CUOMO V. CLEARING HOUSE ASSOCIATION:
PROTECTING MINORITIES FROM DISCRIMINATORY LENDING PRACTICES BY UPHOLDING STATES' RIGHT TO ENFORCE PREDATORY LENDING LAWS

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I. INTRODUCTION

In an effort to lower her costs and pay off her debt, Elizabeth Redrick took out a new mortgage on her home. However, instead of reducing her debt, Elizabeth was charged with thousands of dollars in fees and mortgage payments she could not afford. Like many other minority homeowners, Elizabeth is now on the verge of losing her home because of a subprime loan. Thousands of minorities like Elizabeth lacked protection under the Supreme Court's decision in *Watters v. Wachovia Bank, N.A.*, which held that operating subsidiaries of national banks were not subject to state regulatory visitation. Presumably, this decision meant that national banks did not have to comply with state predatory lending laws, which was likely to contribute to the growing wave of foreclosures. However, the Court's recent decision in *Cuomo v. Clearing House Ass'n* properly limited the

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2. See id. (noting that lenders may not disclose the fees and charges associated with a subprime loan).

3. See id. (claiming that 250 different types of mortgage loan products make it difficult even for experts to meaningfully evaluate them).

4. See 550 U.S. 1, 10-11 (2007) (holding instead that operating subsidiaries are subject to supervision by the Office of the Comptroller of the Currency); Cuomo v. Clearing House Ass'n, 129 S. Ct. 2710, 2717 (2009) (defining visitation as the right to oversee a national bank’s corporate affairs).

5. See Brief for the Federal Respondent at 42, Cuomo v. Clearing House Ass’n, 129 S. Ct. 2710 (2009) (No. 08-453) (contending that enforcement of states' fair lending laws may undermine the national banking system).
effects of *Watters* by holding that the National Bank Act does not prohibit states from enforcing state predatory lending laws against national banks.\(^6\)

This Note first argues that *Cuomo* properly held that the National Bank Act does not prohibit state enforcement of state predatory lending laws.\(^7\) Second, that preemption of state enforcement of state law requires clear congressional intent.\(^8\) Third, that the visitation regulation promulgated by the Office of the Comptroller of the Currency ("OCC") under the National Bank Act has a disparate impact on minorities in violation of the Fair Housing Act ("FHA").\(^9\) Part II examines the emergence of the subprime mortgage market, the state and federal measures enacted to curb predatory lending, the application of a disparate impact analysis to FHA claims, and the history of federal statutory and regulatory preemption of state law.\(^10\) Part III argues that *Cuomo* properly overruled the OCC's interpretative regulation because visitation differs from law enforcement and because there is no clear congressional intent preempting state enforcement of state law. Accordingly, it argues that the Court should apply a disparate impact analysis to national banks' subjective lending practices as they have a disparate impact on minorities, in violation of the FHA.\(^11\) Part IV recommends that Congress should complement, not preempt, state enforcement of state predatory lending laws.\(^12\) Part V concludes that unless Congress clearly intended to preempt state law, courts should not interpret the federal regulation as preempting state enforcement of state law when the regulation has a disparate impact on minorities.\(^13\)

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6. *See* 12 U.S.C. § 484(a) (2006) (forbidding states from exercising visitorial power against national banks unless authorized by federal law); *Cuomo*, 129 S. Ct. at 2717 (ruling that visitation differs from enforcement of state law).

7. *See* 129 S. Ct. at 2717 (stressing that the National Bank Act prohibits states only from exercising visitorial powers over national banks).


10. *See infra* Part II (tracing the federal statutes enacted to protect borrowers from subprime lending and the states' response to enact stronger consumer measures, courts' broad interpretation of the FHA through application of Title VII disparate impact analysis to FHA claims, and courts' reluctance to issue rulings that preempt state law without clear congressional intent).

11. *See infra* Part III (advocating the view that law enforcement differs from visitorial powers, that Congress did not intend to preempt states' historic police powers, and that the similarities between Title VII and the FHA support an application of a disparate impact analysis to FHA claims).

12. *See infra* Part IV (urging that state predatory lending laws are more effective than federal law and provide stronger consumer protection).

13. *See infra* Part V (concluding that states have an interest in protecting minorities
II. BACKGROUND

A. The Emergence of the Subprime Mortgage Market and Predatory Lending

During the 1990s, while the mortgage lending industry was expanding, the value of the subprime mortgage market also increased from $35 billion in 1994 to $625 billion by 2006. Subprime loans are made to borrowers who fail to qualify for a prime loan, providing many low-income individuals and minorities with an otherwise unavailable source of credit. However, while the subprime market provides risky borrowers access to loans, many of these loans target low-income individuals and minorities in a "predatory" manner. Compared to whites, Latino and African-American first-time borrowers disproportionately receive less favorable loan terms. These disparities may be the result of a lender's subjective pricing policies that tend to discriminate against minorities, as loan officers tend to issue minorities higher interest rates that are unrelated to creditworthiness.

B. Congress Enacted the FHA and Title VII to Eradicate Discrimination

In 1968, during the Civil Rights Era, Congress enacted the FHA as a response to residential segregation and lending discrimination. The FHA from abusive lenders and courts should not undermine states' interests).


17. See, e.g., DEBBIE GRUENSTEIN BOCIAN ET AL., CTR. FOR RESPONSIBLE LENDING, UNFAIR LENDING: THE EFFECT OF RACE AND ETHNICITY ON THE PRICE OF SUBPRIME MORTGAGES 3 (2006), http://www.responsiblelending.org/mortgage-lending/research-analysis/rr011-Unfair_Lending-0506.pdf (concluding that after taking a borrower's risk into account, minorities are thirty percent more likely than whites to receive higher loan rates).

18. See, e.g., id. at 4-5, 10, 20 (noting that the lending disparities between African-Americans and whites are greater with regard to loan prepayment penalties).

19. See 114 CONG. REC. S3421 (1968) (statement of Sen. Mondale) (recognizing that while the courts and Congress have attempted to eliminate segregationist practices, a black individual is not free to live where he wishes).
prohibits discrimination in the sale, financing, or renting of dwellings.\textsuperscript{20} Similarly, Congress enacted Title VII of the Civil Rights Act to address employment discrimination.\textsuperscript{21} In enacting both Title VII and the FHA, Congress expressed that certain immutable characteristics should not be factors in housing and employment decisions, and both statutes prohibit neutral policies that have a disparate impact on members of a protected class.\textsuperscript{22}

In \textit{Griggs v. Duke Power Co.}, the Court first recognized that neutral practices that are discriminatory in application are unlawful.\textsuperscript{23} The Court noted that congressional intent required the removal of arbitrary barriers that discriminated on the basis of race.\textsuperscript{24} Furthermore, in \textit{Watson v. Fort Worth Bank & Trust}, the Court held that in some cases a disparate impact analysis should be applied to employment decisions that rely on subjective criteria.\textsuperscript{25}

While the disparate impact analysis developed through Title VII cases, courts also apply this analysis to FHA claims.\textsuperscript{26} For example, in \textit{Metropolitan Housing Development Corp. v. Village of Arlington Heights}, the court stated that the FHA's legislative history did not require a showing of intentional discrimination to prove a discrimination claim.\textsuperscript{27}

\begin{itemize}
\item \textsuperscript{20} See 42 U.S.C. § 3604 (2006) (declaring that it is unlawful to deny the rental or sale of a dwelling because of race, color, religion, or national origin); 42 U.S.C. § 3608(a) (2006) (charging the Department of Housing and Urban Development (“HUD”) with the responsibility of administering the Act).
\item \textsuperscript{22} See 42 U.S.C. § 3601 (2006) (enacting the FHA “to provide fair housing within the constitutional limitations”); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (holding that Title VII prohibits overt discrimination); Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1289-90 (7th Cir. 1977) (concluding that courts should read Title VII and the FHA broadly to prohibit practices that have a disparate impact on minorities); S. REP. No. 92-415, at 5 (1971) (acknowledging that employment discrimination expands far beyond intentional discrimination into discrimination that is perpetrated through “systems” and “effects”).
\item \textsuperscript{23} See 401 U.S. at 431-32 (prohibiting requirements that a job applicant have a high school diploma and pass a general intelligence test when such requirements are not related to the job).
\item \textsuperscript{24} See \textit{id}. at 429-31 (clarifying that the purpose of Title VII was to achieve equal employment opportunities).
\item \textsuperscript{25} See 487 U.S. 977, 989, 991 (1988) (reasoning that a failure to apply disparate impact analysis to subjective criteria would shield employers from liability for discriminatory practices).
\item \textsuperscript{26} See Metro. Hous. Dev. Corp., 558 F.2d at 1289 (rationalizing that if courts can rely on statistical evidence to prove discriminatory intent under Title VII, then courts can rely on statistical evidence to prove FHA claims).
\item \textsuperscript{27} See \textit{id}. at 1289-90 (explaining that one type of discriminatory effect occurs when a neutral policy adversely affects one racial group more than another).
\end{itemize}
Pursuant to Title VII and the FHA, in order to establish a prima facie case alleging disparate impact, a plaintiff must demonstrate: 1) a specific and actionable policy or practice, 2) a disparate impact, and 3) facts raising a sufficient inference of causation. In *Miller v. Countrywide Bank, N.A.*, the court held that the use of subjective factors in mortgage lending, unrelated to creditworthiness, qualifies as a specific and actionable policy. Moreover, in *Ramirez v. Greenpoint Mortgage Funding Inc.*, the court affirmed that the practice of using subjective factors to determine loan charges is subject to a disparate impact analysis and considered data reported under the Home Mortgage Disclosure Act ("HMDA") in support of a disparate impact claim. Both cases confirm that courts have established a framework for applying a disparate impact analysis in a predatory lending context.

C. Federal and State Measures Enacted to Curb Predatory Lending

In addition to the FHA, Congress enacted the Truth in Lending Act ("TILA") in 1968 to promote informed borrowing by requiring lenders to disclose loan terms and conditions. Additionally, in 1974, Congress passed the Real Estate Settlement Procedures Act ("RESPA") to prohibit excessive settlement costs. Furthermore, in 1978, Congress passed the HMDA, which requires certain public disclosures to ensure that mortgage lending institutions serve their communities. Specifically, the HMDA requires compilation and annual reports of lending activity pertaining to home purchase and home improvement loans. Moreover, in 1999, Congress enacted the Home Ownership and Equity Protection Act ("HOEPA") to address reverse redlining by protecting low-income

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28. *See* Smith v. City of Jackson, 544 U.S. 228, 241-42 (2005) (holding that a plaintiff-employee is responsible for isolating the specific practice that results in statistical disparities).

29. *See* 571 F. Supp. 2d 251, 255, 258-59 (D. Mass. 2008) (noting that subjective criteria may be legitimate in making employment decisions, but that they have no role in determining a borrower’s creditworthiness).

30. *See* 633 F. Supp. 2d 922, 928-29 (N.D. Cal. 2008) (observing that the HMDA data indicated that minority customers were "almost 50% more likely" to pay more for their loan than white customers).


34. *See* § 2803 (stating that national banks are to report the number and dollar amount of loans originating from or purchased by them to the OCC).
homeowners from abusive lending tactics.\textsuperscript{35} Still, despite the federal government's many efforts to curb predatory lending, its effectiveness is rather limited.\textsuperscript{36} For example, HOEPA fails to protect consumers against "junk fees" and "loan flipping."\textsuperscript{37} Additionally, while the TILA requires lenders to disclose certain loan terms to borrowers, oftentimes, lenders may disclose loan terms in a manner too sophisticated for borrowers to fully understand.\textsuperscript{38} Thus, the largely ineffective federal laws have forced states to enact tougher consumer protection measures.\textsuperscript{39}

North Carolina became the first state to pass a law restraining predatory lending.\textsuperscript{40} Like HOEPA, North Carolina's law attempts to monitor high-cost loans, but North Carolina's law is more inclusive than HOEPA.\textsuperscript{41} Even though North Carolina enacted strong predatory lending laws that have provided greater consumer protection than federal law and have achieved a modest reduction in predatory lending, the state's subprime market remains active.\textsuperscript{42}

\textsuperscript{35} See 15 U.S.C. § 1639(c) (2006) (forbidding prepayment penalties if a borrower's total debt exceeds fifty percent of his or her income at the time of the loan); U.S. DEP'T OF THE TREASURY & U.S. DEP'T OF HOUS. & URBAN DEV., JOINT REPORT ON RECOMMENDATIONS TO CURB PREDATORY HOME MORTGAGE LENDING 53 (2000), http://www.huduser.org/publications/pdf/treasrpt.pdf [hereinafter TREASURY] (defining reverse redlining as the practice of marketing high-cost loans to potential customers in communities whose residents were denied credit access in the past).

\textsuperscript{36} See TREASURY, supra note 35, at 61 (recommending that TILA and RESPA can be strengthened by increasing the availability of counseling to high-cost borrowers before they commit to a loan).

\textsuperscript{37} See Nicholas Bagley, Note, The Unwarranted Regulatory Preemption of Predatory Lending Laws, 79 N.Y.U. L. REV. 2274, 2282 (2004) (noting that junk fees permit lenders to avoid HOEPA by adding unnecessary costs that appear to be loan related); Fishbein & Bunce, supra note 16, at 281 (explaining that through loan flipping, fees incurred by repeated, successive refinancing depletes equity in a home).

\textsuperscript{38} See Baher Azmy, Squaring the Predatory Lending Circle: A Case for States as Laboratories of Experimentation, 57 FLA. L. REV. 295, 352 (2005) (pointing out that borrowers do not receive loan terms and conditions until the day of closing the loan).

\textsuperscript{39} See id. at 395 (highlighting the fact that state officials are more politically accountable than congress, and thus, more likely to address constituents' grievances).

\textsuperscript{40} See N.C. GEN. STAT. ANN. § 24-1.1E(c) (West 2009) (requiring borrowers to receive pre-loan counseling from the state, prohibiting lending without consideration of a borrower's ability to repay the loan, and prohibiting lender financing of fees); KEITH ERNST ET AL., CTR. FOR RESPONSIBLE LENDING, NORTH CAROLINA'S SUBPRIME HOME LOAN MARKET AFTER PREDATORY LENDING REFORM 2 (2002), http://www.responsiblelending.org/north-carolina/nc-mortgage/researchanalysis/HMDA_Study_on_NC_Market.pdf (showing that the law passed with a broad base of consumer and industry support).

\textsuperscript{41} See ERNST ET AL., supra note 40, at 2 (explaining that North Carolina's law protects consumers by prohibiting loan fees exceeding five percent of a loan, balloon payments, and refinancing, in circumstances where the borrower would not receive a net benefit).

\textsuperscript{42} See id. (claiming that one year after the enactment of predatory lending reform, North Carolina borrowers were still twenty percent more likely than other U.S. borrowers to receive a subprime loan); Fishbein & Bunce, supra note 16, at 274, 276 (recognizing that despite the benefits that subprime lending affords to borrowers with
D. Federal Statutory and Regulatory Preemption of State Law

Pursuant to the Supremacy Clause of the Constitution, Congress may preempt state predatory lending laws. However, in *Rice v. Santa Fe Elevator Corp.*, the Supreme Court stated that a presumption against preemption applies to state laws enacted according to states' historic police powers. Similarly, in *Gregory v. Ashcroft*, the Court recognized that preemption of state law required unequivocal congressional intent, and thus, the Court refused to allow a federal law to preempt a state law that mandated retirement for appointed state judges. In upholding the validity of the state law, the Court noted that the state law neither conflicted with federal law nor violated the Constitution.

On the other hand, in *Barnett Bank of Marion, N.A. v. Nelson*, the Court held that the state law posed an obstacle to the objectives of the federal government and was preempted by federal law. Yet, in upholding the preemption of state law, *Barnett* relied on the express language of the federal law.

Like federal law, federal regulations may also preempt state law. For instance, in *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, the Court upheld a federal regulation that preempted a state law prohibiting unreasonable restraints on property law. However, in upholding the federal regulation, the Court also relied on clear congressional intent.

poor credit histories, lenders tend to engage in predatory lending due to the lack of federal monitoring).

43. *See* U.S. CONST. art. VI, cl. 2 (declaring that all laws made pursuant to the Constitution shall be the supreme law of the land).


45. *See* 501 U.S. 452, 461, 464-67 (1991) (refusing to allow federal preemption of a state law requiring appointed judges to retire at seventy because appointed judges are not covered by the Age Discrimination in Employment Act (“ADEA”)).

46. *See id.* at 467-69 (noting that congressional language excluding “appointees at the policymaking level” from the protections of the ADEA is broad enough to conclude that Congress did not intend for state judges to be covered by the Act).


48. *See id.* at 31 (recognizing that even if congressional preemption is not explicitly stated, courts need to examine whether such intent exists).


50. *See* 458 U.S. 141, 149, 154 (1982) (noting that a federal agency is subject to judicial review when it exceeds its congressionally delegated authority or acts arbitrarily).

51. *See id.* at 160, 164 (stressing that Congress granted the Federal Home Loan
Similarly, in *Watters v. Wachovia Bank, N.A.*, the Court upheld a federal regulation ruling that the National Bank Act prohibited states from exercising general supervision and control over the operating subsidiaries of national banks. In upholding the OCC’s regulation, the Court allowed for the preemption of a Michigan state law that was enacted to protect consumers, noting that the state law burdened the national banking system.

*E. Cuomo v. Clearing House Association*

Two years later, in *Cuomo v. Clearing House Ass’n*, the Court once again interpreted the National Bank Act. After data from the HDMA revealed ethnic and racial disparities in the interest rates charged by national banks, New York’s Attorney General sent letters to various national banks and their operating subsidiaries. In response, the OCC filed a suit to enjoin compliance with the state’s request, arguing that the OCC’s regulation prohibited states from enforcing state lending laws against national banks.

The OCC stressed that pursuant to the Riegle-Neal Act, preemption did not require express congressional intent. Additionally, the OCC argued that the Riegle-Neal Act authorized the OCC to preempt state law, including consumer protection laws. The Supreme Court held that the

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Bank Board ("Board") substantial authority to issue regulations regarding federal savings and loans and that the legislative history did not limit such authority).

52. See 550 U.S. 1, 10-11, 16 (2007) (emphasizing that operating subsidiaries only engage in activities which the national bank undertakes).


54. See 129 S. Ct. 2710, 2716 (2009) (asserting that the enactment of the National Bank Act did not alter the meaning of visitorial powers and law enforcement).

55. See Brief for the Petitioner Cuomo at 12, *Cuomo*, 129 S. Ct. 2710 (2009) (No. 08-453) (requesting national banks voluntarily produce additional data because compared to whites, Latino and African-American borrowers received a greater percentage of high-interest loans).

56. See 12 C.F.R. § 7.4000 (2005) (prohibiting state officials from enforcing state laws against national banks); *Cuomo*, 129 S. Ct. at 2714 (noting that the New York Attorney General sent letters, "in lieu of subpoena[s]," to several national banks, requesting non-public information about their lending practices).


58. See § 36(f)(1)(A) (stating that state laws will not apply if they discriminate against national banks).
OCC’s rule was unreasonable because it prohibited states from enforcing their own laws, noting that “visitation” is limited to the oversight of national banks. In overruling the OCC’s regulation, the Court relied on Guthrie v. Harkness, a case where the Court found that filing a suit requiring a national bank to produce its corporate records was not an exercise of visitorial powers.

Predatory lending is usually associated with non-depository creditors, such as pawn shops and payday lenders. Yet, after Watters, predatory lending became a growing concern because of the OCC’s claim to have exclusive authority to enforce state predatory lending laws against national banks. On their part, states condemned the OCC’s regulation, noting that the OCC’s exclusive authority to enforce lending laws against national banks resulted in discriminatory lending practices that primarily targeted minorities.

III. ANALYSIS

A. Cuomo Properly Limited Watters’ Impact on Minorities by Distinguishing Between State Visitorial Powers and Enforcement of State Law

Watters held that operating subsidiaries of national banks were subject to the OCC’s visitorial regimes, not the states’. As a result, in Cuomo, the OCC and national banks argued that states were also prohibited from enforcing state predatory lending laws against national banks and their operating subsidiaries. However, the Cuomo decision properly limited

59. See Cuomo, 129 S. Ct. at 2715-18 (pointing out that the federal government can exercise general oversight over national banks without preempting state law).

60. See 199 U.S. 148, 154-55, 159 (1905) (holding that a shareholder has the right to inspect the corporate books to ensure that his investment is not being mismanaged).


62. See Brief for the Federal Respondent, supra note 5, at 25-26 (claiming that Congress granted the OCC the authority to issue preemptive regulations pursuant to the National Bank Act).

63. See Brief for the States et al, as Amici Curiae Supporting Petitioner at 12-13, Cuomo, 129 S. Ct. 2710 (2009) (No. 08-453) (criticizing the OCC’s enforcement efforts against national banks and arguing that states are more successful in enforcement actions against national banks).


65. See Brief for the Federal Respondent, supra note 5, at 44-45 (presuming that enforcement of state law is a type of visitorial power prohibited by the National Bank Act).
the impact of the *Watters*’ holding on minorities by finding the OCC’s regulation unreasonable because the National Bank Act does not preclude states from enacting predatory lending laws against national banks. 66

While the National Bank Act prohibits states from exercising visitorial powers over national banks, visitorial powers cannot be equated with law enforcement. 67 Instead, visitorial powers are synonymous with supervisory authority, such as conducting on-site examinations of national banks. 68 In filing suits to enforce state predatory lending laws, states are not overseeing national banks. Rather, states are acting as law enforcers, and claims against national banks that allege discriminatory lending practices must be grounded on a legitimate basis of law and fact. 69

On their part, the OCC and national banks argued that *Watters* further supported their claim that states were prohibited from enforcing state law because the state law at issue in *Cuomo* was similar to the state law that was held preempted by federal regulation in *Watters*. 70 However, in *Watters*, the Court only addressed whether operating subsidiaries were subject to states’ general supervision and control, not whether states were prohibited from enforcing their predatory lending laws against operating subsidiaries. 71

In addition, *Cuomo*’s interpretation that enforcement of state law differs from state visitorial powers adheres to precedent. 72 For instance, in *Guthrie v. Harkness*, the Court concluded that a judicial order requiring a national bank to produce its corporate records was not an exercise of

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66. Compare *Watters*, 550 U.S. at 11 (upholding 12 C.F.R. section 7.4006 and holding that operating subsidiaries are not subject to a state’s licensing, reporting, and visitorial regimes), with *Cuomo v. Clearing House Ass’n*, 129 S. Ct. 2710, 2715-17 (2009) (overruling 12 C.F.R. section 7.4000 because visitation does not encompass law enforcement), and Brief for the Federal Respondent, supra note 5, at 44-45 (acknowledging that *Watters* did not define visitation).

67. *See Cuomo*, 129 S. Ct. at 2716 (asserting that lower courts interpret visitation to mean the act of examining the way in which a national bank conducts business).

68. *See, e.g.*, Brief for the Petitioner *Cuomo*, supra note 55, at 20 (describing visitorial powers as the authority to grant charters and conduct examinations to ensure the security of national banks).

69. *See Cuomo*, 129 S. Ct. at 2719 (pointing out that by acting as litigants, states are subject to sanctions for filing frivolous claims against national banks).

70. Compare *MICH. COMP. LAWS ANN.* §§ 445.1661, 493.56b (West 2009) (granting Michigan’s commissioner the right to supervise and control registered lenders and to conduct examinations and investigations regarding their operations), with *N.Y. EXEC. LAW* § 63(12) (McKinney 2006) (authorizing the attorney general to sue to rectify fraud).

71. *Contra* Brief for the Respondent *Clearing House Ass’n* at 27, *Cuomo*, 129 S. Ct. 2710 (No. 08-453) (contending that the issue in *Watters* was whether states could exert examination and enforcement authority over operating subsidiaries).

visitorial powers because it was not part of the bank's general oversight.\textsuperscript{73} Similarly, the National Bank Act does not preclude states from enforcing state predatory lending laws because such enforcement is not an oversight of national banks.\textsuperscript{74} Indeed, for decades, courts have granted states the right to enforce their general lending laws against national banks.\textsuperscript{75}

Predatory lending is causing a wave of foreclosure that has a disproportionate effect on minorities.\textsuperscript{76} If \textit{Cuomo} had failed to narrow the \textit{Watters} holding, the adverse impact on minorities would have been even more pronounced because the OCC believes it has exclusive authority to enforce state predatory lending laws, and, unlike the states, the OCC rarely enforces predatory lending laws against national banks.\textsuperscript{77} In enacting the National Bank Act, Congress was concerned that states would interfere with the operation of the national banking system, and thus, it limited states from conducting banking examinations; however, the \textit{Cuomo} holding correctly distinguished visitorial powers from law enforcement because the Act does not preclude states from enforcing predatory lending laws which aim to protect minorities from abusive lending practices.\textsuperscript{78}

**B. Cuomo Properly Held that States Are Authorized to Enforce State Predatory Lending Laws Against National Banks Because There Was No Clear Congressional Intent Preempting State Enforcement of State Laws**

\textit{Cuomo} correctly ruled that the National Bank Act did not preempt enforcement of state laws because a presumption against preemption applies to states' exercise of their historic police powers and there was no clear congressional intent prohibiting states from enforcing state law against national banks.\textsuperscript{79} For instance, in \textit{Rice v. Santa Fe Elevator Corp.},

\begin{itemize}
\item \textsuperscript{73} See 199 U.S. 148, 157 (1905) (distinguishing a shareholder's non-visitorial right to sue in court from the OCC's visitorial right to examine a bank's records).
\item \textsuperscript{74} See \textit{Cuomo}, 129 S. Ct. at 2718 (observing that if the OCC's interpretation of visitorial powers were adopted, both state and federal agencies would be precluded from enforcing lending laws).
\item \textsuperscript{75} See, \textit{e.g.}, \textit{First Nat'l Bank v. Missouri}, 263 U.S. 640, 660-61 (1924) (upholding a state's right to file suit against a national bank to enforce a state anti-bank-branching law).
\item \textsuperscript{76} See Fishbein & Bunce, \textit{supra} note 16, at 276 (stressing that the high foreclosure rates in the subprime market is evidence that borrowers are receiving loans that they cannot afford).
\item \textsuperscript{77} See Andrews, \textit{supra} note 14 (noting that the federal government ignored repeated warnings regarding increased predatory lending practices).
\item \textsuperscript{78} Cf. \textit{Cuomo}, 129 S. Ct. at 2722 (explaining that the state Attorney General's threat to issue subpoenas in connection with a fraud investigation is not an exercise of enforcement powers "vested in the courts of justice").
\item \textsuperscript{79} See \textit{id.} at 2721 (countering the dissent by noting that while the OCC's authority to enforce non-preempted state law began in 1966, states have enforced state law against national banks for the past eighty-five years).
\end{itemize}
the Court stated that when federal law purports to preempt states' historic police powers, the Court begins by assuming that Congress did not intend to preempt state law.\(^8\) States traditionally have had the responsibility of overseeing the protection of consumers from abusive lending practices.\(^8\) All states have enacted legislative measures to protect consumers from unfair and deceptive lending practices and more than half of the states have enacted laws curbing predatory lending.\(^8\)

Unlike in *Fidelity Federal Savings & Loan Ass'n*, where the Court recognized that Congress clearly granted the Board power to regulate federal savings associations, the language of the National Bank Act does not clearly indicate that states are prohibited from enforcing state predatory lending laws.\(^8\) The National Bank Act provides that national banks are exempt from state visitation, but the National Bank Act does not define the term "visitation" and courts have not interpreted the term to mean the enforcement of state law.\(^8\)

Like in *Gregory*, where the Court recognized that citizens of a state have a right to establish the qualifications of public officials and refused to uphold a federal law preempting state law without clear congressional intent, *Cuomo* similarly recognized that states have an interest in enacting and enforcing consumer protection laws and refused to uphold the OCC's regulation.\(^8\) Furthermore, as in *Gregory*, *Cuomo*'s refusal to uphold the preemption of state enforcement of state law without clear congressional intent maintains the constitutional balance of power between the states and the federal government.\(^8\)

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80. *See* 331 U.S. 218, 230-32 (1947) (recognizing that Congress may act to prevent subsequent state regulation relating to traditional state police powers when a strong federal interest is at stake).

81. *See* Gen. Motors Corp. v. Abrams, 897 F.2d 34, 41-42 (2d Cir. 1990) (conceding that consumer protection is a power reserved to states and compelling evidence is required to preempt state law).

82. *See* First Nat'l Bank v. Missouri, 263 U.S. 640, 660 (1924) (noting that it is contradictory to allow states to enact a law but then deny states the authority to enforce it); Raphael W. Bostic et al., *State and Local Anti-Predatory Lending Laws: The Effect of Legal Enforcement Mechanisms*, 60 J. ECON. & BUS. 47, 49 (2008) (pointing out that only six states have failed to adopt legislation addressing predatory lending).

83. *Compare* Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 160-61 (1982) (finding that federal law imposes no limits on the Board's right to issue regulations), with *Cuomo*, 129 S. Ct. at 2718 (criticizing the OCC's interpretation of the National Bank Act as extreme because it denies states the authority to enforce any state law against national banks).

84. *See* *Cuomo*, 129 S. Ct. at 2715 (holding that simply because the term visitation is ambiguous does not mean the term merits *Chevron* deference).

85. *See* Gregory v. Ashcroft, 501 U.S. 452, 461 (1991) (stressing that states maintain substantial sovereign powers which Congress may not easily undermine). *But see* *Cuomo*, 129 S. Ct. at 2732 (Thomas, J., dissenting) (arguing that no presumption against preemption applies where Congress expressly preempted state law).

86. *See* Brief for the Petitioner *Cuomo*, *supra* note 55, at 43 (cautioning that
For its part, the OCC argued that the Riegle-Neal Act granted the OCC exclusive authority to enforce consumer protection laws against national banks, however, the OCC’s interpretation is inconsistent with the passage of the Act.\(^\text{87}\) In enacting the Riegle-Neal Act, Congress acknowledged that states have an important interest in protecting consumers, particularly in combating housing and lending discrimination.\(^\text{88}\) Furthermore, in the Conference Report of the Riegle-Neal Act, the conferees criticized the OCC for its aggressive stance in preempts state law.\(^\text{89}\) In enacting its preemptive rule, the OCC exceeded its congressional authority and Cuomo properly overruled the OCC’s regulation because Congress did not intend to preempt states from enforcing predatory lending laws against national banks.\(^\text{90}\)

\textit{C. State Enforcement of State Predatory Lending Laws Does Not Pose an “Undue Burden” on National Banks}

In \textit{Barnett Bank of Marion, N.A. v. Nelson}, the Court stated that national banks are subject to state law, unless state law imposes an “undue burden” upon them.\(^\text{91}\) However, unlike the state law at issue in \textit{Barnett} which contradicted federal law by prohibiting national banks from selling insurance in small towns, state enforcement of state predatory lending laws does not pose an undue burden on national banks.\(^\text{92}\) National banks argued that permitting states to enforce state law would burden them, thereby undermining the purpose of the National Bank Act.\(^\text{93}\) The OCC also claims

preemption of state law without clear congressional intent alters the scheme of political accountability).


\(^\text{89.}\) \textit{See H.R. REP. No. 103-651, at 53-54} (requiring the OCC to submit annual reviews of its preemptive determinations pertaining to consumer protection and fair lending laws noting that the OCC “[has] applied traditional preemptive principles in a manner that . . . is inappropriately aggressive, resulting in preemption of State law in situations where the federal interest did not warrant that result”).

\(^\text{90.}\) \textit{See id.} (stating that courts use a rule of construction where state and federal law can co-exist).

\(^\text{91.}\) \textit{See 517 U.S. 25, 31 (1996)} (observing that complying fully with state and federal law is virtually impossible).

\(^\text{92.}\) \textit{Compare id.} (recognizing that a federal statute may be so pervasive as to leave no room for state law), \textit{with Brief for the Petitioner Cuomo, supra} note 55, at 6 (contending that generally, national banks are subject to both federal and state law).

\(^\text{93.}\) \textit{See Brief for the Respondent Clearing House Ass’n, supra} note 71, at 28-29 (stressing that the Court generally protects the national banking system from states’ burdensome regulations).
that national banks rarely engage in predatory lending. Consequently, state predatory lending laws only impact a small number of national banks that issue abusive loan terms.

Furthermore, the OCC claims that predatory lending laws impose a high cost on national banks; however, national banks can pass these costs on to consumers. Predatory lending laws do not forbid national banks from charging high fees. Rather, the laws serve to monitor abusive loan terms.

While national banks argue that it would be a burden to comply with each state’s different legal standard for determining whether a national bank engages in unlawful discrimination, national banks have for decades complied with differing state laws on other matters. Thus, unlike Barnett where the Court considered a burdensome state law, the Court properly overruled the OCC’s regulation because there is no undue burden in state enforcement of state laws and states have an interest in protecting minorities from abusive loan terms by enforcing predatory lending law against national banks.

D. Cuomo’s Interpretation of the National Bank Act Is Consistent with the FHA in that It Permits States to Enforce Fair Lending Laws Against National Banks

The Court’s conclusion in Cuomo that the National Bank Act does not prohibit states from enforcing state predatory lending laws against national banks adheres to the language of the FHA, which allows states to process

94. See Preemption Determination and Order, 68 Fed. Reg. 46264, 46271 (Aug. 5, 2003) (claiming that subprime lending is carried out by mortgage and finance companies). But see Review of the National Bank Preemption Rules Before the S. Comm. on Banking, Housing, & Urban Affairs, 108th Cong. 188 (2004) (statement of Martin Eakes, Chief Executive Officer, Center for Responsible Lending) [hereinafter Eakes Hearing] (testifying that national banks are a safe haven for predatory lending because the OCC does not have adequate measures in place to prevent predatory lending).

95. Compare 68 Fed. Reg. 46264, 46270 (Aug. 5, 2003) (claiming that state predatory lending laws are vague, creating a potential for liability for national banks), with Bagley, supra note 37, at 2306 (recognizing that subprime borrowers bear the costs of predatory lending legislation in the form of price adjustment).

96. See Bagley, supra note 37, at 2306 (arguing that states have the right to limit abusive loan terms as long as states do not significantly affect the national banking system).


fair lending complaints against national banks.\textsuperscript{99} In enacting the FHA, Congress expressed a preference for HUD to refer fair housing complaints to state and local agencies.\textsuperscript{100} For instance, once HUD certifies a state or local agency, HUD must refer discrimination complaints to those agencies.\textsuperscript{101} Contrastingly, while the OCC believes that only it possesses essential experience to determine whether a national bank engages in abusive lending practices, pursuant to the FHA’s language, the OCC must also cooperate with HUD to ensure that national banks are in compliance with fair lending laws.\textsuperscript{102}

The OCC argues that its procedures for supervising national banks ensure that the banks comply with fair lending laws; however, the OCC rarely enforces state lending laws against national banks.\textsuperscript{103} States, on the other hand, have taken a more proactive role by issuing thousands of enforcement actions to combat abusive lending practices.\textsuperscript{104} Although the OCC points out that it relies on statistical data to determine whether a particular bank’s lending policy has a disparate impact on minorities, achieving the FHA’s goal of eliminating discriminatory lending practices requires the cooperation of multiple actors, including federal and state agencies.\textsuperscript{105}

Additionally, Cuomo correctly held that the National Bank Act does not


\textsuperscript{100} See id. (permitting HUD to certify state and local agencies if their law is similar to the FHA).

\textsuperscript{101} See id. (reporting that HUD may act if the state agency fails to act within thirty days of the referral).

\textsuperscript{102} Compare Brief for the Respondent Clearing House Ass’n, supra note 71, at 53-54 (explaining that the OCC uses its “informal supervisory authority” to ensure that national banks are in compliance with state and federal law), with 42 U.S.C. § 3608(d) (2006) (requiring agencies that have regulatory or supervisory authority over national banks to cooperate with HUD).

\textsuperscript{103} See Memorandum of Plaintiff OCC in Support of Motion for Preliminary Injunction at 5-6, OCC v. Spitzer, 05 CV 5630 (S.D.N.Y. June 2005) [hereinafter Memorandum of Plaintiff OCC] (stating that the HMDA data is an important tool in combating state lending discrimination). But see Eakes Hearing, supra note 94, at 178 (criticizing the OCC’s minimal efforts to protect consumers, as the OCC cites only one case in which it was able to recover payments made to victims of abusive lending practices).

\textsuperscript{104} See Brief for AARP et al. as Amici Curiae Supporting Petitioner at 11-12, Watters v. Wachovia Bank, N.A., 550 U.S. 1 (2007) (No. 05-1342) [hereinafter Brief for AARP et al., Amici] (underscoring the OCC’s ineffectiveness by noting that the OCC lists only eight actions taken against national banks to combat predatory lending).

\textsuperscript{105} Compare Eakes Hearing, supra note 94, at 179 (criticizing the OCC by noting that when Guaranty National Bank engaged in abusive lending practices, the OCC collected $25,000 in fines yet borrowers had to rely on private actions to collect $41 million in settlement fees), with Memorandum of Plaintiff OCC, supra note 103, at 8-9 (implying that the OCC will take action to remedy a borrower’s injury caused by discriminatory lending practices).
limit states from enforcing state predatory lending laws against national banks because the Act does not address whether states are precluded from doing so and the FHA specifically addresses the issue of discriminatory lending, thereby granting states the authority to file suits against national banks. In overruling the OCC’s exclusive authority to enforce state predatory lending laws against national banks, Cuomo adhered to the FHA, which requires multiple levels of enforcement to eliminate national banks’ discriminatory lending practices.

E. The Court Should Apply a Disparate Impact Analysis to National Banks’ Subjective Lending Practices Because These Practices Have a Disparate Impact on Minorities in Violation of the FHA

In Cuomo, the Court did not address whether the OCC’s exclusive authority to enforce state predatory lending laws against national banks was unlawful due to the regulation’s disparate impact on minorities. Generally, the Court is cautious to hold that a statute or regulation is unlawful on the basis of a disparate impact analysis. However, pursuant to Title VII, the Court recognizes that employment practices that have a disparate impact on members of a protected class are unlawful. Because the subjective criteria that employers use to carry out discriminatory employment practices are similar to national banks’ subjective lending practices that have a disparate impact on minorities, the Court should apply the disparate impact analysis of Title VII to FHA claims.

I. Discriminatory Intent and Disparate Impact Are Unlawful Under Title VII and the FHA

In Griggs v. Duke Power Co., the Court recognized that Congress enacted Title VII with the intent to achieve equal employment

106. See FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (stressing that it is the judiciary’s responsibility to reconcile law, recognizing that certain statutes may be altered by later ones).


108. See Cuomo v. Clearing House Ass’n, 129 S. Ct. 2710, 2714-15 (2009) (explaining that the issue before the Court is whether the OCC’s regulation preempting state law enforcement is consistent with the National Bank Act).

109. See Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1288-89 (7th Cir. 1977) (recognizing that the Supreme Court has not addressed the issue of whether a disparate impact claim is sufficient to establish a violation under the FHA).


111. See Miller v. Countrywide Bank, N.A., 571 F. Supp. 2d 251, 256 (D. Mass. 2008) (claiming that a disparate impact analysis applies to subjective criteria when an individual is adversely affected due to his race).
opportunities and therefore broadly interpreted the law.\textsuperscript{112} As support for its decision, the Court noted that in testing an applicant’s abilities, the EEOC only permits the usage of job-related tests.\textsuperscript{113} Similarly, the Court should give deference to HUD’s interpretation that lending practices that have a disparate impact are unlawful because they violate the FHA.\textsuperscript{114} For instance, if HUD concludes that a less discriminatory policy or practice could have been adopted, HUD may conclude that an existing policy is discriminatory because of the policy’s disparate impact on members of a protected class.\textsuperscript{115}

Even more importantly, the Court in \textit{Griggs} stated that by enacting Title VII, Congress intended to remove artificial and arbitrary employment barriers that were established for discriminatory purposes.\textsuperscript{116} In determining loan terms, lenders may add charges that are unrelated to a borrower’s credit history.\textsuperscript{117} However, the discretionary charges that national banks add result in minorities having to pay higher loan interests.\textsuperscript{118} Consequently, in order to remove arbitrary lending practices that have a disparate impact on minorities, the Court should apply a disparate impact analysis to lenders’ subjective lending criteria.\textsuperscript{119}

Furthermore, the Court should recognize that Congress intended to eradicate discriminatory lending and interpret the FHA broadly.\textsuperscript{120} In

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\item \textit{Cf.} 401 U.S. at 429 (affirming that Title VII does not establish that every individual is guaranteed a job regardless of his qualifications).
\item \textit{See id.} at 433-34 (stating that administrative agencies, like the EEOC, are entitled to judicial deference). \textit{But see} Gonzales v. Oregon, 546 U.S. 241, 245 (2006) (holding that interpretative rulings are not entitled to deference merely because they interpret an ambiguous regulation).
\item \textit{Contra} Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18266, 18269 (April 15, 1994) (offering guidelines for agencies to determine when a disparate impact violation exists and cautioning that the fact that a policy or action results in a disparate impact is not conclusive proof of a violation under the FHA).
\item \textit{See Griggs}, 401 U.S. at 431 (reporting that under a disparate impact claim, a defendant can avoid liability by showing a “business necessity”).
\item \textit{See} BOCIAN ET AL., \textit{supra} note 17, at 22 (expressing that discretionary pricing policies permit lenders to waive objective pricing criteria, which grossly favors white borrowers). \textit{But see} Miller, 571 F. Supp. 2d at 254 (realizing that credit scores explain part of the lending disparities).
\item \textit{Cf.} Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 977 (1988) (admitting that neutral employment practices in operation can be equivalent to intentional discrimination).
\item \textit{See} Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1289 (7th Cir. 1977) (asserting that the purpose of Title VII and the FHA is to eradicate disparate treatment and impact); 114 CONG. REC. 3421 (1968) (statement of Sen.
enacting the law, Congress did not aim to limit relief only to plaintiffs that could prove discriminatory intent.\textsuperscript{121} For example, in \textit{Metropolitan Housing Development Corp.}, the court noted that requiring plaintiffs to prove such intent can be a heavy burden to meet.\textsuperscript{122} Thus, plaintiffs should be able to prove that national banks engage in discriminatory lending practices by showing discriminatory effect without having to prove discriminatory intent; otherwise, discriminatory lending practices will go unpunished.\textsuperscript{123}

2. The HMDA Data Establishes a Prima Facie Case of Disparate Impact Under the FHA

Under the FHA, in order for a plaintiff to meet his burden of proof, the plaintiff must show that a specific policy or practice caused a significant disparate impact on members of a protected class.\textsuperscript{124} In attempting to prove the first part of the test, plaintiffs often allege that discretionary pricing policies are the discriminatory practices used by lenders.\textsuperscript{125} National banks might contend that discretionary pricing policies are not discriminatory because pricing policies are determined primarily based on objective criteria, such as creditworthiness. However, when subjective and objective criteria are combined, the resulting lending practices are subject to a disparate impact analysis.\textsuperscript{126} It is the subjective criteria that national banks use that enable them to charge borrowers with similar credit histories different prices for the same loan.\textsuperscript{127}

Under the second and third parts of a disparate impact claim, the plaintiff must plead a disparate impact and facts that raise a sufficient inference of causation between the disparate impact and a lender's specific and Mondale) (arguing that de facto segregation and a failure to achieve fair housing will deny blacks the opportunity to equal education and employment).

\textsuperscript{121} See, e.g., \textit{Metro. Hous. Dev. Corp.}, 558 F.2d at 1288 (declining to read the FHA narrowly because certain practices may have a necessary and foreseeable disparate impact which can perpetuate housing segregation).

\textsuperscript{122} See \textit{id.} at 1290 (concluding that in enacting the FHA, Congress did not intend to permit disparate impact simply because defendants act discreetly).

\textsuperscript{123} \textit{Cf. Watson}, 487 U.S. at 978 (recognizing that if an employer uses an interview for hiring, the subjective practice is subject to a disparate impact analysis).

\textsuperscript{124} See Ramirez v. Greenpoint Mortgage Funding, Inc., 633 F. Supp. 2d 927-28 (N.D. Cal. 2008) (holding that plaintiffs meet their burden of proof by singling out the subjective part of a lending policy that relies on subjective and objective criteria).

\textsuperscript{125} See, e.g., Miller v. Countrywide Bank, N.A., 571 F. Supp. 2d 251, 253 (D. Mass. 2008) (discussing plaintiffs' contentions that lending disparity is the result of lenders' pricing policy that allows subjective markups).

\textsuperscript{126} \textit{Cf. Watson}, 487 U.S. at 978-79 (rejecting the argument that a Title VII claim can only be established through a showing of disparate treatment).

\textsuperscript{127} \textit{See Miller}, 571 F. Supp. 2d at 258 (arguing that subjective decision making, and charges that are unrelated to creditworthiness more specifically, should not play a part in determining a borrower's credit eligibility).
actionable policy. The HMDA data sufficiently demonstrates that lenders' subjective criteria have an adverse effect on minorities. In particular, the HMDA data concludes that regardless of income level, minorities are more likely to get high-annual percentage rate loans than whites. For example, the HMDA data reported that in 2006, African-Americans were almost fifty-four percent more likely than whites to receive higher priced loans.

Lenders attempt to undermine the accuracy of the HMDA data, pointing to the fact that it fails to take into account a borrower's credit history; however, while credit differences may explain part of the lending disparity, using discretionary pricing policies leads to a significant lending disparity that adversely affects minorities. Additionally, new studies that supplement the HMDA data by taking into account borrowers' credit history also concluded that African-American and Latinos receive higher interest loans than whites. Consequently, the Court should recognize that the HMDA data sufficiently establishes that national banks engage in discriminatory lending practices in violation of the FHA, and thus, the Court should overrule an OCC regulation as unlawful if the regulation results in lending disparities that have a disparate impact on minorities.

IV. POLICY RECOMMENDATION

As more minorities' homes are foreclosed, Congress needs to enact

128. See Watson, 487 U.S. at 978 (finding that quotas and preferential treatment adopted to avoid a violation based on a disparate impact claim contradict the purpose of Title VII).


130. See Ramirez v. Greenpoint Mortgage Funding, Inc., 633 F. Supp. 2d 922, 928-29 (N.D. Cal. 2008) (alleging that minorities are charged more for non risk-related criteria than whites).

131. See The 2006 HMDA Data, supra note 129, at 38-39 (finding that for three consecutive years, minorities were more likely than whites to receive higher-priced loans).

132. See Ramirez, 633 F. Supp. 2d at 928-29 (contending that credit differences alone do not account for the fact that minorities are fifty percent more likely than whites to receive a high priced loan). But see Robert B. Avery et al., New Information Reported Under HMDA and Its Application in Fair Lending Enforcement, 91 Fed. Res. Bull. 344, 393 (Summer 2005) (suggesting that the accusations of legal bias reported on the HMDA data might decrease loans available to less creditworthy applicants).

133. See Bocian et al., supra note 17, at 3-5 (advancing the idea that pricing disparities may be the result of the inconsistent use of objective pricing criteria that adversely affects minorities).

tougher anti-predatory legislation. However, Congress should only set federal protection as a floor, not a ceiling, and grant states the authority to enact and enforce anti-predatory lending laws that address states' local needs.

Recently, the House passed a bill to curb predatory lending that mirrored many states' predatory lending laws. Although the bill did not pass in the Senate, the House recognized the importance of state predatory lending laws in curbing the practice.

In enacting tougher federal legislation to curb predatory lending, Congress should not preempt states from enforcing state law because states have a responsibility to protect consumers from abusive lending practices. More importantly, states should have the ability to respond to the loopholes that predatory lenders exploit to circumvent federal legislation. Additionally, states' predatory lending laws are curbing predatory lending without hindering borrower access to subprime credit.

On the other hand, Congress should clearly limit the OCC's authority to preempt states from enforcing state predatory lending laws. An agency's determination to preempt state law is not equivalent to congressional statutory preemption. Congress may preempt state law, but unlike


136. See generally Azmy, supra note 38, at 295 (asserting that states serve as laboratories of experimentation for federal legislation).

137. See Mortgage Reform & Anti-Predatory Lending Act of 2007, H.R. 3915, 110th Cong. (1st Sess. 2007) (expanding federal law protection by increasing the number of loans that qualify as high-cost loans).

138. See id. (establishing that the bill is meant to provide only a minimum standard for lending practices in the consumer mortgage loan industry).


141. See, e.g., Bostic et al., supra note 82, at 65 (noting that despite some state's broader predatory lending laws, applications for subprime loans are higher while denial rates are lower).

142. See DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 109 (1993) (explaining that when enacting a law, Congress, unlike an administrative agency, is responsible for considering all interests).

agency rulemaking, Congress’ legislative preemption of state law undergoes both bicameralism and presentment; in preempting states from enforcing state predatory lending laws, the OCC exercised more authority than Congress.\textsuperscript{144} Furthermore, while courts defer to an agency’s interpretation because they value the agency’s expertise, they should remain mindful that the OCC will likely forgo states’ interests and exceed its authority due to the institutional pressures that it faces.\textsuperscript{145} For example, the OCC receives a substantial amount of its funding from the banks it oversees; this provides the OCC with a financial incentive to grant itself exclusive authority not only to oversee, but also to enforce state laws against national banks.\textsuperscript{146}

In enacting stronger federal legislation to curb predatory lending, Congress should complement and not preempt state law.\textsuperscript{147} Given that the OCC is less accountable than elected officials and the OCC’s financial incentives make its decisions more susceptible to bias, Cuomo correctly overruled the OCC’s preemptive ruling.\textsuperscript{148} In order to protect minorities from abusive lending practices, states need flexibility to enact and enforce laws that address states’ specific needs.

V. CONCLUSION

Consumer protection is historically a state responsibility, and more recently, states are enacting predatory lending laws to curb abusive lending practices that target minorities in particular.\textsuperscript{149} In preempting states from enforcing their own predatory lending laws, the OCC’s regulation weakened states’ efforts to protect minorities, as the regulation stripped states of their authority to ensure that national banks were in compliance

\textsuperscript{144} \textit{See} Schoenbrod, \textit{supra} note 142, at 110 (contending that by shifting decision making authority to agencies, laws pass easier than they would pass under a unicameral legislature).

\textsuperscript{145} \textit{See} Vincent Di Lorenzo, \textit{Federalism, Consumer Protection and the Regulatory Preemption: A Case for Heightened Judicial Review}, 10 U. PA. J. BUS. & EMP. L. 273, 300-04 (2008) (arguing that federal regulations that preempt state law should be subject to heightened judicial review); \textit{see also} Eakes Hearing, \textit{supra} note 94, at 178 (reporting that in 2002, states collected $500 million for victims of predatory lending, compared to the $7 million recovered by the OCC).

\textsuperscript{146} \textit{See} Brief for AARP et al., Amici, \textit{supra} note 104, at 13 (reporting that in 2005, ninety-seven percent of the OCC’s funding came from the banks the agency supervised).

\textsuperscript{147} \textit{See} Federal Preemption Favors Predatory Lending, \textit{supra} note 140 (maintaining that preempting state law harms borrowers because federal law cannot respond to the innovations of predatory lenders).

\textsuperscript{148} \textit{See} Di Lorenzo, \textit{supra} note 145, at 302 (indicating that judicial interference is necessary when an agency’s decision-making presents a conflict of interest for the agency).

\textsuperscript{149} \textit{See generally} Eakes Hearing, \textit{supra} note 94 (noting that states enact tough measures to curb predatory lending without eliminating access to subprime credit).
with state lending laws.\textsuperscript{150} Cuomo correctly overruled the OCC’s regulation because there is no clear congressional intent to preempt states from enforcing state predatory lending laws and the HMDA data establishes a \textit{prima facie} case of disparate impact under the FHA.\textsuperscript{151} In order to adequately protect minorities from predatory lenders, Congress should use its authority to complement and not supersede state law because states are in a better position to enact and enforce tougher consumer measures.\textsuperscript{152} Unless there is clear congressional intent, courts should refrain from upholding a federal regulation preempting state laws—enacted under states’ historical police powers—that combat a practice causing a disparate impact on minorities.\textsuperscript{153}

\begin{footnotesize}
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\item \textsuperscript{150} See generally Brief for the Petitioner Cuomo, \textit{supra} note 55 (stressing that the OCC’s responsibility to protect consumers from abusive lenders conflicts with the OCC’s duty to ensure a competitive banking system).
\item \textsuperscript{151} See BOCIAN \textit{et al.}, \textit{supra} note 17, at 7 (showing that race and neighborhood racial composition significantly impact the likelihood of receiving a subprime loan).
\item \textsuperscript{152} See Eakes Hearing, \textit{supra} note 94, at 175 (claiming that the federal government is removed from predatory lenders and states need authority to intervene in the wave of home foreclosures).
\item \textsuperscript{153} See Rice \textit{v.} Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (announcing that a presumption against preemption applies to states’ historic police powers).
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