreme Court had previously upheld a state quo warranto proceeding against due process and equal protection challenges in *Standard Oil Co v. Missouri,* 224 U.S. 270 (1912).

[159] *E.g., Jackson v. First National Bank of Valdosta,* 349 F.2d 71, 74-75 (5th Cir. 1965) (upholding a state banking commissioner's authority to bring suit for injunctive relief); *Nuesse v. Camp,* 385 F.2d 694, 699-705 (D.C. Cir. 1967) (granting, despite the OCC's opposition, the motion of a state banking commissioner to intervene in a suit seeking injunctive relief); *Missouri ex rel. Kostman v. First National Bank in St. Louis,* 405 F.2d 733, 735 (E.D. Mo. 1975) (confirming a state banking commissioner's standing to file suit for injunctive relief), *aff'd,* 538 F.2d 219 (8th Cir.) (per curiam), *cert. denied,* 429 U.S. 941 (1976); *Colorado ex rel. State Banking Board,* 540 F.2d 497, 498-99 (10th Cir. 1976) (rejecting the OCC's challenge to the standing of Colorado's state banking board), *cert. denied,* 429 U.S. 1091 (1977); *Peoples Savings Bank v. Stoddard,* 102 N.W.2d 777, 792-97 (Mich. 1960) (upholding a state attorney general's authority to bring a quo warranto action); *Minnesota by Lord v. First National Bank of St. Paul,* 313 N.W.2d 390, 395 (Minn. 1981) (affirming a state treasurer's enforcement authority), *appeal dism'd,* 456 U.S. 967 (1982).

[160] *E.g., Brown v. Clarke,* 878 F.2d 627 (2d Cir. 1989); *Mutschler v. Peoples National Bank of Washington,* 607 F.2d 274 (9th Cir. 1979); *New York by Abrams v. Citibank, N.A.,* 537 F. Supp. 1192 (S.D. N.Y. 1982); *North Dakota v. Liberty National Bank & Trust Co.,* 427 N.W.2d 307 (N.D. 1988).

[161] 630 F.2d 981, 988-89 (3d Cir. 1980).

[162] 48 F. Supp. 2d 132 (D. Conn. 1999).

**tive** enforcement actions against national banks.[163] However, the district court also held—citing *Bay City* and other cases cited above—that ''a state may seek enforcement of its banking laws in either federal or state court'' pursuant to the ''vested in the courts of justice'' clause of § 484(a).[164]

In *OCC v. Spitzer,* the District Court held that the OCC could disregard *St. Louis* as a controlling judicial construction of 12 U.S.C. § 484(a) because ''the actual opinion of *St. Louis* did not mention or cite section 5241 of the Revised Statutes.''[165] That conclusion is clearly erroneous. As noted above, the Supreme Court declared in *St. Louis* that it would be a ''fallacy'' to acknowledge ''the binding quality of a [state] statute but deny the power of enforcement'' to an authorized state official.[166] Moreover, it would have been logically **impossible** for the Supreme Court to uphold the Missouri attorney general's authority to bring a quo warranto proceeding **without rejecting** the arguments made by the national bank's counsel and the Solicitor General, who vigorously asserted that the OCC had exclusive authority to bring judicial enforcement proceedings against national banks under Rev. Stat. §§ 5239 and 5241.[167]

For two reasons, the District Court also erred in finding that *Chevron* permitted the OCC to adopt an interpretation of § 484(a) that was contrary to *St. Louis*.[168] First, as demonstrated above, the OCC's interpretation does not qualify for deference under *Chevron*. Second, even if *Chevron* applies, the Supreme Court has held that a federal agency is bound by a prior judicial interpretation of a statute ''if the prior court holding 'determined a statute's **clear** meaning.' ''[169] As demonstrated above, the Supreme Court's decisions in *Bay City* and *St. Louis* —as well as subsequent decisions of lower federal courts and state courts—clearly establish that the ''vested in the courts of justice'' clause of § 484(a) does permit state officials to initiate judicial proceedings to enforce state laws against national banks. Moreover, those judicial decisions—**unlike** 12 C.F.R. § 7.4000(b)(2) —are consistent with the plain, common-sense meaning of the language used by Congress. In such circumstances, *Chevron* does not allow the OCC to disregard these authoritative judicial constructions.

In *OCC v. Spitzer,* the District Court was also mistaken in describing as ''*dicta*'' the careful distinction drawn in *First Union v. Burke* between administrative and judicial enforcement of state laws against national banks.[170] In *First Union v. Burke,* as previously shown, the court's discussion of the states' authority to enforce state laws by means of **judicial** proceedings was **not** dicta, but was instead a crucial premise on which the court based its decision to dismiss Connecticut's Tenth Amendment claim.[171]

The District Court in *OCC v. Spitzer* further argued that the distinction drawn in *Burke* between administrative and judicial enforcement proceedings was ''rejected'' in two subsequent district court decisions.[172] However, the District Court ignored the important fact that, as discussed above, the opinion in *Burke* (i) contained an extensive and persuasive analysis of the text and history of § 484(a) and (ii) was consistent with prior judicial decisions. In contrast the two decisions cited in *OCC v. Spitzer* did not include any comparable analysis and cannot be reconciled with *Bay City, St. Louis* and other court decisions reviewed above.[173]

## Congress Implicitly Endorsed Decisions Allowing States to Seek Enforcement Against National Banks

Finally, the District Court overlooked the significance of Congress' reenactment of the ''vested in the courts of justice'' clause in 1982, without any change. In 1982, Congress amended 12 U.S.C. § 484 by adding a new provision, codified as § 484(b). Section 484(b) authorizes state officials to examine the records of a national bank ''solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws.''[174] Section 484(b) does not address the authority of state officials to bring judicial enforcement proceedings; it deals **only** with their right to examine national bank records for the specified purpose.[175] In the same 1982 statute, Congress reenacted the original § 484—including the ''vested in the courts of justice'' clause—without making any changes. The original § 484 was recodified as § 484(a).[176]

The Supreme Court has repeatedly held that ''Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without

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[163] *See id.* at 143-50.

[164] *Id.* at 145-46.

[165] *OCC v. Spitzer,* 396 F. Supp. 2d at 395.

[166] *St. Louis,* 263 U.S. at 660; see also supra note 78 and accompanying text.

[167] *See St. Louis, 263 U.S.* at 642-43 (argument of bank counsel); *id.* at 645-48 (argument of the Solicitor General). *See also McNeil v. Wisconsin,* 501 U.S. 171, 179-80 (1991) (holding that a legal argument was ''implicitly reject[ed]'' in a previous Supreme Court decision because that argument, if accepted, would have made it ''quite unnecessary'' for the Court to ''establish'' the ''rule'' contained in its earlier decision).

[168] *OCC v. Spitzer,* 396 F. Supp. 2d at 396 n.8.

[169] *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Services,* 125 S. Ct. 2688, 2701 (2005) (emphasis in original) (quoting *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.,* 497 U.S. 116, 131 (1990)). *See also id.* (explaining that ''a court's prior interpretation of a statute [will] override an agency's interpretation only if the relevant court decision held the statute unambiguous'').

[170] *OCC v. Spitzer,* 396 F. Supp. 2d at 396 n.9.

[171] *See First Union v. Burke,* 48 F. Supp. 2d at 148-49, 151; *supra* notes 79-83, 162-64 and accompanying text (discussing *Burke*).

[172] *OCC v. Spitzer,* 396 F. Supp. 2d at 405 n.12 (citing *Bank One Delaware NA v. Wilens,* 2003 WL 21703629 (C.D. Cal. July 7, 2003), and *Goleta National Bank v. O'Donnnell,* 239 F. Supp. 2d 745 (S.D. Ohio 2002)).

[173] *See Bank One v. Wilens,* 2003 WL 21703629 at *1-*2) (concluding, without any detailed analysis, that plaintiff could not bring a ''private attorney general'' suit against a national bank, in view of 12 C.F.R. § 7.4000 and the OCC's interpretation of the ''vested in the courts of justice'' clause of § 484(a)); *Goleta v. O'Donnell,* 239 F. Supp. 2d at 757 (declaring, without any analysis, that § 484(a) and 12 C.F.R. § 7.4000 prohibit state officials from bringing either administrative or judicial enforcement actions against national banks).

[174] Pub. L. No. 97-320, § 412, 96 Stat. 1521 (codified at 12 U.S.C. § 484(b)).

[175] *See* S. Rep. No. 97-536, at 29, 62 (1982) (explaining the scope and purpose of § 484(b)), *reprinted in* 1982 U.S.C.C.A.N. 3054, 3082, 3115.

[176] Pub. L. No. 97-320, § 412, 96 Stat. 1521 (codified as 12 U.S.C. § 484(a)).

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change.''[177] By 1982, as shown above, the Supreme Court and other federal and state courts had consistently upheld the authority of state officials to bring judicial proceedings to enforce state laws against national banks—a result that was consistent with the unqualified terms of the ''vested in the courts of justice'' clause.

In contrast, the OCC's regulations in 1982 did not include any interpretation of that clause. In fact, the OCC ''acquiesced'' in 1999 to the interpretation of the ''vested in the courts of justice'' clause in *First Union v. Burke*, an interpretation that was faithful to *Bay City* and other judicial decisions.[178] The OCC did not put forward its current interpretation barring judicial enforcement by state officials until 2003, when it published notice of its proposal to adopt 12 C.F.R. § 7.4000(b)(2).[179] Given those circumstances, Congress' reenactment of the ''vested in the courts of justice'' clause in 1982 must be viewed as an implicit congressional endorsement of prior court decisions upholding the right of state officials to obtain judicial enforcement of state laws against national banks.

## 4. The OCC's Limited Rulemaking Power Under 12 U.S.C. § 93a Did Not Give the OCC Authority to Adopt 12 C.F.R. § 7.4000(b)(2)

In *OCC v. Spitzer*, the District Court further erred by holding that 12 U.S.C. § 93a provided the OCC with supplemental authority to adopt 12 C.F.R. § 7.4000(b)(2).[180] Under 12 U.S.C. § 93a, the OCC may issue regulations ''to carry out the responsibilities of the office.'' When § 93a was enacted in 1980, Congress made clear that the OCC does **not** have authority thereunder to expand the statutory powers of national banks:

''[Section 93a] is only available to carry out the responsibilities of the [OCC] and **carries with it no new authority to confer on national banks powers which they do not have under existing substantive law**. To give national banks authority under this rulemaking provision that they do not possess under existing substantive law would not be carrying out the responsibilities of the [OCC] since **only Congress can define those responsibilities so as to confer powers on national banks**.''[181]

In *Conference of State Bank Supervisors v. Conover*,[182] the D.C. Circuit explained that (i) § 93a ''grants no new substantive powers to [national] **banks**''; and (ii) § 93a allows the OCC to preempt state laws only ''[s]o long as [the OCC] does not authorize activities that run afoul of federal laws governing the activities of national banks.''[183] Subsequently, the same court confirmed that ''[n]ational banks, being creatures of statute, possess **only those powers conferred upon them by Congress**.''[184] The court therefore struck down an OCC ruling that expanded the powers of national banks beyond the limits established by Congress.[185]

In view of the limited rulemaking power granted by § 93a, the OCC had no authority to issue a regulation barring the states from exercising their sovereign authority to bring judicial enforcement proceedings against national banks. The OCC's ''interpretation'' contained in 12 C.F.R. § 7.4000(b)(2) is contradicted by the unqualified terms of the ''vested in the courts of justice'' of 12 U.S.C. § 484(a), as well as its history and judicial application. As the D.C. Circuit has observed, ''a dramatic rewriting of the statute is not mere interpretation.''[186]

In *Gonzalez v. Oregon*, the Supreme Court held that 21 U.S.C. § 871(b) did **not** give the Attorney General a ''broad authority to promulgate rules'' because the statute only authorized him to issue regulations ''which he may deem necessary and appropriate for the efficient execution of his functions under this [Act].''[187] The Attorney General's power to issue rules to execute his ''functions'' under § 871(b) is essentially the same as the OCC's authority to issue regulations to ''carry out [its] responsibilities'' under 12 U.S.C. § 93a.

The Supreme Court drew a sharp distinction in *Gonzalez* between the limited terms of § 871(b) and the much broader language of statutes that authorize agencies to adopt rules ''in the public interest to carry out the provisions'' of a statute or ''to effectuate the purposes of'' the statute.[188] In view of § 871(b)'s limited scope, the Court concluded that the Attorney General could not ''define the substantive standards of medical practice'' in a manner that went ''well beyond the

[177] *Lindahl v. OPM*, 470 U.S. 768, 782 n.15 (1985) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)).

[178] *OCC v. Spitzer*, 396 F. Supp. 2d at 399-400, 404-05 (discussing regulations adopted by the OCC under § 484 between 1971 and 2004, and pointing out that ''[t]he OCC acknowledges that its current interpretation of the courts of justice exception is **inconsistent with the position it acquiesced to in *First Union Nat'l Bank v. Burke***'') (emphasis added). *See also supra* notes 79-83, 162-64 and accompanying text (discussing *Burke*).

[179] *Id.* at 400 (describing the OCC's proposal to adopt 12 C.F.R. § 7.4000(b)(2) in 2003, and its adoption of that rule in 2004).

[180] *Id.* at 398.

[181] 126 Cong. Rec. 6902 (1980) (remarks of Sen. Proxmire, Senate floor manager for the 1980 legislation) (emphasis added). *See also* H.R. Rep. No. 96-842, at 83 (1980) (Conf. Rep.), *reprinted in* 1980 U.S.C.C.A.N. 298, 313 (stating that § 93a ''carries with it no authority to permit otherwise impermissible activities of national banks with specific reference to the provisions of the McFadden Act and the Glass-Steagall Act'').

[182] 710 F.2d 878 (D.C. Cir. 1983).

[183] *Id.* at 885 (emphasis in original).

[184] *Indep. Ins. Agents of Am., Inc. v. Hawke*, 211 F.3d 638, 640 (D.C. Cir. 2000) (emphasis added) (citing, inter alia, *Texas & Pac. Ry. Co v. Pottorff*, 291 U.S. 245, 253 (1934)).

[185] *Id.* at 643-45.

[186] *ABA v. FTC*, 430 F.3d at 470.

[187] *Gonzalez v. Oregon*, No. 04-623 (U.S. Jan. 17, 2006), slip op. at 12 (quoting 21 U.S.C. § 871(b)).

[188] *Id.*, slip op. at 11-12 (quoting 47 U.S.C. § 201(b) and 15 U.S.C. § 1604(a)).

[CSA's] specific grants of authority.''[189] For the same reason, 12 U.S.C. § 93a did not authorize the OCC to adopt 12 C.F.R. § 7.4000(b)(2), because that regulation changes the substantive meaning and scope of the ''vested in the courts of justice'' clause in a way that conflicts with the ''plain language of the [statutory] text.''[190]

Similarly, in *Board of Governors v. Dimension Fin. Corp.*,[191] the Supreme Court struck down a regulation of the Federal Reserve Board that attempted to redefine the statutory definition of ''bank'' in § 2(c) of the Bank Holding Company Act (''BHC Act'').[192] As it did in *Gonzalez*, the Supreme Court declared that a federal agency cannot expand the limits of its authority by disregarding the ''plain language'' of the governing statute.[193]

The Court also rejected the Board's attempt to rely on its rulemaking power under § 5(b) of the BHC Act.[194] The Court held that ''§ 5 only permits the Board to police within the boundaries of the [BHC] Act; it does not permit the Board to expand its jurisdiction beyond the boundaries established by Congress.''[195] For the same reason, 12 U.S.C. § 93a does not authorize the OCC to redraw the boundary line that Congress has clearly established in 12 U.S.C. § 484(a) between (i) the OCC 's exclusive authority to bring administrative enforcement proceedings against national banks, and (ii) the authority of federal and state courts to entertain suits against national banks by federal and state officials and private parties pursuant to the ''vested in the courts of justice'' clause.

## Conclusion

*OCC v. Spitzer* represents a fundamental misapplication of the *Chevron* doctrine and should be reversed. The District Court improperly upheld an OCC regulation that (i) disregards the plain meaning of the ''vested in the courts of justice'' clause of 12 U.S.C. § 484(a), and (ii) purports to overturn more than a century of judicial decisions affirming the right of state officials to file court suits to enforce state laws against national banks.

Unless *OCC v. Spitzer* is reversed, the OCC is likely to continue its trend of preempting state laws in any area where Congress has not explicitly forbidden the OCC to act. The OCC's preemption campaign may serve the interests of large, multistate banks whose allegiance the OCC wants to preserve or attract. However, the OCC's preemption efforts—unless stopped by the courts or Congress—will continue to undermine the dual banking system, impair state sovereignty, and greatly weaken the protections provided by state laws to consumers of financial services.[196]

In view of the recent decisions by the Supreme Court in *Gonzalez v. Oregon* and by the D.C. Circuit in *ABA v. FTC*, the District Court clearly failed to apply a crucial precondition for *Chevron* deference. That precondition—which I call ''*Chevron* step 2.1''—requires a reviewing court to determine whether Congress intended to delegate the full extent of rulemaking authority claimed by the federal agency, particularly where the agency seeks to expand its jurisdiction or to infringe upon a sovereign state power.

Unless courts apply ''*Chevron* step 2.1'' in future decisions involving OCC regulations, the OCC will enjoy a ''virtually limitless hegemony'' as long as Congress fails to enact statutes that ''expressly **negate**'' the OCC's ability to act.[197] Such an outcome would be contrary to the teachings of *Gonzalez v. Oregon* and *ABA v. FTC*. Moreover, it would vitiate what I have always believed to be the most important principle of administrative law—namely, that ''[t]he rulemaking power granted to an administrative agency **is not the power to make law.** Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed in the [governing] statute.''[198]

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[189] *Id.*, slip op. at 17-18.
[190] *Id.*, slip op. at 18.
[191] 474 U.S. 361 (1986).
[192] 12 U.S.C. § 1841(c).
[193] *Dimension*, 474 U.S. at 373-74; *see also id.* at 368 (holding that ''[t]he traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress'').
[194] 12 U.S.C. § 1844(b).
[195] *Dimension*, 474 U.S. at 373 n.6.
[196] *See generally* Wilmarth, *supra* note 34.
[197] *ABA v. FTC*, 430 F.3d at 468 (emphasis in original) (quoting *Ry. Labor Exec. Ass'n*, 29 F.3d at 671).
[198] *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 472 (1977) (emphasis added; internal quotation marks omitted) (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976)).

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