Articles

FEDERALISM, CONSUMER PROTECTION AND REGULATORY PREEMPTION: A CASE FOR HEIGHTENED JUDICIAL REVIEW

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I. INTRODUCTION

In recent years, federal-state relations have often been strained when dealing with the protection of consumer interests. State officials have, for example, investigated corporate abuses that federal officials had failed to examine, in turn prompting federal action.¹ State legislatures have enacted legislation aimed at protecting consumers against corporate abuses, such as predatory lending, which is more extensive than federal legislation, prompting federal guidelines on abusive lending practices.² In these cases, the actions of state officials have been both praised and criticized—praised by advocates for strong consumer protection, and criticized by industry members and, often, by federal officials.³ Some federal officials, such as

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3. See, e.g., Riva D. Atlas, Firm Sues to Block Mutual Fund Fee Inquiry, N.Y. TIMES, Sept. 7, 2005, at C8 (discussing the efforts of J. & W. Seligman & Company to block Attorney General Eliot Spitzer's inquiry into its fees practices); see also Statement by Acting Comptroller Julie L. Williams in Response to Comments by Eliot Spitzer, May 19,
the Office of the Comptroller of the Currency, have responded by issuing regulations broadly preempts states laws.\(^4\) In addition, the Comptroller of the Currency has aggressively asserted its authority to preempt state law by bringing suit against state officials, such as its suit against New York Attorney General Eliot Spitzer to stop the State from collecting information from national banks to assess possible violations of state and federal fair lending laws.\(^5\) This is part of a broader pattern of attempts by federal officials to set aside state protections for consumers through broad preemption of state law.\(^6\)

This Article explores federal regulatory preemption of state law accomplished through agency nonacquiescence. It presents a case study of nonacquiescence that is one of the most extreme examples of executive assertion of power. It is a study of nonacquiescence to the evolution of legal doctrine recognized by the United States Supreme Court and uniformly recognized by the circuit courts. It is also a study of nonacquiescence to clear statements of Congressional intent. Such agency action is troubling due to its possible negative impact on efforts to protect the interests of consumers on the part of state governments. It is also troubling because of the absence of any effective check on federal agency assertions of power. This is due to the deference most courts grant to agency preemption decisions.

Part II of this Article examines the issue of judicial deference toward federal agency decisions to preempt state law. The law remains unsettled on the issue of whether the judiciary should grant *Chevron* deference to agency preemption decisions.\(^7\) The United States Supreme Court has not clearly resolved the issue. The Court had an opportunity to settle this question in its last term, but again failed to do so.\(^8\) The decisions in the circuit courts are divided. However, the circuit courts generally defer to

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2005, http://www.occ.treas.gov/ftp/release/2005-52a.pdf (arguing that if Attorney General Spitzer is suggesting to undertake duplicative work in connection with institutions currently under OCC review for possible violations of fair lending laws, this would potentially disrupt and certainly impede the OCC’s ability to promptly and efficiently conduct its exam work).\(^4\)

4. See discussion *infra* note 49 and accompanying text.

5. Michele Heller, *For Spitzer, A Tactical Shift in Fight Against OCC*, AM. BANKR., Aug. 9, 2005, at 1 (describing a suit brought against Eliot Spitzer by the OCC and the Clearing House Association, which represents several large banks including Citigroup, HSBC, JP Morgan Chase and Wells Fargo).


agency decisions to preempt state law in the absence of a clear statutory directive. This leads to cursory judicial review and, as documented in this Article, little likelihood that an agency decision will be disturbed. As a result of such cursory review, the courts have sustained federal regulatory actions that have set aside, directly or by implication, state efforts to protect consumers, including state legislation and/or enforcement efforts involving: predatory lending,\(^9\) fair lending laws,\(^10\) antifraud statutes,\(^11\) and other consumer protection measures, such as limits on fees for bank services.\(^12\)

Part III of this Article examines the ramifications of judicial deference to agency preemption decisions. If federal agencies exercise self-restraint, then substantial judicial oversight might be unnecessary. However, restraint cannot be reasonably expected when agencies face conflicts of interest—i.e. when they have an interest in setting aside state laws or protecting the interests of the industry over the interests of the general public. Part III presents a case study of lack of agency restraint due to conflicts of interest by examining the actions of the Comptroller of the Currency over the 1992-2006 period.

Part IV of this Article presents an alternative to judicial deference to preemption decisions. In the past, the alternatives suggested by the courts have been all or nothing—either no deference to any agency preemption decision or deference in all cases. This Article formulates another alternative—heightened judicial review triggered by evidence of agency bias.

II. THE EXISTING DEBATE OVER JUDICIAL DEFERENCE

Preemption of state law by regulatory agencies presents a clash of principles—a clash between the supremacy of federal law\(^13\) and principles

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\(^9\) Nat'l City Bank of Ind. v. Turnbaugh, 463 F.3d 325 (4th Cir. 2006) (holding Maryland's prohibition on prepayment penalties as preempted); Bankwest, Inc. v. Baker, 411 F.3d 1289 (11th Cir. 2005) \textit{reh'g granted, vacated en banc}, 433 F.3d 1334 (11th Cir. 2005), \textit{vacated, appeal dismissed as moot}, 446 F.3d 1358 (11th Cir. 2006) (preempting Georgia statute outlawing "payday" loan stores, which make loans with interest rates averaging 400-500%).


\(^11\) SPGGC, LLC v. Ayotte, 488 F.3d 525 (1st Cir. 2007) (preempting state antifraud statutes regulating sale of "gift cards" by national banks).

\(^12\) Wells Fargo Bank of Tex., NA v. James, 321 F.3d 488 (5th Cir. 2003) (preempting Texas par value statutes prohibiting national banks from charging a check cashing fee); Bank of Am. v. City & County of San Francisco., 309 F.3d 551 (9th Cir. 2002) (finding city ordinances prohibiting ATM fees charged to non-bank customers preempted).

\(^13\) Courts have repeatedly noted that preemption is based on the Supremacy Clause of the U.S. Constitution. \textit{E.g.}, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 540 (2001);
of federalism. Given this clash of two important Constitutional principles, the role of the courts in resolving this issue becomes of paramount concern. Unfortunately, the United States Supreme Court has not settled whether courts should defer to agency decisions to preempt state law.

Early decisions of the Court endorsed a deferential standard of review of agency regulations and decisions preempting state law. These decisions deferred to agency determinations in a specific context, namely when the agency was applying a statutorily delegated power to preempt a specific state law. A very different context would be a case raising an issue of whether there is power to preempt under a relevant federal statute. Such a case raises a question of agency power, namely whether a federal statute permits preemption at all. The case law has consistently noted that a court must independently determine whether an agency has acted within the scope of its statutory authority. It can be said that this is an issue of law that the courts have the expertise to determine without the need to defer to agency determination. However, the issue is not that simple. In claims of


14. Federalism concerns are recognized in the presumption that the historic powers of the states, such as police powers or regulation of health and safety, are not to be superseded by federal law unless that is the clear and manifest purpose of Congress. See Lorillard Tobacco Co., 533 U.S. at 541-42 (applying "the assumption that the historic police powers of the States [a]re not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress" to the analysis of whether the FCLAA preempts Massachusetts' Attorney General's cigarette advertising regulations) (internal citation omitted); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992) ("Consideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [a]re not to be superseded by ... Federal Act unless that [is] the clear and manifest purpose of Congress.'"); Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 722-23 (1985) (holding that the county's health ordinances are not preempted by federal regulation and do not endanger federal goals).

15. See United States v. Shimer, 367 U.S. 374, 381-82 (1961) (explaining that where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involve questions of law or fact, will not be reviewed by the courts unless he has exceeded his authority or his action was clearly wrong); see also Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 154 (1982).

16. See, e.g., New York v. Fed. Energy Regulatory Comm'n, 535 U.S. 1 (2002) (the Court, in 2002, again reviewed an agency decision to preempt state law without referring to Chevron. Again, the court decided whether the agency had statutory authority to adopt the preemptive order in question. The Court of Appeals decision that the Court reviewed had deferred to the agency's determination); Fid. Fed. Sav. & Loan Ass'n, 458 U.S. at 159 (ruling that Congress delegated sufficient authority to the Board to issue its preemptive regulation); City of N.Y., 486 U.S. at 64 (describing how the focus is on the proper bounds of an agency's lawful authority to displace state law); La. Pub. Serv. Comm'n, 476 U.S. 355 (the Court, in 1986, reviewed de novo an agency decision to preempt state law, without citing or discussing the deferential standard of review discussed in Chevron or in the earlier Shimer decision).
implied preemption due to alleged conflict between federal and state law, the governing standard to decide the preemption question is an issue of law. However, the degree of conflict between federal and state law and the ability to harmonize federal and state requirements are not issues of law. They are questions in which agencies can claim expertise. Nonetheless, the public policy question is presented, namely whether an executive agency should effectively determine the bounds of federal versus state authority or whether this is a decision that should be left to the courts.

The rationale for a deferential standard of review has been the superior expertise of agency officials. As the Court explained in United States v. Shimer:

More than a half-century ago this Court declared that "where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involve questions of law or fact, will not be reviewed by the courts unless he has exceeded his authority or this court should be of opinion that his action was clearly wrong." This admonition has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.\(^{17}\)

In 1996, the United States Supreme Court cast doubt on the conclusion that preemption determinations are subject to a deferential standard of judicial review when they involve agency exercise of power and do not raise issues of the agency’s authorization to preempt at all. In Smiley v. Citibank,\(^ {18}\) the claim was made that judicial deference is inappropriate whenever a federal agency decides to preempt state law. The justification for this claim was principles of federalism—the need to preserve traditional areas of state law manifest in a presumption against preemption recognized in the Cipollone decision.\(^ {19}\) In Smiley v. Citibank,\(^ {20}\) the court noted:

\[\text{P}etitioner contends that no Comptroller interpretation of § 85 is entitled to deference, because § 85 is a provision that pre-empts state law. She argues that the "presumption against ... pre-emption" announced in Cipollone v. Liggett Group, Inc., 505 U.S. 504, 518, 112 S.Ct. 2608, 2618, 120 L.Ed.2d 407 (1992), in effect trumps Chevron, and requires a court to make its own

\(^{17}\) Shimer, 367 U.S. at 381-82 (citations omitted).
\(^{20}\) Smiley, 517 U.S. at 743-44.
interpretation of § 85 that will avoid (to the extent possible) preemption of state law. This argument confuses the question of the substantive (as opposed to pre-emptive) meaning of a statute with the question of whether a statute is pre-emptive. We may assume (without deciding) that the latter question must always be decided de novo by the courts. That is not the question at issue here; there is not doubt that § 85 pre-empts state law.\footnote{The statute in Smiley explicitly preempted state law with respect to the "interest" national banks may charge on loans made in states other than the state in which they are chartered. The agency interpretation at issue was of the meaning of the term "interest" contained in the statute. Therefore, the Court applied a deferential standard of review to that determination. The Court's statement regarding de novo review became dicta. However, the agency interpretations in the case study in Part III and the circuit court decisions discussed below rely on general grants of power—e.g., the power to receive deposits or to make loans—and not on explicit statutory provisions preempting state law in the context presented. The issue is whether such statutes implicitly preempt state law at all, and if so, to what extent. The language in the Smiley decision suggests that such agency decisions are subject to de novo review, but the Court did not settle the issue.}

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When faced with the issue of the proper standard of review for agency preemption decisions, the holdings of most circuit courts, such as the Second Circuit's holding in the Wachovia Bank decision,\footnote{See Wachovia Bank, N.A. v. Burke, 414 F.3d 305, 314-15 (2d Cir. 2005).} apply a deferential standard of review. They have either applied the principles laid down in the Chevron case,\footnote{See Nat'l City Bank of Ind. v. Turnbaugh, 463 F.3d 325, 332 (4th Cir. 2006); Wachovia Bank v. Watters, 431 F.3d 556, 560 (6th Cir. 2005); Wells Fargo Bank N.A. v. Boutris, 419 F.3d 949, 959 (9th Cir. 2005); Burke, 414 F.3d at 314-15; Wells Fargo Bank of Tex. v. James, 321 F.3d 488, 494 (5th Cir. 2003) (citing Auer v. Robbins, which in turn applied the Chevron standard of deference); Teper v. Miller, 82 F.3d 989, 997 (11th Cir. 1996); Time Warner Cable v. Doyle, 66 F.3d 867, 876 (7th Cir. 1995); Okla. Natural Gas Co. v. Fed. Energy Regulatory Comm'n, 28 F.3d 1281, 1284 (D.C. Cir. 1994). But see contrary decisions of Eleventh Circuit panel, infra note 26; and uncertainty expressed by other panels in the Seventh and D.C. Circuit, infra note 27.} or a similar rule of deference that gives great weight to any reasonable agency construction of a statute.\footnote{See Bank One, Utah v. Guttau, 190 F.3d 844, 849 (8th Cir. 1999) (arguing that the Comptroller's interpretation of the National Bank Act is entitled to great weight).}

However, some circuit courts have refused to defer to agency decisions to preempt state law.\footnote{See Bankwest, Inc. v. Baker, 411 F.3d 1289, 1301 (11th Cir. 2005) (arguing that a preemption determination is a matter more within the expertise of the courts than within the
resolving the issue, noting it is one that the Supreme Court case law has left unresolved.\textsuperscript{27}

The uncertainty in this area is exemplified by the conflicting opinions of the Eleventh Circuit. In 1996, the court, in \textit{Teper v. Miller}\textsuperscript{28}, reasoned that agency determinations, including interpretations that address the scope of preemption of state law, are entitled to deference under the \textit{Chevron} principle. This deference is due to agency expertise in making policy determinations and reconciling conflicting policies.\textsuperscript{29} However, in 2005, another Eleventh Circuit panel ruled no deference was due to an agency determination to preempt state law. It rejected claims of agency expertise without citing \textit{Teper} or discussing the earlier ruling accepting claims of agency expertise. Instead, the court concluded that preemption determinations involve matters more within the expertise of the courts than within the expertise of an administrative agency.\textsuperscript{30}

The difference of opinion in the Court of Appeals decisions has centered on the expertise of federal executive agencies. However, this is not the only relevant consideration. Federalism is an important concern as well.\textsuperscript{31} In deciding how to resolve the issue of the proper role of the executive branch in the tension between supremacy of federal law and preservation and recognition of state law and interests, it is important to recognize an implicit basis of the United States Supreme Court's decisions to defer to agency determinations. \textit{Chevron} did not speak only of agency expertise. It spoke of a forum for resolving conflicting policies and the expertise of an administrative agency\textsuperscript{32}.

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\textsuperscript{27} Commonwealth Edison Co. v. Vega, 174 F.3d 870, 875 (7th Cir. 1999) (noting that there is uncertainty as to whether it is appropriate to defer to an agency that is seeking to expand federal power at the expense of the states through a generous construal of preemption clause); Mass. v. U.S. Dep’t of Transp., 93 F.3d 890, 894 (D.C. Cir. 1996) (“Neither the Supreme Court nor this one has ever definitively decided whether an agency’s determination that an explicit preemption provision in a statute it administers blocks some state action is reviewed according to \textit{Chevron}. We thus assume, without deciding, that the principles of \textit{Chevron} encompass an agency’s interpretation . . . ”).

\textsuperscript{28} Teper v. Miller, 82 F.3d 989, 997 (11th Cir. 1996).

\textsuperscript{29} Id. at 997-98.

\textsuperscript{30} Bankwest, Inc., 411 F.3d at 1300-01.

\textsuperscript{31} This concern is seen in case law recognizing the importance of avoiding preemption of traditional areas of state regulation. Most recently this federalism concern was the basis of the United States Supreme Court’s decision not to preempt state common law causes of action in \textit{Bates v. Dow AgroSciences}, 544 U.S. 431 (2005).
accountability of the chosen forum. The assumption was that the executive agency would provide a voice for all the conflicting interests and an unbiased forum for settling the conflicting interests. The case study in Part III tests this assumption, and questions whether deference is appropriate when the agency's actions demonstrate it is not acting as an unbiased forum.

How should the courts respond to cases of agency bias and agency self-interest? Differing views on the issue of agency bias are epitomized by the contrasting viewpoints of Cass Sunstein and Richard Pierce. Sunstein recognized the likelihood of agency bias and self-dealing on jurisdictional issues and opined that independent judicial assessments would be appropriate. Pierce, on the other hand, opined that a federal agency is likely to exercise considerable self-restraint in preempting state law and therefore agency bias does not pose a serious threat to values of federalism. Neither Sunstein nor Pierce presented or reviewed the evidence of possible agency bias or, in Pierce's case, the evidence of any agency self-restraint. That is the evidence explored in Part III through a case study of agency preemption decisions by federal bank regulatory agencies.

III. A STUDY OF AGENCY BIAS

The case study in this Article involves the decisions by the Office of the Comptroller of the Currency (OCC) regarding the preemption of state law. It begins with an analysis of the OCC's 2004 regulations preempting a broad range of state laws. It then examines the other OCC preemption

36. Pierce, supra, note 34 at 665 (cautioning, however, that courts should exercise heightened vigilance in reviewing agency preemptive rules to ensure affected states have the opportunity to be heard, the rule is no broader than necessary, and that there is substantial evidence for the conclusion that state regulations have the potential to create substantial disproportionate interstate spillovers).
decisions since the early 1990's. Finally, it compares the OCC approach to the preemption issue to that of the Federal Deposit Insurance Corporation's (FDIC) decisions, on reconciling state and federal laws affecting consumer protection concerns during the same time span.

Overall, the findings are that in the last two decades the OCC has not acted as a neutral forum to resolve conflicting policies. Rather it has acted as an advocate for the interests of national banks and therefore an advocate for the broadest possible preemption of state law. The OCC's advocacy stance has led it to (a) ignore evolution of legal doctrine found in the United States Supreme Court case law, and (b) ignore legislative history when it contradicts the OCC's conclusions on the preemptive effect of federal law.

Agency nonacquiescence has been a subject of commentary for many years, with commentators documenting nonacquiescence in the decisions of one or more circuit courts by various federal agencies. In recent years many commentators and most judges have taken the view that agency nonacquiescence is not justified, especially in cases of intracircuit nonacquiescence, namely when review will be to a particular court and the agency refuses to follow the case law of that court. Even advocates of a contrary viewpoint, such as Estreicher and Revesz, have defended that viewpoint only when the law remains in flux. Thus, the present case


40. "[A] court of appeals is expected to be open to reconsidering prior rulings in the light of developments in other circuits . . . . This is not to say that the legal system or the
study brings to light a troubling assertion of executive power because it demonstrates nonacquiescence to the opinions of the United States Supreme Court, the circuit courts’ uniform statements of the law governing agency preemption, and clear statements of congressional intention.

A. Ignoring the Evolution of Supreme Court Doctrine

The United States Supreme Court has struggled with the conflict between the need to uphold principles of federalism and therefore give recognition to state laws and the need to promote the operations of federally chartered institutions that are largely governed by federal laws. Supreme Court case law in the late nineteenth century and early twentieth century stated that state law must yield to federal law when dealing with nationally chartered banks if state law “impairs the efficiency of the bank to discharge the duties for which it was created.” However, that standard was probably altered by the Court as early as 1944, and certainly was altered by the Court in its 1996 decision in *Barnett*. As early as 1944 the Court recognized the power of a state to protect the interests of depositors even when they were depositors of a national bank. It resolved the tension between federal and state law when dealing with nationally chartered entities such as national banks by ruling the “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.” In other words “undue burden” was now the standard, not “impair the efficiency” of a bank’s exercise of its powers.

courts of appeals themselves should view with indifference widespread, unjustified disregard of circuit law by administrative agencies (or other actors). For example, even in the absence of Supreme Court review, at some point the law in a particular circuit and across circuits will no longer be in flux.” Estreicher and Revesz, *supra* note 38, at 727. See *also id.* at 753 (suggesting nonacquiescence is justified only when it is an interim measure to maintain uniform administration while the agency makes reasonable attempts to persuade the courts to validate its preferred policy).

41. First Nat’l Bank of San Jose v. California, 262 U.S. 366, 369 (1923). The Court cited *Davis v. Elmira*, 161 U.S. 275, 283 (1896), although in *Davis* compliance with both state and federal law was not possible. See *also McClellan v. Chipman*, 164 U.S. 347, 357 (1896) (discussing federalism concerns in the context of instrumentalities of the federal government, and applying state law in this case because a state law regarding preferential transfers in the event of insolvency was not in conflict with a general federal grant of authority to receive real estate as security for a loan).

42. Anderson Nat’l Bank v. Luckett, 321 U.S. 233, 241 (1944) (recognizing debtor obligations are within the state’s control because they are incurred in the state that the bank is situated).

43. *Id.* at 248 (emphasis added). The court ruled that a state law governing disposition of abandoned deposits was not in conflict with a general federal grant of power to accept deposits.
In 1996 the U.S. Supreme Court again considered the tension between federal and state law when dealing with federal instrumentalities such as national banks. It ruled:

In defining the pre-emptive scope of statutes and regulations granting a power to national banks, these cases take the view that normally Congress would not want States to forbid, or impair significantly, the exercise of a power that Congress explicitly granted. To say this is not to deprive States of the power to regulate national banks, where (unlike here) doing so does not prevent or significantly interfere with the national bank's exercise of its powers.\(^{44}\)

The standard had several formulations—"undue burden," "impair significantly," or "significantly interfere"—but the aim was the same: avoid preemting state law unless there was a serious conflict with federal law. The old standard of "impair" the efficiency of exercise of federal power was implicitly overruled.

In Barnett the court then turned to the issue of conflict between federal and state law in a specific context, namely explicit federal authorization of a power for a national bank and the need, under state law, to also obtain state permission for the exercise of such power. In that specific context the court concluded that an explicit grant of a specific federal power is not subject to the "condition" that state authorization must also be obtained unless Congress indicated such additional authorization was necessary.\(^{45}\) This is a specific exception to the general principle embodied in the "significant interference" test.

Thus, for many years the general standard for resolving the conflict between state and federal law for federal instrumentalities such as national banks has been the "significant" impairment or interference standard, which was earlier described as the "undue" burden standard. It certainly is not the former "impair" the efficiency of the exercise of federal powers standard. This change has been uniformly recognized in Court of Appeals decisions since 1996 reconciling conflicts between state and federal law for national banks.\(^{46}\) The Ninth Circuit recently discussed the tension between

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45. Id. at 34-35 (citing Franklin Nat'l Bank of Franklin Square v. New York, 347 U.S. 373 (1954)).

46. Wachovia Bank, N.A. v. Burke, 414 F.3d 305, 314 (2d Cir. 2005) (using significantly interfere standard); Bankwest, Inc. v. Baker, 411 F.3d 1289, 1302 (11th Cir. 2005) (adopting substantially impair standard); Wells Fargo Bank of Texas N.A. v. James, 321 F.3d 488, 491 (5th Cir. 2003) (recognizing significantly interfere standard); Bank of Am. v. City & County of San Francisco., 309 F.3d 551, 558-59 (9th Cir. 2002) (utilizing
principles of federalism that generally lead to a presumption against preemption of state law and the status of national banks as federal instrumentalities. It concluded:

In light of this history, we held in Bank of America that the usual presumption against federal preemption of state law is inapplicable to federal banking regulation . . . . Thus, in defining the pre-emptive scope of statutes and regulations granting a power to national banks, [the Supreme Court's jurisprudence] takes the view that normally congress would not want states to forbid, or to impair significantly, the exercise of a power that Congress has explicitly granted. Barnett Bank, 517 U.S. at 33.47

The general standard is also not a “condition” test. This is instead a narrow exception to the general rule. Moreover, in light of the “significant interference” standard, there is no blanket presumption that state laws are inapplicable to national banks.

The OCC has not recognized this evolution of the preemption doctrine in Supreme Court case law. The OCC ignored the “undue burden” test in interpretive rulings issued in 1992 and 1995.48 Instead it continued to insist that any law that impairs national banks’ efficiency in exercising their powers was preempted. The OCC also ignored the “significant” interference and “undue” burden tests in regulations it issued in 200449 and preemption determinations it made in 2003.50 Instead, the OCC applied the old “impair efficiency” test and added a general “condition” test.

47. Wells Fargo Bank N.A. v. Boutris, 419 F.3d 949, 956-7 (9th Cir. 2005) (emphasis added).
In fact, in a preemption determination in 2004, the OCC did not even cite the *Barnett* case or refer to the "significant interference" or "undue burden" test at all. Instead, it merely cited the terms of its 2004 regulations and preempted an Indiana statute restricting the terms of balloon payment loans because the provisions of the statute "impose limitations on the terms of credit extended by a national bank." 51

The "condition" test has been applied across the board by the OCC, rather than in the specific context in which it was recognized by the United States Supreme Court—namely explicit federal statutory authorization of a specific power and the need to obtain additional state authorization prior to the exercise of such power, as imposed by state law. In the OCC's view, a state cannot condition the exercise of federal power on compliance with any state requirements such as consumer protection statutes.

The OCC cites the *Barnett* case and the *Franklin National Bank* case to support this position. However, the *Franklin National Bank* case never used the phrase "condition" the grant of federal power. In addition it cannot be read to prohibit all conditions or restrictions upon exercise of federal powers. The decision was based on a conflict between federal and state law, where state law prohibited the use of the term "savings" in bank advertisements or transactions and federal law authorized national banks to receive deposits "without qualification or limitation." 52 The court concluded there was a direct conflict between the grant of federal power and the restrictions imposed by state law. As it explained:

"We cannot believe that the incidental powers granted to national banks should be construed so narrowly as to preclude the use of advertising in any branch of their authorized business. It would require some affirmative indication to justify an interpretation that would permit a national bank to engage in a business but gave no right to let the public know about it. . . . There appears to be a clear conflict between the law of New York and the law of the Federal Government. We cannot resolve conflicts of

54319 (Dec. 2, 1983) (stating the standard as "impair the efficiency of national banks"). In an interpretive letter in 2005 the OCC did decide not to preempt the New Jersey Consumer Fraud Act but did so only because the national banks in question did not originate or purchase any of the loans in question but were merely acting as trustees for the benefit of investors in the trusts that purchased the loans. However, in that decision the OCC continued to insist on a broad standard of federal preemption, but concluded the law did not "obstruct, impair, condition or otherwise interfere with the Banks' exercise of fiduciary powers . . . ." Office of the Comptroller of the Currency, Interpretive Letter No. 1016, (Feb. 2005).

See also Owensboro Nat'l Bank v. Stephens, 44 F.3d 388, 390-91 (6th Cir. 1994).
authority by our judgment as to the wisdom or need of either conflicting policy.\textsuperscript{53}

\textit{Barnett} does use the phrase “condition” the exercise of federal power. However, it does so in a specific context. Namely, the issue in \textit{Barnett} was whether additional state authorization was necessary when federal law already grants an explicit authorization to exercise a specific power, e.g. the power to act as an insurance agent, and does not explicitly require additional state authorization. \textit{Barnett} does not support a general preemption standard that any condition or restriction on the manner in which federal power is exercised is preempted.

The OCC’s position reveals an attempt to expand executive power through the aggressive stance of nonacquiescence to judicial decisions. The OCC is refusing to follow the uniform decisions of the circuit courts which have stated the governing standard by which to determine the existence of conflict preemption in the context of federal banking regulation. It is justifying that position by ignoring the evolution of United States Supreme Court doctrine and, instead, picking and choosing individual words or phrases in Supreme Court decisions without reference to the general standards of law announced in the cases and the actual outcomes in the cases in question or the factual context that give the words or phrases meaning. The recent United States Supreme Court’s decision in \textit{Watters} demonstrates how troubling this approach can be because it increases the likelihood of unchecked executive power. In its opinion in \textit{Watters}, the United States Supreme Court cited the \textit{Barnett} decision and the earlier \textit{Franklin National Bank} decision when stating the governing legal standard. It reiterated that states are permitted to regulate the activities of national banks when doing so “does not prevent or significantly interfere” with the national bank’s or the national bank regulator’s exercise of its powers.\textsuperscript{54}

However, in other parts of its decision, the court spoke of the state law in question not being permitted to “interfere” with the business of banking when it “conditioned” real estate lending on registration with the state and subjected it to the State’s investigative and enforcement machinery.\textsuperscript{55} The court also stated that state law may not “significantly burden . . . a national bank’s own exercise of its real estate lending power, just as it may not

\textsuperscript{53} Id. at 377-78.

\textsuperscript{54} Watters v. Wachovia Bank, N.A. 127 S.Ct. 1559, 1567 (2007). See also id. at 1570 (requiring significant burden) and 1571 (stating security against significant interference by state regulators is a characteristic condition of the “business of banking” conducted by national banks).

\textsuperscript{55} Id. at 1568, 1573.
curtail or hinder a national bank's efficient exercise of any other power.

Thus the OCC, picking and choosing whatever word or phrase suits its purpose, might claim that *Watters* recognized not only a "significant interference" test, but also an "interfere" or "condition" standard for conflict preemption, as well as a standard that state law may not "hinder" the exercise of federal power. Indeed, in recent testimony before Congress, this is exactly the position taken by the Comptroller. This ignores that the Court was consistently applying the "significant interference" test in the *Watters* opinion and using the words "interfere" or "hinder" as descriptions of that effect in the case at hand. This conclusion is further confirmed by the Court's citations following the phrase "curtail or hinder" in the *Watters* decision.

The OCC has ignored the evolution of Supreme Court doctrine. It has also read *Franklin National* and *Barnett* to allow it to preempt any state law imposing any restriction on the exercise of federal power. As a result of this view, the OCC's final regulations all preempt any "state laws that obstruct, impair or condition a national bank's ability to fully exercise" any of its federal authorized powers except where state law is made applicable by federal law.

The agency's nonacquiescence viewpoint effectively leads to unchecked executive power. The Comptroller is ignoring uniform Circuit Court statements of the governing law and relying on its own reading of United States Supreme Court decisions. However, the United States Supreme Court issues few opinions that can check an agency's interpretation of the scope of conflict preemption. When the Court issues

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56. *Id.* at 1567-68.


58. *E.g.*, *Watters*, 127 S.Ct. at 1571 ("Security against significant interference by state regulators is a characteristic condition of the "business of banking" conducted by national banks, and mortgage lending is one aspect of that business.").

59. The court cites *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 33-34 (1996). At that point in its opinion, the court noted that various earlier decisions had used various phrases to describe situations involving conflict preemption, such as "encroach," "hamper," "interfere," and "impair" and concluded, "[i]n defining the pre-emptive scope of statutes and regulations granting a power to national banks, these cases take the view that normally Congress would not want states to forbid, or to impair significantly, the exercise of a power that Congress has explicitly granted."

60. 12 C.F.R. §§ 7.4007(b) (deposit taking power), 7.4008(d) (lending authority), 7.4009(b) (all national bank activities), 34.4(a) (real estate lending power) (2005).

61. David G. Savage, *The High Court's New Term is Light on Load, But the Subjects Are Still Spicy*, ABA J., Oct. 2006 at 12 (reporting that in the late 1970s and early 1980s, the
an opinion, an agency can often find verbiage that, when cited out of context, supports the agency's broad view of conflict preemption. Finally, by not recognizing the evolution of doctrine over time, the agency can always pick and choose verbiage from earlier United States Supreme Court decisions which support its broader position.

Such unchecked exercise of executive power has another dimension that is illustrated by the OCC's preemption determinations. In addition to asserting a right of nonacquiescence in the uniform decisions of the federal circuit courts, the OCC's position goes one step further and asserts a power of nonacquiescence to the clear statements of Congressional intention. This is examined below.

B. Ignoring Legislative History

The United States Supreme Court has repeatedly stated that any determination of the scope of federal preemption of state law is a matter calling for ascertainment of Congressional intention. The United States Supreme Court has repeatedly stated that any determination of the scope of federal preemption of state law is a matter calling for ascertainment of Congressional intention. Congress addressed the issue of the applicability of state law to the activities of national banks in the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, the 1997 Amendments to the Act, and in various federal consumer protection and fair lending statutes. In all these enactments Congress stipulated a preference for state law, especially in the areas of consumer protection and fair lending, and a concern for overly aggressive OCC preemption of state law. The 1994 statute itself does not illuminate the issue of preference, however, its legislative history makes clear

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court routinely issued more than 150 opinions each term, but in recent years, it typically issues fewer than seventy-five opinions). See also Matthew Diller and Nancy Morawetz, Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz, 99 YALE L.J. 801, 810-811 (1990) (the decisional capacity of the United States Supreme Court is small, and it frequently addresses narrowly framed questions that leave many matters unresolved).


64. "The laws of the host State regarding community reinvestment, consumer protection, fair lending, and establishment of intra-state branches shall apply to any branch in the host State of an out-of-State national bank to the same extent as such State laws apply to a branch of a bank chartered by that State, except—

(i) when Federal law preempts the application of such State laws to a national back; or

(ii) when the Comptroller of the Currency determines that the application of such State laws would have a discriminatory effect on the branch in comparison
preference for some state laws. The House Report on the Act stated, "Consumer protection, fair lending, and community reinvestment laws have been areas of traditional State concern. The Committee does not intend to distribute these traditional regulatory schemes."

The Conference Report was more explicit. It recognized the strong interest states have in the activities of depository institutions doing business in their jurisdictions and in protecting their consumers, businesses, and communities. In applying state law to national banks' operations, the Conference Report went out of its way to point out that: "Courts generally use a rule of construction that avoids finding a conflict between the Federal and State law where possible. This title does not change these judicially established principles." It then criticized past OCC preemption rulings that took a broader view of preemption authority.

The Congressional concern regarding overly aggressive OCC preemption determinations found its way into a statutory mandate in 1994 as well. The mandate is that any proposed agency preemption opinion letter or interpretive ruling with regard to state laws involving community reinvestment, consumer protection, fair lending, and the establishment of interstate branches must be published in the Federal Register, and give interested parties an opportunity to comment on the issue under consideration. This new requirement was "intended to help focus any administrative preemption analysis and to help ensure that an agency only makes a preemption determination when the legal basis is compelling and the Federal Policy interest is clear."

In floor debates, the bill’s main sponsor, Senator Riegle, confirmed that all banks had traditionally been required to conform with state laws on consumer protection, fair lending and community reinvestment, and assured other members of the Senate that state authority over national banks in the areas of consumer protection, community reinvestment, and fair lending would not be diminished.

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67. Id.
68. Id. at 53-54. Specifically the Conference Report criticized OCC Interpretive Letter 572, issued in 1992, for preempting state law when the federal policy interest in doing so was not clear, and the interpretive ruling found in 12 C.F.R. § 7.800 because it was an overly broad preemption of any state law that attempts to prohibit, limit or restrict deposit account service charges.
70. H.R..REP. No. 103-651, supra note 66, at 55 (emphasis added).
71. Mr. GRAHAM.
Congressional concern regarding overly aggressive OCC preemption of state law again found its way into a statutory mandate in 1997. The Amendments to the Riegle-Neal Act imposed a requirement that the OCC conduct an annual review of its preemption determinations and include the results of the review and the reasons for each such action in its annual report to Congress. 72 The floor debates on the legislation made it clear that the requirement was imposed due to concern that "the Comptroller has undertaken preemptive actions which were unnecessarily expansive." 73

In addition to the terms and legislative history of the 1994 Riegle-Neal Interstate Banking Act and 1997 Amendments to the Act, federal consumer protection and fair lending laws have consistently recognized the desire to preserve state law to the greatest degree possible. Such federal statutes use the same standard for recognition of state law. For example, the Truth in

I would like to bring to the attention of the Chairman the concern of a number of my colleagues with the section of the bill dealing with applicable State law. My concern is that the section will result in the significant loss of authority for the States. Currently through their banking laws and their bank holding company statutes, States are able to require all banks to conform with a wide variety of State laws. States have applied laws in the areas of consumer protection, community reinvestment, and fair lending as well as a number of reporting and notification requirements to these institutions.

We need to look at the financial system from the eyes of the users of the services, the consumers. We need to have uniformity and predictability. At the same time we need to have standards that best achieve the needs of the community. We must recognize the diversity of the community needs across the Nation and provide laws that allow communities to reflect those different needs. . . .

Mr. RIEGLE.

. . . . Under the reported bill, the States do not lose any authority that they already have over national banks. The bill also avoids having two classes of national banks resulting, interstate and intrastate, with each type of bank subject to different laws.

I would just add that we worked hard in the committee to preserve the contours of the dual banking system in crafting this legislation and have not tried to alter the existing balance of power between the Federal and the State levels. The reported bill endeavors to maintain the status quo regarding a State’s ability to regulate the activities of national banks operating in that State . . .

140 CONG. REC. S4819 (1994).
Lending Act provides that it does "not annul, alter or affect the laws of any state . . . . except to the extent those laws are inconsistent with the provisions of this subchapter and then only to the extent of the inconsistency."\(^7\) The Real Estate Settlement Procedures Act, the Fair Debt Collection Practices Act, and the Equal Credit Opportunity Act use the same standard and then add "[t]he Secretary may not determine that any state law is inconsistent with any provision of this chapter if the Secretary determines that such law gives greater protection to the consumer."\(^7\)

Similarly, older federal consumer protection statutes, such as the Federal Trade Commission Act,\(^7\) that do not explicitly preserve state law, have been interpreted not to occupy the field of consumer protection. Instead state laws are "only supplanted when inadequate or counterproductive to the Commission's regulations."\(^7\) This conclusion was based on the legislative history of the statute.\(^7\)

Faced with a Congressional directive to preserve state law to the greatest degree possible, especially in the area of consumer protection, fair lending and community reinvestment, how has the OCC responded? Rather than taking a narrow view of the extent of federal preemption, the OCC has repeatedly attempted a broad preemption of state law. As early as 1983 the OCC concluded: "A national bank may establish any deposit account service charge . . . notwithstanding any state laws which prohibit the charge assessed or limit or restrict the amount of that charge."\(^7\)

The rationale was that state laws impair the efficiency of national banks' exercise of their powers, and any state law impediments to national bank flexibility have potentially serious implications for their continued safety and soundness. The OCC also added that the comprehensive federal statutory scheme governing deposit-taking preempts state laws.\(^8\)

The Conference Report on the 1994 Riegle-Neal Interstate Banking Act specifically criticized this OCC ruling as an overbroad assertion of its authority to preempt state law. What was the OCC's response? In 1996 it

\(^7\) 15 U.S.C. § 1610(a)(1) (2000) (Truth in Lending Act, also applicable to the provisions of the Home Ownership and Equity Protection Act of 1995, which was directed at predatory lending practices).


revised its ruling to employ a case-by-case evaluation of whether particular charges or fees may be imposed notwithstanding contrary state law.\textsuperscript{81} However, more recently the OCC returned to its former position that it would broadly preempt state law, even though there had been no change in legislative intent since 1994. Indeed, the intent to sanction only a narrow preemption of state law had been reaffirmed in the 1997 Amendments to the Reagle-Neal Interstate Banking Act.\textsuperscript{82} The OCC’s 2004 revisions of Part 7 and Part 34 of its regulations preempt any state laws that “obstruct, impair, or condition” a national bank’s ability to fully exercise its deposit-taking powers, non-real estate lending powers, real estate lending powers, and any other activities authorized under federal law.\textsuperscript{83}

The rationale for this broad preemption of state law was that “[w]hen national banks are unable to operate under uniform, consistent, and predictable standards their business suffers, which negatively affects their safety and soundness.”\textsuperscript{84}

In its 2004 regulations, the OCC also presented an inaccurate view on the issue of the presumptive applicability of state law to the activities of national banks. The OCC concluded:

\textit{[N]o Federal statute endorses the presumptive application of state laws to national banks. Although the national bank branching statute makes applicable the laws of the host state regarding community reinvestment, consumer protection, and fair lending to branches of an out-of-state national bank located in the host state to the same extent as those laws apply to a bank chartered by that state, the statute expressly excepts any case where Federal law preempts the application of state law to national banks.}\textsuperscript{85}

This broad statement is not true with respect to state consumer protection, fair lending, and community reinvestment laws. The federal statutes discussed above and the legislative history of the 1994 Reagle-Neal Interstate Banking Act and 1997 Amendments to the Act evidence a

\begin{itemize}
\item \textsuperscript{82} \textit{Supra}, notes 72 and 73 and accompanying text.
\item \textsuperscript{83} 12 C.F.R. §§ 7.4007(b), 7.4008(d), 34.4(a), and 7.4009(b) (emphasis added). The OCC stated its regulations do not occupy the field, Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1911 (Jan. 13, 2004) (to be codified at 12 C.F.R. pt. 7 and 34), although commentators have concluded otherwise. \textit{Id.} at 1906 and Wilmarth, \textit{supra} note 37, at 252.
\item \textsuperscript{84} Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. at 1908.
\item \textsuperscript{85} Scope of National Bank Preemption, 68 Fed. Reg. 46,119, 46,122 (Aug. 5, 2003) (proposed amendments to Parts 7 and 34 of the OCC regulations) (emphasis added).
\end{itemize}
Congressional intent that such specific state laws generally apply to the operations of national banks.

In recent years commentators have debated the usefulness of legislative materials as a vehicle for statutory interpretation. However, the actions of the OCC selectively ignore the statutory language itself and its implications. Moreover, the courts remain committed to use of materials contained in a statute’s legislative history, particularly Committee Reports and statements of a bill’s sponsor—76—the very materials ignored by the OCC. The United States Supreme Court, in particular, remains committed to use of such materials—77.

In addition to ignoring the evolution of Supreme Court doctrine and ignoring legislative history, the OCC’s advocacy stance had also led it to minimize the need to protect consumer interests. This is explored below.

C. Serving the “Public Interest”—A Comparison of Agency Viewpoints

To what extent has the OCC demonstrated a commitment to serving the needs of the general public in its preemption determinations? The OCC’s 2004 preemption regulations, and the justifications and analysis offered by the OCC in its proposal and final regulation, offer an interesting comparison to the actions and approach taken in 2005 by the Federal Deposit Insurance Corporation (FDIC) in response to a request that it similarly preempt state law for state banking institutions operating across state lines.

The OCC’s proposed rule in 2003 emphasized that the National Bank Act sought to assure that the OCC would have authority to “protect national banks from potentially hostile state interference.”—78

When the OCC issued its final rule in 2004 preempts a broad array of state laws applicable to national bank activities, it explained the interests the rule sought to protect. There was almost no mention at all of the interests of consumers or other members of the general public. Instead the OCC emphasized it was charged with the responsibility of “ensuring that national banks operate on a safe and sound basis... [T]his responsibility includes enabling the national banking system to operate... without undue


87. Charles Tiefer, The Reconceptualization of Legislative History in the Supreme Court, 2000 Wis. L. Rev. 205, 207 and 209 (2000) (Justices Breyer and Stevens have assembled a majority of the Court for selective use of legislative history when committee reports explain details of the legislation); Noah, supra note 86, at 275 (committee reports and statements made by a bill’s sponsors during floor debates deserve the greatest weight, based on review of Supreme Court decisions).

88. Scope of National Bank Preemption, supra note 85, at 46,120.
It went on to point out that market changes "highlight the significance of being able to conduct a banking business pursuant to consistent, national standards and . . . accentuate the costs and interference that diverse and potentially conflicting state and local laws have on the ability of national banks to operate under the powers of their Federal Charter." The OCC concluded that when banks are not able to operate under uniform standards, "their business suffers, which negatively affects their safety and soundness."

There was no mention of the equally important interest of federalism and the preservation of state law to the greatest degree possible. There was also almost no mention of the interests of consumers and the additional protections afforded by state consumer protection, fair lending, community reinvestment, and other laws aimed at protecting the interests of the general public. The only mention of consumers' interests was the following:

Even the efforts of a single state to regulate the operations of a national bank operating only within that state can have a detrimental effect on that bank's operations and consumers. As we explained in our recent preemption determination and order responding to National City Bank's inquiry concerning the Georgia Fair Lending Act (GFLA), the GFLA caused secondary market participants to cease purchasing certain Georgia mortgages and many mortgage lenders to stop making mortgage loans in Georgia. National banks have also been forced to withdraw from some products and markets in other states as a result of the impact of state and local restrictions on their activities.

This statement was issued on January 13, 2004. Yet, ten months earlier the Georgia legislature had amended its predatory lending law and lenders had reentered the market in response to the amendment. In addition, by this date twenty-five states had adopted predatory lending laws and the beneficial effects of such laws to consumers had already been

89. Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg., at 1907.
90. Id. at 1908.
91. Id.
92. Id. (footnote omitted).
93. Erick Bergquist, Georgia Legislature Amends Anti-Predator Law, AM. BANKER, Mar. 7, 2003, at 20; Erick Bergquist, Will Georgia 'Fix' Hurt or Help Federal Law's Case? As State Rolls Back Law's Toughest Provisions, AM. BANKER, Mar. 10, 2003, at 1 (lenders now plan to reenter the market). Representative Carson, of the House Financial Services Committee, had a different view of the Georgia statute and its lessons for federal preemption determinations. She stated the amendment of the Georgia statute "calls into question the need for making federal preemption part of any predatory-lending legislation considered by Congress. It is clear the states are still discerning the best formulation of consumer protections that maintain housing investment in low-income communities." Id.
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documented. Yet the OCC fails to mention this evidence. It only states that it is committed to avoiding abusive lending practices in the national banking system.

Finally, mention of the Georgia statute is curious because the example does not support the broad preemption rule the OCC chose to adopt. The original Georgia law caused ratings agencies for mortgage-backed securities to refuse to rate mortgages made in Georgia, and the secondary market had refused to purchase such loans. This led lenders to withdraw from the Georgia market, and was thus an example of a state law that would "significantly interfere" with or "unduly burden" the exercise of real estate lending power. In other words, this is a situation that would justify preemption under a narrow preemption standard.

The OCC’s regulatory actions in 2003-2004 are not the only example of the agency’s embrace of the interests of the industry over the interests of consumers and state governments. In more than a dozen lawsuits in recent years, the OCC has consistently sided with banking institutions seeking to strike down state or local laws protecting consumer interests.

The position taken by the OCC offers an interesting contrast to that taken by the FDIC. In 2005, the FDIC was petitioned to preempt state laws for state chartered banks operating across state lines. In contrast to the OCC’s policy and actions in 2003-2004, the FDIC has demonstrated a recognition of, and commitment to protect, the interests of consumers and the interests of state governments. In fact, the FDIC called a public hearing


96. Diana B. Henriques & Jonathan Fuerburger, Bankers Opposing New State Curbs on Unfair Loans, AM. BANKER, Feb. 14, 2003, at, 1 (Standard & Poor’s, Moody’s and Fitch Rating rocked Wall Street by announcing last month they would no longer give credit ratings to securitization trusts that buy any home loans from Georgia).

97. Jenny Wiggins, Georgia Rattles US Home Equity Market, FIN. TIMES, Feb. 13, 2003, at 29 (Freddie Mac and Fannie Mac have said they will not buy high-cost mortgages in the State of Georgia; more than 40 lenders have stopped originating mortgages in Georgia).


on the matter. In that public hearing it raised twelve specific issues on which it sought guidance. Consumer and federalism interests were at the top of the list of issues raised. Namely, the FDIC asked:

G-1. Is a preemptive rule in these areas necessary to preserve the dual banking system?
G-2. What would be the impact on consumers if a preemptive rule were issued in these areas?
G-3. What are the implications of rule making in these areas for state banking regulation?
G-4. Would the measures urged by Petitioner achieve competitive balance between federally-chartered and state-chartered financial institutions as advocated by the Petitioner?¹⁰⁰

Not only does the FDIC voice a concern for the interests of consumers and individual states in exercising oversight over activities conducted in their state, the FDIC also was not overly aggressive in asserting its power to preempt state law. This is revealing in that the 1997 Amendments to the Riegle-Neal Act clearly grant such power to the FDIC. They provide:

The laws of a host State, including laws regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches, shall apply to any branch in the host State of an out-of-State State bank to the same extent as such State laws apply to a branch in the host State of an out-of-State national bank.¹⁰¹

After the OCC issued its final rule preempting state laws for nationally chartered banks in 2004, this statutory provision would explicitly grant the FDIC the power to preempt state law as well, and to the same extent that the OCC can preempt state law. The FDIC, however, has been cautious about exercising that power. Instead it asked:

G-5. Are there alternative mechanisms available that would achieve the policy goals advocated by the Petitioner?
G-6. Should the issue of competitive parity in interstate operations be left to Congress?
G-7. If the FDIC determines that it has the legal authority to proceed with a preemptive rule, are there reasons why the FDIC should decline to do so? If so, what are they?¹⁰²

In October 2005 the FDIC issued a proposed rule on the preemption petition before it. The proposed rule preempts the state law of a host state for a branch of an out-of-state bank "to the same extent" that such law does not apply to a branch of a national bank. This is not surprising since the federal statute specifically calls for preemption.

It also gave a somewhat broad reach to the preemption determination by interpreting the statutory phrase that describes the state laws preempted as those that "apply to a branch". It defined this phrase to mean the "activity of, by, through, in, from, or substantially involving, a branch" in a host state. However, unlike the OCC, in reaching this conclusion the FDIC resorted to, extensively documented, and relied upon congressional intent. Specifically, the FDIC considered the purpose behind the federal statute as found in its legislative history, and it reviewed committee reports and statements of the statute’s sponsors. Unlike the OCC, the FDIC did not ignore evidence of congressional intent because it was contained in the statute’s legislative history.

A second useful comparison in agency viewpoint is provided by the OCC and FDIC’s determinations in 2001 and 2002 regarding federal preemption of the same statute—the Michigan Motor Vehicle Sales Finance Act. The Michigan statute required licensing of loan lending agents in the state and possibly the originating bank itself, subjected the loans to Michigan interest rate limits and remedies for noncompliance, and imposed requirements concerning the form and content of the installment sales contracts and the disclosures required to be made to the buyer. The

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105. "The laws of a host State, including laws regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches, shall apply to any branch in the host State of an out-of-State State bank to the same extent as such State laws apply to a branch in the host State of an out-of-State national bank. To the extent host State law is inapplicable to a branch of an out-of-State State bank in such host State pursuant to the preceding sentence, home State law shall apply to such branch." 12 U.S.C. § 1831a(j)(l) (2000).

106. FDIC, Interstate Banking; Federal Interest Rate Authority, 70 Fed. Reg. at 60023 (specifying statutory language regarding how the law applies to both out-of-state state banks and national bank branches).

107. FDIC, Interstate Banking; Federal Interest Rate Authority, 70 Fed. Reg. at 60024 (discussing congressional intent). In this case the FDIC found neither committee reports nor conference reports on point, but relied upon the statements of the statute’s sponsors.

OCC concluded that the entire statute was preempted. Initially, the OCC stated that the test it could employ for its preemption analysis was not only the "significantly interference" test but also the "restrict or condition" a grant of power test.\(^{109}\) By contrast, the FDIC cited the *Barnett* case but employed solely a "disproportionate impact" test.\(^{110}\) Thus, the FDIC was more conservative in its view of the governing standard for a preemption determination.

When deciding the petition before it, the OCC ultimately did rely on the "significant interference" test and it then chose to preempt the Michigan statute in its entirety. By contrast, the FDIC attempted to preserve state law to the extent that it was able. It ruled:

> Based upon the facts presented and the foregoing legal analysis, I believe that the Act as interpreted and applied by the Bureau is not preempted by section 27, except to the extent out-of-state federally insured state banks making loans to Michigan residents through Michigan agents would be required to comply, either directly or through their Michigan agents, with the Michigan interest limitations and remedies contained in the Act.\(^{111}\)

This case study comparing the actions of the OCC and FDIC on the issue of federal preemption of state law documents two very different approaches and viewpoints. The OCC has ignored the evolution of Supreme Court doctrine. It has also selectively excerpted the language of Supreme Court decisions and given the language a broad interpretation—ignoring a narrower interpretation intended by the Court as evidenced by the specific fact pattern that led the Court to employ a particular word or phrase. Finally, the OCC has ignored repeated statements of congressional intent in available legislative history that contradicts the broad preemption standard it chooses to embrace. The effect of this viewpoint, its actions in interpretive letters and rulings preempting specific state statutes, and its decision to intervene in pending litigation against banking institutions to consistently advocate for preemption, has been to promote the interests of...

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110. Does Section 27 of the Federal Deposit Insurance Act Preempt the Michigan Motor Vehicle Sales Act, FDIC 02-06, 2002 WL 32361502 (December 19, 2002) (responding to a request from a state chartered out-of-state bank making loans in Michigan through motor vehicle dealers in the state. It was based on interpretation of a federal statute granting state chartered institutions the power to export interest rates. The banking entity was not a federal instrumentality. However, if the FDIC had embraced the broad view of Supreme Court jurisprudence the OCC embraced, it could have prohibited any condition or restriction on any federal grant of power.).

111. *Id.* at 4984.72 (emphasis added).
national banks while downplaying or ignoring the interests of consumers and of state governments.

By contrast, the FDIC has taken a narrow view of its power to preempt state law. It has recognized that this narrow view has been embraced in evolving Supreme Court case law. It has also resorted to and relied upon congressional intent in reaching its decisions, and thoroughly examined available legislative history to document that intention. Finally, in its decision-making process and in its actions, the FDIC has been cognizant of the importance of the need to protect the interests of consumers and state governments.

Why has the OCC acted in such an aggressive manner while the FDIC has sought to preserve state law? The OCC regulates only national banks and therefore its constituency in the financial services industry is only the national banking industry. FDIC regulates both national and state chartered banks as long as they are federally insured. It gains or loses no constituency due to a preemption determination.

This constituency concern is evident in the OCC’s pronouncements. The Comptroller has highlighted the advantage for banking institutions of a national charter, in part based on freedom from state law. For example, Comptroller John Hawke stated: “The ability of 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, is a major advantage of the national charter.”

The OCC’s aggressive stance toward preemption has yielded benefits for its jurisdiction and power. As of 2003, state banks’ share of total assets in the banking system was approximately 45%. This dropped to 33% in 2004 by year-end, while national banks’ share of assets climbed from 55% to approximately 67%. The change was the result of large charter conversions after the OCC issued its preemption rules. If conversions to national charter continue, especially among large institutions operating across state lines, the state banking system’s share of assets could drop to 17%.

IV. A PROPOSAL FOR HEIGHTENED JUDICIAL REVIEW

Should courts defer to preemption determinations of federal agencies? To date, the debate has centered on expertise—that of federal agencies versus the expertise of the judiciary. This Article has considered another significant factor: agency bias. Agencies subject to conflicts of interest are likely to interpret and apply legal standards governing preemption in an aggressive, overly broad manner. As a result, the interests of state governments (federalism interests) and the interests of consumers (the public interest) receive little attention and protection.

The judiciary’s reluctance to review agency determinations is due to a recognition that decisions resolving conflict between federal and state law inevitably requires expertise in assessing the existence of an undue burden or significant interference with granted powers. This is based, in part, on an assessment of the ability of the industry to harmonize and efficiently comply with both federal and state requirements. Courts have been reluctant to make such assessments. One response to the evidence of OCC bias in our case study would be for the courts to insist that the OCC, in its regulations and decisions, apply only the “substantial interference” test. In this way the courts would be deciding only questions of law. The courts have, in fact, uniformly employed the “significant interference” test when reviewing specific OCC preemption determinations.115

However, that alone would not serve the purpose of ensuring greater protection for the interests of state governments and the interests of consumers. Under the Chevron standard of review, the OCC’s decision that a particular state law or requirement constitutes a “significant interference” with the exercise of a national bank’s powers, as opposed to a “condition” on the exercise of such powers, must be “reasonable.” There is almost always a difference of opinion regarding the negative impact of a state law. For example, in the recent debate regarding the cost of compliance with varying state predatory lending laws, industry spokesmen have all concluded compliance is very burdensome.116 Yet, public interest

115. See supra note 46.

116. See Congressional Review of OCC Preemption: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Financial Services, 108th Cong. 215 (2004) (statement of Edward L. Yingling on behalf of the American Bankers Association) (stating that absent preemption, the proliferation of state and local laws would inevitably lead at best to higher operating costs and higher prices for financial services; and at worst to reduction in available credit and fewer product options); id. at 66 (statement of Joe Belew, President, Consumer Bankers Association) (stating that banks today operate across many state lines, provide quality products and services, and through competition drive out the bad actors, but their ability to do so is severely hampered by the laws adopted in each jurisdiction. Forcing national banks to comply with these myriad of state laws would make
groups have documented that costs are likely to be minimal. If we leave it to the agency to choose which evidence to rely upon, the OCC will rely on the former and discount the latter. It will then conclude that the interference with the national banks’ exercise of their federal powers is “significant.” A court would typically refuse to overturn the determination because it is a “reasonable” one—i.e. based on some evidence.

A sample of cases that supports this conclusion is found in the Circuit Court decisions since the Barnett case confirmed that state law would only be preempted when it “significantly interfered” with a national bank’s exercise of its powers. Every court that has applied this test against the Chevron standard of deferential review has sustained the bank agency’s decision to preempt state law, concluding that the agencies’ decision was a “reasonable” one. The only court that has not sustained the bank agencies’ decision is the court that did not apply Chevron but subjected the case to de novo review. This result is consistent with earlier, more extensive studies of the frequency with which courts sustain agency determinations under a deferential standard of review, including Chevron’s
standard of deference. In our sample, the outcome was dramatically altered in favor of upholding the agency determination. Thus a heightened standard of review is necessary.

What is the alternative to a Chevron deferential standard of review? Two issues are raised by this question: (1) what should trigger a decision not to apply a Chevron differential standard of review, and (2) what standard of review should be employed instead?

One alternative is to require judicial review of all agency preemption decisions. The case study in this article suggests this alternative is not necessary. Not every agency acts in an overly aggressive manner in preempting state law so as to always require judicial oversight. The contrast between the viewpoint of the FDIC and the viewpoint of the OCC serves as an example. On the other hand, heightened review is necessary when agency rules or decisions are tainted by agency bias.

Agency bias due to conflict of interests, and the failure of an agency to act as an impartial tribunal, is an example of the need for judicial intervention. A federal agency is charged with protecting not only the interests of the industry it regulates and the interests of the public affected by its regulations and decisions. It is also charged with protecting the interests of state governments. This obligation exists because the United States Supreme Court has repeatedly directed federal agencies to preserve state law to the greatest extent possible unless Congress has explicitly preempted state law. Indeed this causes the interests of state governments to be of paramount concern in any preemption determination by a federal agency. As a result, any agency decision that preempts state law requires scrutiny. However, as this article has demonstrated, some agencies, such as the FDIC, have embraced their obligation to protect state

121. E.g., Peter H. Schuck & E. Donald Elliott, To the Chevron Station: An Empirical Study of Federal Administrative Law, 1990 DUKE L.J. 984, 1029-32, 1058 (proposing that Chevron significantly altered the proportion of agency cases affirmed by appellate courts); Orin S. Kerr. Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals, 15 YALE J. ON REG. 1, 31 (1998) (analyzing three models which interpret how judges apply the Chevron doctrine).

122. See Arthur E. Wilmarth, Jr., OCC v. Spitzer: An Erroneous Application of Chevron that Should be Reversed, 86 BNA'S BANKING REP. No.8 (Feb. 20, 2006) (stating that 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 Congressional intent); Nina A. Mendelson, Chevron and Preemption, 102 MICH. L. REV. 737, 798 (2004) (discussing judicial review of agency decisions on state law preemption questions).

123. This is true for many state laws in the case of the OCC, due to the Court’s embrace of the “significant interference” standard in Barnett. It is especially relevant for state consumer protection and fair lending statutes due to Congressional intent as documented in this Article.
interests. As a result, greater judicial oversight can be limited to cases in which the agency has failed to embrace that obligation. This would be evidenced by its reading of preemption power in an overly expansive manner—a manner at odds with a narrow reading of existing case law or at odds with the weight of the evidence of legislative intent.

An analogy that can be drawn is that of the judiciary’s intervention in business management decision under the business judgment rule. A rule of deference is similarly recognized in that situation, based on the expertise of the decision maker and the court’s unwillingness to second guess such expert determinations. However, despite the expertise of the decision maker the courts do intervene, subjecting decisions to de novo review, when there is evidence that the decision maker is not acting in the interest of the group(s) it has a responsibility to serve, including situations in which its decisions are impaired due to conflicts of interest.

The second issue is the standard of review to be employed. The goal is to ensure greater protection of the interests of state governments and consumers. Commentators have suggested employing the standard of review found in *Skidmore v. Swift*, which would lead the court to reject the agency determination if it is "unpersuasive". Commentators have also suggested a standard of review that is based on the Supreme Court’s recent

124. See PRINCIPLES OF CORP. GOVERNANCE § 4.01(c) (1994) [hereinafter PRINCIPLES] (setting the standards for meeting the directors’ duty of care under the business judgment rule). The analogy to the business judgment rule is not intended to embrace the exact terms of the rule for purposes of judicial intervention in agency decisions, but only to highlight judicial willingness to intervene in other contexts in which reluctance to intervene is based on lack of expertise. See, e.g., Auerbach v. Bennett, 47 N.Y.2d 619, 630-31 (1979) (holding that responsibility for business judgments must rest with corporate directors since their individual capabilities and experience peculiarly qualify them for the discharge of this responsibility).

125. See PRINCIPLES, supra note 124. The business judgment rule places the burden of proving facts in order to justify judicial intervention on the person challenging the decisions of management. Id. at § 4.01(d). See also Stephen M. Bainbridge, The Business Judgment Rule as Abstention Doctrine, 57 VAND. L. REV. 83, 123 & n.232 (2004) (concluding that rational shareholders would prefer judicial intervention with respect to board decisions that are tainted; trust of directors is the key due to the self-governing nature of corporate law); HARRY G. HENN AND JOHN R. ALEXANDER, LAWS OF CORPORATIONS AND OTHER BUSINESS ENTITIES 662 (3d ed., West Pub. Co. 1983) (advocating that business judgment presupposes an honest, unbiased judgment); ROBERT CHARLES CLARK, CORPORATE LAW 124 (Aspen Law & Bus. 1986) (stating that no challenge to the directors’ judgments will be considered on the merits unless the judgment in question was tainted by fraud, conflict of interest, or illegality).

126. 323 U.S. 134 (1944) (holding that a government agency’s interpretation of law will be respected only to the extent that it is able to persuade). See discussion in Mendelson, supra note 122, at 797. A comparison of the *Chevron* standard and the *Skidmore* standard is presented in Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L. J. 833, 853-57 (2001).
decision in *Gonzales v. Oregon*. This approach requires a “clear showing” that the agency’s interpretation is consistent with the available evidence of Congress’ intent. Both are possible alternatives that embrace a heightened standard of review and would better protect the interests of state governments and consumers. What is troubling is that both employ vague standards, i.e. “persuasive” or “clear showing”, and therefore permit judges to embrace agency conclusions with relatively little independent evaluation. In other words, the heightened judicial review might become more apparent than real. The interest of state governments and consumers are so important that, in my view, a standard of review that is most likely to result in greater recognition of such interests should be embraced. That standard is de novo review.

V. CONCLUSION

This Article explores agency power to preempt state consumer protection legislation. It presents a case study of preemption based on an aggressive posture toward non-acquiescence on the part of the Comptroller of the Currency. The non-acquiescence documented is not only to the uniform decisions of the circuit courts, but also to the United States Supreme Court’s statements of the law governing conflict preemption in the field of banking law. The case study also documents agency non-acquiescence to the stated intent of Congress, whenever available in a statute’s legislative history. This aggressive posture toward non-acquiescence is a troubling assertion of executive power because of the lack of effective judicial review. The Article documents that under the *Chevron* deferential standard of review, executive power to broadly set aside state law will not be effectively restrained. The conclusion is that heightened judicial review is justified at least when an agency exhibits that it has not acted as an unbiased forum for the claims of affected industry members, consumers and state governments.

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127. 546 U.S. 243 (2006) (striking down an interpretive rule clarifying the Controlled Substances Act because this power was not within Gonzales’ rulemaking power); see also discussion in Wilmarth, *supra* note 122.

128. See *supra* notes 32 and 119.