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Preemption And State Anti-Redlining Regulations:

Cover Page Footnote

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PREEMPTION AND STATE ANTI-REDLINING REGULATIONS: THE NEED FOR CLARIFICATION

Marianne M. Jennings*

I. Introduction

The phenomenon of continuous decline plagues our urban areas. In particular, residential neighborhoods in many large cities are deteriorating progressively with no signs of reconstruction or revitalization.¹ The responsibility for these decaying inner cities lies, in part, with the lending practices of local financial institutions.² The refusal to lend money for the purchase or improvement of these

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1. Weinstein & Clark, *The Fiscal Outlook for Growing Cities*, in *URBAN GOVERNMENT FINANCE: EMERGING TRENDS* 105 (R. Bahl ed. 1981); Note, *Municipal Blight Declarations*, 23 *URB. L. ANN.* 423 (1982) ("Blight" is described as a process of deterioration characterized by substandard housing, abandoned structures and underutilization of properties).

2. See 1,600 *From Ethnic Groups Protest Against Institutions They Say Are Destroying Central Cities*, *N.Y. Times*, March 20, 1972, at 29, col. 1. "Financial institutions" is a broad term which will be used throughout this Article to represent the several types of lenders which make mortgage loans. These include: savings and loan associations, commercial banks, mutual savings associations, mortgage companies, life insurance companies, credit unions, and federal, state and local finance agencies. As of September, 1979, over \$608.3 billion was invested in the mortgage market. L. VIDGER, *BORROWING AND LENDING ON RESIDENTIAL PROPERTY* 20 (1981).

Savings and loan associations accounted for an estimated \$387.3 billion. *Id.* The two primary functions performed by savings and loans are: (1) to promote savings by the payment of interest to savers and (2) to finance residential property. According to one savings and loan official: "if the home financing element were eliminated from savings and loan activity and the general investment market were made its province, there probably would not be so great an economic and social justification for the existence of these associations." L. KENDALL, *THE SAVINGS AND LOAN BUSINESS: ITS PURPOSES, FUNCTIONS, AND ECONOMIC JUSTIFICATION* (1962), reprinted in H. HUTCHESON, *MONEY, BANKING AND THE UNITED STATES ECONOMY* 44 (4th ed. 1980).

Commercial banks represent the second greatest source of residential financing—approximately \$142 billion—however, mortgage financing constitutes only a small portion of their activity. L. VIDGER, *supra*, at 20. Commercial banks form the underpinnings of the American economy by offering demand deposits or checking accounts. Essentially commercial banks create money. The basic definition of the United States money supply— M_1 —consists of demand deposit liabilities of commercial banks plus coins and currency issued by the Treasury Department. Thus banks finance business, agriculture and the government as well as individuals seeking

properties eliminates any hope or opportunity for neighborhood improvement.³ Ultimately, by withholding mortgage financing, financial institutions virtually control the racial structure and destiny of a neighborhood.⁴

residential mortgages. *See generally* P. HORVITZ, *MONETARY POLICY AND THE FINANCIAL SYSTEM* (4th ed. 1979) (in depth discussion of banks' role in finance); H. HUTCHESON, *supra* (provides banking history).

Mutual savings banks, like savings and loan associations, were established to encourage thrift. They differ from savings and loans structurally. Mutual savings banks do not have stockholders and their net earnings are paid to depositors, while savings and loans are owned by shareholders and net earnings are paid to those shareholders. Moreover, mutual savings banks lend money for residential mortgages on a national scale through government supported loan programs. Savings and loans, on the other hand, generally make their loans to local individuals. *See generally* J. BOYKIN, *FINANCING REAL ESTATE* (1979) (details mortgage financing sources); H. RUSSELL, *SAVINGS AND LOAN ASSOCIATIONS* (1960) (sets forth the role of savings and loan associations in home financing); L. VIDGER, *supra* (discusses providers of mortgage funds).

Each of these types of financial institutions is further differentiated in that it is chartered—authorized to do business—by either the state in which it is situated or by the federal government. This dual chartering system is discussed at note 12 *infra*.

3. Specific stages of the declining process have been described as follows:

- (1) middle class whites depart and the neighborhood's socioeconomic status declines;
- (2) new urban dwellers move in, creating racial or ethnic changes;
- (3) property speculation and exploitation begins;
- (4) weakened market conditions set in—a "crisis ghetto" emerges;
- (5) disinvestment occurs.

R. DEVINE, W. RENNIE & N. SIMS, *WHERE THE LENDER LOOKS FIRST: A CASE STUDY OF MORTGAGE DISINVESTMENT IN BRONX COUNTY 1960-1970*, at 3 (1974), *reprinted in Home Mortgage Disclosure Act: Hearings on S. 1281 Before the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 1st Sess. 1329 (1975) (citing NATIONAL URBAN LEAGUE, *THE NATIONAL SURVEY OF HOUSING ABANDONMENT I* (1972)). *See* RED-LINING ON MILWAUKEE'S WESTSIDE, A REPORT BY THE REINVESTMENT COMMITTEE OF MILWAUKEE ALLIANCE OF CONCERNED CITIZENS, *reprinted in Home Mortgage Disclosure Act: Hearings on S. 1281 Before the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 1st Sess. 293, 295-99 (1975) [hereinafter cited as MILWAUKEE ALLIANCE].

4. More loans are made in greater amounts in suburban areas populated by whites. *Home Mortgage Disclosure Act: Hearings on S. 1281 Before the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 1st Sess. 536-38 (1975) (statement of Edward L. Holmgren, Dir. of Nat'l Comm. Against Discrimination in Housing) [hereinafter cited as *Sen. Hearings on S. 1281*]. Numerous studies conducted by both federal agencies and private organizations have confirmed this disproportion in lending. The most thorough compilation of data and statistical analysis is contained in the Senate Committee on Banking, Housing and Urban Affairs hearings on the Home Mortgage Disclosure Act of 1975. *Sen. Hearings on S. 1281, supra*. *See also* URBAN-SUBURBAN INVESTMENT STUDY GROUP, CENTER FOR URBAN STUDIES OF THE UNIV. OF ILLINOIS, *REDLINING AND DISINVESTMENT AS A DISCRIMINATORY PRACTICE IN RESIDENTIAL MORTGAGE LOANS* (1977) (three part study prepared by

Using race, geographic location or status as criteria for determining whether to grant a mortgage is a form of discrimination⁵ referred to as "redlining."⁶ Municipal,⁷ State,⁸ and Federal⁹ statutes have been

the U.S. Dep't of Housing and Urban Development) [hereinafter cited as URBAN-SUBURBAN STUDY GROUP]; R. DEVINE, W. RENNIE & N. SIMS, *supra* note 3, at 1267; R. SCHAFER & H. LADD, EQUAL CREDIT OPPORTUNITY ACCESSIBILITY TO MORTGAGE FUNDS BY WOMEN AND MINORITIES (Joint Center for Urban Studies of MIT and Harvard 1980) (data on lending practices in California and New York).

There have been, however, studies indicating race as an insignificant factor in the decision to grant or deny a mortgage. *See, e.g.*, R. ALBRANDT, JR., MORTGAGE LENDING IN PITTSBURGH (Action Housing, Inc. Public Policy Monograph No. 6, 1975); G. BENSTON, D. HORSKY & H. WEINGARTNER, AN EMPIRICAL STUDY OF MORTGAGE REDLINING (1978) (prepared for Salomon Brothers Center for the study of financial institutions). One study conducted in 1978 revealed that low income neighborhoods with relatively few single-family owner occupied dwellings had fewer and smaller mortgage loans. Chicago Tribune, Sept. 29, 1978, § 5, at 1, col. 2. By contrast, more and larger mortgage loans were found in areas with higher median incomes and a higher number of single-family owner occupied dwellings. Race was determined to be an insignificant factor. *Id.* Although some controversy exists as to the specific determinants responsible for the unavailability of mortgage funds, it is certain that the lack of funds for the purchase and improvement of homes results in urban decline. For a complete bibliography of material related to discriminatory lending practices see D. LISTOKIN & S. CASEY, MORTGAGE LENDING & RACE (1980); R. SCHAFER, MORTGAGE LENDING DECISIONS: CRITERIA AND CONSTRAINTS (1978).

5. The discrimination referred to here is in blanket form. Unlike conventional discrimination against an individual, an entire neighborhood is the victim. The race or ethnic character of the applicant is irrelevant to the arbitrary denial of mortgage financing. It should be noted that Title VIII of the 1968 Civil Rights Act (codified at 42 U.S.C. §§ 3601 - 3619 (1976)), specifically prohibits discrimination based upon race, religion or national origin. *See United States v. American Inst. of Real Estate Appraisers*, 442 F. Supp. 1072 (N.D. Ill. 1977) (42 U.S.C. § 3613 governs discriminatory appraisal practices); *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489 (S.D. Ohio 1976) (plaintiff entitled to a cause of action under 42 U.S.C. § 3605 for discrimination in financial assistance in housing).

6. The term "redlining" is pejorative, originating in the practice of physically drawing a red line on a map around an area perceived to pose a high financial risk. Ryan, *Redlining*, 1977 ANN. SURV. AM. L. 57 (1977). The definition of redlining varies. Broadly described, redlining is "credit discrimination based upon the characteristics of the neighborhood surrounding the borrower's dwelling." *Conference of Fed. Sav. & Loan Ass'ns v. Stein*, 604 F.2d 1256, 1258 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 921 (1980).

Many commentators emphasize that the refusal to grant mortgages and home improvement loans is "systematic." MILWAUKEE ALLIANCE, *supra* note 3, at 293-94. Other writers highlight the arbitrary nature of the practice. *See URBAN-SUBURBAN STUDY GROUP*, *supra* note 4, at 8. In light of the great deal of attention focused on the practice, it has been aptly noted that:

The word "redlining" has gotten to be what lawyers call a "word of art." It has different meanings for different people. It's shorthand for a refusal to lend money or invest in areas because of the presence of certain criteria—be it age of the homes, racial composition of the neighborhood, income level of the residents or any such similar arbitrary grounds. It is the making of loan underwriting judgments on selected areas, without rigor-

enacted in an effort to curb this discriminatory practice. One aspect of these statutes is procedural, requiring financial institutions to disclose

ous individual analysis necessary for such decisions. Redlining has a destructive consequence—disinvestment.

D. Searing, *Credit Disinvestment and Redlining 1-2* (paper prepared for presentation at the Nat'l Comm. Against Discrimination in Housing, Midwest Regional Housing Conference, Jan. 29-30, 1974 Chicago, Ill.).

The distinction between "redlining" and "disinvestment" is a fine one. Redlining refers specifically to the practice of denying mortgage funds to a particular region such as an inner city residential area. Disinvestment, however, embodies the collection of funds in one neighborhood through savings deposits and then investing those funds in a different locale, i.e., using the savings of local urban residents to make loans for homes in the suburbs or in another state. The sun belt—Florida, Georgia and Texas—was built in part from funds disinvested from northern urban centers. D. LISTOKIN & S. CASEY, *supra* note 4, at 7.

Two methods of redlining exist. The first is the open refusal to consider and grant loans for a particular community. The second and more subtle method is to arbitrarily vary the loan application procedures or the terms of the loan agreement. This can take many forms. These indirect methods include: decreasing the mortgage term; raising the interest rate; requiring a larger downpayment; raising closing costs; refusing to approve loans for less than a minimum amount; lowering the percentage of appraised value for which the loan will be issued or under-appraising the property; requiring the outstanding principal of a balloon mortgage to be paid immediately rather than extending the loan; charging "up front" fees to the applicant; and enforcing a "due on sale clause" rather than permitting an assumption of the mortgage by the new owner. See Werner, Frej & Madway, *Redlining and Disinvestment: Causes, Consequences and Proposed Remedies*, 10 CLEARINGHOUSE REV. 501, 502 (1977).

Redlining has the effect of perpetuating residential segregation. In 1972, the Department of Housing and Urban Development found that 18% (1,000 institutions) of selected lending institutions in the United States admitted to considering a neighborhood's racial or ethnic character in evaluating loan applications. URBAN-SUBURBAN STUDY GROUP, *supra* note 4, at 7, 25, 106. Furthermore, redlining in interracial areas contributes to the destabilization and decline of the neighborhood. See M. STEGMAN, *HOUSING INVESTMENT IN THE INNER CITY: THE DYNAMICS OF DECLINE: A STUDY OF BALTIMORE, MARYLAND 1968-70* (1972).

The most troubling aspect of redlining is that it constitutes a self-fulfilling prophecy. Senator William Proxmire appropriately stated:

When lenders systematically restrict mortgage credit in a so-called declining neighborhood, their fears can become a self-fulfilling reality. Home-owners move out; new ones can't move in. The community goes into a tailspin, with the ultimate result that sound existing housing prematurely deteriorates and the community dies a premature death.

Sen. *Hearings on S. 1281, supra* note 4, at 1 (opening remarks).

7. See, e.g., CHICAGO, ILL. MUN. CODE § 7-30 to 7-36 (1974); MINNEAPOLIS, MINN. CODE OF ORDINANCES tit. 7, §§ 139.40G, 141.50J (1982); CLEVELAND, OHIO ADMIN. CODE §§ 127.34-127.36, at 60-61 (1975); District of Columbia Resolution to Create a Commission on Residential Mortgage Investments (investigatory purposes only); see *Toward a Local Partnership for Neighborhood Reinvestment Commission* (1978) (results of the District of Columbia Commission).

8. See, e.g., CAL. ADMIN. CODE ch. 2, Subch. 23, § 245.2 (1976); CAL. HEALTH & SAFETY CODE §§ 35800-35854 (West Supp. 1982); ILL. ANN. STAT. ch. 95, § 201

periodically certain loan data to enable regulatory agencies to discover the occurrence of redlining.¹⁰ In some instances the laws contain substantive anti-redlining provisions.¹¹

There are two categories of lending institutions to be regulated—those chartered locally by the individual state and those chartered nationally by the federal government.¹² The state and

(Smith-Hurd Supp. 1977), *invalidated in* *Glen Ellyn Sav. & Loan v. Tsoumas*, 71 Ill. 2d 493, 377 N.E.2d 1 (1978), *cert. denied*, 439 U.S. 927 (1979); ILL. ANN. STAT. ch. 17, §§ 851-855 (Smith-Hurd 1981); Mass. Comm'r of Banks Disclosure Directive (Ref. No. 18-26); MASS. GEN. LAWS ANN. ch. 155, § 1 (West Supp. 1982); MASS. GEN. LAWS ANN. ch. 167, § 7 (West Supp. 1982); MICH. COMP. LAWS ANN. §§ 445.1601 to .1609 (West Supp. 1982-1983); N.J. STAT. ANN. § 17:16F (West Supp. 1982-1983); N.Y. BANKING LAW § 9f (McKinney Supp. 1982-1983); NEW YORK SUPERVISORY PROCEDURE G-107 (promulgated pursuant to N.Y. BANKING LAW §§ 10, 36(1), 36(3), 125(2) (McKinney 1971)); OHIO REV. CODE ANN. § 135.07 (Page 1969); WIS. ADMIN. CODE ch. S-L 27.01 to .05 (1975).

9. *See, e.g.*, Home Mortgage Disclosure Act of 1975, Pub. L. No. 94-200, 89 Stat. 1125 (codified at 12 U.S.C. §§ 2801-2811 (1976 & Supp. V 1981)); Community Reinvestment Act of 1977, Pub. L. No. 95-128, 91 Stat. 1147, *amended by* Pub. L. No. 95-630, § 1502, 92 Stat. 3713 (1978) (codified at 12 U.S.C. §§ 2901-2905 (Supp. V 1981)); Equal Credit Opportunity Act of 1974, Pub. L. No. 90-321, 88 Stat. 1521, *amended by* Pub. L. No. 94-329, 90 Stat. 251 (codified at 15 U.S.C. §§ 1691-1691f (1976 & Supp. IV 1980)); 12 C.F.R. §§ 528, 531.8 (1982).

10. 12 U.S.C. § 2803 (1976 & Supp. V 1981); *id.* § 2903 (Supp. V 1981). *See* notes 43-62 *infra* and accompanying text.

11. *See* notes 71, 74, 75, 85, 91 & 100 *infra*.

12. The United States employs a dual banking system. Banking charters are issued by both state and federal governments. The charter authorizes the operation of the institution.

In the 1780's, states first began to charter banking companies. By 1791, the federal government chartered the first national bank. National banks were insignificant until the mid-19th century when Congress passed the National Bank Act of 1863. 12 Stat. 665 (1863). The National Bank Act authorized the establishment of nationally chartered institutions to be regulated by the Comptroller of the Currency. *Id.* This federal act did not, however, abolish state chartered banks. Thus, the two have coexisted for over a century. Today, national banks are still subject to regulation by the Comptroller of the Currency, an office of the Treasury Department. 12 U.S.C. §§ 1, 21, 481 (1976 & Supp. IV 1980). State banks are subject to regulation by the state banking commission or its equivalent. The Federal Reserve Board also regulates banks belonging to that system. *Id.* § 248(a) (1976 & Supp. IV 1980). Membership is mandatory for national banks but optional for state banks. Additionally, the Federal Deposit Insurance Corporation (FDIC) exerts control over certain banks. *Id.* §§ 1815-1820 (1976 & Supp. IV 1980). Federal Reserve Members (all federally chartered and some state chartered banks) must have Federal Deposit Insurance Corporation insurance. *Id.* § 1814. FDIC insurance is voluntary for other banks. *Id.* § 1815.

The dual chartering system also exists among savings and loan associations. Thus, while some savings and loans are chartered by the state in which they are located, other savings and loans are chartered and regulated by the Federal Savings and Loan Association. *Id.* § 1464 (1976 & Supp. V 1981). *See* notes 23-24 *infra* and accompanying text. Moreover, for federally chartered savings and loans, insurance from the

federal laws and regulations, passed to monitor and eliminate redlining,¹³ give rise to an important issue: with which statutory requirement a federally chartered financial institution must comply. This conflict is exacerbated because these regulations impose hardships on the institutions; therefore, voluntary compliance is extremely unlikely. The question of which set of statutes is applicable to which lending institution has not only caused confusion, but has diminished the force and effectiveness of anti-redlining legislation.¹⁴

Federal Savings and Loan Insurance Corporation is obligatory. It is evident that there are a number of regulatory agencies involved in the banking industry.

Criticisms of the complex dual system include allegations that it is an arrangement where banks "play off" one regulatory authority against another, to evade regulations implemented at either the federal or state level. H. HUTCHESON, *supra* note 2, at 83 (quoting W. BROWN, *THE DUAL BANKING SYSTEM IN THE UNITED STATES* 59 (1968)).

Supporters of the dual system, however, assert that it is an escape valve from arbitrary or discriminatory chartering or regulatory policies by state and federal authorities. *Id.* See generally P. HORVITZ, *supra* note 2 (history and examination of American banking system); T. MAYER, J. DUSENBERRY & R. ALIBER, *MONEY, BANKING, AND THE ECONOMY* (1981) (analysis of banking industry).

The dual system creates a complex intertwining of state and federal law. Four categories of relationships between federal and state regulations exist: (1) federal domination, where a federal rule applies to both state and national entities; (2) overlap, where an institution must comply with both state and federal regulations; (3) independence, where a federal rule applies to a national institution and a state rule applies to a state institution; and (4) state domination, where a state law governs both state and national institutions. See Scott, *The Patchwork Quilt: State and Federal Roles in Bank Regulation*, 32 *STAN. L. REV.* 687, 688 (1980).

13. See generally Sen. Hearings on S. 1281, *supra* note 4 (testimony of advocates of anti-redlining legislation). Representing the United States Conference of Mayors, Kenneth Gibson, Mayor of Newark, New Jersey, described the Home Mortgage Disclosure Act as "an essential first step in winning the war against investment malpractice." *Id.* at 1023.

14. A state legislature which desires to impose disclosure requirements which are significantly more stringent than those established under the federal law will face considerable opposition since national institutions will not be required to comply and thus may enjoy an advantage over state chartered institutions.

The financial cost of compliance with the disclosure mandates was an important issue in the congressional debates over the Home Mortgage Disclosure Act of 1975 (HMDA). One Congresswoman estimated that " 'providing the loan information would add \$1 million a year to the operating costs of all affected associations.' " H.R. REP. No. 561, 94th Cong., 1st Sess. 37 (1975) (statement of Rep. Millicent Fenwick, quoting Tom Scott, Jr.).

In the Senate, concern for the burden which these requirements would impose on smaller institutions without access to computer systems led to the suggestion that HMDA should be a three-year demonstration study applicable only to twenty metropolitan areas. 121 *CONG. REC.* 19,683 (1975) (suggested amendment by Sen. Garn).

Essentially the question to be addressed is whether the federal statutory scheme has preempted¹⁵ the field of redlining legislation. In other words, are states foreclosed from legislating against redlining? Resolution of a federal preemption issue requires an examination of the legislative intent and subsequent judicial construction of the relevant federal statutes. Additionally the purpose and effect of the state laws must be analyzed.

This Article will set forth certain federal, state and municipal anti-redlining laws and discuss the conflicting decisions concerning the proper application of these laws. The need for clarification of federal and state roles in the anti-redlining field will be set forth and recommendations for the most effective means by which to accomplish this goal will be offered. Specifically, it will be asserted that although federal legislation has preempted the area of disclosure procedures, federal financial institutions should be subject to state-enacted substantive anti-redlining laws.

II. The Relevant Legislation

At the federal level, there exists a complete statutory scheme to regulate all aspects of real estate finance.¹⁶ The principal federal procedural statute designed to expose and prevent redlining practices is the Home Mortgage Disclosure Act of 1975 (HMDA).¹⁷ However, Congress has never enacted a legislative prohibition on the practice of redlining. The preemption conflict between federal statutes and regulations and similar state legislation is best understood by an introduction to the federal, state and municipal regulatory schemes.

15. The federal preemption doctrine is discussed fully at notes 124-34 *infra* and accompanying text.

16. See, e.g., National Housing Act, 48 Stat. 1246 (1934) (codified at 12 U.S.C. §§ 1701-1701z (1976 & Supp. V 1981)); Real Estate Procedures Act of 1974, Pub. L. No. 93-533, 88 Stat. 1724 (renumbered by Pub. L. 94-205, 89 Stat. 1159) (codified at 12 U.S.C. §§ 2601-2617 (1976)) (regulating costs and procedures of settlement services such as title searches, title insurance, appraisals, and other closing requirements); Home Owners' Loan Act of 1933, 48 Stat. 128 (currently codified at 12 U.S.C. §§ 1461-1470 (1976 & Supp. V 1981)); Home Mortgage Disclosure Act of 1975, Pub. L. No. 94-200, 89 Stat. 1125 (codified at 12 U.S.C. §§ 2801-2811 (1976 & Supp. IV 1980)); Community Reinvestment Act of 1977, Pub. L. No. 95-128, 91 Stat. 1147 (codified as 12 U.S.C. §§ 2901-2905 (Supp. V 1981)); Equal Credit Opportunity Act of 1974, Pub. L. No. 93-495, 88 Stat. 1525, *amended by* Pub. L. No. 94-239, 90 Stat. 255 (codified at 15 U.S.C. §§ 1691-1691f (1976, Supp. IV 1980 & Supp. V 1981)). See generally J. BOYKIN, *supra* note 2 (discussing legislation pertaining to home financing).

17. 12 U.S.C. §§ 2801-2809 (1976, Supp. IV 1980 & Supp. V 1981).

A. The Federal Regulatory Scheme

Federal regulation of mortgage loans began in 1932 with the enactment of the Federal Home Loan Bank Act (FHLBA).¹⁸ The Act was passed to alleviate the crisis in the home mortgage market resulting from the Depression.¹⁹ The FHLBA created a new administrative agency, the Federal Home Loan Bank Board (FHLBB), which was authorized to charter twelve Federal Home Loan Banks to serve as wholesale banks for member financial institutions.²⁰ These twelve banks provided a source for mortgage loans made directly to members of the public.²¹

The FHLBA failed to relieve the crisis and by 1933 approximately forty percent of all home loans in the United States were in default.²² Consequently, Congress enacted the Home Owners' Loan Act of 1933 (HOLA).²³ HOLA's primary purpose²⁴ was to counteract the effect of

18. Federal Home Loan Bank Act of 1932, 47 Stat. 725 (1932), *amended by* 48 Stat. 129, 643, 1261 (1934) (currently codified at 12 U.S.C. §§ 1421-1455 (1976 & Supp. V 1981)).

19. This measure was specifically recommended by President Hoover. 75 CONG. REC. 1263 (1932). Simply stated, the Federal Home Loan Bank Act "aimed to give relief . . . to the small homeowner of America," *id.* at 12,574, by reorganizing the entire banking system. *See id.* at 12,582.

20. 12 U.S.C. § 1423.

21. The Federal Home Loan Banks made loans directly to the public and served as wholesale banks for member financial institutions. The provision permitting loans to the public eventually proved ineffective because so few loans were actually made. T. MARVELL, *THE FEDERAL HOME LOAN BANK BOARD* 23-24 (1969).

In 1933, Congress repealed wholesale banks' power to make loans directly to the public. Home Owners' Loan Act of 1933, 48 Stat. 128 (1933). *See* 12 U.S.C. §§ 1424, 1426 & 1430 (current version).

22. T. MARVELL, *supra* note 21, at 23-24, *cited in* Conference of Fed. Sav. & Loan Ass'ns v. Stein, 604 F.2d 1256, 1258 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 921 (1980).

23. Home Owners' Loan Act of 1933, 48 Stat. 128 (codified at 12 U.S.C. §§ 1461-1470 (1976 Supp. V 1981)). To ensure HOLA's enactment, President Roosevelt wrote to Congress: "I ask the Congress for legislation to protect small homeowners from foreclosure and relieve them of a portion of the burden of excessive interest and principal payments incurred during the period of higher values and higher earning power." H.R. Doc. No. 19, 73d Cong., 1st Sess. 1618, 1702 (1933), *cited in* Conference of Fed. Sav. & Loan Ass'ns v. Stein, 604 F.2d at 1257.

24. As stated in the Act, its objective was:

To provide emergency relief with respect to home mortgage indebtedness, to refinance home mortgages, to extend relief to the owners of homes occupied by them who are unable to amortize their debt elsewhere, to amend the Federal Home Loan Bank Act, to increase the market for obligations of the United States, and for other purposes.

48 Stat. 128 (1933). The general counsel for the Federal Home Loan Bank Board, Horace Russell, a drafter of the bill, indicated the purpose of the Act was not

some state regulations that enabled savings and loan associations to engage in pernicious practices²⁵ which exacerbated the defaulting and foreclosing market.

HOLA performed three functions. First, HOLA repealed that portion of the FHLBA which permitted Federal Home Loan Banks to make loans directly to members of the public.²⁶ Second, the statute created the Homeowners' Loan Corporation.²⁷ Congress empowered this Corporation to purchase mortgages from financial institutions, including those with state charters, in exchange for corporate bonds.²⁸

protection of the investor but protection of the homeowner. *Hearings on Home Owners' Loan Act of 1933, S. 1317 Before a Subcomm. on Banking and Currency, 73d Cong., 1st Sess. 11-12 (1933).*

By the time HOLA was passed the situation was critical. Loan defaults caused the failure of 1,700 financial institutions. Consequently, savers accrued losses of approximately \$200 million or about one third the value of total savings held in financial institutions at the time. T. MARVELL, *supra* note 21, at 18-19. Thus, HOLA was an emergency provision.

For judicial discussion of the purpose of HOLA, see *United States v. Kay*, 89 F.2d 19 (2d Cir. 1937), *vacated on other grounds*, 303 U.S. 1 (1938); *First Fed. Sav. & Loan Ass'n v. Elbert*, 33 Ill. App. 3d 335, 337 N.E.2d 420 (1975).

25. For example, state laws permitted sinking fund loans under which principal payments were placed in compulsory savings accounts. When the balance plus dividends accrued equalled the amount of the loan, it was deemed paid. The disadvantages of this method of repayment were: the maturation period of the loan was unduly extended if dividend rates declined; in case of reorganization, share values could be written down; and in the case of liquidation, entire share accounts would be sacrificed, including those required by borrowers. Despite the liquidation, the borrower still owed the full amount of the mortgage. See STANFORD RESEARCH INSTITUTE, *THE SAVINGS AND LOAN INDUSTRY IN CALIFORNIA* § III-37 (1960). Another commonly used, though unfair practice, was to require "balloon payment" loans. Under a balloon payment loan, large sums of money are due at the final stage of the repayment schedule. Under the economic circumstances of the 1930's very few people were able to make these large payments. Thus, people who had dutifully repaid their loan over a long period of time were suddenly placed in default. *Id.*

26. See note 21 *supra*.

27. 48 Stat. 129 (1933), *repealed by* 67 Stat. 126 (1953).

28. The Home Owners' Loan Corporation was prohibited from purchasing a mortgage which contained any of the following provisions: (1) sinking fund clause; (2) balloon payments clause; or (3) roll over of principal at specified intervals. Sinking funds and balloon payments are described at note 25 *supra*. "Rollover" loans are those in which a loan is extended at an exorbitant rate of interest. These restrictions were placed on the Corporations' purchasing power although most mortgage instruments throughout the country contained such provisions. 77 CONG. REC. 2480, 2573-74 (1933). The desired effect of these restrictions was to induce state chartered institutions to comply with federal standards and to promote the resale of existing loans.

Throughout the hearings on HOLA, national uniformity remained a key issue. The outlawing of certain types of loans constituted a step toward that uniformity. Critics of the dual banking system point to this type of disparity and advocate a single federal system. See H. HUTCHESON, *supra* note 2, at 83-84.

The Corporation was limited, however, to purchasing only those mortgages which required direct payments in equal monthly installments.²⁹ The desired effect of this restriction was to entice state chartered institutions to comply with federal standards, thereby facilitating the resale of loans. The third portion of HOLA established a system of federally chartered savings and loan associations.³⁰ Additionally, the Federal Home Loan Bank Board was authorized to promulgate regulations for the maintenance and operation of these federal savings and loans.³¹ In delegating this responsibility, Congress clearly intended for the FHLBB to be comprised of experts who would be sensitive to the variety of needs throughout the country.³² The Board was to (1) determine the best practices and (2) implement them on a national level.³³ This particular statutory authority has become critical in subsequent preemption decisions,³⁴ primarily because of its comprehensive scope.

29. 48 Stat. 128 (1933).

30. 12 U.S.C. § 1464.

31. *Id.* § 1464(a)(1) (Supp. V 1981) provides:

In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as "Federal Savings and Loan Associations," or "Federal Mutual Savings Banks" . . . and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.

Id.

32. The legislative history evidences this intent. The chairman of the Federal Home Loan Bank Board stated:

A good many people think we ought to put all the state regulations, what they ought to do and all that kind of thing, in here. But that is left to regulation by the Board, who will put the most expert building and loan authorities on it to provide those regulations so that the regulations can be varied. In some states you have to deal with them one way and in other states another way, and we want the latitude allowed to fit the regulations of the board and the associations to the state law and the different needs.

Hearings on HOLA, H.R. 4980 Before the House Comm. on Banking and Currency, 73d Cong., 1st Sess. 7 (1933) (statement of William F. Stevenson, chairman, Federal Home Loan Bank Board). Mr. Stevenson, however, cautioned that the Board should be very careful to remain within the parameters of existing state laws. *Id.* By contrast, one of HOLA's sponsors advocated giving the Bank Board great power to administer the Act. 77 CONG. REC. 2480 (1933) (statement of Representative Luce). See *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 102 S. Ct. 3014 (1982) for a thorough discussion of the congressional debates over the Board's authority.

33. 12 U.S.C. § 1464(a)(1) (Supp. V 1981).

34. The broad regulatory authority of the FHLBB is frequently characterized as "covering all aspects of every federal savings and loan association 'from its cradle to

Using the authority granted to it under HOLA, the FHLBB promulgated extensive regulations for federal savings and loans.³⁵ In fact, the operation of these institutions is subject exclusively to Board regulation.³⁶ For example, the Board governs capital fund raising, earnings distribution, withdrawals and loans.³⁷ Moreover, an association's ability to invest in real estate and to make and purchase real estate loans is subject to Board proscriptions.³⁸ Decisions concerning which types of mortgage instruments are permissible,³⁹ loans to build-

its corporate grave.' " *Meyers v. Beverly Hills Fed. Sav. & Loan Ass'n*, 499 F.2d 1145, 1147 (9th Cir. 1974) (quoting *California v. Coast Fed. Sav. & Loan Ass'n*, 98 F. Supp. 311, 316 (S.D. Cal. 1951)).

Under the occupation approach to the federal preemption question, *see* note 128 and text accompanying notes 130-33 *infra*, courts frequently point to the comprehensive regulatory system promulgated by the FHLBB to determine that federal control is so pervasive as to leave no room for state regulatory control. *See, e.g.*, *Conference of Fed. Sav. & Loan Ass'n v. Stein*, 604 F.2d 1256, 1260 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 921 (1980) (procedural aspects of California's Housing Financial Discrimination Act are preempted since the FHLBB's control over savings and loans is so pervasive). *See* also notes 156-58 *infra* and accompanying text for a complete discussion of the *Stein* cases. *But see* note 164 *infra* and accompanying text.

The judicial approach toward commercial banks, however, has differed from that taken toward savings and loans. Commercial banks are subject to state laws unless those regulations hinder national banking or place an undue burden on the bank's performance. *Anderson Nat'l Bank v. Lockett*, 321 U.S. 233, 248 (1944).

35. 12 C.F.R. §§ 541.1-541.30, 543.1-543.11, 544.1-544.7, 545.1-545.29, 546.1-546.5 (1982).

36. 12 U.S.C. § 1464(b)(2) (1976) provides:

To such extent as the Board may authorize by regulation or advice in writing, any association may borrow, may give security, may be surety as defined by the Board and may issue such notes, bonds, debentures, or other obligations, or other securities (except capital stock) as the Board may so authorize.

Id. *See* 12 C.F.R. §§ 506.1-506.6 (1982).

37. 12 U.S.C. § 1464(b)(1) (1976) provides:

An association may raise capital in the form of such savings deposits, shares, or other accounts, for fixed, minimum, or indefinite periods of time (all of which are referred to in this section as savings accounts and all of which shall have the same priority upon liquidation) as authorized by its charter or by regulations of the Board, and may issue such passbooks, time certificates of deposit, or other evidence of savings accounts as are so authorized.

Id. *See* 12 C.F.R. §§ 526.1-526.9 (1982).

38. 12 U.S.C. § 1464(c) (1976). The extension of real estate loans for single family and multi-family mortgage loans is governed by 12 U.S.C. § 1464(c)(1)(B) (Supp. V 1981) which provides in pertinent part: "Loans on the security of liens upon residential real property in an amount which, when added to the amount unpaid upon prior mortgages, liens, or encumbrances, if any, upon such real estate does not exceed the appraised value thereof" *Id.* *See* 12 C.F.R. §§ 545.6 to 545.6-11 (1982).

39. 12 C.F.R. § 545.6-4 (1982), which provides for the use of alternative forms of mortgage instruments. Section 545.6-4(b) states:

ers⁴⁰ and advances⁴¹ are also regulated by the Board. The regulations specifically prohibit both discriminatory loan denials and the arbitrary setting of loan terms.⁴²

In the wake of the increased interest in civil rights in the sixties, Congress re-examined the home mortgage market. In 1975 Congress enacted the Home Mortgage Disclosure Act (HMDA),⁴³ empowering the FHLBB to inspect the books and records of depository institutions and requiring those institutions to disclose pertinent data. The HMDA was designed to curtail redlining by financial institutions.⁴⁴ Under the

This regulation is promulgated pursuant to the plenary and exclusive authority of the Board to regulate all aspects of the operations of Federal associations, as set forth in 5(a) of the Home Owners' Loan Act of 1933, as amended. This exercise of the Board's authority is preemptive of any state law purporting to address the subject of a Federal association's ability or right to make, purchase, participate or otherwise deal in adjustable mortgage loans, or to directly or indirectly restrict such ability or right.

Id.

40. *Id.* § 545.6-5 (1982).

41. *Id.* § 531.1. It provides: "Banks may make advances to members, subject to regulations and restrictions the Board may prescribe Advances may be made to meet withdrawals, cover seasonal requirements, and expand residential mortgage portfolios." *Id.*

42. Discrimination is expressly prohibited in the areas of lending, appraisal, underwriting, application procedures and advertising. *Id.* §§ 528.1-528.8, 531.8. Section 528.2 sets forth the prohibitions:

No member institution may deny a loan or other service or discriminate in fixing the amount, interest rate, duration, application procedures, collection or enforcement procedures . . . on the basis of the age or location of the dwelling, or on the basis of the race, color, religion, sex or national origin of . . . (4) the present or prospective owners, lessees, tenants or occupants of other dwellings in the vicinity of the dwelling(s) for which such loan . . . is to be made or given.

Section 531.8, a general policy statement, enumerates federal goals to ensure equal opportunity in home financing. To this end, lending decisions are not to be based on "unfounded or unsubstantiated assumptions regarding the effect upon loan risk of the age of the dwelling or the physical or economic characteristics of an area." *Id.* § 531.8(c)(7). Section 531.8 provides that member institutions should review their advertising and marketing practices to ensure adequate service to the entire community.

43. Home Mortgage Disclosure Act of 1975, Pub. L. No. 94-200, 89 Stat. 1125 (codified at 12 U.S.C. §§ 2801-2809 (1976, Supp. IV 1980 & Supp. V 1981)).

44. Congress determined that depository institutions contributed to neighborhood decline by failing to provide adequate home financing to qualified applicants. *See Senate Hearings on S. 1281, supra* note 4. The stated purpose of the HMDA was to supply citizens with the data necessary to determine whether a particular institution was fulfilling its obligations to the communities in which it was located. 12 U.S.C. § 2801(a), (b) (1976). Congress hoped that fully informed depositors would restrict their banking business to those institutions demonstrating reinvestment in the community. *See S. REP. No. 187, 94th Cong., 1st Sess. 12 (1975)* (disclosure of this data will "get the facts out" and possibly defuse tensions arising from unsupported allegations of redlining); *S. REP. No. 553, 94th Cong., 1st Sess. 2 (1975)* (the Senate version

Act, lending institutions must compile and make public information on the number of loans originated and purchased each fiscal year.⁴⁵ Geographic breakdowns of this data should indicate whether a particular neighborhood has been redlined.⁴⁶ This method of disclosure has significant flaws;⁴⁷ nevertheless it represents a step toward remedying the problem.

The most interesting aspect of the HMDA is its broad application. The act applies to "depository institutions," defined as "any commercial bank, savings bank, savings and loan association, building and loan association, or homestead association (including cooperative banks) or credit union which makes federally related mortgage loans as determined by the Board"⁴⁸ This latter extension brings state

of this bill required the data to be available for inspection at every branch of an institution); H.R. REP. NO. 561, 94th Cong., 1st Sess. 14 (1975) (disclosure will identify beginning stages of redlining and provide a vehicle for neighborhood residents and public officials to join in planning reinvestment strategies); H.R. CONF. REP. NO. 726, 94th Cong., 1st Sess. 8 (1975) (conference committee report compares Senate and House purposes in enacting HMDA). *See also* 121 CONG. REC. 25154, 25157, 25159 & 25171 (1975) (Senate debates).

As originally enacted, the HMDA provided that it would lapse in 1980. Congress, however, reenacted it in 1980. H.R. REP. NOS. 7509 & 7060, 96th Cong., 2d Sess. 126 (1980). The HMDA is scheduled to lapse in 1985. 12 U.S.C. § 2811 (Supp. V 1981).

45. 12 U.S.C. § 2803 (1976 & Supp. V 1981).

46. *Id.* § 2803(a). This information must be maintained and made available for a period of five years. *Id.* § 2803(c). Section 2803(a)(1) provides in pertinent part:

Each depository institution which has a home office or branch office located within a standard metropolitan statistical area, as defined by the Office of Management and Budget shall compile and make available, in accordance with regulations of the Board, to the public for inspection and copying at the home office, and at at least one branch office within each standard metropolitan statistical area in which the depository institution has an office the number and total dollar amount of mortgage loans which were A) originated, or B) purchased by that institution during each fiscal year. . . .

Id.

47. Technically, loan statistics need only be made available upon the request of interested citizens. 12 C.F.R. § 203.5(c) (1982). The data is complicated and requires sophisticated analytical techniques to detect redlining practices. An ordinary citizen is not capable of the necessary scrutiny. Thus far, only community groups, legislators and financial analysts have made use of the data. Note, *Redlining, Disinvestment and the Role of Mutual Savings Banks: A Survey of Solutions*, 9 FORDHAM URB. L.J. 89, 94 n.18 (1980).

48. 12 U.S.C. § 2802 (1976). While the Board is responsible for promulgating regulations necessary to carry out the purposes of the Act, *id.* § 2804(a), enforcement is delegated to several different agencies. *Id.* § 2804(b). Thus, the Comptroller of the Currency is to ensure compliance by national banks; the Federal Reserve Board ensures compliance of its member banks; the Board of Directors of the FDIC enforces compliance of its members; and the National Credit Union Administrator is responsible for compliance by credit unions. *Id.*

chartered institutions within its parameters. In fact, the Act contains a provision for determining whether state chartered institutions should comply with state or federal regulations.⁴⁹ Section 2805(a) of the HMDA provides that state laws are not annulled and state institutions may continue to comply with state procedural regulations so long as the Board does not determine that those requirements are inconsistent with the federal law.⁵⁰ While the standards for determining inconsistency are not set forth, it is clear that if the state law requires more extensive disclosure, there cannot be a judgment of inconsistency.⁵¹ Specific state institutions may be exempted by the Board from the Act's informational requirements and a number of states have applied for and received this exemption status.⁵² No provision, however, addresses the relationship between federally chartered institutions and state enacted disclosure regulations.⁵³ One facet of the preemption debate has centered around this gap in the law.

49. *Id.* § 2805.

50. *Id.* The section provides:

This chapter does not annul, alter, or affect, or exempt any State chartered depository institution subject to the provisions of this chapter from complying with the laws of any State or subdivision thereof with respect to public disclosure and record keeping by depositor institutions, except to the extent that those laws are inconsistent with any provision of this chapter, and then only to the extent of the inconsistency. The Board is authorized to determine whether such inconsistencies exist. The Board may not determine that any such law is inconsistent with any provision of this chapter if the Board determines that such law requires the maintenance of records with greater geographic or other detail than is required under this chapter, or that such law otherwise provides greater disclosure than is required under this chapter.

Id.

51. *Id.*

52. California, Illinois, Massachusetts and New York applied for and were granted exemptions by the FHLBB. 41 Fed. Reg. 55,581-83 (1976). The Board also exempted New Jersey institutions. *National State Bank v. Long*, 630 F.2d 981, 984 (3d Cir. 1980).

53. The Senate originally recommended that the predecessor provision to § 2805—the section entitled “relation to state laws”—include the following language:

(a) This Act does not annul, alter or affect, or exempt *any person* subject to the provisions of this Act from complying with the laws of any state or subdivision thereof with respect to public disclosure and recordkeeping by depositor institutions. . . .

(b) The Board may by regulation exempt from the requirements of this Act *any depository* institution within any state or subdivision thereof if it determines that under the laws of such state or subdivision, that institution is subject to requirements substantially similar to those imposed under this Act.

121 CONG. REC. 27,624 (1975) (emphasis added).

The House members of the joint conference committee, however, feared that permitting state law to govern federally chartered institutions threatened the dual

In 1977, Congress enacted the Community Reinvestment Act (CRA).⁵⁴ Congress intended the CRA to encourage "institutions to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound operation of such institutions."⁵⁵ Under the Act, financial institutions⁵⁶ have an affirmative obligation to meet the community's needs and are required to establish their compliance.⁵⁷ Despite the general reference to community financial needs, neither redlining nor loan refusal based on property location is expressly prohibited.⁵⁸ Instead, the CRA is written in positive terms to encourage reinvestment.⁵⁹

banking system. Consequently, the bill was amended to its current form which restricts the availability of exemption to state chartered institutions. S. REP. NO. 553, 94th Cong., 1st Sess. 9-10 (1975). See notes 143 & 165 *infra* and accompanying text.

54. Community Reinvestment Act of 1977, Pub. L. No. 95-128, 91 Stat. 1147 (codified at 12 U.S.C. §§ 2901-2905 (Supp. V 1981)). The CRA is evaluated in Note, *The Community Reinvestment Act Regulations: Another Attempt to Control Redlining*, 28 CATH. U.L. REV. 635 (1979).

55. 12 U.S.C. § 2901(b).

56. The CRA applies to national banks and savings and loans, as well as to state banks and savings and loans who belong to the Federal Reserve System, or are insured by the FDIC or FSLIC. *Id.* § 2902.

57. *Id.* § 2901(a) provides:

- (1) regulated financial institutions are required by law to demonstrate that their deposit facilities serve the convenience and needs of the communities in which they are chartered to do business;
- (2) the convenience and needs of communities include the need for credit services as well as deposit services; and
- (3) regulated financial institutions have continuing and affirmative obligations to help meet the credit needs of the local communities in which they are chartered.

Id. Pursuant to this section a Credit Reinvestment Statement must be written and made public by FDIC members, 12 C.F.R. § 345.4 (1982), by FSLIC insured members, *id.* § 563e.4, and Federal Reserve members, *id.* § 228.4. The CRA Statement delineates the local community and specifies the forms of credit which the lender offers to the community.

58. 12 U.S.C. §§ 2901-2905 (Supp. V 1981).

59. The legislative history indicates that Congress intended the CRA to herald the beginning of a national community reinvestment policy. See 123 CONG. REC. 31886-93 (1977).

Financial institutions have objected to this philosophy of reinvestment in their local communities on the ground that their portfolios become too weighted with local investments. Givens, *The "Anti-redlining" Issue: Can Banks Be Forced to Lend?*, 95 BANKING L.J. 515, 520-25 (1978). Moreover, there are potential constitutional implications in that investors' rights may be affected by requiring banks to act in a manner which is not necessarily prudent. A second constitutional question is whether the free flow of commerce is interrupted by the reinvestment requirement. See, e.g., *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (New Jersey statute prohibiting the importation of solid wastes collected from outside the state was held to violate the Commerce Clause); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (Maryland statute designed to induce suppliers to process scrapped vehicles within the state was held not to burden interstate commerce).

The CRA comes into play when a financial institution seeks a federal charter, deposit insurance, merger, consolidation, or new branch.⁶⁰ The appropriate federal supervisory agency responsible for approving the application is directed to assess the institution's record of meeting the community's needs and to take this data into account in its evaluation of the application.⁶¹ Moreover, each of the relevant supervisory agencies is directed to establish regulations necessary to implement the goals of the CRA.⁶²

The Economic Credit Opportunity Act (ECOA)⁶³ prohibits credit discrimination and is significant in two respects. First, it is one of two affirmative measures to be drawn upon in the battle against redlining.⁶⁴ Second, it is expressly not preemptive of concurrent state law.⁶⁵ Thus federally chartered institutions are subject to state statutes governing discriminatory credit practices.⁶⁶

These three Acts comprising the federal legislative scheme developed to stem credit discrimination do not expressly prohibit redlining. However, pursuant to the general policies of providing fair credit and housing opportunities embodied in these statutes, the FHLBB has issued regulations prohibiting lending discrimination.⁶⁷ Specifically, no member association may discriminate on the basis of the dwelling's

60. Under § 2903 the appropriate supervisory agency is directed to consider an institution's record of meeting community credit needs in evaluating an application for a deposit facility. 12 U.S.C. § 2903 (Supp. V 1981). "[A]pplication for a deposit facility" is defined to include an application for a charter, deposit insurance, a new branch, merger, or consolidation. *Id.* § 2902(3).

61. *Id.* § 2903 (Supp. V 1981). See 12 C.F.R. § 228.8 (1982) (Federal Reserve Board regulations promulgated under the CRA).

62. 12 U.S.C. § 2905 (Supp. V 1981). See 12 C.F.R. § 228 (Federal Reserve Board); § 543; § 545; § 546; § 563; § 584 (Federal Home Loan Bank Board).

63. 15 U.S.C. §§ 1691-1691f (1976 & Supp. IV 1980).

64. See note 58 *supra*. See also *Equal Credit Opportunity Act: Hearings on S. 1927 Before the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong. 1st Sess. 318, 467, 479 (1975) (testimony of experts suggesting that the ECOA will aid in the elimination of redlining).

65. The ECOA provides:

This subchapter does not annul, alter or affect, or exempt *any person* subject to the provisions of this subchapter, from complying with, the laws of any State with respect to credit discrimination, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.

15 U.S.C. § 1691d(f) (1976) (emphasis added).

66. The Congressional Committee stated its intent to ensure that those state laws which grant greater protection to the credit applicant shall apply equally to all credit granting institutions located in that state. 1976 U.S. CODE CONG. & AD. NEWS 403, 414. See 90 Stat. 251, 253 (1976).

67. 12 C.F.R. §§ 528.2, 531.8 (1982).

age or location, or on the basis of race, color, religion, sex or national origin of the owners or occupants of dwellings in the vicinity.⁶⁸ Another aspect of the preemption issue relates to these substantive regulations.

B. State Legislation

State action against redlining commenced prior to the enactment of the Home Mortgage Disclosure Act and served as a motivating factor in the passage of the HMDA.⁶⁹ Congress desired uniformity; nevertheless, "substantially similar" state laws qualify a state for exemption from the federal disclosure requirements.⁷⁰ Consequently, uniformity does not exist. Those states which have legislated in this field have devised significant variations.⁷¹ An examination of selected state statutes illustrates the diverse anti-redlining approaches currently in effect.

California has developed an extensive statutory and regulatory scheme dealing with discriminatory mortgage lending practices. The

68. *Id.* § 528.2(a). See note 42 *supra*.

69. The House Committee on Banking, Currency and Housing reported that Massachusetts and Illinois were already collecting data on lending practices. H.R. REP. NO. 561, 94th Cong., 1st Sess. 18 (1975). The report further noted that Chicago and other cities also were contemplating disclosure requirements and concluded:

Your committee believes that the trend at state and local levels to require mortgage disclosure makes it imperative that Congress act. If the Congress does not set at least a Federal minimum disclosure requirement by law, state regulated institutions required to submit mortgage disclosure information could well be placed in a competitively disadvantaged position with respect to Federally regulated institutions. Your committee believes that mortgage disclosure by only state institutions would not meet the public's needs nor foster the development of the dual banking system. . . . "Unless there is uniformity, we will find one group [state chartered institutions] seeking refuge in another set of laws," noted one witness.

Id. at 19.

70. 12 U.S.C. § 2805 (1976).

71. For instance, while no federal statute creates an affirmative duty to refrain from redlining, some states have expressly prohibited mortgage discrimination based on geographic location. See CAL. HEALTH & SAFETY CODE § 35810 (West Supp. 1982); N.J. STAT. ANN. § 17:16F (West Supp. 1982-1983); New York Supervisory Procedure G-107, promulgated pursuant to N.Y. BANKING LAW §§ 10, 36(1), 36(3), 125(2) (McKinney 1971) [hereinafter cited as Supervisory Procedure G-107].

Moreover, while the HMDA and the regulations promulgated under it lack sanctions, some states have devised enforcement methods as well as penalties. See CAL. HEALTH & SAFETY CODE § 35815 (West Supp. 1982) (state treasurer may decline to deposit state funds in an institution found to be discriminating in lending); ILL. ANN. STAT. ch. 17, § 855 (Smith-Hurd 1981) (civil action for damages); N.J. STAT ANN. § 17:16F-7 (civil damages), § 17:16F-9 (cease and desist order); § 17:16F-10 (penalty for violation of cease and desist order).

central attack on redlining is the Holden Act⁷² which concerns financial discrimination. The statute specifically states that this measure was enacted to discontinue the practice of denying mortgage loans because of "conditions, characteristics, or trends in a neighborhood."⁷³ Therefore, the Holden Act prohibits redlining on two levels. First, financial assistance cannot be withheld because of economic trends in the neighborhood surrounding the housing accommodation.⁷⁴ Second, the racial, ethnic, religious, or national origin compo-

72. CAL. HEALTH & SAFETY CODE §§ 35800-35834 (West Supp. 1982) (also referred to as the Housing and Financial Discrimination Act).

73. *Id.* § 35801. The legislature enumerated its findings and declarations:

(a) The subject of housing is of vital statewide importance to the health, safety, and welfare of the residents of the state. . . . (e) With respect to certain geographic areas, financial institutions have sometimes denied financial assistance or approved assistance on terms less favorable than are usually offered in other geographic areas, regardless of the creditworthiness of the applicant or the condition of the real-property security offered, and this practice has the following effects:

(1) Contributes to the decline of available housing in such areas and is likely to continue to do so.

(2) Limits the choice of housing opportunities and inhibits the operation of a healthy housing market in such areas.

(3) Leads to the abandonment of such areas.

(4) Adversely affects the health, welfare and safety of the residents of this state.

(5) Undermines the value of the equity of current owners of property in such areas.

(6) Inhibits the granting of amortized loans.

(7) Perpetuates racially and economically segregated neighborhoods and geographic areas.

(8) The practice of denying mortgage loans or adversely varying the terms of such loans because of conditions, characteristics or trends in a neighborhood or geographic area that are unrelated to the creditworthiness of the applicant or the value of the real property security offered is against public policy.

Id. The stated purposes of the Act include preventing discrimination, encouraging increased lending in areas where financial assistance was previously unavailable, and preventing abandonment and decay of neighborhoods. *Id.* § 35802.

74. Section 35810 provides:

No financial institution shall discriminate in the availability of, or in the provision of, financial assistance for the purpose of purchasing, constructing, rehabilitating, improving, or refinancing housing accommodations due, in whole or in part, to the consideration of conditions, characteristics, or trends in the neighborhood or geographic area surrounding the housing accommodation, unless the financial institutions can demonstrate that such consideration in the particular case is required to avoid unsafe and unsound business practice.

Id.

sition of a community surrounding the housing accommodation shall not be considered in determining whether to grant a requested loan.⁷⁵

The Secretary of Business and Transportation is charged with the enforcement of the Holden Act.⁷⁶ Furthermore, the Secretary is empowered to issue regulations necessary to implement the Act.⁷⁷ Part of the Secretary's duties include complaint resolution.⁷⁸ The complaint resolution provisions of the Act allow an injured party to collect up to \$1000 in damages.⁷⁹ The California statute also sets forth a notice provision requiring financial institutions to inform all loan applicants of their right to review after denial of the mortgage loan.⁸⁰

The New York State Banking Department has issued a regulation requiring banks to maintain a record of all loan applications.⁸¹ The

75. Section 35812 provides:

No financial institution shall consider the racial, ethnic, religious, or national origin composition of a neighborhood or geographic area surrounding a housing accommodation or whether or not such composition is undergoing change, or is expected to undergo change, in appraising a housing accommodation or in determining whether or not, and under what terms and conditions, to provide financial assistance for the purpose of purchasing, constructing, rehabilitating, improving or refinancing a housing accommodation. No financial institution shall utilize appraisal practices that are inconsistent with the provisions of this part.

Id. Additionally, § 35811 prohibits discrimination in the availability of financial assistance for housing due to considerations of race, sex, religion, marital status, national origin, or ancestry. *Id.* § 35811.

76. *Id.* § 35815. The secretary is instructed to monitor and investigate lending practices.

77. *Id.* § 35814.

78. An aggrieved applicant may file a complaint with the secretary. *Id.* § 35820. The secretary is authorized to hold an arbitration conference. *Id.* § 35821.

79. Upon a finding by the secretary that an unlawful practice has occurred, the institution is to be served with written findings and a cease and desist order which also directs the institution to grant the loan or pay damages to the complainant. *Id.* § 35822.

80. *Id.* § 35830. The provision also requires information concerning the complaint procedures to be posted in a conspicuous location in the financial institution. Additional protection is afforded by the California Real Estate Department regulations which require that the developers of subdivisions identify to prospective buyers lenders who will be associated with the development. CAL. BUS. & PROF. CODE § 11018.2 (West 1964 & Supp. 1982). See also CAL. ADMIN. CODE tit. 10, R. 2792.6 (1982) (microfiche) (Regulations of the Real Estate Commission which provide that the commissioner shall examine any subdivision and shall issue to the subdivider a public report authorizing the sale or lease of the lots or parcels within the subdivision).

81. Supervisory Procedure G-107 was promulgated pursuant to N.Y. BANKING LAW §§ 10, 36(1), 36(3), 125(2) (McKinney 1971). For a thorough analysis of Supervisory Procedure G-107 see Note, *supra* note 47.

regulation, commonly called Supervisory Procedure G-107, requires banks to record the basis for denying or granting a loan application as well as the terms of approved loans.⁸² The Banking Department analyzes the information to "insure that discrimination in housing mortgage credit does not occur."⁸³ The information actually available to the public, however, consists only of the number and dollar amounts of mortgage loans grouped by zip code or census tract.⁸⁴ In addition to these disclosure requirements, chapter 788 of the New York Banking Law expressly prohibits discrimination in mortgage lending where the decision is based upon geographic location.⁸⁵ Consequently, when an application is denied, the aggrieved applicant may request a review of the denial by the Superintendent of Banks.⁸⁶ The Superintendent, upon finding a violation, may compel the bank to discontinue the discriminatory practice.⁸⁷ Furthermore, as provided in the comparable Federal Credit Reinvestment Act regulations, the state may consider a bank's lending patterns while evaluating a bank's application to establish a new branch.⁸⁸ This measure can have a strong deterrent effect, particularly on younger, smaller institutions which project significant growth and expansion. The potential deterrent power of this provision is limited, however, because it is indirect and is used only after the practices have occurred for an extended period of time.

New Jersey promulgated its anti-redlining statutes in 1977 to "prohibit the arbitrary denials of mortgage loans on the basis of the

82. Supervisory Procedure G-107, § 107.7 app. 7, Part III, at 8. The bank must answer questions about the applicant's creditworthiness on an "equal housing opportunity lender form" as well as indicate his race and marital status. *Id.*, app. 7, Part I, at 5-6.

83. *Id.*, app. 7, at 5; §§ 107.6 to 107.8.

84. *Id.*, § 107.2(b)(1), (2). Additionally, information pertaining to foreclosure, delinquent payments, renegotiated loans, and specific mortgage terms are made public. *See* app. 8.

85. N.Y. BANKING LAW § 9-f (McKinney Supp. 1982-1983). A banking institution is prohibited from discriminating or refusing to make a "prudent" mortgage loan on the basis of the geographic location if the property is "located within the geographic area ordinarily serviced by such bank or within the community" where the bank or its branch is located. *Id.* § 9-f(1).

86. *Id.* § 9-f(2).

87. *Id.* § 39 (McKinney 1971). The Superintendent may also impose penalties. *Id.* § 44 (McKinney Supp. 1982-1983).

88. General regulations of the Banking Board §§ 76.1-76.3, promulgated pursuant to N.Y. BANKING LAW §§ 10, 14(1), 28(b), 29, 601-b (McKinney 1971 & Supp. 1982-1983). An additional and essential element in the State's legislative scheme is the New York Human Rights Law which prohibits discrimination in the general area of credit allocation. N.Y. EXEC. LAW § 296-a (McKinney 1971).

location of the property to be mortgaged.”⁸⁹ In furtherance of this ultimate goal, the statute expressly prohibits discrimination in granting and denying loans because the property is located in a “specific neighborhood or geographic area.”⁹⁰ Additionally, no depository institution may impose discriminatory conditions upon the loan application or procedures surrounding it.⁹¹ The statute extends broadly to all banks, savings and loans, and credit unions with total assets exceeding \$10 million.⁹² To monitor the conduct of New Jersey depository institutions, extensive disclosure is required on a quarterly basis. This information must be available for a period of five years.⁹³

Enforcement of these two prongs—the substantive prohibitions and the disclosure requirements—is delegated to the New Jersey Commissioner of Banking. The Commissioner is empowered to conduct investigations, hold hearings, issue subpoenas, and compel witnesses to attend.⁹⁴ Upon a finding that a financial institution is discriminating in its lending policies or practices, the Commissioner is authorized to issue a cease and desist order.⁹⁵

Other states, including Massachusetts, Wisconsin, Ohio, and Michigan, have legislated against redlining. Massachusetts requires certain banks and credit unions to report and make public residential loan data.⁹⁶ Violators may be subject to fines and sanctions.⁹⁷ Wisconsin

89. N.J. STAT. ANN. §§ 17:16F-1 to :16F-11 (West Supp. 1982-1983). The legislation was intended to increase the available mortgage capital in capital deficient communities and to provide information to state residents as to which institutions are meeting their obligations to the neighborhood. *Id.* § 17:16F-1.

90. *Id.* § 17:16F-3.

91. *Id.* § 17:16F-3(b). The New Jersey legislature amended this anti-redlining statute in 1979 to prevent banks from circumventing the law by discouraging or refusing to accept loan applications. See Assembly Banking and Insurance Comm. Statement, 1979 N.J. Sess. Law Serv. c. 148, Assembly No. 3019 (West).

92. N.J. STAT. ANN. § 17:16F-2(a) (West Supp. 1982-1983). The legislature intended to enforce the statute against both state and federally chartered institutions. See note 172 *infra*.

93. N.J. STAT. ANN. § 17:16F-6 (West Supp. 1982-1983). The information to be reported is the number and dollar amounts of loans originated and purchased. *Id.* § 17:16F-4.

94. *Id.* § 17:16F-8.

95. *Id.* § 17:16F-9.

96. Mass. Comm’r of Banks, Disclosure Directive (Ref. No. 18-2c). The Massachusetts Commissioner of Banking issued a directive requiring mortgage and deposit data from institutions. Additionally, he established a procedure for depositors to petition to have an opportunity to examine the information. The data must be included in the Annual Report of Examination for specified state chartered banks and credit unions. *Id.* For an analysis of the compiled data see Taggart & Smith, *Redlining: An Assessment of the Evidence of Disinvestment in Metropolitan Boston*, 17 URB. AFF. Q. 91 (1981).

97. MASS. GEN. LAWS ANN. ch. 167, § 7 (West Supp. 1982).

expressly prohibits redlining by savings and loan associations⁹⁸ but does not require disclosure. The Ohio disclosure statute requires quarterly reports to include the addresses on which mortgage loans have been granted.⁹⁹ Michigan mandates disclosure, prohibits redlining and also provides means of enforcement.¹⁰⁰ To ensure compliance with the various provisions of the Michigan anti-redlining statutory scheme, a series of depository laws prohibit any state agency from depositing public funds in any federal or state depository institution which fails to report the required loan data.¹⁰¹ This carrot and stick approach employs public funds to induce compliance on a broad scale.¹⁰²

98. WIS. ADMIN. CODE ch. S-L, §§ 27.0 to .11 (1975).

99. H.B. 485, *amending* 13 OHIO REV. CODE ANN. § 1343.01, *enacting* § 1343.01 (Page Supp. 1976).

100. MICH. COMP. LAWS ANN. §§ 445.1601 to .1609 (West Supp. 1982-1983). Penalties may be imposed for violations. *Id.* § 445.1612. Additionally, communities are encouraged to form local review boards to deal with complaints. *Id.* § 445.1609. Where local voluntary boards are found to be ineffective, the banking commissioner is permitted to form mandatory boards. *Id.*

One comprehensive legislative scheme to combat redlining, the Illinois Financial Institutions Disclosure Act, has been invalidated. The Illinois Act required disclosure of the number and dollar amounts of loan applications and of loans granted. ILL. ANN. STAT. ch. 95, § 201 (Smith-Hurd 1977), *invalidated in* *Glen Ellyn Sav. & Loan Ass'n v. Tsoumas*, 71 Ill. 2d 493, 377 N.E.2d 1 (1978), *cert. denied*, 439 U.S. 927 (1979). In *Glen Ellyn* the Illinois Supreme Court held that the HMDA preempted the Illinois Statute. The Financial Institutions Disclosure Act contained a nonseverability clause and therefore the entire statute was deemed ineffective. *Id.* at 500, 377 N.E.2d at 4.

101. Specific governmental agencies are directed not to deposit their funds in any financial institution which does not file, either voluntarily or pursuant to state law, disclosure reports required by § 445.1606 of the Michigan Compiled Laws. *See* 1979 Mich. Pub. Acts 77 (unincorporated villages); *id.* 78 (community college districts); *id.* 79 (counties, cities, villages, townships, agencies, boards and commissions); *id.* 84 (county board of commissioners); *id.* 86 (surplus county funds); *id.* 87 (school districts); *id.* 88 (surplus state funds).

102. Recently several federal savings and loan associations in Michigan brought suit in federal court seeking a declaratory judgment that they were exempt from the Michigan anti-redlining statutes. *Michigan Savings & Loan League v. Francis*, 683 F.2d 957 (6th Cir. 1982). The case was dismissed for lack of federal question jurisdiction, since preemption was raised only as a defense to threatened state action. The Michigan Financial Institutions Bureau determined not to take action to compel compliance with the state anti-redlining laws because the rate of voluntary compliance was very high. Telephone interview with Mr. Daniel Tsai, Director of Urban Investment Unit of the Michigan Financial Institutions Bureau (Feb. 4, 1983). According to Mr. Tsai, federally chartered financial institutions are under a duty to comply with the substantive anti-redlining provisions of the Michigan law; however, enforcement authority remains with the appropriate federal agency.

C. Municipal Ordinances

Significantly, the local municipal governments of several older urban areas have promulgated ordinances to discourage redlining.¹⁰³ Chicago, under the leadership of Mayor Daley, passed its Municipal Depositories Ordinance in 1974.¹⁰⁴ Under the Municipal Depositories Ordinance, before a depository institution may be eligible to hold city funds, two conditions must be met.¹⁰⁵ The first requirement is to report information pertaining to residential lending practices.¹⁰⁶ This disclosure is substantially more extensive than that required under the federal HMDA.¹⁰⁷ The second condition imposed is that the institution must sign a pledge that it will not arbitrarily reject mortgage loans for a particular geographic area on the basis of location or age of the property.¹⁰⁸ Thus city funds give the Chicago city government leverage to induce compliance with anti-redlining laws.

Similarly, Cleveland's Municipal Ordinance regulates financial institutions seeking to be public fund depositories.¹⁰⁹ Modeled after the Chicago law, Cleveland's version also requires comprehensive disclosure.¹¹⁰ This includes the duty to report data concerning the number and dollar amounts of deposits held in the bank.¹¹¹ Additionally, Cleveland requires lending institutions to sign a pledge to refrain from redlining practices.¹¹²

103. CHICAGO, ILL. MUN. CODE §§ 7-32 to 7-41 (1974); CLEVELAND, OHIO ADMIN. CODE § 127.34 (1976); MINNEAPOLIS, MINN. CODE OF ORDINANCES § 139.406 (1974).

104. CHICAGO, ILL. MUN. CODE §§ 7-32 to 7-41 (1974).

105. The City Comptroller is directed to obtain residential lending information with each bid for interest on City and School funds. *Id.* § 7-34. It has been argued that the burden of disclosure could influence a bank to forego holding city funds. Wisniewski, *Mortgage Redlining (Disinvestment): The Parameters of Federal, State, and Municipal Regulation*, 54 U. DET. J. URB. L. 367, 394 (1977).

106. CHICAGO, ILL. MUN. CODE § 7-34.

107. In addition to specific lending related data, information concerning deposits held is required. See note 113 *infra* and accompanying text.

108. *Id.*

109. CLEVELAND, OHIO ADMIN. CODE § 127.34 (1976).

110. Depository institutions must disclose information on construction and home improvement loans as well as the number and dollar amounts on savings accounts. *Id.*

111. *Id.* § 127.34(b).

112. *Id.* § 127.35. The pledge provides:

We pledge not to arbitrarily reject mortgage loans for residential properties within a specific geographic area in Cleveland because of the location and/or age of the property, or in the case of a proposed borrower to arbitrarily vary the terms of those loans or the application procedures for those loans because of race, color, religion, national origin, age, sex or marital status. In addition, we pledge to make loans available on low and moderate income residential property in the neighborhoods of the City of

The requirement to disclose the number of and dollar amounts of deposits held by the institution was expressly rejected by Congress.¹¹³ Moreover the federal government has no such leverage as the withholding of funds for failure to comply with anti-redlining measures. Thus these city regulations considerably exceed the scope of the federal legislative scheme.

Another comprehensive and well organized municipal attack on redlining is the Minneapolis Ordinance¹¹⁴ passed in 1974. It is actually a civil rights ordinance and is composed of three integral parts. The first aspect addresses discrimination against individual loan applicants who belong to enumerated protected classes.¹¹⁵ The second facet regulates the types of permissible questions used on mortgage application forms.¹¹⁶ The third portion prohibits redlining.¹¹⁷ According to the ordinance, redlining is discrimination against a loan applicant who desires funds for use "in specific urban area because of social, economic or environmental conditions of the area"¹¹⁸ Financial institutions are mandated to post a sign, in a conspicuous location, which advises loan applicants of their rights and directs them to telephone either a state or city civil rights agency to register their complaint.¹¹⁹ Statutory relief available includes an order compelling the institution to make the loan,¹²⁰ punitive damages,¹²¹ and in certain circumstances, a monetary award for pain and suffering.¹²² The City

Cleveland within the limits of our legal restrictions and prudent financial practices.

Id.

113. The drafters of HMDA rejected this broad form of disclosure because it represented an attempt to allocate credit and violated depositor privacy. S. REP. NO. 187, 94th Cong., 1st Sess. 12-13 (1975).

114. MINNEAPOLIS, MINN. CODE OF ORDINANCES tit. 7, §§ 139.40(G), 141.50 (1974).

115. *Id.* § 139.40(G)(1).

116. *Id.* § 139.40(G)(2).

117. *Id.* § 139.40(G)(3).

118. *Id.*

119. *Id.* The sign must state:

This institution abides by the state and local law prohibiting the denial of a mortgage or home improvement loan or the granting of a mortgage or home improvement loan on different terms, because of the conditions in the neighborhood in which the home is located. If you believe that you have been discriminated against, call either of the following agencies for help: State Human Rights Department; City Civil Rights Department.

120. *Id.* § 139.50(d).

121. *Id.*

122. Telephone interview with Will Ternoir, Minneapolis City Civil Rights Department (December 1982). Mr. Ternoir stated that no complaints had yet been registered.

Civil Rights Department is prohibited from acting on its own: it must act only in response to a complaint. Thus enforcement is subject to limitations.¹²³

This survey reveals the variety of methods currently in use to combat redlining. While each method may have drawbacks or flaws, it is impossible to determine which approach will be most effective if lenders are unsure of which measure requires their compliance. Businesses, homeowners and property buyers suffer from Congress' failure to address the issue of state legislation and federal institutions. Financial institutions may incur additional costs through compliance with both federal and state regulations or may risk penalties for noncompliance on the presumption of preemption. The only way to alleviate these problems is to resolve the following issues: (1) has the federal law preempted local statutes; (2) if so, is preemption limited to procedural anti-redlining laws; and (3) can the law relating to preemption in the area of banking be applied to savings and loans. These questions will be addressed after an overview of the preemption doctrine.

III. Preemption Doctrine

The federal preemption doctrine developed from the Supremacy Clause¹²⁴ of the United States Constitution. Traditionally, preemption describes the invalidation of a state statute where the federal laws in the same area preclude concurrent regulation.¹²⁵ The simplest exam-

123. See note 122 *supra*. For a detailed discussion of the various state and municipal anti-redlining laws see Ryan, *supra* note 6, at 77; Werner, Frej & Madway, *supra* note 6, at 517; Wisniewski, *supra* note 105, at 394.

124. The Supremacy Clause provides: "This Constitution, and the Laws of the United States, which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding. U.S. CONST. art. VI, cl. 2.

125. According to the United States Supreme Court, the states retain all prior rights of sovereignty except those exclusively delegated to Congress. Exclusive federal authority exists when (1) the Constitution expressly grants authority to Congress and prohibits that authority to states, (2) exclusive authority is granted to Congress or (3) authority is granted to Congress to which a similar state authority would be contradictory or repugnant. In summary, the Court noted that care must be exercised in distinguishing between those situations in which the concurrent exercise of a power by the federal government and the states or by the states alone may lead possibly to conflicts, and those situations where conflicts will necessarily arise. "It is not . . . a mere possibility of inconvenience in the exercise of power, but an immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of [state] sovereignty." *Goldstein v. California*, 412 U.S. 546, 554-55 (1973) (quoting *THE FEDERALIST* No. 32, at 243 (Alexander Hamilton) (B. Wright ed. 1961)).

ple is where, by constitutional mandate, Congress is given exclusive jurisdiction to regulate a particular field. In the absence of a delegation of exclusive authority to Congress, the key factor is congressional intent.¹²⁶ Ordinarily federal law does not preempt a field within the state's police power, absent a clear and manifest purpose to do so.¹²⁷

In examining concurrent federal and state legislation, the United States Supreme Court has adopted two approaches: the "occupation" theory,¹²⁸ and the "conflict" theory.¹²⁹ Under the occupation ap-

126. Preemption " 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.' " *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 102 S. Ct. 3014, 3022 (1982); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). *See, e.g.*, *New York State Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 413 (1973) (Supreme Court refused to void state statutes absent congressional intent to preempt them); *Goldstein v. California*, 412 U.S. 546, 561 (1973) (it is necessary to examine the federal act to determine what objectives Congress intended); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963) (Court considered whether Congress ordained that the state regulation yield to federal law); *Hines v. Davidowitz*, 312 U.S. 52, 78-79 (1941) (to ascertain the boundaries of federal legislation, the Court looks to the federal statute itself, read in light of its constitutional setting and its legislative history).

127. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). Justice Douglas, writing for a majority of the Court, asserted: "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 230.

128. "Occupation" is synonymous with "ouster" or "displacement" and it occurs in one of three ways. The Court's three step analysis revolves around these methods of occupation. Therefore, the Court must first ascertain whether the federal regulatory scheme is so pervasive as to naturally give rise to the inference that Congress left no room for supplementary state laws. *Compare* *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973) (pervasive nature of the federal scheme of aircraft supervision led the court to find preemption) *with* *Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424, 431 (1963) (federal regulation of interstate commerce was not so pervasive as to preclude state legislative measures to control radio advertising practices).

If the scheme is deemed to be less than pervasive, the court must then determine whether federal interest in the field is so dominant that state legislation would be excluded. *Compare* *Hines v. Davidowitz*, 312 U.S. 52, 62 (1940) (the national interest in foreign affairs including supervision of immigration, naturalization and deportation is dominant to any individual state's interest) *with* *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144-45 (1963) (state's interest in the marketing of foodstuffs dominates any national interest in uniformity in the field).

Finally, the court must determine whether the declared objective of a federal act and the obligations imposed by the act demonstrate congressional intent to occupy the field. For a complete discussion of "occupation" see Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975).

129. State legislation is nullified when it conflicts with federal law. *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 102 S. Ct. at 3022. Conflict occurs where compliance with both federal and state laws is physically impossible. *Florida Lime &*

proach, state legislation is invalidated where it is determined that Congress intended to occupy the field fully.¹³⁰ The clear and manifest purpose of Congress to occupy the field is found either by express declarations or in the legislative history.¹³¹ In the application of the "occupation" test, courts have not interpreted "occupy" liberally.¹³² However, once occupation is found, the state statute is invalid regardless of the aid or enhancement it provides to the federal regulatory scheme.¹³³

In the same vein, the conflict approach is utilized where Congress has not manifested an intent to exclusively regulate a particular field. Under these circumstances, state laws which conflict with or frustrate the goals of federal laws are invalid.¹³⁴ The classic test under the

Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963). Additionally, conflict arises where the state statute hinders the accomplishment of Congress' goals in enacting the federal law. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). See notes 135-36 *infra* and accompanying text for a complete discussion of *Hines*. Under this analysis the court must examine both the federal and state laws.

130. *E.g.*, *Perez v. Campbell*, 402 U.S. 637, 656 (1971) (Federal Bankruptcy Act precludes state supervision of this area); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1946) (by amendments to the Federal Warehouse Act, Congress eliminated dual regulation and demonstrated that it foreclosed State regulation of warehousemen).

131. See notes 126-27 *supra*.

132. There is no existing presumption of federal supremacy. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230. Indeed, one Justice has observed:

At a time when the exercise of the federal power is being rapidly expanded through Congressional action, it is difficult to overstate the importance of safeguarding against such diminution of state power by vague inferences as to what Congress might have intended if it had considered the matter or by reference to our own conceptions of a policy which Congress has not expressed and which is not plainly to be inferred from the legislation which it has enacted.

Hines v. Davidowitz, 312 U.S. at 75 (Stone, J. dissenting). Critics, however, have commented that:

By framing the preemption question in terms of specific Congressional intent the Supreme Court has manufactured difficulties for itself. Apart from the difficult problem of defining which Congress' and which congressman's intent is relevant, this manner of stating the issue suggests that the preemption question was consciously resolved and that only diligent effort is needed to reveal the intended solution.

Note, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 209 (1959).

133. See *Free v. Bland*, 369 U.S. 663, 666 (1962). The Court stated: "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law. . . ." *Id.*

134. The Supreme Court cautioned: "we must also be careful to distinguish those situations in which the concurrent exercise of a power by the Federal Government and the States . . . may possibly lead to conflicts and those situations where conflicts will necessarily arise." *Goldstein v. California*, 412 U.S. at 554. Therefore, the Court

conflict approach was formulated by the Supreme Court in *Hines v. Davidowitz*.¹³⁵ In *Hines* the Court defined its function as one of determining "whether . . . [the state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."¹³⁶ Several factors must be considered, including the subject of the regulation, the agency seeking to regulate, statutory language and legislative intent.¹³⁷ Frequently, the basic tenets of federalism influence the decision in a preemption case.¹³⁸

IV. Preemption and Redlining

Most often the central question in a preemption case is whether the state law is constitutional.¹³⁹ In banking laws and redlining legislation, however, the crucial issue is whether the state law may be applied to a federal institution. The HMDA is silent on this issue. In a series of federal and state cases challenging the application of state mortgage disclosure requirements to federally chartered institutions, however, it has been established clearly that courts have interpreted the HMDA procedural provisions to have preempted the field.¹⁴⁰

In *Glen Ellyn Savings & Loan Association v. Tsoumas*,¹⁴¹ a federally chartered savings and loan sought a declaration that the Illinois Financial Institutions Disclosure Act was inapplicable to national institutions.¹⁴² The Illinois Supreme Court held that the federally chartered associations were exempt from state disclosure proce-

explained that state law is preempted where it is "absolutely and totally *contradictory and repugnant*" to federal law. *Id.* at 553 (quoting THE FEDERALIST No. 32, at 241 (A. Hamilton) (B. Wright ed. 1961)). See, e.g., *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978) (Washington state law requiring certain oil tankers to use licensed pilots while in Puget Sound held to conflict with Federal Ports and Waterways Safety Act of 1972).

135. 312 U.S. 52 (1941).

136. *Id.* at 67.

137. *Marino v. Town of Ramapo*, 68 Misc. 2d 44, 59, 326 N.Y.S.2d 162, 180 (Sup. Ct. Rockland County 1971) (citing *Fitzgerald v. Catherwood*, 388 F.2d 400, 406 (2d Cir.), *cert. denied*, 391 U.S. 934 (1968)).

138. See Note, *supra* note 128, at 623.

139. See note 125 *supra* and accompanying text.

140. *National State Bank v. Long*, 630 F.2d 981 (3d Cir. 1980); Conference of Fed. Sav. & Loan Ass'ns v. Stein, 604 F.2d 1256 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 921 (1980); *Glen Ellyn Sav. & Loan Ass'n v. Tsoumas*, 71 Ill. 2d 493, 377 N.E.2d 1 (1978), *cert. denied*, 439 U.S. 927 (1979). See generally Payne, *Banking Institutions Trim State Efforts to Enforce Anti-Redlining Measures*, 9 REAL ESTATE L.J. 357 (1981) (discusses recent cases).

141. 71 Ill. 2d 493, 377 N.E.2d 1 (1978), *cert. denied*, 439 U.S. 927 (1979).

142. *Id.* at 500, 377 N.E.2d at 4.

dures.¹⁴³ The basis for the *Glen Ellyn* decision was that Congress, by enacting the HMDA, fully occupied the field and state regulation would infringe upon federal interests.¹⁴⁴ In finding occupation the court relied upon the language in the HMDA pertaining to the exemption for state financial institutions subject to equally stringent state disclosure laws.¹⁴⁵ The Illinois Supreme Court concluded that Congress intended exclusive regulation of federally chartered savings and loans; only state associations could be exempted.¹⁴⁶ The court conceded, however, that this interpretation represented a retreat from the stated purpose of the HMDA.¹⁴⁷ Nevertheless, HMDA's legislative history mandated this result.

In the original draft form, both the House and Senate bills provided that federal institutions were to be subject to both state and federal anti-redlining legislation.¹⁴⁸ Furthermore, these drafts permitted either state or federal associations to be exempt from the federal statute if similar state provisions existed. Predicated upon congressional committee recommendations, these provisions evidenced recognition of the local nature of the redlining problem and the ability of each state to devise laws best equipped to deal with the particular problems of a specific locale. The Senate Committee on Banking, Housing and Urban Affairs reported that the federal disclosure requirements should apply to all institutions with the caveat that a state law with substantially similar mandates would take precedence.¹⁴⁹ The House Banking

143. The Illinois Supreme Court affirmed the trial court's decision, stating: "[u]nder the supremacy clause of article VI, United States Constitution, the Federal Act has preempted the application of the State Act to federally chartered institutions subject to the Federal Act." *Id.* See Janda, *Federal Preemption of the Illinois Financial Institutions Disclosure Act—Glen Ellyn Savings and Loan Association v. Tsoumas*, 28 DE PAUL L. REV. 805 (1979).

144. *Glen Ellyn*, 71 Ill. 2d at 499, 377 N.E.2d at 3. Specifically, the court referred to the Federal Home Loan Bank Board's protestations that to subject "[f]ederally chartered institutions to state disclosure laws would threaten the dual banking system." *Id.*

145. *Id.* at 498, 377 N.E.2d at 3. See notes 50-53 *supra* and accompanying text.

146. *Glen Ellyn*, 71 Ill. 2d at 498, 377 N.E.2d at 3. This conclusion was supported by the legislative history of the HMDA. See note 53 *supra* and accompanying text.

147. *Glen Ellyn*, 71 Ill. 2d at 499, 377 N.E.2d at 3. The court noted that compelling federally chartered institutions to comply with the more extensive disclosure requirements of the Illinois Act would augment the information available to citizens and public officials. This in turn would enhance the potential for determining whether depository institutions were fulfilling their obligations to the community.

148. H.R. REP. NO. 561, 94th Cong., 1st Sess. 19 (1975); S. REP. NO. 553, 94th Cong., 1st Sess. 9-10 (1975); see note 53 *supra* and accompanying text.

149. See H.R. REP. NO. 561, 94th Cong., 1st Sess. 18-19 (1975); S. REP. NO. 187, 94th Cong., 1st Sess. 1 (1975).

committee also recommended the same approach in a report which emphasized that "solutions to the problem of urban disinvestment are going to come at the local and state level."¹⁵⁰ The report further clarified that even where a state disclosure act was stricter than the federal requirements under HMDA, federally chartered financial institutions must comply with the state laws and regulations.¹⁵¹

The bill, however, was amended in the House of Representatives in response to the conference committee's fear that "subjecting a Federally chartered institution to state law would threaten the dual banking system."¹⁵² As amended, the bill expressly provides an exemption limited solely to state institutions. Federally chartered lenders, on the other hand, cannot be exempted from the HMDA. The *Glen Ellyn* court focused primarily on this legislative history and utilized an occupation approach to the preemption issue. The Illinois Supreme Court noted that the Senate agreed, although reluctantly, to accept the House version of the HMDA.¹⁵³ Thus the court concluded that Congress preempted the field of loan reporting procedures.

Conference of Federal Savings & Loan Associations v. Stein,¹⁵⁴ also raised the question of whether a state government could institute reporting procedures for federal savings and loans. California's Housing and Financial Discrimination Act of 1977 (the Holden Act) prohibited redlining.¹⁵⁵ After its enactment, the California Secretary of Business and Transportation notified all savings and loans that they should begin compliance with the state procedures. The Federal Home Loan Bank Board instructed the federal associations that they need not comply with the state law and suit was initiated by a group representing those institutions to settle the dispute. The Ninth Circuit held that there was no room for state regulation of reporting procedures of federally chartered savings and loans.¹⁵⁶ Instead of limiting its analysis to the HMDA as did the *Glen Ellyn* court, the Ninth Circuit examined the entire regulatory scheme relating to savings and loans, emphasizing HOLA and the FHLBB's extensive powers granted by

150. H.R. REP. NO. 561, 94th Cong., 1st Sess. 19 (1975).

151. *Id.* See also S. REP. NO. 187, 94th Cong., 1st Sess. 13 (1975).

152. H. CONF. REP. NO. 726, 94th Cong., 1st Sess. 10 (1975). See note 53 *supra* & note 174 *infra*.

153. 71 Ill. 2d at 500, 377 N.E.2d at 4 (citing H. CONF. REP. NO. 726, 94th Cong., 1st Sess. 10 (1975)).

154. 604 F.2d 1256 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 921 (1980).

155. See notes 70-72 *supra* and accompanying text.

156. 604 F.2d at 1260. The court stated: "In our judgment the regulatory control of the Bank Board over federal savings and loan associations is so pervasive as to leave no room for state regulatory control." *Id.*

HOLA. The court described those regulations as covering all aspects of every federal savings and loan "from its cradle to its corporate grave."¹⁵⁷

The Ninth Circuit also contrasted the HMDA with the Equal Credit Opportunity Act.¹⁵⁸ Devised to prohibit discrimination in the extension of credit, the ECOA specifically provides that similar rights granted by state legislation are not federally preempted.¹⁵⁹ This deferral provision is diametrically opposed to the corresponding provision in the HMDA. The intent behind the ECOA provision was to enhance the protections afforded to a credit applicant by subjecting both federally and state chartered institutions to state laws.¹⁶⁰ Consequently, the statute functions as an enabling law, permitting the states to expand upon those rights and to regulate all lenders within its borders. This provision substantiates the theory that when Congress intends state laws to supersede a federal regulatory scheme, it will expressly include language to that effect.¹⁶¹ In the absence of an explicit provision, the courts will not arbitrarily infer such congressional intent.¹⁶² In effect, the *Stein* court found that the FHLBB has extensive regulatory powers which preempt state law unless a contrary intent not to preempt is manifested. The result of *Glen Ellyn* and *Stein* is that a state may not impose procedural requirements on federally chartered savings and loans with respect to their mortgage lending practices.

This conflict between state and federal laws permeates the real estate finance field.¹⁶³ Under a limited number of circumstances, state

157. *Id.* (quoting *California v. Coast Fed. Sav. & Loan*, 98 F. Supp. 311, 316 (S.D. Cal. 1951)).

158. *Id.* at 1258. The Equal Credit Opportunity Act (ECOA) is discussed at notes 63-66 *supra* and accompanying text.

159. 15 U.S.C. § 1691d(f) (1976). Congress expressly stated: The Committee intends that those state laws which give greater protection to the applicant, as determined by the Board, shall apply equally to all credit granting institutions doing business in that state." 1976 U.S. CODE CONG. & AD. NEWS 403, 414.

160. 604 F.2d 1256, 1258. The court indicated that this language represents congressional intent that the federal act "shall not result in federal preemption of similar rights granted by state statutes." *Id.* Furthermore, this language promotes uniformity within the state; encourages the state to promulgate more stringent laws to combat redlining; and it does not harm the dual banking system. This arrangement permits a local problem—redlining—to be treated by locally devised laws. Essentially, the ECOA sets forth the minimum rights to which a credit applicant is entitled. States may expand upon those rights.

161. See note 53 *supra* and accompanying text.

162. See notes 126-27 *supra* and accompanying text.

163. See, e.g., *First Fed. Sav. & Loan Ass'n v. Myrick*, 533 F. Supp. 1041 (W.D. Ark. 1982) (state law prohibiting use of mortgage acceleration, or due-on-sale, clauses inapplicable to federal savings and loans); *First Fed. Sav. & Loan Ass'n v.*

laws have been determined to be applicable to federal savings and loans.¹⁶⁴ The general rule, however, is to the contrary. A majority of circuit courts has concluded that the federal government has preempted the field with regard to federally chartered savings and loans.¹⁶⁵ In *People v. Coast Federal Savings & Loan Association*,¹⁶⁶ the California State Attorney General brought an action to seek monetary penalties against a federal savings and loan association. The State contended that the institution had violated a California regulation on advertising standards. The court, citing HOLA, refused to subject the association to state law, reasoning that since HOLA empowered the Board to create, operate and supervise federal savings and loans, this entire field was occupied, leaving no room for state supervision.¹⁶⁷

Following the reasoning set forth in *Coast Federal*, other courts have held that Congress intended comprehensive federal regulation of nationally chartered savings and loans.¹⁶⁸ With respect to savings and

Norwood Realty Co., 212 Ga. 524, 93 S.E.2d 763 (1956) (state usury laws inapplicable to loans made by federal savings and loans within that state).

164. See, e.g., *Gulf Fed. Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.*, 651 F.2d 259, 266 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 350 (1982) (Board's authority is restricted to the internal management of savings and loan associations and disputed loan agreement provisions are outside the scope of the Board's power); *Shea v. First Fed. Sav. & Loan Ass'n*, 439 A.2d 997, 1004-05 (Conn. 1981) (state anti-trust laws held applicable to federal savings and loan); *Derenco, Inc. v. Benjamin Franklin Fed. Sav. & Loan Ass'n*, 281 Or. 533, 577 P.2d 477, *cert. denied*, 439 U.S. 1051 (1978) (FHLBB regulation permitting savings and loans to maintain reserve accounts for tax and insurance payments does not preempt state statute requiring interest on those accounts).

165. The general principle that the Board's authority is plenary and the Board has exercised its powers through all-embracing regulations covering all aspects of banking has been adopted widely. See, e.g., *First Fed. Sav. & Loan v. First Fed. Sav. & Loan*, 446 F. Supp. 210, 212 (N.D. Ala. 1978) (federal preemption in the field of unfair competition); *Rettig v. Arlington Heights Fed. Sav. & Loan Ass'n*, 405 F. Supp. 819, 824 (N.D. Ill. 1975) (federal preemption in the areas of director's fiduciary obligations and of association's authority to sell insurance); *City Fed. Sav. & Loan Ass'n v. Crowley*, 393 F. Supp. 644, 658 (E.D. Wis. 1975) (federal preemption in the area of director's fiduciary duties). See also *Glendale Fed. Sav. & Loan Ass'n v. Fox*, 459 F. Supp. 903 (C.D. Cal. 1978) (thorough discussion of the history of HOLA and subsequent cases construing it).

166. 98 F. Supp. 311 (S.D. Cal. 1951).

167. *Id.* at 316. The court stated: "Congress expressly delegated the duty and authority to the Board to make policy. . . . No provision is made for sharing the Board's delegated authority with state regulatory or supervisory agencies." *Id.*

168. For example, significant controversy exists over whether federal institutions may be subjected to state laws concerning the enforceability of due-on-sale clauses. A due-on-sale provision is an accelerator provision whereby a bank is entitled to demand the entire sum of the mortgage due and payable upon the sale or transfer of title to the mortgaged property. The purchaser is precluded from assuming the first mortgage. While federal law permits the use of a due-on-sale clause, 12 C.F.R. §

loans, state regulation might seem to be precluded because under HOLA the Board was conferred with plenary powers,¹⁶⁹ evidencing congressional intent to preempt. However, an examination of the many cases in which courts have determined that Congress preempted the field of depository institutions reveals that the actual holdings of these cases narrowly define the preempted area. In fact, the preemption doctrine is carefully applied in a precise and limited fashion on a case-by-case basis.¹⁷⁰

545.8-3f (1982), some states prohibit their use or enforcement. *See, e.g.*, *Patton v. First Fed. Sav. & Loan Ass'n*, 118 Ariz. 473, 578 P.2d 152 (1978) (due-on-sale provision cannot be enforced unless the federally chartered bank can show that its security is jeopardized by the transfer of the property).

Other courts assessing the issue of federal preemption in the area of due-on-sale clauses have also held that the entire field of regulation of federally chartered savings and loans had been preempted by HOLA. *See Glendale Fed. Sav. & Loan Ass'n v. Fox*, 459 F. Supp. 903 (C.D. Cal. 1978) (granting partial summary judgment for plaintiff); 481 F. Supp. 616 (C.D. Cal. 1979) (final judgment entered for plaintiff), *rev'd and remanded*, 663 F.2d 1078 (9th Cir. 1981).

169. *See* notes 31-36 *supra* and accompanying text.

170. *See* note 167 *supra*. While many of these cases suggest that Congress has completely preempted the field of federal savings and loan associations, the ultimate holdings narrowly define the preempted area.

In *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 102 S. Ct. 3014 (1982), the United States Supreme Court addressed the question of whether a FHLBB regulation, 12 C.F.R. § 545.8-3f (1982), which permitted savings and loans to use and exercise due-on-sale clauses preempted a California doctrine of law which generally prohibited the enforcement of due-on-sale provisions. 102 S. Ct. at 3023. *See* note 168 *supra* for an explanation of due-on-sale clauses. The Court framed the issue as whether the Board intended to preempt the state law and if so, whether that action was within the scope of the Board's delegated authority. 102 S. Ct. at 3025. Writing for the majority, Justice Blackmun determined that the FHLBB's preamble to the regulation expressed a clear intent to preempt state law. *Id.* at 3019. The preamble can be found at 41 Fed. Reg. 18,286-18,287 (1976). The preamble states that due-on-sale clauses shall be governed exclusively and solely by the Board. 41 Fed. Reg. 18,286.

The Court evaluated HOLA and concluded that Congress had given the Board plenary authority. Nevertheless the holding was extremely narrow. The Court declined to decide whether HOLA or the Board's regulations occupied either the field of due-on-sale clauses or the field of savings and loan supervision. 102 S. Ct. at 3025 n.14. Justice Blackmun opined: "in this case we do not need to explore the outer limits of the Board's discretion." *Id.* at 3029.

In her concurring opinion, Justice O'Connor emphasized that the Board's power is not limitless. *Id.* at 3031-32. In vigorous dissent, Justice Rehnquist stressed that "there is no indication in the FHLBA that the Board may, by promulgating regulations, preempt state laws that are deemed to be economically unsound." *Id.*; *see also* *First Fed. Sav. & Loan Ass'n v. Myrick*, 533 F. Supp. 1041 (W.D. Ark. 1982) (narrowly focused on state and federal laws in question); *First Fed. Sav. & Loan v. Peterson*, 516 F. Supp. 732 (N.D. Fla. 1981) (court declined to hold that federal regulations preempted every aspect of state control of federal savings and loans); *Meyers v. Beverly Hills Sav. & Loan Ass'n*, 499 F.2d 1145 (9th Cir. 1974) (prepayment penalties); *First Fed. Sav. & Loan Ass'n v. First Fed. Sav. & Loan Ass'n*, 446 F.

The most important example of this narrow application of the preemption doctrine is a recent Third Circuit case involving a commercial bank—*National State Bank v. Long*.¹⁷¹ *Long* involved a suit alleging that the application of New Jersey's anti-redlining law¹⁷² to the plaintiff national banks violated the Supremacy Clause of the United States Constitution. The New Jersey statute consisted of two subdivisions—a procedural provision and a substantive provision—which the Third Circuit analyzed individually.

The procedural aspect of the New Jersey law required the reporting of certain lending statistics to the state banking authorities. The challenge to this facet of the statute was identical to the *Stein* and *Glen Ellyn* cases.¹⁷³ The court examined the legislative history of the federal disclosure procedural requisites to determine whether Congress intended preemption of state reporting regulations. Citing the discussion in *Glen Ellyn*, the Third Circuit noted that the Senate had acceded to the House's contention that subjecting federal institutions to state regulation would threaten the dual banking system.¹⁷⁴ Thus, the court refused to apply state disclosure laws to federal institutions.

Supp. 210 (N.D. Ala. 1978) (unfair competition claims between two federal associations arising from similarity of names); *Greenwald v. First Fed. Sav. & Loan Ass'n*, 446 F. Supp. 620 (D. Mass. 1978) (regulation of interest payments); *Rettig v. Arlington Heights Fed. Sav. & Loan Ass'n*, 405 F. Supp. 819 (N.D. Ill. 1975) (control of internal management); *Lyons Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 377 F. Supp. 11 (N.D. Ill. 1974) (branch banking); *Durnin v. Allentown Fed. Sav. & Loan Ass'n*, 218 F. Supp. 716 (E.D. Pa. 1963) (right of inspection of membership lists); *Kaski v. First Fed. Sav. & Loan Ass'n*, 72 Wis. 2d 132, 240 N.W.2d 367 (1976) (regulation of lending practices).

171. 630 F.2d 981 (3d Cir. 1980), *aff'g and modifying* 469 F. Supp. 1068 (D.N.J. 1979).

172. N.J. STAT. ANN. § 17:16F-4(f)(6) (West Supp. 1982-1983); *see* notes 89-95 *supra* and accompanying text.

173. In each of these three cases the respective states sought to subject the federally chartered institution to state statutory reporting procedures. Although *Glen Ellyn* and *Stein* involved savings and loan associations and *Long* involved a commercial bank, the court approached the issues in a similar fashion. The Third Circuit noted, however, that banking has been subject to dual control since 1863. 630 F.2d at 985.

174. *Id.* at 986. Significantly, the senate members of the conference committee added the caveat that they acceded only "with the understanding that the program goes only to the narrow area of geographical disclosure of mortgage lending statistics." *Id.* (quoting H. CONF. REP. NO. 726, 94th Cong., 1st Sess. 9-10 (1975)).

The Senate conferees regarded this federal preemption as an exception to the preemption provisions in other consumer finance laws. The division in viewpoint was attributed to the divergent perceptions of the HMDA's purpose. The Senate intended to obligate lenders to service their communities. On the other hand, the House perceived the HMDA as a tool to enable citizens to determine whether depository institutions were fulfilling their general obligations. H. CONF. REP. NO. 726, 94th Cong., 1st Sess. 8-10 (1975).

The nationally chartered banks also challenged the applicability of the New Jersey statute's substantive prohibition against redlining.¹⁷⁵ Addressing this challenge, the court framed the issue as whether Congress intended to limit the preemption to procedural disclosure requirements.¹⁷⁶ It should be noted that no federal statute applicable to banks expressly prohibits the practice of redlining a community. While the FHLBB, which governs federally chartered savings and loans, has issued extensive anti-redlining regulations,¹⁷⁷ the Comptroller of the Currency, which governs federally chartered banks, has not. The Third Circuit characterized the New Jersey substantive provision as a "supplementary" law which did not conflict with the federal laws.¹⁷⁸ Furthermore, the court stated that national banks, unlike savings and loans, are subject to state laws unless the state statute conflicts with federal law, frustrates the purpose of the national banks, or impairs the efficiency of national banks to discharge the duties imposed on them by federal law.¹⁷⁹ Determining that none of these exceptions applied in the case of redlining prohibitions, the court concluded that the substantive provisions of the anti-redlining statute validly applied to national banks in New Jersey.¹⁸⁰ The administration of this state law vis-a-vis the national banks, however, would not rest in the hands of the state authorities. The court held that enforcement authority lies exclusively in the federal agency responsible for the institution.¹⁸¹ The Third Circuit noted that the *Stein* Court had expressly declined to address the issue of substantive rights,¹⁸² ruling

175. N.J. STAT. ANN. § 17:16F-3(a) (West Supp. 1982-1983).

176. 630 F.2d at 986.

177. See notes 42 & 67 *supra*.

178. 630 F.2d at 986.

179. *Id.* at 985 (citing *McClellan v. Chipman*, 164 U.S. 347 (1896)).

180. *Id.* at 987.

181. *Id.* at 988. The court stated:

The requirements imposed on national banks by the Home Mortgage Disclosure Act and the Community Reinvestment Act are closely allied with the state's flat prohibition against redlining. The regulations enacted by the Comptroller [of Currency] supplementing those two acts serve to further the interests of uniformity and national application. To allow enforcement of the anti-redlining provisions by state officials with accompanying variations on the federal disclosure requirements simply would result in unnecessary and wasteful duplications of effort on the part of the bank and the state agency. From that standpoint enforcement exclusivity in the federal agency is reasonable and practical.

Id.

182. *Id.* at 989. In *Stein* the court clarified the issues presented and concluded: The state act and the regulations of the Bank Board can be divided into two groups. First are the substantive nondiscrimination provisions—those

only on the procedural regulations. Thus the decision in *Long* is ostensibly consistent with existing case law.

The practical result of the *Long* decision is that since national banks are subject to the state enacted substantive anti-redlining legislation, there is uniformity among banks with in New Jersey. However, the question of whether federal savings and loans will be subjected to state enacted substantive anti-redlining laws remains unsettled. No court has had the opportunity to address this issue. The proper resolution of this gap in the case law is to apply *Long* to federal savings and loans.

Essentially, *Long* stands for the proposition that both federally and locally chartered banks will be subject to state substantive anti-redlining laws. This conclusion was based on two rationales: (1) traditionally banks have been subject to dual-federal and state-control; and (2) no federally enacted substantive anti-redlining law applicable to banks existed.

Although the FHLBB has issued a regulation prohibiting the practice of redlining, there is no congressional intent to preempt state substantive anti-redlining laws applicable to savings and loans. Additionally, state enacted substantive provisions would be compatible with this Board regulation and would not threaten the dual system. Moreover, there is authority that where the area to be regulated is outside of the internal management of savings and loans, Board issued regulations do not preempt state law.¹⁸³ Furthermore, no preemption problem exists because no court has addressed this specific issue. Therefore, co-existence of both state and federal substantive anti-redlining laws is a permissible and powerful deterrent.

V. Conclusion

In those urban areas where the redlining problem is most acute, local legislatures are best equipped to alleviate the discrimination problem. Uniformity within a state among both federally and locally chartered lending institutions is highly desirable. Toward that end, states should enact substantive anti-redlining laws. Laws designed to

conferring substantive rights upon borrowers. . . . No dispute presently exists as to those. . . . Whether preemption exists as to them is a question we need not and do not reach.

604 F.2d at 1260.

183. In *Gulf Fed. Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 651 F.2d 259 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 350 (1982) the court held that the Board's authority is limited to the internal management of savings and loans; therefore, certain loan agreement provisions are outside the scope of the Board's power. *Id.* at 266.

end discrimination and to assist urban renewal constitute a minimal incursion into the federal domain. No undue burden is placed on the dual banking system. The actual management of the financial institution remains undisturbed. Enforcement of the substantive prohibitions may be delegated to the appropriate federal agency.

In light of the Third Circuit's determination in *Long*, substantive anti-redlining laws should apply uniformly to state and national banks and savings and loan associations. State laws could not conceivably conflict with the existing Board regulation which simply prohibits mortgage discrimination on the basis of geographic location. Moreover, there exists no congressional intent to occupy this field. Thus there is no preemption. Therefore, states should be permitted to enact substantive anti-redlining statutes to ensure the future of urban residential communities.

