

August 26, 2019

A *Skidmore*-Style Deference for Banking Preemption

*John L. Rockenbach**

Recommended Citation:

John L. Rockenbach, *A Skidmore-Style Deference for Banking Preemption*, NEB. L. REV. BULL. (August 9, 2019), <https://lawreview.unl.edu/skidmore-style-deference-banking-preemption>

* John L. Rockenbach, J.D., is a Class of 2019 graduate of the Nebraska College of Law.

TABLE OF CONTENTS

I. Introduction	3
II. Background	3
A. Introduction to Part II	3
B. The Scope of This Paper	3
C. Standards of Deference	4
1. <i>Chevron</i> Deference	4
2. A Clear Statement Rule	5
3. <i>Skidmore</i> Deference	5
D. Lurking Themes	7
1. The Dual-Banking System	7
2. Who decides?	7
3. Nondelegation Canons	8
E. <i>Watters v. Wachovia Bank, N.A.</i> (550 U.S. 1 (2007))	8
1. The Federal Regulation in <i>Watters</i>	8
2. The State Regulation in <i>Watters</i>	9
3. Wachovia’s Case	10
4. The Supreme Court Majority Opinion	12
5. Justice Stevens’s Dissent	12
F. Conclusion to Part II	13
III. Argument	14
A. Introduction to Part III	14
B. <i>Chevron</i> and Clear Statement Rules for Banking Preemption Discord with Supreme Court Preemption Precedent	14
1. <i>Chevron</i> Discords with the Presumption Against Preemption.	14
2. A Clear Statement Rule Discords with Implied Preemption	16
C. A <i>Skidmore</i> -style Deference Tailored to Banking Preemption Accords with Precedent.	17
1. <i>Skidmore</i> Deference can be Tailored to Banking Preemption.	17
2. <i>Skidmore</i> Deference Accords with Precedent.	19
D. A <i>Skidmore</i> -style Deference Achieves Better Outcomes than <i>Chevron</i> Deference or a Clear Statement Rule	19
E. Conclusion to Part III	21
IV. Conclusion	21

I. Introduction

In this paper I argue that courts should give agencies a *Skidmore*-style deference¹ instead of giving agencies *Chevron* deference² or applying a clear statement rule when the agencies interpret a federal banking law as preempting state law. In Part II I provide some background for my argument by explaining three standards of deference that a court might apply to an agency determination that state law is preempted and by tracing the most recent Supreme Court case to implicate deference to agencies on preemption. In Part III I present my argument. I first assert that the two alternatives to *Skidmore* deference discord with Supreme Court precedent on preemption. I next show how *Skidmore* deference would accord with Supreme Court precedent on preemption. Finally, I demonstrate how *Skidmore* deference on preemption would produce the best outcomes.

II. Background

A. Introduction to Part II

In this Part I provide some background for my argument that courts should give agencies a *Skidmore*-style deference when they interpret a federal banking law as preempting state law. I begin by briefly defining the scope of this paper. I then move to explaining three levels of deference that a court might apply when an agency determines that federal banking law preempts a state law: 1) *Chevron* deference; 2) a Clear Statement Rule; and 3) *Skidmore* deference. I then introduce three themes to keep in mind while reading the paper: the dual-banking system, the “Who-decides?” question, and the nondelegation canons. Finally, I trace *Watters v. Wachovia Bank*, the most recent Supreme Court case to implicate the standard for deference in agency preemption determinations.

B. The Scope of This Paper

This paper addresses what level of deference courts should give to agencies when they determine that a federal banking statute preempts state law. That is, where it is unclear whether a statute preempts state law, how much discretion should courts leave to agencies to answer that question and how much should courts exercise their own independent judgment?

There is a closely related, and in fact overlapping question

¹ *Skidmore* is explained in Part II.C.3, *infra*.

² *Chevron* is explained in Part II.C.1, *infra*.

of regulatory preemption.³ That is, when should an agency's regulation preempt state law?⁴ This paper will not directly discuss the question of regulatory preemption, but many of the principles would carry over.

C. Standards of Deference

1. *Chevron* Deference

One approach to agency deference is *Chevron* deference. *Chevron* deference hails from *Chevron USA v. Natural Resources Defense Council, Inc.*⁵ *Chevron* “dominates modern administrative law.”⁶

Under *Chevron*, courts take a two-step approach. At the first step, courts ask: Is the statute ambiguous? That is, has Congress spoken directly to the question at issue in the case?⁷ If the statute is not ambiguous because Congress has spoken directly to the question at issue in the case, the inquiry ends; Congress has answered the question and there is no room for the agency to decide.⁸ If the statute is ambiguous, courts proceed to the second step. At the second step, courts ask: Is the agency's interpretation reasonable? That is, does the statutory ambiguity permit the agency's interpretation of the statute?⁹

Chevron is a highly deferential standard because where there is ambiguity it requires courts to instantiate the agency's interpretation. This has particular force in the context of banking preemption, where many of the statutes have been on the books for a long time, but states continue to pass possibly-preempted statutes today. It will often be impossible for Congress to have intended to preempt a specific state law, as that state law would not have been in existence before the federal law.

³ The questions of whether a statute preempts state law and whether a statute grants an agency the jurisdiction to preempt state law overlap because the Supreme Court has, thus far, refused for deference purposes to distinguish an agency's interpretation of its jurisdiction to regulate. *See City of Arlington v. FCC*, 569 U.S. 290 (2013).

⁴ Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 738 (2004).

⁵ 467 U.S. 837 (1984).

⁶ Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 329 (2000).

⁷ *Chevron*, 467 U.S. at 842–43.

⁸ *Id.*

⁹ *Id.*

2. A Clear Statement Rule

At the opposite end of the deference spectrum lie clear statement rules. Clear statement rules require Congress to be explicit in order to accomplish an end.¹⁰ This leaves no ambiguity—or rather, where there is ambiguity, the ambiguity is imagined to be conclusive proof that Congress did not intend to accomplish the end—and therefore no room for an agency to be involved in the decision. Where a clear statement rule applies, there is no deference to agencies.

3. *Skidmore* Deference

Somewhere in the middle lies *Skidmore* deference. *Skidmore* deference comes from *Skidmore v. Swift*.¹¹ Justice Jackson memorably wrote:

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.¹²

Thus, *Skidmore* keys deference off certain factors and processes of specific agency decisions—not off the agency’s inherent position as delegatee of Congress’s legislative power. As a result of this multifactor, action-specific analysis, *Skidmore* does not apply itself. It has been called a “juridical chameleon”¹³ because its many, abstract standards allow judges inclined to reach their own policy ends the tools to do so.

It also is not clear that *Skidmore* requires any formal deference, as Justice Scalia put it: “Justice Jackson’s eloquence notwithstanding, the rule of *Skidmore* deference is an empty truism and a trifling statement of the obvious: A judge should take into

¹⁰ See Sunstein, *supra* note 6, at 316.

¹¹ 323 U.S. 134 (1944).

¹² *Skidmore*, 323 U.S. at 140.

¹³ Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 890 (2008).

account the well-considered views of expert observers.”¹⁴ “In other words, under *Skidmore*, courts should defer to agencies only if and when they want to defer.”¹⁵

Although *Chevron* dominates administrative law, *Skidmore* hangs around. Where agencies interpret the law outside of congressional delegation of binding, rulemaking power, *Skidmore* applies.¹⁶ *Skidmore* has also been called upon in the consumer finance context. The Dodd-Frank Act requires *Skidmore* deference for Office of the Comptroller of Currency (OCC) determinations on preemption of state consumer finance laws.¹⁷ It would be a mistake, however, to see Dodd-Frank as being too friendly towards *Skidmore* deference. *Skidmore* deference, not *Chevron* deference, normally applies when multiple agencies administer a single statute.¹⁸ Because the Consumer Financial Protection Bureau (CFPB) administers many statutes with other agencies, the default rule would have been for courts to apply *Skidmore* deference.¹⁹ The Dodd-Frank Act, however, includes a provision that circumvents this default rule and requires courts to act as though the CFPB alone administers the statute when deciding how much deference to give to the agency.²⁰ So although Dodd-Frank specifically approved *Skidmore* deference for OCC determinations on state consumer finance laws, it specifically avoided applying *Skidmore* deference to all CFPB decisions, including preemption decisions.

¹⁴ *United States v. Mead Corp.*, 533 U.S. 218, 250 (2001) (Scalia, J., dissenting).

¹⁵ Eric Pearson, *A Brief Essay on the Constitutionality of the Consumer Financial Protection Bureau*, 47 CREIGHTON L. REV. 99, 117 (2013).

¹⁶ *See Mead*, 533 U.S. at 221 (2001).

¹⁷ 12 U.S.C. § 25b(b)(5)(A) (“A court reviewing any determinations made by the Comptroller regarding preemption of a State law by title 62 of the Revised Statutes or section 371 of this title shall assess the validity of such determinations, depending upon the thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency, the consistency with other valid determinations made by the agency, and other factors which the court finds persuasive and relevant to its decision.”) *See* FEDERAL PREEMPTION ISSUES IN BANKING, PRACTICAL LAW PRACTICE NOTE 9-504-7936.

¹⁸ Pearson, *supra* note 15, at 116–17 (citing *Ass’n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993); *Rapaport v. United States Dep’t of the Treasury, Office of Thrift Supervision*, 59 F.3d 212, 217 (D.C. Cir. 1995)).

¹⁹ Pearson, *supra* note 15, at 117.

²⁰ 12 U.S.C. § 5512(b)(4)(B) (“[T]he deference that a court affords to the [CFPB] with respect to a determination by the [CFPB] regarding the meaning or interpretation of any provision of a Federal consumer financial law shall be applied as if the [CFPB] were the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law.”) (quoted in Pearson, *supra* note 15, at 117).

D. Lurking Themes

1. The Dual-Banking System

The United States has a dual-banking system. That is, banks can get either state charters or federal charters. Federally chartered banks are, however, still located in states. This creates a sensitive balance between state and federal interests. States have an interest in protecting their consumer citizens. They also have an interest in protecting their state banks and enabling them to compete with federally chartered banks. The federal government has an interest in effectuating the purposes of its banking legislation, for instance: in protecting the national economy from downfalls, in spurring economic growth, and in protecting consumers nationwide. It is easy to imagine why a state would be uncomfortable with an entity in its territory that could escape its regulations. But the Supremacy Clause allows federal legislation to displace state legislation. That is preemption. And preemption is one of the key mechanisms for balancing state and federal interests in the dual-banking system.

2. Who decides?

Lurking behind the different standards of deference is the recurring question: Who decides?²¹ The question of who decides takes on particular importance in the preemption context because preemption implicates those sensitive federal and state interests. This is even more sensitive in the banking context, given the dual-banking system and the importance of banking rules to the national economy.

If courts apply *Chevron* deference to an agency's preemption determination then it will, more often than not, be agencies who decide whether federal law preempts state law. This is because ambiguity abounds in preemption, where it may be unclear both what the standard for preemption is, and whether a particular state law violates that standard. If courts apply a clear statement rule to preemption then it will, more often than not, be Congress who decides whether federal law preempts state law. This is because a clear statement rule ties the hands of courts and agencies; either Congress decides by express language or it is considered to have decided by omitting the express language. If courts apply *Skidmore* deference then it will, more often than not, be courts who decide whether federal law preempts state law. This is because the *Skidmore* standards are so flexible and because *Skidmore* ultimately

²¹ See Thomas W. Merrill, *Preemption and Institutional Choice*, 102 Nw. U. L. Rev. 727, 727 (2008).

sees agency interpretations as persuasive, not binding authority.

3. Nondelegation Canons

Related to the question of who decides is the doctrine of nondelegation canons identified by Cass Sunstein. Sunstein argues that the nondelegation doctrine,²² long thought dead, now lives through nondelegation “canons,” value-based methods of statutory interpretation that require Congress to speak clearly to accomplish politically-sensitive ends.²³ One of the canons that Sunstein identifies is preemption,²⁴ though only lower courts have included preemption in the nondelegation canons.²⁵ These canons are closely related to the clear statement rules,²⁶ but one can also view them on a spectrum, with *Chevron* as the “quintessential” pro-delegation doctrine,²⁷ clear statement rules as nondelegation doctrines, and *Skidmore* deference as a mid-delegation doctrine.

E. *Watters v. Wachovia Bank, N.A.* (550 U.S. 1 (2007)).

1. The Federal Regulation in *Watters*

The National Bank Act (NBA) controls what national banks may do.²⁸ This control is exclusive; that is, the NBA preempts state laws that significantly impair “the exercise of a power that Congress explicitly granted,”²⁹ and excludes state executive officers from visiting or overseeing national banks.³⁰ The OCC administers the NBA.³¹

The NBA permits national banks to mortgage lend.³² States,

²² The nondelegation doctrine ostensibly limits Congress’s ability to delegate its lawmaking power to administrative agencies. Congress may only delegate its lawmaking power if it gives agencies an “intelligible principle” to make rules under. It is based in the Article I of the Constitution’s vesting clause, which vests legislative power in Congress (and not in agencies). *See* *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001).

²³ Sunstein, *supra* note 6, at 315–16.

²⁴ *Id.* at 331.

²⁵ *See, e.g.*, *Nat’l Ass’n of Regulatory Util. Comm’rs v FCC*, 880 F.2d 422 (D.C. Cir. 1989) (cited in Sunstein, *supra* note 6, at 331 n.79).

²⁶ *See* Sunstein, *supra* note 6, at 316 n.5.

²⁷ Sunstein, *supra* note 6, at 329.

²⁸ *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 6 (2007).

²⁹ *Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 32–34 (1996). As we will see, the *Watters* majority and dissent disagree on whether a power recognized by an OCC regulation under the incidental powers provision counts as a “power that Congress explicitly granted.”

³⁰ *See* 12 U.S.C. § 484; *Cuomo v. Clearing House Ass’n*, 557 U.S. 519, 524 (2009).

³¹ *Watters*, 550 U.S. at 6; *See* 12 U.S.C. §§ 24, 93a, 371(a).

³² *Watters*, 550 U.S. at 7.

therefore, may not significantly interfere with a national bank's mortgage lending.³³ Nor may states oversee a national bank's mortgage lending.³⁴

The NBA also permits national banks to “exercise . . . all such incidental powers as shall be necessary to carry on the business of banking.”³⁵ The incidental-power provision permits banks to act through operating subsidiaries.³⁶ Because national banks may mortgage lend, and because national banks may act through operating subsidiaries, national banks may mortgage lend through operating subsidiaries.³⁷

But that does not directly answer this question: May states oversee those operating subsidiaries as they mortgage lend? As we know, states may not oversee national banks. Operating subsidiaries, however, are not national banks.³⁸

The OCC answered the question with a “no.” That is, the OCC interpreted the NBA as preempting state laws that significantly impair an operating subsidiary's mortgage lending, and as excluding states from overseeing operating subsidiaries.³⁹

2. The State Regulation in *Watters*.

To begin to see why it matters whether states may oversee operating subsidiaries, consider the Michigan laws at play in *Watters*. Michigan law empowered its Office of Financial and Insurance Services (OFIS) to administer the state's lending laws.⁴⁰ The state's lending laws required mortgage lenders to register with the state, to submit annual financial statements to the commissioner of OFIS, and to retain documents.⁴¹ The state's lending laws also empowered the OFIS commissioner to deny or revoke registrations, to inspect registrants and enforce laws against them, and to act against covered lenders.⁴² Michigan exempted state and national banks from these lending laws.⁴³ It did not, however, exempt

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ An operating subsidiary is a “discrete entit[y] authorized to engage solely in activities the bank itself could undertake, and subject to the same terms and conditions as those applicable to the bank.” *Watters*, 550 U.S. at 7.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 21.

⁴⁰ *Id.* at 8.

⁴¹ *Id.* at 9–10.

⁴² *Id.*

⁴³ *Id.* at 9.

operating subsidiaries from these laws.

3. Wachovia's Case

To further see why it matters whether states may oversee operating subsidiaries, consider the history of Wachovia Mortgage. Wachovia Mortgage became an operating subsidiary of a national bank—Wachovia Bank—in 2003.⁴⁴ Before becoming an operating subsidiary, Wachovia Mortgage had to comply with Michigan's lending laws by registering with OFIS, annually paying a fee, filing a report, and permitting OFIS examiners to inspect its books and records.⁴⁵ After becoming an operating subsidiary in 2003, Wachovia Mortgage still had to comply with Michigan's lending laws—according to Michigan, anyways.⁴⁶

When it became an operating subsidiary in 2003, Wachovia Mortgage—believing that the NBA preempted Michigan's lending laws—surrendered its mortgage registration.⁴⁷ When Wachovia Mortgage surrendered its mortgage registration, the commissioner of OFIS, Linda Watters, wrote a letter to Wachovia Mortgage. The letter explained that Michigan would no longer permit Wachovia Mortgage to mortgage lend in the state.⁴⁸

Wachovia Mortgage and its parent, Wachovia Bank, sued Commissioner Watters in federal district court. In the District Court, the Wachovias alleged that the NBA preempted the Michigan lending laws as they applied to Wachovia Mortgage.⁴⁹ They also alleged that the NBA excluded state executive officers—like Commissioner Watters—from overseeing Wachovia Mortgage.

Commissioner Watters, unsurprisingly, disagreed. She argued that the NBA preempted lending laws only as they applied to national banks, and excluded states only from overseeing national banks.⁵⁰ Because Wachovia Mortgage was not a national bank, but an operating subsidiary, the NBA neither preempted Michigan's lending laws (as applied to Wachovia Mortgage) nor excluded Michigan from overseeing Wachovia Mortgage.⁵¹

The District Court granted summary judgment for the

⁴⁴ *Id.* at 8.

⁴⁵ *Id.*

⁴⁶ *Id.* at 9.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 10.

⁵¹ *Id.*

Wachovias.⁵² To do so, the District Court had to decide whether the NBA protects operating subsidiaries as much as it protects national banks. When deciding that question, the District Court deferred to the OCC's interpretation that yes, the NBA protects operating subsidiaries as much as it protects national banks.

The District Court applied *Chevron*, declaring: “The fact that the regulation reviewed carries preemptive force does not alter this analysis.”⁵³ The parties agreed on *Chevron* step one: Congress had not spoken directly to the issue of whether the NBA preempted state mortgage lending laws, as applied to operating subsidiaries.⁵⁴ The parties disagreed on *Chevron* step two: Did the OCC interpret the NBA reasonably when it promulgated a regulation declaring that the NBA preempted state mortgage lending laws, as applied to operating subsidiaries?⁵⁵

Commissioner Watters argued that the interpretation was unreasonable given the interaction of various provisions of the act. Essentially, the statute distinguishes between “national banks” and “affiliates.” “Affiliates” include “any non-bank corporation controlled or owned by a national bank,”⁵⁶ and so, Commissioner Watters argued, “affiliates” include operating subsidiaries. One section of the statute, § 481, authorizes the OCC to examine national banks and affiliates. The section vesting the exclusive authority to the OCC to visit national banks refers only to national banks, and not to affiliates. The conclusion, according to Commissioner Watters, is that it is unreasonable to read the exclusive visitation provision as applicable to affiliates and therefore to operating subsidiaries.⁵⁷

The District Court agreed with the Wachovias and disagreed with Commissioner Watters. “Affiliates,” the court reasoned, should not be construed to include operating subsidiaries because the statute referred to affiliates around a century before operating subsidiaries emerged as legitimate vehicles for the business of banking.⁵⁸ This short-circuited Commissioner Watters's complex textual argument, which hinged on “affiliates” including operating subsidiaries.

To recap, the District Court held that Michigan could not

⁵² 334 F. Supp. 2d 957, 966 (W.D. Mich. 2004).

⁵³ *Id.* at 963.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 963–64.

apply its mortgage-lending laws to Wachovia Mortgage, an operating subsidiary of a national bank. The District Court did not determine that the best reading of the NBA required that state laws be preempted as applied to operating subsidiaries. Instead, it deferred under *Chevron* to the OCC's reasonable interpretation of the NBA to justify preempting Michigan's laws.

The Sixth Circuit affirmed.⁵⁹ Like the District Court, the Sixth Circuit applied *Chevron*, found that Congress had not spoken directly to the issue, and upheld the OCC's regulation as reasonable.⁶⁰

4. The Supreme Court Majority Opinion

The Supreme Court granted the petition for a writ of certiorari. One of the two questions it granted certiorari on was whether courts should give *Chevron* deference to an agency when the agency decides that state law is preempted.⁶¹

The Court, however, ultimately dodged that question.⁶² It held that the best reading of the statute itself preempted Michigan's mortgage lending laws as applied to operating subsidiaries.⁶³

5. Justice Stevens's Dissent

Justice Stevens disagreed and dissented. He began by discussing the history of the dual-banking system.⁶⁴ He then explained why, contrary to the Court's holding, the NBA did not preempt state laws as applied to operating subsidiaries. He noted that the touchstone of preemption analysis is what Congress intended.⁶⁵ He said that courts presume that Congress did not intend to preempt state law when a law touches on areas of state police powers.⁶⁶ He conceded that *Barnett Bank* altered this analysis in the banking context, but, citing *Barnett Bank*, reminded the Court that *Barnett Bank*'s altered analysis did not apply where Congress had spoken on the preemption question.⁶⁷ Congress had spoken on the preemption question, according to Justice Stevens, through Section

⁵⁹ *Wachovia Bank v. Watters*, 431 F.3d 556, 558 (6th Cir. 2005) (aff'd sub nom. *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007)).

⁶⁰ 431 F.3d at 560–63.

⁶¹ *Watters v. Wachovia Bank, N.A.*, 2006 WL 1068854 (U.S.), i.

⁶² *Watters*, 550 U.S. at 20–21.

⁶³ *Id.* at 17–20.

⁶⁴ *Id.* at 23–28 (Stevens, J., dissenting).

⁶⁵ *Id.* at 31.

⁶⁶ *Id.* at 31.

⁶⁷ *Id.* at 33–34. See discussion *supra* note 29 and accompanying text regarding the standard from *Barnett Bank*.

484(a), which preempted state laws applying to national banks but remained silent as to affiliates.⁶⁸ He noted that although the OCC recognized operating subsidiaries forty years earlier, this was the first case challenging, as preempted, state laws as they applied to operating subsidiaries. To undermine the majority’s assertion that Congress intended to preempt state laws as applied to operating subsidiaries, he observed that Congress has never acknowledged the existence of operating subsidiaries nor explicitly approved them.⁶⁹ Operating subsidiaries were, he noted, authorized not by Congress, whose intent controls the preemption question, but by the OCC. In sum, Justice Stevens accused the majority of errantly “infus[ing] congressional silence with pre-emptive force . . .”⁷⁰

Because he disagreed with the majority and found that the NBA did not preempt state laws on its own, he was forced to confront the questions of agency authority to preempt state laws. He called these the “most pressing” issues in the case.⁷¹ He first noted that Congress can, and knows how to, explicitly authorize agencies to preempt state law.⁷² It had not here, which he argued should counsel against empowering the OCC to preempt state laws. He next argued that *Chevron* deference should not apply to an agency decision to preempt state laws. As a general matter, he said, agencies are not built in a way to represent state interests.⁷³ This contrasts with Congress, and especially the Senate, in which the states are clearly represented.⁷⁴ Specifically to this case, he argued first that the OCC regulation merely parroted the statutes for its interpretation that state laws were preempted.⁷⁵ He argued secondly that it was particularly disrespectful of state sovereignty to preclude the states from regulating operating subsidiaries because national banks benefited from state laws that prevented the banks from being liable for what the subsidiaries did, and so the subsidiaries themselves ought to comply with state law.⁷⁶

F. Conclusion to Part II

In this Part I provided some background for my argument that courts should give agencies only a *Skidmore*-style deference when an agency interprets a federal banking law as preempting state

⁶⁸ *Id.* at 32.

⁶⁹ *Id.* at 28–31.

⁷⁰ *Id.* at 35.

⁷¹ *Id.* at 38.

⁷² *Id.*

⁷³ *Id.* at 41.

⁷⁴ *Id.*

⁷⁵ *Id.* at 41–42.

⁷⁶ *Id.* at 42–43.

law. I began by briefly defining the scope of this paper. I then explained the three levels of deference that a court might apply to an agency's determination that federal banking law preempts a state law: 1) *Chevron* deference, where a court will defer to an agency's reasonable interpretation of an ambiguous statute; 2) a Clear Statement Rule, where a court will not defer to an agency but will require Congress to speak clearly; and, 3) *Skidmore* deference, where a court will apply a flexible factors test to decide whether to instantiate the agency's interpretation. I then introduced three themes to keep in mind throughout the course of the paper: the dual-banking system, the "Who-decides?" question, and the nondelegation canons. Finally, I traced *Watters v. Wachovia Bank*, the most recent Supreme Court case to implicate the standard for deference in agency preemption determinations. In that case, the majority dodged the deference question, but Justice Stevens wrote a protesting dissent steeped in the intricacies of banking law and argued that courts should not give *Chevron* deference to agencies when they interpret federal law as preempting state law.

III. Argument

A. Introduction to Part III

In this Part I argue that courts should give agencies only a *Skidmore*-style deference when an agency interprets a federal banking law as preempting state law. I first assert that giving agencies *Chevron* deference or applying a clear statement rule would discord with Supreme Court precedent on preemption. I explain that *Chevron* is inconsistent with the longstanding presumption against preemption and that a clear statement rule would conflict with implied preemption. I next outline what a *Skidmore*-style deference might look like in the context of banking preemption and show how *Skidmore* deference evades the precedential defects of *Chevron* deference and a clear statement rule. Finally, I demonstrate how a *Skidmore*-style deference tailored to banking preemption would be the approach most likely to produce good outcomes.

B. Chevron and Clear Statement Rules for Banking Preemption Discord with Supreme Court Preemption Precedent.

1. *Chevron* Discords with the Presumption Against Preemption.

Normally, when a court construes a statute it will presume that Congress did not intend to preempt state law. This presumption against preemption goes back at least as far as 1947.⁷⁷ In 1947, the

⁷⁷ Mendelson, *supra* note 4, at 738 n.3 (citing *Rice v. Santa Fe Elevator Corp.*,

Court decided *Rice v. Santa Fe Elevator Corp.*⁷⁸ In *Rice*, Justice Frankfurter wrote “Congress legislated here in a field which the States have traditionally occupied. So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”⁷⁹

The rule that courts will require a “clear and manifest purpose of Congress” to preempt state law discords with giving *Chevron* deference to an agency when that agency determines that federal law preempts state law. Judge Kravitch summarized that discord nicely:

Indeed, there is an inherent tension between *Chevron* deference, which only obtains where a statute is ‘silent or ambiguous,’ and preemption doctrine, which maintains that state law will not be preempted unless ‘that is the clear and manifest purpose of Congress.’ So, to say that a court should defer to an agency’s determination that state law is preempted is seemingly paradoxical: the agency would command deference under *Chevron* only if the federal statute were ambiguous; but if the federal statute were ambiguous, then Congress’s intent to preempt seemingly would not be ‘clear and manifest.’⁸⁰

The Supreme Court should, when next it has the chance, release this tension by negating *Chevron* deference in the context of banking preemption (the option this paper argues for), pulling back from the presumption against preemption in the banking context, or explaining how the two can be reconciled. The Court had an opportunity to do this in *Watters* but dodged the question.

And *Watters* was not the first case where the Court saw the problem but did not release the tension. In another banking case, *Smiley v. Citibank*, the Court assumed without deciding that the tension should be released in favor of the presumption against preemption and against *Chevron*.⁸¹ That is, it assumed that courts must review an agency’s determination that a federal law preempts a state law *de novo*.⁸² *Smiley*, however, highlights an interesting distinction and proves that *Chevron* deference would continue to

331 U.S. 218 (1947) as the inception of the presumption).

⁷⁸ *Santa Fe Elevator Corp.*, 331 U.S. at 222.

⁷⁹ *Id.* at 230 (citations omitted).

⁸⁰ *Teper v. Miller*, 82 F.3d 989, 998 (11th Cir. 1996) (citations omitted).

⁸¹ *See Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996).

⁸² *Smiley*, 517 U.S. at 743–44.

play a role in preemption questions even if courts did not defer to an agency's determination that the statute has preemptive force.

In *Smiley*, the Court deferred to and upheld the OCC's interpretation that 12 U.S.C. § 85 preempts state laws prohibiting banks from charging certain late fees.⁸³ 12 U.S.C. § 85 authorizes a national bank to export interest rates, that is, to charge out-of-state credit-card holders interest rates at the level allowed in the state where the national bank is located even if those rates are above the level allowed in the state where the cardholder lives.⁸⁴ Notice that this means that there are actually two levels to preemption under 12 U.S.C. § 85. 12 U.S.C. § 85 itself forms one level, but the laws of the bank's home state form another level. For the consumer's state's laws to be preempted, that state's laws must be inconsistent with both federal law and with the laws of another state. "Thus, the state law of one state could have a preemptive effect on the state law of another state"⁸⁵

The OCC interpreted 12 U.S.C. § 85 as preempting state late-fee laws because it interpreted "interest" to include late fees. Though the Court assumed that it ought not defer to an agency's determination that a statute preempts state law, it still deferred to the OCC's interpretation. Why? Because while the OCC's interpretation ultimately demanded that the state law be preempted, its interpretation was not about the preemptive force of the statute. The OCC did not interpret the statute as requiring the preemption. The very structure of 12 U.S.C. § 85 requires preemption, because it explicitly permits national banks to do something that is against state law. Instead, the OCC interpreted the content of the federal law; it interpreted "interest" to include late fees. A consequence of that content interpretation was that 12 U.S.C. § 85 would now preempt some formerly-valid state laws—those prohibiting late fees. The Court deferred to the agency's interpretation because Congress had decided that 12 U.S.C. § 85 would preempt state laws, and the OCC merely interpreted the meaning of the term "interest" within 12 U.S.C. § 85, which is at the heart of *Chevron* deference.⁸⁶

2. A Clear Statement Rule Discords with Implied Preemption

Though a court, when trying to determine whether federal

⁸³ *Id.* at 737, 747.

⁸⁴ *Id.* at 737.

⁸⁵ Ramyn Atri, *Cuomo v. Clearing House Association: The Latest Chapter in the OCC's Pursuit of Chevron Deference*, 14 N.C. BANKING INST. 467, 478 (2010).

⁸⁶ *See Smiley*, 517 U.S. at 743–44.

law preempts state law, looks at what Congress intended, *Rice*'s presumption against preemption is not descriptive; rather it is normative.⁸⁷ That is, the presumption is not about whether Congress actually intended to preempt state law. Instead, the presumption is one of those value-based tools of statutory interpretation. Whether that tool of statutory interpretation reflects reality is not the point. The point is that courts want to respect state sovereignty and put states on notice when their laws might become void. And the courts “presume” that Congress also wants to respect states and put them on notice; that is, they force Congress to do so by construing ambiguity against preemption.

Because the presumption against preemption is a value-based tool of statutory interpretation, and because Justice Frankfurter employed the impressive language of a “clear and manifest purpose,” one might think that a clear statement rule is most appropriate for preemption. A clear statement rule, however, would also discord with *Rice* and with the court’s preemption precedent more broadly. Immediately after declaring that courts will require a “clear and manifest purpose” before construing a federal law as preempting state law, Justice Frankfurter made it clear that his “clear and manifest purpose” test was not a clear statement rule. The “clear and manifest purpose test” is not a clear statement rule because under that test, courts may infer that Congress intended to preempt state law from clues like how pervasive the federal regulatory scheme is, how dominant the federal interest is, and the goal of the federal program.⁸⁸ These clues form the “implied preemption” doctrine that sits alongside “express preemption.” If a clear statement rule were appropriate for preemption, there would be no implied preemption, there would be only express preemption.

C. A *Skidmore*-style Deference Tailored to Banking Preemption Accords with Precedent.

1. *Skidmore* Deference can be Tailored to Banking Preemption.

As mentioned previously, *Skidmore* deference is very flexible, which has led many, including Justice Scalia, to criticize it. But those problems attend *Skidmore* deference only as it is generally formulated. Its broad factors supporting deference across all areas of the law may not accurately capture the justifications for agency deference in any one area of the law.

Skidmore deference is, therefore, best understood as a way to “begin[] a conversation” on deference to agency preemption

⁸⁷ Young, *supra* note 13, at 881.

⁸⁸ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

determinations.⁸⁹ To put it more precisely: *Skidmore* deference is about more than just Justice Jackson’s “truism”; it is about a framework that puts how much deference a court should give to an agency on a sliding scale based on how well that agency has met certain factors. There is nothing necessary to *Skidmore*-style deference about the specific factors in *Skidmore* (i.e. thoroughness, validity, consistency). The better approach is to establish different factors for different areas of the law. Ernest Young has presented these factors as possible *Skidmore* factors in the context of agency determinations on preemption: 1) “[T]he agency itself considered the *Rice* presumption in the first instance, as required by Executive Order 13,132”; 2) “[T]he agency’s analysis includes a ‘federalism impact statement,’ also required by the Federalism Order, that is nonperfunctory”; 3) “[T]he preemption determination turns on the existence of policy conflicts, which the agency may have special expertise in identifying, rather than on pure statutory construction”; 4) “[S]tate officials had prior notice that the agency was considering a preemption finding, and those officials participated in the agency’s preemption determination, by notice and comment or otherwise”; 5) “[T]he agency’s preemption finding includes a limiting principle preserving meaningful areas of state regulatory authority”; and/or, 6) “[T]he agency in question has a moderate history--that is, it sometimes finds against preemption rather than always expanding its own authority at the expense of the states.”⁹⁰

To these factors, it would be best to add some factors specific to the banking context. Perhaps: 7) The agency’s preemption finding considers the effect of preempting state law on the dual-banking system; 8) The agency’s preemption finding considers, under the *Barnett Bank* standard, whether Congress has explicitly authorized national banks to exercise the power the agency is trying to protect; 9) The agency’s preemption finding considers how the presence or absence of state banking regulations will affect national banks’ risk-taking activities; and, 10) The agency’s preemption finding considers the balance between state regulation and national bank freedom represented in the Dodd-Frank Act.

That is a lot of factors. But a court need not consider all the factors in any given case. And, more importantly, the factors serve a higher purpose than helping a court decide how much deference it should give to an agency. Because the factors are procedural, they serve as instructions for best practices for agency determinations on preemption.

⁸⁹ Young, *supra* note 13, at 890–91.

⁹⁰ *Id.* at 891–92.

2. *Skidmore* Deference Accords with Precedent.

As will quickly become apparent, *Skidmore* deference in the banking preemption context does not share the obvious precedential defects of *Chevron* deference or a clear statement rule.

Unlike *Chevron* deference, *Skidmore* deference does not conflict with *Rice*'s presumption against preemption. *Chevron* gets into trouble with the presumption against preemption because it allows a court to abdicate its duty to exercise its independent judgment in the face of statutory ambiguity—ambiguity which should be construed against preemption but which an agency might construe for preemption. *Skidmore* deference, on the other hand, still requires the judge to exercise her independent judgment; *Skidmore* factors are those which “give [the agency interpretation] power to persuade, if lacking power to control.”⁹¹ Thus, under *Skidmore* deference, the judge can weigh the presumption against preemption against an agency's justification for preempting a particular law. Furthermore, as Young's preemption-specific *Skidmore* factors show, *Skidmore* can incorporate the presumption against preemption into the level of deference the agency's interpretation receives.

Unlike a clear statement rule, *Skidmore* deference would still allow for implied preemption and would not collapse the preemption analysis into only express preemption. Although *Skidmore* deference is less deferential than *Chevron*, it is still quite deferential.⁹² That is, there is nothing in *Skidmore* that is intrinsically opposed to allowing agencies to interpret in the place of congressional silence, so long as the agency's interpretation conforms to the factors.

D. A *Skidmore*-style Deference Achieves Better Outcomes than *Chevron* Deference or a Clear Statement Rule.

As mentioned when discussing lurking themes,⁹³ the level of deference set is ultimately about who decides. Under *Chevron*, the agency decides. Under a clear statement rule, Congress decides. Under the traditional *Skidmore* deference, courts decide. The choice of which part of the government decides the question will have ramifications for the effectiveness of the government. The different parts of the government have their own strengths and weaknesses, so the system of deference that accounts for these strengths and weaknesses best will produce the best outcomes. A *Skidmore*-style deference tailored to banking preemption would produce the best

⁹¹ *Skidmore v. Swift Co.*, 323 U.S. 134, 140 (1944).

⁹² Young, *supra* note 13, at 890.

⁹³ See *supra* subsection II.D.2.

outcomes.

Skidmore's only rival in terms of practical outcomes is *Chevron*. A clear statement rule in preemption could prove disastrous. A clear statement rule would place preemption entirely in the hands of Congress. For Congress to competently and promptly handle all preemption questions would be "beyond impossible."⁹⁴ This is because whether a federal law preempts a state law is not ultimately something to be found in a federal law alone. Rather, it is found in the interaction between a federal law and a state law.⁹⁵ This creates a problem along two dimensions: space and time. Space: There are fifty states with fifty sets of statutory and non-statutory law; Congress cannot be expected to master the laws of every state.⁹⁶ Time: Long after Congress passes a statute, new preemption questions will arise. Congress is not a quick actor and updating all of its statutes (in all the different contexts of the law) would take up all of Congress's time.⁹⁷ Preemption requires more nimble fingers.

At first blush, the agency-centric *Chevron* regime would seem like a better choice. Agencies have many methods of action (formal and informal adjudication and rulemaking), which gives them the flexibility needed to manage the many types of preemption problems.⁹⁸ Agencies have expertise in their own statutes and in their own fields.⁹⁹ Their expertise in state tort law, where it interacts with federal statutory regimes may also exceed the courts'.¹⁰⁰ They are certainly more politically accountable, through the president, than federal judges with life tenures.¹⁰¹ Agencies can also be very responsive to state interests, which is key for preemption because they are connected with the president (who has a national constituency), because their employees often have state government backgrounds, and because states can participate in formal adjudication by briefs and informal rulemaking with comments.

Agencies bring a lot to the table when it comes to deciding whether state law should be preempted. *Chevron* deference, however, gives them too much power given their flaws. First, "no

⁹⁴ Merrill, *supra* note 21, at 754.

⁹⁵ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("Such a purpose may be evidenced in several ways. . . . [T]he state policy may produce a result inconsistent with the objective of the federal statute.") (citations omitted).

⁹⁶ *See* Merrill, *supra* note 21, at 754.

⁹⁷ *See id.*

⁹⁸ Merrill, *supra* note 21, at 755.

⁹⁹ *Id.*

¹⁰⁰ Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 497 (2008).

¹⁰¹ *See* Young, *supra* note 13, at 738.

single institution” can handle preemption on its own.¹⁰² Second, agencies are prone to “tunnel vision”—they focus too much on their own realms and not enough on the whole picture.¹⁰³ Finally, agencies are less equipped to deal with constitutional constraints and principles, including regarding their own power, the scope of which *Chevron* places in their own hands.¹⁰⁴

A properly attuned *Skidmore*-style deference, with factors specific to banking preemption better balances the courts and agencies. The factors funnel agency expertise and responsiveness into the courts, but the courts ultimately constrain agencies from seizing too much power for themselves.

E. Conclusion to Part III

In this Part, I argued that courts should give agencies a *Skidmore*-style deference instead of *Chevron* deference when an agency interprets a federal banking law as preempting state law. I first asserted that giving agencies *Chevron* deference or applying a clear statement rule would discord with Supreme Court precedent on preemption. I explained that *Chevron* is inconsistent with the longstanding presumption against preemption because it allows agencies to construe ambiguity in favor of preemption, when it should be construed against preemption. And a clear statement rule would conflict with an even more fundamental part of the Court’s preemption precedent: implied preemption. I next outlined what a *Skidmore*-style deference might look like in the context of banking preemption and showed how *Skidmore* deference easily evades the precedential defects of *Chevron* deference and a clear statement rule. Finally, I demonstrated how a *Skidmore*-style deference tailored to banking preemption would allocate the decision-making authority between Congress, agencies, and the courts in a way that is most likely to produce good outcomes.

IV. Conclusion

To review, in this paper I have argued that courts should give agencies a *Skidmore*-style deference, instead of giving agencies *Chevron* deference or applying a clear statement rule, when an agency interprets a federal banking law as preempting state law. In Part II, I provided some background for my argument, including by explaining three standards of deference—*Chevron* deference, a clear statement rule, and *Skidmore* deference—that a court might apply

¹⁰² Jamelle C. Sharpe, *Toward (a) Faithful Agency in the Supreme Court’s Preemption Jurisprudence*, 18 GEO. MASON L. REV. 367 (2011).

¹⁰³ Merrill, *supra* note 21, at 755.

¹⁰⁴ *Id.* at 756.

when an agency determines that federal law preempts state law. I also traced *Watters v. Wachovia Bank*, the most recent Supreme Court case to implicate—but not resolve—deference to agencies on preemption. In Part III, I presented my argument. I first asserted that the two alternatives to *Skidmore* deference—*Chevron* deference and a clear statement rule—discord with Supreme Court precedent on preemption. I next showed how *Skidmore* deference would accord with Supreme Court precedent on preemption. Finally, I demonstrated how *Skidmore* deference on preemption would produce the best outcomes.