
Louis P. Malick

I. Introduction

The Supreme Court held in *Cuomo v. Clearing House Ass’n, L.L.C.* that state attorneys general may bring suit against national banks to enforce non-preempted state laws. In so doing, the Court invalidated a federal regulation interpreting the National Bank Act that gave the Office of the Comptroller of the Currency exclusive visitatorial control over national banks. Although the Court made clear that the states’ role is limited to law enforcement and does not include administrative control, this new rule has the potential to subject national banks to “unduly burdensome and duplicative state regulation”—the very difficulty the National Bank Act was designed to prevent. The recent financial crisis has spurred calls for more expansive regulation of financial institutions, but these arguments go too far. Consumers need smarter regulation, and not just more regulation from multiple levels of government. *Cuomo* may have opened a Pandora’s Box of conflicting regulation and inconsistent enforcement by fifty states that will be of untold cost to the banking industry and, by extension, consumers.

II. The Case

In the course of investigating the lending practices of certain banks and their subsidiaries operating in New York, New York Attorney General Eliot Spitzer noticed
racial disparities in data concerning home loan prices. The Attorney General advised several of these national banks of his investigation through “letters of inquiry” and asked the banks to voluntarily disclose non-public lending information “[i]n lieu of issuing a formal subpoena.” The Office of the Comptroller of the Currency (“OCC”) filed a complaint and moved for a preliminary injunction against the Attorney General, claiming the investigation intruded on the OCC’s exclusive authority as visitor of national banks. The Attorney General conceded that his action was barred by an OCC regulation interpreting the National Bank Act (“NBA”) to vest the OCC with exclusive visitorial power, but argued that the regulation was “an impermissible construction” of the statute.

The Clearing House Association, L.L.C. (“Clearing House”) brought a separate action against the Attorney General on the same day. The action raised many of

9. Id. at 388 (internal citation omitted). These national banks included Citibank, N.A., JPMorgan Chase Bank, N.A., HSBC Bank USA, N.A., and Wells Fargo Bank, N.A. Id. at 387. The Attorney General pointed to N.Y. EXEC. § 296-a(1) (McKinney 2009), which provides:

“It shall be an unlawful discriminatory practice for any creditor or any officer, agent or employee thereof: . . . In the case of applications for credit with respect to the purchase . . . of any housing accommodation . . . to discriminate against any such applicant because of the race . . . of such applicant . . . in the granting, withholding, extending or renewing, or in the fixing of the rates, terms or conditions of, any such credit.”

The Attorney General relied for enforcement authority on N.Y. EXEC. § 63(12) (McKinney 2009), which allows the attorney general to apply for an injunction in state court “[w]henever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business.”
10. Id. at 387.
11. Id. at 388.
12. 12 C.F.R. § 7.4000(a)(1) (2009) (“Only the OCC or an authorized representative of the OCC may exercise visitorial powers with respect to national banks, except as provided in paragraph (b) of this section. State officials may not exercise visitorial powers with respect to national banks, . . . except in limited circumstances authorized by federal law.”). See also id. at § 7.4000(b)(2) (“Exception for courts of justice. National banks are subject to such visitorial powers as are vested in the courts of justice. This exception pertains to the powers inherent in the judiciary and does not grant state or other governmental authorities any right to inspect, supervise, 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 under Federal law.”).
14. Clearing House Ass’n, L.L.C. v. Spitzer, 394 F. Supp. 2d 620, 623 (S.D.N.Y. 2005). The Clearing House is owned by several commercial banks and was “established in 1853 to simplify the exchange of checks and improve the efficiency of the payments system . . . [and today] provides payment services for check, electronic
the same issues as the complaint brought by the OCC, but the Clearing House also sought to enjoin the Attorney General from “[suing] national banks in the state’s parens patriae capacity for alleged violations of the [Fair Housing Act’s] fair lending provisions.” The district court accepted the two cases as related and consolidated the trials with hearings on the applications for preliminary injunctions pursuant to Federal Rule of Civil Procedure 65(a)(2).

The district court applied the framework prescribed by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, for determining whether a federal agency’s regulation represents a permissible construction of its statutory authority. The district court noted that *Chevron* directs a court to defer to an agency’s interpretation of a statute where the statute is silent or ambiguous on the specific question at issue. The Attorney General argued that, contrary to the OCC’s interpretation, the NBA was only meant to prohibit “state administrative officials from directly supervising national banks,” and did not prohibit state law enforcement officials from enforcing state laws through judicial process. The district

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15. *Clearing House Ass’n*, 394 F. Supp. 2d at 622. A provision of the federal Fair Housing Act, codified at 42 U.S.C. § 3613 (2006), provides a civil cause of action for an “aggrieved person[,]” § 3613(a), to sue for damages or injunctive relief based on “a discriminatory housing practice[,]” § 3613(c). *Parens patriae* is “[a] doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen . . . . [however t]he state ordinarily has no standing to sue on behalf of its citizens, unless a separate, sovereign interest will be served by the suit.” *Black’s Law Dictionary* 1221 (9th ed. 2009).


> Consolidation of Hearing With Trial on Merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.


18. See OCC v. Spitzer, 396 F. Supp. 2d 383, 391 (2005). The court rejected the Attorney General’s argument that the court should instead apply a “presumption against preemption” or at least “a heightened degree of judicial skepticism” because the OCC’s interpretation of the National Bank Act “interferes with the traditional state interest in enforcing its own laws, and in protecting its citizens from discriminatory conduct.” Id. at 391–92. Instead, the court followed *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 314 (2d Cir. 2005) (“The presumption against federal preemption disappears . . . in fields of regulation that have been substantially occupied by federal authority for an extended period of time. Regulation of federally chartered banks is one such area.”) (quoting Flagg v. Yonkers Sav. & Loan Ass’n, 396 F.3d 178, 183 (2d Cir. 2005), *cert. denied*, 546 U.S. 817 (2005)).


20. See id. at 394.
The district court determined that the OCC regulation was in line with the Act’s objective of creating a comprehensive and exclusive scheme of federal banking regulation. The OCC’s regulation was thus reasonable and entitled to *Chevron* deference. The district court therefore enjoined the Attorney General from enforcing state or federal fair lending laws against national banks through the judicial process or by compelling national banks’ compliance with extra-judicial state investigations.

In the related *Clearing House* action, the district court found that the OCC’s interpretation that the NBA vested the OCC with exclusive visitorial authority over national banks prohibited a *parens patriae* action against national banks because *parens patriae* standing doctrine requires states to invoke a quasi-sovereign authority.

The Attorney General argued that a Fair Housing Act provision allowing enforcement actions by “aggrieved persons” represented a congressional grant of *parens patriae* authority that fell within the “authorized by [federal law]” exception of the NBA. Although the district court acknowledged that rights of action for aggrieved persons could allow states to enforce federal rights through *parens patriae* actions, the court found that it could not resort to general *parens patriae* principles in this

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21. See id. at 397. The court also found that, because residential mortgage lending is authorized by federal banking law and the OCC has power both to regulate lending activity and to enforce state and federal laws against national banks. See id. at 395. The Supreme Court’s holding in *First Nat’l Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924), “did not foreclose the OCC from interpreting [the Act]’s limitation on visitorial powers to encompass state efforts to enforce non-preempted state laws that regulate the business of banking.” OCC, 396 F. Supp. 2d at 396.


23. See id. at 404.

24. See id. at 407.

25. See *Clearing House Ass’n v. Spitzer*, 394 F. Supp. 2d 620, 628 (S.D.N.Y. 2005). The court reviewed the *parens patriae* doctrine as discussed in *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez*, 458 U.S. 592, 607 (1982) (explaining that, in order to establish standing, “[a] State must articulate an interest apart from the interests of particular private parties . . . . [t]he State must express a quasi-sovereign interest . . . [and the State must allege] injury to a sufficiently substantial segment of its population”). See also *New York v. 11 Cornwall Co.*, 695 F.2d 34, 40 (2d Cir. 1982), *vacated on other grounds*, 718 F.2d 22 (2d Cir. 1983) (en banc) (“*Parens patriae* standing also requires a finding that individuals could not obtain complete relief through a private suit.”).

26. See 42 U.S.C. § 3613(a)(1)(A) (2006) (“An aggrieved person may commence a civil action . . . to obtain appropriate relief with respect to such discriminatory housing practice or breach.”). See also 42 U.S.C. § 3602(i) (2006) (“‘Aggrieved person’ includes any person who – (1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur.”).


28. See *Clearing House*, 394 F. Supp. 2d at 628; see also *Connecticut v. Physicians Health Servs. of Conn.*, Inc., 287 F.3d 110, 121 (2d Cir. 2002) (approving district court’s statement that “the federal statutes under which states have been granted *parens patriae* standing all contain broad civil enforcement provisions that ‘permit suit by any ‗person‘ that is ‗injured‘ or aggrieved”).
case. Instead, the court examined the statutory scheme and found that, because the FHA enforcement provisions were “carefully drawn” and Congress explicitly created narrow exceptions through which states might exercise visitatorial authority over national banks, the FHA “aggrieved persons” provision did not constitute congressional authorization for states to enforce FHA fair lending provisions against national banks by bringing parens patriae actions. The district court therefore enjoined the Attorney General from using the state’s parens patriae authority to judicially enforce FHA provisions against national banks.

The Second Circuit affirmed the district court’s judgment in OCC, but vacated the judgment in Clearing House because the issue of FHA enforcement was not yet ripe for review. Writing for the panel, Judge Parker applied the Chevron framework and rejected the Attorney General’s arguments that Chevron should not apply because there was no clear congressional intent to prohibit states from enforcing non-preempted state laws against national banks.

Although the Second Circuit found that the precise meaning of “visitorial powers” was not clear from either the text of the National Bank Act or its common law interpretation, it declined to accept the Attorney General’s argument that “visitorial powers” only referred to administrative authority over national banks—especially in light of the Supreme Court’s recent implication in Watters v. Wachovia Bank,

29. See id. at 629 (citing Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 259 (1972)).
30. See id. at 629, 630–31. See also Physicians Health Servs. of Conn., 287 F.3d at 121–22 (holding that states have no parens patriae standing where the statute at issue does not specifically provide for parens patriae actions and the statute does not evince a clear Congressional intent to allow such actions).
32. Clearing House Ass’n, L.L.C. v. Cuomo, 510 F.3d 105, 110, 122–23 (2d Cir. 2007). Because the Clearing House’s claim for permanent injunctive relief was not yet ripe, the district court lacked jurisdiction and the Second Circuit therefore remanded the claim with instructions to dismiss. Id. at 124–25. Anthony Cuomo was automatically substituted as appellant in place of former Attorney General Eliot Spitzer per Fed. R. App. P. 43(c)(2). Id. at 105. This rule provides:
(2) Automatic Substitution of Officelholder. When a public officer who is a party to an appeal or other proceeding in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate. The public officer’s successor is automatically substituted as a party. Proceedings following the substitution are to be in the name of the substituted party, but any misnomer that does not affect the substantial rights of the parties may be disregarded. An order of substitution may be entered at any time, but failure to enter an order does not affect the substitution.

33. Id. at 114. Like the district court, the Second Circuit found that no presumption against federal preemption applies to national bank regulation because it has long been an area of federal concern. Id. at 113 (citing Wachovia Bank, N.A. v. Burke, 414 F.3d 305, 314 (2d Cir. 2005)).
34. Id. at 117.
N.A. 35 “that investigation and enforcement by state officials are just as much aspects of visitorial authority as registration and other forms of administrative supervision.” 36 Because the underlying statute was ambiguous, the court proceeded to determine whether the OCC’s regulation was a permissible construction of the statute. 37 The court remarked that “[t]he OCC’s analysis is at or near the outer limits of [Chevron]” because the OCC engaged in little fact-finding and “accretes a great deal of regulatory authority to itself at the expense of the states through rulemaking lacking any real intellectual rigor or depth.” 38 Nevertheless, the court found that the OCC’s regulation was a permissible construction of the statute because it struck a proper balance between establishing a uniform system of federal regulation for national banks and preserving state sovereignty over national banks in areas other than “[federally] authorized banking powers.” 39

Judge Cardamone agreed with the court’s judgment that the district court lacked jurisdiction to hear the Clearing House’s claim regarding the FHA. 40 He dissented, however, because the OCC’s regulation “[casts] the states into a permanent junior or inferior position vis-à-vis the national government.” 41 He feared that the regulation “portends the power to destroy the constitutional concept of federalism, an indispensable component of our free society.” 42

The Supreme Court granted certiorari 43 to determine whether the OCC’s regulation was a reasonable construction of the NBA. 44

III. Legal Background

Administrative agencies have no authority other than that given by legislative enactment. 45 They exist to make regulations and manage programs in such a way

35. 550 U.S. 1, 21 (2007) (invalidating Michigan registration and inspection requirements as applied to mortgage lending subsidiaries of national banks because “state regulators cannot interfere with the ‘business of banking’ by subjecting national banks or their OCC-licensed operating subsidiaries to multiple audits and surveillance under rival oversight regimes”).
38. Id. at 119.
39. Id. at 120.
40. Id. at 126 (Cardamone, J., concurring in part, and dissenting in part).
41. Id.
42. Id.
45. See La. Public Serv. Comm’n v. F.C.C., 476 U.S. 355, 374 (1986) (“[A]n agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.”).
that carries out Congress’s legislative intent. When a plaintiff challenges an administrative regulation promulgated by a federal agency, a reviewing court must apply the Supreme Court’s Chevron framework to determine whether the agency’s interpretation is entitled to deference as a permissible construction of its statutory authority. Congress gave the federal Office of the Comptroller of the Currency (“OCC”) the authority to regulate national banks by enacting the National Bank Act of 1864. The OCC interpreted the NBA as giving it exclusive visitorial powers over national banks. Visitation is a broad common law public right that legislatures exercise to oversee the corporations they charter. Courts have traditionally interpreted the NBA as a shield that protects national banks from state regulation. The Supreme Court recently reaffirmed that national banks are subject only to federal regulation and that states may not interfere with their activities.

A. Where a statute is silent or ambiguous on a particular issue, courts will ordinarily defer to an administrative agency’s interpretation of the statute

In Chevron, U.S.A. v. Natural Resources Defense Council, the Supreme Court established a two-step framework courts use when determining whether a federal agency’s regulation is a valid interpretation of a statute it is charged to administer. First, the court must determine whether Congress has clearly and directly addressed the precise question at issue. If the statute is unambiguous, the statute controls: “the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” If the statute is ambiguous, however, the court must then determine

46. See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213–14 (1976) ("The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute."') (quoting Dixon v. United States, 381 U.S. 68, 74 (1965)).
48. See infra Part III.A. See also Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 739 (1996) (citing Chevron, 467 U.S. at 842–45) (noting that disagreement in interpretation of statute between two state high courts suggested statute was ambiguous, and that "[i]t is our practice to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering").
50. See 12 C.F.R. § 7.4000(a)(1) (2009). See also infra Part III.D.
51. See infra Part III.C.
52. See infra Part III.B.
55. Id. at 842–44.
56. Id. at 842.
57. Id. at 842–43. For example, in Watters, the Court concluded that the NBA unambiguously prohibited states from regulating operating subsidiaries of national banks. Watters, 550 U.S. at 15. The NBA expressly au-
“whether the agency’s answer is based on a permissible construction of the statute.”

58. Chevron, 467 U.S. at 843. For example, in NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251 (1995), the Court upheld an OCC decision granting permission to a national bank to sell annuities. Id. at 254. The Court concluded that it was permissible for the OCC to construe the “business of banking” over which the OCC has exclusive visitorial authority to include the sale of annuities. Id. at 263–64. See also Ramyn Atri, Comment, Cuomo v. Clearing House Association: The Latest Chapter in the OCC’s Pursuit of Chevron Deference, 14 N.C. BANKING INST. 467, 474–75 (2010).

59. Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Serv., 545 U.S. 967, 982 (2005). In Brand X, the Court held that Chevron required deference toward a Federal Communications Commission ruling that broadband internet providers were telecommunications carriers exempt from mandatory regulation under the Communications Act of 1934—even in the face of a contrary judicial interpretation—because the statute at issue was ambiguous. Id. at 982–83. The Court worried that a contrary rule would mean that the controlling interpretation would be the interpretation which was first in time, rather than the interpretation which was a more logical construction of the statute. Id. at 983.

60. Id. at 980. See also G & T Terminal Packaging Co. v. U.S. Dep’t of Agric., 468 F.3d 86, 95 (2d Cir. 2006) (“[U]nless we find the [agency’s] construction of the statute to be ‘arbitrary, capricious, or manifestly contrary to the statute,’ we must yield to that construction of the statute even if we would reach a different conclusion of our own accord.”) (quoting Chevron, 467 U.S. at 844) (citations omitted). In Chevron, for example, the Court sustained regulations promulgated by the Environmental Protection Agency as a permissible construction of the Clean Air Act. 467 U.S. at 845. The Court found that the EPA Administrator fairly reconciled two competing policy goals: reducing air pollution and allowing for economic growth. Chevron, 467 U.S. at 866. The Court concluded:

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.

Id. In Smiley v. Citibank (S.D.), N.A., 517 U.S. 735 (1996), the Court upheld an OCC regulation interpreting “interest” in 12 U.S.C. § 85 to include late payment fees. See 12 C.F.R. § 7.4001(a) (1996). A credit card customer challenged a late payment fee enforced by her bank in South Dakota because it would be illegal in her domiciliary of California. Smiley, 517 U.S. at 737–38. The Court found that the statute, which provided that national banks may charge “interest at the rate allowed by the laws of the State . . . where the bank is located,” was ambiguous at least in part because the supreme courts of California and New Jersey had reached opposing
B. The National Bank Act was intended to shield national banks from both hostile and neutral state regulation

The National Bank Act was enacted by the Thirty-Eighth Congress in 1864\(^1\) and is now codified at 12 U.S.C. § 484. In its current form, the Act provides:

(a) No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

(b) Notwithstanding subsection (a) of this section, lawfully authorized State auditors and examiners may, at reasonable times and upon reasonable notice to a bank, review its records solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws.\(^2\)

The Act generally places national banks under federal regulatory control, with a limited exception for states to enforce their own unclaimed property or escheat laws.\(^3\) The Act was intended “[t]o prevent inconsistent or intrusive state regulation from impairing the national [banking] system,” and courts “have repeatedly made

\(^{1}\) 13 Stat. 99 (1864), now codified at 12 U.S.C. § 484 (2006). In particular, Chapter 106 § 54 provides “[t]hat the comptroller of the currency . . . shall appoint a suitable person or persons to make an examination of the affairs of every banking association . . . . And the association shall not be subject to any other visitorial powers than such as are authorized by this act, except such as are vested in the several courts of law and chancery.”


\(^{3}\) See, e.g., State by Lord v. First Nat’l Bank of St. Paul, 313 N.W.2d 390, 392 (Minn. 1981). In Lord, the court found that the NBA did not preempt a state from requiring a national bank to open its records to the Minnesota state treasurer “to determine if the bank has complied with the Minnesota Uniform Disposition of Unclaimed Property Act.” Id. The court found that such inspection did not constitute visitorial powers and therefore did not fall within the OCC’s exclusive purview. Id. The Lord court was interpreting an older version of § 484 than the Court in Cuomo, however, paragraph (b) of the statute was not added until the 1982 version, a result of P.L. 97-320 (1982), 96 Stat. 1469 and 97-467. It is not clear whether this change was in response to the Lord case or not. See also Anderson Nat’l Bank v. Luckett, 321 U.S. 233 (1944). In Luckett, a national bank sued the Kentucky Commissioner of Revenue challenging a state law as applied to national banks which required banks “to turn over to the state, deposits which have remained inactive and unclaimed for specified periods.” Id. at 236. The Court upheld the Kentucky statute because it was a permissible extension of the ancient common law doctrine of escheat to presumptively abandoned funds and it did not discriminate against national banks. See id. at 251–53.
clear that federal control shields national banking from unduly burdensome and duplicative state regulation.\textsuperscript{65}

The Court made clear as early as 1896 that national banks are constructions of federal law and states may not attempt "to define their duties or control the conduct of their affairs" wherever such attempt would conflict with federal law, frustrate the purpose of national banks, or impair their efficiency.\textsuperscript{66} The Court has recently traced federal control of national banking as far back as \textit{M'Culloch v. Maryland}\textsuperscript{67}—some 45 years before the National Bank Act was passed in 1864—where Chief Justice Marshall, writing for the Court, held that states could not constitutionally levy taxes on federally-created national banks.\textsuperscript{68} In \textit{Easton v. Iowa},\textsuperscript{69} the Court noted that state legislatures may not interfere with national banks, "whether with hostile or friendly intentions."\textsuperscript{70} In \textit{Easton}, the Court struck down state legislation that was intended to boost public confidence in national banks by requiring a "higher degree of diligence" of bank officers because it found that Congress had not "intended to leave the field open for the States to attempt to promote the welfare and stability of national banks by direct legislation."\textsuperscript{71} The Court warned that "[i]f [states] had such power it would have to be exercised and limited by their own discretion, and confusion would necessarily result from control possessed and exercised by two independent authorities."\textsuperscript{72}

Federal control is not absolute, however. The Court has long held that "national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks’ functions."\textsuperscript{73} In \textit{First

\textsuperscript{65} Watters v. Wachovia Bank, N.A., 550 U.S. 1, 11 (2007) (holding that national bank subsidiary was not subject to state registration requirements or state supervision because "[d]iverse and duplicative superintendence of national banks' engagement in the business of banking . . . is precisely what the NBA was designed to prevent." \textit{Id.} at 13–14). \textit{See also} Beneficial Nat’l Bank v. Anderson, 538 U.S. 1, 10–11 (2003) (holding that cause of action against national banks for usury arose under federal law for purposes of motion to remove case to federal court, in part because "[u]niform rules limiting the liability of national banks and prescribing exclusive remedies for their overcharges are an integral part of a banking system that needed protection from ‘possible unfriendly State legislation.’") (quoting \textit{Tiffany v. Nat’l Bank of Mo.}, 85 U.S. 409, 412 (1873) (discussing need to protect national banks from state legislation regarding interest rates)).


\textsuperscript{67} 17 U.S. (4 Wheat.) 316 (1819).

\textsuperscript{68} \textit{See id.} at 436.

\textsuperscript{69} 188 U.S. 220 (1903).

\textsuperscript{70} \textit{Id.} at 238.

\textsuperscript{71} \textit{Id.} at 231–32. The Court found that state legislation requiring officers of national banks to suspend operations when the bank became insolvent would not benefit banks because it would limit the directors’ business discretion and even impose criminal penalties for exercising that discretion. \textit{Id.} at 232.

\textsuperscript{72} \textit{Id.}

\textsuperscript{73} Anderson Nat’l Bank v. Luckett, 321 U.S. 233, 248 (1944) (upholding a state forfeiture law for abandoned accounts as applied to national banks).
National Bank in St. Louis v. Missouri, the Court upheld a Missouri statute prohibiting branch banks—even of federally chartered national banks—because it did not “interfere with the purposes of [national banks’] creation, tend to impair or destroy their efficiency as federal agencies or conflict with the paramount law of the United States.” Having deemed the state law valid, the Court found that the state had the power to enforce it, “for such power is essentially inherent in the very conception of law.” The Court clarified this proposition in Watters, noting that “when state prescriptions significantly impair the exercise of authority, enumerated or incidental under the NBA, the State’s regulations must give way.”

C. Legislatures exercise common law visitorial powers over the corporations they charter as a public right

The legal doctrine of visitorial powers has a long common law history. In Dartmouth College v. Woodward Justice Story traced “visitation” from the king’s power at common law over civil corporations. Justice Story characterized visitation as a property right whereby, in the case of eleemosynary corporations, the founders or their assignees may “visit, inquire into, and correct all irregularities and abuses in such corporations, and to compel the original purposes of the charity to be faithfully fulfilled.” In Guthrie v. Harkness, the Court explained that in the United States the crown was replaced by the legislature, which acts as “visitor of all corporations created by it . . . and may direct judicial proceedings against such corporations for such abuses or neglects as would at common law cause forfeiture of their charters.” In civil corporations visitation was very much a “public right” that belonged to the state. A nineteenth century court defined visitation as “the act of a superior

74. 263 U.S. 640 (1924).
75. Id. at 656.
76. Id. at 660.
77. Watters v. Wachovia Bank N.A., 550 U.S. 1, 12 (2007). In Watters, the Court struck down a state law requiring operating subsidia ries of national banks which engaged in the mortgage business to register with the state and submit to state supervision and inspection. Id. at 21.
78. 17 U.S. (4 Wheat.) 518 (1819).
79. Id. at 666–77 (Story, J., concurring).
80. Id. at 673 (citing 1 B. & C. 480). In the case of Dartmouth College, Justice Story found the visitors “may amend and repeal its statutes, remove its officers, correct abuses, and generally superintend the management of the trusts.” Id. at 676.
81. 199 U.S. 148 (1905).
82. Id. at 158 (citation omitted). The Court noted that American corporations could have private visitors, but this was rare and “in the absence of such, the State is the visitor of all corporations.” Id.
83. Id. at 158–59 (rejecting the view that visitation “would include the private right of the shareholder to have an examination of the business in which he is interested, and the right of discovery of the methods and means by which the agents of the corporation are conducting its affairs”).
or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations.”

In Watters, the Supreme Court reaffirmed the definition of “visitation” it established in Guthrie as “the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations.”

D. The OCC adopted a broad reading of “visitation” and made clear that it exercises exclusive visitorial control over national banks

Congress has vested authority to regulate national banks in the OCC. The OCC clarified 12 U.S.C. § 484 by promulgating 12 C.F.R. 7.4000. This regulation defines visitation as “[e]xamination of a bank; [i]nspection of a bank’s books and records; [r]egulation and supervision of activities authorized or permitted pursuant to federal banking law; and [e]nforcing compliance with any applicable federal or state laws concerning those activities.” More importantly, the regulation gives a general rule that

[o]nly the OCC or an authorized representative of the OCC may exercise visitorial powers with respect to national banks . . . . State officials may not exercise visitorial powers with respect to national banks, such as conducting examinations, inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions, except in limited circumstances authorized by federal law.

The regulation lists several exceptions to the OCC’s exclusive authority, most notably for “courts of justice,” as mandated by the NBA. Nevertheless, the OCC

84. First Nat’l Bank of Youngstown v. Hughes, 6 F. 737, 740 (C.C.N.D. Oh. 1881). The court here found that a county attorney’s subpoena for deposit records in the course of a tax fraud investigation did not involve visitorial powers, and therefore the bank should honor the state court subpoena. Id. at 741–43.
86. See 12 U.S.C. § 93a (2006) (“Except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to another regulatory agency, the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office . . . .
89. Id. at § 7.4000(a)(1). This regulation may have been a response to the Court’s holding in Barnett Bank of Marion County v. Nelson, 517 U.S. 25 (1996) (arguing that a federal statute allowing national banks to sell insurance preempted a Florida statute prohibiting the practice). See Atri, supra note 58, at 470–71.
interpreted this exception as pertaining only “to the powers inherent in the judiciary” and not as an exception whereby states might “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 under Federal law.” The OCC thus construed its statutory grant of authority as a broad mandate whereby the OCC is, for nearly all purposes, the exclusive regulator and law enforcer of national banks and the National Bank Act’s exceptions to that authority are given only minimal effect.

The Supreme Court appeared to accept the OCC’s position that Congress had vested it with exclusive visitorial powers over national banks as recently as 2007. In Watters v. Wachovia Bank, N.A., the Court held that when exercising the function of a national bank, a national bank or its subsidiaries “is subject to OCC’s superintendence, and not to the licensing, reporting, and visitorial regimes of the several States in which the subsidiary operates.” Michigan law required mortgage lenders, including subsidiaries of national banks, to register with a state office and submit to state supervision. After Wachovia Mortgage became a wholly owned subsidiary of its parent national bank, Wachovia Bank, it claimed exemption from the state registration and reporting requirements. The state informed Wachovia Mortgage that, without a state license, “it would no longer be authorized to conduct mortgage lending activities in Michigan.” Writing for the Court, Justice Ginsburg noted that “federal control shields national banking from unduly burdensome and duplicative state regulation” and that states may not restrict a national bank’s exercise of any power granted or implied by the NBA. Justice Ginsburg warned that, were Michigan to have its way, national banks could face different regulatory schemes in every state—“precisely what the NBA was designed to prevent.” Therefore, Justice Ginsburg found, “[t]he NBA is thus properly read by OCC to protect from state

92. See Arthur E. Wilmarth, Jr., The OCC’s Preemption Rules Exceed the Agency’s Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection, 23 ANN. REV. BANKING & FIN. L. 225, 233–37 (2004) (concluding that the OCC’s January 2004 amendments to § 7.4000 preempted the application of all state laws to national banks, with two exceptions: state-law standards expressly incorporated in federal statutes, and general state laws which do not regulate the business of banking).
94. Id. at 7.
95. Id. at 8.
96. Id. at 8–9.
97. Id. at 9.
98. Id. at 8.
99. Id. at 11, 13. The Court in Watters found that federal preemption of state banking laws extends not just to the national banks themselves, but also to their state-chartered operating subsidiaries. Id. at 17–20.
100. Id. at 14.
hindrance a national bank’s engagement in the ‘business of banking’ whether con-
ducted by the bank itself or by an operating subsidiary, empowered to do only what
the bank itself could do.”

Other courts have also accepted the NBA as vesting the OCC with exclusive visi-
torial powers, and have at least tacitly approved various OCC regulations proclaim-
ing that interpretation. In *Capital One Bank (USA), N.A. v. McGraw*, a
district court relied on both *Watters* and the Second Circuit’s holding in *Cuomo* to find that
the West Virginia Attorney General’s issuance of subpoenas to a national bank as
part of an investigation of credit card customers’ complaints was an impermissible
infringement on the OCC’s visitorial powers. In *Wells Fargo Bank, N.A. v. Bou-
tris*, the Ninth Circuit held that the NBA preempted the California Commissioner
of Corporations from enforcing state visitation laws, and therefore the Commis-
sioner had no power to order regulatory audits of national bank operating subsidi-
aries. In *National State Bank, Elizabeth, N.J. v. Long*, the Third Circuit held that
the National Bank Act prohibited the New Jersey Commissioner of Banking from
enforcing anti-redlining statutes against national banks. On the other hand, the
OCC’s jurisdiction is not limitless. As the court pointed out in *Hatch v. Fleet Mort-
gage Corp.*, the OCC does not have exclusive enforcement power over claims that
“do not directly concern a banking practice” or “are not banking industry specific,”
such as general consumer fraud or false advertising claims.

**IV. The Court’s Reasoning**

Writing for the Court, Justice Scalia considered the question “whether the [OCC]’s
regulation purporting to pre-empt state law enforcement can be upheld as a reason-
able interpretation of the National Bank Act.” Justice Scalia concluded that the
OCC’s regulation was only a reasonable interpretation of the NBA insofar as it pro-

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103. Id. at 617.
104. 419 F.3d 949 (9th Cir. 2005).
105. Id. at 964.
106. 630 F.2d 981 (3d Cir. 1980).
107. Id. at 988–89. The regulation at issue in *Long* was 12 C.F.R. § 7.6025(b) (1980).
109. Id. at 966. The court in *Fleet Mortgage* denied a national bank’s motion to dismiss claims brought by
Minnesota Attorney General Mike Hatch for data sharing, inadequate disclosure to customers, and deceptive
telemarketing. See also Matthew J. Nance, Note, The OCC’s Exclusive Visitorial Authority over National Banks
Justices Stevens, Souter, Ginsburg, and Breyer. Id. at 2714.
hibited states from “conducting examinations [and] inspecting or requiring the production of books or records of national banks” in terms of states’ role as “supervisor of corporations.” Justice Scalia held that the regulation could not reasonably prohibit a state attorney general from suing a national bank to enforce non-preempted state law, because in civil enforcement actions states act in the role of “sovereign-as-law-enforcer” rather than “sovereign-as-supervisor.” In this case, however, the Attorney General had not brought a judicial enforcement action; he had merely threatened to issue executive subpoenas. The Court therefore affirmed the district court’s injunction barring the Attorney General from issuing executive subpoenas, but vacated the portion of the injunction barring the Attorney General from bringing judicial enforcement actions.

Justice Scalia acknowledged that the term “visitorial powers” was at least somewhat ambiguous, but not sufficiently uncertain as to require the Court to give Chevron deference to the OCC’s interpretation. Justice Scalia found that, even viewing the convoluted evolution of visitation “through the clouded lens of history,” the outer limits of “visitorial powers” do not include “ordinary enforcement of the law.” Justice Scalia pointed to “the well established distinction between supervision and law enforcement” and construed the Court’s recent holding in Watters as only prohibiting states from exercising “general supervision and control” over national bank subsidiaries, because “multiple audits and surveillance under rival oversight regimes’ would cause uncertainty.” Justice Scalia also noted that, even within the federal government, the OCC does not enjoy exclusive law enforcement powers over national banks. Unlike the OCC, Justice Scalia reasoned that the “courts of justice” exception to the NBA did not refer merely to inherent powers of the judiciary, but instead allowed state attorneys general to enforce state laws through the courts—thereby “[preserving] a regime of exclusive administrative

111. Id. (quoting 12 C.F.R. § 7.4000(a)(1) (2009)).
112. Id.
113. Id. at 2722.
114. Id.
115. Id. at 2715.
116. Id.
117. Id. at 2717.
118. Id. (citing Bank of America Nat. Trust & Sav. Ass’n v. Douglas, 105 F.2d 100, 105–06 (D.C. Cir. 1939)).
119. Id. at 2718; see 12 C.F.R. § 7.4000(b)(2) (2009) (“Exception for courts of justice. National banks are subject to such visitorial powers as are vested in the courts of justice. This exception pertains to the powers inherent in the judiciary and does not grant state or other governmental authorities any right to 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 under Federal law.”).
oversight by the [OCC] while honoring in fact rather than merely in theory Congress’s decision not to pre-empt substantive state law.”

Justice Thomas concurred in part and dissented in part because he considered the OCC’s interpretation of visitorial powers to be a reasonable construction of the NBA. Justice Thomas reasoned that “visitation” can have multiple reasonable meanings—including both the OCC’s broad dictionary definition “and a common-law history suggesting that the scope of the visitor’s authority varied in accordance with the nature of the organization under supervision.” Although not as narrow as the reading the Attorney General advocated, Justice Thomas noted that the OCC did choose “a more modest construction than could have been supported by the common-law and dictionary definition,” making the OCC’s interpretation seem more reasonable.

V. Analysis

Attorney General Cuomo hailed the Court’s ruling as “a huge win for consumers across the nation” that “reaffirms the vital role State Attorneys General play in protecting consumers from illegal and improper practices by our country’s biggest and most powerful banks.” Nevertheless, the national banking system will likely suffer from dual state and federal law enforcement. Our federalist system has always had the feature (or problem) of dual federal and state regulation in many areas, and banking is no different. States do have a legitimate role in certain banking regulation, but courts should take care to define separate spheres for federal and state banking regulation. Otherwise, a “national patchwork of conflicting regula-
tions” could easily result. The Supreme Court should have accepted the OCC’s regulation as a permissible construction of the NBA and affirmed the judgments below. The Court’s division between “sovereign-as-law-enforcer” and “sovereign-as-supervisor” will likely prove to be a distinction without a difference. The Court should have done more to delineate the respective scopes of federal and state regulation, and will likely need to address this in a future case.

A. The Supreme Court should have accepted the OCC regulation as a permissible construction of the National Bank Act

The NBA is, at best, ambiguous in its reference to “visitorial powers.” Therefore, under the Chevron framework, the Court should have given greater deference to the OCC’s interpretation that it possessed exclusive visitorial authority over national banks and accepted the regulation as a permissible construction of the statute. Under Chevron, the reviewing court must give the regulation “controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.” As Justice Thomas pointed out, “visitorial powers” can have multiple meanings, and the OCC’s interpretation was not as broad as earlier common law understandings of visitation. As found by the lower courts, the OCC’s regulation was a permissible construction of the statute. The Court itself implicitly accepted the OCC’s construction in Watters only two years before. In fact, Cuomo was the first time in a

128. See infra Part V.A.
130. See Leading Cases, Preemption of State Law Enforcement, 123 HARV. L. REV. 322, 332 (2009) (suggesting that the Court will have to address the relationship between Chevron analysis of an agency regulation and federalism concerns in a future case).
131. Although reasonable judicial minds could disagree on whether the statute is ambiguous, see id. at 331 (criticizing the Court’s Chevron analysis for grounding the entire opinion in the construction of the term “visitorial powers,” after conceding its ambiguity), both Justice Scalia, Cuomo v. Clearing House Ass’n, L.L.C., 129 S. Ct. 2710, 2715 (2009) (“We can discern the outer limits of the term ‘visitorial powers’ even through the clouded lens of history.”), and Justice Thomas, id. at 2722 (Thomas, J., concurring in part and dissenting in part), agree that the term “visitorial powers” is at least somewhat ambiguous. Nevertheless, Justice Scalia concluded that the OCC’s interpretation was unreasonable and not entitled to Chevron deference. Cuomo, 129 S. Ct. at 2715.
133. Cuomo, 129 S. Ct. at 2723, 2727 (Thomas, J., concurring).
135. See Watters v. Wachovia Bank N.A. 550 U.S. 1, 14 (referring to 12 C.F.R. § 7.4000(a)(2) for its definition of visitorial powers). The Watters Court upheld a closely related regulation, 12 C.F.R. § 7.4006, which provides that state laws only “apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank.” 12 C.F.R. § 7.4006 (2006). The Court held that the Michigan Commissioner of
long series of cases where the Court did not accept the OCC’s interpretation of a statute. The Court should have accepted the agency’s reading of the statute, “even if [it] differs from what the court believes is the best statutory interpretation.”

B. The OCC’s interpretation of the National Bank Act allowed for consistent regulation of the national banking industry

Federalism concerns aside, the OCC’s assertion of exclusive enforcement power over national banks at least ensured consistent enforcement of law according to principles emanating from one office. At oral argument, Justice Breyer doubted “that 51 different individuals, 50 State attorneys general plus one Federal individual, will reach the same result.” Although centralized federal enforcement of state law may prevent states from acting as laboratories in developing new systems of regulation—a key feature of federalism—national banking has always been an area of federal control. The OCC is uniquely situated to use its enforcement discretion to enforce a consistent body of law against national banks, tacitly choosing not to enforce those local provisions that may conflict with a greater national scheme. The national banking industry would certainly benefit from a consistent scheme of na-

Financial and Insurance Services could not enforce state real estate and mortgage lending laws against national banks or their operating subsidiaries, because that would be a “state hindrance” in a national bank’s engaging in the “business of banking.” Watters, 550 U.S. at 21.

136. See Atri, supra note 58, at 473. Atri argues that, before Cuomo, the Court was “likely to grant Chevron deference when federalism implications [were] not at issue,” but to avoid applying the Chevron framework “where federalism concerns were abundant” by concluding that the statute was unambiguous. Id. at 490. In Cuomo, however, Atri argues that the Court reached a middle ground by applying the Chevron framework even though federalism concerns were present, but not according the regulation deference. Id. at 491–92.


139. See, e.g., Gonzalez v. Raich, 545 U.S. 1, 42 (2005) (O’Connor, J., dissenting) (“One of federalism’s chief virtues, of course, is that it promotes innovation by allowing for the possibility that ‘a single courageous State may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country.’”) (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

140. See Flagg v. Yonkers Sav. & Loan Ass’n, 396 F.3d 178, 183 (2d Cir. 2005), cert denied, 546 U.S. 817 (2005) (“The presumption against federal preemption disappears, however, in fields of regulation that have been substantially occupied by federal authority for an extended period of time . . . . Regulation of federally chartered banks is one such area.” (citation omitted)); see also Bank of Am. v. City & County of San Francisco, 309 F.3d 551, 558 (9th Cir. 2002) (tracing federal preemption of state laws regulating national banks back to M’Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)).

tional regulation. Although Justice Scalia worried at oral argument that the OCC does not have “spare time” to enforce state law, perhaps that is exactly the point. The OCC best serves the banking industry and the public by shielding banks from excessive and conflicting state regulation. In removing this shield, the Court ignores the clear intent of the NBA and its own precedent.

C. State attorneys general are already using their new-found enforcement power

At least one state attorney general has made use of this new-found state enforcement power against national banks. Illinois Attorney General Lisa Madigan filed a

142. See Elizabeth R. Schiltz, Damming Watters: Channeling the Power of Federal Preemption of State Consumer Banking Laws, 35 FLA. ST. U. L. REV. 893, 896, 897–926 (2008) (discussing "federal preemption of state banking law based . . . on a theory of congressional intent to permit national banks to provide consistent banking services nationwide, without any interference from inconsistent state regulations." Id. at 896).


145. See Michael Edwards, The Changing Landscape of Financial Services Law in 2009: Federal Preemption, Credit Rating Agency Liability, and Regulatory Reform Legislation, 6 BUS. L. BRIEF (Am. U.) 27, 29–30 (2010) (noting that the Cuomo Court receded from the high-water mark of federal preemption jurisprudence reached in Watters). Edwards notes that “[i]n an increasingly national (and global) financial system, the regulatory compliance costs of a federally-chartered financial institution conforming to what the OCC Comptroller John C. Dugan has called a patchwork of state laws are higher than the regulatory compliance costs under a single set of federal rules.” Id. at 29. Nevertheless, Edwards concludes that the Court’s decision in Cuomo provides a reasonable preemption framework:

Taken together, Watters and Cuomo establish a reasonable rule for federal preemption under the NBA: the Act and the OCC regulations preempt conflicting state laws; state bank regulators cannot take administrative actions—such as examinations of books and records or enforcement hearings held before an administrative law judge—against national banks, but state attorneys general may sue a national bank if the bank violates state laws that are not preempted by federal law. This rule is reasonable because it fairly balances the state’s interest in enforcing its own, non-preempted laws—laws that the OCC could theoretically use its discretion not to enforce and therefore nullify for practical purposes if the Court had not ruled the way it did in Cuomo—while at the same time preserving the ability of national banks and their subsidiaries to operate under a single set of federal rules in any state in most respects.

146. See Ropiequet, supra note 129, at 18–19. Attorney General Madigan has confirmed that the Cuomo decision “green-lighted” her decision to file suit against Wells Fargo and that she was “the first state attorney general to sue a national lender for its role in creating this crisis.” Hearing Before the Financial Crisis Inquiry Commission, 111th Cong. (Jan. 14, 2010), available at http://www.ag.state.il.us/pressroom/2010_01 /AGMadiganFCICWrittenTestimony.pdf. (testimony of Lisa Madigan, Illinois Attorney General).
complaint in state court on July 31, 2009, against Wells Fargo Bank, N.A., alleging racial discrimination in mortgage lending in violation of Illinois fair lending and consumer protection laws. In a press release, Attorney General Madigan linked Wells Fargo’s allegedly discriminatory practices to the recent subprime mortgage crisis: “By targeting African-American’s [sic] for the sale of its highest-cost and riskiest loans, Wells Fargo drained wealth from families and neighborhoods and added to the stockpile of boarded-up homes that are an open invitation to criminals.” In prepared written testimony before the Financial Crisis Inquiry Commission, Madigan charged that the OCC was “lax in its efforts to protect consumers from the coming crisis” and gave lenders “implicit authorization to expand their subprime offerings without fear of state prosecution.” She applauded the Court’s ruling in Cuomo because it “dealt a serious blow to the OCC’s sweeping preemption rules and affirmed the right of states to hold national banks and their subsidiaries accountable for violations of fair lending laws.”

Attorney General Madigan is likely at the forefront of a coming trend among state attorneys general to enforce state banking laws against national banks operating in their states — especially in light of the recent financial crisis. Although the crisis may have resulted in part from a regulatory failure, the best way to move forward is by centralized, consistent regulation. A “patchwork” of local law enforcement efforts is counter-productive and should be avoided. Whether these new enforcement actions are meritorious is of no moment. The mere fact that banks must respond to and defend themselves against more actions by more enforcement enti-


149. Illinois Attorney General Lisa Madigan, supra note 146, at 9, 10.

150. Id. at 11.


152. See Edwards, supra note 145, at 29.
ties introduces litigation costs which would not have been incurred in the pre-Cuomo world.155

D. The Court did too little to clarify the difference between “visitation” and “law enforcement”

The Court in Cuomo did not hide the fact that it was interpreting a generally murky area of the law. Justice Scalia admitted that “[t]here is necessarily some ambiguity as to the meaning of the statutory term ‘visitorial powers.’”154 Even though the Court could only view visitation “through the clouded lens of history,” it still concluded that the OCC’s regulation went too far.155 Unfortunately, the Court added insufficient clarity to this legal quagmire. The respective scope of federal and state regulation of national banks remains uncertain and should have been more directly addressed by the Court in Cuomo.156 For example, the Court pointed out that the OCC’s regulation did not and could not exclude “state enforcement of all state laws against national banks,”157 but surely the Court does not mean that states may enforce all state laws. Longstanding doctrine states that national banks are not subject to those state laws which “infringe the national banking laws or impose an undue burden on the performance of the banks’ functions.”158 The court in Fleet Mortgage distinguished between a state’s impermissible enforcement of laws which are directed primarily at the banking industry, and a state’s permissible enforcement of those laws which are more general in nature or did not directly concern a banking practice.159 Some commentators have correctly pointed out that Cuomo only allows

153. In the post-Cuomo world, national banks can theoretically face separate enforcement actions by separate enforcement authorities in each of the states in which they operate. In the pre-Cuomo world, although the OCC could have acted against national banks to enforce state law in various states, these actions were controlled by a single enforcement authority and national banks could at least hope for a consistent enforcement strategy or policy.


155. Id.

156. On the other hand, some have concluded that the Court’s decision actually resolved some uncertainty and provides a reasonable framework for national banks and states to follow. See Edwards, supra note 145, at 29 (“Taken together, Watters and Cuomo establish a reasonable rule for federal preemption under the NBA: the Act and the OCC regulations preempt conflicting state laws; state bank regulators cannot take administrative actions—such as examinations of books and records or enforcement hearings held before an administrative law judge—against national banks, but state attorneys general may sue a national bank if the bank violates state laws that are not preempted by federal law.”); Kutchins, supra note 144, at 180 (“Taken together with Watters, . . . the rule the Court seems to have adopted is that states may impose consumer protection laws on national banks and enforce them as long as the laws do not have the characteristics of an oversight regime.”).


159. Minnesota v. Fleet Mortgage Corp., 158 F. Supp. 2d 962, 966 (D. Minn. 2001). See Nance, supra note 109, at 823–24 (exploring the Fleet Mortgage holding that states may not enforce laws which “directly [concern]
states to enforce non-preempted state laws, but even so the question of which state laws are preempted is not settled law.\textsuperscript{160} A distinction between the types of laws states may and may not enforce against national banks would have provided clear guidance for national banks and state officials.

That is not, however, the approach the Court took in \textit{Cuomo}. In the context of an investigation into banking practices, Justice Scalia drew the line between "visitation" and "law enforcement," and explained that a sovereign-as-visitor "may inspect books and records at any time for any or no reason," whereas a sovereign-as-law-enforcer must act as a civil litigant and obtain information through ordinary civil discovery processes.\textsuperscript{161} This distinction could easily result in a law enforcer receiving the same information as a visitor, only the law enforcer will receive the information more slowly and only after jumping through a series of procedural hoops.\textsuperscript{162} This could mean that the OCC and the states will accomplish the same results, but at much greater cost for the states. This distinction is artificial and unhelpful.

\textbf{E. The Court gave states too much power to enforce state laws against national banks through the courts.}

The Court’s holding in \textit{Cuomo} opens the door for intrusive state oversight through the courts. Indeed, the Court attempted to divide a state’s powers between its impermissible role as "sovereign-as-supervisor" and its permissible role as "sovereign-as-law-enforcer."\textsuperscript{163} The only clear limit on a state’s authority, however, is that it may not act as "sovereign-as-supervisor" to order a national bank to open its records for inspection or require a bank to file periodic reports. Justice Scalia correctly pointed out that, unlike visitation, judicial enforcement reduces a state to the business of banking” as a way to determine the boundary between state and OCC authority over national banks).

\textsuperscript{160} See Kutchins, supra note 144, at 180–81 ("Although [Cuomo] did not decide the issue of whether state consumer protection laws were preempted, it did recognize that the states do have some authority and regulatory power over national banks. The uncertain extent of that authority, which has yet to be articulated by the Court or the OCC, is what has been causing the banking industry’s anxiety."); see also David L. Beam & Ralph T. Wutscher, The New Trajectory of Federal Preemption, 65 BUS. LAW. 645, 650 (2010) ("Before Cuomo, the Visi- torial Powers Rule protected national banks from enforcement actions by states in these situations. Now, national banks increasingly may be forced to litigate preemption issues of first impression with state attorneys general.").

\textsuperscript{161} \textit{Cuomo}, 129 S. Ct. at 2719.

\textsuperscript{162} See Elvira Pereda, Note, Cuomo v. Clearing House Association: Protecting Minorities from Discriminatory Lending Practices by Upholding States’ Right to Enforce Predatory Lending Laws, 18 AM. U. J. GENDER SOC. POL’Y & L. 317, 327 (2010) (noting that state attorneys general acting as civil litigants can only file claims "grounded on a legitimate basis of law and fact").

\textsuperscript{163} \textit{Cuomo}, 129 S. Ct. at 2721.
status of an ordinary civil litigant. Nevertheless, civil discovery rules are still loose enough that state attorneys general can obtain a wide range of information by subpoena—anything short of “fishing expeditions” or an undirected rummaging through bank books and records for evidence of some unknown wrongdoing.

The pragmatic difference between visitation and judicial enforcement is not as “clear” as Justice Scalia suggests—in fact, in reality the information a state attorney general may obtain by judicial enforcement may not be that different from the information the OCC obtains through visitation. Although elected state attorneys general may have the best interests of their constituents at heart—if not their own self-interest in reelection—these concerns are likely to conflict with the goal of having an efficient national banking system, especially in the current climate of popular distrust and even animosity toward banks in general.

VI. Conclusion

The Supreme Court held in Cuomo v. Clearing House Ass’n, L.L.C. that state attorneys general may enforce state laws against national banks through judicial...
In so doing, the Court ignored Congress’s intent in enacting the National Bank Act to establish a system of consistent nationwide banking regulation,169 as well as the OCC’s reasonable construction of Congress’s clear grant of exclusive visitorial authority over national banks.170 After Cuomo, national banks will have to contend with 51 enforcement authorities and a corresponding 51 interpretations of banking law.171 Even if the recent financial crisis played in the Court’s collective mind, the Court should have stayed away from an extra-judicial policy arena and instead deferred to the OCC’s interpretation of the National Bank Act.172

169. Id. at 2721.
170. See supra Part V.B.
171. See 12 C.F.R. § 7.4000 (2009); see supra Part V.A.
172. See supra Part V.C.
173. See supra Part V.B.