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**FEDERAL PREEMPTION OF THE ILLINOIS
FINANCIAL INSTITUTIONS DISCLOSURE ACT—
GLEN ELLYN SAVINGS AND
LOAN ASSOCIATION V. TSOUMAS**

An increasing number of residential neighborhoods in the country's major metropolitan areas are rapidly declining due to the practice of redlining.¹ Congress has recognized that financial institutions are redlining² certain city neighborhoods by refusing to make mortgage or home improvement loans at reasonable interest rates,³ regardless of the credit worthiness of the potential borrower.⁴ As a result, many urban dwellers are denied their only possible means of obtaining finance for the sale, improvement, or revitalization of their neighborhood homes.⁵

Both Congress and state legislatures have enacted statutes designed to call attention to the practice of redlining where it exists. These statutes, the Federal Home Mortgage Disclosure Act⁶ and the Illinois Financial Institutions Disclosure Act,⁷ require financial institutions to publicly disclose various statistics relating to their lending practices.⁸ Since the passage of these two acts, there has been a great deal of controversy over whether the Illinois

1. ILLINOIS LEGISLATIVE INVESTIGATING COMMISSION, REDLINING DISCRIMINATION IN RESIDENTIAL MORTGAGE LOANS (May, 1975, Report to the Illinois General Assembly).

2. S. REP. NO. 187, 94th Cong., 1st Sess. 1 (1975). "Redlining" is a popular term for disinvestment by lenders in older communities. The term derives from the practice of actually drawing a line around certain sections of the map which are considered "high risk" lending areas. Today, the practice is much more subtle. *Id.* at 3. The initial effect of this disinvestment by lenders is that homes become increasingly difficult to sell because prospective buyers are being denied mortgage loans. Subsequently, property values decrease, homeowners move out and the neighborhood begins to deteriorate. *See generally* Ryan, *Redlining*, 1977 ANN. SURVEY AM. L., 57 (1977); Note, *Attacking the Urban Redlining Problem*, 56 B.U.L. REV. 989 (1976).

3. S. REP. NO. 187, 94th Cong., 1st Sess. 1 (1975).

4. It has been suggested that financial institutions redline on the basis of race. *Hearings on S. 1281 Before the Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 1st Sess. 536 (1975). It is a fact that a greater number and dollar amount of loans are made in white areas. *Id.* at 1085-1113. A recent study, however, shows that this fact is attributable to a number of factors of which the racial composition of neighborhoods is just one. This study found that, whether white or black, areas with low-income and relatively few single-family, owner-occupied dwellings receive fewer and smaller mortgage loans. Conversely, regardless of race, areas with relatively high median incomes and a higher percentage of single-family and owner-occupied dwellings, receive more loans and in larger amounts. *Chicago Tribune*, Sept. 29, 1978, § 5, at 1, col. 2.

5. H.R. REP. NO. 561, 94th Cong., 1st Sess. 4 [hereinafter cited as H.R. REP. NO. 561], reprinted in [1975] U.S. CODE CONG. & AD. NEWS 2303, 2305.

6. 12 U.S.C. § 2801 (1975).

7. ILL. REV. STAT. ch. 95, §§ 201-08 (1977). California and Wisconsin have also enacted anti-redlining regulations. 10 CAL. ADMIN. CODE ch. 2, subch. 23, § 243.2 (1975); WIS. ADMIN. CODE ch. S-L, § 27.05(2) (1975).

8. 12 U.S.C. § 2803 (1976); ILL. REV. STAT. ch. 95, § 203 (1977).

disclosure scheme is meant to apply to federally chartered savings and loan associations.⁹ In a recent Illinois Supreme Court decision, *Glen Ellyn Savings and Loan Association v. Tsoumas*,¹⁰ it was held that under the supremacy clause,¹¹ the Federal Home Mortgage Disclosure Act has preempted¹² the application of the Illinois Financial Institutions Disclosure Act to certain federally chartered savings and loan associations operating in Illinois.¹³ This Note will discuss the purpose and scope of the respective Federal and Illinois Acts, the analysis that the Supreme Court traditionally has applied in preemption decisions, and the impact of *Glen Ellyn* on disclosure requirements by Illinois financial institutions.

FACTS OF *GLEN ELLYN*

The Illinois legislature adopted the Financial Institutions Disclosure Act on October 1, 1975.¹⁴ The Act requires any institution¹⁵ which operates or has a place of business in Illinois to file a statement with the Department of Financial Institutions,¹⁶ showing the number and aggregate dollar amount of written applications for mortgage and home improvement loans. Additionally, it requires disclosure of the number and aggregate dollar amount of these loans granted.¹⁷ The Federal Home Mortgage Disclosure Act was

9. Since the instant case concerns a federal savings and loan association, this discussion will be confined primarily to savings and loan associations. Savings and loans are the single most important source of home financing in the United States. See JOURNAL OF THE FEDERAL HOME LOAN BANK BOARD, Oct., 1973, Tables S.5.3 and S.5.5.

10. 71 Ill. 2d 493, 377 N.E.2d 1 (1978).

11. U.S. CONST. art. 6: "This Constitution, and the Laws of the United States, which shall be made in Pursuance thereof; . . . shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

12. BALLENTINE'S LAW DICTIONARY 976 (3d ed. 1969) defines preemption of a field as an "[a]ction taken by Congress in passing legislation in a field theretofore open to state legislation."

13. 71 Ill. 2d 493, 377 N.E.2d 1 (1978).

14. ILL. REV. STAT. ch. 95, § 201 (1977) [hereinafter referred to as Illinois Act].

15. Section 202(b) defines institution as "any bank, insurance company, mortgage banking company or savings and loan association which operates or has a place of business in this State." *Id.* at § 202(b).

16. Section 203 provides that "each institution shall file semi-annually with the Director. . . ." *Id.* § 203. Section 202(a) defines Director as the "Director of the Illinois Department of Financial Institutions." *Id.* at § 202(a).

17. Section 203 mandates that an institution must disclose:

the number and aggregate dollar amount of written applications for, and the number granted and aggregate dollar amount of: (1) Loans secured by residential real estate; (2) mortgage loans insured under the federal National Housing Act, Title 12, United States Code, Chapter 13; (3) mortgage loans guaranteed under the provisions of the federal Veterans' Benefits Act, Title 38, United States Code, Chapter 37, Subchapter II; (4) construction loans; and (5) home improvement loans and loans made in accordance with Subchapter I, 'Housing Renovation and Modernization,' of the National Housing Act, Title 12, United States Code, Chapter 13.

Id. at § 203.

enacted by Congress on December 31, 1975.¹⁸ It requires both federal and state depository institutions¹⁹ to make available, for public inspection and copying, the number and total dollar amount of mortgage loans which were originated or purchased by that institution during each fiscal year.²⁰

On March 4, 1976, Glen Ellyn Savings and Loan Association,²¹ a federally chartered association, filed a complaint seeking a declaration that the Illinois Act was unconstitutional or void, and that the Act does not apply to federally chartered financial institutions operating in Illinois.²² The trial court granted Glen Ellyn's request for preliminary relief, which was subsequently reversed and remanded by the Illinois Appellate Court. On January 18, 1977, the trial court entered a declaratory judgment that the Illinois Act is inappropriate and unenforceable against federally chartered financial institutions operating in Illinois.²³ On direct appeal, the Illinois Supreme Court decided that under the supremacy clause, the Federal Act preempts the application of the Illinois Act to federally chartered institutions. The court further held that because the Illinois Act contained a self-destruct clause, it was invalid in toto.²⁴ On October 28, 1978, the United States Supreme Court declined to review the Illinois Supreme Court decision.²⁵

ANALYSIS OF THE COURT'S REASONING

Federal Preemption

The principal issue in *Glen Ellyn* was whether the Illinois Act was meant to apply to federally chartered savings and loan associations. Justice Clark, writing for the court, noted that the plain language of the Federal Act requires the preemption of the application of the Illinois Act to federally char-

18. 12 U.S.C. § 2801 (1975) [hereinafter referred to as Federal Act].

19. Compare *id.* § 2802(2), which defines a depository institution as "any commercial bank, savings bank, savings and loan association, building and loan association, or homestead association (including co-operative banks) or credit union which makes federally related mortgage loans as determined by the Board" with ILL. REV. STAT. ch. 95, § 202(b) (1977). The Illinois Act applied to both federally and state chartered savings and loan associations. See note 16 *supra*.

20. 12 U.S.C. § 2803 (1976).

21. In addition to Glen Ellyn Savings and Loan Association, the Illinois Savings and Loan League and its members were parties to the suit. Brief for Appellant at 8, *Glen Ellyn Sav. & Loan Ass'n v. Tsoumas*, 71 Ill. 2d 493, 377 N.E.2d 1 (1978).

22. Plaintiff also sought a declaration that the regulations, instructions, information, and reporting forms issued by the Department of Financial Institutions were unconstitutional or void. *Id.* at 9.

23. The trial court also decided that the Illinois Act is unconstitutional and void to the extent that it requires reporting of applications for loans and aggregate amounts of loans made prior to October 1 by the federal institutions. *Id.* Since this is not an issue in the Illinois Supreme Court decision, it is not relevant to this discussion.

24. The severability provision of the Illinois Act read: "If any provision of this Act or the application thereof to any person or circumstance is held invalid, such determination of invalidity shall apply to all provisions of this Act. No provision is severable." ILL. REV. STAT. ch. 95, § 208 (1977).

25. See *Chicago Tribune*, Nov. 2, 1978, at § 1, at 2, col. 2.

tered savings and loans.²⁶ The language of the Federal Act, however, is not as clear on this point as the court suggested.

The Federal Act does not expressly mandate whether federally chartered savings and loans must comply with state law.²⁷ In fact, federally chartered institutions are not even specifically mentioned in the Federal Act. There are two basic provisions of the "Relation to state laws"²⁸ section of the Federal Act. First, a state chartered depository institution must continue to comply with state disclosure laws unless they are inconsistent with the requirements of the Federal Act.²⁹ Second, the Federal Reserve Board³⁰ may exempt a state chartered depository institution from the provisions of the Federal Act if it determines that the state institution is subject to requirements substantially similar to the federal requirements.³¹

Apparently, Justice Clark was not entirely convinced by the "plain language" of the Federal Act, since he found it necessary to analyze the legislative history in order to determine whether Congress intended that federally

26. 71 Ill. 2d at 498, 377 N.E.2d at 3.

27. 12 U.S.C. § 2805 (1976). If a state act is to be preempted by federal legislation, the intent to preempt can be found either in the express provisions of the federal legislation, or it can be implied by a reasonable interpretation of the federal act. *See, e.g.*, *Malone v. White Motor Corp.*, 435 U.S. 497 (1978); *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972); *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767 (1947); *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605 (1926).

28. 12 U.S.C. § 2805 (1976) provides:

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

(b) The Board may by regulation exempt from the requirements of this chapter any State chartered depository institution within any State or subdivision thereof if it determines that, under the law of such State or subdivision, that institution is subject to requirements substantially similar to those imposed under this chapter, and that such law contains adequate provisions for enforcement. Notwithstanding any other provision of this subsection, compliance with the requirements imposed under this subsection shall be enforced under (1) Section 1818 of this title in the case of national banks, by the Comptroller of the Currency; and (2) Section 1464 (d) of this title in the case of any institution subject to that provision, by the Federal Home Loan Bank Board.

29. *Id.* § 2805(a).

30. The Federal Reserve Board is the United States agency which acts with primary authority in supervising banks in the Federal Reserve System. *BALLENTINE'S LAW DICTIONARY* 1101 (3d ed. 1969).

31. 12 U.S.C. § 2805(b) (1976).

chartered institutions be excluded from state financial disclosure laws.³² Although it was never specifically stated, a review of the legislative history of the Federal Act indicates that Congress probably intended to preempt the application of state disclosure laws to federally chartered savings and loan associations.³³ This was not the intent, however, of the House or Senate when they initially considered the preemption question. In the original House³⁴ and Senate³⁵ Reports, it was unmistakably clear that both the House and Senate intended that the Federal Act would require federal associations to comply with recordkeeping and disclosure requirements imposed by state law. The Senate Committee on Banking, Housing, and Urban Affairs decided that state law should take precedence in states with disclosure requirements which were similar to or more comprehensive than federal disclosure requirements.³⁶ The House Committee followed this line of reasoning, but added that the application of state disclosure requirements to all financial institutions is particularly appropriate because "solutions to the problem of urban disinvestment are going to come at the local and state level."³⁷

The original drafts of the House³⁸ and the Senate³⁹ versions of the bill did not exempt "any person" from complying with state disclosure requirements unless the state law was inconsistent with the requirements of the Federal Act.⁴⁰ These drafts additionally allowed the Federal Home Loan Bank Board to exempt "any" depository institution from compliance with the Federal Act if the state act imposed substantially similar requirements.⁴¹

When the bill was under consideration in the House, Congressman Stephens proposed an amendment which stated that the Federal Act should not exempt any "state chartered depository institution" (as opposed to "any

32. 71 Ill. 2d at 498, 377 N.E.2d at 3.

33. See notes 34-45 and accompanying text *infra*.

34. H.R. REP. NO. 561, *supra* note 5.

35. S. REP. NO. 187, 94th Cong., 1st Sess. 1 (1975).

36. *Id.* at 13. Senator Proxmire submitted the Senate Report from the Committee on Banking, Housing, and Urban Affairs on June 6, 1975. The Senate Report suggested that the Federal Act "would apply to all institutions, with the provision that state law would take precedence in states with substantially similar or more comprehensive disclosure requirements." *Id.*

37. H.R. REP. NO. 561, *supra* note 5, at 19. The House Report on October 10, 1975 stated:

[T]o insure compliance by Federal institutions with stricter state disclosure statutes, H.R. 10024 makes it clear that Federal institutions must comply with state law and regulations, even if it should be inconsistent with Federal law by requiring maintenance of records with greater geographic or other detail, or provide for greater disclosure than is required by Federal law.

38. H.R. 10024, 94th Cong., 1st Sess. (1975) [hereinafter cited as H.R. 10024]. Section 306 of the House bill stated that "(a) This title does not annul, alter, or affect, or exempt *any person* subject to the provisions of this title . . . (b) The Board may by regulation exempt from the requirements of this Act *any* depository institution within any State . . ." (emphasis added).

39. S. 1281, 94th Cong., 1st Sess. (1975).

40. H.R. 10024, *supra* note 38, § (a).

41. *Id.* § (b).

person") from complying with state disclosure requirements.⁴² Stephens also recommended that the Board should be allowed to exempt any "state chartered depository institution" (as opposed to "any" depository institution) from compliance with the Federal Act if the state act imposed substantially similar requirements.⁴³ Representative Stephens' amendments were approved and incorporated into the version of the bill that became law.⁴⁴ Thus, while Congress originally intended state disclosure requirements to apply to federally chartered savings and loan associations, the adoption of Congressman Stephens' amendments indicate that Congress did in fact intend to exempt federally chartered savings and loans from state law.⁴⁵

Although the Illinois Supreme Court was arguably correct in finding that Congress did intend to preempt the application of state law to federally chartered savings and loan associations, the court failed to consider adequately the additional tests and standards traditionally applied in preemption cases. While the United States Supreme Court has decided preemption questions in a number of fields,⁴⁶ it has never considered a preemption question in the area of savings and loans. The absence of any well-defined method of resolving preemption questions in the area may partially explain the court's superficial approach.⁴⁷ Nevertheless, the significance of the *Glen Ellyn* decision, which rendered the entire Illinois Act invalid, warranted a much more thorough preemption analysis.⁴⁸

42. 121 CONG. REC. 10,517 (daily ed. Oct. 31, 1975) (remarks of Rep. Stephens). Stephens proposed these amendments because he felt it was not "clear whether Federal regulation will be adhered to in a savings and loan company if there is a difference between State regulation and the federal regulation." *Id.* He said that he was concerned that the House bill could be construed to require federally chartered savings and loans to comply with disclosure requirements imposed by state law. *Id.*

43. *Id.*

44. The Home Mortgage Disclosure Act was signed into law by President Ford on Dec. 31, 1975. (Public Law 94-200).

45. The Joint Explanatory Statement of the Committee of Conference explained that the House Conferees strongly believed that "subjecting a Federally chartered institution to state law would threaten the dual banking system." H. CONF. REP. NO. 726, 94th Cong., 1st Sess. 10 (1975). This statement makes it more certain that Congress did not intend to require federally chartered institutions to comply with state law.

46. See, e.g., *Ray v. Atlantic Richfield*, 435 U.S. 151 (1978) (design and regulation of tankers); *Douglas v. Seacoast Prods.*, 431 U.S. 265 (1977) (marine fisheries); *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977) (food labeling); *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767 (1947) (labor law); *Hines v. Davidowitz*, 312 U.S. 52 (1941) (alien registration).

47. See *Derenco v. Benjamin Fed. Sav. & Loan Ass'n*, 577 P.2d 477 (1978). In *Derenco*, the Oregon Supreme Court explained that the apparent confusion and inconsistency in preemption cases are due to the fact that the particular circumstances of each case are of compelling importance in reaching a decision. See also *Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973); *Hines v. Davidowitz*, 312 U.S. 52 (1941).

48. When the congressional intent is not entirely clear, as in *Glen Ellyn*, the judiciary exercises broad discretion in formulating preemption policy. It has been suggested that the Court needs to redefine its preemption doctrine by elaborating on its present preemption analysis and

Although numerous preemption tests have been articulated,⁴⁹ there are basically two tests—both of which were ignored by the *Glen Ellyn* court. First, a state law has been held void when it has been found to conflict⁵⁰ with the federal law. Second, when a federal act is found to “occupy the field”⁵¹ regarding a particular subject, a state is precluded from regulating that subject in any way. Although at first glance these commonly used tests appear to be quite workable, most preemption questions cannot be disposed of by a simple determination of whether the state law conflicts with a federal law or occupies a particular area of law.⁵² More commonly, the dispute is over the degree of conflict permissible or how broadly or narrowly the occupied field is defined.⁵³

Generally, a state law is said to conflict with a federal law when compliance with both is a physical impossibility or where the law becomes an obstacle to accomplishing the full purpose and objective of the federal statute.⁵⁴ For example, the United States Supreme Court has held that if federal orders forbade the picking and marketing of any avocado having more than a 7% oil content, while the state law excluded from the state any avocado measuring less than 8% oil content, compliance with both statutes simultaneously would be a physical impossibility.⁵⁵ Similarly, a Washington tanker law required all oil tankers of at least 50,000 deadweight tons navigating in Puget Sound to take on a state-licensed pilot while the Federal Ports and Waterways Safety Act of 1972 (PWSA), on the other hand, said that no state government could impose an obligation upon a pilot of a ship engaged in domestic or coastwide trade or fishing to get a license other than the one

articulating general preemption policies. Hirsch, *Toward a New View of Federal Preemption*, 1972 U. ILL. L.F. 515 [hereinafter cited as Hirsch]. Professor Hirsch proposed a four step analytical framework which is intended to clarify the process of deciding preemption cases. *Id.* at 554-55.

49. The Supreme Court has used a wide variety of expressions in considering the validity of state law, including: “conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference.” *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

50. *See, e.g.*, *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978); *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978); *Merrill Lynch, Pierce, Fenner, & Smith, Inc. v. Ware*, 414 U.S. 117 (1973); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

51. *See, e.g.*, *De Canas v. Bica*, 424 U.S. 351 (1976); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960); *Meyers v. Beverly Hills Fed. Sav. & Loan Ass'n*, 499 F.2d 1145 (9th Cir. 1974).

52. The Supreme Court, in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), pointed out that “each case turns on the peculiarities and special features of the federal regulatory scheme in question.” *Id.* at 638. Although this proposition seems obvious, courts have often failed to adequately examine these regulatory schemes.

53. For an excellent discussion of the Supreme Court’s preemption standards, *See* Hirsh, *supra* note 48.

54. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

55. *See id.* at 143.

issued by the United States.⁵⁶ It was held that the Tanker Law was in direct conflict with the PWSA, and therefore invalid.⁵⁷ Compliance with both the Washington Tanker Law and the Ports and Waterways Safety Act would be a physical impossibility.

The conflict in *Glen Ellyn* cannot be as summarily dealt with as it was in the examples above. In those cases there were direct conflicts between the provisions of the federal and state acts. In *Glen Ellyn*, however, the conflict at issue was between the provisions of the Illinois Act (which applied to both state and federally chartered institutions) and the alleged legislative intent of the Federal Act to preempt the application of state law to federally chartered institutions.⁵⁸

In addition to a determination of physical impossibility, a state act may also be said to conflict with a federal law if it is an obstacle to accomplishing the full purpose and objective of the federal act.⁵⁹ The Illinois Supreme Court in *Glen Ellyn* clearly pointed out that both acts are directed at the same general object.⁶⁰ Additionally, it admitted that the Illinois Act could only further the purpose of the Federal Act.⁶¹ Considering the fact that both acts have identical purposes, it would be difficult to say that the Illinois Act is an obstacle to the fulfillment of the purpose of the Federal Act.⁶²

56. See *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978).

57. The district court in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), held that the Washington Tanker Law was invalid in toto because it was in direct conflict with the Federal Ports and Waterways Safety Act. Justice White held that the judgment was overly broad because it precluded the state from imposing pilotage requirements on any vessels (not just those engaged in domestic trade or coastwise trade or fishing), which was not the intent of the PWSA. Accordingly, *Ray* held that the state was still free to require tankers engaged in trade with foreign countries in excess of 50,000 dead weight tons to take on state licensed pilots.

The *Glen Ellyn* decision closely parallels the district court decision in *Ray*, which was modified because it was overly broad. Similarly, the *Glen Ellyn* decision is overly broad because it invalidates the Illinois Act in toto; it precludes the state from regulating state and federally chartered savings and loan associations, even though the Federal Act was meant to preclude the state only from regulating federally chartered savings and loans. See note 37 *supra*.

58. See notes 28-45 and accompanying text *supra*.

59. See, e.g., *De Canas v. Bica*, 424 U.S. 351, 363 (1976). In *De Canas*, the Court held that the California Labor Code, designed to regulate immigration, was not preempted by the Federal Immigration and Nationality Act, which regulated the employment of illegal aliens. *Id.* See also *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

60. The undisputed object of both acts is "disclosure of the geographical distribution of the real estate securing the extension of credit by various financial institutions, with a view toward elucidating whether such institutions have arbitrarily refused to extend credit secured by real estate located in certain urban areas." 71 Ill. 2d at 496, 377 N.E.2d at 2.

61. *Id.* at 494, 377 N.E.2d at 3.

62. *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1963), however, suggests that the pertinent test is not whether the purposes of the act are similar or divergent, but whether both regulations can be enforced without impairing the federal superintendence of the field. *Id.* at 142. In *Avocado Growers*, California and the federal government imposed different tests to assure the ripeness of marketed avocados. The purpose of the federal statute was to keep prematurely picked avocados off the market. California's statute had the added purpose of protecting consumers from prematurely picked avocados which are unpalatable. Justice Brennan up-

The second traditional basis for preemption is the "occupation of the field" doctrine.⁶³ In preemption decisions in some areas, the Supreme Court has held that Congress has "occupied a field" when there is a vitally important federal interest,⁶⁴ uniform regulation is necessary,⁶⁵ or when a federal scheme is pervasive in its regulation of the subject matter.⁶⁶

A vitally important federal interest precluding state intervention was found in *Pennsylvania v. Nelson*.⁶⁷ The Federal Smith Act and Pennsylvania Sedition Act prohibited advocacy of the overthrow of the United States government by force and violence.⁶⁸ Chief Justice Warren, speaking for the Supreme Court, held that since the prevention of sedition was such a vitally important federal interest, Congress had "occupied the field" and left no room for the states to supplement the Smith Act.⁶⁹ It is necessarily within the exclusive control of the United States, since it is a crime against the United States and not a local offense.⁷⁰

In *Glen Ellyn*, there is an obvious federal interest in the prevention of redlining in metropolitan areas. Redlining, however, is primarily a local problem which requires solutions at the state and local level.⁷¹ The court in *Glen Ellyn* did not recognize the existence of any local interest, but instead recognized the need to protect certain undefined federal interests.⁷²

held the California statute, since "both the federal and state statutes can be enforced without impairing the federal superintendence of the field." *Id.*

63. The Supreme Court has held that several areas of the law have been preempted by federal law since Congress has "occupied the field." *See, e.g.,* *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973) (aircraft noise regulation); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (regulation of warehousing rates); *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941) (alien registration).

64. The federal interest in certain areas is so strong that the Supreme Court has held that all state legislation in these areas is preempted by federal law. *See, e.g.,* *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973) (safety of aircrafts, utilization of airspace, and protection of persons on the ground); *Pennsylvania v. Nelson*, 350 U.S. 497, 504 (1956) (preventing subversion of government); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (warehouse rate regulation).

65. *See, e.g.,* *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 163 (1978) (uniform standards for design and regulation of tankers are necessary for safety purposes and for the preservation of the marine environment); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 639 (1973) (uniform regulation needed because of the interdependence of noise control and safety regulation).

66. *See* *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148 (1942), in which the Supreme Court held that federal regulation of interstate commerce is so pervasive that there is no room for state regulation. *See also* *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

67. 350 U.S. 497 (1956).

68. *Id.* at 499.

69. *Id.* at 505.

70. *Id.*

71. Reply Brief for Appellant at 18, *Glen Ellyn Sav. & Loan Ass'n v. Tsoumas*, 71 Ill. 2d 493 (1978).

72. Justice Clark stated in *Glen Ellyn* that Congress "retreated somewhat from its stated purpose in order to protect the interests of certain Federal agencies." 71 Ill. 2d at 499, 377

Preemption decisions commonly have held that Congress has "occupied a field" when there is a need for uniform regulation in a particular area. In *Burbank v. Lockheed Air Terminal*,⁷³ for example, the City Council of Burbank, California, sought to enforce a city ordinance which made it unlawful for a jet-aircraft to take off from the Hollywood-Burbank Airport between 11 p.m. and 7 a.m. The purpose of the statute was noise regulation. Justice Douglas found that the interdependence of the factors of noise and safety required a uniform and exclusive system of federal regulation.⁷⁴ He pointed out that if the Court upheld the city ordinance and other cities subsequently enacted similar regulations, the fractionalized control of takeoffs and landings would make it difficult, if not impossible, for the Federal Aviation Administration to control traffic flow.⁷⁵

While there are compelling reasons for the uniform regulation of the hours during which airports may operate, it is questionable whether there are such compelling reasons for the uniform regulation of the disclosure requirements of savings and loan associations. State and local control of mortgage disclosure requirements may even be more practical than uniform federal control, considering that redlining is not a uniform problem throughout the country.⁷⁶

The Supreme Court also has determined that Congress has "occupied the field" when an existing federal scheme is pervasive in its regulation of the subject matter.⁷⁷ Many lower courts which have considered preemption questions concerning the application of state law to federally chartered savings and loan associations have found preemption.⁷⁸ These decisions have consistently held that the Federal Home Loan Bank Board, pursuant to its broad grant of statutory authority, has adopted rules that are so compre-

N.E.2d at 3. Presumably, Clark was referring to the Federal Home Loan Bank Board and its interest in preserving the dual banking system. In the House Conference Report, it was stated that "[i]n the case of mortgage disclosure . . . the conferees on the part of the House strongly believe that subjecting a Federally chartered institution to state law would threaten the dual banking system." H. CONF. REP. NO. 726, 94th Cong., 1st Sess. 10, reprinted in [1975] U.S. CODE CONG. & AD. NEWS 2333, 2336. But Congress failed to explain why or how it would threaten the dual banking system. One of the fundamental principles of the dual banking system is that savings and loan associations may choose to operate under federal or state law. See generally Scott, *The Dual Banking System: A Model of Competition and Regulation*, 30 STAN. L. REV. 6 (1977). Thus, depriving savings and loans of the choice of operating under Illinois or federal disclosure laws may in itself threaten the dual banking system.

73. 411 U.S. 624 (1973).

74. *Id.* at 639.

75. *Id.*

76. The Senate Committee on Banking, Housing and Urban Affairs originally intended the federal disclosure requirements to be a uniform minimum standard. The original bill (S. 1281) was considered with full knowledge that more stringent disclosure requirements had already been initiated in several jurisdictions at the state and local levels. Senator Proxmire recognized that Illinois was one of the states that had introduced a comprehensive disclosure bill which had already passed one house of the state legislature. S. REP. NO. 187, 94th Cong., 1st Sess. 13 (1975).

77. See note 66 *supra*.

78. See note 79 *infra*.

hensive that they govern all aspects of every savings and loan association from its "cradle to its corporate grave."⁷⁹ On the other hand, there are numerous decisions that indicate that savings and loans are subject to a variety of state laws, including taxation⁸⁰ and usury.⁸¹ Most of the cases that resort to this general preemption language combine it with a narrow holding.⁸² For example, it has been noted that "it is apparent that Congress has substantially occupied the field in regard to the regulation of federal savings and loan associations, particularly in the area of lending practices."⁸³ As a result, the law is in a state of confusion as to whether the entire field of federal savings and loans is to be preempted, or whether preemption is to be decided on an ad hoc basis. Regardless of whether the pertinent field in *Glen Ellyn* is the field of federal savings and loan associations or the field of mortgage disclosure, the decision of the Illinois Supreme Court does nothing to clear up the confusion.⁸⁴

79. See, e.g., *California v. Coast Fed. Sav. & Loan Ass'n*, 98 F. Supp. 311 (S.D. Cal. 1951). *Coast* was the originator of the phrase "cradle to its corporate grave." *Id.* at 316. The phrase was subsequently used to find preemption in numerous other decisions. Many of these decisions have neglected to analyze the facts and circumstances of each case, and instead have summarily dealt with important preemption questions by utilizing the "cradle to corporate grave" reasoning. See also *First Fed. Sav. & Loan Ass'n. of Jackson County v. First Fed. Sav. & Loan Ass'n of Huntsville*, 446 F. Supp. 210, 212 (N.D. Ala. 1978); *Rettig v. Arlington Heights Fed. Sav. & Loan Ass'n*, 405 F. Supp. 819, 823 (N.D. Ill. 1975); *City Fed. Sav. & Loan Ass'n v. Crowley*, 393 F. Supp. 644, 655 (E.D. Wis. 1975).

80. *First Fed. Sav. & Loan Ass'n. v. Johnson*, 49 Cal. App. 2d 465, 122 P.2d 84 (1942); *State v. Minnesota Fed. Sav. & Loan Ass'n.*, 218 Minn. 229, 15 N.W.2d 568 (1944). *But see California v. Coast Fed. Sav. & Loan Ass'n.*, 98 F. Supp. 311, 319 (S.D. Cal. 1951). *Coast* points out that savings and loan associations are subject to state taxation only because it is expressly permitted by 12 U.S.C. § 1464(h) (1933).

81. See *First Fed. Sav. & Loan Ass'n of Atlanta v. Norwood Realty Co.*, 212 Ga. 524, 93 S.E.2d 763 (1956), in which the Georgia Supreme Court held that Georgia's usury laws applied to loans made by federal savings and loan associations in that state. See also *City Fed. Sav. & Loan Ass'n v. Crowley*, 393 F. Supp. 644, 655 (E.D. Wis. 1975).

82. While many of these cases suggest that Congress has preempted the field of federal savings and loan associations, they narrowly define the preempted field in the ultimate holding. See, e.g., *Meyers v. Beverly Hills Sav. & Loan Ass'n*, 499 F.2d 1145 (9th Cir. 1974) (prepayment penalties); *First Fed. Sav. & Loan Ass'n of Jackson City v. First Fed. Sav. & Loan Ass'n of Huntsville*, 446 F. Supp. 210 (N.D. Ala. 1978) (unfair competition between two federal associations from similarity in names); *Greenwald v. First Fed. Sav. & Loan Ass'n of Boston*, 446 F. Supp. 620 (D. Mass. 1978) (interest payments); *Rettig v. Arlington Heights Fed. Sav. & Loan Ass'n*, 405 F. Supp. 819 (N.D. Ill. 1975) (internal affairs); *Lyons Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 377 F. Supp. 11 (N.D. Ill. 1974) (branch banking); *Durnin v. Allentown Fed. Sav. & Loan Ass'n*, 218 F. Supp. 716 (E.D. Pa. 1963) (right of inspection of membership lists); *Kaski v. First Fed. Sav. & Loan Ass'n of Madison*, 72 Wis. 2d 132, 240 N.W.2d 367 (1976) (regulation of lending practices).

83. *Kaski v. First Fed. Sav. & Loan Ass'n of Madison*, 72 Wis. 2d 132, 140, 240 N.W.2d 367, 372 (1976).

84. Upon finding that the Federal Act preempted the application of the Illinois Act to federally chartered savings and loan associations, the Illinois Supreme Court held that the Illinois Act was totally invalid. 71 Ill. 2d at 500, 377 N.E.2d at 4. The court voided the entire Act on the basis of a self-destruct clause found therein, which provided that if any provision of the Illinois

IMPACT

In requiring Illinois and federally chartered savings and loan associations to follow the same disclosure requirements, the Illinois Supreme Court impaired, rather than furthered, the common purpose of the Federal and State Acts for two reasons. First, since the Illinois Act demanded more stringent disclosure requirements, it was more effective in exposing redlining practices. Second, redlining is a local problem that can be more effectively addressed on the state and local level.

The Illinois legislature passed a comprehensive disclosure scheme to deal with the redlining problem which plagued Illinois at the time of the enactment. It required the disclosure of the number and dollar amount of mortgage loans applied for and the number granted.⁸⁵ The Illinois Act also demanded disclosure by more institutions than the Federal Act.⁸⁶ The Federal Act, on the other hand, requires only the disclosure of the number of loans granted.⁸⁷ As a result of the invalidation of the Illinois Act, the statutory purpose of providing citizens with sufficient information to determine whether depository institutions are meeting their obligation of serving community housing needs is not being accomplished.

Potentially, the Illinois Act was a more effective disclosure scheme than the Federal Act not only because of its comprehensiveness, but also because redlining is a predominantly local matter that can be handled more efficiently at a state and local level.⁸⁸ An individual state is in better position to detect, and has a more direct interest in prohibiting, the practice of redlining than the federal government. Additionally, the practice is widespread in certain urban areas and nonexistent in others. For these reasons, each individual state should be able to require disclosure of lending statistics to the extent necessary to deal with its particular redlining problem.

Act were found invalid, the entire Act would be deemed invalid. See ILL. REV. STAT. ch. 95, § 208 (1975), which provided that "[i]f any provision of this Act or the application thereof to any person or circumstance is held invalid, such determination of invalidity shall apply to all provisions of this Act. No provision is severable."

The Illinois legislature included this self-destruct clause in the Illinois Act because it feared that if the judiciary determined that the Illinois Act applied only to state chartered savings and loan associations, there would be a rush of state chartered institutions to convert to federal charters. See *Debates on Proposed Financial Inst. Disclosure Act*: H.B. 1103, 1975 Gen. Assembly, 71st day, 173-74 (remarks of Representative Lundy).

85. ILL. REV. STAT. ch. 95, § 203 (1977).

86. The Illinois Act required disclosure of lending statistics from "any bank, insurance company, mortgage banking company or savings and loan association which operates or has a place of business in this state," ILL. REV. STAT. ch. 95, § 202(b) (1977), while the Federal Act demanded disclosure by "any commercial bank, savings bank, savings and loan association, building and loan association (including cooperative banks) or credit union which makes federally related mortgage loans as determined by the Board." 12 U.S.C. § 2802(2) (1975).

87. 12 U.S.C. § 2803 (1975).

88. Reply Brief for Appellant at 18, *Glen Ellyn Sav. & Loan Ass'n v. Tsoumas*, 71 Ill. 2d 493, 377 N.E.2d 1 (1978).

CONCLUSION

The Illinois Supreme Court took a superficial approach to the preemption question in *Glen Ellyn* by failing to apply those tests that have traditionally been applied in preemption decisions. The court found that the congressional intent mandated a finding that the Federal Home Mortgage Disclosure Act preempts the application of the Illinois Financial Institutions Disclosure Act to federally chartered savings and loan associations. It ultimately held that the Illinois Act was invalid in toto because of the self-destruct clause contained therein. As a result of *Glen Ellyn*, Illinois may not demand mortgage disclosure by either state or federally chartered savings and loan associations.

The court concentrated too heavily on finding the federal legislative intent, and consequently, failed to give adequate consideration to the broad purpose of both the Illinois and Federal Acts. The court overlooked the fact that the state is in a better position to recognize when redlining is being practiced and also in a better position to legislate against redlining according to its own particular needs.

There is a need for Supreme Court guidance to determine the extent to which federal law preempts state law in the area of savings and loan associations. Until the Court suggests the proper limits of preemption in this area, lower court decisions will continue to invalidate state laws, like the Illinois Financial Institutions Disclosure Act, which are more effective in making the practice of redlining visible.

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