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# Wachovia Bank, N.A. v. Burke: Preemption of State Law with Respect to National Bank Operations Subsidiaries

Russell J. Andrew

# Notes and Comments

## Wachovia Bank, N.A. v. Burke: Preemption of State Law With Respect to National Bank Operating Subsidiaries

### I. INTRODUCTION

With its roots grounded in the Supremacy Clause of the United States Constitution, the preemption doctrine has been used by national banks for over 140 years to avoid following dozens of distinct sets of state banking regulations.[1] Currently, however, there is a growing national debate over the scope of preemption and the extent to which national banks are authorized to preempt state laws.[2]

One area in particular where this debate is emerging is that of national bank operating subsidiaries. Are national banks operating subsidiaries, like their national bank parents, exempt from following state regulations as a result of preemption?[3] This was precisely the question presented to the U.S. Court of Appeals for the Second Circuit in *Wachovia Bank, N.A. v. Burke*.[4] The *Burke* court concluded that federal law does preempt state law with respect to national bank operating subsidiaries to the same extent as it does with respect to the national bank parents.[5]

The Second Circuit was the first federal circuit court to rule on the issue, establishing a precedent favorable to national banks.[6] In making its decision, the Second Circuit in *Burke* deferred to a regulation promulgated by the Office of the Comptroller of the Currency (OCC) that defines the scope of operating subsidiaries' preemption

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1. *See* 12 U.S.C. § 484 (2000) (indicating that the National Bank Act of 1864 created nationally chartered banks).

2. *See infra* notes 48-173 and accompanying text.

3. National bank operating subsidiaries are in effect incorporated departments of the bank. *See* 12 C.F.R. § 5.34 (2005).

4. *See* Wachovia Bank, N.A. v. Burke, 414 F.3d 305 (2d Cir.2005).

5. *See id.*

6. Richard Cowden, *Second Circuit Upholds Authority of OCC to Preempt States Regarding National Banks*, 85 BANKING REP. 3, 129 (2005) (explaining that the *Burke* court was the first federal circuit decision on the issue of preemption with respect to operating subsidiaries).

capabilities.[7] The timing of this decision was crucial for national banks.[8] The debate over the extent to which the OCC can promulgate preempting regulations is current, and *Burke* stands as support for a recent movement by the OCC to expand its regulatory authority.[9] Nonetheless, the regulation relied on in *Burke*, along with the OCC's banking preemption policy in general, has remained the center of significant controversy.[10]

In analyzing *Burke*, Part II of this Note details the legislative history of national banks and the general analysis utilized by courts for preemption challenges.[11] Part III presents the facts of *Burke*, details the procedural posture of this case, and evaluates the Second Circuit's application of the law to these facts.[12] Part IV forecasts the effects the *Burke* decision will have on the battle over preemption as well as banking law as a whole.[13] Additionally, Part IV inquires into the *Burke* Court's rationale and suggests that *Burke* was decided incorrectly based upon its unwarranted deference to the OCC.[14]

## II. NATIONAL BANKS AND PREEMPTION

### *A. History of National Banks*

Congress enacted the National Bank Act of 1864 (NBA) to establish a federal banking system and to help stabilize the economy by providing a uniform national currency.[15] Prior to the NBA, all 1466 banks in the United States were state-chartered institutions regulated by the laws of each individual state.[16] Through the NBA, Congress granted

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7. The central preemption regulation at issue in *Burke* was 12 C.F.R. § 7.4006. *See Burke*, 414 F.3d at 319.

8. *See generally* Martin Flumenbaum & Brad Karp, *Preemption of State Banking Laws*, 234 N.Y. L. J. (July 27, 2005) (describing the effect and aftermath of *Burke*).

9. *See infra* notes 96-117 and accompanying text.

10. *See infra* notes 118-73 and accompanying text.

11. *See infra* notes 15-47 and accompanying text.

12. *See infra* notes 48-95 and accompanying text.

13. *See infra* notes 96-117 and accompanying text.

14. *See infra* notes 118-73 and accompanying text.

15. *See* Bank Activities and Operations; Real Estate Lending and Appraisals, 68 Fed. Reg. 46,119, 46,120 (proposed Aug. 5, 2003) (to be codified at 12 C.F.R. pt. 734) [hereinafter "Bank Activities"] (describing the legislative history of the National Bank Act).

16. Mark Furletti, *The Debate Over the National Bank Act and the Preemption of State Efforts to Regulate Credit Cards*, 77 TEMP. L. REV. 425, 427 (2004).

nationally chartered banks "all such incidental powers as shall be necessary to carry on the business of banking."[17] Congress intended for national banks to operate distinctly and separately from state banks, and likewise did not intend for national banks to be governed by state law.[18] Congress was concerned that subjecting national banks to individual state laws would impede the objectives of national banks through unfriendly legislation and harmful competition.[19]

The NBA also created the OCC to supervise and regulate national banks within the Department of Treasury.[20] Congress authorized the OCC "to make a thorough examination of all the affairs of [national banks],"[21] and reinforced the OCC's supervisory authority by granting the agency exclusive visitorial powers over national banks, except where federal law provided otherwise.[22]

### *B. The OCC and Operating Subsidiaries*

The OCC has had a significant impact on the development of operating subsidiaries as well as the extent to which they may preempt state laws.[23] The OCC promulgated 12 C.F.R. § 5.34 in 1983, which determined that, in accordance with national banks' incidental powers, a "national bank may conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly whether as part of, or incidental to, the business of banking."[24] Additionally, the OCC clarified the preemption capabilities of operating subsidiaries when it specified that "operating subsidiar[ies] conduct activities [related to licensing and examination procedures] pursuant to the same

17. 12 U.S.C. § 24 (Seventh) (2000).

18. *See* Bank Activities, *supra* note 15, at 46,120.

19. *See id.*

20. *See id.*

21. 12 U.S.C. § 481 (2000).

22. 12 U.S.C. § 484 (2000); *see also* Bank Activities, *supra* note 15, at 46,120; *see also* NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256 (1995) (explaining how the Comptroller of the Currency has the authority to set forth the rules and regulations for national banks, and how the OCC's rulemaking authority includes the authorization to define the "incidental powers" of national banks in addition to the ones listed in the NBA).

23. *See* 12 C.F.R. § 5.34(e)(1) (2005).

24. *Id.*

authorization, terms and conditions that apply to the conduct of such activities by its national parent bank."[25]

In reinforcing this point, the OCC issued 12 C.F.R. § 7.4006 in 2001, which proclaimed: "Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank."[26] While this regulation does not speak directly to a specific preemption issue, it implies that state law should be preempted for national bank operating subsidiaries to the same extent as they are preempted for the parent national banks.[27] One of the controversial issues raised in *Burke* is whether the OCC had the authority to issue this regulation, and therefore whether the Second Circuit should have given the regulation deference.[28] This issue is addressed in greater detail in a following section of this Note.[29]

### *C. Preemption Analysis*

Preemption of state law occurs in three different situations.[30] One, preemption can occur when a federal statute explicitly demonstrates a congressional intent for preemption.[31] Preemption may also arise when a particular statute's "structure and purpose" reveal an implicit intent by Congress to preempt state law.[32] Lastly, and applicable to the facts in *Burke*, preemption can occur where federal law is in "irreconcilable conflict" with state law.[33]

According to the United States Supreme Court, an "irreconcilable conflict" exists where "compliance with both federal and

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25. *Id.* at § 5.34(e)(3).

26. *Id.* at § 7.4006.

27. *See id.*

28. Press Release, Conference of State Bank Supervisors, Statement by Neil Milner (Feb. 12, 2004), *available at* http://csbs.org/pr/news_releases/2004/nr_02.13.04.htm ("OCC has acted unilaterally and with disregard for repeated requests from the Congress to allow federal lawmakers time to debate and deliberate on the issues.") [hereinafter CSBS Feb. 12, 2004 Press Release].

29. *See infra* notes 127-58 and accompanying text.

30. *See* Barnett Bank of Marion County v. Nelson, 517 U.S. 25, 31 (1996) (explaining the circumstances under which preemption of state law may occur).

31. *See id.* (ruling that a federal statute was in direct conflict with a state statute, and as a result, the affiliated national bank was not prohibited from selling insurance).

32. *See id.*

33. *Id.*

state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[34] The Court has also noted that "federal regulations have no less preemptive effect than federal statutes,"[35] and the Fifth Circuit has determined that the OCC may enact regulations that preempt state law.[36]

When addressing a challenge to the preemption of a particular law, courts begin by examining Congress's intent with respect to the preempting statute itself, or the statute that authorized an agency's issuance of preempting regulations.[37] The U.S. Supreme Court has determined that "the purpose of Congress is the ultimate touchstone of pre-emption analysis."[38] Further, there is an "assumption that the historic police powers of the States [are] not to be superseded by . . . [a] Federal Act unless that [is] the clear and manifest purpose of Congress."[39]

However, in order to show congressional intent when determining the preemptive effect of a regulation, it is not necessary to demonstrate an express congressional authorization to preempt state law.[40] Instead, the analysis centers on whether a particular agency in question acted within the authority granted to it by statute when enacting the regulation.[41]

In analyzing the preempting effect of agency regulations, courts often apply the framework set forth in the 1984 Supreme Court case

34. Fidelity Fed. Savings & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153 (1982) (determining that federal law preempted state law and applied to federal savings and loan's "due-on-scale" practices).

35. *Id.* at 153.

36. Wells Fargo Bank of Tex., N.A. v. James, 321 F.3d 488, 494 (5th Cir. 2003) (holding that in promulgating 12 C.F.R. § 7.4002, the OCC operated within the sphere delegated it by Congress when issuing the regulation that preempted state law).

37. *De La Cuesta*, 458 U.S. at 152 (holding that federal law preempted state law with respect to federal savings and loan's "due-on-scale" practices).

38. Cipollone v. Liggett Group, 505 U.S. 504, 516 (1992) (analyzing the Supremacy Clause of the Constitution and its allowance of preemption of state laws); *see also* Medtronic, Inc. v. Lohr, 518 U.S. 470, 485-486 (1996) ("Any understanding of the scope of a pre-empting statute must rest primarily on a fair understanding of congressional purpose.") (quoting from *Cipollone*, 505 U.S. at 530 n.27).

39. *Cipollone*, 505 U.S. at 516 (quoting from Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

40. *De La Cuesta*, 458 U.S. at 154.

41. *Id.*

*Chevron U.S.A., Inc. v. Natural Resources Defense Council.*[42] The *Chevron* doctrine consists of two parts: (1) whether Congress's intent in the statute is "clear as to the precise question at issue;"[43] and, if not, (2) whether the agency's action is "based on a permissible construction of the statute."[44] In the event that a statute is silent or ambiguous in regards to the question presented, it is then necessary to proceed to step two in the *Chevron* analysis.[45] Step two involves an inquiry into whether the issuance of the particular regulation at hand was reasonable within the agency's statutory authority.[46] With specific relevance to the situation in *Burke*, it is important to note that the Supreme Court has said: "We must give great weight to any reasonable construction" by the OCC of a statute when there is an ambiguity in the statute's interpretation.[47]

## III. WACHOVIA BANK, N.A. v. BURKE

### *A. Facts*

Wachovia Bank is a nationally chartered bank.[48] Wachovia Mortgage is a North Carolina corporation that became a wholly owned operating subsidiary of Wachovia Bank in 2003.[49] Wachovia Mortgage has an office in Connecticut, and after becoming wholly owned by Wachovia Bank, it gave up its Connecticut mortgage licenses while

42. 468 U.S. 1227 (1984); *see also* NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 257-258 (1995) (applying the *Chevron* doctrine and upholding Comptroller of Currency's broad decision-making power); *see also* Wells Fargo Bank of Tex., N.A. v. James, 321 F.3d 488, 494 (2003) (applying the *Chevron* doctrine and holding that in promulgating 12 C.F.R. § 7.4002, the OCC operated within the sphere delegated it by Congress).

43. NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 257 (1995) (quoting from Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837, 842 (1984)).

44. *Id.* (quoting from Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837, 843 (1984)).

45. *Id.*

46. *See id.*

47. Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 403 (1987) (ruling for the OCC giving it broad discretion to interpret whether certain discount brokerage services were subject to restrictions) (quoting from Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837, 843 (1984)).

48. Wachovia Bank, N.A. v. Burke, 414 F.3d 305, 310 (2d Cir. 2005).

49. *Id.*

continuing to act as a mortgage lender.[50] As a result, Connecticut's Banking Commissioner (Commissioner) filed a Notice of Intent to Issue a Cease and Desist Order against Wachovia Mortgage for operating as a mortgage lender in Connecticut without a Connecticut license.[51] Wachovia Mortgage decided to apply for re-licensing, but reserved its right for further legal action.[52] Wachovia Bank subsequently filed a lawsuit in the United States District Court of Connecticut, requesting a declaratory judgment and injunctive relief against the Commissioner based on the assertion that the applicable federal OCC regulations preempt Connecticut law.[53]

*B. District Court*

The district court held that the applicable Connecticut banking regulations conflicted with federal law, triggering the preemption of Connecticut law by the OCC regulations.[54] The district court utilized the *Chevron* doctrine and, after finding that Congress had not directly addressed this question in the statute, decided that the OCC's regulation section 7.4006, "was a reasonable regulation designed to prevent state laws from inhibiting a national bank's ability to conduct banking through a subsidiary, as authorized under 12 U.S.C. § 24."[55] The Commissioner appealed to the Second Circuit following the district court's issuance of a declaratory judgment for Wachovia Mortgage on the issue of preemption.[56]

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50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* (indicating that there were six Connecticut regulations at issue in this case; Wachovia Mortgage also brought claims for abridgment of rights provided by federal law under 42 U.S.C. § 1983 and the Court ruled that § 1983 did not provide any federally protected rights in this case).

54. *Burke*, 414 F. 3d at 310 (indicating that the District Court also found that Connecticut also abridged Wachovia Mortgage's rights provided by § 1983, but this part of the decision was reversed by the Second Circuit).

55. *See id.* (explaining that 12 C.F.R. § 7.4006 determines that national bank operating subsidiaries are subject to the same laws as their parent banks: "Unless otherwise provided by Federal law or OCC Regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." ).

56. *See id.*

*C. Second Circuit*

The Second Circuit was the first United States Court of Appeals to rule on this precise preemption issue regarding national bank operating subsidiaries.[57] The Second Circuit affirmed the district court's ruling and upheld its decision to grant a declaratory judgment in favor of Wachovia Mortgage on the issue of preemption.[58] The court's approach in resolving the issue involved an application of the *Chevron* doctrine to the facts, which ultimately resulted in an inquiry into the reasonableness of the OCC regulations at issue.[59]

1. Step One: Has Congress Directly Addressed the Question at Issue?

The court framed its analysis of this question as a response to two of the Commissioner's primary contentions.[60] The statute at issue was the NBA, which does not expressly mention "national bank operating subsidiaries."[61] The Commissioner, however, argued that it is clear through the NBA that Congress did not intend to grant such entities the same preemption capabilities that it granted to their national bank parents.[62]

First, the Commissioner argued that because the NBA did not mention operating subsidiaries when explaining that "no national bank shall be subject to any visitorial powers except as authorized by Federal law,"[63] it intended not to provide preemption of state laws for operating subsidiaries.[64] In a brief of *amicus curiae* submitted to the Second Circuit on behalf of Commissioner Burke, William Brauch, Iowa's assistant attorney general, urged that because they were omitted from the statute, "operating subsidiaries are *not* entitled to any immunity

57. *See* Cowden, *supra* note 6, at 129.

58. *See Burke*, 414 F. 3d at 320.

59. *See id.* at 318 (demonstrating how the court looked at the reasonableness of the regulations because it determined that Congress had never addressed the precise question at issue).

60. *See infra* notes 64, 69 and accompanying text.

61. *See* 12 U.S.C. § 484 (2000); *see also Burke*, 414 F.3d at 315-316.

62. *See Burke*, 414 F. 3d at 315.

63. 12 U.S.C. § 484 (2000).

64. *See Burke*, 414 F. 3d at 315-316.

from state supervision that 'national banks' may enjoy under Section 484(a)."[65]

The court rejected this first argument by explaining that the OCC agrees with the Commissioner in that the OCC is not alleging that the term "national bank" in § 484 includes operating subsidiaries.[66] The court emphasized that the OCC argued only that the ability to conduct business through operating subsidiaries falls within the "incidental powers" granted to national banks by 12 U.S.C. § 24 (Seventh).[67] The court added that, moreover, "[t]o the extent that using an operating subsidiary is a legitimate power granted to national banks, [the NBA] provides the OCC with ample authority to preempt states from exercising visitorial power over the subsidiary because such state regulation could interfere with the national bank's exercise of its federal powers."[68]

Second, the Commissioner argued that neither the OCC nor the federal government had exclusive authority over operating subsidiaries because such operating subsidiaries are merely national bank "affiliates."[69] This is significant, the Commissioner argued, because the Banking Act of 1933, parts of which are also known as the "Glass-Steagall Act," granted the OCC only non-exclusive power with regard to national bank "affiliates."[70]

The court responded by explaining that Congress enacted the "Glass-Steagall Act" to address the "inherent conflict between the promotional role of an investment banker and the commercial banker's obligation to give disinterested investment advice."[71] Therefore, the

65. Brief for Iowa Assistant Attorney General as Amici Curiae Supporting Petitioner-Appellant at 14, Wachovia Bank, N.A. v. Burke, 414 F.3d 305 (2d Cir. 2005) (No. 04-3770).

66. *See Burke*, 414 F. 3d at 316.

67. *Id.*

68. *Id.* at 316; *see also* Barnett Bank of Marion County v. Nelson, 517 U.S. 25, 31 (1996) (ruling that a federal statute was in direct conflict with a state statute, and as a result, the affiliated national bank was not prohibited from selling insurance).

69. *See Burke*, 414 F. 3d at 316-318 (explaining that 12 U.S.C. § 221(a) indicates an intent not to grant exclusive power to the federal government in regards to national bank "affiliates," and that the Banking Act of 1933, defined national bank "affiliates" as "any corporation, business, trust, association, or similar organization [controlled by a] member bank").

70. *See id.* at 316 (citing Banking Act of 1933, ch. 889, § 2(b), 48 Stat. 162, 162 (current version at 12 U.S.C. § 24 (2000))).

71. *Id.* at 316 (citing Sec. Indus. Ass'n v. Bd. of Gov'rs of the Fed. Reserve Sys., 716 F.2d 92, 97 (2d Cir. 1983)).

court concluded that the "Glass-Steagall Act" does not address the question at issue.[72] Additionally, the court noted that while the "Glass-Steagall Act" was enacted in 1933, the OCC did not begin to identify national banks' use of operating subsidiaries until the 1960s.[73] Likewise, the court continued, Congress distinguished operating subsidiaries in 1999 by enacting the Gramm-Leach-Bliley Act (GLBA), which allowed national banks to operate "financial subsidiaries."[74]

By rejecting these two arguments, the Court determined that step one of the *Chevron* analysis was not satisfied because Congress had not spoken to the precise issue at hand.[75] Therefore, it was necessary to address the second prong of the *Chevron* framework in order to determine Congressional intent.[76]

### 2. Step Two: Is 12 C.F.R. § 7.4006 Reasonable?

The central preemption regulation at issue in *Burke* was 12 C.F.R. § 7.4006.[77] Section 7.4006 reads: "Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank."[78] The Commissioner in *Burke* contended that the court should not have relied on the regulation for two primary reasons.[79] The Commissioner argued that (1) the rationale of section 7.4006 is

72. *Id.* at 318 ("The 'Glass-Steagall Act' targeted national banks' use of affiliates to engage in non-commercial banking and does not address national banks' use of operating subsidiaries to engage in the business of banking.").

73. *Id.* at 317 (citing Acquisition of Controlling Stock Interest in Subsidiary Operations Corporation, 31 Fed. Reg. 11,441, 11,459 (Aug. 31, 1966)).

74. *See id.* at 317 (citing 12 U.S.C. § 24a (2000)) ("[The GLBA] excluded from the definition of 'financial subsidiary' a subsidiary 'that engages solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that govern the conduct of such activities by such national banks.").

75. *Burke*, 414 F. 3d at 318.

76. *See id.* (referencing NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 257-258 (1995) (determining that the *Chevron* doctrine applied and therefore the Comptroller of Currency's broad decision-making power and interpretations must be upheld)).

77. *Id.* at 319.

78. 12 C.F.R. § 7.4006 (2005) (demonstrating that this regulation was enacted in 2001 by the OCC).

79. *Burke*, 414 F. 3d at 318-19.

unreasonable; and (2) section 7.4006 simply reflects the OCC's opinion of what a court would hold.[80]

First, the Commissioner asserted that the rationale behind section 7.4006 is flawed because, by suggesting that operating subsidiaries are "in essence incorporated departments" of parent banks,[81] the regulation "unreasonably disregards the corporate separateness of a parent bank and improperly allows national banks to take advantage of the legal benefits through a subsidiary while remaining free from state regulation."[82]

In response, the court highlighted the extensive history of national banks' use of subsidiaries as "convenient and useful corporate form[s] of conducting [banking] activities."[83] The court seemed to endorse this type of use by quoting the following line from the Federal Register: "The use of a separate subsidiary structure can enhance the safety and soundness of conducting new activities from those of the parent bank and allowing more focused management and monitoring of operations."[84] By citing the Federal Register as support, the Court appeared to essentially be punting to the OCC, granting the agency broad discretion in its policy judgments.[85]

The Commissioner's other argument regarding the second prong of the *Chevron* analysis attempted to discredit some of the authority submitted by Wachovia.[86] Wachovia, in support of preemption, cited 66 Fed. Reg. 33,790, which includes the OCC's view of section 7.4006.[87] The Commissioner asserted that the Court could not base its decision on the OCC's opinion of how it believed a court would rule on the issue.[88]

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80. *Id.*

81. *Id.* at 318 (referencing 12 C.F.R. § 7.4006).

82. *Id.* (explaining that the operating subsidiaries are not "in essence" incorporated departments of the bank contrary to the rationale and wording of § 7.4006).

83. *Id.* at 319 (citing 66 Fed. Reg. 34,784, 34,788 (July 2, 2001)).

84. *Id.* (citing Rules, Policies and Procedures for Corporate Activities, 61 Fed. Reg. 60,342, 60,354 (Nov. 27, 1996)).

85. *See Burke*, 414 F. 3d at 319.

86. *Id.* ("The commissioner . . . argu[es] that 12 C.F.R. § 7.4006 merely reflects the OCC's view of what courts would hold.").

87. *See id.* at 310 (referencing 66 Fed. Reg. at 33,790 ("Section 7.4006 generally provides that national bank operating subsidiaries are subject to State law to the extent State law applies to their parent bank. The section itself does not effect preemption of State law; it reflects the conclusion we believe a federal court would reach, even in the absence of the regulation, pursuant to the Supremacy Clause and applicable Federal judicial precedent.")).

88. *See id.*, at 319-20.

The Court again sided with Wachovia, citing a recent example where a Georgia statute was preempted by federal law based on an opinion submitted by the OCC.[89] However, the court added a backup rationale by suggesting that the authority provided by 12 C.F.R. § 7.4006 was not determinative in this case because 12 C.F.R. §§ 34.1(b) and 34.4 also support a finding for preemption.[90] This suggestion is dubious, however, because the court's discussion throughout the opinion is dominated by the validity of 12 C.F.R. § 7.4006.[91] Moreover, the Commissioner's appeal was focused solely on the premise that the district court should not have deferred to section 7.4006.[92] Therefore, despite the court's "last-minute safety-hatch" contention otherwise, the central preemption regulation at issue in *Burke* was 12 C.F.R. § 7.4006.[93]

Overall, the court held that (1) Congress had not addressed, in the NBA, the specific issue of whether preemption of state law applies to bank operating subsidiaries, and (2) 12 C.F.R. § 7.4006, determining that federal law preempts state law with regard to operating subsidiaries, was a reasonable construction of the authorizing statute.[94] As a result, the court in *Burke* ruled in favor of Wachovia on the issue of preemption.[95]

89. *See id.* (citing Bank Activities, 69 Fed. Reg. 1904 (Jan. 13, 2004), in reference to the Georgia Fair Lending Act (GFLA), which was preempted by state law in accordance with an opinion issued by the OCC detailing the negative effects GFLA had on national banks ("When national banks are unable to operate under uniform, consistent, and predictable standards, their business suffers, which negatively affects their safety and soundness ... The OCC is issuing this final rule in furtherance of its responsibility to enable national banks to operate to the full extent of their powers under Federal law, without interference from inconsistent state laws, ... and in furtherance of their safe and sound operations.")).

90. *See id.* at 321 ("Even if [§ 7.4006 cannot be used as conclusive support], 12 C.F.R. §§ 34.1(b) and 34.4 independently support a finding of preemption in this case.").

91. *See Burke*, 414 F. 3d at 318-21.

92. *See id.*

93. *See id.* at 321.

94. *See id.* at 318-21.

95. *Id.* at 324.

## IV. ANALYSIS OF *BURKE*

### *A. Impact*

The *Burke* decision had an immediate effect based on both the timing of the decision and the fact that it was the first federal circuit decision on the issue.[96] On August 12, 2005, just over a month after the Second Circuit issued its *Burke* opinion in favor of national banks, the Ninth Circuit followed suit in *Wells Fargo Bank N.A. v. Boutris*, citing *Burke* as support.[97]

*Boutris* involved a situation similar to *Burke* where California's Banking Commissioner sought to enforce certain state regulations against Wells Fargo Home Mortgage, Inc. (WFHMI), a wholly owned operating subsidiary of Wells Fargo Bank.[98] The Commissioner in *Boutris* argued that the OCC did not have the authority to promulgate regulations such as section 7.4006 that in effect preempt state law.[99] In rejecting the Commissioner's claims on this issue, the Ninth Circuit pointed to *Burke* for authority, ultimately concluding that "the Bank Act and OCC regulations preempt state banking laws concerning subsidiaries of nationally chartered banks to the same extent that they preempt regulation of the parent national bank."[100] However, the extent to which *Burke* affected *Boutris* is debatable.[101] *Burke* came after the district court decision in *Boutris* where the U.S. District Court for the Eastern District of California also decided for preemption, and the Ninth Circuit merely upheld the district court.[102]

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96. *See* Cowden, *supra* note 6, at 129 (explaining that the *Burke* court was the first federal circuit court to rule on the issue of preemption with respect to operating subsidiaries).

97. *See* Wells Fargo Bank, N.A. v. Boutris, 419 F.3d 949 (9th Cir. 2005) (upholding the district court's ruling that the Commissioner could not enforce CRMLA or the CFLL against WFHMI because federal regulations preempt state regulations with respect to national bank operating subsidiaries); *see also* Ethan Zindler, *In Brief: Court Upholds Preemption for Bank Units*, AM. BANKER ONLINE, Aug. 15, 2005 ("The U.S. Court of Appeals for the Ninth Circuit in San Francisco upheld a lower court's ruling that California regulators' attempt to require a Wells Fargo & Co. subsidiary to hold a state license to offer mortgages was not legal.").

98. *See* Wells Fargo Bank, N.A. v. Boutris, 265 F. Supp. 2d 1162, 1164 (E.D. Cal. 2003) (explaining the background of the circumstances in the case).

99. *See Boutris*, 419 F. 3d at 957.

100. *See id.* at 963 n.15 (citing *Burke*, 414 F.3d at 305); *see also* Zindler, *supra* note 97.

101. *See infra* note 102.

102. *See Boutris*, 265 F. Supp. 2d at 1164; *see also Boutris*, 419 F.3d 949, 954 (affirming

Nonetheless, after *Boutris*, there were two federal circuits which had ruled on the issue in favor of national banks, further strengthening the precedent set by *Burke*.[103] This fact had a significant effect on the recent Michigan preemption case *Wachovia Mortgage v. Watters*.[104] The facts and issues presented in *Watters* resemble those found in *Burke* and *Boutris*.[105] In *Watters*, the Michigan Commissioner of Insurance and Financial Services attempted to suspend Wachovia Mortgage, a national bank operating subsidiary, from conducting mortgage lending activities in Michigan after the subsidiary relinquished its state lending registration.[106] In August of 2004, the U.S. District Court for the Western District of Michigan concluded, "OCC regulations prohibiting states from exercising visitorial authority over the operating subsidiaries of national banks represent a permissible construction of the National Banking Act."[107] Therefore, the court continued, federal law preempts state law with respect to operating subsidiaries to the same extent it does with respect to the national parent banks.[108]

On appeal, in December of 2005, the Sixth Circuit upheld the district court's decision in *Watters*.[109] In support of preemption, the Sixth Circuit cited *Wachovia v. Burke* and the Second Circuit's treatment of section 7.4006.[110]

Another related case was recently decided in the U.S. District Court for the Southern District of New York involving a dispute between New York attorney general Eliot Spitzer and the OCC.[111] The OCC brought the case seeking a declaratory judgment and injunctive relief in order to bar Spitzer from "infringing on the OCC's exclusive visitorial authority over national banks and their operating subsidiaries."[112] The OCC pointed to *Burke* for support and prevailed,

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district court).

103. *See Boutris*, 419 F.3d at 954.

104. *See* 334 F. Supp. 2d 957 (W.D. Mich. 2004).

105. *See infra* notes 106-108; *see also Boutris*, 419 F.3d 949; *Burke*, 414 F.3d 305.

106. *See Federal District Court Upholds OCC Authority to Exercise Visitorial Authority Over Operating Subsidiaries*, 8 FIN. SERVICES ALERT 2 (Aug. 31, 2004) (summarizing the district court ruling in *Watters*).

107. *Id.*

108. *See id.*

109. *See* Wachovia Bank, N.A. v. Watters, 431 F.3d 556 (6th Cir. 2005).

110. *Id.*

111. Office of the Comptroller of the Currency v. Spitzer, 396 F. Supp. 2d 383 (2005).

112. *Id.* at 383.

gaining permanent injunctive relief from the Office of the Attorney General for New York.[113]

Overall, the *Burke* decision came at a great time for national banks.[114] It stands as support for the OCC in an ongoing movement to expand federal preemption of state banking law.[115] Due to the fact that it was the first of a series of current cases related to preemption, *Burke* has the potential to create a domino effect of decisions that could build a considerable amount of judicial precedent that will be difficult to overcome.[116] One commentator noted, "[T]he timing of the Wachovia decision was serendipitous [for the national banks]."[117]

### *B. Criticisms of Burke*

Because the *Burke* opinion was the first instance in which a U.S. Court of Appeals ruled on the issue of preemption of state regulations by a national bank's operating subsidiary,[118] the only precedent that the Second Circuit had to go by was a series of district court cases that all ruled in favor of preemption for operating subsidiaries.[119] One such district court case was *Wells Fargo Bank v. Boutris*, as discussed above, where the U.S. District Court for the Eastern District of California used reasoning similar to that of the *Burke* court.[120] The court in *Boutris* ruled that the Commissioner had no visitorial powers over the subsidiary because the OCC had authority to enact 12 C.F.R. § 7.4006, which limited the application of state law to subsidiaries of national banks, and because the OCC's visitorial powers were exclusive.[121] Like

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113. *Id.* at 404, 407.

114. *See generally* Martin Flumenbaum & Brad Karp, *Preemption of State Banking Laws*, 234 N.Y. L.J. (2005) (describing the effect and aftermath of *Burke*).

115. *See generally id.* (explaining the relevance of *Burke*).

116. *See* Cowden, *supra* note 6, at 129 (explaining that the *Burke* court was the first federal circuit decision on the issue of preemption with respect to operating subsidiaries).

117. *See* Flumenbaum & Karp, *supra* note 114.

118. *See* Cowden, *supra* note 6, at 129 (explaining that the *Burke* court was the first federal circuit court to rule on the issue of preemption with respect to operating subsidiaries).

119. *See, e.g.*, Wells Fargo Bank, N.A. v. Boutris, 265 F. Supp. 2d 1162, 1164 (E.D. Cal. 2003).

120. *See id.* at 1164 (explaining the background of the circumstances in the case).

121. *See id.* at 1169-70 (ruling that the Commissioner could not enforce CRMLA or the CFLL against WFHMI because federal regulations preempt state regulations with respect to national bank operating subsidiaries).

*Burke*, *Boutris* gave deference to the OCC's interpretative regulation[122] that the banks used in persuading the courts that federal regulations preempt state law even when dealing with operating subsidiaries.[123]

### 1. The Pre-Existing Controversy

The question of whether the OCC is authorized to adopt expansive preemption regulations like 12 C.F.R. § 7.4006 is the subject of significant controversy.[124] Consequently, many who disagree with the OCC's stance on preemption assert that the Second Circuit should not have deferred to section 7.4006 in upholding preemption for operating subsidiaries.[125]

In response to an announcement made by the Comptroller of the Currency in early 2004 regarding OCC preemption regulations, the Conference of State Bank Supervisors (CSBS) issued this statement:

> The [CSBS] is stunned that the [OCC] would proceed with implementation of this far-reaching preemption proposal in the face of widespread opposition from members of Congress, state banking and financial regulators. . . .The arrogance and audacity of the Comptroller's actions are astounding. Ignoring concerns from the United States Congress, the nation's governors, state legislatures, and attorneys general is an affront to the democratic process.[126]

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122. 12 C.F.R. § 7.4006 (2005) ("Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank.").

123. Both *Burke* and *Boutris* cited 12 C.F.R. § 7.4006 in their opinions, and deferred to it as the authoritative law on the issue. *See Boutris*, 419 F. 3d 949; *Burke*, 414 F. 3d 305.

124. *See infra* notes 125-58 and accompanying text.

125. *See* Arthur Wilmarth, *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 ANN. REV. BANKING & FIN. L. 225, 343-348 (2004).

126. *See* Press Release, Conference of State Bank Supervisors, CSBS Statement on the Comptroller of the Currency's Preemption Announcement (Jan. 8 2004), *available at* http://csbs.org/pr/news_releases/2004/nr_01.08.04.htm ) [hereinafter CSBS Jan. 8, 2004 Press Release].

### 2. Why Has *Burke* Been Criticized?

Three of the major arguments asserting that the Second Circuit should not have deferred to the OCC in *Burke* involve the decision's (1) effect on states' abilities to protect their citizens, (2) unconstitutional allowance of the federal government's infringement on states' police powers, and (3) misapplication of the preemption analysis.[127]

#### A. PROTECTION OF CITIZENS

According to some commentators, by fundamentally expanding the scope of preemption, the "OCC [is usurping] the states' ability to protect their citizenry."[128] The argument is that the OCC is taking away the states' abilities to protect their citizens due to the fact that the OCC preemption regulations allow entities such as operating subsidiaries to ignore state consumer protection laws.[129] Arthur Wilmarth, an advocate for the CSBS, argues that state officials have been the "leaders in combating fraud and other misconduct" in the banking industry, and "the OCC's record in protecting consumers is not impressive."[130] In 2000, for instance, Minnesota attorney general Mike Hatch sued an operating subsidiary of Fleet Bank for privacy violations resulting from a scheme where the subsidiary sold confidential customer information to telemarketers.[131] The OCC, however, did not take enforcement measures against Fleet, but instead filed a brief in support of dismissing the lawsuit.[132] Fleet's attempt to dismiss the lawsuit was not successful.[133]

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127. *See* Wilmarth, *supra* note 125; *see also* CSBS January 8, 2004 Press Release, *supra* note 126; *see also* Press Release, Conference of State Bank Supervisors, CSBS Statement on U.S. District Court Ruling in Wachovia Bank v. Burke (May 28, 2004), *available at* http://csbs.org/pr/news_releases/2004/nr_05.28.04.htm [hereinafter CSBS May 28, 2004 Press Release].

128. *See* CSBS Jan. 8, 2004 Press Release, *supra* note 126.

129. *See* Press Release, Conference of State Bank Supervisors, Attorneys General Support Connecticut Appeal of Preemption Case (Oct. 14, 2004 ), *available at* http://csbs.org/pr/news_releases/2004/nr_10.14.04.htm [hereinafter CSBS Oct. 14, 2004 Press Release] ("Wachovia sought a determination that it can offer first and second mortgages through its wholly-owned subsidiary, a state corporation, free from any state oversight and without complying with state consumer protection laws.").

130. Wilmarth, *supra* note 125, at 348, 353.

131. Minnesota v. Fleet Mortgage Corp., 158 F. Supp. 2d 962, 964 (D. Minn. 2001).

132. *See* Wilmarth, *supra* note 125, at 353.

133. *See id.* at 355.

The list of unimpressive OCC protection of state citizens goes on. Since June of 2000, the OCC has taken action on the grounds of abusive or predatory lending practices against only seven national banks.[134] Furthermore, the OCC has brought only two public enforcement actions for violations of customer privacy rules since 1999.[135]

Many commentators, including Congress, have questioned whether the OCC has the "administrative resources [sufficient] to enforce consumer protection laws against national banks and their operating subsidiaries."[136] The House Financial Services Committee questioned whether the OCC has the necessary resources to "investigate all consumer complaints for 2150 national banks... from a single customer assistance center."[137] Moreover, the Committee expressed concerns of whether the OCC's possession of exclusive authority in regards to "consumer law enforcement activities that typically have been undertaken by the States... could weaken the OCC's ability to carry out its most primary mission of ensuring safety and soundness of the national bank system."[138]

In response to such arguments, the OCC issued a series of letters in 2004 asserting that states' citizens are not in any heightened amount of danger as a result of the new OCC preemption regulations.[139] The OCC stressed that states' citizens are not any more vulnerable to predatory lending practices when national banks are subject to federal regulation than the citizens would be if state law governed national banks and their operating subsidiaries.[140] OCC Letter 999, for example, emphasizes that national banks, like state banks, are subject to unfair and deceptive acts and practices regulation.[141]

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134. *Id.* at 353.

135. *Id.* at 355.

136. *Id.* at 352.

137. *Id.* at 352 (citing H. FIN. SERV. COMM., 108TH CONG., 2D SESS., VIEW AND ESTIMATES OF THE COMM. ON FIN SERV. ON MATTERS TO BE SET FORTH IN THE CONCURRENT RES. ON THE BUDGET FOR FISCAL YEAR FOR 2005, (Comm. Print, Feb. 25, 2004)).

138. Wilmarth, *supra* note 125, at 352.

139. *See OCC Further Clarifies Lending Preemption Regulation*, 8 FIN. SERVICES ALERT 2 (Aug. 31, 2004) (indicating that the OCC has responded to complaints through Letter 998 and describing the nature of Letters 998 and 999).

140. *See id.*

141. *See id.* (explaining that national banks must abide by Federal Trade Commission Act).

In addition, OCC Letter 998 pointed out that federal law does not always preempt state law with respect to national banks and their operating subsidiaries.[142] This Letter "confirm[ed] that state anti-discrimination laws are not preempted across the board by the Preemption Regulation, but rather would be considered as to preemption on a case-by-case basis."[143]

Critics of the recent preemption regulations, however, are not satisfied with the OCC's letters.[144] Neil Milner, President and CEO of the CSBS noted that the OCC "acted unilaterally and with disregard for repeated requests from the Congress to allow federal lawmakers time to debate and deliberate on the issues."[145] Milner made this statement in response to amendments the OCC made to its preemption regulations without a public hearing on February 12, 2004.[146] Additionally, CSBS's Arthur Wilmarth warns, "Unless the OCC's position is overturned, the frequency and effectiveness of government enforcement measures will undoubtedly decline with regard to national banks and their subsidiaries."[147]

## B. INVASION INTO STATE SOVEREIGNTY

In his brief submitted *amici curiae* to the Second Circuit, Iowa's assistant attorney general William Brauch argued that the OCC's adoption of section 7.4006 was unauthorized due to its invasion into "sovereign state interests protected by the Tenth Amendment, because it attempts to transform state-chartered corporations into creatures of federal law without the chartering states' permission."[148] Brauch cited

142. *See id.*

143. *Id.* (indicating that the OCC has responded to complaints through Letter 998 and describing the nature of Letters 998 and 999).

144. *See infra* notes 145-47 and accompanying text.

145. CSBS Feb. 12, 2004 Press Release, *supra* note 28.

146. OCC Bulletin, Preemption and Visitorial Powers, *available at* http://www.occ.treas.gov/ftp/bulletin/2004-6.doc. (explaining the amendments that clarified the OCC's position on preemption) ("[s]tate authorities may not inspect, superintend, direct, regulate, or compel compliance by a national bank with respect to any law regarding the content or conduct of activities authorized for national banks, except as permitted under federal law.").

147. Wilmarth, *supra* note 125, at 348.

148. Brief for Iowa Assistant Attorney General as Amici Curiae Supporting Petitioner-Appellant at 28, Wachovia Bank, N.A. v. Burke, 414 F.3d 305 (2005) (No. 04-3770).

*Hopkins Federal Savings & Loan Association v. Cleary*, as support.[149] In *Cleary*, the U.S. Supreme Court struck down a federal statute for violating the Tenth Amendment where it permitted state-chartered corporations to convert to federal charters without states' permission.[150] The court stated that "[formation, maintenance, supervision, and dissolution of state-chartered corporations] are matters of governmental policy, [therefore] it would be an intrusion for another government to regulate by statute or decision."[151]

A literal application of this rule to the *Burke* case would seem to render section 7.4006 a violation of the Tenth Amendment because it in effect determines how operating subsidiaries (state-chartered corporations) shall be maintained and supervised.[152] Interestingly, the *Burke* Court did not address this issue raised by the Commissioner.[153] Rather, it ruled in strict accordance with the wording of the OCC regulation, and in effect gave much deference to the OCC and its ability to adopt regulations under the authority granted to it by statute.[154] The Court overlooked this constitutional argument[155] when analyzing both Congressional intent and the reasonableness of section 7.4006.[156]

However, one factor that may have contributed to this omission is the method by which the court approached the question.[157] Essentially, *Burke* simply applied the wording of the applicable law to the facts of the case using the *Chevron* doctrine, a framework established and repeatedly approved by the Supreme Court.[158]

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149. *Id.*; Hopkins Fed. Savings & Loan Ass'n v. Cleary, 296 U.S. 315 (1935) (ruling that a statute allowing state-chartered institutions to convert to federal charters without the state's permission violated the Tenth Amendment).

150. 296 U.S. 315 (1935).

151. *Id.* at 337.

152. *See Burke*, 414 F.3d 305 (2005); 12 C.F.R. § 7.4006 (2005) ("Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank.").

153. *See generally Burke*, 414 F.3d 305.

154. *See id.* at 312.

155. *See supra* text accompanying notes 128-29.

156. *See* CSBS Feb. 12, 2004 Press Release, *supra* note 28 (indicating that current preemptive regulations made by the OCC are outside of the scope of the OCC's authority granted by statute, and therefore not reasonable).

157. *See infra* notes 159-173 and accompanying text.

158. *See* NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 257-58 (1995) (applying the *Chevron* doctrine and upholding the Comptroller of Currency's broad decision-making power); *see also* Wells Fargo Bank of Tex., N.A. v. James, 321 F.3d 488, 494 (2003) (applying the *Chevron* doctrine and holding that in promulgating 12 C.F.R.

## C. *CHEVRON* DEFERENCE

The *Chevron* framework itself has also endured some criticism due to the result it yielded in *Burke*.[159] CSBS President Neil Milner complained, "The [*Burke*] decision shows, once again, how the Office of the Comptroller of the Currency has been allowed by the courts to use the *Chevron* doctrine as a weapon against the states— in effect, as an administrative bootstrap that permits the OCC to use Congressional silence to justify its self-created preemption of state law."[160]

It may be argued, furthermore, that the *Burke* court should not even have deferred to *Chevron* for the resolution of this case.[161] In *Solid Waste Agency of Northern Cook County v. U.S. Army Corp. of Engineers*,[162] the U.S. Supreme Court struck down an agency's interpretation of a federal statute because it in effect "permit[ed] federal encroachment upon traditional state power" absent any "indication that Congress intended that result."[163] Moreover, the Court added:

> Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.[164]

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§ 7.4002, the OCC operated within the sphere delegated it by Congress).

159. *See* CSBS May 28, 2004 Press Release, *supra* note 127.

160. *See id.*

161. *See* Solid Waste Agency of Northern Cook County v. U.S. Army Corp. of Engineers, 531 U.S. 159, 172-73 (2001) (explaining why the Supreme Court sided with states' rights over administrative deference by denying an agency's interpretation of a federal law where the interpretation worked to usurp state authority).

162. *Id.*

163. *Id.*

164. *Id.*; *see also* Atherton v. FDIC, 519 U.S. 213, 221 (1997) (demonstrating that banking is a traditional state activity).

Despite the constitutional questions raised by section 7.4006, however, the *Burke* Court did not require a "clear indication that Congress intended" federal law to preempt state law with respect to national bank operating subsidiaries. Instead, the Second Circuit held that the district court correctly applied the *Chevron* doctrine, which ultimately led to broad deference to section 7.4006.[165]

Not all cases concerning whether or not a federal law preempts a state statute require *Chevron* deference.[166] Moreover, in instances where a court does not apply the *Chevron* framework to a preemption question, there is a greater chance that the state law will not be preempted.[167] In *Bankwest, Inc. v. Baker*, for example, the Eleventh Circuit ruled that a Georgia Act, which regulated agreements between instate payday stores and out-of-state banks, was not preempted by the Federal Deposit Insurance Act (FDIA).[168] *Baker* was initiated by a series of out-of-state banks and payday loan corporations that were seeking an injunction against the enforcement of O.C.G.A. §§ 16-17-1 to 16-17-10 (Georgia Act). The court declined to apply the *Chevron* doctrine, and likewise ruled that federal law did not preempt the Georgia Act.[169]

However, there is a significant difference between the circumstances in *Baker* and those in *Burke*. *Baker* did not involve conflict preemption.[170] In other words, compliance with both state and federal laws in *Baker* was not impossible, and the state law at issue likewise did not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[171] Nevertheless, the plaintiffs in *Baker* did not want the Georgia Act to apply.[172] In its decision, the court noted, "Because 'a preemption determination involves matters . . . more within the expertise of the

165. Wachovia Bank, N.A. v. Burke, 414 F. 3d, 305, 315 (2d Cir. 2005).

166. *See* Bankwest, Inc. v. Baker, 411 F. 3d 1289, 1300 (11th Cir. 2005) (ruling that a state statute was not preempted by a federal statute, deciding not to apply *Chevron*).

167. *See generally id.*

168. *Id.*; *see also* Elizabeth Willoughby, *Bankwest v. Baker: Is it a Mayday for Payday Lenders in Rent-a-Charter Arrangements?*, 9 N.C. BANKING INST. 269, 281 (2005).

169. *Baker*, 411 F.3d,. at 1300.

170. *See id.*

171. *See* Fid. Fed. Savings & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153 (1982) (describing what is meant by "irreconcilable conflict").

172. *Baker*, 411 F.3d at 1299.

courts than within the expertise of' an administrative agency, we need not defer to an agency's opinion regarding preemption."[173]

## V. CONCLUSION

In *Burke*, the Second Circuit took a stance on the controversial issue of preemption, establishing its position in the ongoing national debate. The importance of the decision is unquestionable.[174] If the court had ruled for the Commissioner, future courts would be faced with ruling opposite a federal circuit's precedent if in favor of preemption for operating subsidiaries.

There are arguments that *Burke* results in bad policy and was decided incorrectly due to its deference to an invalid regulation.[175] Many believe that the practical effect of *Burke* is to essentially make states' citizens more vulnerable to improper practices by national banks and their operating subsidiaries.[176] Another argument is that the OCC preemption regulations are unreasonable and should have therefore failed the second prong of the *Chevron* analysis.[177] It may also be argued that either the Second Circuit should not have applied *Chevron* in this case, or that the *Chevron* doctrine itself provides a standard that is too lenient for federal agencies to meet when enacting law.[178]

Nonetheless, the effects of *Burke* are already noticeable in courts throughout the nation.[179] Yet, the potential effect of the decision, coupled with the OCC's expansive preemption policies, may be much greater. *Burke* dealt with national banks' use of operating subsidiaries

173. *Id.* at 1301 (citing Colo. Pub. Utilities Comm'n v. Harmon, 951 F.2d 1571, 1579 (10th Cir. 1991)).

174. *See supra* notes 96-117 and accompanying text.

175. *See supra* notes 118-73 and accompanying text.

176. *See* CSBS Jan. 8, 2004 Press Release, *supra* note 126; *see also* CSBS Feb. 12, 2004 Press Release, *supra* note 28 (explaining the CSBS's reaction to the OCC's preemption regulations).

177. *See supra* notes 127-158 and accompanying text.

178. *See* CSBS May 28, 2004 Press Release, *supra* note 127 (demonstrating the CSBS's criticism of the *Chevron* doctrine).

179. *See* Wells Fargo Bank v. Boutris, 419 F.3d 949 (9th Cir. 2005) (explaining why the Ninth Circuit upheld the district court's ruling that the Commissioner could not enforce CRMLA or the CFLL against WFHMI because federal regulations preempt state regulations with respect to national bank operating subsidiaries); *see also* Zindler, *supra* note 97 ("The U.S. Court of Appeals for the Ninth Circuit in San Francisco upheld a lower court's ruling that California regulators' attempt to require a Wells Fargo & Co. subsidiary to hold a state license to offer mortgages was not legal.").

in the broad arena of mortgage lending.[180] Therefore, its relevance with respect to this aspect of banking law is immediate. It remains to be seen, however, whether national banks will utilize *Burke* and current OCC policy to expand their use of operating subsidiaries into other contexts as well.

RUSSELL J. ANDREW

180. *See* Wachovia Bank, N.A. v. Burke, 414 F.3d 305 (2d Cir. 2005).