STATE ENFORCEMENT OF STATE FAIR-LENDING LAWS AGAINST NATIONAL BANKS IS NOT AN EXERCISE OF VISITORIAL POWERS RESERVED EXCLUSIVELY TO THE FEDERAL GOVERNMENT BY THE NATIONAL BANK ACT: **CUOMO V. CLEARING HOUSE ASSOCIATION, L.L.C.**

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BANKING LAW—NATIONAL BANK ACT—VISITORIAL POWERS—The Supreme Court of the United States held that states have the power to enforce state fair-lending laws against national banks and that a regulation promulgated by the Office of the Comptroller of the Currency, which prevented states from exercising such powers by including them in the definition of visitorial powers reserved exclusively to the federal government, was not a reasonable interpretation of the National Bank Act.—**Cuomo v. Clearing House Ass’n, L.L.C.**, 129 S. Ct. 2710 (2009).

INTRODUCTION

Do states have the power to enforce their own fair-lending laws against national banks? This was the question presented to the Supreme Court of the United States in **Cuomo v. Clearing House Ass’n, L.L.C.** 1 In a majority opinion by Justice Antonin Scalia, the Court

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answered in the affirmative, holding that states have the power to enforce state laws against national banks.\textsuperscript{2} Justice Clarence Thomas, in an opinion concurring in part and dissenting in part, disagreed with the majority and argued that the exercise of such power over national banks was reserved to the federal government.\textsuperscript{3}

The question hinged on the reasonableness of a regulation enacted through notice-and-comment rulemaking by the federal Office of the Comptroller of the Currency (“OCC”) that interpreted a provision of the National Bank Act.\textsuperscript{4} The National Bank Act provided that the exercise of “visitorial powers”\textsuperscript{5} over national banks was reserved exclusively to the federal government.\textsuperscript{6} The OCC’s regulation interpreted the term “visitorial powers” to include the regular enforcement of state laws relating to banks.\textsuperscript{7} Applying the \textit{Chevron} standard of

\begin{itemize}
  \item \textsuperscript{2} \textit{Cuomo}, 129 S. Ct. at 2714-22. Justice Scalia’s majority opinion was joined by Justices Stevens, Souter, Ginsburg, and Breyer. \textit{Id.} at 2714.
  \item \textsuperscript{3} \textit{Id.} at 2722-33 (Thomas, J., concurring in part and dissenting in part). Justice Thomas’s opinion was joined by Chief Justice Roberts and Justices Kennedy and Alito. \textit{Id.} at 2722.
  \item \textsuperscript{4} \textit{Id.} at 2715 (majority opinion).
  \item \textsuperscript{5} Visitorial power has been referred to as “[t]he power to inspect or make decisions about an entity’s operations.” BLACK’S LAW DICTIONARY 1289 (9th ed. 2009).
  \item \textsuperscript{6} 12 U.S.C. § 484(a) (2006). The relevant provision of the National Bank Act stated:
    \begin{quote}
      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.
    \end{quote}
    \textit{Id.} The National Bank Act was enacted in 1864. \textit{Cuomo}, 129 S. Ct. at 2716.
  \item \textsuperscript{7} 12 C.F.R. § 7.4000 (2009). The OCC’s regulation stated in part:
    \begin{enumerate}
    \item § 7.4000 Visitorial powers.
    \item (a) General rule.
    \item (1) 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, 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. However, production of a bank’s records (other than non-public OCC information under 12 CFR part 4, subpart C) may be required under normal judicial procedures.
    \item (2) For purposes of this section, visitorial powers include:
\end{enumerate}
deference to an agency’s interpretation of a statute it is charged with administering, the majority still found the OCC’s regulation to contain an unreasonably broad definition of visitorial powers. In dissent, Justice Thomas stated that he would have held the regulation to be reasonable under Chevron.

This note examines the Cuomo decision, its interpretation of applicable law, and its potential effect on the operations of banks. First, this note outlines the decision, including the case’s procedural background, the majority opinion, and the dissenting opinion. A study of the two opinions reveals a disagreement over how visitorial powers were understood throughout our nation’s history. Next, this note provides a brief overview of the history of visitorial powers, as differing views on the proper interpretation of this history are at the center of the justices’ disagreement. Then, this Note analyzes the Cuomo decision, discussing the merits of the Court’s opinion and the criticisms leveled against the majority in the dissenting opinion. Finally, this Note will conclude by discussing the potential effects of the Court’s decision on the operations of national banks.

(i) Examination of a bank;
(ii) Inspection of a bank’s books and records;
(iii) Regulation and supervision of activities authorized or permitted pursuant to federal banking law; and
(iv) Enforcing compliance with any applicable federal or state laws concerning those activities.

(3) Unless otherwise provided by Federal law, the OCC has exclusive visitorial authority with respect to the content and conduct of activities authorized for national banks under Federal law.

Id.

9. Id. at 2733 (Thomas, J., concurring in part and dissenting in part).
10. See infra Part 1.A.
11. See infra Part 1.B.
12. See infra Part 1.C.
13. See infra Part 2.
15. See infra CONCLUSION.

1. The Cuomo Decision

A. Procedural Background

The petitioner was Andrew Cuomo, attorney general of the state of New York, whose predecessor had requested certain non-public information from several national banks for the purpose of ensuring their compliance with state fair-lending laws. The information request was made “in lieu of” executive subpoena, with an implied threat of further action if the request was not complied with. The respondents, the OCC and the Clearing House Association, a bank trading group, brought suit in federal court to enjoin the request. The United States District Court for the Southern District of New York granted the injunction, and the United States Court of Appeals for the Second Circuit affirmed the District Court’s decision. The Supreme Court granted certiorari to address the question of whether the state attorney general’s action against the national banks was an exercise of visitorial powers, which are reserved exclusively to the OCC under the National Bank Act.

B. Justice Scalia’s Majority Opinion

In a majority opinion by Justice Scalia, the Court held that the threatened subpoena was an exercise of visitorial powers and could be enjoined, but that a general enforcement action brought in state court to enforce state law was not an exercise of visitorial powers. Thus, the OCC’s regulation broadly defining visitorial powers to include state law enforcement actions was unreasonable.

The Court began its analysis by outlining the Chevron framework under which agency interpretations of statutes are reviewed. Noting that courts defer to an agency’s reasonable interpretation of a statute it is charged with administering, the majority found that the statutory

17. Id. at 2721. See infra note 54.
18. Cuomo, 129 S. Ct. at 2714.
22. Id. at 2721.
23. Id. at 2715.
term “visitorial powers,” as used in the National Bank Act, was ambiguous.\(^\text{24}\) The OCC, the Court stated, could give meaning to the term within the bounds of the ambiguity.\(^\text{25}\) However, Justice Scalia asserted, *Chevron* deference did not allow the OCC to give the term any meaning it wished.\(^\text{26}\) He maintained that the limits of the term “visitorial powers” could be discovered through an analysis of history, and the OCC’s definition would be considered unreasonable if it went beyond those limits.\(^\text{27}\)

Accordingly, the Court proceeded to review the history of visitorial powers, noting that visitorial powers have long existed with respect to churches, charitable institutions, and civil corporations.\(^\text{28}\) A church had a right to supervise each of its institutions, while the founder of a charitable institution had the right to see that it was used properly.\(^\text{29}\) In England, the king was considered the “visitor” of all civil corporations, and could exercise visitorial powers to control a corporation that was abusing its power or acting adversely to the public.\(^\text{30}\) The Court stated that a visitor could inspect and control the visited institution at will.\(^\text{31}\)

Moving on to an examination of its own precedent, the Court perceived a critical distinction between a sovereign’s visitorial power to oversee a corporation’s affairs and its power to enforce its general laws.\(^\text{32}\) The majority found this distinction in *Trustees of Dartmouth College v. Woodard*,\(^\text{33}\) understanding the case to hold that, with respect to a charitable institution, the visitor could exercise powers such as removing officers, correcting abuses, and managing trusts.\(^\text{34}\) However, the majority asserted, in *Dartmouth College*, a court’s general jurisdiction to redress grievances against the institution was not considered an exercise of visitorial powers.\(^\text{35}\) The Court found further support that a court’s general jurisdiction was an exercise of visitorial

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24. *Id.*
25. *Id.*
27. *Id.*
28. *Id.* at 2715-16.
29. *Id.*
30. *Id.* at 2716.
31. *Cuomo*, 129 S. Ct. at 2716.
32. *Id.*
33. 17 U.S. 518 (1819).
34. *Cuomo*, 129 S. Ct. at 2716 (citing *Dartmouth College*, 17 U.S. at 676).
35. *Id.* (citing *Dartmouth College*, 17 U.S. at 676).
powers in Guthrie v. Harkness,\(^3^6\), where an individual shareholder was deemed not to be exercising visitorial power when he petitioned a court to force the production of corporate records.\(^3^7\) The majority also observed that, in First National Bank in St. Louis v. Missouri,\(^3^8\) a sovereign’s visitorial power to perform administrative supervision over a national bank was treated as distinct from its power to enforce a state statute of general applicability.\(^3^9\) Finally, the Court contended that its recent decision in Watters v. Wachovia Bank\(^4^0\) was consistent with its reading of older precedent, as Watters held only that a state was precluded from exercising supervision and control of a national bank and did not address the question of a state’s power to enforce general laws.\(^4^1\) Justice Scalia asserted that all these cases supported the notion that a sovereign’s visitorial powers and its power to enforce general laws were two different things, and that there was no credible argument to the contrary.\(^4^2\)

The Court then sought to bolster its position by pointing out the inconsistencies that would flow from acceptance of the opposite position.\(^4^3\) If state enforcement of general laws was considered to be an exercise of visitorial powers pre-empted by the National Bank Act, then many valid state laws, though still technically applicable to national banks, could not be enforced.\(^4^4\) The Court stated that such a result would be “bizarre,” as the power to enforce a law is inherent in its binding quality.\(^4^5\) This inconsistency, the majority concluded, showed that the most natural interpretation of visitorial powers would be to limit them to administrative supervision, preserving the general law enforcement power of state attorneys general.\(^4^6\)

The Court found support for this point in the language of § 484(a) of the National Bank Act, which outlined an exception to the powers reserved exclusively to the federal government, exempting from pre-

\(^{36}\) 199 U.S. 148 (1905).
\(^{37}\) Cuomo, 129 S. Ct. at 2716-17 (citing Guthrie, 199 U.S. at 159).
\(^{38}\) 263 U.S. 640 (1924).
\(^{39}\) Cuomo, 129 S. Ct. at 2717 (citing St. Louis, 263 U.S. at 660).
\(^{40}\) 550 U.S. 1 (2007).
\(^{41}\) Cuomo, 129 S. Ct. at 2717 (citing Watters, 550 U.S. at 8).
\(^{42}\) Id.
\(^{43}\) Id. at 2717-19.
\(^{44}\) Id. at 2717-18.
\(^{45}\) Id. at 2718 (quoting St. Louis, 263 U.S. at 660).
\(^{46}\) Cuomo, 129 S. Ct. at 2718.
emption state powers “vested in the courts of justice.” The majority asserted that this language must preserve state general law enforcement power. Justice Scalia pointed out that visitorial powers had traditionally been exercised through a court’s issuance of prerogative writs such as mandamus and quo warranto. If § 484(a)’s exception allowed state courts to use these writs against national banks, the exception would swallow the rule by giving states the means to exercise visitorial powers. Thus, the majority reasoned, the only possible reading of the exception was that it preserved state general law enforcement power, allowing state attorneys general to bring actions against national banks in court, where the attorneys general would be treated like litigants and would not have the sweeping powers over the banks’ internal operations that visitorial powers would convey.

Using this analysis, the Court held that the OCC’s regulation was inconsistent with the National Bank Act. The Court found evidence of inconsistency in the OCC’s interpretation of its regulation in a statement of basis and purpose, which sought to impose some limits on the broad pre-emptive effect of the regulation’s definition of visitorial powers. The OCC’s attempt to soften the blow of the regula-

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47. Id. (citing 12 U.S.C. § 484(a)).
48. Id.
49. Id. The writ of mandamus is “issued by a court to compel performance of a particular act . . . .” BLACK’S LAW DICTIONARY 1046 (9th ed. 2009). The writ of quo warranto is used “to inquire whether authority exist[s] to justify or authorize certain acts . . . .” Id. at 1371 (quoting CHARLES HERMAN KINNANE, A FIRST BOOK ON ANGLO-AMERICAN LAW 662 (2d ed. 1952)).
50. Cuomo, 129 S. Ct. at 2718.
51. Id. at 2718-19.
52. Id. at 2719.
53. Id. See 69 Fed. Reg. 1896 (2004). The OCC’s statement of basis and purpose stated in part:

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.” [quoting Bank of America v. City & County of San Francisco, 309 F.3d 351, 359 (9th Cir. 2002).] 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 conducted by national banks, but rather establishes the legal infrastructure that surrounds and supports the ability of national banks . . . to do business.

Id. (footnotes omitted).
tion by suggesting exceptions in the statement of basis and purpose, Justice Scalia stated, could not be squared with the clear language of the regulation itself. The Court held that the statement of basis and purpose could not be considered as narrowing the broad scope of the regulation because it was not based on the text of the regulation or the text of the statute.

After addressing some aspects of the position taken by Justice Thomas in his dissenting opinion, the Court applied its analysis to the instant case. It held that a state attorney general exercises visitorial powers when acting in the role of “sovereign-as-supervisor,” but not when acting in the role of “sovereign-as-law-enforcer.” Accordingly, the Court held that the New York attorney general’s threatened subpoena was an attempt to exercise visitorial powers and could be enjoined, but that a law enforcement action brought in court was permitted.

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54. _Cuomo_, 129 S. Ct. at 2719-20.
55. _Id._ at 2720.
56. _Id._ at 2720-21.
57. _Id._ at 2721.
58. _Id._ at 2721-22. The Court stated:

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. All parties have assumed, and we agree, that if the threatened action would have been unlawful the request-cum-threat could be enjoined. Here the threatened action was not the bringing of a civil suit, or the obtaining of a judicial search warrant based on probable cause, but rather the Attorney General’s issuance of subpoena on his own authority under New York Executive Law, which permits such subpoenas in connection with his investigation of “repeated fraudulent or illegal acts… in the carrying on, conducting or transaction of business.” That is not the exercise of the power of law enforcement “vested in the courts of justice” which 12 U.S.C. § 484(a) exempts from the ban on exercise of supervisory power. Accordingly, the injunction below is affirmed as applied to the threatened issuance of executive subpoenas by the Attorney General for the State of New York, but vacated insofar as it prohibits the Attorney General from bringing judicial enforcement actions.

_Id._ (internal citations omitted).
C. Justice Thomas’s Dissenting Opinion

In an opinion concurring in part and dissenting in part, Justice Thomas argued that the OCC’s regulation was reasonable and that state enforcement actions against national banks could be enjoined.\(^{59}\) He began by emphasizing the \textit{Chevron} standard, pointing out that a court must accept an agency’s reasonable interpretation of a statute even where the court believes it is not the best interpretation.\(^{60}\)

Justice Thomas took issue with the majority’s assertion that it could determine the precise scope of the term “visitorial powers” through a historical analysis, arguing that history showed that the term was susceptible to the broader meaning chosen by the OCC.\(^{61}\) Conceding that the majority’s interpretation may be the best interpretation, Justice Thomas maintained that it was not the only reasonable interpretation.\(^{62}\)

Citing definitions of “visitation” from law dictionaries in use at the time the National Bank Act was enacted, Justice Thomas found that the definitions were broad enough to encompass both administrative supervision and law enforcement.\(^{63}\) He contended that the majority’s narrower understanding of visitorial powers applied only to churches, charities, and universities.\(^{64}\) Under the common law tradition in place at the time of the National Bank Act’s enactment, Justice Thomas argued, visitorial powers over civil corporations (such as banks) were broader.\(^{65}\) Unlike with churches, charities, and universi-

\(^{59}\). \textit{Cuomo}, 129 S. Ct. at 2722 (Thomas, J., concurring in part and dissenting in part). Justice Thomas concurred with the majority’s holding that the threatened subpoena was an exercise of visitorial powers, but dissented from its holding that general law enforcement power could not reasonably be considered an exercise of visitorial powers. \textit{Id.}

\(^{60}\). \textit{Id.} at 2723 (quoting Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005)).

\(^{61}\). \textit{Id.}

\(^{62}\). \textit{Id.} at 2727.

\(^{63}\). \textit{Id.} at 2723 (quoting 2 A. BURRILL, A LAW DICTIONARY AND GLOSSARY 598 (1860) (defining “visitation” as “[i]nspection; superintendence; direction; [and] regulation”); 2 J. BOUVIER, A LAW DICTIONARY 633 (1852) (defining “visitation” as “[t]he act of examining into the affairs of a corporation” and noting that visitation of civil corporations was conducted “by the government itself, through the medium of the courts of justice.”)).

\(^{64}\). \textit{Cuomo}, 129 S. Ct. at 2724.

\(^{65}\). \textit{Id.}
ties, the visitor of a civil corporation was the government itself.\textsuperscript{66} Citing numerous treatises, Justice Thomas found that the common law understanding of visitorial powers over civil corporations was broad enough to include general law enforcement actions.\textsuperscript{67} He charged the majority with not appreciating the difference between visitorial powers over civil corporations and visitorial powers over churches, charities, and universities.\textsuperscript{68} Under Justice Thomas’s reading of the history, both administrative supervision and law enforcement power were considered visitorial powers with respect to civil corporations.\textsuperscript{69}

As evidence of this broader understanding, Justice Thomas cited \textit{Attorney General v. Chicago & Northwestern Railway Company},\textsuperscript{70} an 1874 case decided by the Supreme Court of Wisconsin.\textsuperscript{71} In that case, the state attorney general’s action—seeking an injunction to prevent a railroad company (a civil corporation) from charging tolls higher than the maximum established by Wisconsin law—was considered an exercise of visitorial power.\textsuperscript{72} The Supreme Court of Wisconsin understood visitorial powers to include general law enforcement actions and noted that the conception of visitorial powers had expanded beyond the narrower scope that had applied to churches.\textsuperscript{73} Considering this case and the many treatises cited, Justice Thomas declared, the majority’s assertion that no reasonable interpretation of visitorial powers

\begin{itemize}
\item \textsuperscript{66} Id. at 2724-25.
\item \textsuperscript{67} Id. (citing 2 S. KYD, LAW OF CORPORATIONS 276 (1794); 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 467-72 (1765); 2 J. KENT, COMMENTARIES ON AMERICAN LAW 241 (1827); J. ANGELL & S. AMES, LAW OF PRIVATE CORPORATIONS § 684 (4th ed. 1852); S. MERRILL, LAW OF MANDAMUS § 158 (1892); J. GRANT, A PRACTICAL TREATISE ON THE LAW OF CORPORATIONS IN GENERAL, AS WELL AGGREGATE AS SOLE 262 (1854)).
\item \textsuperscript{68} Id. at 2725 n.1.
\item \textsuperscript{69} Cuomo, 129 S. Ct. at 2724-25.
\item \textsuperscript{70} 35 Wis. 425 (1874).
\item \textsuperscript{72} Cuomo, 129 S. Ct. at 2726 (citing \textit{Chicago & Nw. Ry. Co.}, 35 Wis. at 529-30).
\item \textsuperscript{73} Id. (citing \textit{Chicago & Nw. Ry. Co.}, 35 Wis. at 529-30). The Wisconsin Supreme Court, referring to visitorial powers, stated: “The grounds on which this jurisdiction rests are ancient; but the extent of its application has grown rapidly of late years, until a comparatively obscure and insignificant jurisdiction has become one of great magnitude and public import.” \textit{Chicago & Nw. Ry. Co.}, 35 Wis. at 530.
\end{itemize}
could include general law enforcement power falls apart.74 He concluded that the OCC’s decision to adopt a broad regulatory definition of visitorial powers was reasonable in light of the historical evidence of what the term had been understood to mean.75

Justice Thomas then addressed the petitioner’s argument that the structure of the National Bank Act showed that visitorial powers were limited to examination of internal banking operations, pointing out exceptions contained within the Act that would be unnecessary if the petitioner’s limited interpretation were adopted.76 He noted exceptions allowing states to review a national bank’s records to ensure compliance with certain state property laws and tax laws.77 Such exceptions would be unnecessary if the petitioner’s interpretation were correct, Justice Thomas argued, because such state actions would never have been within the petitioner’s understanding of visitorial powers.78

Taking up the majority’s treatment of case law precedent, Justice Thomas observed that, under the Chevron standard, a court’s previous interpretation of a statute does not trump an agency’s interpretation unless the court held the statute’s meaning to be unambiguous.79 Where a court has acknowledged a statute’s ambiguity, an agency has discretion to adopt an interpretation different from the court’s as long as it is reasonable.80 Here, the Court acknowledged that the meaning of “visitorial powers” was ambiguous.81 Thus, Justice Thomas asserted, it was irrelevant whether prior case law interpreted the term differently.82 Even so, he went on to maintain, the Court has never adopted an interpretation of visitorial powers contrary to that adopted by the OCC, and has in fact never addressed the precise question presented in this case.83

74. Cuomo, 129 S. Ct. at 2726-27.
75. Id. at 2727.
76. Id. at 2727-28.
77. Id. at 2728 (citing 12 U.S.C. § 484(b); 26 U.S.C. § 3305(c) (2009); 12 U.S.C. § 62 (2009)).
78. Id.
79. Cuomo, 129 S. Ct. at 2728-29 (quoting Brand X, 545 U.S. at 982).
80. Id.
81. Id. at 2715 (majority opinion).
82. Id. at 2729 (Thomas, J., concurring in part and dissenting in part).
83. Id. at 2729-31 (citing Guthrie, 199 U.S. at 157-59; St. Louis, 263 U.S. at 660; Watters, 550 U.S. at 7-13).
Finally, Justice Thomas considered the petitioner’s federalism-based argument that, if Congress had intended to effect such a substantial pre-emption of state power when it enacted the National Bank Act, a more clear statement of that intent was necessary. Justice Thomas disagreed, noting that the presumption against pre-emption did not apply to areas with a history of significant federal presence. Regulation of national banks, he explained, had long been the province of the federal government. Thus, the petitioner’s federalism concerns were not implicated in the case at hand. In conclusion, Justice Thomas stated that he would have held that the OCC’s regulation broadly defining “visitorial powers” to include general law enforcement power was reasonable.

2. **History of Visitorial Powers**

Visitation has a long history, dating back to Roman law and the canon law of the early Catholic church. Visitorial powers were originally used to look into the affairs of a church or charity to prevent or correct abuses. For example, under the Roman emperor Justinian, bishops were to supervise charitable gifts made to churches to ensure that they were being used properly. In the common law of England, the visitor of a church was the bishop and the visitor of a charitable institution was the founder or his heirs. As civil corporations had no such private visitor, the concept developed that the king was the visitor of all civil corporations. The king’s visitorial powers were typically exercised through prerogative writs issued by the Court of the King’s Bench. In the United States, the legislature was considered the visitor of civil corporations. Visitors could compel corporations...
to perform duties prescribed by their charters, by statute, or by the common law.96

In Chicago & Northwestern Railway Company, the Supreme Court of Wisconsin granted an injunction sought by the state attorney general to prevent certain railroad companies from charging tolls higher than the maximum established by Wisconsin law.97 The attorney general had applied for a writ of injunction in order to “correct abuses.”98 The court understood the attorney general’s effort to enforce the generally-applicable maximum toll law as an exercise of visitorial power.99 It explained that visitorial powers over civil corporations had expanded as corporations became larger and more influen-
In the Dartmouth College case, the Supreme Court of the United States, in an opinion by Justice Story, addressed visitorial powers over a charitable institution, Dartmouth College. 102 While the institution was subject to the general laws of the land, the Court explained, the government did not have visitorial power over it. 103 As it was a cha-

100. Id. at 530-31. Explaining the need for visitorial powers in the new landscape of large corporations, the court stated:

In our day the common law has encountered in England, as in this country, a new power, unknown to its founders, practically too strong for its ordinary private remedies. The growth of great corporations, centers of vast wealth and power, new and potent elements of social influence, overrunning the country with their works and their traffic... has been marvelous during the last half century. It is very certain that the country has gained largely by them in commerce and development. But such aggregations of power, outside of public control, are dangerous to public and private right; and are practically above many public restraints of the common law, and all ordinary remedies of the common law for private wrongs. Their influence is so large, their capacity of resistance so formidable, their powers of oppression so various, that few persons could litigate with them... And all England had occasion to bless the courage and integrity of her great judges, who used so ably and so freely and so beneficially the equity writ, and held great corporations to strict regard to public and private right. . . . When their oppression becomes public, it is the duty of the attorney general to apply for the writ [of injunction] on behalf of the public.

101. Id. at 550. The court held:

[W]e sustain the jurisdiction to enjoin a corporation from abuse or excess of franchise, or other violation of public law to public detriment, on information in equity, filed ex officio by the attorney general.

The jurisdiction which we claim for this court puts the writ of injunction to a prerogative use. . . . [W]e consider this jurisdiction, in this court, a necessary and most salutary one for the preservation of public right and public authority.


103. Id. at 675-76.
ritable institution, visitorial power was vested in the trustees, who could exercise a range of powers to oversee the institution’s operations. The Court considered this power separate and distinct from the general jurisdiction of courts.

In Guthrie, the Supreme Court addressed visitorial powers under the National Bank Act, holding that a shareholder acting in his private capacity was not exercising visitorial powers when he petitioned a court to force the production of bank records. After determining that a shareholder had a common law right to inspect a corporation’s records, the Court held that a state court could issue a writ of mandamus to enforce that right. The Court acknowledged that the National Bank Act prohibited states from exercising visitorial powers over national banks, but found no definition of “visitorial powers” that would include a shareholder’s common law right to inspect corporate records.

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104. *Id.* at 676. The Court stated:

[A charitable institution] is subject to the controlling authority of its legal visitor, who, unless restrained by the terms of its charter, may amend and repeal its statutes, remove its officers, correct abuses, and generally superintend the management of the trusts. Where, indeed, the visitorial power is vested in the trustees of the charity, in virtue of their incorporation, there can be no amotion of them from their corporate capacity. But they are not, therefore, placed beyond the reach of the law. 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.*

105. *Id.*


107. *Id.* at 153-56.

108. *Id.* at 157-59. The Court held:

That the [National Bank Act] did not intend, in withholding visitorial powers, to take away the right to proceed in courts of justice to enforce such recognized rights as are here involved, is evident from the language used. If the right to compel the inspection of books was a well-recognized common-law remedy, as we have no doubt it was, even if included in visitorial powers as the terms are used in the statute, it would belong to that class “vested in the courts of justice” which are expressly excepted from the inhibition of the statute.

*Id.* See supra note 6.
In St. Louis, the Supreme Court held that a state court could issue a writ of quo warranto preventing a national bank from establishing a branch bank in the state. Though it did not expressly address visitorial powers or § 484 of the National Bank Act, the Court’s upholding of the state’s action impliedly determined that such action was not an exercise of visitorial powers. Concluding that federal law did not give national banks the power to establish branch banks, the Court held that the state was free to enforce its own law prohibiting branches. In dissent, Justice Vandevanter asserted that because federal law established a comprehensive scheme under which national banks existed, the question of whether a national bank could establish a branch bank was a question of federal law only. After it is determined that federal law gives national banks no such power, the inquiry should end. The state, Justice Vandevanter argued, had no right to protect through enforcement of its own law. The question was one of protecting the public right, he contended, and only the federal government had power to act for the public with respect to national banks.

110. Id.  
111. Id. at 659-60. The Court explained: The state is neither seeking to enforce a law of the United States nor endeavoring to call the bank to account for an act in excess of its charter powers. What the state is seeking to do is to vindicate and enforce its own law, and the ultimate inquiry which it propounds is whether the bank is violating that law, not whether it is complying with its charter or law of its creation. The latter inquiry is preliminary and collateral, made only for the purpose of determining whether the state law is free to act in the premises or whether its operation is precluded in the particular case by paramount law. Having determined that the power sought to be exercised by the bank finds no justification in any law or authority of the United States, the way is open for the enforcement of the state statute. In other words, the national statutes are interrogated for the sole purpose of ascertaining whether anything they contain constitutes an impediment to the enforcement of the state statute, and the answer being in the negative, they may be laid aside as of no further concern.  
112. Id. at 665-66 (Vandevanter, J., dissenting).  
113. Id. at 666.  
114. St. Louis, 263 U.S. at 666.  
115. Id. at 666-67.
In *Watters*, the Supreme Court held that the National Bank Act’s prohibition on state exercises of visitorial powers over national banks extended to subsidiaries of national banks. When a national bank acquired a subsidiary that had been engaged in mortgage lending in Michigan, the subsidiary advised the state government that it would no longer submit to the state’s registration and inspection requirements. The Court held that the state could not exercise general supervision and control over the subsidiary, as those powers were visitorial powers preempted by the National Bank Act. Though subsidiaries are not themselves national banks, the Court stated, they enjoyed the same immunity from state exercises of visitorial powers.

3. Analysis of the Cuomo Decision

The question presented in *Cuomo* came down to an application of the *Chevron* standard, and the majority’s application of that standard was decidedly less than rigorous. Though it conceded that the term “visitorial powers” was ambiguous and that its meaning had to be discerned “through the clouded lens of history,” the Court was too certain of its own interpretation of that history and too quick to call all other interpretations unreasonable. While it may be the case that the majority’s interpretation was the best, that is not sufficient to invalidate the agency’s interpretation under *Chevron*—the agency’s interpretation must be deemed unreasonable. In light of the vagueness of “visitorial powers” and the lack of definitive history and precedent on the term’s scope, the Court should have deferred to the OCC’s interpretation as Justice Thomas urged.

In holding the OCC’s regulation unreasonable, the majority relied too heavily on Supreme Court precedents that did not reach the precise question at issue. *St. Louis* and *Guthrie*, though not directly addressing the question, would seem to point to the majority’s conclusion—if the Court were interpreting the law de novo. However, under *Chevron*, the Court was required to defer to the OCC’s interpretation as long as it was reasonable. Though *St. Louis* and *Guthrie* may suggest a particular path, they are not sufficiently definitive to foreclose

117. *Id.* at 8.
118. *Id.* at 21.
119. *Id.*
120. *Cuomo*, 129 S. Ct. at 2715.
all other paths. Where these cases did not reach, a gray area remained. Operating within that space, the OCC was not unreasonable in its conclusion that visitorial powers could include general law enforcement.

Focusing on its own inconclusive precedent, the Cuomo Court neglected to address many of the 18th and 19th century sources brought up by Justice Thomas.121 On a question where Supreme Court precedent provided no definitive pronouncement, those secondary sources would have been important guideposts for the OCC in its effort to determine the outer limits of “visitorial powers.” The opinion of the Supreme Court of Wisconsin also shed valuable light on how the vague term was understood, especially with respect to powerful civil corporations.122 Declining to acknowledge the importance of such sources, the Cuomo Court unduly silenced voices that could have legitimately spoken on the question at hand. As Justice Thomas pointed out, the opinions of eminent commentators such as William Blackstone should not be lightly swept aside.123 The result of the majority’s narrowness was that the universe of sources it considered was thinner than that which could reasonably have been considered by the OCC.

The majority also failed to appreciate the difference between visitorial powers over churches and charities and visitorial powers over civil corporations. A distinction between oversight and law enforcement is easy to perceive where the visitor has no law enforcement power, but where the visitor is the sovereign, the line is at least somewhat blurred. Thus, references to visitorial powers over churches and charities do not lend much support to the majority’s conclusion that a sovereign’s oversight and law enforcement powers over national banks were distinct and that the latter was not considered visitorial. Private visitors possess no law enforcement power whatsoever, so in the case of churches and charities there can never be a question as to whether visitorial powers included law enforcement. Only when the visitor is a sovereign wielding general law enforcement power can the question arise. Thus, the majority’s reliance on the Dartmouth College case to illustrate the scope of visitorial powers was misplaced.124

121. See supra notes 63, 67, and 71.
122. See supra notes 97-101 and accompanying text.
123. Cuomo, 129 S. Ct. at 2727 (Thomas, J., concurring in part and dissenting in part).
124. See id. at 2716 (majority opinion).
The historical evidence set forth by Justice Thomas tended to show that some thought the government’s visitorial powers over corporations were broader than those exercised by private visitors over churches and charities.\footnote{125. See id. at 2726-27 (Thomas, J., concurring in part and dissenting in part).} The evidence was not clear enough to definitively prove either the broad or narrow interpretation correct, so both interpretations should have been considered reasonable.

Had the Cuomo Court properly addressed all these considerations, it probably would have interpreted the substantive law the same way—and probably would not have been wrong. But the Court’s own interpretation of the substantive law was not dispositive in this case, as the Chevron standard required it to defer to the OCC’s interpretation as long as it was reasonable. While the majority made a good case that it had arrived at the best interpretation of the scope of “visitorial powers,” it fell short of showing that the OCC’s interpretation was unreasonable.

CONCLUSION

The question presented in Cuomo was essentially a dry dispute over the application of the Chevron standard, and the opinions written by Justice Scalia and Justice Thomas were principally occupied by discussions of cases and treatises over one hundred years old. But what does the Cuomo decision mean for today’s national banks and the states that want to regulate them? The consequences are as yet largely uncertain, but a few observations can be made. In a time of subprime mortgage crisis, the lending practices of banks are a controversial and politically-charged topic that may attract the attention of the public and attorneys general alike. Armed with a new weapon, states may seek to regulate banks more aggressively. Because Cuomo limits the states’ power over national banks to law enforcement actions, attorneys general will have to use litigation to enforce their laws. Increased litigation can be expected, though the outcome of such actions will depend on the particular state laws and bank activities at issue.