

VISITORIAL POWERS AND THE GENERAL POWER  
TO ENFORCE THE LAW: *ANDREW M. CUOMO,*  
*ATTORNEY GENERAL OF NEW YORK V. THE*  
*CLEARING HOUSE ASSOCIATION, L.L.C.*

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BANKING LAW—THE NATIONAL BANK ACT—VISITORIAL POWERS—  
The Supreme Court of the United States vacated an injunction against  
the attorney general of New York insofar as it prohibited him from  
bringing a judicial enforcement action to enforce compliance with  
New York fair-lending law because the vesting of visitorial powers in  
the Comptroller of the Currency does not preclude a state from enforcing  
its laws of general applicability.

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## INTRODUCTION

Central to the Obama administration's proposed financial reform is the notion that states should be encouraged to create harsher consumer protection laws to prevent abusive lending practices. Some urge that under his plan federal preemption of state consumer protection regulation will come to an end, and the federal government will merely set the minimum standard of protection which states will be free to build upon. *Clearing House*, the case discussed below, arguably takes a step in this direction by placing a limit on the current broad preemption of state regulation of national banks.

This case note will first discuss the majority and minority opinions in *Clearing House*, and then present the fundamental concepts and laws applied to resolve the case. Then it will examine the competing interests underlying the Court's decision as well as the preemption debate, and conclude with an attempt to gage toward which interest the Court is leaning post-*Clearing House*.

1. *Cuomo v. Clearing House Ass'n, L.L.C.*

A. *Facts and Procedural History*

Eliot Spitzer, the attorney general of New York, mailed letters to several national banks in 2005 requesting information regarding their lending practices.<sup>1</sup> He sought to verify whether the banks had violated New York's fair-lending laws.<sup>2</sup> The Clearing House Association, L.L.C. (the "Clearing House") and the Office of the Comptroller of the Currency (OCC) brought suits in the United States District Court for the Southern District of New York against the attorney general seeking to enjoin his requests.<sup>3</sup> They argued that under the National Bank Act<sup>4</sup> (NBA) and an OCC regulation<sup>5</sup> interpreting the term visitorial powers within the statute preempted state law enforcement of

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1. *Cuomo v. Clearing House Ass'n, L.L.C.*, 129 S. Ct. 2710, 2714 (2009).

2. *Clearing House*, 129 S. Ct. at 2714.

3. *Id.*

4. 12 U.S.C. § 484(a) (2006).

5. 12 C.F.R. § 7.4000(a)(1) (2009).

state laws against national banks, and therefore the attorney general could not make demands for the national banks' records.<sup>6</sup>

The district court entered an injunction in favor of the OCC and Clearing House.<sup>7</sup> It found the OCC's interpretation of visitorial powers within the NBA reasonable, and barred the attorney general from enforcing New York's fair-lending laws by means of information requests and judicial proceedings.<sup>8</sup> Andrew Cuomo, Eliot Spitzer's successor in office, appealed, and the United States Court of Appeals for the Second Circuit affirmed the lower court's decision.<sup>9</sup> The Supreme Court granted Cuomo's petition for writ of certiorari.<sup>10</sup>

Justice Antonin Scalia delivered the opinion of the Court, while Justice Clarence Thomas, joined by the Chief Justice John Roberts, Justice Anthony Kennedy, and Justice Samuel Alito, concurred in part and dissented in part.<sup>11</sup> The Court aimed to resolve the question whether, under *Chevron* deference framework,<sup>12</sup> the regulation's definition of visitorial powers was a reasonable interpretation of the NBA.<sup>13</sup> The majority ultimately answered in the negative insofar as the regulation's definition prohibited states from enforcing their non-preempted state laws through judicial action, while the dissent reasoned otherwise.<sup>14</sup>

### B. *Scalia's Majority Opinion*

Scalia explained that under *Chevron* framework, courts are required to defer to an agency's reasonable interpretation of ambiguous terms in a statute which it has the authority to administer.<sup>15</sup> He admit-

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6. *Clearing House*, 129 S. Ct. at 2714. The NBA provides that national banks are only "subject to . . . visitorial powers . . . authorized by Federal law, or vested in the courts of justice." 12 U.S.C. § 484(a). The OCC regulation defines the term "visitorial powers" within the context of the NBA to prohibit states from, among other things, demanding the production of bank records and "prosecuting enforcement actions" against national banks. 12 C.F.R. § 7.4000(a)(1).

7. *Clearing House*, 129 S. Ct. at 2714.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 2715, 2722.

12. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

13. *Clearing House*, 129 S. Ct. at 2714-2715.

14. *Id.* at 2715, 2722.

15. *Id.* at 2715.

ted that the term visitorial powers is somewhat ambiguous in the NBA, but reasoned that in light of the historical usage of the term, its reasonable interpretation cannot include the power to bring judicial enforcement actions.<sup>16</sup>

A sovereign's visitorial powers over corporations, Scalia noted, historically were analogous to those enjoyed by founders and benefactors of charitable institutions to inspect, at will, the institution's records to ensure their property was not misused.<sup>17</sup> At the time of the NBA's enactment in 1864, a state's visitorial powers over its corporations included the power to inspect the corporation's books in order to ensure compliance with its laws, usually by means of prerogative writs.<sup>18</sup>

In Scalia's view, even though visitorial powers included the power to enforce state laws, case law at the time demonstrated a clear distinction between the power to oversee the actions of corporations and the general power to enforce the law against them.<sup>19</sup> The holdings of *Trustees of Dartmouth College v. Woodward*,<sup>20</sup> *Guthrie v. Harkness*,<sup>21</sup> and *First National Bank in St. Louis v. Missouri*,<sup>22</sup> according to Scalia, exhibited this understanding.<sup>23</sup> He argued further that if, under the NBA and the OCC regulation, the Comptroller's exclusive visitorial powers preempted states from enforcing their laws, federal agencies would also be preempted from bringing actions.<sup>24</sup> More recent case law, however, clearly demonstrated otherwise.<sup>25</sup>

Scalia's next argument focused on the consequences of the regulation's definition.<sup>26</sup> He noted the legal oddity of allowing states to keep their laws that affect national banks free from NBA preemption, yet stripping states of the ability to enforce them.<sup>27</sup> Such a definition of "visitorial powers" in the NBA, Scalia said, is unnatural.<sup>28</sup> A defi-

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16. *Id.* (quoting 12 C.F.R. § 7.4000(a)(1)).

17. *Id.* at 2715-16.

18. *Clearing House*, 129 S. Ct. at 2716.

19. *Id.*

20. 17 U.S. 518 (1819).

21. 199 U.S. 148 (1905).

22. 263 U.S. 640 (1924).

23. *Clearing House*, 129 S. Ct. at 2716-17.

24. *Id.* at 2717.

25. *Id.*

26. *Id.*

27. *Id.* at 2717-18.

28. *Clearing House*, 129 S. Ct. at 2718.

dition that recognizes the distinction between the power to oversee and the general power to enforce the law leads to more commonplace conclusion, in light of the express exception in the NBA for state powers vested in the courts of justice.<sup>29</sup> The state is a litigant, not a visitor, if it opts to bring suit against a national bank to enforce its substantive law of general applicability.<sup>30</sup>

Concluding that the OCC regulation was inconsistent with the NBA, Scalia turned to the OCC's statement of basis and purpose to further demonstrate the unreasonableness of the OCC's definition.<sup>31</sup> The statement attempted to limit the scope of preemption of state law to include only state banking law, not other substantive state laws which govern the bank's ability to do business.<sup>32</sup> Scalia recognized this as being inconsistent with the almost categorical exclusion of judicial enforcement actions within the OCC regulation, as well as with the regulation's definition of visitorial powers.<sup>33</sup>

Scalia concluded that the OCC's definition of visitorial powers was reasonable insofar as it included the power to supervise corporations and inspect their records, but unreasonable to the extent that it attempted to preempt states from enforcing their substantive law against national banks through the courts.<sup>34</sup> Therefore the majority affirmed the injunction against the attorney general's information requests because such requests did not fall within the NBA's exception for enforcement actions vested in the courts of justice.<sup>35</sup> The injunc-

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29. *Id.*

30. *Id.* at 2718-19.

31. *Id.*

32. *Id.* at 2719-20.

33. *Clearing House*, 129 S. Ct. at 2718 (quoting 12 C.F.R. § 7.4000(a)(1)).

What the case law *does* recognize is that "states retain some power to regulate national banks in areas such as contracts, debt, collection, acquisition and transfer of property, and taxation, zoning, criminal, and tort law." . . . Application of these laws to national banks and their implementation by state authorities typically does not affect the content or extent of the Federally-authorized business of banking . . . but rather establishes the legal infrastructure that surrounds and supports the ability of national banks . . . to do business.

*Id.*

34. *Id.* at 2721.

35. *Id.* at 2721-22 ("The request for information in the present case was stated to be 'in lieu of' other action: implicit was the threat that if the request was not voluntarily honored, that other action would be taken . . . if the threatened action would have been unlawful the request-cum-threat could be enjoined . . .").

tion prohibiting the attorney general from bringing judicial actions to enforce New York law, however, was vacated.<sup>36</sup>

### C. *Thomas' Concurring and Dissenting Opinion*

Justice Thomas concurred in both judgments, but dissented with respect to the majority's reasoning: he rejected the majority's finding that the OCC's definition of visitorial powers was unreasonable.<sup>37</sup> While he agreed to the definition presented in the majority opinion of visitorial powers in 1864, he was not convinced that it was unreasonable for the OCC to adopt a definition of visitorial powers which included enforcement of all laws against national banks.<sup>38</sup> The OCC's definition was reasonable; it fit within the 1864 definition.<sup>39</sup>

Thomas alleged that the majority overlooked an important distinction in the history of visitation: the visitor of a charitable institution and the visitor of a civil corporation, at common law, did not share the same rights.<sup>40</sup> Only with respect to visitors of charitable institutions was there a sharp distinction between the power to enforce the law and the power of oversight.<sup>41</sup> For civil corporations, the sovereign enjoyed both the power to oversee and the power to enforce the law; an exercise of either power was referred to as an exercise of the sovereign's visitorial power.<sup>42</sup> Furthermore, the NBA was modeled after New York's statute which granted banking commissioners the

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36. *Id.* at 2722.

37. *Clearing House*, 129 S. Ct. at 2722 (Thomas, J., concurring in part and dissenting in part).

38. *Id.* at 2723. The clearest difference between the majority and the minority views was stated in a portion of the majority opinion dedicated entirely to explaining why the "dissent fails to persuade." *Id.* at 2720-21.

The dissent establishes . . . (and we do not at all contest), that in the course of exercising visitation powers the sovereign can compel compliance with the law. But [the minority] concludes from that . . . that *any* sovereign attempt to compel compliance with the law can be deemed an exercise of the visitation power. That conclusion obviously does not follow. . . . The critical question is not what is being compelled, but what sovereign power has been invoked to compel it.

*Id.*

39. *Id.* at 2723-24.

40. *Clearing House* 129 S. Ct. at 2724 (Thomas, J., concurring in part and dissenting in part).

41. *Id.*

42. *Id.* at 2724-25. "At common law, all attempts by the sovereign to compel civil corporations to comply with state law—whether through administrative subpoenas or judicial actions—were visitorial in nature." *Id.* at 2727.

authority to inspect corporations to ensure compliance with the generally applicable laws of the state through use of the courts.<sup>43</sup> In New York, Thomas argued, the separation between oversight and enforcement of law were not clear and distinct.<sup>44</sup> Without recognizing this distinction, Thomas argued that the majority failed to properly conduct its historical analysis and as a result reached the wrong conclusion regarding the reasonableness of the OCC's definition.<sup>45</sup>

Not noted in the majority opinion, yet addressed by Thomas in the dissent, were arguments made by the attorney general that the structure of the original NBA supported his definition of visitorial powers.<sup>46</sup> The visitorial powers clause was sandwiched between a provision discussing the authority of the OCC to appoint examiners of national banks and another discussing examiner's compensation.<sup>47</sup> The entire section was also titled Bank Examiners.<sup>48</sup> Thomas found this argument weak, as other structural cues lead to the opposite conclusion.<sup>49</sup>

Thomas next criticized the majority for allegedly giving too much weight to case law decided before the OCC adopted its chosen inter-

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43. *Id.* at 2726.

44. *Clearing House*, 129 S. Ct. at 2726 (Thomas, J., concurring in part and dissenting in part).

45. *Id.* at 2726-27. Scalia, while discussing *Dartmouth*, replied to Thomas' criticism that visitorial powers for charitable corporations were not the same as those enjoyed by visitors of civil corporations. *Clearing House*, 129 S. Ct. at 2716 n.1. He expressed doubt that visitors of charitable institutions lacked the power to enforce the law, but admitted even if they did, *Dartmouth* would demonstrate even stronger "that visitation is different from ordinary law enforcement." *Id.*

46. *Clearing House*, 129 S. Ct. at 2727 (Thomas, J., concurring in part and dissenting in part).

47. *Id.*

48. *Id.* at 2727-28.

49. *Id.* at 2728. The most notable of these structural cues was § 484(b), which expressly exempts from preemption state inspection of federal bank records "solely to ensure compliance with applicable State unclaimed property or escheat laws." 12 U.S.C. § 484(b). Thomas argued that "[s]uch review does not fall within petitioner's definition of 'visitorial powers' because the enforcement of state property laws is in no way associated with national bank examinations or internal operations. Thus, were § 484(a) to have the meaning petitioner assigns, there would have been no reason for Congress to identify the § 484(b) authority as an exception to § 484(a)'s 'visitorial powers' prohibition, as the authority granted in § 484(b) would never have been eliminated by § 484(a)." *Clearing House*, 129 S. Ct. at 2728 (Thomas, J., concurring in part and dissenting in part).

pretation of “visitorial powers.”<sup>50</sup> Prior court constructions of a statute only defeat an agency’s later interpretation if the court’s construction emanates from the unambiguous language of the statute.<sup>51</sup> Thomas noted that none of the case law the majority considered construed the NBA in a way that defeated the OCC’s definition.<sup>52</sup>

Thomas rejected three of the attorney general’s arguments that aimed to overcome *Chevron* deference afforded by the OCC’s regulation.<sup>53</sup> The attorney general first contended that the OCC’s regulation altered principles of federalism, and therefore congress was required to make a clear statement regarding its preemptive intent.<sup>54</sup> Thomas rejected this argument on the basis that the OCC’s regulation did not alter principles of federalism, but rather it merely maintained the OCC’s congressionally-delegated power of oversight over national banks.<sup>55</sup>

Second, the attorney general asserted that Congress was required to give a clear statement of purpose because, essentially, the NBA was designed to supersede state visitorial powers.<sup>56</sup> Thomas rejected this argument too, stating that no presumption against preemption arose in this case.<sup>57</sup> Congress expressly preempted state visitorial powers in the NBA.<sup>58</sup> National banks have always been an area dominated by

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50. *Id.*

51. *Id.* at 2728-29.

52. *Id.* at 2729. Scalia rebuffed Thomas’s criticisms about his use of case law for “miss[ing] the point.” *Clearing House*, 129 S. Ct. at 2717 n.2. Scalia used the case law only to prove the point that visitorial powers have always been separate from enforcement of generally applicable laws. *Id.* He did not at all assert that *Dartmouth*, *Guthrie*, or *St. Louis* answered “the question whether States can enforce their banking laws . . .” *Id.*

53. *Clearing House*, 129 S. Ct. at 2731 (Thomas, J., concurring in part and dissenting in part). The majority never reached this argument because it found it unnecessary “in giving force to the plain terms of the National Bank Act.” *Clearing House*, 129 S. Ct. at 2720. For an interesting article urging that the Court should have considered principles of federalism in determining whether the OCC’s definition of visitorial powers was reasonable, see Leading Case, *Preemption of State Law Enforcement*, 123 HARV. L. REV. 322 (2009).

54. *Clearing House*, 129 S. Ct. at 2731 (Thomas, J., concurring in part and dissenting in part).

55. *Id.* at 2731-32. Although Scalia never reached this argument, he cautioned the minority not to minimize the “incursion that the Comptroller’s regulation makes upon traditional state powers . . .” *Id.* at 2720.

56. *Id.* at 2732.

57. *Id.*

58. *Id.*

federal law, and historically, federal banking laws always preempt contrary state law.<sup>59</sup>

Third, the attorney general argued that *Chevron* deference did not apply in this case because the OCC's regulation attempted to control the preemptive reach of the NBA.<sup>60</sup> Thomas was not convinced.<sup>61</sup> Congress, not the OCC, determined the preemptive scope of the NBA.<sup>62</sup> By defining the ambiguous term visitorial powers in such a way that preempted states from enforcing their fair lending laws, the OCC merely clarified the NBA's preemptive scope.<sup>63</sup>

Thomas argued lastly that the majority went too far when it considered the odd result of the OCC's definition—leaving state laws untouched yet preempting states' ability to enforce them.<sup>64</sup> The Court's only task was to determine if the text of the NBA unequivocally could not support the OCC's definition of visitorial powers.<sup>65</sup>

## 2. *History*

### A. *The NBA and the OCC*

The NBA was enacted in 1864 in response to the need for a national currency to finance the Civil War.<sup>66</sup> It provided for the establishment of a national banking system which could issue bank notes based on United States bonds.<sup>67</sup> The OCC was created to supervise

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59. *Clearing House*, 129 S. Ct. at 2732 (Thomas, J., concurring in part and dissenting in part).

60. *Id.*

61. *Id.*

62. *Id.* at 2732-33.

63. *Id.* at 2733. Scalia would have found had he reached this argument that “[a]ny interpretation of visitorial powers necessarily declares the pre-emptive scope of the NBA.” *Clearing House*, 129 S. Ct. at 2721 (internal quotations omitted).

64. *Clearing House*, 129 S. Ct. at 2733 (Thomas, J., concurring in part and dissenting in part).

65. *Id.*

66. The Office of the Comptroller of the Currency, <http://www.occ.treas.gov/aboutocc.htm> (last visited Nov. 20, 2009). “‘An Act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof,’ approved June 3, 1864, shall be known as ‘The National Bank Act.’” 12 U.S.C. § 38 (2006).

67. The Office of the Comptroller of the Currency, <http://www.occ.treas.gov/aboutocc.htm> (last visited Nov. 20, 2009).

the NBA,<sup>68</sup> and to prevent harmful intrusion by inconsistent state regulation, visitorial powers over national banks were vested exclusively in the Comptroller.<sup>69</sup> Together with the provisions of the NBA, the OCC's regulations govern the national banking business.<sup>70</sup>

### B. *Preemption and Deference*

There are three generally accepted kinds of preemption: express preemption by Congress, field preemption, and conflict preemption.<sup>71</sup> This case deals with none of them. Instead, *Clearing House* presents an instance of enforcement preemption, which is rare in American law.<sup>72</sup> The Court applied *Chevron* deference framework to determine if had to defer to the OCC's interpretation of visitorial powers, and thus, whether the OCC's enforcement preemption was valid.

The first inquiry under *Chevron* is whether Congress' intent is clear on a certain issue in a statute, and if it is clear, an agency has no authority to answer otherwise.<sup>73</sup> As a corollary, the Court has held that an agency must follow prior court precedent construing a statute

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68. *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 6 (2007). "There shall be in the Department of the Treasury a bureau charged with the execution of all laws passed by Congress relating to the issue and regulation of a national currency secured by United States bonds and . . . all Federal Reserve notes . . . the chief officer of which bureau shall be called the Comptroller of the Currency, and shall perform his duties under the general directions of the Secretary of the Treasury." 12 U.S.C. § 1.

69. *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 311-12 (2d Cir. 2005). "[T]he OCC has exclusive visitorial powers over national banks." *Id.* at 312. The OCC "has the power to promulgate rules and regulations and may use its rulemaking authority to define the 'incidental powers' of national banks beyond those specifically enumerated in the statute." *Id.*

70. *Watters*, 550 U.S. at 6.

71. *Watters*, 550 U.S. at 44 (Stevens, J., dissenting). Express preemption is self-explanatory: state or local law will be preempted if Congress, by passing a law, expressly says so. *Burke*, 414 F.3d at 314. Conflict preemption involves an instance where state or local law conflicts with the accomplishment of the objective or purpose of federal law. *Id.* Field preemption exists when "Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law." *Id.*

72. Francesca S. Laguardia, *Recent Development, Enforcing the Fair Housing Act: Can Agency Interpretations Override Congressional Intent in Anti-discrimination Legislation?*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 535, 546 (2006) (discussing that the only other instance in American law of enforcement preemption regards enforcement of Indian gambling laws on Indian reservations).

73. *Burke*, 414 F.3d at 315.

only if that precedent forecloses agency interpretation by holding the statute unambiguous.<sup>74</sup> This is the only instance where a prior court construction of a statute displaces an agency's conflicting construction.<sup>75</sup>

The court will ask a second question if the statute is ambiguous or silent on a certain issue: whether the agency's interpretation or answer to the issue is a permissible construction of the statute.<sup>76</sup> If the construction is reasonable, the court must refrain from construing the statute and defer instead to the agency's construction.<sup>77</sup>

### C. *The Common Law History of Visitation*

In this case, the majority examined the common law understanding of visitatorial powers to demonstrate the distinction between visitation and the general power to enforce the law.<sup>78</sup> Scalia pointed to three cases for this distinction: *Trustees of Dartmouth College v. Woodward*,<sup>79</sup> *Guthrie v. Harkness*,<sup>80</sup> and *First National Bank in St. Louis v. State of Missouri*.<sup>81</sup> The dissent argued that *Dartmouth* did not mean what Scalia thought it meant, and used the other two cases to illustrate the proposition that the OCC was free to depart from the Court's prior construction of visitation.<sup>82</sup> The following discussion sets forth an overview of *Dartmouth*, *Guthrie*, and *St. Louis* as they pertain to the present case.

#### (1) *Trustees of Dartmouth College v. Woodward*

The trustees of Dartmouth College received a charter from the King of England in 1769 incorporating them as a charitable corpora-

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74. *Nat. Cable and Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 982-983 (2005). "Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction." *Brand X*, 545 U.S. at 982-983.

75. *Id.*

76. *Burke*, 414 F.3d at 315.

77. *Id.*

78. *Clearing House*, 129 S. Ct. 2715-18.

79. 17 U.S. 518 (1819).

80. 199 U.S. 148 (1905).

81. 263 U.S. 640 (1924).

82. *Clearing House*, 129 S. Ct. at 2724-26, 2728-30.

tion.<sup>83</sup> After the Revolutionary War, the State of New Hampshire amended the charter, enlarging the number of trustees from twelve to twenty-one.<sup>84</sup> Appointment of the additional trustees was to be made by the state.<sup>85</sup> The amendment also created a board of overseers and vested in them the power to inspect and control the trustees' activities.<sup>86</sup> This board was made up of a number of high-ranking New Hampshire government officials.<sup>87</sup> After refusing to accept the amendment, the original trustees brought suit in trover for their corporate property, namely their corporate books, which the defendant Woodward had come to possess under the amendment.<sup>88</sup>

Chief Justice Marshall answered the question whether the charter (as a contract) was impaired by New Hampshire's amendment in the affirmative and found for the plaintiff on constitutional grounds.<sup>89</sup> Of interest to Scalia and Thomas was Justice Story's concurring opinion, which discussed at length the nature of visitorial powers as they attached to charitable corporations.<sup>90</sup> The visitors of a charitable corporation like Dartmouth College incorporated under charter of the crown are the trustees themselves, not the crown, in contrast to civil corporations.<sup>91</sup> The crown had no power to direct the charitable corporation or change its charter without the consent of its trustees.<sup>92</sup> But, just like other corporations, charitable corporations were still subject to the law of the land.<sup>93</sup>

## (2) *Guthrie v. Harkness*

*Guthrie* involved a bank shareholder who sought inspection of the bank's records to determine the value of his stock and to discover

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83. *Dartmouth*, 17 U.S. at 624, 626.

84. *Id.* at 626.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Dartmouth*, 17 U.S. at 624.

89. *Id.* at 650-651.

90. *Dartmouth*, 17 U.S. at 667, 671-677 (Story, J., concurring).

91. *Id.* at 673.

92. *Id.* at 675.

93. *Id.* "As managers of the revenues of the corporation, they are subject to the general superintending power of the court of chancery, not as itself possessing a visitorial power, or a right to control the charity, but as possessing a general jurisdiction, in all cases of an abuse of trust, to redress grievances and suppress frauds." *Id.* at 676 (Story, J., concurring).

whether the bank was operating in accordance with the law.<sup>94</sup> The owner of the bank, a majority shareholder, refused, and the shareholder brought suit to compel inspection.<sup>95</sup> The issue on appeal was whether the NBA's provision preempting visitorial powers other than those authorized under the NBA stripped a shareholder of his common law right to demand inspection of a bank's records.<sup>96</sup> The Court answered in the negative, and affirmed the lower court's order to permit inspection of the bank's records.<sup>97</sup>

Justice Day found that a shareholder's visitorial rights rested upon his or her ownership in the corporation,<sup>98</sup> and nothing in the NBA, including the provision preempting state visitorial powers,<sup>99</sup> diminished a shareholder's common law right to inspect the corporation's books.<sup>100</sup> He distinguished between visitation as enjoyed by a sovereign power and a shareholder's common law right to inspect the books of a corporation, and recognized that no definition of visitorial powers existed which included the shareholder's common law rights.<sup>101</sup> Even if there was such a definition, a shareholder's common law rights would fall squarely within the NBA's preemption exception for visitorial powers vested in the courts of justice.<sup>102</sup>

### (3) *First National Bank in St. Louis v. State of Missouri*

In *St. Louis*, the attorney general of Missouri proceeded quo warranto against the First National Bank of St. Louis to determine its authority to operate a branch bank.<sup>103</sup> A law in Missouri at the time expressly prohibited branch banking, and the attorney general sought compliance with that law.<sup>104</sup> On appeal, the Court addressed two questions: whether the Missouri law was valid against national banks, and whether the state could bring suit against national banks for violation

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94. *Guthrie v. Harkness*, 199 U.S. 148, 149 (1905).

95. *Guthrie*, 199 U.S. at 149.

96. *Id.* at 156.

97. *Id.* at 157.

98. *Id.* at 156.

99. *Id.* at 157.

100. *Guthrie*, 199 U.S. at 157.

101. *Id.* at 158-159.

102. *Id.* at 159.

103. *First Nat. Bank in St. Louis v. State of Missouri*, 263 U.S. 640, 655 (1924).

104. *St. Louis*, 263 U.S. at 655.

of that law.<sup>105</sup> The Court found in favor of the attorney general on both issues.<sup>106</sup>

Answering the first question whether the Missouri law was valid, the Court noted that although national banks are instrumentalities of the federal government, the general rule is that they are subject to the laws of the state in the way they conduct their business.<sup>107</sup> Excepted from the general rule are state laws in conflict with federal laws, or state laws which frustrate the national bank's purpose.<sup>108</sup> The Court found that in this case the Missouri law did not conflict with federal law, as the national banking law at the time did not support bank branching.<sup>109</sup> The Court then found that because the Missouri law was valid, the answer to the second question—whether it was enforceable—must naturally be yes.<sup>110</sup>

#### D. *The 2004 OCC Preemption Regulations*

In 2004 the OCC passed a series of regulations, the “preemption regulations,” in order to clarify the preemptive effect of the NBA.<sup>111</sup> Under these regulations, all state laws that obstruct, impair, or condition a national bank's exercise of powers authorized by federal law are preempted.<sup>112</sup> The broad standard was intended to allow for the natural development of national financial services and enable the OCC to enact whatever regulations that are necessary to protect national banks' federally authorized powers.<sup>113</sup> The regulations also delineate areas where state law is not preempted: contract, tort, criminal law, rights to collect debts, acquisition and transfer of property, taxation, zoning, and any other law determined to be incidental to the deposit-taking powers of the bank or powers not inconsistent with the bank's federally authorized powers.<sup>114</sup>

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105. *Id.*

106. *Id.* at 659, 660.

107. *Id.* at 565.

108. *Id.*

109. *St. Louis*, 263 U.S. at 656-659.

110. *Id.* at 659-661.

111. Sarah H. Burghart, Survey, *Overcompensating Much? The Impact of Preemption on Emerging Federal and State Efforts to Limit Executive Compensation*, 2009 COLUM. BUS. L. REV. 669, 707 (2009).

112. 12 C.F.R. § 7.4007(a) (2009).

113. Burghart, *supra* note 111, at 708-709.

114. 12 C.F.R. § 7.4007(c) (2009).

*Watters v. Wachovia*, decided in 2007, tested the OCC's broad preemptive scope. Many expected the Court to use the case to limit that scope; however, the Court essentially endorsed it in full and extended it to national bank operating subsidiaries.<sup>115</sup> Controversy arose after *Watters* about the federal government's capacity to fulfill its oversight responsibilities not only regarding national banks, but their operating subsidiaries as well.<sup>116</sup> The debate persists today, even after *Clearing House*.

### 3. Analysis

*Clearing House* quieted confusion and controversy surrounding the OCC's 2004 preemption regulations by placing a limit on the OCC's self-declared broad regulatory authority: states may bring judicial enforcement actions against national banks for violating non-preempted state consumer protection laws.<sup>117</sup> Many expected the Court to find in favor of the OCC, as several years earlier in *Watters v. Wachovia* the Court endorsed the OCC's broad preemptive authority as declared in its preemption regulations.<sup>118</sup> The Court, however, implicitly preserved the dual banking system by reaching a result which balanced a state's interest in preserving independent sovereignty against a national bank's interest in being unburdened by conflicting standards of state and federal regulation.

The decision in *Clearing House*, however, could have easily gone the other way. Four justices on the Court cast their votes in favor of the OCC's enforcement preemption,<sup>119</sup> a position which indubitably favors national banks and rejects any balancing against state sovereignty. The dichotomy between the outcomes of the majority and minority illustrates two competing policies which have fueled the consumer protection law preemption debate, a debate which has sharpened since the subprime mortgage crisis began. On one side are state attorneys general arguing to preserve federalism and the dual banking system, and on the other, pro-business aficionados pleading for exclu-

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115. Burghart, *supra* note 111, at 709.

116. *Id.* at 710.

117. *Clearing House*, 129 S. Ct. at 2722.

118. Cheyenne Hopkins, *On High Court, Questions Suggest Support for OCC*, AMERICAN BANKER, Apr. 28, 2009, <http://www.americanbanker.com>.

119. *Clearing House*, 129 S. Ct. at 2722 (Thomas, J., concurring in part and dissenting in part).

sive federal control and deregulation.<sup>120</sup> The Court itself over the past few years has trended toward favoring the latter interests,<sup>121</sup> although after *Clearing House*, its position is less clear and warrants exploration. The remainder of this note will examine the policies on either side of the preemption debate, and then attempt to determine where the Court now stands.

#### A. *Exclusive Federal Control and Deregulation*

The main argument asserted by those in favor of exclusive federal control over national banks is that the national banking system demands uniform regulation and enforcement standards, and would function most efficiently without state intermeddling.<sup>122</sup> Over the past few decades, markets for banking services have become increasingly interstate, with help from the internet, the growing mobility of American citizens, and changes in federal bank branching laws<sup>123</sup> which permit branching across state lines.<sup>124</sup> Exclusive federal regulation of national banks would enable them to better conduct their activities by not burdening them with possibly conflicting state regulations. By broadly preempting state regulation of national banks, the result is essentially a deregulation of the national banking industry, as the federal system regulates through mandating disclosure, rather than imposing restrictions.<sup>125</sup>

The major weakness with this policy argument in the context of *Clearing House*, where it was asserted that national banks would be unduly burdened by inconsistent standards of state enforcement of their own non-preempted state laws, is a lack of capability within the federal government to effectively oversee every aspect of the banking industry and enforce fifty different state laws against it. Indeed, Scalia asserted this flaw during the *Clearing House* oral argument.<sup>126</sup> Not

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120. See Elizabeth R. Schiltz, *Damming Watters: Channeling the Power of Federal Preemption of State Consumer Banking Laws*, 35 FLA. ST. U. L. REV. 893, 934 (2008); Opinion, *Spitzerism Revisited: Scalia invites assaults on national banks*, WALL ST. J., June 30, 2009, at A14.

121. Burghart, *supra*, note 111, at 710.

122. *Spitzerism Revisited: Scalia invites assaults on national banks*, *supra* note 120.

123. 12 U.S.C. § 36(f)(1)(B) (2009).

124. Schiltz, *supra* note 120, at 907.

125. *Id.* at 939.

126. Hopkins, *supra* note 118.

only would broad preemption of state law result in deregulation, but even state law which was not preempted would likely never be enforced. National banks would enjoy so much freedom, yet be subject to such little accountability to the communities they serve.

### B. *Federalism and Regulation*

On the other end of the spectrum are states fighting to maintain principles of federalism and to preserve the dual banking system. Although the Court has already essentially accepted the OCC's broad preemptive power,<sup>127</sup> the subprime mortgage crisis has spawned debate over the need for, and the source of, further regulation of the banking industry. Two arguments are often asserted in favor of states being the best source of further regulation. The first and most commonly asserted argument is that competition between state and federal banking systems will, in the long run, result in the optimal level of regulation for the entire industry.<sup>128</sup> Historically, state banks have provided innovative products and services, and consumer protection laws, which their federal counterparts have been able to adopt.<sup>129</sup> If the system continues to trend toward exclusive federal control over national banks and deregulation of that system, states will not be able to offer as attractive rates or services, and will be less equipped to experiment with new solutions to local problems.<sup>130</sup>

The second argument, which has not been popular until recently, is based on democratic accountability.<sup>131</sup> States are in a better position to monitor and respond to banking abuses because of their close proximity to the harm and the people.<sup>132</sup> Furthermore, state attorneys general are elected and held accountable to their citizenry, whereas federal banking officials, like the Comptroller of the Currency, are appointed and more sensitive to national political ebb and flow.<sup>133</sup> The whole reason the dual banking system has proven so durable throughout our history is, at a most fundamental level, due to a general appre-

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127. See *Watters*, 550 U.S. 1.

128. Schiltz, *supra* note 120, at 934-935.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. Schiltz, *supra* note 120, at 936-937 (quoting Christopher L. Peterson, *Preemption, Agency Cost Theory, and Predatory Lending by Banking Agents*, 56 AM. U. L. REV. 515, 516 (2007)).

hension of an all-powerful centralized authority.<sup>134</sup> Too much power and lack of accountability leads to unchecked opportunities for abuse; too much centralization leaves the authority too disconnected from local communities to notice when problems arise.

The major weakness of the pro-federalism view can be seen from an economic or pro-business standpoint. Commentators defending deregulation and exclusive federal control assert that if states are permitted to impose harsher regulations on banks, particularly in the realm of consumer protection, credit lines will dry up due to heightened costs of lending.<sup>135</sup> As one commentator put it, consumer protection laws would inevitably hurt those whom they were designed to protect.<sup>136</sup>

### C. *The Court's Position*

A writer for the *Wall Street Journal* criticized the majority's opinion in *Clearing House* for disregarding the NBA's intent for federal regulators only to oversee national banks.<sup>137</sup> He fervently contended that the Court, by its holding in *Clearing House*, opened the gates to state regulation of national banks.<sup>138</sup> But this is not so. The Court's holding in *Clearing House* does not stretch far enough to open the gates.

All *Clearing House* stands for is that states may enforce, through the courts, their non-preempted laws. The issue was not whether state consumer protection laws were preempted. Taken together with *Watters*, which struck down a state licensing regulation imposed on national bank operating subsidiaries because it was visitorial in nature, 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.

Although *Clearing House* 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

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134. *Id.* at 935.

135. Marcus Cole, *Protecting Consumers from Consumer Protection: Watters v. Wachovia Bank*, 2007 CATO SUP. CT. REV. 251, 253 (2007).

136. *Id.*

137. *Spitzerism Revisited: Scalia invites assaults on national banks*, *supra* note 120.

138. *Id.*

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. It is arguable that the Court's decision in *Clearing House* will make the enactment of a Consumer Federal Protection Agency and new financial regulations which leave the states with considerable authority to regulate national banks less traumatic for the banking industry and the federal authorities which currently oversee them. In that respect, the Court seems to have retreated from its pro-business trend in favoring the OCC's broad preemptive authority to do whatever necessary to regulate national banks. But it did not open the gates to state regulation; it merely acknowledged a gap in the fence that existed all along.

### CONCLUSION

In a sense the ruling in *Clearing House* was a surprise to many, but its long-term shock appeal has yet to be determined. It appears as though the political machinery in Washington has finally set its sights on financial reform, and the question many in the banking industry are asking is whether Congress will end preemption of state regulations against national banks. The only path clear at this point is that something in the area of preemption will change, and the majority in Congress wants to see more accountability and tougher state regulation. *Clearing House* seems to be a step in that direction, but not a step bold enough to bring about the change many desire and many others fear.

