

ENFORCING THE FAIR HOUSING ACT: CAN AGENCY INTERPRETATIONS OVERRIDE CONGRESSIONAL INTENT IN ANTI-DISCRIMINATION LEGISLATION?

*Francesca S. Laguardia**

I.

INTRODUCTION

On October 12, 2005, the Southern District of New York ruled that the New York State Attorney General was enjoined from enforcing state laws prohibiting discriminatory lending against national banks.¹ The court found in favor of the Office of the Comptroller of the Currency (OCC), the federal regulator of national banks. The OCC claimed that while state fair lending laws had not been preempted, the New York State Attorney General's (OAG) *authority to enforce* those laws had been preempted by a series of federal statutes and OCC-written regulations that give the OCC exclusive authority to bring any enforcement action against national banks.² In other words, the OCC, a federal agency, claimed that authority to enforce non-preempted state fair lending laws against national banks rested exclusively within its office. Such enforcement preemption is otherwise unheard of in United States law³ and raises serious federalism questions as well as concerns regarding the relationship between agency regulations and federal statutes.

* Candidate for J.D., 2007, New York University School of Law. Candidate for Ph.D., Law and Society, New York University Graduate School for Arts and Sciences, Institute for Law and Society. The Author was a summer intern in the Office of the New York State Attorney General in 2005.

1. Office of the Comptroller of the Currency v. Spitzer, 396 F. Supp. 2d 383, 407 (S.D.N.Y. 2005).

2. *Comptroller of the Currency*, 396 F. Supp. 2d at 385.

3. The OAG could find only one other instance of such a statute, gambling on Native American reservations. See Defendant's Memorandum of Law in Opposition to Plaintiff's Request for Injunctive and Declaratory Relief and in Support of Counterclaim at 27, *Comptroller of the Currency*, 396 F. Supp. 2d 383 (S.D.N.Y. 2005) (No. 05 Civ. 5636), 2005 WL 2095741 [*hereinafter* OAG Memo].

The conflict arose when the OAG began investigating national banks for Fair Housing Act⁴ (FHA) violations. Disclosures made under the Home Mortgage Disclosure Act⁵ revealed extreme racial disparities in interest rates on home mortgages.⁶ The OAG found that at some banks, African-Americans were two to three times more likely to receive high-rate loans than their Caucasian counterparts with equivalent qualifications.⁷ The OAG argued that it is empowered to investigate national banks for such violations because the FHA designates state agencies as its primary enforcers.⁸ However, the OCC, relying on 12 C.F.R. § 7.4000, argued that it has the exclusive authority to enforce any laws (state or federal) against national banks.⁹

4. 42 U.S.C. §§ 3601–3619, 3631 (2000).

5. 12 U.S.C. §§ 2801–2810 (2000). The Home Mortgage Disclosure Act (HMDA) requires that certain information regarding mortgage and lending rates be disclosed and made public, in order to make lending agencies more responsible for their practices. *See id.*

The HMDA requirements include information about the loan itself, the property the loan was made on, and information about the borrower, including ethnicity, race, sex, and income. 12 U.S.C. § 2803. As of January 2004, amendments to the federal regulation which implements the HMDA took effect, requiring that the information disclosed include the difference between the annual percentage rate on the loan and the yield from U.S. Treasury securities of comparable maturity for loans where the annual rate exceeds certain designated thresholds. In simpler words, the newly amended regulation requires that banks disclose the relative rates of high-rate loans. 12 C.F.R. § 203.4 (2003); *see also* Home Mortgage Disclosure, 68 Fed. Reg. 31,589 (May 28, 2003); Press Release, Federal Reserve Board, Board Announces Changes to Public Disclosure Tables Used to Report Data Under the Home Mortgage Disclosure Act, Regulation C (Dec. 10, 2004), *available at* <http://www.federalreserve.gov/boarddocs/press/bcreg/2004/20041210/attachment2.pdf>; NATIONAL CREDIT UNION ADMINISTRATION, FREQUENTLY ASKED QUESTIONS ABOUT THE NEW HMDA DATA 3–4 (2005), *available at* http://www.ncua.gov/GuidesManuals/HMDA_reporting/HMDA_FAQ.pdf.

6. OAG Memo, *supra* note 3, at 5.

7. *Id.*

8. *See infra* Part III.

9. *See* 12 C.F.R. § 7.4000(a)(1) (2005). The rule grants the OCC exclusive visitatorial powers with regard to national banks and interprets “visitatorial” to mean any examination, inspection of books and records, and any enforcement of compliance with federal or state laws. *Id.* § 7.4000(a)(2). This is an interpretation of the National Bank Act, 12 U.S.C. § 484(a) (2002), which states that:

No national bank shall be subject to any visitatorial 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.

The OAG additionally questioned the OCC’s interpretation of the “courts of justice” exception. 12 C.F.R. § 7.4000(b)(1). The debates over the proper interpretation of these terms are historical and will not be discussed in this Recent Development. This Recent Development accepts the district court’s determination that these terms are ambiguous and instead discusses two arguments raised by the OAG that were not adequately addressed in the court’s opinion.

Acting on its belief that the racial disparities established a prima facie case of violation of state and federal anti-discrimination laws under the FHA, the OAG sent letters to various banks, asking those banks to voluntarily provide information which could explain the disparities.¹⁰ Worried that several national banks that are members of the National Clearing House Association (NCHA) were going to be sued or subpoenaed,¹¹ the NCHA filed a complaint in the Southern District of New York seeking to enjoin the OAG from enforcing federal and state anti-discrimination laws against NCHA member national banks.¹² The OCC filed suit the same day to enjoin the OAG from enforcing any laws whatsoever against national banks asking for a declaration that the OAG has no authority to investigate legal violations by national banks, nor to enforce any laws, state or federal, against national banks.¹³

The district court's forty-page opinion granted a mere page and a half to resolving the conflict between the OCC's regulations and the FHA, and another page and a half to deciding the federalism questions involved.¹⁴ The vast majority of the opinion was devoted to the question of *Chevron* deference, concluding that the OCC's interpretations of statutes enforced by the OCC (the interpretations embodied in 12 C.F.R. § 7.4000) were "permissible."¹⁵

This Recent Development will argue that, in doing so, the court impermissibly allowed a federal banking agency to overwrite a federal statute. Part II will present the background of the case and the district court's opinion. Part III will address the conflict with the FHA, and Part IV will address the federalism issues inherent in allowing enforcement preemption. Part V will conclude that the district court found the OCC's interpretation of the National Banking Act to be reasonable only by ignoring some of the most compelling issues presented by the OAG, that this constitutes an over-extension of the *Chevron* doctrine to unprecedented and ill-advised levels of agency power, and that these issues can and should be taken up on appeal.

10. OAG Memo, *supra* note 3, at 6.

11. See Complaint at 5–7, Clearing House Ass'n v. Spitzer, 394 F. Supp. 2d 620 (S.D.N.Y. 2005) (No. 05 Civ. 5269).

12. *Id.*

13. Complaint for Declaratory Relief, Preliminary Injunction and Permanent Injunction, Office of the Comptroller of the Currency v. Spitzer, 396 F. Supp. 2d 383 (S.D.N.Y. 2005) (No. 05 Civ. 5636), 2005 WL 1803340.

14. *Comptroller of the Currency*, 396 F. Supp. 2d at 391–92, 403–04.

15. *Id.* at 385.

II.

THE DISTRICT COURT'S DECISION
AND *CHEVRON* DEFERENCE

Legally, this case arose as a dispute over the interpretation of a federal statute. The district court explained that the OCC wrote 12 C.F.R. § 7.4000 to clarify 12 U.S.C. § 484,¹⁶ a portion of the National Bank Act that has remained “substantially the same as it was when originally enacted 141 years ago.”¹⁷ *Chevron v. Natural Resources Defense Council* mandates that federal agencies be given a great deal of deference when interpreting statutes which they have authority to enforce.¹⁸ As the district court noted in this case, if the statute being interpreted is ambiguous with respect to the disputed issue, and the federal agency interpreting the statute has sufficient enforcement authority to be considered an administrator of the statute, the agency’s interpretation must be accepted as long as it is based on a permissible interpretation of the statute.¹⁹

The district court found that the OCC has enough enforcement authority with regard to banking laws that its interpretations of such laws should generally be given *Chevron* deference.²⁰ The district

16. *Id.* at 390.

17. *Id.* at 389.

18. 467 U.S. 837, 842–43 (1984).

19. *Comptroller of the Currency*, 396 F. Supp. 2d at 391 (quoting *Nations Bank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995) (quoting *Chevron*, 467 U.S. 837, 842–43 (1984))).

20. *Id.* (quoting *Clarke v. Secs. Indus. Ass’n*, 479 U.S. 388, 403–04 (1987)). The OAG claimed no deference was deserved because only legal expertise is needed in order to determine whether a state can enforce its own laws, and on this basis courts have refused to give deference to federal agency decisions that state laws are preempted. See OAG Memo, *supra* note 3, at 35 (citing *Smiley v. Citibank*, 517 U.S. 735, 744 (1996) (finding OCC decision as to whether federal statute preempted state law not entitled to deference); *Bankwest, Inc. v. Baker*, 411 F.3d 1289, 1300–01 (11th Cir. 2005) (finding preemption is more within expertise of courts than agencies, therefore deference is not appropriate); *Colorado Pub. Utils. Comm’n v. Harmon*, 951 F.2d 1571, 1579 (10th Cir. 1991) (“[courts] independently review the legal issue of preemption”). In response, the court stated that the OCC’s interpretation was informed by its experience as the national banks’ primary regulator. *Comptroller of the Currency*, 396 F. Supp. 2d at 398.

The OAG had also argued that courts and scholars have been reluctant to grant *Chevron* deference to federal agencies’ decisions to extend their own jurisdiction. OAG Memo, *supra* note 3, at 37 n.18 (citing *Nat’l Res. Def. Council v. Abraham*, 355 F.3d 179, 199 (2d Cir. 2004) (“[I]t seems highly unlikely that a responsible Congress would implicitly delegate to an agency the power to define the scope of its own power.” (quoting *ACLU v. FCC*, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987))); *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 616 (1944) (“The determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested.”); *ACLU v. FCC*, 823 F.2d 1554, 1567

court also came to the conclusion that 12 U.S.C. § 484 was ambiguous on the matter of enforcement; notably the court focused on disputing the OAG's claims that the statute unambiguously contradicted the OCC's interpretation, while ignoring OCC's claim that the OCC's interpretation was unambiguously correct.²¹ Finally, the district court came to the conclusion that the OCC's interpretations were permissible because they were consistent with historical understanding,²² they were consistent with the purposes of the National Bank Act,²³ and they were consistent with the statutory text.²⁴

The court found that the FHA did not render the OCC's interpretation unreasonable or impermissible.²⁵ Rather than addressing the federalism issues inherent in the question of preempting state enforcement of state laws without preempting the laws themselves, the court looked at this issue as a pure preemption question. The court stated that "[t]his case . . . involves an instance of 'conflict preemption' that arises where 'state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"²⁶ As is discussed in Part IV, however, the federalism issues raised by enforcement preemption, where state laws are in effect but enforced by a non-state agency, are entirely different from the issues raised by a normal preemption case. Under that rubric, the OCC's interpretation

n.32 (11th Cir. 1987) ("it seems highly unlikely that a responsible Congress would implicitly delegate to an agency the power to define the scope of its own power. When an agency's assertion of power into new arenas is under attack . . . courts should perform a close and searching analysis of congressional intent, remaining skeptical of the proposition that Congress did not speak to such a fundamental issue."); *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 916 (3d Cir. 1981) ("more intense scrutiny . . . is appropriate when the agency interprets its own authority"); Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORNELL J. L. & PUB. POL'Y 203 (2004); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 910 (2001) ("Congress cannot be presumed to intend that courts defer to agency judgments about the scope of their jurisdiction."). The court responded that the OCC had interpreted the statute in 12 C.F.R. § 7.4000 in order to clarify existing ambiguity and provide certainty to affected parties, and therefore the regulation in question could not be distinguished from other regulations recently affirmed by the Second Circuit. *Comptroller of the Currency*, 396 F. Supp. 2d at 392.

Finally the OAG argued that the OCC's rulemaking authority is limited to issues of "safety and soundness" of national banks. OAG Memo, *supra* note 3, at 38. The court replied that 12 U.S.C. § 93(a) encompassed the authority claimed in this case. *Comptroller of the Currency*, 396 F. Supp. 2d at 398.

21. *Comptroller of the Currency*, 396 F. Supp. 2d at 385, 393–98.

22. *Id.* at 400.

23. *Id.* at 401–03, 405–06.

24. *Id.* at 405–06.

25. *Id.* at 403.

26. *Id.* at 391–92 (citing *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 313–14 (2d Cir. 2005)).

comes in direct conflict with the accepted intent and construction of the FHA. These two facts should have been enough to show that the OCC's interpretation of the National Banking Act is impermissible.

III.

THE CONFLICT BETWEEN THE OCC'S INTERPRETATION OF THE NATIONAL BANKING ACT AND THE FAIR HOUSING ACT

The OCC claims (through its interpretation of 12 U.S.C. § 484) that the National Bank Act has always prevented the type of legal action taken by the OAG against national banks. The FHA, however, was passed 100 years after the National Bank Act, and seems to grant to state attorneys general precisely the role the OAG attempted to play here.²⁷

A. *The Fair Housing Act Gives State Agencies Primary Enforcement Authority*

While it is the OCC's position that no governmental agency other than the OCC may take any type of enforcement action against a national bank, the FHA explicitly delegates certain enforcement authority to state agencies. The U.S. Department of Housing and Urban Development (HUD) may certify state or local agencies to process fair housing complaints pursuant to state or local law, if the state or local law is substantially equivalent to the FHA.²⁸ Once agencies have been certified, they become the primary enforcers of the FHA.²⁹ In other words, although HUD is a federal agency, Congress insisted that HUD *must* refer complaints to the relevant certified state and local agencies, rather than taking action on its own.³⁰ HUD has referred discriminatory lending complaints against national banks to state enforcement agencies.³¹ The OAG further noted that the FHA implies that all federal regulators are meant to align their practices with the FHA's enforcement scheme as set out in 42 U.S.C. § 3610(f). Federal agencies "having regulatory or supervisory authority over financial in-

27. Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 73, 81-89 (1968) (codified as amended at 42 U.S.C. §§ 3601-3619, 3631 (2000)); National Bank Act of 1864, 13 Stat. 99.

28. 42 U.S.C. § 3610(f) (2002).

29. *Id.*

30. *Id.*

31. See OAG Memo, *supra* note 3, at 25; see also *Boykin v. Key Corp.*, No. 03-CV-944S, 2005 U.S. Dist. LEXIS 5546 at *4 (W.D.N.Y. Mar. 28, 2005).

stitutions” are directed to “cooperate with” HUD in order to further the goals of the FHA.³²

B. Authority Was Granted to Provide Multiple Levels of Enforcement

The OAG argued that the purpose behind granting state agencies primary enforcement authority in the FHA was to create a system of enforcement involving “multiple actors in multiple fora.”³³ To support this claim, the OAG pointed to the fact that the FHA provides several different avenues of enforcement—HUD may pursue administrative proceedings,³⁴ “aggrieved persons” may pursue civil actions,³⁵ the U.S. Department of Justice may take enforcement action in federal court,³⁶ and state and local agencies, once certified by HUD, may process fair housing complaints.³⁷ Multiple possible parties means broad enforcement coverage.

Corroborating this conclusion is the fact that use of the statutory phrase “aggrieved person” in granting authority to sue under an act has been interpreted to reflect congressional intent to extend standing “to the broadest class of plaintiffs permitted by Art[icle] III.”³⁸ The Second Circuit has interpreted such a grant of standing to include authority for state and local governments to bring a fair housing claim.³⁹ This, among other reasons, may also be what led the Tenth Circuit to state, “It is clear that Congress intended to summon all available forces to vindicate a policy that Congress considered to be of the highest priority.”⁴⁰ This broad interpretation of which parties may be granted standing appears consistent with congressional policy in enforcing civil rights under the FHA’s statutory scheme.

32. OAG Memo, *supra* note 3, at 25–26 (citing 42 U.S.C. § 3608(d) (2002)).

33. *Id.* at 24.

34. 42 U.S.C. § 3610 (2002).

35. *Id.* § 3613.

36. *Id.* §§ 3612(o), 3614.

37. *Id.* § 3610(f).

38. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 97, 109 (1979) (stating that use of phrase “direct victims” in 42 U.S.C. § 3612 extends standing to same class of plaintiffs as does phrase “aggrieved persons,” and that in both cases standing is granted to broadest class of plaintiffs possible).

39. *See infra* notes 44–46 and accompanying text.

40. *Hous. Auth. of Kaw Tribe of Indians v. City of Ponca City*, 952 F.2d 1183, 1195 (10th Cir. 1991) (internal citation omitted).

C. *Is a Grant of Authority to State Agencies Necessarily a Grant of Authority to State Attorneys General?*

The NCHA, in order to protect its members from the enforcement of state anti-discrimination laws, argued that state and local agencies do not include the OAG.⁴¹ The OAG is not certified with HUD, and the NCHA argued that such certification is necessary in order to be a state or local agency to which HUD refers cases.⁴² The only certified state agency in New York is the New York State Division of Human Rights.⁴³ It might be added that the OAG should be considered in a different light from other state and local agencies because the OAG's enforcement of state laws may be more likely to become overly burdensome to national banks.

However, the OAG does not necessarily need to be certified by HUD in order to enforce state anti-discrimination laws. The Second Circuit has noted that states may bring suit to enforce federal statutes *parens patriae*, and that congressional intent to allow lawsuits by states may be demonstrated by certain legislative language, such as broad enforcement provisions permitting suits by "aggrieved persons."⁴⁴ This exact language is found in the FHA.⁴⁵

The Northern District of New York (NDNY) has specifically granted the State of New York, through its state officials, *parens patriae* standing to enforce the FHA.⁴⁶ Additionally, through the FHA, Congress has shown a clear preference for maximum enforcement with respect to civil rights policy.⁴⁷ It is unlikely that congressional intent would not include enforcement by state Attorneys General, precisely because Attorneys General are more likely to have the resources and capability to vigorously enforce these laws.

If nothing else, the National Bank Act forbids visitation of national banks "except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by

41. Reply Memorandum in Further Support of Motion for Preliminary and Final Injunction at 16, Clearing House Ass'n v. Spitzer, 394 F. Supp. 2d 620 (S.D.N.Y. 2005) (No. 05 Civ. 5629), 2005 WL 1803333.

42. *Id.* (citing 42 U.S.C. § 3610(f)); see *supra* notes 28–31 and accompanying text.

43. *Id.*; see also Fair Housing Assistance Program (FHAP) Agencies, <http://www.hud.gov/offices/fheo/partners/FHAP/agencies.cfm#NY>.

44. See *Connecticut v. Physicians Health Servs. of Conn., Inc.*, 287 F.3d 110, 121 (2d Cir. 2002).

45. See, e.g., 42 U.S.C. §§ 3610, 3612, 3613.

46. See *Support Ministries for Persons with AIDS, Inc. v. Village of Waterford*, 799 F. Supp. 272, 279 (N.D.N.Y. 1992).

47. See *supra* notes 34–37 and accompanying text.

Congress or by either House thereof.”⁴⁸ The history and interpretation of the FHA over the years show that state Attorneys General have been either authorized or directed by Congress, through the FHA, to visit banks along with any and all other actions that must be taken to enforce the Act.

*D. Reconciling a Specific Statute With a More General Statute
Must Be Done by Finding in Favor of
the More Specific Statute*

While the National Bank Act sets out a general enforcement scheme for national banks, the FHA sets out a very specific enforcement scheme to deal with a specific matter, i.e. discrimination in lending. The OAG points to this fact in order to support its contention that the FHA’s requirements should control.⁴⁹ In so doing, the OAG cites the Supreme Court’s statement that “where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand. . . . a specific policy embodied in a later federal statute should control our construction of the earlier statute, even though it has not been expressly amended.”⁵⁰

The district court’s opinion specifically responds to this argument by the OAG, suggesting that the FHA lacks any indication that its enforcement mechanisms should override the National Bank Act and, furthermore, that the FHA does not expressly mention state Attorneys General.⁵¹ Evaluating the arguments presented by the OAG, the district court came to the conclusion that the FHA is broader because it does not specifically address lending, while the National Bank Act does, making the National Bank Act determinative in any conflict between the two statutes with respect to lending.⁵² The court, therefore, found that the FHA did not require a narrower interpretation of the OCC’s authority.⁵³

The FHA does, however, specifically refer to federal agencies with regulatory or supervisory control over financial institutions.⁵⁴ As noted above, the statutory language requires that those agencies coop-

48. 12 U.S.C. § 484.

49. OAG Memo, *supra* note 3, at 24.

50. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (internal citations omitted); *see also* OAG memo, *supra* note 3, at 24.

51. *Office of the Comptroller of the Currency v. Spitzer*, 396 F. Supp. 2d 383, 404 (S.D.N.Y. 2005).

52. *Id.*

53. *Id.*

54. 42 U.S.C. § 3608(d) (2000).

erate with HUD.⁵⁵ While the FHA does not specifically refer to lending, nowhere does the National Bank Act specifically refer to the discriminatory practices alleged here, which are precisely what the FHA was written to curtail. Nor does the National Bank Act speak to the applicability of state laws to national banks, and no party in this case argued that they were not applicable.

IV.

THE FEDERALISM QUESTION AND THE PUBLIC POLICY PROBLEMS OF FORBIDDING STATES FROM ENFORCING THEIR OWN LAWS

As a federal agency arguing for exclusive authority to enforce state laws, the OCC is attempting something almost unprecedented. The OAG found only one other instance of exclusive federal enforcement of state laws—that of regulation of gambling on Native American reservations.⁵⁶ However, as noted by the OAG, states generally do not have jurisdiction on Native American reservations; without federal authorization, state laws would not apply at all.⁵⁷ Moreover, the gambling statute in question explicitly grants exclusive enforcement authority to the federal government,⁵⁸ something which no statute cited by the OCC does.

Another useful statute for comparison is the Assimilated Crimes Act (ACA).⁵⁹ The ACA applies to areas already under the exclusive jurisdiction of the United States, such as military installations. It allows federal prosecution, in those areas already exclusively under federal jurisdiction, for acts and omissions that are not already considered offenses under federal law.⁶⁰ Essentially, state law of surrounding areas is adopted into the federal system. The ACA has been referred to as “a shorthand method of providing a set of criminal laws on federal reservations by using local law to fill the gaps in federal criminal law.”⁶¹ Prosecutions under the ACA are considered federal prosecu-

55. *Id.* (“All executive departments and agencies shall administer their programs and activities relating to housing and urban development . . . in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.”); *see also supra* note 32 and accompanying text.

56. OAG Memo, *supra* note 3, at 27.

57. *Id.*; *see also* *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 471 (1979).

58. 18 U.S.C. § 1166(d) (2002).

59. *Id.* § 13(a).

60. *Id.*

61. *United States v. Prejean*, 494 F.2d 495, 496 (5th Cir. 1974).

tions under a federal law which assimilates state law, rather than enforcements of state law.⁶²

The OAG argued that a statutory scheme in which federal agencies enforced state law would threaten political accountability as well as interfered in core state sovereign interests, and would offer up none of the traditional benefits attained either by preempting state laws or by leaving those laws in state control.⁶³ Before accepting the OCC's exclusive approach, the OAG argued, the court should look for a clear statement of Congress that such a statutory scheme had been intended, suggesting that no such clear statement exists.⁶⁴

A. *Exclusive Federal Authority to Enforce State Laws
Would Threaten Core State Sovereign
Interests and Accountability*

The OAG argued that a state's ability to enforce its own laws is a key aspect of state sovereignty.⁶⁵ The OAG pointed to Congress's acknowledgement that states have a strong "interest in protecting the rights of their consumers, businesses, and communities, and specifically in combating discrimination in housing and lending."⁶⁶ According to the OAG Memo, this sovereign interest is so fundamental that a clear statement of Congress is necessary before the interest can be impinged upon.⁶⁷

The OAG argued that a clear statement of congressional intent is even more necessary because of the blurring of accountability which would occur if federal agencies are granted exclusive authority to en-

62. See *United States v. Gaskell*, 134 F.3d 1039, 1042 (11th Cir. 1998) ("Prosecution under the ACA is for enforcement of federal law assimilating a state statute, not for enforcement of state law."); *United States v. Brown*, 608 F.2d 551, 553 (5th Cir. 1979).

63. OAG Memo, *supra* note 3, at 30.

64. *Id.* at 29.

65. *Id.*; see also *Diamond v. Charles*, 476 U.S. 54, 66 (1986) ("Because the State alone is entitled to create a legal code, only the State has [the direct stake needed to support standing] . . . in defending the standards embodied in that code."); *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982) ("power to create and enforce a legal code" is sovereign interest of state); *Berger v. Cuyahoga County Bar Ass'n*, 983 F.2d 718, 722 (6th Cir. 1993) ("Promulgation and enforcement of the rules are plainly exercises of Ohio's sovereign power.").

66. OAG Memo, *supra* note 3, at 30 (citing H.R. Rep. No. 103-651, at 53 (1995), *reprinted in* 1994 U.S.C.A.N. 2074).

67. *Id.* at 29 ("When a statute would 'pre-empt the historic powers of the States' or 'alter the usual constitutional balance between the States and the Federal Government,' the Supreme Court requires Congress to 'make its intention to do so unmistakably clear in the language of the statute.'") (citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989)).

force state laws.⁶⁸ The OAG Memo suggests, for example, that if the OCC does not adequately enforce state laws, it will be overly insulated from public response due not only to public confusion over whom to blame, but also because the people of any given state will be far less likely to be able to get Congress or the President to listen to their complaints regarding enforcement of their own state's laws while local officials who might listen would be unable to change enforcement policies.⁶⁹

Finally, the OAG noted that the argument for preemption is generally one of conformity in law enforcement.⁷⁰ By preempting state laws, Congress protects international actors by offering them uniform laws, as well as avoiding wasteful and harmful duplicative enforcement. In contrast, the argument for leaving an issue to state law is that of experimentation. State-by-state legislation allows states to try out new techniques until a superior one is found and gradually adopted by the nation, or a balance is found through tailoring techniques to jurisdictions with different needs and values.⁷¹

If the OCC were granted exclusive authority to enforce state laws, the benefits of experimentation would be lost, as the OCC would almost certainly enforce each state's laws in as similar a manner as possible. It is also unlikely that the OCC would be as familiar with local needs and attitudes as would be local legislatures and enforcement authorities. At the same time, the OCC cannot claim that there would be a single, uniform law across state lines, as it must at least make efforts to enforce each state's individual laws, and it would not have the authority to rewrite those laws, although it might be willing to run the risk of ignoring some of them, or manipulating enforcement in order to further its own uniform policy goals. For these reasons, the OAG asserted that the OCC's interpretation of exclusive enforcement fails to provide any justification for so thoroughly interfering with what has traditionally been within state authority.⁷²

*B. The Clear Congressional Statement Required to Justify
Interference with Core State Sovereign Interest
Cannot Be Found In This Case*

The OAG further argued that no statute cited by the OCC provides a clear statement of congressional intent to grant exclusive en-

68. *Id.* at 30.

69. *Id.* at 31.

70. *See id.* at 28.

71. *See id.*

72. *Id.*

forcement authority to the OCC.⁷³ Such a statement “must be both unequivocal and textual.”⁷⁴ The very difficulties that led the court into the *Chevron* question show that the language of these statutes is not, in fact, unequivocal. Indeed, the district court’s decision that the statute under interpretation was ambiguous, and that there was no clear statement of Congress which could decide the *Chevron* question,⁷⁵ shows that there is no clear statement sufficient to resolve the federalism issues raised here.

C. *The Court’s Response*

In response, the court limited its consideration of the OAG’s argument to that of the traditional state interest in protecting its citizens from discrimination.⁷⁶ The court insisted that preemption does not *require* a clear statement of Congress,⁷⁷ although it nonetheless ignored the main part of the OAG’s argument. The OAG did not argue simply that the state’s anti-discrimination laws could not be preempted by Congress; rather the OAG argued that its *enforcement authority* could not be preempted, without preempting the laws themselves, absent a clear statement from Congress.⁷⁸ These two arguments are extremely different. The vast majority of the negative federalism implications cited by the OAG apply specifically because New York state laws, still in effect as state laws, would be enforced exclusively by an agency having no original understanding of those laws and no ability (nor responsibility) to change them. When considering whether an ambiguous statute can be reasonably interpreted as foreclosing a state’s authority to enforce its own laws, it is appropriate for a court to consider the delicate balance of federalism which might be disrupted by such an interpretation. A court might therefore reasonably require clarity from Congress before accepting an agency’s claim.

Stating that policy issues are to be determined by legislatures and not courts,⁷⁹ the court did not pursue the rest of the OAG’s arguments. This is in direct conflict with the cases cited by the OAG which show that at least some courts have found it appropriate to consider these policy issues.⁸⁰

73. *Id.* at 31.

74. *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989).

75. Were there a clear statement of Congress, the district court would not have performed its evaluation of whether or not the OCC’s interpretation is permissible.

76. *Comptroller of the Currency*, 396 F. Supp. 2d at 391.

77. *Id.*

78. OAG Memo, *supra* note 3, at 29.

79. *Comptroller of the Currency*, 396 F. Supp. 2d at 386.

80. *Id.* at 37 n.18.

V.

CONCLUSION: IMPLICATIONS FOR REGULATIONS,
STATUTES, AND THE APPEAL

Office of the Comptroller of the Currency v. Spitzer does inevitably turn on the *Chevron* question. However, *Chevron* does not place agency regulations on the same level as federal statutes; *Chevron* mandates that deference be given to agency interpretations of statutes enforced by that agency, not that such interpretations are necessarily correct.⁸¹ If an interpretation is impermissible, if an agency oversteps the bounds of its authority or interprets a statute in a manner that simply cannot be an accurate evaluation of congressional intent, or if an agency interpretation directly contradicts Congress's intent in writing the statute, the interpretation must fail.⁸² The *Chevron* test shows that even if the statute itself is ambiguous as to congressional intent, the regulation may be impermissible based on indications of what the statute must mean, outside of the language of the statute itself; if this were not the case, determining the ambiguity of a statute would be the sole facet of the *Chevron* test.

Although the district court found that the OCC's interpretation was reasonable, it did so by largely ignoring the serious issues raised by the contradictions between the OCC's interpretation of 12 U.S.C. § 484, the FHA's mandate of multiple enforcers, and the federalism concerns raised by the idea of enforcement preemption. These arguments would provide strong support to an OAG appeal to the Second Circuit that the OCC's statutory interpretation is unreasonable. The fact that Congress has previously been explicit when authorizing federal agencies to enforce state law, as well as the complexity resulting from federal enforcement of state law, strongly suggest that Congress would have expressed some clear opinion as to whether it wished to authorize such activity. Certainly the history of the FHA, which was passed as part of the Civil Rights Act of 1968, implies that Congress would have more clearly expressed whether it wished to alter that Act in such a fundamental way.

The OCC has not explained why Congress would have desired to preempt state enforcement of state laws. The normal justifications for preemption do not apply here; in fact, it has been agreed by all parties involved that state laws are not preempted. The continuing vitality of these state anti-discrimination laws undermines any claim of benefit from conformity in law enforcement, and the policy of encouraging as

81. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843–44 (1984).

82. *Id.* at 842, 844.

much enforcement as possible undermines any claim that national banks should only have to answer to one regulator with respect to discriminatory lending practices.

By stating that an agency-written regulation can effectively re-write an accepted interpretation of an independent federal statute, the district court's decision appears to have elevated the import of agency interpretation to the level of congressional intent. In this particular case, the district court has accepted the understanding of a federal banking regulator as re-writing significant aspects of a civil rights statute. An appeal will almost certainly question whether this is what the *Chevron* analysis was actually meant to achieve. To this author's mind, such an interpretation seems entirely unreasonable.

