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Cover Page Footnote

Carliss Chatman is an attorney in private practice in Houston, Texas. Many thanks to Demetria Frank, Mitra Woody and Maxine Goodman for their helpful comments on earlier drafts.

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*Carliss N. Chatman**

ABSTRACT

This article studies legislation, regulations, and case law to analyze whether the Homeowners Loan Act, as well as other measures taken to stabilize federal thrifts in the last forty years, have served their original purpose. It also examines the impact of federal intervention on states and homeowners and the role that federally-chartered institutions such as banks and savings and loan associations played in the 2008 market collapse. Over the course of this analysis, particular attention is given to Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act. This act has numerous goals including implementing stronger consumer protections, restoring state rights, and preventing another financial crisis, thereby avoiding the need for government funded recovery. It is clear that federal regulators overstepped their bounds in order to preserve federal thrifts, infringed on the rights of states, and limited homeowner access to justice-all in the name of promoting market stability. The evidence proves that federal intervention worsened the impact of the crisis. This article concludes that federal thrifts no longer serve their original purpose and are no longer economically viable without preferential treatment from the federal government. Since states are in the best position to protect homeowners and institutions do not need an incentive to engage in residential lending, it is in the best interest of all parties to eliminate the federal thrift charter.

* Carliss Chatman is an attorney in private practice in Houston, Texas. Many thanks to Demetria Frank, Mitra Woody and Maxine Goodman for their helpful comments on earlier drafts.

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INTRODUCTION

In response to the worst economic crisis since the Great Depression,[1] Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank," "Dodd-Frank Act").[2] Federal institutions played a significant role in causing this crisis, specifically the housing market collapse, by using preemption to block state efforts at addressing the financial meltdown.[3] Dodd-Frank repealed the regulations mandating field preemption and eliminated the Office of Thrift Supervision ("OTS"), instead bringing the regulation of

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1. *See* Ben S. Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys., Remarks at the Swearing-In Ceremony, Washington, D.C. (Feb. 3, 2010), *available at* http://www.federalreserve.gov/newsevents/speech/bernanke20100203a.htm.

2. Pub. L. No. 111-203, 124 Stat. 1376 (2010) (to be codified in scattered sections of the U.S. Code).

3. Kurt Eggert, *Foreclosing on the Federal Power Grab: Dodd-Frank, Preemption, and the State Role in Mortgage Servicing Regulation*, 15 CHAP. L. REV. 171, 172–73 (2011); FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT xxiii, 13, 111–12 (2011) [hereinafter CRISIS INQUIRY REPORT], *available at* http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf.

thrifts under the control of the Office of the Comptroller of the Currency ("OCC").[4] The Act also created the Bureau of Consumer Financial Protection ("CFPB" or "Bureau").[5]

In the 1930s, Congress enacted the Home Owners' Loan Act ("HOLA")[6] and created the federal thrift charter.[7] Congress considered federal intervention necessary to the country's recovery, and intended for these actions to stimulate the economy and provide a resource for home financing.[8] Recently, HOLA has been the basis for removing cases brought by homeowners from state to federal court due to field preemption.[9] After removal many homeowners' claims are dismissed due to the lack of a comparable federal remedy, caused in part by the failure of the OTS to adopt consumer protection laws.[10] Congress' original intent was to create more sources for loans, not to usurp state power and restrict homeowner access to the courts.[11] Dodd-Frank makes some effort to undo the impact of the OTS power grab by subjecting OCC regulations to conflict preemption. Unfortunately, to date, courts have not applied conflict preemption and have instead relied

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4. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, § 312, 124 Stat. 1376, 1521–22 (2010) (to be codified at 12 U.S.C. § 5412).

5. Dodd-Frank Act §1021(a) (to be codified at 12 U.S.C. § 5511) (stating that the Bureau will draft federal consumer protection laws and monitor financial institutions of all varieties). For more information on the Bureau, see CONSUMER FINANCIAL PROTECTION BUREAU, http://www.consumerfinance.gov (last visited Mar. 24, 2013).

6. Home Owners' Loan Act of 1933 (HOLA) §§ 1–14, 12 U.S.C. §§ 1461–1468c (2006).

7. Home Owners' Loan Act § 5 (authorizing the Federal Home Loan Bank Board to issue charters for federal savings and loan associations). A federal thrift, also known as a savings and loan, specializes in making mortgage loans and accepting savings deposits.

8. *See infra* Part II.A. for a discussion of the purposes underlying HOLA. *See also* H.R. REP. NO. 73-210, at 1 (1933) (Conf. Rep.). For a summary of the origination of HOLA and the federal government's involvement in home finance, see Daniel Immergluck, *Private Risk, Public Risk: Public Policy, Market Development, and the Mortgage Crisis*, 36 FORDHAM URB. L.J. 447, 453–59 (2009).

9. *See* 12 C.F.R. § 560.2 (2012).

10. *See* Patricia A. McCoy et. al., *Systemic Risk Through Securitization: The Result of Deregulation and Regulatory Failure*, 41 CONN. L. REV. 1327, 1350 (2009) (noting the OTS did not issue formal regulations and opposed guidance from other agencies on nontraditional lending). For a discussion of OTS actions following the 1996 Regulations, see *infra* Part II.B.

11. *See* H.R. REP. NO. 73-210, at 1 (stating that HOLA was passed, among other reasons, "to refinance home mortgages [and] to extend relief to the owners of homes").

on the fact that the Act does not apply retroactively to completely disregard the reforms.[12]

In theory, the authority vested in the CFPB should create a system of dual regulation, thereby returning power to the states while creating a parallel system of federal measures.[13] However, it remains to be seen whether the CFPB can operate to prevent the harm to homeowners caused by federal thrifts.[14] The CFPB's creation was subject to extensive debate and its current operation is controversial.[15] If Dodd-Frank's changes are not implemented and the CFPB is abolished or its activities limited in the name of partisan politics, homeowners and state

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12. Dodd-Frank is not intended to be retroactive. Regulations and statutes cannot be applied retroactively absent express direction from Congress. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."). Dodd-Frank provides that the governing section of the statute was enacted and amended to become effective on the transfer date, July 21, 2011, which means that it does not apply to loans originating before that date. *See* Dodd-Frank Act § 1048.

13. In the spirit of creating a federal regulatory floor, in addition to implementing conflict preemption for regulations adopted by the OCC, the Dodd-Frank Act §1041(a)(1) also states that the Act itself does not preempt state law except to the extent that the state law is inconsistent with the Act, and, even then, only to the extent of the inconsistency. Section 1041(a)(2) declares that if a state law provides greater protection it is not inconsistent.

14. The CFPB has included mortgage related items on its short-term to do list and has taken some action. In the preamble to the Mortgage Servicing Final Rules, issued on January 17, 2013, the Bureau makes it clear that Regulation X does not preempt the field of possible mortgage servicing regulation by states. *See* 12 C.F.R. pt. 1024 (2012). On April 19, 2013, the Bureau released a proposal addressing questions related to mortgages. The proposal includes an additional clarification that Regulation X does not preempt the field and recommends a comment emphasizing the point. *See* http://files.consumerfinance.gov/f/201304_cfpb_proposed-rule_amending-atr-qm-and-servicing-mortgage-rules.pdf at 3.

15. For example, to avoid a prolonged approval process and political debate in the Senate, President Obama appointed Richard Cordray as director during recess in January of 2012. 2012 Presidential candidate Mitt Romney's economic advisors suggested that "defanging" the Bureau would be a central item in Romney's economic strategy. *See* Suzy Khimm, *The GOP's New Push to Defang the CFPB*, WASH. POST, Feb. 8, 2012, http://www.washingtonpost.com/blogs/wonkblog/post/the-gops-new-push-to-defang-the-cfpb/2012/02/08/gIQA1DrfzQ_blog.html; Janna Herron, *CFPD's Existence at Stake in Election*, BANKRATE.COM, Oct. 12, 2012, http://www.bankrate.com/finance/politics/cfpb-existence-at-stake-election.aspx.

economies will suffer while banks benefit from the same relaxed and confusing regulatory environment that contributed to the crisis.

This article addresses a number of issues including: the need for federal savings and loans in the context of the original purpose of federal thrifts; the nature of our system of government; the regulatory failures of the last decade; and Dodd-Frank's controversial attempts to provide a federal solution. Instead of proposing additional alternative reforms, this article reaches the novel conclusion that the federal thrift charter is no longer necessary to provide a source of residential lending or to stabilize the market. Further, it states that under the current regulatory scheme, the charter is of little value to the banks, states, or borrowers.

Part I of this article analyzes the role of federal thrifts in the recent economic crisis. Part II examines the history of HOLA and the impact of the 1996 OTS regulations. Part III outlines Dodd-Frank's changes to HOLA, preemption, and the financial regulatory structure. Part IV discusses the benefits of eliminating the federal thrift charter. In sum, if federal thrifts add nothing to the market, do not fulfill the original intentions of Congress, and serve only to complicate the regulatory landscape, there is little reason to maintain their charters.

I. THE ROLE OF THE FEDERAL THRIFT IN THE COLLAPSE OF THE HOUSING MARKET

In the fall of 2011 my client, a real estate investor, found himself litigating a title dispute in federal court with a federal savings and loan association. He had purchased property at a homeowners' association foreclosure sale but had not been aware of the lender's pending foreclosure due to issues with the title record. As an investor, he had experience handling title cases *pro se* in state court and typically could resolve the issues within a few months. However, this property was different. The loan originated with and was serviced by a federal thrift, so the lender was able to remove the case to federal court based on federal question jurisdiction arising out of field preemption under HOLA. Eventually, the case was remanded to state court on the grounds that the federal court lacked subject matter jurisdiction.[16] The suit was

16. Pursuant to 28 U.S.C. § 1447(c), a plaintiff must make a motion to remand a case on the basis of a defect in the removal procedure within thirty days after the filing of the notice of removal under § 1446(a). However, if at any time the court finds a lack of subject matter jurisdiction, the case shall be remanded. 28 U.S.C. § 1447(c) (2006).

not preempted by HOLA since the underlying mortgage was not at issue; therefore, the case lacked a federal question. Following remand, my client was able to rely on state consumer protection and property laws. A typical homeowner—lacking the requisite legal knowledge—would not have been so fortunate.

HOLA has been used to preempt state laws at every stage of the lending process, from the rules governing the initiation of the loan, to the terms of the note, to disputes between lenders and homeowners. This preemption has contributed to losses felt not only by the homeowners but also their neighbors, cities, and states. When a home enters foreclosure, all parties suffer. Lenders lose between 20 and 60 cents on the dollar for each foreclosure.[17] Vacant foreclosed homes are vulnerable to crime, create direct costs and losses to state and local government agencies, and reduce property values and home equity in the surrounding areas.[18] Unfortunately, federal institutions contributed to these losses instead of preventing them.

The last two decades of deregulation, including a 1996 OTS regulation declaring field preemption, has resulted in catastrophic change to the residential lending landscape.[19] In *A Failure of Capitalism*, Judge Posner explains the cause of the financial crisis of 2008:

> [A]ggressive and imaginative marketing of home mortgages . . . [and] diminishing regulation of the banking industry . . . spurred speculative lending, especially on residential real estate, which is bought mainly with debt. As in 1929, the eventual bursting of the bubble endangered the solvency of banks and other financial institutions.[20]

Federal favoritism did not prevent the crisis, nor did it minimize the involvement of federal thrifts in the collapse. Decades of deregulation

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A remand based on lack of subject matter jurisdiction may occur at any time and can be made by any party, including the judge acting *sua sponte*. *Id.* § 1447.

17. NEIGHBORWORKS AMERICA, FORECLOSURE STATISTICS 2, *available at* http://www.fdic.gov/about/comein/files/foreclosure_statistics.pdf.

18. G. THOMAS KINGSLEY, ROBIN SMITH & DAVID PRICE, THE URBAN INSTITUTE, THE IMPACTS OF FORECLOSURES ON FAMILIES AND COMMUNITIES15–21(2009), *available at* http://www.urban.org/url.cfm?ID=411909.

19. For a discussion of the changes to the lending market, see *infra* Part II.

20. RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION 13 (2009).

aimed at keeping federal thrifts solvent allowed the institutions to engage in higher risk practices without adequate oversight from the OTS.[21]

Federally-chartered financial institutions played a significant role in the recent fiscal crisis. National banks funded 21 of the 25 largest subprime lenders.[22] In addition, federally-regulated banks and thrifts saw higher default rates in their mortgages than state regulated banks and thrifts.[23] Federal institutions were involved in predatory lending through loan origination as well as the purchase of predatory loans or securities backed by predatory loans.[24] Lenders regulated by the OTS were "among the worst offenders."[25] To prevent a complete financial meltdown, the federal government was required to bail out institutions such as Washington Mutual, the largest institution at the time holding a thrift charter.[26]

Preemption of state consumer protection laws has weakened protection of homeowners at the state level.[27] Field preemption allowed federal savings and loans to avoid state regulation; at the same time it thwarted states' attempts at lessening the impact of predatory lending and other actions by thrifts that led to the mortgage crisis.[28] State government authorities have testified that one of the biggest obstacles to effective regulations of unfair and subprime lending came from the federal government.[29] Prentiss Cox, who formerly held the positions of

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21. *See infra* notes 22–30.

22. CRISIS INQUIRY REPORT, *supra* note 3, at 13 (citing testimony of Illinois Attorney General Lisa Madigan).

23. *Id.*

24. *See* Julian Patterson Forrester, *Still Mortgaging the American Dream: Predatory Lending, Preemption and Federally Supported Lenders*, 74 U. CIN. L. REV. 1303, 1349 (2006).

25. Eggert, *supra* note 3, at 173.

26. *See All Things Considered: Washington Mutual Collapses* (NPR radio broadcast Sept. 26, 2008). On September 25, 2008, the OTS seized Washington Mutual Bank and placed it into receivership of the FDIC. Washington Mutual was sold to JP Morgan Chase. Washington Mutual accounted for approximately 20% of the assets overseen by the OTS and 12% of the OTS budget. *See* OTS Fact Sheet on Washington Mutual Bank (Sept. 25, 2008), http://files.ots.treas.gov/730021.pdf.

27. *See* Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 79–80 (2008).

28. Eggert, *supra* note 3, at 173; Robert Berner & Brian Grow, *They Warned Us: The Watchdogs Who Saw the Subprime Disaster Coming-And How They Were Thwarted by the Banks and Washington*, BUSINESS WEEK, Oct. 20, 2008, at 36, 41.

29. CRISIS INQUIRY REPORT, *supra* note 3, at 13.

Minnesota Assistant Attorney General and Manager of the Consumer Enforcement Division, criticized the federal government stating: "Not only were they negligent, they were aggressive players attempting to stop any enforcement action[s] . . . . Those guys should have been on our side."[30] When considering the original purpose of HOLA, the impact of such action is especially troubling.

Under the U.S. system of government, state laws may go into effect when passed, without approval by the federal government. Although "the laws of the United States [are] the Supreme Law of the Land," state law yields to federal law only when it conflicts with the Constitution, laws, or treaties of the U.S.[31] The federal government does not have general oversight of the states and cannot overturn a law for policy reasons. A determination of any relevant conflict is made by the judiciary, which also has the power to review the constitutionality of federal and state legislative action.[32] Courts utilize the preemption doctrine to determine when the Supremacy Clause requires federal law to displace state law. Generally, there is a presumption against preemption, but courts abandon the presumption when the area of law has "a history of significant federal presence."[33] Courts consider both the historic role of state laws and the role of the states when determining congressional intent to preempt.[34]

The national banking system has been controversial since its inception.[35] Federal financial institutions have existed since very early

30. *Id.* (quoting Prentiss Cox).

31. U.S. CONST. art. VI, cl. 2 (Supremacy Clause).

32. *See* U.S. CONST. art. III; Marbury v. Madison, 5 U.S. 137 (1803).

33. United States v. Locke, 529 U.S. 89, 108 (2000).

34. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) ("[T]he purpose of Congress is the ultimate touchstone in every preemption case.").

35. The debate is first addressed by the Supreme Court in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). In 1816, Congress passed a statute creating a national bank to perform usual banking functions and serve as a depository for federal government funds. Supporters of the bank argued that it was necessary to help facilitate economic expansion and provide a source of funds for the government during wartime. *Id.* at 330. Opponents, such as Thomas Jefferson, argued that the states maintained the power to control banking under the Tenth Amendment and that the Commerce Clause did not provide Congress with the power to create a national bank. 5 THE WRITINGS OF THOMAS JEFFERSON 284–89 (Paul L. Ford ed., 1904). In upholding the actions of Congress, the Court asserted the superiority of federal law above states' rights, declaring: "[T]he states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by

in American history, but states have always had a hand in the regulation of the day-to-day activities of banks.[36] In fact, the rules governing national banks chartered pursuant to the National Bank Act ("NBA") only preempt state law when state regulation prevents an institution from engaging in an activity authorized by this act.[37] For example, national banks are subjected to state contract, property, licensing, corporations, and insurance laws.[38]

Federal thrifts have been given the benefit of field preemption since inception; however, this policy is an anomaly in banking regulation. Field preemption is usually not detrimental to plaintiffs, but this has not been the case with federal thrifts. Because of the way the OTS was funded, the banks, and not the citizens, were the customers of the federal regulators. The OTS was funded largely through assessments from the institutions it regulated, so the more thrift charters, the greater the revenue.[39] The OTS was incentivized to lure banks into the system. Thus, there was little regulation following the clear and more expansive declaration of field preemption. States' continued attempts to protect consumers with reforms were thwarted by OTS efforts to preempt state

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Congress to carry into execution the powers vested in the general government." *McCulloch*, 17 U.S. at 336. *See also* Daniel A. Farber, *The Story of McCulloch: Banking on National Power*, *in* CONSTITUTIONAL LAW STORIES 33, 35 (Michael C. Dorf ed., 2004).

36. *See* Cuomo v. Clearing House Ass'n, 557 U.S. 519, 534 (2009) ("States . . . have always enforced their general laws against national banks——and have enforced their banking-related laws against national banks for at least 85 years . . . .").

37. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (In Rice, the state of Illinois sued several grain warehousemen for violating the Illinois Grain Warehouse Act. The warehousemen sued in federal court, arguing that state law was preempted by the U.S. Warehouse Act and that the federal law should be construed to mean that Illinois may not regulate subjects in any related area, even though the scope of federal regulation is not as broad as the regulatory scheme of the state. The court held that when Congress legislates in a field which the States have traditionally occupied, the Court begins its analysis with the assumption that the police powers of the states were not superseded by the federal law unless that was the clear and manifest purpose of Congress); Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516 (1992); *see also infra* Part III.C.

38. *See* 12 C.F.R. § 34.4 (2012) (stating that state laws regarding contracts, torts, criminal law, debt collection, etc. apply to federally-charted banks "to the extent [such laws are] consistent with the decision of the Supreme Court in Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al., 517 U.S. 25 (1996)").

39. CRISIS INQUIRY REPORT, *supra* note 3, at 54.

laws and shield the banks from regulation.[40] As a result, institutions engaged in charter shopping, often opting for the least rigorous regulations within the federal regime.

Even in the face of preemption, OTS and OCC actions contradict the general principles that the federal government cannot overrule a state law solely due to policy reasons and may only challenge laws through judicial review.[41] Despite having a less restrictive preemption standard, the OCC was not an innocent actor in the financial crisis.[42] The OCC comptrollers used their authority to admonish and threaten the states as well as block state efforts to regulate federal entities, encouraging them to focus on state-chartered institutions and non-banking institutions instead.[43] Both the OCC and OTS issued regulations that infringed on state rights, arguing policy under the guise of preemption.[44] In fact, the predatory lending laws advanced by the states did not conflict with federal laws, as there were no comparable federal laws in existence.[45] Unfortunately, homeowners with loans involving a federal thrift executed before July 21, 2011 are subject to field preemption and the OTS regulations put in place before Dodd-Frank.[46] These homeowners are still left without a remedy due to federal interference in the markets.

Dodd-Frank seeks to return to the states some of their previous power to regulate financial institutions. This effort does not address the problems that federal thrifts have caused to the market as a whole, nor does it address the efficacy of the institutions. While analyzing the financial crisis in his book, Judge Posner states, "[t]he costs of the present depression may include a swing to excessive regulation [and] a politically as well as economically unhealthy dependence of business on government largesse . . . ."[47] The federal thrift is an example of this phenomenon. The 1980s saw a period of deregulation and relaxed restrictions on savings and loans for the purpose of increasing the stability and profits of federal thrifts; this era resulted in the collapse of

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40. *See* McCoy et al., *supra* note 10, at 1353; see also CRISIS INQUIRY REPORT, *supra* note 3, at 13.

41. *See supra* notes 29–34 and accompanying text (discussing the relationship between state and federal government).

42. *See* CRISIS INQUIRY REPORT, *supra* note 3, at 13.

43. *Id.*

44. *Id.*

45. *Id.*

46. Dodd-Frank Act § 1044(a); *see infra* Part III.C.

47. POSNER, *supra* note 20, at 114–15.

several institutions.[48] The OTS was created, HOLA was amended, and the oversight of thrifts changed in order to promote stability.[49] Dodd-Frank is the second major attempt to reform federal thrifts, aiming to keep them afloat while minimizing the impact of failure. Despite facing yet another crisis involving federal savings and loans,[50] Congress did not address in the first instance whether federal thrifts are necessary to stimulate residential lending during their discussions on the Dodd-Frank Act.

Thus, despite the failures of federal regulations and the collapse of federal thrifts, the threat of complex and protracted litigation is still a federal savings and loan's greatest weapon against economically distressed homeowners. Although the Dodd-Frank Act changes preemption for thrifts to the standard governing banks pursuant to the NBA, plaintiffs will still face the prospect of litigation in federal court while these courts interpret the new standards.[51] In addition, if the OCC continues its regulatory behavior, eliminating the OTS will not give states the power they need to protect homeowners and properly regulate federal thrifts.

II. Federal Preemption under HOLA

Federal legislation preempts state law in three circumstances: (1) where Congress expresses a clear intent to preempt state law; (2) when federal law occupies the field; or (3) where a clear conflict exists between federal law and state law.[52] A federal defense such as

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48. *See infra* Part II.A. (discussing the savings and loan crisis).

49. *Id.*; *see also* Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) § 101, 12 U.S.C. § 1818 (2006).

50. *Id.*

51. *See infra* Part III for a detailed discussion of the Dodd-Frank changes to the residential lending industry.

52. Jones v. Rath Packing Co., 430 U.S. 519, 525–26 (1977); Ray v. Atlantic Richfield Co., 435 U.S. 151, 157–58 (1978); Barnett Bank of Marion Cnty., N.A. v. Nelson, 517 U.S. 25, 30–31 (1996); Wyeth v. Levine, 555 U.S. 555 (2009) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)) ("[T]he purpose of Congress is the ultimate touchstone in every pre-emption case."). Under field preemption, a state law is preempted "if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it." Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516 (1992) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (internal quotation marks omitted). Under conflict preemption, a conflict exists when a state regulation makes compliance with the federal law a "physical impossibility," or where the state law creates "an obstacle to the

preemption is not enough to grant removal to a federal forum.[53] However, if there is field preemption of an area of law, the claim actually arises under federal law for purposes of removal.[54] Prior to Dodd-Frank, the OTS relied on HOLA to permit the field preemption of state laws against federal thrifts, their subsidiaries, and independent agents.[55] Although the OTS carved out exceptions for property, fraud, and contract claims, by preempting laws that substantially impact mortgage lending and servicing, it effectively took control of areas traditionally controlled by the states without providing a comparable form of relief.[56]

The sections below outline the history of HOLA preemption and federal thrifts, as well as the 1996 OTS regulations. They also describe how the courts have interpreted the OTS field preemption mandate.

A. HISTORY OF HOLA AND THE FEDERAL THRIFT

The residential lending market has changed greatly during the last century.[57] Prior to the development of federal institutions that promoted lending, residential mortgages were uncommon. HOLA, "a product of the Great Depression of the 1930's, was intended 'to provide emergency relief with respect to home mortgage indebtedness at a time when as

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accomplishment and execution of the full purposes and objectives of Congress." Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963).

53. Tennessee v. Union & Planters' Bank, 152 U.S. 454, 461–63 (1894).

54. Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 8 (2003).

55. Watters v. Wachovia Bank, N.A., 550 U.S. 1, 6–8 (2007) (holding that a national bank's mortgage business, even when conducted by a subsidiary of that bank rather than the bank itself, cannot be subject to state mortgage lending requirements such as registration, inspection and enforcement regimes); SPGGC, LLC v. Ayotte, 488 F.3d 525, 532 (1st Cir. 2007) (holding that when a thrift acts through an independent agent, activities of the agent are protected); Chief Counsel of the Office of Thrift Supervision (OTS), P-2003-1, Preemption of Georgia Fair Lending Act (Jan. 21, 2003), http:// www.ots.treas.gov/docs/5/56301.pdf. *See also* State Farm Bank, FSB v. Reardon, 539 F.3d 336, 340–41 (6th Cir. 2008).

56. *See* 12 C.F.R. § 560 (2012).

57. In 1900, less than half of Americans owned their own home. Following a slight uptick in the 1920s, the Great Depression drove the rate down to 44 percent. After the housing reforms of the New Deal Era, the rate rose to 61.9% by 1960, and continued to slowly rise to a rate of 66.2% in 2000. *See Historical Census of Housing Tables*, UNITED STATES CENSUS BUREAU, http://www.census.gov/hhes/www/housing/census/historic/owner.html (last updated Oct. 31, 2011).

many as half of all home loans in the country were in default."[58] The purpose of HOLA was to create additional sources of mortgage financing in areas where no existing home-loan institutions were available.[59] HOLA was intended to provide emergency relief in response to inadequacies in the state systems.[60] HOLA did serve its purpose for several decades under the careful regulation of federal government agencies, and homeownership grew due to an abundance of financing sources.[61]

The Federal Home Loan Bank Board ("FHLBB") was the primary regulator of federal savings associations until 1989, when the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA") amended HOLA and the OTS took over the FHLBB's supervisory responsibilities and rulemaking powers.[62] Up until the financial difficulties of the 1970s, federal thrifts served their purpose and operated to increase residential lending.[63] The Federal Reserve gave savings and loan associations favorable treatment, allowing them to pay higher interest rates on deposits than commercial banks.[64] Eventually, non-bank lenders began to enter the residential lending market. These entities offered more advantageous interest rates, alternative loan arrangements, and other perks prohibited or restricted by federal regulations.[65] Due to inflation, competition from other institutions, and

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58. Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 159 (1982) (quoting H.R. REP. NO. 73-210, at 1 (1933) (Conf. Rep.)); *see also In re* Ocwen Loan Servicing, LLC Mortg. Servicing Litig., 491 F.3d 638, 641–42 (7th Cir. 2007).

59. *See* 77 CONG. REC. 2480, 2486 (1933); *De La Cuesta*, 458 U.S. at 159–60 ("[HOLA was passed in 1933] and provided for the creation of a system of federal savings and loan associations, which would be regulated by the Board so as to ensure their vitality as permanent associations to promote the thrift of the people in a cooperative manner, to finance their homes and the homes of their neighbors.") (internal quotation marks omitted).

60. *De la Cuesta*, 458 U.S. at 159–60; *see also* 77 CONG. REC. 2480, 2486.

61. *See* Historical Census of Housing Tables, U.S. CENSUS BUREAU (Oct. 31, 2011), http://www.census.gov/hhes/www/housing/census/historic/owner.html.

62. FIRREA § 101, 12 U.S.C. § 1818 (2006).

63. *See* Timothy Curry & Lynn Shibut, *The Cost of the Savings and Loan Crisis: Truth and Consequences*, FDIC BANKING REV., Dec. 2000, at 26, *available at* http://www.fdic.gov/bank/analytical/banking/2000dec/.

64. *See* Regulation Q, 12 C.F.R. 217 (2010) (Regulation Q no longer exists independently and has now been incorporated into Regulation D).

65. *See generally* Curry & Shibut, *supra* note 63, at 27.

the restrictions placed on federal thrifts, savings and loans struggled to make profits and compete in the market.[66]

In an attempt to strengthen thrifts, the legislature enacted several acts. In 1980, the Depository Institutions Deregulation and Monetary Control Act[67] authorized thrifts to issue credit cards and make consumer and commercial real estate loans, each of up to 20% of assets, respectively.[68] Other legislation reduced net worth requirements, expanded the activities of federal thrifts, and enacted tax incentives. For instance, the Garn-St. Germain Depository Institutions Act of 1982[69] allowed thrifts to offer adjustable rate mortgages, interest only notes, and balloon notes.[70] For the first time, efforts were made to allow federal savings and loans to engage in more than just residential lending activities. Thrifts were allowed to make higher risk non-residential loans in the interest of receiving greater reward.

Unfortunately, these expansions simply shifted the risk from the thrifts to the homeowners.[71] In addition to a reduction in legislative control, oversight by the FHLBB was increasingly lax over the years, due in part to a reduction in its staff.[72] Favorable regulations caused banks to obtain federal charters at higher rates than before.[73] These efforts did not yield the intended result, and by the mid-1980s the federal savings and loan crisis erupted.[74] Customers of thrifts demanded higher rates of return on deposits and thrifts complied out of fear of losing their market share. Despite this arrangement, the interest that thrifts earned from mortgages and other long-term loans did not generate adequate revenue to match their costs.[75] Federal thrifts began to fail nationwide, resulting in record losses estimated at a total of $12.1 billion in 1988.[76] In total, almost 3,000 banks and federal savings and loans

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66. *Id.*

67. Pub. L. No. 96-221, 94 Stat. 132 (1980) (codified as amended in scattered sections of 12 U.S.C. & 15 U.S.C.).

68. 15 U.S.C. § 80a-51(2).

69. Pub. L. No. 97-320, 96 Stat. 1469 (codified as amended in scattered sections of the U.S.C.).

70. *See* 12 U.S.C. §§ 3801-3805 (1982).

71. CRISIS INQUIRY REPORT, *supra* note 3, at 35–36.

72. Curry & Shibut, *supra* note 63.

73. *Id.* at 27.

74. *Id.*

75. CRISIS INQUIRY REPORT, *supra* note 3, at 34.

76. *See* Nathaniel C. Nash, *Savings Loss Put at $2.3 Billion*, N.Y. TIMES, Mar. 22, 1989 at D1; *see also* Curry & Shibut *supra* note 63, at 27–28.

failed.[77] Between July 1990 and February 1992, before the crisis had even ended, national home values had declined by 2.5%.[78] The total cost of the crisis is estimated to range between $100 and $160 billion.[79]

In response to this crisis that began in the late 1980s, Congress passed FIRREA in 1989, which restructured savings and loans by dissolving the FHLBB and replacing it with the OTS.[80] FIRREA then amended HOLA to give the OTS the responsibility of promulgating uniform accounting and disclosure regulations.[81] As part of the bailout plan for federal thrifts, FIRREA also shifted deposit insurance functions to the FDIC.[82] FIRREA also imposed stricter net worth requirements and greater general oversight.[83]

In addition to the changes in thrift structure, the OTS was also empowered to preempt conflicting state law through regulations pursuant to HOLA and FIRREA.[84] Under HOLA, OTS had "authority [that] is preemptive of any state law purporting to address the subject of the operations of a Federal savings association."[85] Regulators believed that preemption would provide a uniform set of regulations and ensure the stability of federal thrifts "by efficiently delivering low-cost credit to the public free from undue regulatory duplication and burden."[86]

Notably, HOLA's content does not contain any explicit congressional intent of field preemption, and no court has specifically addressed whether OTS field preemption is appropriate.[87] However, despite Congress' silence, laws adopted by the FHLBB as well as case law interpreting such regulations have held that HOLA does in fact

77. *See* Curry & Shibut *supra* note 63, at 27–28.

78. CRISIS INQUIRY REPORT, *supra* note 3, at 36.

79. Curry & Shibut, *supra* note 63, at 29.

80. FIRREA §§ 301, 304, 12 U.S.C. §§ 1462a, 1468 (2006).

81. FIRREA § 301, 12 U.S.C. § 1463(b). FIRREA amendments also require all savings associations to achieve and maintain adequate capital, with standards no less stringent than those applicable to national banks. HOLA § 5(t)(1)(c).

82. Previously, deposits were insured by the Federal Savings and Loan Insurance Corporation (FSLIC), which insured savings and loan accounts up to $100,000.

83. 12 U.S.C.A. § 1464(c)(2)(a).

84. *In re* Ocwen Loan Servicing, LLC Mortg. Servicing Litig., 491 F.3d 638, 642 (7th Cir. 2007).

85. 12 C.F.R. § 545.2 (2012).

86. 12 C.F.R. § 560.2(a) (2012).

87. *See* JULIE L. WILLIAMS, SAVINGS INSTITUTIONS: MERGERS, ACQUISITIONS AND CONVERSIONS § 17.01, at 17-4.

occupy the field.[88] Long before OTS regulations declared field occupation in 1996, one district court concluded that "not only does the Act of Congress which authorizes the creation, operation and supervision of federal savings and loan associations . . . embrace the entire field, but the comprehensive rules and regulations adopted by the Board clearly meet the test of covering the subject matter of the statute."[89] Over the years, Congress did not correct this assumption, even following the near collapse of the institutions in the 1980s. In *Fidelity Federal Savings and Loan Association v. De La Cuesta*,[90] the Supreme Court states, "it would have been difficult for Congress to give . . . a broader mandate . . . . [HOLA governs] the powers and operations of every federal savings and loan association from its cradle to its corporate grave."[91] Until Dodd-Frank eliminated the OTS, it had plenary authority under HOLA to issue regulations governing federal savings and loans.[92] As a result, federal thrifts were given a level of preemption greater than that afforded to national banks.

In connection to loans originating before Dodd-Frank,[93] OTS regulation claims that it "occupies the entire field of lending regulation for federal savings associations."[94] The OTS regulations preempted state laws "affecting the operations of federal savings associations . . . to enable federal savings associations to conduct their operations in accordance with the best practices of thrift institutions."[95] Specifically, the regulations preempt state laws imposing requirements regarding licensing, credit terms, loan fees, disclosure requirements, origination, and interest rates; on the other hand they do not preempt state laws that "only incidentally affect the lending operations of Federal savings associations."[96] In theory, the federal system of borrower-protection

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88. People v. Coast Fed. Sav. & Loan Ass'n, 98 F. Supp. 311, 316 (S.D. Cal. 1951).

89. *Id.* at 318.

90. 458 U.S. 141 (1982).

91. *Id.* at 145 (quoting *Coast Fed. Sav. & Loan Ass'n*, 98 F. Supp. at 316).

92. *See* FRREA, Pub. L. No. § 301, 103 Stat. 280-282 (repealed 2010); Sec. Sav. & Loan v. Director, Office of Thrift Supervision, 960 F.2d 1318, 1321 n.8 (5th Cir. 1992).

93. Dodd-Frank overturns the field preemption standard in the OTS regulation, and declares that courts must make a case-by-case determination as to whether a state's substantive law should be preempted. *See* Dodd-Frank Act § 1044(a).

94. 12 C.F.R. § 560.2(a) (2012).

95. *Id.*

96. *Id.* § 560.2(b)–(c).

statues would be used to protect homeowners.[97] The OTS believed preemption was necessary to prevent another savings and loan crisis. Ultimately, field preemption resulted in an improper federal intrusion on states' rights and contributed to the financial collapse.[98]

B. The 1996 OTS Regulations

With the authority granted by FIRREA, the OTS promulgated a regulation in 1996 asserting the rights of federal savings and loan associations to "extend credit as authorized under federal law . . . without regard to state laws purporting to regulate or otherwise affect their credit activities."[99] Specifically, 12 C.F.R. § 560.2(a) provides:

> Occupation of field. Pursuant to sections 4(a) and 5(a) of the HOLA, 12 U.S.C. 1463(a), 1464(a), OTS is authorized to promulgate regulations that preempt state laws affecting the operations of federal savings associations when deemed appropriate to facilitate the safe and sound operation of federal savings associations, to enable federal savings associations to conduct their operations in accordance with the best practices of thrift institutions in the United States, or to further other purposes of the HOLA. To enhance safety and soundness and to enable federal savings associations to conduct their operations in accordance with best practices (by efficiently delivering low-cost credit to the public free from undue regulatory duplication and burden), OTS hereby occupies the entire field of lending regulation for federal savings associations. OTS intends to give federal savings association's maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation. Accordingly, federal savings associations may extend credit as authorized under federal law, including this part, without regard to state laws purporting to regulate or otherwise affect their credit activities, except to the extent provided in paragraph (c) of this section or § 560.110 of this part . . . .[100]

97. Interview by Dixie Noonan, Senior Counsel, FCIC, of Alan Greenspan, former Chairman, Federal Reserve, in Washington, D.C. (Mar. 31, 2010), *available at* http://fcic-static.law.stanford.edu/cdn_media/fcic-docs/2010-03-31%20FCIC%20memo%20of%20staff%20interview%20with%20Alan%20Greenspan%20Interview,%20Federal%20Reserve%20Board.pdf.

98. *See supra* Part I for an analysis of federal thrift involvement in the financial crisis.

99. 12 C.F.R. § 560.2(a).

100. *Id.*

Subsection 560.2(a) leaves no room for conflicting state laws.[101] The regulation codifies the long-standing presumption that HOLA occupies the field.[102]

Subsection 560.2(b) goes on to provide a non-exhaustive list of examples of state laws that are expressly preempted, stating, in relevant part:

> Except as provided in § 560.110 of this part, the types of state laws preempted by paragraph (a) of this section include, without limitation, state laws purporting to impose requirements regarding processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages.[103]

The list of activities in 560.2(b) is similar to lists found in the regulations of other institutions.[104] However, the language in 560.2(b) is stronger. Other regulations preempt state laws that "obstruct" or "impair" the activities of federal institutions, while 560.2(b) preempts actions that impose any requirement without regard to whether a state regulation conflicts with or compliments federal law.

The savings clause found in 560.2(c) has been the source of most of the litigation related to HOLA. It should be used to allow states to maintain control of traditional areas of law. However, due to its wording, this provision has been utilized to deny homeowners legal remedies. Subsection 560.2(c) provides:

> State laws of the following types are not preempted to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of paragraph (a) of this section:
>
> (1) Contract and commercial law;
> (2) Real property law;
> (3) Homestead laws specified in 12 U.S.C. 1462a(f);
> (4) Tort law;
> (5) Criminal law; and
> (6) Any other law that OTS, upon review, finds:
> (i) Furthers a vital state interest; and
> (ii) Either has only an incidental effect on lending operations or is not otherwise contrary to

101. *Id.*
102. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 161–62 (1982).
103. 12 C.F.R. § 560.2(b)(10).
104. *See, e.g.*, *id.* § 34.4.

> the purposes expressed in paragraph (a) of this section.[105]

Following the guidance of the OTS, the Ninth Circuit provided a procedure for determining whether regulations preempt a state law in *Silvas v. E*TRADE Mortgage Corp.*[106]:

> The first step will be to determine whether the type of law in question is listed in paragraph (b). If so, the analysis will end there; the law is preempted. If the law is not covered by paragraph (b), the next question is whether the law affects lending. If it does, then, in accordance with paragraph (a), the presumption arises that the law is preempted. This presumption can be reversed only if the law can clearly be shown to fit within the confines of paragraph (c). For these purpose paragraph (c) is intended to be interpreted narrowly. Any doubt should be resolved in favor of preemption.[107]

The OTS failed to provide a bright line test for deciding preemption issues. In a 1996 OTS Opinion Letter, the Chief Counsel of the OTS concluded that an Indiana statute prohibiting deceptive trade practices in commerce was exempt pursuant to paragraph (c).[108] The law did not "affect lending" because its purpose was to regulate practices of all businesses within the state, not to impose policy on federal thrifts specifically.[109] The position of the OTS evolved over time, and in so doing found that more state laws had been preempted. In 2003, the OTS issued letters announcing preemption of predatory lending statutes in several states including Georgia, New York, New Jersey, and New Mexico.[110] Although the predatory lending statutes sought to prohibit

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105. *Id.* § 560.2(c).

106. 514 F.3d 1001 (9th Cir. 2008).

107. *Id.* at 1005 (quoting Lending and Investment, 61 Fed. Reg. 50,951, 50,966–67 (Sept. 30, 1996) (codified at 12 C.F.R. § 560.2)).

108. Chief Counsel of the Office of Thrift Supervision (OTS), P-96-14, Preemption of State Laws Applicable to Credit Card Transactions, 6 (Dec. 24, 1996), http://www.occ.gov/static/news-issuances/ots/legal-opinions/ots-lo-12-24-1996.pdf.

109. *Id.* ("[B]ecause federal thrifts are presumed to interact with their borrowers in a truthful manner, Indiana's general prohibition on deception should have no measurable impact on their lending operations.").

110. *See* Chief Counsel of the Office of Thrift Supervision (OTS), P-2003-1, Preemption of Georgia Fair Lending Act (Jan. 21, 2003), www.occ.gov/static/news-issuances/ots/legal-opinions/ots-lo-01-21-2003.pdf.; Chief Counsel of the Office of Thrift Supervision (OTS), P-2003-2, Preemption of New York Predatory Lending Law (Jan. 30, 2003), www.occ.gov/static/news-issuances/ots/legal-opinions/ots-lo-01-30-2003.pdf; Chief Counsel of the Office of Thrift Supervision (OTS), P-2003-5,

egregious behavior that was traditionally within state domain, the OTS held that the statutes imposed requirements on lending as outlined in paragraph (b).[111]

OTS regulations preempted areas traditionally under state control such as real property, fraud, and contract law[112] if they imposed requirements on lenders or substantially impacted mortgage lending and servicing. In the Letters Preempting Predatory Lending Laws, the OTS used preemption to obstruct state attempts to slow the impact of the crisis.[113] Once the OTS occupied the field, the agency became the only source of protection from abusive practices by federal lenders. By carving out exceptions for specific types of law but preempting all activity that interfered with lending, the OTS regulation resulted in confusion and allowed banks to rely on an exception to escape regulation.[114]

C. ANALYSIS OF HOLA PREEMPTION IN THE COURTS

Federal circuits have used varying methods to interpret the 1996 HOLA Regulations, with the Seventh Circuit finding preemption only in limited circumstances and the Eighth and Ninth Circuits taking a broader approach.[115] Seventh Circuit courts have held that state common-law claims are not preempted, and that preemption is not

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Preemption of New Jersey Predatory Lending Act (July 22, 2003), www.occ.gov/static/news-issuances/ots/legal-opinions/ots-lo-07-22-2003.pdf; Chief Counsel of the Office of Thrift Supervision (OTS), P-2003-6, Preemption of New Mexico Home Loan Protection Act (Sept. 2, 2003), www.occ.gov/static/news-issuances/ots/legal-opinions/ots-lo-09-02-2003.pdf [hereinafter collectively "OTS Letters Preempting Predatory Lending Laws"].

111. *See* OTS Letters Preempting Predatory Lending Laws, *supra* note 110.

112. *See, e.g.*, Aronson v. Quick Point Pencil Co., 440 U.S. 257 (1979) (finding that federal patent law does not prevent enforcement of a contract for payment of royalty fees when the parties contemplate denial of the patent in the contract); Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) (finding that a majority of law related to property exists in the domain of the states).

113. OTS Letters Preempting Predatory Lending Laws, *supra* note 110.

114. *See, e.g.*, CRISIS INQUIRY REPORT, *supra* note 3, at 14–16.

115. *See, e.g.*, Casey v. FDIC, 583 F.3d 586 (8th Cir. 2009) (finding claims under Missouri Merchandising Practices Act preempted by HOLA); Silvas v. E*Trade Mortg. Corp., 514 F.3d 1001 (9th Cir. 2008) (finding claims under California Unfair Competition Law preempted by HOLA); *In re* Ocwen Loan Servicing, LLC Mortg. Servicing Litig., 491 F.3d 638 (7th Cir. 2007) (finding common law claims generally not preempted).

required when it leaves a homeowner with no adequate remedy.[116] The Eighth and Ninth Circuits have followed the OTS regulations exactly, using an "as applied" analysis to preempt all activity that interferes with lending in any way without consideration of the outcome.[117] Other Circuits have either chosen to clearly follow the Seventh, Eighth or Ninth Circuits or approach preemption on a case-by-case basis, creating inconsistent results.[118]

Following Judge Posner's approach from *In re Ocwen Loan Servicing, LLC Mortgage Servicing Litigation*, courts such as the Seventh Circuit have held that certain state law claims against a federal savings and loan association compliment rather than conflict with HOLA.[119] The courts have balanced the OTS's authority over federal banks with the ability of homeowners to recover under HOLA's statutory structure.[120] When a plaintiff's claim is based on a defendant's conduct under laws that do not regulate lending activity, the claims are not preempted.[121] Under Judge Posner's approach the court does not find preemption even if a law may be applied to impact lending in some scenarios, as long as it does not impose requirements on a federal thrift in the case at hand.[122] Claims based on property law have long been recognized by the Supreme Court as a matter of special concern to states; the Seventh Circuit thus considers them to be specifically reserved for the states by §560.2(c).[123] Therefore, to determine whether a property claim is preempted, the Seventh Circuit considers the function and specific nature of each state law claim to determine whether it is an attempt at regulation preempted by HOLA.[124]

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116. *See, e.g.*, *Ocwen*, 491 F.3d 638.

117. *See Casey*, 583 F.3d 586; *Silvas*, 514 F.3d 1001.

118. *See supra* notes 135–177 and accompanying text.

119. *Ocwen*, 491 F.3d at 643–44; *see also* Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 578 (7th Cir. 2012).

120. *Ocwen*, 491 F.3d 638 at 644; *see also* Jones v. Home Loan Inv., F.S.B., 718 F. Supp. 2d 728, 735 (S.D. W. Va. 2010).

121. *See Ocwen*, 491 F.3d at 643–44.

122. *Id.*

123. *See* Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982); Butner v. United States, 440 U.S. 48, 55–56 (1979) ("Property interests are created and defined by state law.").

124. *See Ocwen*, 491 F.3d at 643; *see also* Dixon v. Wells Fargo Bank, N.A., 798 F. Supp. 2d 336, 356 (D. Mass. 2011) ("The question is one of function, not theory: will enforcement of the cause of action interfere with or contravene lending, the regulation of which Congress has committed exclusively to a federal agency?").

The Seventh Circuit approach to HOLA preemption is reflective of judicial attempts to provide a remedy for homeowners. In *Ocwen*, the lender sought to dismiss the homeowner's claims based on fraud and breach of contract. In deciding to deny the lender's motion to dismiss, Judge Posner explains "[t]he line between subsections (b) and (c) is both intuitive and reasonably clear."[125] The OTS "has exclusive authority to regulate the savings and loan industry in the sense of fixing fees (including penalties), setting licensing requirements, prescribing certain terms in mortgages, establishing requirements for disclosure of credit information to customers, and setting standards for processing and servicing of mortgages."[126] However, the "assertion of plenary authority does not deprive persons harmed by the wrongful acts of savings and loan associations of their basic state common-law type remedies."[127] The court balanced the OTS's authority over federal banks with the ability of consumers to recover in federal courts under federal or state law.[128]

The Seventh Circuit provides examples of scenarios in which an as applied analysis would yield an unjust result:

> Suppose [a savings and loan association] signs a mortgage agreement with a homeowner that specifies an annual interest rate of 6 percent and a year later bills the homeowner at a rate of 10 percent and when the homeowner refuses to pay institutes foreclosure proceedings. It would be surprising for a federal regulation to forbid the homeowner's state to give the homeowner a defense based on the mortgagee's breach of contract. Or if the mortgagee fraudulently represents to the mortgagor that it will forgive a default, and then forecloses, it would be surprising for a federal regulation to bar a suit for fraud. Some federal laws do create such bars, notably ERISA, but this is recognized as exceptional. Enforcement of state law in either of the mortgage-servicing examples above would complement rather than substitute for the federal regulatory scheme.[129]

Instead of a blanket preemption of all laws, the Seventh Circuit divides claims into those that fall onto the regulatory side of the ledger,

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125. *Ocwen*, 491 F.3d at 643.
126. *Id.*
127. *Id.*
128. *Id.*; *see also* Jones v. Home Loan Inv., F.S.B., 718 F. Supp. 2d 728, 734 (S.D. W. Va. 2010).
129. *Ocwen*, 491 F.3d at 643–44 (internal citations omitted).

and those that fall onto the common law side.[130] State consumer finance laws, like the ones preempted by the OTS in the Letters Preempting Predatory Lending Laws, were aimed at curbing the activities established in the examples above.[131]

Following the Seventh Circuit's approach, a court would not preempt a wrongful foreclosure or consumer protection law aimed at subprime lending if such law merely applies a common law equally to all lenders, even if it addresses loan servicing and processing. To determine preemption the court must look to the nature of the claim, including the actions alleged in the complaint. The OTS lacks the authority to provide a remedy to those injured by the wrongful acts of federal savings and loan associations.[132] Therefore, if HOLA preempts all causes of action related to the mortgage, even those for which it has not provided remedies, then federal savings associations could "use preemption as a shield to avoid adherence" to the commitments that they make to their customers.[133] Since neither federal law nor the OTS has the means to redress plaintiffs harmed by federal savings and loan associations' breaches of contract, fraud, or tortious acts, *Ocwen* holds that the regulations cannot be read to deprive persons of basic common law remedies, even those that may interfere with loan servicing.[134] The Seventh Circuit and courts following its approach apply an analysis similar to that used in cases under the NBA.[135]

Courts following the Eighth and Ninth Circuits have held that any "state law that either on its face or as applied imposes requirements regarding the examples listed in § 560.2(b) is preempted."[136] The Ninth Circuit explains in *Silvas* that the OTS has laid out a system of regulation "so pervasive as to leave no room for state regulatory control."[137] Courts following this approach use an applied analysis where a state law that is not preempted on its face may be preempted if it fits within Section 560.2(b) as applied. Claims based on a loan

130. *Id.* at 644.

131. *See* OTS Letters Preempting Predatory Lending Laws, *supra* note 110.

132. *See id.* at 643.

133. Dixon v. Wells Fargo Bank, N.A., 798 F. Supp. 2d 336, 356 (D. Mass. 2011) (citations omitted).

134. *Ocwen*, 491 F.3d at 643.

135. *See infra* Part III.B.

136. Casey v. FDIC, 583 F.3d 586, 595 (8th Cir. 2009). *See also* Silvas v. E*Trade Mortg. Corp., 514 F.3d 1001, 1006 (9th Cir. 2008).

137. *Silvas*, 514 F.3d at 1003–04.

transaction, even when rooted in common law claims, are preempted.[138] This analysis preempts most state consumer protection laws, unless they are pure common law claims.[139]

In *Silvas*, the Ninth Circuit held that claims based on the California unfair competition law were preempted by HOLA.[140] The plaintiffs alleged that E*Trade Mortgage Corporation violated the law by including false information on its website and in advertising, by misrepresenting consumer legal rights in advertising and other documents, and by charging an interest rate lock-in fee that was not refunded when loan applicants cancelled.[141] The California law applied equally to all businesses and was not limited to just federal institutions.[142] It did not create a regime of favoritism for state entities.[143]

The Ninth Circuit took a very limited approach in analyzing Section 560.2(b). The Ninth Circuit held that the claims were preempted by HOLA, as HOLA generally preempts state law claims regarding advertising and disclosures.[144] Additionally, HOLA preempts state laws that purport to impose requirements on loan fees. The Court ended its analysis because the law was the type of state law contemplated under paragraph (b) and did not require examination under paragraph (c).

In *Casey*, the Eighth Circuit reached a similar result, finding that claims that violated the Missouri Merchandising Practices Act were preempted by HOLA because the law purported to impose requirements regarding loan-related fees.[145] The plaintiff alleged that the lender's practice of charging fees for the preparation of documents by non-lawyers violated the Missouri law.[146] The homeowners in *Casey* argued that paragraph (b) referred to state laws that on their face impose requirements on lenders, and because the Missouri Act was a law of

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138. Davis v. World Sav. Bank, F.S.B., 806 F. Supp. 2d 159, 171 (D.D.C. 2011).
139. *See, e.g.*, Sovereign Bank v. Sturgis, No. 11-10601-DPW, 2012 U.S. Dist. LEXIS 38860 (D. Mass. Mar. 22, 2012).
140. *Silvas*, 514 F.3d at 1006.
141. *Id.* at 1004.
142. *Id.*
143. *Id.*
144. *Id.* at 1006.
145. Casey v. FDIC, 583 F.3d 586, 595 (8th Cir. 2009).
146. *Id.*

general application the statute was not preempted by HOLA.[147] The court disagreed, holding that because the OTS had previously used an as applied analysis, a state law that either on its face or as applied imposes requirements regarding the examples listed in paragraph (b) is preempted.[148] Even though the law was of general application, as it applied to the homeowner's claims the statute imposed requirements regarding loan related fees.[149] Under the *Casey* reading of the law, only the OTS had the authority to impose restrictions on fees.

Courts using the as applied analysis have preempted many types of general application laws. For example, any claims based on defects in the procedure used to foreclose the property are preempted by HOLA.[150] Courts taking this approach hold that while a wrongful foreclosure claim is also a common law claim, these claims seek to bind federal thrifts to requirements outlined in state law and therefore fall within the confines of 560.2(b).[151] This analysis is unique to federal thrifts; courts analyzing preemption under the NBA have held that it does not preempt wrongful foreclosure laws.[152]

Under the as applied analysis, HOLA has also been found to preempt claims related to breach of an implied covenant of good faith and fair dealing in lending, even though they are nothing more than breach of contract claims.[153] Additionally, when claims are based on the deficiency of disclosures in loan documents or the structure of the loan itself, claims are preempted by HOLA even though they may be classified as fraud, breach of contract, or other common law causes of action.[154] Thus, courts utilizing the as applied analysis will find these claims to be preempted even if there is no comparable federal means of

147. *Id.*
148. *Id.*
149. *Id.*
150. Hague v. Wells Fargo Bank, N.A., No. 11-02366, 2012 WL 1029668, at *4 (N.D. Cal. Mar. 26, 2012) ("[W]rongful foreclosure action is based on allegations regarding note ownership, securitization, and substitution of trustee, all defects in the foreclosure procedure used by Defendant and therefore within the ambit of HOLA preemption.").
151. *Id.*
152. *See infra* Part III.C (discussing preemption under the NBA).
153. Haehl v. Washington Mut. Bank, F.A., 277 F. Supp. 2d 933, 942–43 (S.D. Ind. 2003); Washington Mut. Bank v. Superior Court, 115 Cal. Rptr. 2d 765, 780 (Ct. App. 2002).
154. Kelley v. Mortg. Elec. Registration Sys., Inc., 642 F. Supp. 2d 1048, 1054 (N.D. Cal. 2009).

recovery, simply because they impact lending. The as applied approach gives very little deference to the savings provision in 560.2(c).

Under either the Seventh Circuit of as-applied approach, if claims are clearly based on common law, courts do not find preemption.[155] As one district court explains: "HOLA does not preempt a plaintiff's claims that are premised on fraud or promises made by defendants. '[S]uch claims are not necessarily preempted, because the only 'requirement' they impose on federal savings banks is that they be held responsible for the statement they make to their borrowers.'"[156] When all of a plaintiff's claims are based on representations made by the lender and do not involve the administration of the loan, claims are not preempted.[157]

Similarly, when a claim is purely based on breach of contract, there is no preemption. If a homeowner seeks only to compel a thrift to supply the notice that it contractually agreed to, without requiring the lender to draft specific terms, the common law breach of contract claims are not preempted by HOLA.

HOLA field preemption requires various types of cases to be litigated in federal court, such as actions arising out of lending or regulating lending. As a result of the OTS regulations, courts allowed banks to remove cases to federal court and often found that HOLA preempted homeowners' attempts to recover for egregious practices by the banks. As there were no corresponding federal claims, homeowners were left with no remedy for the wrongs of lenders holding federal thrift charters. Many federal courts saw the injustice in such a system and used the exceptions in the regulations to allow cases to continue in state

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155. *See, e.g.*, Susilo v. Wells Fargo Bank, N.A., 796 F. Supp. 2d 1177, 1186 (C.D. Cal. 2011) ("[W]hen a plaintiff's claim is based on a defendant's failure to fulfill the general duty not to misrepresent material facts, . . . the claims are not preempted." (citing Biggins v. Wells Fargo & Co., 266 F.R.D. 399, 417 (N.D. Cal. 2009))). As long as special requirements are not imposed on lenders, the claims are not preempted by HOLA. *Id.*

156. Viets v. Wachovia Mortg., F.S.B., No. 2:11-cv-00169-GMN-RJJ, 2011 WL 6181934, at *4 (D. Nev. Dec. 12, 2011) (citing Rumbaua v. Wells Fargo Bank, N.A., No. 11-1998, 2011 WL 3740828, at *7 (N.D. Cal. Aug. 25, 2011)).

157. *Id.*; *see also* Becker v. Wells Fargo Bank, N.A., No. 2:10-cv-02799, 2011 WL 1103439, at *8 (E.D. Cal. Mar. 22, 2011) ("[P]laintiff's fraud claim does not arise from a 'state law purporting to address the subject of the operations of a federal savings association' and is therefore not preempted . . . ."); *see also* Dixon v. Wells Fargo Bank, N.A., 798 F. Supp. 2d 336, 356 (D. Mass. 2011) (holding promissory estoppel claim alleging that lender promised to enter into a loan modification if the borrowers took certain steps was not preempted by HOLA).

court. Other courts followed the letter of the OTS regulations, utilizing an as applied analysis. These attempts resulted in inconsistencies, sometimes even within the same circuit, making it impossible to predict the outcome of a homeowner's lawsuit against a federal thrift.

III. DODD-FRANK CHANGES TO THE RESIDENTIAL LENDING LANDSCAPE

Federal preemption has been used as a barrier against state efforts to address the financial meltdown.[158] HOLA preemption was altered when the Dodd-Frank Act was enacted on July 21, 2011.[159] Title X of the Dodd-Frank Act discusses the scope of federal preemption of consumer financial laws, limiting it to conflict preemption for institutions formerly regulated by the OTS.[160] While Dodd-Frank attempts to limit the scope of HOLA preemption and clarify which laws apply to federal thrifts, it does not address the fact that HOLA is no longer necessary or serving its original purposes. The discussion below outlines the changes to the residential lending landscape made by the Dodd-Frank Act; analyzes preemption under the NBA, which should apply to HOLA for loans originating after July 2011; and explores the treatment of HOLA preemption by the courts in the aftermath of Dodd-Frank.

A. THE DODD-FRANK CHANGES TO RESIDENTIAL LENDING

Before Dodd-Frank, no single federal institution had the legal authority or responsibility to monitor the entire financial system and take action when there was a threat.[161] The Dodd-Frank Act then came along and merged the OTS into the OCC.[162] Dodd-Frank added Section 6(a) to HOLA, providing that every preemption determination made by a court or agency under HOLA "shall be made in accordance with the laws and legal standards applicable to national banks regarding the preemption of State law."[163] Section 6(b) provides that HOLA "does not

158. Eggert, *supra* note 3, at 173; CRISIS INQUIRY REPORT, *supra* note 3, at 13.

159. Dodd-Frank Act, sec. 1046, § 1465(a)–(b), 124 Stat. 1376, 2017.

160. Dodd-Frank Act § 1044 (to be codified at 12 U.S.C. § 25b).

161. Michael Barr, Address at the Pew/New York University Stern Conference on Financial Reform: The Dodd-Frank Act, One Year On (June 27, 2011), *available at* http://www.brookings.edu/research/speeches/2011/06/27-dodd-frank-barr.

162. *See* Dodd-Frank Act § 312 (to be codified at 12 U.S.C. § 5412).

163. Dodd-Frank Act § 1046 (to be codified at 12 U.S.C. § 1465).

occupy the field in any area of State law."[164] Preemption under HOLA is now governed by the conflict preemption standard outlined in *Barnett Bank of Marion County, N.A. v. Nelson.*[165]

The most restrictive procedures against preemption apply when a state consumer financial law is at issue.[166] Under Dodd-Frank, preemption of a state consumer financial law will be permissible only if: (i) application of the state law would have a discriminatory effect on national banks or federal thrifts as compared to state banks; (ii) the state law is preempted under a judicial standard that requires a state consumer financial law to prevent or significantly interfere with the exercise of the national bank's or federal thrift's powers before it can be preempted, with such preemption determination being made by the OCC or by a court on a case-by-case basis; or (iii) the state law is preempted by another provision of federal law other than Title X of the Dodd-Frank Act.[167] Thus, under Dodd-Frank, a consumer financial protection law will not automatically be preempted as it would under 560.2(b), even if it "purport[s] to impose requirements regarding . . . [p]rocessing, origination, servicing, sale or purchase of, or investment or participation in mortgages."[168] Under Dodd-Frank, preemption occurs only on a case-by-case basis, and a decision by federal regulators is applicable only to the individual state law and substantially equivalent laws.[169] Dodd-Frank is silent on laws that are not "state consumer financial" laws. If a law is not a state consumer financial law, the OCC presumably has the power to preempt it using traditional conflict preemption analysis.[170]

In response to the Dodd-Frank Act, the OCC issued an Interim Final Rule that supersedes 12 C.F.R. § 560.2.[171] The OCC Preemption Rules, effective July 21, 2011, rescinded subsidiary preemption, laws

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164. *Id.*

165. *Id.*; *see* Barnett Bank v. Nelson, 517 U.S. 25, 31 (1996) (holding that conflict preemption applies to national banks).

166. Dodd-Frank Act § 1044. A state consumer financial law is a law that does not discriminate against national banks directly and specifically regulates the manner, content, terms, and conditions of any financial transaction or account as it relates to consumers.

167. *Id.*

168. 12 C.F.R. § 560.2(b)(10) (2012).

169. *Id.*

170. *Id.*

171. *See* Office of Thrift Supervision Integration, 76 Fed. Reg. 48,950 (Aug. 9, 2011).

impairing banks "incidental powers,"[172] and conformed HOLA to NBA preemption.[173] Although the regulations removed the "occupy the field" language found in HOLA regulations, the new regulations maintain the laundry list of fiduciary laws found in §560.2(b) of HOLA that are preempted.[174] On its face, the preservation of the list violates part of the Dodd-Frank mandate to conduct a case-by-case analysis. The new regulations explicitly apply *Barnett Bank* only for the list of laws not explicitly preempted in §560.2(c) of the HOLA regulations, which includes real property, homestead, tort, and criminal law.[175] Thus, as written and enforced by the OCC, state consumer finance laws are the only laws clearly protected by Dodd-Frank. Other state laws remain open to interpretation by the courts and the OCC, possibly in keeping with the prevalent approaches to HOLA.

In addition to structural reforms to the lending and deposit taking institutions, Title X of Dodd-Frank also created the CFPB to consolidate federal consumer protection into one place.[176] The CFPB is tasked with educating consumers, monitoring financial products, and restricting deceptive trade practices.[177] The new Bureau regulates consumer financial products and services in compliance with federal law.[178] The CFPB is tasked with implementing and enforcing federal consumer financial law to ensure that consumers have access to markets for consumer financial products and services, and that such markets are "fair, transparent, and competitive."[179]

The Bureau is placed within the Federal Reserve System but operates independently.[180] Under the Act, the CFPB is given broad regulatory, supervisory, and enforcement authority over "covered persons" and "service providers."[181] These are with respect to both new consumer financial protection provisions, as well as an array of existing

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172. 12 C.F.R. § 7.4009 (2012).

173. 12 U.S.C. § 25b(b).

174. 12 C.F.R. § 7.4009.

175. *Id.*

176. Dodd-Frank Act tit. X (codified as 12 U.S.C. §§ 5511–5519).

177. *Id.*

178. *Id.* § 1021.

179. *Id.* § 1021(a). A director who is appointed by the President, with the advice and consent of the Senate, for a term of five years, heads the Bureau. *Id.* § 1011. Although the advice and consent of the Senate is required, the current Director was appointed during recess due to partisan objections to the Dodd-Frank Act and the creation of the CFPB.

180. *Id.*

181. *Id.* §§ 1014–15.

federal consumer financial protection laws and provisions that are to be transferred to the CFPB from existing federal banking agencies.[182] Therefore, the CFPB has control over residential lenders of all varieties, including non-bank institutions.

After a one-year "stand up" period, the Bureau obtained enforcement authority and commenced most activities on July 21, 2011.[183] However, the CFPB did not have a Director until January of 2012. President Obama used a recess appointment to select Richard Cordray, thus avoiding a battle with the Senate. Going forward, the CFPB has vowed to overhaul the home mortgage market over a six-month period beginning in July 2012.[184] As of April 2013, new regulations have included rules related to disclosure forms, information provided to consumers when obtaining a mortgage, and more transparency in mortgage servicing.[185] In January 2013, the CFPB issued new rules regarding mortgage servicing.[186] In the preamble to the Mortgage Servicing Final Rules, the Bureau makes it clear that Regulation X does not preempt the field of mortgage servicing regulations by states.[187] On April 19, 2013, CFPB released additional proposals addressing questions related to mortgages. The proposal includes yet another clarification that Regulation X does not preempt the field and recommends a comment emphasizing the point.[188]

To date, the CFPB has been over-extended, slow moving, and the subject of partisan political debates. If banks still have the option of raising preemption, even if only as a defense, the issue of laborious and costly litigation has not been resolved. The need for repeated clarifications from the Bureau is reflective of hesitance from the courts

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182. *Id.*

183. Dodd-Frank Act § 1017.

184. Edward Wyatt, *Loans Top A To-Do List: New Agency Plans to Make over Mortgage Market*, N.Y. TIMES, July 6, 2012, at B1.

185. CONSUMER FIN. PROT. BUREAU, SEMI-ANNUAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU (July 2012), *available at* http://www.consumerfinance.gov/reports/semi-annual-report/.

186. *See* High-Cost Mortgage and Homeownership Counseling Amendments to the Truth in Lending Act (Regulation Z) and Homeownership Counseling Amendments to the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 6855 (Jan. 31, 2013) (to be codified at 12 C.F.R. pt. 1024).

187. *Id.*

188. *See* Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement Procedure Act (Regulation X) and Truth in Lending Act (Regulation Z), 78 Fed. Reg. 25,638 (proposed May 2, 2013) (to be codified at 12 C.F.R. pts. 1024 and 1026).

to apply the Dodd-Frank preemption standard. Other changes proposed by the CFPB thus far may help customers obtaining new mortgages, but those with existing mortgages are stuck in limbo. Additionally, the availability of upfront cost estimates will not fix wrongful foreclosure and other servicing problems. While the Bureau's attempts at keeping borrowers informed is helpful, consumer disclosure and paperwork requirements will not prevent the OCC from overstepping its authority, nor will it combat a banker's ability to delay a homeowner's recovery in the face of egregious behavior by utilizing the court system.

Dodd-Frank created a regulatory scheme that is vulnerable to the changing political climate. Even if the measures are left intact, history shows us that while these measures may help prevent a crisis exactly like the current recession, they may not be adequate to produce lasting overall reform within the financial industry.[189] "Dodd-Frank . . . relies primarily on the same supervisory tool—capital-based regulation—that failed to prevent the banking and thrift crises of the 1980s as well as the recent financial crisis."[190] Historically, Congress and federal regulators have been unable to resolve consumer protection issues without industry involvement, which results in less restrictive regulations.[191]

The recent crisis is evidence of how detrimental the relationship between federal regulators and industry players can be to homeowners.[192] Post-Dodd-Frank homeowners are still forced to address the preemption question, even if only to protest removal.[193] The case-by-case requirement found in Dodd-Frank, if ever applied, is not enough to shelter homeowners from the influence that financial institutions have on federal regulators. Preemption, even case-by-case conflict preemption, can still act as a carrot to bait institutions to use the federal charter system, particularly if the courts continue to find federal preemption when interpreting HOLA. Looking forward, homeowners seeking to make the best of the situation will continue to face avoidance and aggressive court action by banks with federal thrift charters.

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189. *See supra* Part II.A (discussing the savings and loan crisis of the 1980s).

190. Arthur E. Wilmarth, Jr., *The Dodd-Frank Act: A Flawed and Inadequate Response to the Too-Big-to-Fail Problem*, 89 OR. L. REV. 951, 1053 (2011).

191. *See id.*; *cf.* Susan Block-Lieb & Edward J. Jager, *Reforming Regulation in the Markets for Home Loans*, 38 FORDHAM URB. L.J. 681, 692–93 (2011).

192. *See, e.g.*, CRISIS INQUIRY REPORT, *supra* note 3.

193. *See infra* Part III.C.

B. THE NBA PREEMPTION STANDARD

Historically, national banks have been subject to greater state control than federal thrifts.[194] Preemption under the NBA, and going forward HOLA, follows the *Barnett Bank* conflict preemption standard. NBA preemption has always been narrower than HOLA.[195] National banks are given "all such incidental powers as shall be necessary to carry on the business of banking."[196] The OCC defines the incidental powers; in the context of mortgage lending, "state laws of general application, which merely require all businesses to refrain from fraudulent, unfair, or illegal behavior, do not necessarily impair a bank's ability to exercise its real estate lending powers."[197]

The National Bank Act preemption provision states:

> Except where made applicable by Federal law, state laws that obstruct, impair or condition a national bank's ability to fully exercise its Federally authorized real estate lending powers do not apply to national banks. Specifically, a national bank may make real estate loans…without regard to state law limitations concerning: (10) Processing, origination, servicing, sale or purchase of, or investment or participation in mortgages.[198]

The language does not declare occupation of the field, as HOLA did in 560.2(c). Instead, the NBA regulations codify conflict preemption. The NBA regulation contains a savings clause similar to HOLA, excepting state contract, tort, criminal, homestead, debt collection, taxation, zoning, real property, and any other law that only incidentally affects national banks' real estate lending powers.[199]

Conflict preemption occurs when there is an actual conflict between state and federal law, such as when compliance with both laws

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194. *See, e.g. Atherton v. FDIC*, 519 U.S. 213, 222 (1997) (National banks "are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when State law incapacitates the [national] banks from discharging their duties to the [federal] government that it becomes unconstitutional").

195. For an analysis of banking history, see *supra* Part I.

196. 12 U.S.C. § 24 (2006).

197. Martinez v. Wells Fargo Home Mortg. Inc., 598 F.3d 549, 555 (9th Cir. 2009).

198. 12 C.F.R. § 34.4(a)(10) (2012).

199. *Id.* § 34.4(b).

would be a "physical impossibility."[200] Though there was no direct conflict between state and federal laws in *Barnett Bank v. Nelson*—the case that produced the standard applied to both NBA and HOLA institutions under Dodd-Frank—the state law was still an obstacle to accomplishing the federal law's objectives.[201] As a result, the NBA preempted that law. *Barnett Bank* involves a Florida law prohibiting banks from selling insurance, unless the bank is located in a small town and not affiliated with a larger institution.[202] Barnett Bank bought a Florida licensed insurance agency with the plan of selling insurance through bank branches in towns with a population of over 5,000, which was in violation of the Florida Law.[203] The Supreme Court sided with Barnett Bank, holding that the Florida law interfered with a power explicitly granted by Congress[204] and that Florida could not prevent banks from engaging in the insurance business. Even though it did not directly contradict federal law, the Florida law was an obstacle to a power that Congress intended to grant to national banks.[205]

In analyzing whether the NBA preempts state foreclosure laws, courts have held that they do not conflict with a federal right and thus are not preempted.[206] Citing the Supreme Court, the *Tamburri* court holds "[t]he NBA leaves national banks subject to the laws of the State, and banks are governed in their daily course of business far more by the laws of the State than of the nation."[207] The court also notes the states' "longstanding interest in regulating the foreclosure process."[208] Per the Dodd-Frank Act, this analysis should apply to loans made by institutions governed by HOLA. If courts apply the NBA standard to HOLA, consumer finance laws as well as state foreclosure laws will not be preempted due to the state's longstanding interest in regulating the foreclosure process. In addition, the scope of authority held by federal

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200. Barnett Bank v. Nelson, 517 U.S. 25, 31 (1996).
201. *Id.* at 33 (stating that preemption occurs where a state law "prevent[s] or significantly interfere[s] with the national bank's exercise of its powers" as determined by federal law).
202. *Id.* at 28–29.
203. *Id.* at 29.
204. *Id.* at 31.
205. *Id.*
206. Tamburri v. Suntrust Mortg., Inc., 875 F. Supp. 2d 1009, 1018 (N.D. Cal. 2012) (citation omitted).
207. *Id.* (quoting Atherton v. FDIC, 519 U.S. 213, 222 (1997) (internal quotation marks omitted)).
208. *Id.* (citing BFP v. Resolution Trust Corp., 511 U.S. 531, 541–44 (1994)).

thrifts will change and they will face significantly more regulation by state entities.

Although the NBA provides the OCC with less preemptive power, preemption was not the only tool used by federal regulators to shelter banks from state regulation.[209] Notably, nationally chartered banks included Bank of America, Citibank, and Wachovia, some of the biggest players in the financial collapse.[210] Dodd-Frank does not stop the OCC from aggressively attempting to quash state regulations, as it did during the most recent crisis.

C. HOLA PREEMPTION IN THE COURTS SINCE DODD-FRANK

Dodd-Frank does not apply to mortgages signed before the Act took effect; thus, homeowners who entered into mortgages before July 21, 2011 are still unprotected.[211] The Act does not alter the applicability of prior regulations, but since it clarifies the prior law it should influence the interpretation. However, to date, it is impossible to know what impact the Dodd-Frank Act will have on litigation. Thus far, courts continue to follow the judicial interpretations of OTS regulations prevalent within the circuit without regard for Dodd-Frank.[212] This uncertainty and lack of court interpretation is hurtful to homeowners.

Courts rely on Congress' failure to make Dodd-Frank retroactive in order to avoid an analysis of the Act and the new OCC regulations. For example, in *Davis v. World Savings Bank*,[213] the court does not rely on Dodd-Frank or the interim regulations to influence its interpretation of HOLA preemption. The court explained:

> On July 21, 2011, OTS was transferred to the Office of the Comptroller of the Currency pursuant to a new statute, the Dodd-

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209. CRISIS INQUIRY REPORT, *supra* note 3, at 13.

210. CRISIS INQUIRY REPORT, *supra* note 3, at 13.

211. Dodd-Frank is not intended to be retroactive. Regulations and statutes cannot be applied retroactively absent express direction from Congress. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("Congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."). Dodd-Frank provides that the governing section of the statute was enacted and amended effective on the transfer date, July 21, 2011, which means that it does not apply to loans originated before that date. *See* Dodd-Frank Act §§ 1046, 1047(b), 1048.

212. *See, e.g.*, *infra* notes 213–26 and accompanying text.

213. Davis v. World Sav. Bank, F.S.B., 806 F. Supp. 2d 159 (D.D.C. 2011).

> Frank Wall Street Reform and Consumer Protection Act of 2010 . . . . Effective 90 days after the transfer date, the OTS will be abolished. . . . The Dodd-Frank Act provides that HOLA does not occupy the field in any area of state law and that preemption is governed by the standards applicable to national banks. . . . The OCC has issued an Interim Final Rule that changes the preemption regulations . . . . The new regulation, however, does not govern this case because regulations, like statutes, cannot be applied retroactively absent express direction from Congress . . . . Congress did not direct retroactive application of the new regulation, and the Dodd-Frank Act provided that section 1465 of Title 12 was enacted and amended effective on the transfer date, i.e. July 21, 2011. . . . Section 560.2 governs here because it was the regulation in effect when the parties entered into the Pick-a-Payment mortgage loan transaction.[214]

Other cases have followed the *Davis* analysis, continuing to apply the OTS regulations to all loans without considering Dodd-Frank.[215]

In *Molosky v. Washington Mutual, Inc.*, the court not only confirmed that Dodd-Frank is not retroactive, but also held that HOLA preemption still applies to both a bank that originates loans and those servicing such loans.[216] The *Molosky* holding reveals that to adequately protect the rights of homeowners, courts need further guidance from Congress. For loans signed before July 2011, a lender can still avoid state law by merely transferring the loan to a federal entity, acquiring a federal entity, or switching its charter. The *Molosky* plaintiff did not sign a loan with a federal institution, but is subjected to federal regulations and foreclosed from adequately asserting state law claims simply due to the nature of the institution servicing the loan.[217] Such an outcome does not protect consumers, enhance the market, or fulfill the original intent of HOLA.

Although NBA regulations and precedent clearly indicate an intention to allow states to regulate foreclosures as well as other areas of law that are traditionally of special interest to them, in some circumstances courts have ignored the spirit of Dodd-Frank and continued to adhere to a strict as applied analysis, without regard for

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214. *Id.* at 166 n.5 (internal quotation marks omitted).

215. Molosky v. Washington Mut., Inc., 664 F.3d 109, 113 (6th Cir. 2011) (confirming that the Dodd-Frank amendments to HOLA affecting preemption are not retroactive, and so, concluding that the OTS Regulations mandating field preemption still apply to mortgages that predate the enactment of Dodd-Frank).

216. *Id.* at 114–15.

217. *Id.*

harm to homeowners. *Copeland-Turner v. Wells Fargo Bank, N.A.* [218] involves a foreclosure-related action with conversion claims arising out of Wells Fargo's alleged failure to record an assignment, its issuance of an invalid notice of default, and its failure to honor an oral agreement to stay sales during loan modification and re-application.[219] Plaintiffs argued that Dodd-Frank's amendments to HOLA changed the nature and analysis of HOLA preemption.[220] Citing § 1043 of the Dodd-Frank Act, the court holds that the Act is not meant to apply to contracts entered into before enactment.[221]

In *Sovereign Bank v. Sturgis*,[222] the U.S. District Court for Massachusetts held that HOLA preempted the Massachusetts Consumer Credit Cost Disclosure Act, a law regulating disclosures regarding credit.[223] The court analyzed the statute under OTS regulations without mention of the Dodd-Frank Act or consumer financial protection laws, holding that since the law purports to impose requirements regarding disclosures, it is preempted by HOLA pursuant to 12 C.F.R. 560.2(b)(9).[224] While analyzing the plaintiff's other claims, the *Sturgis* court followed the prevailing view for pure common law claims, finding that a breach of contract claim was not preempted because "courts have regularly held that when a federally chartered bank violates a specific clause of a mortgage contract, HOLA will not preempt the resulting breach of contract claim."[225] When faced with a state consumer protection law and common law claims, the *Sturgis* court engaged in a more in-depth analysis relying on OTS opinion letters, but not the guidance provided by Dodd-Frank.[226]

Dodd-Frank declares that HOLA no longer occupies the field in any area of state law, but rather preemption is governed by the standards applicable to national banks; it is intended to clarify existing OTS

218. 800 F. Supp. 2d 1132, (D. Or. 2011).
219. *Id.* at 1134.
220. *Id.* at 1137.
221. *Id.* at 1137–38.
222. 863 F. Supp. 2d 75 (2012).
223. *Id.*
224. *Id.* at 103.
225. *Id.* at 94 (citing McAnaney v. Astoria Fin. Corp., 665 F. Supp. 2d 132, 164 (E.D.N.Y. 2009) ("The breach of contract claim . . . does not seek to impose specific substantive requirements upon the operations of defendants, apart from compliance with specific contractual obligations . . . . The claim is therefore not preempted . . . .")).
226. *Id.* at 96–98.

regulations.[227] However, courts continue to follow precedent, not the congressional advisory.[228] This begs the question of whether courts will ever apply the same standard to federal thrifts that are applied to national banks, or if instead, those facing litigation with a federal thrift will be saddled with additional unnecessary steps to adequate recovery. To date, it is still unclear what method a court may use to determine preemption under the Act. Presently, courts are continuing to follow two distinct standards for HOLA and NBA preemption based on the fact that the Dodd-Frank Act is not retroactive.[229] Even when a suit regarding a loan originating after the effective date comes before a court, the court may rely on the spirit and intentions of HOLA, as opposed to the NBA, to continue to permit more preemption. Post-Dodd-Frank holdings give the impression that courts may never fully apply the same standard to federal thrifts that they do to national banks.[230] This uncertainty does not ensure public access to home financing or ensure the solvency of federal savings associations.[231]

It is difficult to determine exactly how Dodd-Frank will impact residential lending by federal thrifts. Many existing loans cannot be protected by new state laws that aim at curbing subprime lending, robo-signing, wrongful foreclosure, or other egregious behavior. Therefore, even with the new standards, Dodd-Frank does not fix the problem. The possible conflict preemption analysis, assuming courts and the OCC follow the legislative requirements, makes future litigation with thrifts difficult for both homeowners and federal thrifts. Under Dodd-Frank, thrifts are unsure if they will have to comply with state or federal regulations, while homeowners are still being forced to litigate the most egregious mortgages in federal court without state law protection.

Dodd-Frank has taken steps to prevent another crisis similar to the recent meltdown, but it does not address the underlying cause. In the last forty years, the original purpose of HOLA has not been considered. Perhaps instead of regulating these institutions, the solution is to repeal

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227. *See supra* Part III.B.

228. *See supra* notes 224–39 and accompanying text.

229. *See supra* notes 216–34 and accompanying text.

230. *See supra* notes 216–34 and accompanying text.

231. *See* H.R. REP. NO. 73-210 (1933) (Conf. Rep.); *see also* Davis v. World Sav. Bank, F.S.B., 806 F. Supp. 2d 159, 166 (D.D.C. 2011) ("In order to ensure that the public had access to home financing and to ensure the solvency of federal savings associations, OTS regulated federal savings associations through a uniform set of regulations that occupied the entire field of lending regulation . . . .").

the charter or to allow the market to correct itself and eliminate the charter.

IV. THE ELIMINATION OF HOLA BENEFITS ALL PARTIES

The history of federal thrifts has shown that reforming regulations is not enough. Attempts to protect federal thrifts have resulted in a vicious cycle of financial crises, despite regulations developed with the intent of protecting the stability of these institutions and preventing another meltdown.[232] Since the 1970s, thrifts have not made a profit without the benefit of protection from the federal government or deviation from their original purpose.[233] Thus far, all attempts at incentivizing banks to maintain the thrift charter have conflicted with the purpose of HOLA and caused harm to homeowners. Dodd-Frank attempted to correct the issues of inadequate oversight; however, the Act created a regulatory scheme that is vulnerable to the changing political climate, just like the financial legislation that preceded it.[234]

Due to the political climate and recent history of financial regulation, it is vital that the necessity of HOLA-based federal thrifts be reevaluated. The recent crisis has shown that federal thrifts need little to no protection. The market is complex enough, there are numerous sources of residential loans, and it is clear that federal thrifts cannot compete in the market without favorable treatment by the government. Concerns regarding over-regulation and the difficulty of complying with multiple states' rules are unsupported. It is clear that banks have the sophistication to determine which state is best for their interests and which forum—state or federal—will result in more favorable litigation outcomes. Even with the removal of the preemption assumption, banks may still draw out the litigation process.

There are numerous reasons to eliminate the federal thrift charter and minimize the option of charter shopping. HOLA no longer serves its intended purpose, and in fact impedes the very process it was designed to aid. The mortgage industry will not disappear if federal thrifts are eliminated. However, homeowners will have one less barrier to court access. HOLA is no longer a primary source of lending, but is instead a tool for preemption and other trial tactics. With the remaining

232. *See supra* Part II.A.
233. *See supra* Part II.A.
234. *See supra* Part III.A.

federal legislation and entities in place, the federal regulatory scheme will continue to exist. In essence, HOLA is redundant; its benefits, if any, are to the lenders and not to the homeowners.

The sections below outline how the elimination of HOLA would be beneficial to homeowners and states, and how banks may be impacted by the elimination of the federal thrift charter. Given that HOLA is no longer necessary, eliminating the federal thrift charter may be the best solution for all parties. Homeowners would benefit from consistent regulations, easier access to the courts, and adequate remedies for the egregious behavior of lenders. The states would regain some control of areas historically within their domain: real estate, consumer protection, and the mortgage contract. Dodd-Frank has eliminated field preemption, believed to be the largest perk of the thrift charter, and has created an element of uncertainty for the banks. If the elimination of field preemption acts as a de facto repeal of HOLA, then the removal of the federal thrift charter will have limited impact on lending institutions.

A. IMPACT ON HOMEOWNERS

Home equity is the single largest source of wealth for most Americans,[235] and for many it accounts for more than 50% of their assets.[236] Homeowner equity is a critical factor in moving up the economic ladder; as a result, the loss of a home can mean complete financial ruin for many Americans. Over the course of the financial crisis, Americans lost six trillion dollars in home equity, and as of spring 2011 more than one in five homes was in a negative equity position.[237]

Courts have not only applied HOLA when a federal thrift originates the loan and initiates foreclosure, but also when a federal thrift originates the loan but the thrift is later sold, or when a federal thrift merely services a loan.[238] These changes are outside the control of the homeowner, who has no say in the negotiations of the mortgage sale or the selection of the servicing entity. Yet, homeowners' rights change after the execution of the contract in a way that is extremely detrimental.

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235. Frank E. Nothaft and Yan Chang*, Refinance and the Accumulation of Home Equity Wealth¸ in* BUILDING ASSETS BUILDING CREDIT 71 (Nicolas P. Retsinas & Eric S. Belsky eds., 2005).

236. *Id.*

237. DEP'T OF HOUS. & URBAN DEV., EVIDENCE MATTERS: TRANSFORMING KNOWLEDGE INTO HOUSING AND COMMUNITY DEVELOPMENT POLICY '(2011), *available at* http://www.huduser.org/portal/publications/EM_Newsletter_Spring_2011_FNL.pdf.

238. *See, e.g.*, Molosky v. Washington Mut., Inc., 664 F.3d 109 (6th Cir. 2011).

Homeowners do not bargain for a federal court battle when they enter into a mortgage with a state thrift that later transfers its charter, nor is the average homeowner sophisticated enough to know the ramifications of entering into a mortgage with a federal thrift. Thus, a homeowner dealing with foreclosure should not be forced into federal court. When faced with the prospect of losing the most significant measure of their wealth, homeowners should be able to rely on longstanding state foreclosure procedures and common law protections.

The resources necessary to fight a mortgage company in federal court can be overwhelming, even when the bank is at fault. For the homeowner, foreclosure or any legal conflict with a bank is a complex and frustrating process. This, in part, is due to the nature of lending. The mortgage lender is the financial institution that lends the homeowner money, while the mortgage servicer handles the day-to-day tasks of managing a loan. A loan servicer typically processes loan payments, responds to borrower inquiries, keeps track of principal and interest paid, manages an escrow account, and may initiate foreclosure. The servicer may or may not be the same company that issued the loan. In a case of foreclosure, a bank may transfer a note to a trustee to handle the sale, adding yet another party to the equation.

If any party in such a case is a federal institution, federal preemption may be invoked under HOLA and the NBA. While courts generally agree that the NBA does not preempt foreclosure law,[239] this does not stop regulators from invoking preemption, nor does it prevent the OCC from deterring states from taking action against financial institutions.[240] As established in Dodd-Frank, the CFPB should fill the gap in consumer protection if federal regulators are going to attempt to utilize supremacy to let federal institutions avoid compliance with state laws. Unfortunately, to date, the actions of the Bureau have not risen to the same level of protection that a consumer could receive from a state.[241] Federal regulation of financial institutions and instruments is complex, but at the homeowner level, the desires are simpler. Homeowners need a straightforward process for recovery and redress when conflicts arise with their lenders. If homeowners face protracted

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239. Tamburri v. Suntrust Mortg., Inc., 875 F. Supp. 2d 1009, 1018 (N.D. Cal. 2012).

240. *See, e.g.*, CRISIS INQUIRY REPORT, *supra* note 3, at 13.

241. *See supra* Part III.A.

litigation against a federal thrift, they risk losing their homes and are saddled with large legal bills.

The argument that the existence of different levels of regulation harms federal thrifts is not persuasive, as banks and thrifts are already subject to state specific contract, tort, property, and other claims. This argument is especially unpersuasive in light of HOLA's purpose. HOLA was not drafted to create and preserve an institution, nor was it created as a profit source for the banking industry. Since the 1970s, federal thrifts have moved away from their intended purpose and have instead focused on competition, profits, and survival.[242] Savings and loans claim they need uniform laws to stay afloat, yet such uniformity has not worked to prevent market collapse. Federal thrifts should not be given the privilege of uniformity, including access to a federal forum, when it is the homeowner that has suffered and bore the brunt of the recent crisis. This outcome is precisely the opposite of what HOLA originally intended.

Banks and thrifts are sophisticated and have more bargaining power than homeowners, who secure loans from whichever institution offers the lowest interest rate, or in this market, who will provide them a mortgage at all. Consumers do not have the option of refusing a loan based on the fact that an institution is a federal thrift that will subject them to litigation in federal court in the event of a dispute. Thus, homeowners are not in a fair bargaining position, even with the creation of the CFBP and other changes to the market initiated by Dodd-Frank. The elimination of the HOLA-based thrift charter, as well as any corresponding regulatory measures taken to keep the thrifts solvent, will provide relief for homeowners beyond what is attempted by Dodd-Frank.

B. IMPACT ON STATES

The Supreme Court has long recognized that "[p]roperty interests are created and defined by state law."[243] Unlike most scenarios in which forum shopping may arise, a real property plaintiff typically only has two choices—state or federal—because a state has dominion and control of the property within its borders.[244] Unlike torts and other causes of action, only federal preemption can override a state's ability to hear a

242. *See supra* Part II.A.
243. Butner v. United States, 440 U.S. 48, 55–56 (1979).
244. U.S. CONST. amend. X.

case involving a property claim within its territory. Therefore, charter shopping and preemption by a federal institution can infringe not only on a plaintiff's rights, but on a state's rights as well.

A state has the ability to be progressive or conservative and to contradict national trends if it is the will of its citizens. Due to full faith and credit,[245] state regulations have the power to create sweeping reforms. In the case of banking, a bank's ability to switch charters, or even change the character of its institution, creates a market-based check on state overregulation. If state regulations are overly restrictive, a bank can choose to avoid the market altogether—a prospect that could be catastrophic to a state's economy. Thus, the market provides both an incentive to lend and an incentive for states to strike a regulatory balance. Federal involvement is not necessary to encourage either the banks or the states. In the recent meltdown, even as signs of an impending housing crisis appeared and states attempted to curb the impact, banks did not cease to engage in residential lending in the face of action by the states. Instead, institutions switched charters and used their resources to fight attorney generals, deny homeowner access to the courts, and influence regulators.[246]

The federal government has proven that it is slow to react to changes in the residential mortgage industry, and that the changing tides in Washington can have a major impact on its regulation of mortgage servicing.[247] The OCC and CFPB, which have a dual incentive to preserve banking and protect consumers, are slow to react and operate in a hostile climate. Dodd-Frank conformed HOLA to NBA preemption; however, to date the OCC regulations have not fully eliminated all of the preemptive preferences outlined in the HOLA regulations.[248] Further, while the CFPB has been tasked with filling the gaps in consumer protection regulations within the federal system, to date there are no federal regulations in existence to mirror the state causes of action that are still preempted by HOLA.[249] Meanwhile, states continue to face preemption in connection with some of the worst mortgages due to Dodd-Frank's failure to apply retroactively.

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245. U.S. CONST. art. IV, § 1.
246. *See supra* Part I.
247. *See supra* Parts I and III.A.
248. *See supra* Part III.A.
249. *See supra* Part III.A.

States have proven that they are capable of adapting to an impending crisis faster than the federal government. In the face of opposition from the OTS and OCC, many states continued to advance legislation to regulate financial institutions. In 1999, North Carolina passed legislation establishing a 5% fee trigger—a rate 3% lower than the federal regulations—that designated a loan as high risk and subjected it to state regulation. North Carolina's act also banned prepayment penalties for mortgages under $150,000 and prohibited loan flipping (repeated refinancing).[250] Eventually, the OCC joined the OTS's efforts to restrain state activities in regulations issued in 2004. In 2006 alone, state attorney generals launched more than 3,000 enforcement actions.[251] States also teamed up to produce large settlements with banks. In the face of HOLA preemption, other states followed North Carolina, and by 2007, twenty-nine states and the District of Columbia had passed anti-predatory lending legislation.[252] Instead of changing their behavior, banks and thrifts relied on preemption to evade state legislation, thus worsening the impact of the financial crisis. When homeowners filed suit against lenders pursuant to state legislation aimed at combating wrongful lending practices, thrifts and national banks raised preemption as a defense, thereby prolonging litigation and usurping state control.

It is clear from HOLA's intent that the OTS has overstepped its bounds, and that legislative efforts to keep thrifts afloat have completely shifted the focus. The mortgage crisis proved that banking and securities regulations are subject to the whims of politics. For example, an era of deregulation led to the lingering financial crisis, which was in part caused by a historical number of mortgage defaults and foreclosures. With much of state revenues linked to the value of property, particularly in states that do not have an income tax, OTS and OCC regulations have resulted in a catastrophic impact on state revenues. Congress never intended for the OTS to preempt state laws with regulations and then fail to enact similar protections for consumers. Unfortunately, the OTS had no incentive to enact consumer protection

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250. CRISIS INQUIRY REPORT, *supra* note 3, at 96 (citing Raphael W. Bostic et al., *State and Local Anti-Predatory Lending Laws: The Effect of Legal Enforcement Mechanisms*, 60 J. ECON. & BUS. 47 (2008)).

251. *Id.* (citing *Mortgage Market Turmoil—Causes and Consequences: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 110th Cong. 33 (2007) (statement of Joseph A. Smith, Jr., North Carolina Commissioner of Banks)).

252. *Id.*

legislation—particularly since the budget of the OTS is funded with fees paid by the very banks it regulated.

Real estate law has always varied from state to state, but this variation has not impacted access to credit to date. States are financially incentivized to protect homeowners because many states rely on property taxes as a primary source of revenue. As a result, it is in a state's interest to prevent foreclosures because it is inevitable that they will impact property values, impose costs on state and local governments, and lead to an increase in crime. States cannot create money like the federal government, with access to the Federal Reserve, and in times of economic crisis, states encounter the same limited availability of credit and higher interest rates as private citizens and entities. In addition, the recent crisis proves that industries and lobbyists induce federal regulators to create lax regulations that cause harm to consumers. At the very least this influence slows down the process of developing reforms, and at its worst it can leave homeowners completely unprotected. Thus, states are in the best position to implement laws to protect the interests of homeowners within their jurisdiction.

Therefore, the problem is not a particular agency.[253] An analysis of the most recent crisis indicates that the problem may be federal intervention within areas that are better regulated by the states. While preemption is based on a determination of congressional intent to displace the police power of states, the recent use of HOLA to avoid state court efforts to stall foreclosures and police high risk practices of lenders warrants a reexamination of the Homeowner's Loan Act. The OTS declaration of field preemption places a federal agency in control of an area better suited, and many would argue, intended to be state-controlled. Dodd-Frank subjects thrifts to conflict preemption; however, the Act does not consider whether federal intervention is necessary at all or if the thrift is an institution worth preserving. The drafters ignored the default presumption against preemption[254] and instead sought to create a less damaging regime. The outcome of the financial crisis confirms that the federal thrifts' interest in maintaining consistent regulations does not outweigh a state's desire to curb predatory lending

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253. Dain C. Donelson & David Zaring, *Requiem for a Regulator: the Office of Thrift Supervision's Performance During the Financial Crisis*, 89 N.C. L. REV. 1777, 1780 (2011).

254. For a discussion of federalism and preemption, see *infra* Part I.

or other high-risk behavior in the interest of economic stability. Conflict preemption may not provide states with adequate authority to regulate thrifts, as demonstrated by the actions of the OCC. Banks should not have the option to charter shop or forum shop in the face of state attempts at regulation that are still more restrictive and punitive than federal equivalents.

Because states are quicker to react to changes in the lending market and have an interest in controlling issues related to real estate transactions within their borders, state actions should not be preempted. The solution is simple in light of HOLA's purpose: HOLA should be eliminated. This will provide the states with the authority they need to protect homeowners, real estate values, and revenue. Through the repeal of HOLA states will regain some of the control necessary to prevent another crisis, or at least lessen the impact of negative influences on the residential real estate market.

C. IMPACT ON BANKS

Since the 1970s, federal thrifts have fought a losing battle to maintain market share and remain profitable. Competition from non-bank lenders, unrestricted by federal banking rules, has created a market in which it is difficult for federal thrifts to survive without government intervention. The growth of the "shadow banking" system allowed institutions performing the same market functions as banks to escape regulation due to their corporate structure, while banks and thrifts used subsidiaries within the shadow banking system to move activities off balance sheet and outside the reach of more stringent regulation.[255] It is nearly impossible for thrifts to remain solvent because hedge funds, investment banks, brokerage funds, and other institutions have been allowed to offer the same financial products without the restrictions that thrifts face. The recent crisis has proven that the remedy is not to expand the scope of control for large banks and thrifts—such as engaging in the same practices as non-deposit taking financial institutions—which creates perverse incentives by creating "too-big-to-fail" institutions.[256]

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255. Barr, Address on Financial Reform: The Dodd-Frank Act, One Year On, *supra* note 161.

256. HAMID MEHRAN, ALAN MORRISON & JOEL SHAPIRO, FEDERAL RESERVE BANK OF NEW YORK STAFF REPORT NO. 502: CORPORATE GOVERNANCE AND BANKS: WHAT HAVE WE LEARNED FROM THE FINANCIAL CRISIS? 18–19 (2011) (discussing how

The savings and loan crisis of the 1980s proved that eliminating the restrictions on federal thrifts does not increase solvency. FIRREA's changes to HOLA, as well as the adoption of uniform governance and a strong jurisdictional preference for thrifts through field preemption, also failed to prevent a near-collapse. This phenomenon does not indicate a need for looser federal guidelines or the creation of additional incentives to entice banks to hold federal thrift charters. Instead, it is evidence that the economic situation that prompted the development of HOLA has disappeared, and that the thrift charter is no longer necessary to stabilize residential lending.

Under Dodd-Frank, all aspects of a financial institution, regardless of the form, will be subject to federal oversight under the CFPB. Many argue that the additional oversight proposed by Dodd-Frank outweighs any benefits of maintaining a thrift charter, particularly in the absence of field preemption. This is particularly true for institutions that relied on subsidiary preemption to extend field preemption to other aspects of their business. It is possible that in the face of competition from non-bank institutions and with the option of switching to a state charter, the Dodd-Frank changes will act to eliminate the federal thrift charter purely through economic forces.

There have always been disadvantages to maintaining a federal thrift charter; yet, at the height of the era of lending that sparked the financial crisis, federal thrift loans accounted for as many as one third of all mortgage loans originated in the U.S.[257] This may be because the OTS allowed federal thrifts to engage in activities unrelated to residential lending and to enjoy protection of deposits by the FDIC, while not being subject to states' attempts to minimize the impact of the crisis or homeowners' attempts to recover under state laws.[258] With these perks eliminated, much of what remains after Dodd-Frank are the downsides of maintaining a thrift charter. Federal thrifts continue to face a lending limit for commercial loans equal to 20% of total assets,[259] as well as a cap on nonresidential real property loans set at 400% of capital.[260] Thrifts are also prohibited from making secured consumer

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allowing banks to become too big to fail through expanded scope of activities and conglomeration may have weakened the market).

257. *See supra* Part I for a discussion of the role of federal thrifts in the financial crisis.

258. *Id.*

259. *See* 12 U.S.C. § 1464(c)(2)(A) (2006); 12 C.F.R. § 560.30 (2012).

260. *See* 12 U.S.C. § 1464(c)(2)(B).

loans and from holding commercial paper and corporate debt securities in excess of 35% of their assets.[261] Although under the purview of the CFPB, non-bank lenders are not subjected to restrictions of this magnitude, even following the economic collapse. Dodd-Frank also codifies the Supreme Court holding in *Cuomo v. Clearing House Association*[262] in §1047 of the Act, which will likely increase actions by state attorney generals against institutions to enforce compliance with non-preempted state laws. Although attorney general enforcement is somewhat limited by the Dodd-Frank Act, the codification of *Cuomo* will increase actions for reasons beyond the restrictions.[263]

Thus, while the only clear protection in Dodd-Frank applies to state consumer protection laws, it is possible that Dodd-Frank will work to eliminate the federal thrift because of its stance on preemption. The uncertainty alone may cause banks to abandon the federal thrift charter. To determine whether the thrift charter is worthwhile, banks must determine whether the preemption standard of Dodd-Frank will provide adequate protection from state regulation of activities. However, after decades of relaxed restrictions, it is evident that the banks do not need the ability to choose between federal and state thrifts. The institutions do not need an incentive to engage in residential lending. HOLA was drafted to provide a funding resource for homeowners, not a shelter for the banks.

CONCLUSION

The refrain "too big to fail" is frequently used in reference to the size of financial institutions and the impact that their failure would have on the economy. Analysts attest that allowing the collapse of these

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261. *See id.* § 1464(c)(2)(D).

262. 557 U.S. 519, 529–30. *Cuomo* holds that even though the NBA preempted state administrative oversight for national bank subsidiaries, state attorneys general remained empowered to enforce state law. *Cuomo* also notes the OCC's role in the financial crisis. Writing for the atypical majority (which includes Justices Stevens, Souter, Ginsburg and Breyer), Justice Scalia states while the OCC has "visitorial powers," the right to examine the affairs of a corporation, that does not mean that it has the exclusive right to enforcement. "A sovereign's 'visitorial powers' and its power to enforce the law are two different things. Contrary to what the [OCC's] regulation says, the National Bank Act pre-empts only the former." *Id.* at 529. Scalia noted that states "have always enforced their general laws against national banks——and have enforced their banking-related laws against national banks for at least 85 years." *Id.* at 534.

263. Dodd-Frank Act § 1042(a)(2) (stating that an attorney general may not enforce Dodd-Frank against federal savings associations without advising the CFPB).

institutions would have led to an even more catastrophic economic crisis. The Dodd-Frank Act is now necessary to prevent a similar crisis from occurring. However, legislation does not address the tools that the government gave to institutions in the interest of preventing the failures that contributed to the collapse. In the last two decades, HOLA preemption became a weapon against litigation by homeowners.

Many feel that deregulation and expansive preemption are at least partially responsible for the severity of the housing crisis. Allowing financial institutions to choose between state and federal charters with varying degrees of regulations worked to the detriment of all parties involved, with the homeowner bearing the brunt of the injury. Federal institutions took advantage of supremacy and competed directly with states for the business of banks. In response, states were forced to expend resources to fight federal overstepping and to compete with the federal government to maintain state institutions. Then, when the system began to fail, banks took advantage of a combination of relaxed federal laws and confusion stemming from uncertainty on which of the numerous institutions were actually responsible.

Federal thrifts do not stabilize the housing market, but instead have contributed to two major financial crises. Therefore, if federal thrifts cannot survive in the market without incentives from the federal government, they should be allowed to fail. Federal thrifts no longer serve their original purpose and instead act counter to that purpose. By repealing the federal thrift, the residential lending market will be simplified for the consumer. The states will have one less obstacle to overcome in promoting consumer protection and other laws favorable to homeowners. Banks may also benefit from the elimination of a source of uncertainty in a climate of extensive reforms. Because state laws can adequately protect homeowners, and many of the perks of maintaining a federal thrift have been removed, it is in the best interest of all parties to eliminate the federal thrift charter.