Constitutional Law - Supremacy Clause - Authority of an Independent Federal Regulatory Agency to Preempt - Application of State Mortgage Law to Federal Savings and Loan Associations - Due-on-Sale Clause

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CONSTITUTIONAL LAW—SUPREMACY CLAUSE—AUTHORITY OF AN INDEPENDENT FEDERAL REGULATORY AGENCY TO PREEMPT—APPLICATION OF STATE MORTGAGE LAW TO FEDERAL SAVINGS AND LOAN ASSOCIATIONS—DUE-ON-SALE CLAUSE—The Supreme Court of the United States has held that the Federal Home Loan Bank Board's regulation of the use of due-on-sale clauses by federal savings and loan associations is preemptive of conflicting state law.


The Federal Home Loan Bank Board, an independent federal regulatory agency, was created in 1932, and was subsequently vested with complete authority to administer the Home Owners’ Loan Act of 1933 (HOLA). HOLA provided the Board with authority to regulate the powers and operations of federal savings and loan associations. Pursuant to this authorization, the Board has extensively regulated federal savings and loan associations throughout their corporate lives.

In 1976, due to the increased controversy over federal savings and loan associations’ exercise of due-on-sale clauses in loan instruments, the Board issued a regulation declaring that every fed-

   In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as ‘Federal Savings and Loan Associations’ . . . and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States. . . .
4. 102 S. Ct. at 3018. See People v. Coast Fed. Sav. & Loan Ass’n, 98 F. Supp. 311, 316 (S.D. Cal. 1951)(the Board has promulgated regulations governing every federal savings and loan association “from its cradle to its corporate grave”).
5. A due-on-sale clause is “a contractual provision that permits the lender to declare the entire balance of a loan immediately due and payable if the property securing the loan is sold or otherwise transferred.” 102 S. Ct. at 3018.
6. Id. See 12 C.F.R. § 545.8-3(f)-(g)(1982). The relevant portion of this regulation, which became effective July 31, 1976, provides:
eral savings and loan association continued to have the power to include, as a matter of contract, due-on-sale clauses in loan instruments. The Board believed that restrictions on a federal savings and loan association's ability to utilize the due-on-sale clause to accelerate a loan upon transfer of the security would adversely effect its operation by: (1) endangering the financial stability of the association by allowing the security property to be transferred to a person whose ability to repay the loan and maintain the property is inadequate; (2) causing a substantial reduction in the net income and cash flow of federal associations thereby forcing such associations to charge higher interest rates on new home loans; and (3) impairing the ability of federal associations to sell their home loans in the secondary mortgage market, as restrictions on the due-on-sale clause tend to make such loans unsalable or marketable only at reduced prices, further reducing the flow of funds for new residential loans. Further, in a preamble which accompanied the publication of the regulation, the Board expressed its intent that fed-

(f) Due-on-sale clauses. An association continues to have the power to include, as a matter of contract between it and the borrower, a provision in its loan instrument whereby the association may, at its option, declare immediately due and payable sums secured by the association's security instrument if all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written consent. Except as provided in paragraph (g) of this section with respect to loans made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, exercise by the association of such option (hereafter called a due-on-sale clause) shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the association and borrower shall be fixed and governed by that contract.

(g) Limitations on the exercise of due-on-sale clauses. With respect to any loan made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, a Federal association may not exercise a due-on-sale clause based on any of the following: (i) Creation of a lien or other encumbrance subordinate to the association's security instrument; (ii) Creation of a purchase money security interest for household appliances; (iii) Transfer by devise, descent, or by operation of law upon the death of a joint tenant; or (iv) Grant of any leasehold interest of three years or less not containing an option to purchase.

Id.

7. 102 S. Ct. at 3018. See Late Charges and Due-on-Sale Clauses, 41 Fed. Reg. 6283, 6285 (1976)(to be codified at 12 C.F.R. pt. 545). The Board determined that limitations upon the ability of federal savings and loan associations to enforce due-on-sale clauses would contain detrimental effects, and would benefit only a minority of home sellers while economically burdening the majority of home buyers and potential buyers in the real estate market. Id.


9. Amendments Relating to Late Charges and Due-on-Sale Clauses, 41 Fed Reg. 18,286, 18,287 (1976) (to be codified at 12 C.F.R. § 545.6-11). The preamble stated: Finally, it was and is the Board's intent to have ... due-on-sale practices of Federal associations governed exclusively by Federal law. Therefore ... exercise of due-on-
eral law would exclusively govern the due-on-sale practices of federal associations.\textsuperscript{10}

The appellant, Fidelity Federal Savings and Loan Association,\textsuperscript{11} maintains its principal place of business in Glendale, California. Fidelity had loaned money to individuals who in return had given to Fidelity deeds of trust on real property as security.\textsuperscript{12} De la Cuesta, Moore, and Whitcombe, the appellees, each purchased realty from the individuals indebted to Fidelity.\textsuperscript{13} Each deed of trust held by Fidelity included a due-on-sale clause.\textsuperscript{14} Two of the deeds

sale clauses by Federal associations shall be governed and controlled solely by (§ 545.8-3) and the Board's new Statement of Policy. Federal associations shall not be bound by or subject to any conflicting State law which imposes different . . . due-on-sale requirements, nor shall Federal associations attempt to . . . avoid the limitations on the exercise of due-on-sale clauses delineated in (§ 545.8-3(g)) on the ground that such . . . avoidance of limitations is permissible under State law.

\textit{Id.}

Prior to the enactment of the due-on-sale regulation, 12 C.F.R. § 545.8-3(a)(1982) was interpreted by the Board as providing for federal associations to exercise due-on-sale clauses regardless of state law to the contrary, because acceleration of the loan upon the transfer of the security property would help to ensure full protection to the lender. Schott v. Mission Fed. Sav. & Loan Ass'n, Fed. Home Loan Bank Board Resolution No. 75-647 (July 30, 1975).

10. Id. 102 S. Ct. at 3019. See supra note 9.
12. 102 S. Ct. at 3019.
13. \textit{Id.} Fidelity was not notified of the transfers prior to each appellee's acquisition of property. \textit{Id.}
14. \textit{Id.} Two of the deeds of trust contained paragraph 17 of the uniform mortgage instrument, the due-on-sale clause developed by the Federal Home Loan Mortgage Corporation and the Federal National Mortgage Association. 102 S. Ct. at 3018 n.2. Paragraph 17 provides:

Transfer of the Property; Assumption. If all or any part of the Property or an interest therein is sold or transferred by Borrower without Lender's prior written consent, excluding (a) the creation of a lien or encumbrance subordinate to this Deed of Trust, (b) the creation of a purchase money security interest for household appliances, (c) a transfer by devise, descent or by operation of law upon the death of a joint tenant or (d) the grant of any leasehold interest of three years or less not containing an option to purchase, Lender may, at Lender's option, declare all the sums secured by this Deed of Trust to be immediately due and payable. Lender shall have waived such option to accelerate if, prior to the sale or transfer, Lender and the person to whom the Property is to be sold or transferred reach agreement in writing that the credit of such person is satisfactory to Lender and that the interest payable on the sums secured by this Deed of Trust shall be at such rate as Lender shall request. If lender has waived the option to accelerate provided in this paragraph 17 and if Borrower's successor in interest has executed a written assumption agreement accepted in writing by Lender, Lender shall release Borrower from all obligations under this Deed of Trust and the Note.

\textit{Federal Home Loan Mortgage Corp. & Federal Nat'l Mortgage Ass'n, Uniform Mortgage Instrument ¶ 17 (1979).} See 102 S. Ct. at 3018 n.2.
also contained a provision calling for the deed to be governed by
the law of the jurisdiction of the situs of the property.15 Fidelity,
upon receiving notice of the transfers, evinced its intention to en-
force the due-on-sale clauses.16 Fidelity exercised its option to ac-
celerate the loans, and when the loans were not paid, commenced a
nonjudicial foreclosure proceeding.17

The appellees each filed suit in the Superior Court of California
for Orange County,18 asserting that under Wellenkamp v. Bank of
America,19 Fidelity's use of the due-on-sale clauses constituted an
unreasonable restraint upon alienation.20 After consolidating the
three actions, the superior court granted Fidelity's motion for sum-
mary judgment.21 The superior court held that the Wellenkamp
decision could not be extended to federal associations because the
federal government had completely occupied the field of regulation
of federal associations.22

The California Court of Appeals for the Fourth Appellate Dis-
trict found Wellenkamp to be controlling and thus reversed.23 Act-
ing Judge Kaufman determined that Congress had failed to ex-
press an intent to preempt state due-on-sale law, or to totally
occupy the field of federal savings and loan regulation.24 Further,

15. 102 S. Ct. at 3019. Paragraph 15 of the uniform mortgage instrument states: "This
Deed of Trust shall be governed by the law of the jurisdiction in which the Property is
located." FEDERAL HOME LOAN MORTGAGE CORP. & FEDERAL NAT'L MORTGAGE ASS'N, UNI-
16. 102 S. Ct. at 3019-20. Fidelity had offered to agree to the transfers if the appellees
would consent to an increase in the interest rate on the loans to the then prevailing market
rate; the appellees refused to consent to such an adjustment. Id. at 3020.
17. Id.
18. Id. Each complaint sought (1) a judicial declaration that the due-on-sale clause
was not enforceable unless there was a showing that the transfer would impair Fidelity's
security interest, (2) an injunction against any foreclosure proceedings, and (3) compen-
satory and punitive damages. Id. Further, the complaints alleged slander in malicious publica-
tions by Fidelity of false charges that the appellees were in default under the deeds of trust.
Id. at 3020 n.6.
20. 102 S. Ct. at 3020. In Wellenkamp, the California Supreme Court had determined
that unless a lender could show that the transfer of property would impair its security or
risk default, the enforcement of a due-on-sale clause would violate the California prohibition
on unreasonable restraints on alienation. 21 Cal. 3d at 953, 582 P.2d at 977, 148 Cal Rptr. at
386. See CAL. CIVIL CODE § 711 (West 1954).
21. 102 S. Ct. at 3020.
22. Id.
23. Id. See de la Cuesta v. Fidelity Fed. Sav. and Loan Ass'n, 121 Cal. App. 3d 328,
24. 102 S. Ct. at 3020. The California court of appeal noted that federal associations
had long been subject to state real property and mortgage law dealing with conveyancing,
recording, foreclosure proceedings, and priority of liens. 121 Cal. App. 3d at 337, 175 Cal.
Judge Kaufman refused to find either an express preemption of the *Wellenkamp* doctrine by the Board's 1976 regulation, or an implied preemption of the California due-on-sale law. The court of appeal found further support for its decision from the provision in two of the deeds which stated that the law of the jurisdiction where the property was located would govern. Judge Kaufman felt that such a provision displayed an intent that state law would govern the deeds. The appellant's petition to the California Supreme Court for review was denied. The United States Supreme Court noted that the majority of courts which had considered the preemptive effect of the Board's due-on-sale regulation had decided in the affirmative, thus the Court noted probable jurisdiction.

Justice Blackmun, author of the majority opinion, observed that the federal preemption doctrine requires an examination of congressional intent, which may be either express or implied. He

Rptr. at 472.

25. 102 S. Ct. at 3020. The court of appeal recognized the Board’s intent to preempt conflicting state law by the preamble to 12 C.F.R. § 545.8-3(f)(1982), but failed to equate the intention of the Board with that of Congress. In addition, the court observed that two of the three deeds were executed prior to the effective date of the due-on-sale regulation, July 31, 1976, and therefore the two deeds were not subject to that regulation and any preemptive effect it might hold. 121 Cal. App. 3d at 339, 175 Cal. Rptr. at 474.

26. 102 S. Ct. at 3020-21. Judge Kaufman reasoned that there was no conflict between federal and California due-on-sale law, because the Board’s due-on-sale regulation was merely permissive and not mandatory. He likewise found the purposes of the federal and California law compatible, reasoning that both assisted financially distressed homeowners. 121 Cal. App. 3d at 342, 175 Cal. Rptr. at 475.

27. 102 S. Ct. at 3021. The provision of the deeds at issue was paragraph 15 of the Federal Home Loan Mortgage Corporation and Federal National Mortgage Association Uniform Mortgage Instrument. See *supra* note 15.

28. 102 S. Ct. at 3021. See 121 Cal. App. 3d at 346, 175 Cal. Rptr. at 477.


30. 102 S. Ct. at 3021-22. See Price v. Florida Fed. Sav. & Loan Ass'n, 524 F. Supp. 175, 178 (M.D. Fla. 1981) (there are no federal court decisions which have not found 12 C.F.R. § 545.8-3(f)(1982) to be preemptive). But see Holiday Acres No. 3 v. Midwest Fed. Sav. & Loan Ass'n, 308 N.W.2d 471 (Minn. 1981)(12 C.F.R. § 545.8-3(f) does not preempt Minnesota regulation of due-on-sale clauses). See also *infra* notes 132-66 and accompanying text.


32. Justice Blackmun's majority opinion was joined by Chief Justice Burger and by Justices Brennan, White, Marshall and O'Connor. Justice O'Connor also filed a separate concurring opinion. Justice Rehnquist filed a dissenting opinion in which Justice Stevens joined. Justice Powell took no part in the decision.

33. 102 S. Ct. at 3022. The preemption doctrine has its roots in the supremacy clause of the United States Constitution. U.S. Const., art. VI, cl. 2 See *infra* note 105.

found that preemption is required when the federal statute explicitly so states, or when the purpose and structure of the statute implicitly leads to preemption.\textsuperscript{35} Further, in areas in which Congress has not completely displaced state regulation, state law is nullified only to the extent of its actual conflict with federal law.\textsuperscript{36} Justice Blackmun noted that a conflict arises when application of the state law would prevent the accomplishment of the purpose of the federal law,\textsuperscript{37} or when it is impossible to comply with both federal and state law.\textsuperscript{38} He stated that this principle will apply even though real property is a matter of special concern to the states, for the Constitution provides for federal law to prevail when there is a conflict.\textsuperscript{39}

The majority observed that federal regulations have the same preemptive effect as federal statutes.\textsuperscript{40} He further stated that judicial review of a federal regulation intended to preempt state law is limited to an inquiry of whether the regulation was a reasonable accommodation of conflicting policies that Congress would have sanctioned, and that is was promulgated within the scope of the administrator’s statutory authority.\textsuperscript{41} Justice Blackmun noted that

Congress’ intent to preempt state law may be implied because:

The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. Or the state policy may produce a result inconsistent with the objective of the federal statute.

\textit{Id.} at 230 (citations omitted).


\textsuperscript{36} 102 S. Ct. at 3022.

\textsuperscript{37} Id. See Hines v. Davidowitz, 312 U.S. 52, 67 (1941). A conflict is present when state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” \textit{Id.} at 67.

\textsuperscript{38} 102 S. Ct. at 3022. See Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963). A conflict exists where “compliance with both federal and state regulations is a physical impossibility.” \textit{Id.} at 142-43. See also infra notes 114-18 and accompanying text.

\textsuperscript{39} 102 S. Ct. at 3022. The importance which a state places upon its own law is not dispositive when such law is in conflict with a valid federal law. \textit{Id.} See Free v. Bland, 369 U.S. 663, 666 (1962)(the framers of the Constitution provided that federal law must prevail).

\textsuperscript{40} 102 S. Ct. at 3022.

\textsuperscript{41} Id. See United States v. Shimer, 367 U.S. 374, 381-83 (1961). The \textit{Shimer} Court found that when Congress has directed an administrator to exercise discretion in carrying out his duties, the scope of judicial review of his decisions would be limited to a determination of whether he exceeded his statutory authority or acted arbitrarily. \textit{Id.} at 381-82. See also Ridgway v. Ridgway, 454 U.S. 46, 57 (1981)(regulations must not be “unreasonable, unauthorized or inconsistent with” the underlying statute).
the preemptive effect of a federal regulation does not depend upon express congressional authorization to displace state law. In so noting, he explicitly found the California court of appeal's focus on congressional intent misdirected.\textsuperscript{42}

Justice Blackmun determined the issues before the Court to be: whether the Board intended to preempt the conflicting California due-on-sale law, and if so, whether that action was within the scope of the Board's statutory authority.\textsuperscript{43}

Justice Blackmun stated that, as the California court of appeal recognized, the Board's intent to preempt conflicting state law developed in \textit{Wellenkamp v. Bank of America}\textsuperscript{44} was unambiguous.\textsuperscript{45} The conflict arose between the Board's due-on-sale regulation\textsuperscript{46} which declares that federal savings and loan associations continue to have the power to include due-on-sale clauses in their loan instruments and to enforce such clauses at their option, and the \textit{Wellenkamp} doctrine\textsuperscript{47} which has limited the right to enforcement of a due-on-sale clause to instances in which the lender could show that the transfer has impaired its security.\textsuperscript{48} Justice Blackmun noted that the conflict between the federal regulation and California law did not disappear simply because the language of the regulation was permissive and not mandatory, because a major objective of the Board was to afford associations flexibility in the use of due-on-sale clauses.\textsuperscript{49} Justice Blackmun observed that although arguably it could be possible to comply with both the federal regulation and the \textit{Wellenkamp} doctrine, the California rule deprived lenders of the flexibility given to them by the Board by forbidding federal savings and loan associations from enforcing due-on-sale clauses solely at their option.\textsuperscript{50} The Court found further conflict in that \textit{Wellenkamp} explicitly denies a federal savings and loan asso-

\begin{itemize}
\item \textsuperscript{42} 102 S. Ct. at 3023.
\item \textsuperscript{43} Id.
\item \textsuperscript{44} 21 Cal. 3d 943, 582 P.2d 970, 148 Cal. Rptr. 379 (1978).
\item \textsuperscript{45} 102 S. Ct. at 3023.
\item \textsuperscript{46} 12 C.F.R. \S 545.8-3(f)(1982).
\item \textsuperscript{47} 21 Cal. 3d 943, 582 P.2d 970, 148 Cal. Rptr. 379 (1978).
\item \textsuperscript{48} Id. at 953, 582 P.2d at 977, 148 Cal. Rptr. at 386. \textit{See supra} notes 18-20 and accompanying text.
\item \textsuperscript{49} 102 S. Ct. at 3023.
\item \textsuperscript{50} Id. \textit{See} 12 C.F.R. \S 556.9(f)(1)(1982). The Board did not mandate the use of due-on-sale clauses because it desired "to afford associations the flexibility to accommodate special situations and circumstances." Id.
\end{itemize}

Practically, most mortgage instruments contain a due-on-sale clause. The inclusion of such a clause is necessary for sale in the secondary mortgage market, which is an important means of federal savings and loan associations' income. 102 S. Ct. at 3023 n.10.
ciation the right to use a due-on-sale clause for the purpose of adjusting a long term mortgage interest rate towards the prevailing market rates, a policy which the Board has viewed as essential for the stability of the industry. Because California law had created an obstacle to the attainment of the objectives and purposes of the due-on-sale regulation, the Court found that a conflict was created.

The majority then considered the appellees' contention that the \textit{Wellenkamp} doctrine was consistent with the due-on-sale regulation because the regulation incorporated state contract law, including any state restrictions on the utilization of a due-on-sale clause. He rejected this argument by observing that an incorporation of state law does not necessarily render federal law inapplicable, because included in every state's laws are the Constitution, laws and treaties of the United States. Justice Blackmun interpreted the due-on-sale regulation to mean that a federal savings and loan association could accelerate a loan upon transfer of the secured property only if the parties had given the lender the right to enforce it as a matter of contract.

The Court concluded that the Board intended to preempt conflicting state law on federal savings and loan associations usage of due-on-sale clauses. Justice Blackmun cited the preamble to the Board's due-on-sale regulation as unequivocally expressing the Board's preemptive intent. In addition, the Board had recently

51. 102 S. Ct. at 3023-24. The Board's only restrictions on federal association enforcement of due-on-sale clauses can be found in 12 C.F.R. § 545.8-3(g)(1982). See supra note 6.
52. California had created "an obstacle to the accomplishment and execution of the full purposes and objectives" of the federal regulation in light of the fact that the Board considered this option essential to the sound economy of the thrift industry. 102 S. Ct. at 3024 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). See supra note 37.
53. 102 S. Ct. at 3024. The portion of 12 C.F.R. § 545.8-3(f)(1982), upon which appellees relied states: "[e]xercise by the association of such option (hereafter called a due-on-sale clause) shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the association and borrower shall be fixed and governed by that contract." Id.
54. 102 S. Ct. at 3024. See Hauenstein v. Lynham, 100 U.S. 483, 490 (1879). "[T]he Constitution, laws and treaties of the United States are as much a part of the law of every state as its own local laws and Constitution." Id. Thus, the Court rejected appellees' argument that in two of the three deeds appellant had agreed to be bound by local law by providing for the loan instrument to be governed by the terms of the loan contract, and all rights and remedies of the association and borrower shall be fixed and governed by that contract. 102 S. Ct. at 3024 n.12. See also supra note 15.
55. 102 S. Ct. at 3024. If the parties agreed to limit an association's right to exercise a due-on-sale clause, the second sentence of 12 C.F.R. § 545.8-3(f)(1982) could preclude the lender's reliance on the first sentence of § 545.8-3(f) as authorizing a more liberal use of the due-on-sale provision. See supra note 6.
56. 102 S. Ct. at 3024-25. The Board's preamble to 12 C.F.R. § 545.8-3(f)(1982) states
confirmed that Board regulations would exclusively govern the due-on-sale practices of federal savings and loan associations without regard to state law. Justice Blackmun stated that since an actual conflict between federal and state law was found to exist, there was no need to decide whether the HOLA or the Board's regulations occupied the field of due-on-sale law.

The Court next focused its attention on whether the Board, in promulgating the preemptive due-on-sale regulation, acted within its statutory authority. The Court found that the language and history of the HOLA showed a delegation of authority to the Board to regulate the lending practices of federal savings and loan associations to further the Act's purposes, and that the Board's due-on-sale regulation is consistent with those purposes.

Justice Blackmun noted that the HOLA, enacted as a result of the depression of the 1930's, was intended to provide emergency aid in the area of home mortgage indebtedness during a time when half of the home loans in the country were defaulting. He explained that previously, local institutions had been responsible for supplying funds to finance homes, but they had failed dismally during the depression as over half of the counties in the country were without an institution for home financing. In response to the inadequacies of the state systems, Congress enacted the HOLA. Justice Blackmun observed that the HOLA provided for

that it is the intention of the Board to have the due-on-sale practices of federal savings and loan associations' governed exclusively by federal law. 41 Fed. Reg. 18,286, 18,287 (1976). See supra note 9 for the text of the preamble.

The Court expressed its opinion that 12 C.F.R. § 545.8-3(f)(1982) on its face intended to preempt conflicting state due-on-sale law. The preamble was referred to only as a tool for administrative construction of the regulation. 102 S. Ct. at 3025 n.13.

57. 102 S. Ct. at 3025. See 12 C.F.R. § 556.9(f)(2)(1982), a recent Board regulation, where it is said that the due-on-sale practices of federal associations "shall be governed exclusively by the Board's regulations in preemption of and without regard to any limitations imposed by state law on either their inclusion or exercise. . . ."

58. 102 S. Ct. at 3025 n.14.
59. Id. at 3025.
60. Id.
the creation of federal savings and loan associations, and vested in the Board plenary power to regulate these associations in such a manner as to ensure their permanency in promoting the financing of homes. The Court then observed that the broad language of the HOLA presents no limitations upon the Board’s power to regulate federal associations’ lending practices, and Congress’ explicit delegation of jurisdiction over the operation of federal associations certainly empowered the Board to issue regulations concerning mortgage loan instruments. The Court further explained that Congress had anticipated that federal savings and loan associations would be governed by what the Board thought were the best practices in the loan industry, and not by what a particular state might suggest to be the best method of operation. The Court concluded that the statutory language suggested congressional anticipation and approval of the Board’s promulgation of regulations which would supersede state law.

Justice Blackmun also considered the appellees’ argument that because certain sections of the HOLA specifically preempted and incorporated state law, the Board had no additional authority to

(9th Cir. 1979), aff’d mem., 445 U.S. 921 (1980) (the HOLA was enacted as “a radical and comprehensive response to the inadequacies of the existing state systems”).

64. 102 S. Ct. at 3026. Home Owners’ Loan Act of 1933, § 5(a), 12 U.S.C. § 1464(a)(1976 & Supp. V. 1981). See supra note 3. See also S. REP. No. 91, 73d Cong., 1st Sess. 2 (1933)(regulations by the Board should ensure federal associations’ 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”).

65. 102 S. Ct. at 3026. See Glendale Fed. Sav. & Loan Ass’n v. Fox, 459 F. Supp. 903, 910 (C.D. Cal. 1978) (“[i]t would have been difficult for Congress to give the Bank Board a broader mandate”), rev’d on other grounds, 663 F.2d 1078 (9th Cir. 1981), cert. denied, 102 S. Ct. 3508 (1982).

66. 102 S. Ct. at 3026. Over 75% of savings and loan assets are invested in mortgage loan contracts. Id.

67. Id. See First Fed. Sav. & Loan Ass’n v. Mass. Tax Comm’n, 437 U.S. 255, 258 n.3 (1978)(HOLA “protects federal associations from being forced into the state regulatory mold”). See also supra note 3.

68. 102 S. Ct. at 3026.

69. Id. at 3026-27. See Home Owners’ Loan Act of 1933 § 5(a), 12 U.S.C. § 1464(a) (1976 & Supp. V 1981), which exempts federal mutual savings banks formerly organized under state law from “any numerical limitations of State law on the establishment of branch offices and other facilities”; and § 5(h), which preempts state taxes on federal associations greater than those imposed upon “other similar local mutual or cooperative thrift and home financing institutions.” 102 S. Ct. at 3026 n.15.

70. 102 S. Ct. at 3027. See 12 U.S.C. § 1464(a) (1976 & Supp. V 1981) which provides that any federal mutual savings bank which was formerly a state-chartered institution is subject to state discrimination laws on lending based on neighborhood or geographic area. 102 S. Ct. at 3027 n.16.
adopt regulations preempting state law.\textsuperscript{71} He found that these sections did not imply that Congress intended no further preemption of state law, but rather that the broad authority delegated by Congress to the Board indicated that the Board should not feel bound by existing state law.\textsuperscript{72}

The majority stated that the legislative history of the HOLA, although somewhat sparse, confirmed their interpretation of the statutory language.\textsuperscript{73} The majority found repeated references in the legislative history to the Board’s broad discretion and plenary authority to regulate newly created federal savings and loan associations, with no suggestions of limitations upon this authority.\textsuperscript{74} Moreover, the majority observed that testimony throughout the HOLA hearings led to the inescapable conclusion that the Act contemplated that federal law would control the loan instruments of the federal savings and loan associations.\textsuperscript{75} The majority found that the HOLA was not merely an incorporation of existing local loan practices, but rather was a broad delegation of power to the Board to establish and regulate a national system of savings and loan associations to be uniformly governed by the Board and its regulations.\textsuperscript{76} The majority concluded that the Board had exten-

\textsuperscript{71} 102 S. Ct. at 3026-27.
\textsuperscript{72} Id. at 3027. The Court further observed that if appellees’ interpretation were to be utilized, the provisions that incorporated specific state law would be repetitive, thereby violating the rule of statutory construction advanced in American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 513 (1981), that all parts of a statute are to be given effect. See also supra note 3.
\textsuperscript{73} 102 S. Ct. at 3027-28.
\textsuperscript{74} Id. at 3028. During House Hearings on the Bill, Chairman Stevenson of the FHLBB stated that Congress laid down the ground work and left many details to the Board. \textit{Home Owners’ Loan Act: Hearings on H.R. 4980 Before the House Comm. on Banking and Currency}, 73d Cong., 1st Sess. 13 (1933) (statement of William F. Stevenson, Chairman, Federal Home Loan Bank Board). Representative Luce commented during the subsequent debates that “[i]t is contemplated by the bill before us to put the machinery in the hands of the Home Loan Bank Board”, “we give the board great power to administer the act.” 77 CONG. REC. 2480, 2481 (1933). Representative Luce further observed that federal savings and loan associations “will be formed in accordance with the best building-and-loan practice, and I feel sure we may rely upon [Chairman Stevenson] and his Board to carry out that promise.” Id. at 2480.

While discussing the bill in senate hearings, a question arose about the power of the Board to regulate lending practices of associations, specifically whether the Board could promulgate a regulation prohibiting borrowers from obtaining financing and then renting the property. Chairman Stevenson replied: “If the Federal Home Loan Bank Board should choose to make that kind of a regulation it could put that in.” \textit{Home Owners’ Loan Act: Hearings on S. 1317 Before a Subcomm. of the Senate Comm. on Banking And Currency}, 73d Cong., 1st Sess. 14 (1933).
\textsuperscript{75} 102 S. Ct. at 3028.
\textsuperscript{76} Id. at 3028-29. In 1978, Congress amended § 5(a) of the HOLA to allow state mu-
sively exercised its powers, comprehensively regulating the operations of federal associations including their lending practices.\textsuperscript{77}

Justice Blackmun stressed the finding that mortgage lending practices are a vital aspect of a savings and loan's operation, and stated that unquestionably the Board has jurisdiction to regulate such practices.\textsuperscript{78} However, he found no need to explore the limits of the Board's discretionary power, finding it only necessary to conclude that the Board's due-on-sale regulation was safely within the scope of the Board's authority and consistent with the HOLA's principal purposes.\textsuperscript{79}

Justice Blackmun, in discussing the principal purposes of the HOLA, observed that Congress assigned power to the Board for the purpose of enacting and regulating federal savings and loan associations that would be financially sound institutions capable of supplying financing for home construction and purchase permanently.\textsuperscript{80} He determined that the due-on-sale regulation promulgated by the Board was consistent with these purposes, as the Board had determined that due-on-sale clauses are an important source of protection for the continued financial soundness of federal associations.\textsuperscript{81} Justice Blackmun noted that the Board has found that elimination of the due-on-sale clause would have adverse effects upon the financial stability of federal associations: causing reductions in the amount of funds available for home loans, impairing the ability of associations to sell their loans in sec-

\textsuperscript{77} 102 S. Ct. at 3029. The Board's regulations comprehensively govern federal associations' lending practices, including fair credit requirements, types and amounts of loans, collateral required, repayment schedules, initial loan charges, assignment of rents, late charges, loan payments and repayments, and many other areas. \textit{Id.} n.20. See 12 C.F.R. §§ 545.6, 545.8 (1982).

\textsuperscript{78} 102 S. Ct. at 3029.

\textsuperscript{79} \textit{Id.}

\textsuperscript{80} \textit{Id.} at 3029-30. During the House Hearings on the HOLA, the Chairman of the Bank Board observed: "The new corporations that we propose to set up, we want them set up on a sound basis as they will be of very material assistance in home financing for all time, if properly managed." \textit{Home Owners' Loan Act: Hearings on H.R. 4980 Before the House Comm. on Banking and Currency, 73d Cong., 1st Sess. 12 (1933)(statement of William F. Stevenson).}

\textsuperscript{81} 102 S. Ct. at 3030. In a 1982 regulation, the Board has stated that due-on-sale clauses are "a valuable and often an indispensable source of protection for the financial soundness of Federal associations and for their continued ability to fund new home loan commitments." 12 C.F.R. § 556.9(f)(1)(1982).
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ondary markets, and creating a rise in new home loan interest rates. Justice Blackmun stated that although the Board's policy determination in promulgating the due-on-sale clause was not uncontroverted, it was not arbitrary or capricious. He observed that the promulgation of the due-on-sale regulation was a reasonable exercise by the Board of its authority to protect the continued financial stability of federal savings and loan associations. The majority thus rejected the appellees' argument that the Board's authority to regulate extended only to internal management and not to external matters such as their relationship with borrowers. They stated that even if the distinction had some validity, the finding that due-on-sale clauses are important to the financial soundness of federal associations would certainly bring this regulation within the sphere of internal management. In conclusion, the majority held that the due-on-sale regulation promulgated by the Board barred application of the Wellenkamp doctrine to federal savings and loan associations.

In a concurring opinion, Justice O'Connor accepted the majority's holding, but noted that the authority of the Board to exempt federal savings and loan associations from state law is not limitless. Although the Board was granted broad power to ensure that federally chartered savings and loan institutions would be financially sound, she observed that nothing in section 5(a) of the HOLA suggests that the Board has the authority to preempt all state and local laws which do not deal directly with savings and

82. 102 S. Ct. at 3030. The Board's analysis runs as follows: the practice of federal associations borrowing short and lending long when combined with inflationary interest rates results in an increased cost of funds and lower earnings. Use of the due-on-sale clause alleviates this problem, replacing low-yield loans with loans at the prevailing rate and avoiding the need for a uniform rise in interest rates. This also enhances their saleability in secondary markets, thereby raising funds for new loans. Schott v. Mission Fed. Sav. & Loan Ass'n, Fed. Home Loan Bank Board Resolution No. 75-647 (July 30, 1975).

83. 102 S. Ct. at 3030. Opponents of the Board's view insist that the effect of a due-on-sale clause is to shift the burden of an inflationary market from the lending institution to the homeowner and prospective homebuyer. Id. at 3030 n.22. See Wellenkamp v. Bank of Am., 21 Cal. 3d 943, 582 P.2d 970, 148 Cal. Rptr. 379 (1978). See also supra notes 18-20 and accompanying text.

84. 102 S. Ct. at 3030.
85. Id. at 3031.
86. Id. at 3031 n.23. See infra notes 142-49 and accompanying text.
87. 102 S. Ct. at 3031. Judgment of the California Court of Appeals for the Fourth Appellate District was thus reversed. Id.
88. Id. at 3031-32 (O'Connor, J., concurring).
In a dissenting opinion, Justice Rehnquist concluded that Congress had not given the Board the authority to promulgate the due-on-sale regulation. Justice Rehnquist conceded that section 5(a) of the HOLA gave the Board broad authority to regulate the mortgage lending practices of federal savings and loan associations, and that the Board could take into account state property and contract law. He further observed that it would be within the power of the Board to promulgate a regulation determining that it is an unsafe lending practice for a federal savings and loan association to conclude a mortgage without an enforceable due-on-sale clause, and that such a regulation would be consistent with the approach taken by Congress in its enactment of section 8 of the Federal Home Loan Bank Act of 1932, the precursor to HOLA. However, Justice Rehnquist could not agree that Congress gave the Board authority to preempt state laws which the Board deemed to be economically unsound. He stressed that if the Board found that the California restrictions on the enforceability of due-on-sale clauses endangered the soundness of the HOLA system then the Board should withhold or limit the operation of the system in California.

Justice Rehnquist stated that although the Board had the authority to regulate the lending activities of federal savings and

90. 102 S. Ct. at 3032 (O'Connor J., concurring).
91. Id. (Rehnquist, J., dissenting).
92. Id. Justice Rehnquist observed that:
[It] would be within the Board's power to determine that it constitutes an unsafe lending practice for a federal savings and loan to conclude a real property mortgage without a fully enforceable due-on-sale clause. It would be within the authority delegated to it by Congress for the Board to conclude that a due-on-sale clause must be included in a mortgage instrument as a means of enabling a federal savings and loan to remove unprofitable loans from its portfolio.

93. 12 U.S.C. § 1428 (1976). Section 8 provides:
If any such examination shall indicate, in the opinion of the board, that under the laws of any such State . . . there would be inadequate protection to a Federal Home Loan Bank in making or collecting advances under this chapter, the board may withhold or limit the operation of any Federal Home Loan Bank in such State until satisfactory conditions of law . . . shall be established.

94. 102 S. Ct. at 3032 (Rehnquist, J., dissenting). Justice Rehnquist looked to the Federal Home Loan Bank Act (FHLBA) of 1932, the creator of the Board, rather than to the HOLA in formulating this opinion. He cited § 8 of the FHLBA as authority for his decision that the Board can only withhold or limit the operation of a federal savings and loan in California rather than exclude the association from California law. 12 U.S.C. § 1428 (1976).
95. 102 S. Ct. at 3032-33 (Rehnquist, J., dissenting).
loans, Congress did not give the Board the power to decide whether federal law governed the enforceability of particular mortgage provisions.\textsuperscript{96} Moreover, he asserted that contract and real property law which deal with real estate transactions and the enforceability and interpretation of mortgage lending agreements have been traditionally state governed.\textsuperscript{97} and that Congress did not intend to create a federal common law of mortgages in the HOLA.\textsuperscript{98}

Justice Rehnquist criticized the Board for going further than regulating how, when, and in what manner a federal savings and loan could lend mortgage money. He stated that instead, the Board purported to create a rule of law which would control the rights and obligations of the parties to the loan instrument.\textsuperscript{99} Justice Rehnquist perceived that the Board had entered into an unauthorized domain in attempting to override state law.\textsuperscript{100}

Justice Rehnquist stated that the California limitations upon the enforceability of a due-on-sale clause did not impair the Board's dominion over the manner in which federal savings and loan associations engaged in mortgage lending. Moreover, the California limitation on due-on-sale practices was not invalid pursuant to the supremacy clause simply because the law made it difficult for federal associations to remove economically unsound home loans from their loan portfolios.\textsuperscript{101} Finally, Justice Rehnquist found that Congress had not authorized the Board to insulate lenders from California mortgage law. He concluded that the Board has no authority to move into the areas of contract and property law, which have traditionally been left to the states, to fulfill its responsibility of insuring the financial soundness of federal savings and loan associations.\textsuperscript{102}

It is a well established rule of law that when a federal law conflicts with a state law, the federal law will prevail.\textsuperscript{103} This principle,

\textsuperscript{96} Id. at 3033 (Rehnquist, J., dissenting).
\textsuperscript{99} 102 S. Ct. at 3033 (Rehnquist, J., dissenting). The dissent noted that the due-on-sale regulation does not regulate the operation of federal associations, but rather operates the due-on-sale clauses themselves. Id.
\textsuperscript{100} Id.
\textsuperscript{101} Id.
\textsuperscript{102} Id.
\textsuperscript{103} See Comment, A Case For Preemption: Wellenkamp v. Bank of America is Inapplicable to Federal Savings and Loan Associations, 20 SANTA CLARA L. REV. 219, 226
known as the preemption doctrine,\textsuperscript{104} has its basis in the supremacy clause of the United States Constitution.\textsuperscript{105} The Supreme Court in the often cited case of \textit{Parker v. Brown},\textsuperscript{106} determined that when Congress occupies a legislative field in the exercise of a granted power,\textsuperscript{107} it presents an example of its constitutional power to supplant state law; thus, any state law within that legislative field is preempted.\textsuperscript{108} In 1947, the Supreme Court in \textit{Rice v. Santa Fe Elevator Corp.}\textsuperscript{109} stated that when a preemption analysis is conducted in a field traditionally occupied by the states, the court must start with the assumption that the police powers of the states were not to be superseded by federal law, unless the contrary was indicated through a clear and manifest congressional purpose.\textsuperscript{110}

Congressional intent to preempt may be either express or implied in the legislation.\textsuperscript{111} The \textit{Rice} Court found that an implied congressional intent to preempt may be evidenced in several ways:

\begin{itemize}
  \item Does the federal government possess the power to regulate in the given area?
  \item If so, is compliance with federal law and state law a physical impossibility?
  \item If not, did Congress expressly and unequivocally declare that the authority conferred by it should be exclusive?
  \item Even if not, has Congress impliedly preempted state control? Key factors to be considered here include the intent of Congress, the pervasiveness of the regulatory scheme, whether the nature of the subject matter demands exclusive federal regulation, and whether state law would stand as an obstacle to the accomplishment of a uniform national policy.
\end{itemize}

\textsuperscript{104} See Northern States Power Co. v. Minnesota, 447 F.2d 1143, 1146-47 (8th Cir. 1971), \textit{aff'd mem.}, 405 U.S. 1035 (1972). The Eighth Circuit Court of Appeals here suggested a general framework for analysis of whether federal law preempts state law: (1) Does the federal government possess the power to regulate in the given area? (2) If so, is compliance with federal law and state law a physical impossibility? (3) If not, did Congress expressly and unequivocally declare that the authority conferred by it should be exclusive? (4) Even if not, has Congress impliedly preempted state control? Key factors to be considered here include the intent of Congress, the pervasiveness of the regulatory scheme, whether the nature of the subject matter demands exclusive federal regulation, and whether state law would stand as an obstacle to the accomplishment of a uniform national policy. \textit{Id.}

\textsuperscript{105} U.S. Const. art.VI, § 2 states: "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land . . . anything in the Constitution or laws of any State to the contrary notwithstanding." \textit{Id.}

\textsuperscript{106} 317 U.S. 341 (1943).

\textsuperscript{107} The Supreme Court in \textit{McCulloch v. Maryland}, 17 U.S. (4 Wheat.) 316 (1819) found that the powers granted to Congress included various implied powers that are necessary to implement those powers expressly granted under article I, § 8 of the United States Constitution. 17 U.S. (4 Wheat.) 316.


\textsuperscript{109} 331 U.S. 218 (1947).

\textsuperscript{110} \textit{Id. at} 230. See \textit{Ray v. Atlantic Richfield Co.}, 435 U.S. 151 (1978)(when a state's exercise of its police power is challenged under the supremacy clause, the Court must start with the assumption that those powers are not to be superseded); \textit{First Fed. Sav. & Loan Ass'n v. Peterson}, 516 F. Supp. 732, 736 (N.D. Fla. 1981)(consideration under the supremacy clause starts with the basic assumption that Congress did not intend to displace state law).

\textsuperscript{111} \textit{Ray v. Atlantic Richfield Co.}, 435 U.S. 151, 157 (1978); \textit{Rice}, 331 U.S. at 230.
(1) an intent to preempt may be found if the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it; (2) the congressional act may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state law on the same subject; or (3) the object sought to be obtained by the federal law and the character of obligations imposed by it may indicate an intent to preempt.\(^{112}\)

When Congress expresses its intent to preempt, state law will not always be totally preempted. If Congress has not completely foreclosed state legislation in the field, preemption will only be found to the extent that a state law actually conflicts with a valid federal law.\(^{113}\) A conflict will be found where compliance with both state and federal law is an impossibility,\(^{114}\) or where the state regulation stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.\(^ {115}\) In *Florida Lime & Avocado Growers, Inc. v. Paul*,\(^ {116}\) state law was allowed to stand even though there was federal legislation in the field. In that case, California law prohibited the transportation of avocados which contained less than eight percent oil by weight, while the federal law attributed no significance to oil content. The California law


113. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978)(even if Congress has not completely foreclosed state legislation in a particular field, a state statute will be void to the extent that it actually conflicts with a valid federal statute); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1977)("[c]ongressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict").

114. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field . . . . A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility.

115. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). In *Hines*, the Pennsylvania Act required every alien 18 years of age or over to register once each year and to carry an identification card for inspection, while federal law required a single registration of aliens fourteen years of age or over and did not require the carrying of a registration card; the Court held this to amount to a conflict. In *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977), California law regulating the sampling of commodities did not allow for variations in weight due to moisture loss during the course of good distribution practice, and federal law permitted reasonable variations caused by loss or gain of moisture in the course of good distribution practice; this also was held to be a conflict. *Id.*

was allowed to stand as the Court found no inevitable collision between the two schemes despite the dissimilarity of the standards.\textsuperscript{117} The \textit{Paul} Court noted that federal exclusion of state law would be inescapable if, for example, the federal law forbade the marketing of avocados with more than seven percent oil by weight, while the state law excluded avocados with less than eight percent oil by weight. As the Court stated, dual compliance in this instance would be a physical impossibility.\textsuperscript{118} When a conflict is found to exist, the relative importance to the state of its own law is immaterial.\textsuperscript{119}

Preemption problems are not confined to legislative enactments. The legislature can delegate to an administrative agency the power to preempt.\textsuperscript{120} Generally, regulations promulgated by an administrative agency charged with administering federal law are subject to judicial review only to determine whether the administrator has exceeded statutory authority or acted arbitrarily.\textsuperscript{121} Thus, a preemptive regulation will stand unless it is promulgated without authority or is inconsistent with the administrators' empowering statute.\textsuperscript{122}

A necessary element for federal preemption of a field of regulation is congressional authority to act in that area.\textsuperscript{123} It has long been held that Congress has the authority to create federal savings and loan associations and to legislate in the area.\textsuperscript{124} In 1819, the

\textsuperscript{117} Id. at 142-43.
\textsuperscript{118} Id.
\textsuperscript{119} See Free v. Bland, 369 U.S. 663 (1962) (the Framers of the United States Constitution provided that federal law must prevail over conflicting state law).
\textsuperscript{120} See Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 773 (1947). The \textit{Bethlehem} Court observed that where Congress has outlined its policy in general and inclusive terms and delegated determination of its specific application to an administrative tribunal, the mere fact of delegation of power, without any agency action, can preempt state action if it is clear Congress intended no regulation except its own. \textit{Id.} See First Fed. Sav. & Loan Ass'n v. Peterson, 516 F. Supp. 732, 737 (N.D. Fla. 1981) (the HOLA authorizes expansive regulation of federal savings and loan associations). See also Comment, supra note 103, at 226 ("Since the FHLBB is an instrumentality and agency of the United States Government charged with administering federal law, its regulations, like congressional legislation, are also preemptive").
\textsuperscript{121} See United States v. Shimer, 367 U.S. 374, 381-83 (1961) (judicial review of a regulation is limited to a determination of whether the administrator exceeded his statutory authority or acted arbitrarily). See also supra note 41 and accompanying text.
\textsuperscript{122} See Ridgway v. Ridgway, 454 U.S. 46, 57 (1981) (regulations will have a preemptive effect unless they are "unreasonable, unauthorized, or inconsistent with" the underlying statute).
\textsuperscript{124} Fahey v. Mallonee, 332 U.S. 245 (1947); First Fed. Sav. & Loan Ass'n v. Loomis,
Supreme Court in McCulloch v. Maryland, held that the congressional creation of the Second Bank of the United States was valid as a necessary and proper means by which to carry out the federal government's fiscal operations. Pursuant to the McCulloch rationale, the HOLA, in establishing federal savings and loan associations governed by the Federal Home Loan Bank Board, has been upheld as a valid exercise of congressional power. Once congressional authority to legislate in a field is firmly established, the crucial determination to be made is whether Congress intended to preempt, or to delegate authority to an administrator to act without state interference in a field of law.

A good example of Congress' intent to legislate in the banking field is the HOLA. The Act authorizes the Board to promulgate rules and regulations which provide for the organization, incorporation, examination, operation, and regulation of federal savings and loan associations. In prescribing these regulations, the Board should give primary consideration to the best practices of local mutual thrift and home financing institutions in the United States. The language of section 5(a) of the HOLA, when read in conjunction with the Act's history, tends to show Congress' intent to grant the Bank Board broad authority to administer the act.

The courts have interpreted the HOLA as a demand for uniformity in the regulation of federal savings and loan associations, thus calling for preemption by occupation of the field of regulation of federal associations by the Bank Board, and preemption of con-

97 F.2d 831 (7th Cir. 1938); People v. Coast Fed. Sav. & Loan Ass'n, 98 F. Supp. 311 (S.D. Cal. 1951).
125. 17 U.S. (4 Wheat.) 316 (1819).
126. Id. at 424.
127. See supra note 124. See also Comment, supra note 103, at 226-27.
128. See Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 773 (1947). See also supra note 120.
130. Id.
131. In 1933 when the HOLA was enacted, the home finance industry was in dire straits. Many state institutions were folding and home owners were defaulting on their mortgages. Due to the exigencies of the time, the Act was passed hurriedly, giving the Board great power under the Act to regulate the area of home finance. See 77 Cong. Rec. 2480 (1933). See also Glendale Fed. Sav. & Loan Ass'n v. Fox, 459 F. Supp. 903 (C.D. Cal. 1978)(for an extensive overview of the HOLA), rev'd on other grounds, 663 F.2d 1078 (9th Cir. 1981), cert. denied, 102 S. Ct. 3508 (1982). T. MARVELL, THE FEDERAL HOME LOAN BANK BOARD 26 (1969) (the states had developed a hodgepodge of savings and loan laws and regulations, and Congress hoped that FHLBB rules would set an example for uniform and sound savings and loan regulations).
flicting state laws. In *People v. Coast Federal Savings & Loan Association*, 132 a federal association was charged with misleading the public through its business transactions into believing it was a bank. The Federal District Court for the Southern District of California faced the issue of whether federal or state law would apply to this association; the court found that the HOLA contained no provision for a sharing of the Board’s delegated authority to regulate federal associations with the states. *Coast* further explained that when Congress gave plenary preemptive authority to the Board to regulate federal savings and loan associations, it left no field for state supervision, and that the Board had adopted a comprehensive scheme of regulation, regulating federal associations from their cradle to their corporate graves. 133 In keeping with the *Coast* rationale, the Federal District Court for the Northern District of Illinois in *Lyons Savings & Loan Association v. Federal Home Loan Bank Board*, 134 held that the HOLA vested discretion in the Board to determine what constituted the best practices of savings and loan operation, and to implement those practices on a nationally uniform basis. 135 Further, in *Glendale Federal Savings & Loan Association v. Fox*, 136 the Federal District Court for the Central District of California found that the language, history, and purpose of the HOLA evince an unmistakable congressional intent to give the Board complete authority to regulate federal associations and to preempt state regulation. 137 Thus, whenever the Board promulgates a regulation pursuant to that authority, that regulation governs exclusively and preempts any state attempt to regulate. 138 According to *Glendale*, it would have been difficult for Con-

133. Id. at 316.
135. Id. at 18. The court further stated that “[t]he fact that any particular state has not adopted for its own institutions what the Board deems to be a ‘best practice’ cannot limit the Board’s authority without undermining this fundamental purpose of the statute.” Id. See *Glendale Fed. Sav. & Loan Ass’n v. Fox*, 459 F. Supp. 903, 909 (C.D. Cal. 1978), rev’d on other grounds, 663 F.2d 1078 (9th Cir. 1981), cert. denied, 102 S. Ct. 3508 (1982), in which the court expressed that “the Bank Board was delegated by Congress the authority to select from the prevailing practices in all the states what it deemed the best practices and to prescribe a nationwide system of operation, supervision, and regulation which would apply to all federal associations.” Id.
137. Id. at 908-10.
138. Id. at 910. See *Meyers v. Beverly Hills Fed. Sav. & Loan Ass’n*, 499 F.2d 1145, 1147 (9th Cir. 1974); *Lyons*, 377 F. Supp. at 17. The district court stated that “[c]ourts have upheld the authority of the Board on the basis that the plenary powers given to the Board
gress to provide the Bank Board with a broader mandate. Similarly, the Ninth Circuit Court of Appeals, in *Conference of Federal Savings & Loan Associations v. Stein*, held that the regulatory authority granted to the Board by the HOLA is so pervasive that state action is wholly preempted.

Not all case law leads to a finding of total preemption by the HOLA. There is some authority for the proposition that the preemptive delegation of authority to the Board extends only to the internal affairs of federal associations. The Fifth Circuit Court of Appeals, in *Gulf Federal Savings & Loan Association v. Federal Home Loan Bank Board*, found that federal regulations governed only the internal management of federal associations such as the management's fiduciary duty, and had no preemptive effect upon external affairs which include loan agreement provisions. Similarly, in *Holiday Acres No. 3 v. Midwest Federal Savings and Loan Association*, the Minnesota Supreme Court determined that Board regulations which do not deal with internal affairs are not preemptive, and that instead the substantive law of the state should apply. The *Holiday Acres* court specifically found that state regulation of the exercise of due-on-sale clauses in loan agreements would not in any way effect the internal management of federal associations.

in the HOLA clearly evidence a Congressional intention to preempt the field, thus precluding any regulation of federal associations by State law.” *Id.*


140. 604 F.2d 1256 (9th Cir. 1979).

141. *Id.* at 1260. *See Glendale*, 459 F. Supp. at 910. This district court found that whenever the Bank Board promulgates a regulation, pursuant to its plenary authority, that regulation preempts any attempt by a state to regulate in that area. *Id.*

142. *See Holiday Acres No. 3 v. Midwest Fed. Sav. & Loan Ass'n*, 308 N.W.2d 471, 478 (Minn. 1981). The Minnesota Supreme Court found that the Board holds no preemptive power in the field of non-internal affairs, such as the validity of contractual provisions contained in mortgage instruments between mortgagors and the federal association. *Id.* Rettig v. Arlington Heights Fed. Sav. & Loan Ass'n, 405 F. Supp. 819 (N.D. Ill. 1975) held that the federal government may preempt, by occupation of the field of internal affairs of federal savings and loan associations. *Id.* See Comment, supra note 80, at 1099-01. See also Comment, *The Due-On Clause: A Pre-Emption Controversy*, 10 Loy. L.A. L. Rev. 629 (1977). The author noted that although the term “internal affairs” has never been defined, it has traditionally been used to designate the relationships between directors, officers, members, and associations. *Id.* at 638.

143. 651 F.2d 259 (5th Cir. 1981), cert. denied, 102 S. Ct. 3509 (1982).

144. *Id.* at 266.

145. 308 N.W.2d 471 (Minn. 1981).

146. *Id.* at 478.

147. *Id.*
First Federal Savings & Loan Association,148 likewise held that preemption only applied to the governing of a federal association’s internal affairs. However, Kaski differed from Holiday Acres by finding that the association’s internal affairs included lending practices, which would encompass the due-on-sale clause, and as such were subject to uniform federal control.149 Thus, even the courts which have confined the authority of the Bank Board to regulation of internal affairs of federal associations have had difficulty with the application of that standard and are by no means certain whether lending practices of federal associations, specifically the use of the due-on-sale clause, are included in that standard.

Conversely, numerous recent decisions which have not made an internal management distinction, have held that the Board regulation which governs the federal association’s usage of due-on-sale clauses150 is preemptive of state law.151 There are no federal court decisions to the contrary.152 In Glendale Federal Savings & Loan Association v. Fox,153 the federal savings and loan association sought a declaratory judgment that federal law exclusively governed the validity and usage of its due-on-sale clauses. The district court held that the Board’s due-on-sale regulation preempted state law dealing with that subject and found that the Board had determined that such state limitations were not the best practices of savings and loan operation.154 Glendale further stated that the regulation on its face indicated that the Bank Board intended to exercise the authority to preempt, which had been delegated to it by Congress, and to govern exclusively the use of due-on-sale clauses in the lending instruments of federal associations.155 Similarly, in

148. 72 Wis.2d 132, 240 N.W.2d 367 (1976).
149. Id. at 142, 240 N.W.2d at 373.
154. Id. at 912.
155. Id. at 911-12.
Recent Decisions

Bailey v. First Federal Savings & Loan Association,\textsuperscript{156} an Illinois district court stated that a federal association's use of a due-on-sale clause was governed by the Board in determining the best practices for such associations. By promulgating a specific regulation regarding due-on-sale clauses, any state regulation was preempted by the use of the clause in federal associations' loan agreements.\textsuperscript{157} In Dantus v. First Federal Savings & Loan Association,\textsuperscript{158} Colorado law allowed for no more than a one percent increase in the interest rate upon assumption, however, the federal regulation permitted the federal association to waive its right to use the due-on-sale clause if it agreed with the purchaser that the interest rate payable upon assumption would be at a rate requested by the association.\textsuperscript{159} The Federal District Court for the District of Colorado held that the Board's due-on-sale regulation preempted state regulation that did not allow use of the due-on-sale clause for interest rate adjustment, because such state regulation conflicted with the federal regulation.\textsuperscript{160}

The Federal District Court for the Northern District of Florida in First Federal Savings & Loan Association v. Peterson,\textsuperscript{161} held that the federal regulation of due-on-sale clauses was preemptive on many grounds. Peterson held that the federal regulation on the subject of due-on-sale clauses was pervasive and left no room for state regulation.\textsuperscript{162} The court further found that the federal interest involved and the object sought to be obtained by the regulation evidenced preemption. The court reached this conclusion by finding that the due-on-sale clause allowed for the adjustment of interest rates and the marketability of associations' mortgages in the secondary market, both of which are essential to the future success of federal associations and the health of the home finance industry.\textsuperscript{163} Peterson also found preemption of the Florida due-on-sale law by reason of a conflict between the federal regulation and Florida law.\textsuperscript{164} The most recent federal district court decision to consider the preemptive effect of the Board's due-on-sale regulation,

\textsuperscript{156} 467 F. Supp. 1139 (C.D. Ill. 1979).
\textsuperscript{157} Id. at 1141.
\textsuperscript{158} 502 F. Supp. 658 (D.Colo. 1980).
\textsuperscript{159} 12 C.F.R. § 545.8-3(g)(3)(1980). See supra note 6.
\textsuperscript{160} 502 F. Supp. at 661.
\textsuperscript{162} Id. at 738.
\textsuperscript{163} Id. at 738-41.
\textsuperscript{164} Id. at 740-41.
Price v. Florida Federal Savings & Loan Association,\textsuperscript{165} declared that the Board's regulation was preemptive of state regulation, whether judicially grafted or legislatively grounded, because of the congressional grant in the HOLA to completely regulate federal associations and to preempt state regulations.\textsuperscript{166} The Fidelity Court, in affirming the line of cases that have found the Board's due-on-sale regulation to be preemptive of state law, certainly has given strong testimony to the Board's authority to regulate in the field of federal savings and loan operations to the exclusion of the states. By adopting this well-reasoned approach, the Court rejected the contention that Congress gave authority to the Board only to regulate the internal management of federal associations.\textsuperscript{167} The decision to reject the distinction between external and internal management of an association is well deserving of praise, for application of such a nebulous standard could only lead to a sea of conflicting decisions regarding the relationship of the questioned activity to the management of the association.\textsuperscript{168} As Fidelity noted,\textsuperscript{169} there is no authority in either the language or history of the HOLA for such a restriction on the authority of the Board.

A thorough examination of the HOLA\textsuperscript{170} exposes a total grant of authority to the Board calling for uniformity in the regulation of federal savings and loan associations. Thus, as Fidelity clearly stated, preemption of conflicting state law is imminent. But by finding an actual conflict and by not feeling compelled to go further, the Fidelity Court has left open the very broad issue of whether the HOLA and the Board's regulations thereunder occupy the field of due-on-sale law or for that matter, the entire field of federal savings and loan regulation. It would appear that the broad language of Congress in authorizing the Board to regulate according to what it thought were the best practices of savings and loan

\textsuperscript{165} 524 F. Supp. 175 (M.D. Fla. 1981).
\textsuperscript{166} Id. at 178.
\textsuperscript{167} Fidelity, 102 S. Ct. at 3031.
\textsuperscript{168} It would appear to be a simple matter to find any lending practice of an association to be essential to the soundness of the association, and thus related to the internal management of the association; or conversely, to find the practice an external relationship with the borrower. Such a flexible test would be difficult in application, and surely would cause conflict among the courts. See 102 S. Ct. at 3031 n.23.
\textsuperscript{169} Id.
\textsuperscript{170} Id. at 3025-30. See Glendale Fed. Sav. & Loan Ass'n v. Fox, 459 F. Supp. 903, 908-12 (C.D. Cal. 1978), rev'd on other grounds, 663 F.2d 1078 (9th Cir. 1981), cert. denied, 102 S. Ct. at 3508 (1982).
operation, and the Board's pervasive scheme of regulation pursuant to that authorization have settled this issue. Many opinions have so found.\textsuperscript{171} What is certain is that Congress, in the HOLA, laid down the foundation for a uniform system of savings and loan associations and gave the Board great authority and discretion to carry out its intent and purpose,\textsuperscript{172} subject only to limited judicial review.

\textit{Fidelity}, by properly limiting its review\textsuperscript{173} to the questions of whether the Board exceeded its statutory authority or acted arbitrarily in promulgating the due-on-sale regulation, did not pass directly on this issue of the propriety of the due-on-sale clause. But by deciding that the Board's determination was a reasonable accommodation of conflicting policies and by rejecting appellee's contention that the proposed use of the due-on-sale clause was a restraint on alienation,\textsuperscript{174} the Court clearly found the due-on-sale clause to be a valuable tool for the financial stability of federal savings and loan associations. The effect of the \textit{Fidelity} decision is to ensure that the use of a due-on-sale clause by federal associations will be an important means in obtaining the objective of maintaining a permanent system of sound institutions in the home financing industry. In order to remain financially sound and able to finance new home loans, the federal associations must be assured that they can sell their mortgages in secondary markets and adjust interest rates on outstanding loans to prevailing market rates upon transfer of the security property. The \textit{Fidelity} decision, by affirming the due-on-sale regulation of the Board, facilitates this objective and protects the majority of homebuyers and future home owners from increased lending rates.


\textsuperscript{172} See \textit{Home Owners' Loan Act: Hearings on H.R. 4980 Before the House Comm. on Banking and Currency}, 73d Cong., 1st Sess. 13 (1933)(Congress set out the general framework and left many of the details to the Board). \textit{See also supra} notes 60-68 and accompanying text.

\textsuperscript{173} 102 S. Ct. at 3030-31. "As judges, it is neither our function, nor within our expertise, to evaluate the economic soundness of the Board's approach." \textit{Id.}

\textsuperscript{174} In an amicus curiae brief in support of the appellees, the California Association of Realtors advocated that automatic acceleration of a loan and use of the due-on-sale clause for interest rate adjustments, created a restraint on alienation by keeping many borrowers out of the market. Brief of the California Association of Realtors as amici curiae in support of Appellees, \textit{Fidelity}, 102 S. Ct. 3014 (1982).
It is difficult to foresee how expansive the Board's power to regulate the field of federal associations will become. What is certain is that the propounders of the Home Owners Loan Act would have been hard pressed to afford the Federal Home Loan Bank Board a broader mandate of authority.  

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