2011

Municipal Predatory Lending Regulation in Ohio: The Disproportionate Impact of Preemption in Ohio's Cities

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MUNICIPAL PREDATORY LENDING REGULATION IN OHIO: THE DISPROPORTIONATE IMPACT OF PREEMPTION ON OHIO'S CITIES

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I. INTRODUCTION

"Foreclosure on a family home is the American dream lost. Foreclosures uproot families, destroy credit and lock individuals out of the housing market while destabilizing neighborhoods and lowering property values."[1] Ohio has been an "epicenter" of the nation's foreclosure crisis.[2] From 2004 to the present, the City of Cleveland alone is estimated to have between 10,000 and 25,000 abandoned properties at any given time,[3] many of which are the direct result of the city's high foreclosure rate.[4] With the intent to protect its citizens from predatory lending, a known contributing factor to the foreclosure crisis, and to avert the problem of abandoned houses and falling property values caused by foreclosures, the City of Cleveland adopted an anti-predatory lending ordinance on March 1, 2002.[5] With these ordinances, municipal leaders sought to protect certain populations, including minorities, the elderly, and the undereducated, which predatory lenders tend to target. A majority of these demographics live in Ohio's larger cities.[6]

Regrettably, this ordinance never came into effect. In *American Financial Services Ass'n v. Cleveland*, the Ohio Supreme Court held that the regulation of predatory lending was "general law" within the meaning of the Home Rule Amendment in that Ohio's regulation of predatory lending was a comprehensive,

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[1] Press Release, Cuyahoga Cnty. Bd. of Comm'rs, County Launches Assault of Foreclosures (Mar. 17, 2006) (on file with author).

[2] Lisa Nelson, *Foreclosure Filings in Cuyahoga County*, *in* A LOOK BEHIND THE NUMBERS 1, 2 (2008).

[3] *See* ALLAN MALLACH ET AL., CLEVELAND AT THE CROSSROADS: TURNING ABANDONMENT INTO OPPORTUNITY 5 (2005), *available at* http://www.vacantproperties.org/latestreports/ ClevelandattheCrossroads.pdf.

[4] *See* Nelson, *supra* note 2, at 2.

[5] CLEVELAND, OHIO, CODIFIED ORDINANCES § 659 (2002).

[6] *See* Nelson, *supra* note 2, at 5; U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY 3-YEAR ESTIMATES, 2006-2008, *available at* http://factfinder.census.gov/servlet/DatasetMain PageServlet?_program=ACS (last visited May 9, 2011). Which populations predatory lenders tend to target will be discussed at length *infra* Part II.

statewide enactment prescribing police regulations that applied throughout the state and generally to its citizens.[7] When a municipal ordinance conflicts with general laws of the state, state regulations preempt the ordinance.[8] Courts must apply a conflict analysis in preemption cases to determine whether there is an actual conflict between municipal and state law. In that case, the court applied a broad "conflict by implication" test and determined that Cleveland's stricter lending regulations conflicted with state law.[9] The court, however, failed to foresee the disproportionate impact of predatory lending experienced by Ohio's largest cities—the very problem that municipal legislatures were trying to protect against through regulation.[10]

Today, Ohio's cities are plagued by a housing crisis, the impact of which would have been reduced had municipal predatory lending ordinances remained in effect. After the preemption of municipal regulations, in Cuyahoga County alone, more than 45,000 foreclosure cases were filed,[11] many of which can be at least partly attributed to predatory lending.[12] Even more disheartening, while many people are losing their homes, certain lenders have been profiting by cheaply acquiring foreclosed properties in bulk at sheriff's sale and then reselling the bulk packaged properties in "as is" condition.[13] While on the market, and even after resale, these properties are often not brought up to city code. This practice creates a public nuisance[14] by generating problems such as vandalism, crime, and plummeting neighborhood values.[15] Municipalities now alone bear the burden to abate the nuisances created by high foreclosure rates, even though many city leaders foresaw

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[7] City of Canton v. Ohio, 766 N.E.2d 963, 968 (Ohio 2002).

[8] Am. Fin. Servs. Ass'n v. City of Cleveland, 858 N.E.2d 776, 780 (Ohio 2006).

[9] 2002 Ohio Legis. Serv. Ann. 94 (2002) (codified at sections 1.63 and 1349.25 through 1349.37 in the Ohio Revised Code); Am. Fin. Servs. Ass'n v. City of Cleveland, 858 N.E.2d at 786; OHIO CONST. art. XVIII, § 3.

[10] CLEVELAND, OHIO, CODIFIED ORDINANCES § 659 (2002); DAYTON, OHIO, REVISED CODE OF GENERAL ORDINANCE §§ 112.40-.44 (2002); TOLEDO, OHIO, MUNICIPAL CODE §§ 795.21-.23 (2002).

[11] *Cuyahoga County Foreclosure Cases*, CLEVELAND.COM, http://www.cleveland.com/datacentral/foreclosure/ (last visited May 9, 2011) (foreclosure data included from 2006 through early 2009).

[12] *See* Nelson, *supra* note 2, at 5; Lisa Keyfetz, *The Home Owner and Equity Protection Act of 1994: Extending Liability for Predatory Subprime Loans to Secondary Mortgage Market Participants*, 18 LOY. CONSUMER L. REV. 151, 158-59 (2005) ("The foreclosure rate among subprime mortgages is 8% nationally, with some states facing foreclosure rates in excess of 12%. By comparison, the foreclosure rate for prime loans is 1%.").

[13] C.H.R.P. v. Wells Fargo Bank, No. 08-CVH-3139, ¶¶ 17, 19 (Cleveland Mun. Ct. Housing Div. June 18, 2009).

[14] *See* OHIO REV. CODE ANN. § 3766.41(A)(2)(a) ("'Public nuisance' means a building that is a menace to the public health, welfare, safety; that is structurally unsafe, unsanitary, or not provided with adequate safe egress; that constitutes a fire hazard, is otherwise dangerous to human life, or is otherwise no longer fit and habitable; or that in relation to its existing use, constitutes a hazard to public health, welfare, or safety by reason of inadequate maintenance, dilapidation, obsolescence, or abandonment.").

[15] *See* MALLACH ET AL., *supra* note 3.

these problems and sought to protect their communities through predatory lending regulation.[16]

Through its holding in *American Financial Services Ass'n v. Cleveland*, the Ohio Supreme Court denied community leaders the ability to protect their communities by maintaining a preemption shield that allowed predatory lending to continue. That court held that predatory lending regulation was not a "general law" within the meaning of the Ohio Constitution,[17] and in applying a conflict by implication test, determined that ordinance conflicted with state law.[18] Instead, however, the court could have upheld Cleveland's ordinance by determining it was not a general law by considering the totality of the circumstances, including the local interest and intent behind the ordinance. Also, the court could have used a direct conflict analysis that would have allowed stricter municipal regulations not directly contradicting state law to remain effective. Supported and shared by the Framers' intent for the Home Rule Amendment and by other jurisdictions, either approach would give greater consideration to local ordinances passed with the intent of protecting local communities.[19] Because of the disproportionate impact suffered by Ohio municipalities that sought to protect themselves from predatory lending, Ohio courts should modify their Home Rule analysis. Adopting these proposed modifications to the Home Rule analysis would ensure that local interests are given weight not only in regard to future predatory lending regulation, but also generally to guarantee that municipalities can regulate under their Home Rule police power when necessary for the protection of their communities.

Part II of this note defines predatory lending, describes the impact of predatory lending, and summarizes efforts to combat these lending practices. Part III discusses Ohio's Home Rule Amendment, the unpredictable conflict analysis applied by Ohio courts, and how Ohio's approach compares with those of federal courts and other states. In Part IV, this note contends that the Ohio Supreme Court effectively upheld a preemption shield that allowed predatory lending to continue in Ohio's cities, thus contributing to the public nuisance burden now carried by Ohio's municipalities. Additionally, this section proposes policy to modify Ohio courts' Home Rule analysis by allowing greater local considerations to promote consistency and fairness in court decisions.

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[16] A recent study in a survey of eight Ohio cities found that unused properties cost the cities a total of $15 million in extra municipal services and $49 million in lost property tax revenues. CMTY. RESEARCH PARTNERS & REBUILD OHIO, $60 MILLION AND COUNTING: THE COST OF VACANT AND ABANDONED PROPERTIES TO EIGHT OHIO CITIES (2008), *available at* http://communityresearchpartners.org/uploads/publications//FullReport_everythingbutcitysections.pdf. Municipalities employ numerous methods to deal with public nuisance caused by abandoned properties. *See infra* section II.B.

[17] *See* Am. Fin. Servs. Ass'n v. City of Cleveland, 858 N.E.2d at 784.

[18] *Id.* at 785-86.

[19] *See* U.S. West Commc'ns, Inc. v. City of Longmont, 948 P.2d 509, 515 (Colo. 1997) (considering local interests in totality of the circumstances analysis); Walsh v. City of River Rouge, 189 N.W.2d 318, 324 (Mich. 1971) ("Mere differences in detail do not render [statute and ordinance] conflicting. If either is silent where the other speaks, there can be no conflict between them. Where no conflict exists, both laws stand. . . . As a general rule, additional regulation to that of a state law does not constitute a conflict therewith.").

II. OVERVIEW OF PREDATORY LENDING IN OHIO

A. What Is Predatory Lending?

Predatory lending falls within the classification of subprime lending. Subprime lending is a mortgage market that services borrowers who have lower-than-average credit scores and would otherwise be denied credit. In order to compensate for the additional risk associated with these loans, borrowers are charged higher interest rates.[20] "[F]rom a lender's perspective, all residential home mortgages roughly may be categorized as either prime or subprime; the grouping is simply a function of a lender's view of the risk involved with extending credit to the particular borrower."[21] If the borrower meets certain criteria, he qualifies for a prime rate mortgage; however, if he does not meet these criteria, he only qualifies for a subprime loan. From the borrower's perspective, being screened by creditors for a loan based on risk suggests that there is a clear distinction between those borrowers who qualify for prime mortgages and those who only qualify for the lower standards of the subprime loans.[22]

Predatory lending includes "a broad range of unfair and deceptive lending practices that are primarily practiced within the subprime market."[23] Predatory loans are often secured by the borrower's primary residence, and because the average American holds the majority of her wealth in the form of homeownership,[24] predatory lending puts not only a person's residence at risk, but also any assets the borrower has upon default.[25] Predatory lending can be immensely profitable for the perpetrator who collects large origination fees and high interest rates on timely

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[20] *See* Heather M. Tashman, *The Subprime Lending Industry: An Industry in Crisis*, 124 BANKING L.J. 407, 408 (2007). "A typical subprime borrower has a low FICO score (a credit score created by Fair Isaac Corporation to measure consumer credit worthiness), and a lower net income than average." *Id.*

[21] Nathaniel R. Hull, Note, *Cross the Line: Prime, Subprime and Predatory Lending*, 61 ME. L. REV. 287, 292 (2009).

[22] *See* Tashman, *supra* note 20, at 407-08.

[23] Kimm Tynan, Note, *Pennsylvania Welcomes Predatory Lenders: Pennsylvania's Act 55 Preempts Philadelphia's Tough Ordinance but Provides Little Protection for Vulnerable Borrowers*, 34 RUTGERS L. J. 837, 839-40 (2003).

[24] MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 6 (1995). Homeownership is central to the wealth portfolio of the average American and makes up the largest part of wealth held by the middle class. In comparison, the upper classes more commonly hold a greater degree of their wealth in financial assets. *Id.*

[25] Tynan, *supra* note 23, at 839-40. The goal of a subprime predatory loan is the attempt to mine as much equity out of a home as possible. This is done by lenders steering homeowners into high rate mortgages that are packed with many additional fees, expenses, costs, points, and onerous terms as possible in order to "maximize up-front profits and to keep the borrower economically hostage." Cecil J. Hunt, *In the Racial Crosshairs: Reconsidering Racially Targeted Predatory Lending Under a New Theory of Economic Hate Crime*, 35 U. TOL. L. REV. 211, 223 (2003). Refinancing options designed to drain as much equity as possible further deplete the homeowner's equity. When the value of the home is exhausted, the property, often a personal residence, is foreclosed and sold at auction. *Id.*

payments and forecloses on any equity in the house when the borrower cannot pay.[26] "The primary targets of these abusive loans are vulnerable homeowners who are cash poor but home equity rich, and who, for a variety of reasons, are either in fact, or simply believe they are, shut out of the mainstream credit markets and have nowhere else to turn for credit."[27]

Instead of a borrower simply being a greater credit risk, recent studies suggest that predatory lenders target the most susceptible populations, including racial and ethnic minorities, low-income communities, and the undereducated who often must seek financing in the subprime market.[28] African Americans "and Hispanics are disproportionately represented in the subprime market, even at upper-income levels."[29] Increased levels of subprime lending in minority communities suggest that such communities may be subject to increased lending abuses. "The United States Department of Housing and Urban Development ("HUD") reported five times more subprime loans are originated in predominantly African-American neighborhoods than white neighborhoods."[30] Additionally, "[l]ow- and moderate-income families, women, and older homeowners may be overrepresented in the subprime and predatory markets."[31] Deceitful lenders often target the elderly because they typically have substantial equity in their homes, their diminished faculties impair their ability to understand loan terms, and this expose them to aggressive sales tactics, all of which makes them easier targets for predatory lenders.[32]

As over 80% of subprime loans are refinanced loans based on existing equity, it is not surprising that predatory lending has been confirmed as a contributing factor to high foreclosure rates.[33] In fact, the national foreclosure rate for properties with subprime mortgages is 8% compared to a foreclosure rate of only 1% for prime loans.[34] Lenders often entice borrowers "to take on long-term credit secured by the borrowers' home equity to pay for mounting credit card, health care, or other unsecured, short-term consumer debts."[35] The minority, elderly, and undereducated

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[26] Julia Patterson Forrester, *Still Mortgaging the American Dream: Predatory Lending, Preemption, and Federally Supported Lenders*, 74 U. CIN. L. REV. 1303, 1314-15 (2006).

[27] Hunt, *supra* note 25, at 214.

[28] *See* Nelson, *supra* note 2, at 5; Tynan, *supra* note 23, at 839-40. In 2002, home ownership rates for whites were almost 75%, while the home ownership rates for blacks were only 49%. A. Mechele Dickerson, *Bankruptcy and Mortgage Lending: The Homeowner Dilemma*, 38 J. MARSHALL L. REV. 19, 22 (2004). This racial home ownership gap must be put into perspective because it further elucidates the disproportionate impact predatory lending has had on at-risk populations.

[29] Elizabeth Renuart, *An Overview of the Predatory Mortgage Lending Process*, 15 HOUSING POL'Y DEBATE 467, 477 (2004).

[30] Christopher R. Childs, Comment, *So You've Been Preempted—What Are You Going to Do Now?: Solutions for States Following Federal Preemption of State Predatory Lending Statutes*, 2004 BYU L. REV. 701, 709 (2004).

[31] Renuart, *supra* note 29, at 478.

[32] Childs, *supra* note 30, at 709.

[33] *See* Nelson, *supra* note 2, at 5; Keyfetz, *supra* note 12, at 158-59.

[34] Keyfetz, *supra* note 12, at 158.

[35] *Id.* at 159.

populations that are most susceptible to predatory lenders are far more common in urban areas of the state. Thus, there is an exceedingly high concentration of foreclosures within Ohio's cities.[36] Beyond the financial and psychological impact that foreclosure has on families, "geographic concentration of foreclosures undoubtedly leads to negative spillover effects—in particular, increased numbers of vacant and abandoned properties."[37]

B. Abandoned Properties and the Economic Impact of Predatory Lending

Ohio has been an "epicenter" of the nation's foreclosure crisis.[38] Currently, Ohio has 46,361 active foreclosure properties, 8,089 of which are located in Cleveland, Dayton, and Toledo.[39] In Cuyahoga County alone, more than 45,000 foreclosure cases were filed from the beginning of 2006 through early 2009.[40] As there is a direct correlation between foreclosure rates and predatory lending,[41] the foreclosure rates in these cities are of particular interest because each had ordinances regulating predatory lending preempted by state law.[42] After foreclosure, properties that do not sell at sheriff's sale, or are purchased but left in "as is" condition, soon become abandoned.[43]

"An abandoned property is a property where the owner has stopped carrying out at least one of the significant responsibilities of property ownership, as a result of which the property is vacant, or likely to become vacant in the immediate future."[44] Abandoned properties are often classified as a "public nuisance," which the Ohio Revised Code defines as:

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[36] Of Ohio's population: 11.7% is black, 6.1% of households speak a language other than English, 87% have at least a high school level education, and 9.7% of families live below the poverty line while 11% of its housing is vacant. *Id.* For comparison, of Cleveland's population: 52.5% is black, 11.7% of households speak a language other than English, 74.7% have at least a high school education, and 23.9% of families are below the poverty line while 22.1% of its housing is vacant. *Id.* Toledo, Dayton, Cincinnati, and Columbus are similar to Cleveland with greater concentrations of "at risk" demographics than Ohio generally. U.S. CENSUS BUREAU, *supra* note 6.

[37] Nelson, *supra* note 2, at 8.

[38] *Id.* at 2.

[39] *Ohio Foreclosures*, NATIONAL RELOCATION, http://bank-foreclosures.nationalrelocation.com/Ohio/ (last visited May 9, 2011) (numbers calculated as of Mar. 27, 2011).

[40] *Cuyahoga County Foreclosure Cases*, *supra* note 11 (foreclosure data included from 2006 through early 2009).

[41] Nelson, *supra* note 2, at 5.

[42] *See* Am. Fin. Servs. Ass'n v. City of Cleveland, 858 N.E.2d 776 (Ohio 2006); Am. Fin. Servs. Ass'n v. City of Toledo, 830 N.E.2d 1233 (Ohio Ct. App. 2005); City of Dayton v. Ohio, 813 N.E.2d 707 (Ohio Ct. App. 2004).

[43] C.H.R.P. v. Wells Fargo Bank, No. 08-CVH-3139, ¶¶ 17, 19 (Cleveland Mun. Ct. Housing Div. June 18, 2009).

[44] ALLAN MALLACH, BRINGING BUILDINGS BACK: FROM ABANDONED PROPERTIES TO COMMUNITY ASSETS 1 (2005).

> [A] menace to the public health, welfare, safety; that is structurally unsafe, unsanitary, or not provided with adequate safe egress; that constitutes a fire hazard, is otherwise dangerous to human life, or is otherwise no longer fit and habitable; or that in relation to its existing use, constitutes a hazard to public health, welfare, or safety by reason of inadequate maintenance, dilapidation, obsolescence, or abandonment.[45]

Abandoned properties clearly fit the Ohio Revised Code's definition of "public nuisance" by posing significant dangers to communities, especially urban neighborhoods.[46] Abandoned properties "drive down property values, create health hazards, threaten the safety of residents, and perpetuate an image of the neighborhood which promotes criminal behavior and discourages redevelopment."[47] Owners of abandoned properties allow these problems to perpetuate. The "Broken Windows" theory asserts that the mere existence of abandoned housing detrimentally affects a neighborhood because it demonstrates to outsiders and residents that the neighborhood is of the type that supports crime and poverty, creating a vicious cycle that encourages additional abandonment.[48]

Abandonment occurs for a multitude of reasons, with economic variables being the dominant cause, normally occurring in poorer urban areas with lower property values.[49] If a property owner views a property as a drain on resources that cannot produce income, even in the long-term, abandonment of the property becomes an attractive alternative. When the expense of rehabilitation is greater than any potential return on investment into a property, abandonment can become a cost-effective alternative.[50] In Ohio's cities, as a direct result of a faltering regional economy[51] and high foreclosure rates,[52] the estimates of abandoned properties in 2007 range between 10,000 and 25,000 in Cleveland,[53] 2,000 in Toledo,[54] and 3,500 in Dayton.[55]

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[45] OHIO REV. CODE ANN. § 3766.41(A)(2)(a).

[46] Bill Hormann, *Toledo Struggles to Keep Up with Homes*, 13 ABC NEWS TOLEDO, Nov. 20, 2009, http://abclocal.go.com/wtvg/story?section=news/local&id=7129232 ("Kids will be going in [abandoned property]. You have to worry about it getting caught on fire.").

[47] Matthew J. Samsa, Note, *Reclaiming Abandoned Properties: Using Public Nuisance Suits and Land Banks to Pursue Economic Redevelopment*, 56 CLEV. ST. L. REV. 189, 196 (2008).

[48] *Id.*

[49] Samsa, *supra* note 47, at 195. Returns on investment are going to be reduced when the property would not sell for a high price, even if that property itself was in perfect condition but its proximity to other dilapidated properties diminishes any return on investment from the property.

[50] MALLACH, *supra* note 44, at 5 (describing physical obsolescence and abandonment as an alternative to investment).

[51] Samsa, *supra* note 47, at 195; *see* MALLACH ET AL., *supra* note 3, at 5.

[52] Nelson, *supra* note 2, at 5. "All of these [abandonment] conditions are made worse by practices such as predatory lending or speculative 'flipping' of properties, which lead to situations where properties end up being abandoned." Samsa, *supra* note 47, at 195 n.46.

[53] MALLACH ET AL., *supra* note 3, at 5.

While Ohio cities are reeling from the blight caused by abandoned homes, banks practicing predatory lending are often profiting from this situation by following a business plan in which they cheaply acquire foreclosed properties in bulk at sheriff's sales and then resell the bulk packaged properties in "as is" condition.[56] A lender "takes title to property which is already vacant, or evicts the occupants, to cause the property to become vacant. It then boards the property to secure it, cuts the grass, markets the property and sells it, without ever bringing the property up to City code."[57] Additionally, the appraisal value for the auction will often fall short of the amount actually owed on the mortgage. Then, often a lender will cancel the foreclosure, again putting the original owner, who had thought the house had gone back to the lender, on the hook for the growing property taxes and zoning fines from the city for the property.[58] Regardless of whether it is the lender or borrower who actually holds title, the failure of the owner to bring these vacant properties up to city code creates a public nuisance.[59] Business plans such as this and other real estate speculation schemes contribute to abandonment because lenders invest as little capital as possible into properties, often leaving them in a state of disrepair, in hopes of making large profits when the real estate market recovers.[60]

Ohio's cities are left to deal with these abandoned properties. A recent study in a survey of eight Ohio cities found that unused properties cost the cities a total of $15 million in extra municipal services and $49 million in lost property tax revenues—a total drain of more than $64 million.[61] Rather than engage in traditional common law public nuisance abatement suits, municipalities tend to employ abatement means in the form of code enforcement and tax foreclosure.[62] Unfortunately, "[n]either method was designed specifically to address abandonment and, thus, neither method can effectively be harnessed to combat neighborhood blight."[63] Municipalities through their police power can enforce housing codes to abate nuisances rather than rely on resource-consuming litigation.[64] The problem with this approach is that even if it is feasible for the city, property owners can easily avoid enforcement, or as these

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[54] *See* Hormann, *supra* note 46.

[55] *See* CMTY. RESEARCH PARTNERS & REBUILD OHIO, *supra* note 16, at 2-7.

[56] C.H.R.P. v. Wells Fargo Bank, No. 08-CVH-3139, ¶¶ 17, 19 (Cleveland Mun. Ct. Housing Div. June 18, 2009).

[57] *Id.* at ¶ 27.

[58] *See* Ken McCall, *Owners of Abandoned Properties Are Hard to Track Down*, DAYTON DAILY NEWS, Oct. 17, 2009, *available at* http://www.daytondailynews.com/news/dayton-news/352641.html.

[59] OHIO REV. CODE ANN. § 3766.41(A)(2)(a).

[60] Geoff Dutton, *Flipping Frenzy: Wealthy Investors Profit from Run-Down Houses*, COLUMBUS DISPATCH, Sept. 20, 2005, at A1.

[61] *See* CMTY. RESEARCH PARTNERS & REBUILD OHIO, *supra* note 16.

[62] Samsa, *supra* note 47, at 197-200.

[63] *Id.* at 197.

[64] MALLACH, *supra* note 44, at 41.

properties are often in dilapidated conditions, owners lack the means to abate the nuisance.[65]

Tax foreclosure also fails to serve efficiently as a means of nuisance abatement. Because owners, especially property speculators, have kept up with their tax payments, municipalities are often unable to reach vacant properties through this method.[66] Further, even when a municipality is able to reach an abandoned property through a tax foreclosure proceeding, the process is lengthy, and there is no guarantee that the property will sell at auction, essentially leaving the property in a nuisance state rather than generating any economic benefit.[67]

Another more effective alternative for municipalities to reduce blight is pursuing private nuisance abatement suits. "Privatized nuisance abatement suits are proceedings brought by plaintiffs other than the government on the basis of a public nuisance."[68] Non-profit entities with the purpose of community redevelopment through government authority, often a statute, can put forth a more focused effort in redeveloping neighborhoods.[69]

While private nuisance abatement suits have proved somewhat effective in comparison to other abatement methods,[70] these suits and other initiatives for redevelopment and affordable home ownership still effectively drain both public and private resources.[71] The main problem with these solutions is that a municipality must use them after the damage is effectively done. Allowing municipal regulation beforehand to deter predatory lending is necessary to protect individual communities, and to give both municipalities and private parties a legal remedy for breach of these ordinances.[72]

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[65] *See* Samsa, *supra* note 47, at 198.

[66] MALLACH, *supra* note 44, at 1; *see* Samsa, *supra* note 47, at 199.

[67] *See* Samsa, *supra* note 47, at 199. "Foreclosing agencies looking to return the property to the tax rolls put it up for auction, which often results in vacancy when homes fail to sell at auction." *Id.*

[68] *Id.* at 201.

[69] *Id.* at 202.

[70] *Id.* "The residents who drive CDCs also maintain a long-term stake in revitalizing the neighborhood, which increases the likelihood of successful rehabilitation of homes." *Id.*

[71] *See* CMTY. RESEARCH PARTNERS & REBUILD OHIO, *supra* note 16; Hormann, *supra* note 46. "Toledo needs more inspectors, needs to hold landlords accountable for their property, and needs to tear down these buildings before they blight a neighborhood. But Toledo needs money to make all that happen." *Id.*

[72] *See generally* Abraham B. Putney, Note, *Rules, Standards, and Suitability: Finding the Correct Approach to Predatory Lending*, 71 FORDHAM L. REV. 2101, 2103 (2003) (stating that predatory lending legislation would be more effective if it subjected lenders to a clear, objective standard rather than a subjective one).

C. Regulating Predatory Lending

1. Federal Predatory Lending Regulation

To deal with the spreading foreclosure crisis, national, state, and local governments took action to slow predatory lending.[73] The principal federal law regarding predatory lending is the Home Ownership and Equity Protection Act ("HOEPA").[74] Congress passed HOEPA in 1994 as an addendum to the Truth in Lending Act ("TILA").[75] TILA itself was enacted in 1968 to promote informed use of consumer credit by requiring creditors to provide potential borrowers with helpful information regarding certain credit transactions, but it was not created to respond specifically to predatory lending in the home equity subprime market.[76]

Unlike TILA, HOEPA was a legislative response directly intended to curb "prohibitive and coercive mechanisms to control lender and broker behavior."[77] HOEPA tries to identify "high-cost" loans by mandating lenders to disclose certain information to borrowers.[78] Under HOEPA, the Board of Governors of the Federal Reserve is authorized to alter the scope of the act's coverage, meaning alter which loans are subject to the act and subject to this regulatory authority.[79] Generally, HOEPA also seeks to prevent unfair terms in mortgage loans such as increased default rates, prepayment penalties, and balloon payments.[80] Further, HOEPA prevents lenders from granting high-cost loans without first considering a borrower's ability to repay.[81]

Critics of HOEPA claim the act is ineffective because "it is not sufficiently inclusive."[82] Even if federal regulation has been able to curb predatory lending,

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[73] Approximately forty states, counties, and municipalities have adopted predatory lending laws attempting to protect homeowners from predatory mortgage brokers and lenders. Christopher L. Peterson, *Preemption, Agency Cost Theory, and Predatory Lending by Banking Agents: Are Federal Regulators Biting Off More than They Can Chew?*, 56 AM. U. L. REV. 515, 516 (2007). "[D]emocratically-elected state representatives all across the country responded to their constituents' demands by adopting such legislation, and no federal statute had ever explicitly authorized the unelected beltway banking custodians to dismiss these state consumer protection laws." *Id.* State and local predatory lending legislation will be discussed *infra* Parts II.C.2 and II.C.3.

[74] 15 U.S.C. § 1639 (2006).

[75] 12 C.F.R. § 226 (2010).

[76] *See* Joshua Michael Stolly, Note, *Subprime Lending: Ohioans Fall Prey to Predatory Lending at Record Levels—What Next?*, 34 OHIO N.U. L. REV. 289, 302-03 (2008); Keyfetz, *supra* note 12, at 163.

[77] Lloyd T. Wilson, Jr., *Effecting Responsibility in the Mortgage Broker-Borrower Relationship: A Role for Agency Principles in Predatory Lending Regulations*, 73 U. CIN. L. REV. 1471, 1486 (2005).

[78] *See* Stolly, *supra* note 76, at 300-01.

[79] *Id.* at 301.

[80] 15 U.S.C. § 1639 (2006); *see* Stolly, *supra* note 76, at 301.

[81] 15 U.S.C. § 1639 (2006); *see* Stolly, *supra* note 76, at 301.

[82] Forrester, *supra* note 26, at 1317.

HOEPA still allows for predatory lenders to avoid being subject to the act by avoiding certain "triggers" in the act, while still subjecting borrowers to much higher rates than those with prime credit scores.[83] Because federal predatory lending regulation through HOEPA and TILA still allows maneuverability for predatory lenders, Ohio and its cities, along with other states and municipalities throughout the country, have sought to supplement federal regulation to meet the needs of their specific communities.

2. Predatory Lending Regulation in States and Cities

More than thirty states including Ohio have enacted legislation designed to address predatory lending problems.[84] While similar to HOEPA, many state and local regulations provide more inclusive protection than HOEPA.[85] Despite such additional protections, the success of regulation at the state level has been minimal at best with subprime markets continuing to grow because of the difficulty in enforcing statewide laws.[86]

Not surprisingly, lenders have fought regulations on the state level and proposed that federal law should preempt state law.[87] Lenders received a partial victory when, pursuant to the Home Owner's Loan Act, the Office of Thrift Supervision issued regulations preempting state lending regulations that affect the operations of federal savings associations.[88] Similarly, the Office of the Comptroller issued a regulation preempting state laws governing mortgage lending as applied to national banks and their subsidiaries.[89] This has created the incentive for lenders to apply for status as a "national bank" or "federal savings association" within the meaning of the regulations to avoid state and local predatory lending statutes.[90]

Municipalities likewise followed the trend of enacting local ordinances to combat predatory lending but have been consistently preempted by state law. The Pennsylvania General Assembly expressly overruled Philadelphia's predatory lending ordinance by "prohibiting municipalities 'from enacting and enforcing ordinances, resolutions and regulations pertaining to' the activities of financial

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[83] The national average interest for a fixed thirty-year mortgage was around 6% while subprime borrowers are paying 13% for the same amount of money. *See* Stolly, *supra* note 76, at 301-02.

[84] Forrester, *supra* note 26, at 1319.

[85] *Id.* Most states have restrictions or requirements beyond HOEPA for loans that are covered. *Id.*

[86] *See id.* at 1320.

[87] *See id.* at 1321-22.

[88] 12 C.F.R. § 560.2 (2010).

[89] *Id.* § 34.4.

[90] *See* Forrester, *supra* note 26, at 1339-42. While these regulations occupy a good deal of subprime market lending, issues remain as to the ability of these organizations to police their regulations and the extent of their authority. *Id.* at 1347-49; *see also* Young v. Wells Fargo & Co., 671 F. Supp. 2d 1006, 1019 (S.D. Iowa 2009) ("If a state statute of general applicability is not substantively pre-empted, then the power of enforcement must rest with the State and not with the National Government.").

institutions, lenders and brokers."[91] In New York, the superior court invalidated a New York City ordinance that prohibited the city from doing business with predatory lenders.[92] In that case, even though there was no express preemption, the court held that the state's banking law occupied that field, and thus, state law implicitly preempted the city ordinance.[93] Also, the California Supreme Court held California law preempted a City of Oakland ordinance in which both measures sought to regulate home loans.[94] Even though Oakland's restrictions on lending were stricter than state regulation, the court held that the state act did not allow for local regulation in the field.[95]

3. Ohio State and Municipal Predatory Lending Regulation

When the state of Ohio enacted its predatory lending regulations in February 2002, the General Assembly made clear that the act was "intended as a clarification of existing law and not as a substantive change in the law."[96] The Ohio enactment integrated much of the substance of the federal Home Ownership and Equity Protection Act of 1994 into Ohio law.[97] Interestingly, the very banks involved in nuisance abatement suits were also heavily involved in Ohio's legislative process regarding predatory lending regulation.[98] This enactment required lenders to disclose certain information to mortgagors and limit certain terms of mortgage loans, including the amount of a loan payment that can be collected up front and the prohibition of balloon payments for loans with terms of less than five years.[99]

The City of Cleveland adopted its own anti-predatory lending ordinance on March 1, 2002. Cleveland's ordinance sought to regulate loans at a lower threshold, reaching loans with interest rates three and a half percentage points below those that the state regulated.[100] Additionally, the municipal ordinance required stricter

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[91] Tynan, *supra* note 23, at 880.

[92] Mayor of New York v. Council of New York, 780 N.Y.S.2d 266, 275-76 (N.Y. Sup. Ct. 2004).

[93] *Id.* at 274; Jonathan L. Entin & Shadya Y. Yazback, *City Governments and Predatory Lending*, 34 FORDHAM URB. L.J. 757, 780 (2007).

[94] Am. Fin. Servs. Ass'n v. City of Oakland, 104 P.3d 813, 829 (Cal. 2005).

[95] *Id.* at 819-20; Entin & Yazback, *supra* note 93, at 773.

[96] H.B. 386, 124th Gen. Assemb., Reg. Sess. (Ohio 2002).

[97] OHIO REV. CODE ANN. §§ 1.63, 1349.25-.37.

[98] *See generally* Cleveland Housing Renewal Project v. Wells Fargo Bank, No. 08-CVH-31391 (Cleveland Mun. Ct. Housing Div. June 18, 2009); City of Cleveland v. Ameriquest Mortgage Securities, Inc., 621 F. Supp. 2d 513 (N.D. Ohio 2009); Tynan, *supra* note 23 at 880.

[99] OHIO REV. CODE ANN. § 1349.27.

[100] The Cleveland ordinance prohibited any predatory loan that either was secured by a first mortgage and having an interest rate between four and a half and eight percentage points above the yield on certain treasury securities, or secured by a junior mortgage and having an interest rate between six and a half and ten percentage points above that treasury yield and made under certain enumerated circumstances, i.e., excessive increasing of interest rates upon default. CLEVELAND, OHIO, CODIFIED ORDINANCES § 659.01(f) (2002).

requirements on lenders such as mandatory loan counseling for the borrower, filing a certification of compliance contemporaneously with the recording of a mortgage, and prohibiting any direct payment to home improvement contractors of the proceeds of any residential loan having an interest rate in violation of this ordinance.[101] Further, certain violations of the ordinance could result in criminal sanctions.[102] In *American Financial Services Ass'n v. Cleveland*, the Ohio Supreme Court struck down the Cleveland ordinance, holding that it conflicted with Ohio law because it regulated matters within the general scope of the state's regulations.[103]

Cleveland was not the only Ohio city trying to regulate a growing predatory loan problem. In July 2001, the City of Dayton passed a similar ordinance to deter predatory lending that was struck down by the Ohio Second District Court of Appeals.[104] Dayton's ordinance sought to regulate loans at a lower threshold than Ohio's regulation and could reach the loan at any point during the life of the loan whenever the percentage rates rise above impermissible ranges.[105]

Likewise, Toledo passed municipal predatory lending regulation that contained nearly identical prohibitions as the state laws; however, certain differences did exist between the ordinance and state law, such as a credit-insurance disclosure requirement.[106] Because of these differences, Toledo's ordinance was challenged in *American Financial Services Ass'n v. Toledo*, but the court held that provisions of the statutes not in direct conflict with the state regulation could be severed from the unconstitutional portions of the municipal ordinance.[107] The Toledo ordinance provisions left intact after this ruling lost effect after the Ohio Supreme Court in *American Financial Services Ass'n v. Cleveland* designated predatory lending regulations as general law that occupied the entire field.[108]

Currently in Ohio, after the Ohio Supreme Court held that the General Assembly alone had the power to regulate predatory lending, Ohio and its cities remain among the nation's worst affected by the foreclosure crisis.[109] With the intent to further protect against predatory lending, the General Assembly passed the Ohio's Homebuyer Protection Act to include further restrictions that required lenders to consider a borrower's ability to repay, banned repeated refinancing that does not benefit the borrower, prohibited taking advantage of borrowers who were illiterate or with mental deficiencies, and restricted excessive late fees on a single late

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[101] *Id.* §§ 659.02(a)(2)-(3), 659.04.

[102] *Id.* § 659.99.

[103] Am. Fin. Servs. Ass'n v. City of Cleveland, 858 N.E.2d 776, 786 (Ohio 2006).

[104] City of Dayton v. Ohio, 813 N.E.2d 707, 724 (Ohio Ct. App. 2004).

[105] DAYTON, OHIO, REV. CODE GEN. ORD. §§ 112.40-44 (2004).

[106] Am. Fin. Servs. Ass'n v. City of Toledo, 830 N.E.2d 1233, 1247-48 (Ohio Ct. App. 2005).

[107] *Id.* at 1248-49.

[108] Am. Fin. Servs. Ass'n v. City of Cleveland, 858 N.E.2d at 786.

[109] Melinda Fulmer, *States Ranked by Foreclosure Rates*, MSN REAL ESTATE (2008), http://realestate.msn.com/article.aspx?cp-documentid=13107814 (last visited May 9, 2011); *see supra* notes 53-55 and accompanying text.

payment.[110] While it is too soon to analyze any potential benefit of more recent state predatory lending regulation, it is clear that the damage has been done; however, municipalities may have been able to prevent at least some of the harm that has been caused to Ohio's cities by predatory lending.

III. CONFLICT ANALYSIS UNDER OHIO'S HOME RULE AMENDMENT

In order to avoid a duplication of the dire situation presented by predatory lending currently plaguing Ohio's cities, Ohio courts should afford municipalities the regulatory police powers they were intended to have under the Home Rule Amendment. Adopted in 1912 during the Ohio Constitutional Convention, the Home Rule Amendment grants authority to Ohio's municipalities "to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."[111] In other words, the Home Rule Amendment allows municipal sovereignty in matters of local self-government, subject to constitutional limitations.[112] Municipalities may also enact regulations under their police power, but when such regulations reach beyond local matters, the municipal ordinance must not conflict with state law.[113]

Prior to the adoption of the Home Rule Amendment, municipalities could exercise only those powers that the Ohio General Assembly delegated to them.[114] The original draft stated that powers of local government were to be subject to "general laws," but that section was changed to prohibit only municipal ordinances that conflicted with state statutes.[115] The original draft also provided that "no such regulations shall . . . be deemed in conflict therewith unless the general assembly, by general law, affecting the welfare of the state as a whole, shall specifically deny all municipalities the right to act thereon."[116] The intent behind the Amendment was to allow municipalities the option to have different forms of municipal organization, to give municipalities all the powers of local governance that did not conflict with the state's general laws, and to define and expand municipal power in the operation of local utilities.[117] These goals were the consequence of compromise between those wanting the state to remain superior and those desiring that municipalities have complete sovereignty. While municipalities were not granted complete sovereignty, they were given limited power in those areas set out by the Amendment.[118] Ohio's

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[110] 2006 Ohio Legis. Serv. Ann. 1478 (West).

[111] OHIO CONST. art. XVIII, § 3.

[112] City of Canton v. Whitman, 337 N.E.2d 766, 769 (Ohio 1975).

[113] JOHN MARTINEZ, 1 LOCAL GOVERNMENT LAW § 4:13 (West 2010).

[114] STEVEN H. STEINGLASS & GINO J. SCARSELLI, THE OHIO STATE CONSTITUTION: A REFERENCE GUIDE 327 (2004); *see* Kevin P. Shannon, Note, *Speeding Toward Disaster: How Cleveland's Traffic Cameras Violate the Ohio Constitution*, 55 CLEV. ST. L. REV. 607, 627 (2007).

[115] GEORGE VAUBEL, MUNICIPAL HOME RULE IN OHIO 679 (1978).

[116] *Id.*

[117] *Id.* at 14-15.

[118] *Id.*

courts are charged with the task of determining the extent of these powers by interpreting the Home Rule Amendment and ordinances written under its authority.[119]

In the Home Rule analysis, a court must first determine whether the matter in question involves an exercise of local self-government or an exercise of local police power.[120] If the city ordinance involves only an exercise of local self-government, the Home Rule analysis stops because a municipality is granted such power under the Ohio Constitution;[121] however, if the city ordinance involves the concurrent police power shared between local and state governments, then a court must determine if the state statute qualifies as general law. When a court determines that an exercise of municipal police power is in conflict with the general law, the ordinance must yield.[122] Ohio's courts must ensure that municipal police power ordinances "survive long enough to face a conflict test against a state statute" to comply with the Amendment.[123] The local police power is derived directly from the Home Rule Amendment, so even an express legislative provision cannot extinguish this power and avoid a conflict test.[124] Also, courts should not find state legislation automatically occupies an entire field just because the General Assembly has regulated some matter in that field.

A. Exercise of Local Self-Governance or Local Police Power

Under the Home Rule analysis, a court will first determine whether the ordinance in question involves a municipality's exercise of "local self-government" or "local police power."[125] Local self-government includes those matters relating "solely to the government and administration of the internal affairs of the municipality."[126] "The Ohio Supreme Court has described the powers of local self-government to be those whose nature and field of operation are 'local and municipal in character'—'all matters of a purely local nature.'"[127] Courts must consider the effect of the municipal ordinance when deciding whether to classify the ordinance as self-governance. If the result of the ordinance has no effect outside of the municipality, then the ordinance is derived from the municipality's self-government power;

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[119] *See* Fondessy Enter. v. City of Oregon, 492 N.E.2d 797, 803 (Locher, J., concurring).

[120] City of Dayton v. Ohio, 813 N.E.2d at 713.

[121] OHIO CONST. art. XVIII, § 3.

[122] Gregory M. Saul, Comment, *Constitutional Issues Under Ohio's New Regulatory Framework for Video Service Providers*, 37 CAP. U. L. REV. 819, 840 (2009); Am. Fin. Serv. Ass'n v. City of Cleveland, 858 N.E.2d at 780.

[123] *Fondessy Enter.*, 492 N.E.2d at 800.

[124] *Id.*

[125] Am. Fin. Servs. Ass'n v. City of Cleveland, 858 N.E.2d at 780.

[126] Beachwood v. Bd. of Elections, 148 N.E.2d 921, 923 (Ohio 1958).

[127] Saul, *supra* note 122, at 840 (citing Britt v. City of Columbus, 309 N.E.2d 412, 415 (Ohio 1974)).

however, if the effect of the ordinance is extraterritorial, then the General Assembly may regulate on such matters.[128]

Municipal regulations derived from the local police power are premised not only on protecting the "public health, safety, morals and general welfare," but also "in promoting the comfort, convenience and peace of mind" of its citizens.[129] Municipal regulations promulgated to deter predatory lending clearly fall within this category.[130] Those regulations sought to protect individuals and their communities at risk to predatory lenders from the dangerous repercussions of the illicit practice. If the ordinance is a police regulation, then courts must continue the Home Rule analysis.

B. "General Law" Within the Meaning of the Home Rule Amendment

Next, the court must apply the test set forth in *Canton v. Ohio* to determine if a state law constitutes "general law" within the meaning of the Home Rule Amendment.[131] The state enactment must (1) be part of a statewide, comprehensive legislative enactment, (2) prescribe a rule of conduct upon citizens generally, (3) apply equally to all parts of the state, and (4) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipality.[132] Ohio courts occasionally meld these factors into a general consideration of whether a comprehensive statutory plan is necessary to promote the safety and welfare of all the citizens of this state and is, thus, an issue of statewide concern.[133]

In comparison to Ohio's Home Rule analysis, California courts, in considering whether regulation is a matter of state-level concern, look to the intent of the state legislature. Local legislation enters an area that is "fully occupied" when the legislature has expressly manifested its intent to fully occupy the field, or impliedly when:

> (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the

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[128] *Id.* Examples of valid exercises of local self-government include "municipal elections, municipal ordinances regarding employees' military leave, zoning ordinances, and establishing and operating a police department." *Id.* at 841.

[129] City of Maple Heights v. Ephraim, 898 N.E.2d 974, 978 (Ohio Ct. App. 2008) (citing Ghaster Prop., Inc. v. Preston, 200 N.E.2d 328 (Ohio 1964)).

[130] Am. Fin. Servs. Ass'n v. City of Cleveland, 858 N.E.2d at 780-81 (issue of whether the ordinance constituted a police regulation rather than local self governance was uncontested).

[131] City of Canton v. Ohio, 766 N.E.2d 963 (Ohio 2002).

[132] *Id.* at 968.

[133] *See* Am. Fin. Servs. Ass'n v. City of Cleveland, 858 N.E.2d at 782.

> transient citizens of the state outweighs the possible benefit to the locality.[134]

This approach is distinguishable from Ohio's general law analysis in that it looks at how the legislation operates when the legislature has not expressly preempted municipal regulation. Particularly of interest, when state law partially covers a subject matter, California courts must balance the harm to state citizens generally with the local benefits secured through municipal regulation.[135]

Similarly, Colorado courts look to the totality of the circumstances to determine whether an issue is one of state, local, or mixed concern. Colorado courts consider factors "including the need for statewide uniformity of regulation, extraterritorial impact, other state interests, and local interests."[136] By considering local interests, Colorado's approach offers some protection to municipalities' home rule police power and to legislative intent behind the ordinances.

C. Conflict Analysis Under Home Rule Amendment

1. Ohio's Conflict Analysis

Once a court finds that a state enactment is "general law," it is imperative that the Home Rule analysis continues to an actual conflict.[137] To do otherwise would deny municipalities their powers granted by the Home Rule Amendment because the Amendment expressly states that municipal regulations "as are not in conflict with general laws" are permissible.[138] Ohio courts cannot simply merge the general law analysis into the final determination of whether a municipal ordinance stands.

In *Fondessy Enterprises, Inc. v. Oregon*, a hazardous waste landfill owner sought to have a municipal ordinance imposing a fee and recordkeeping requirements declared invalid because it conflicted with a state law regulating landfills.[139] In that case, the court held that local and state power had concurrent authority under their police power that did not conflict with each other because the power conferred upon municipalities by the Home Rule Amendment cannot be withdrawn by the legislature, and authority to adopt and enforce police regulations is limited only by general laws in actual conflict.[140] The courts below in that case were found to be in error because they relied exclusively on preemption grounds; finding that state law generally occupied the field of hazardous material regulation, rather than applying the direct conflict test set out by the Ohio Supreme Court in *Struthers v. Sokol*.[141]

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[134] City of Claremont v. Kruse, 100 Cal. Rptr. 3d 1, 14 (2009).

[135] Allowing a local consideration to permeate the courts' determination of whether state law is a general law that may conflict with a municipal ordinance would be beneficial to Ohio's municipalities and will be discussed further *infra* Part IV.

[136] U.S. W. Commc'ns, Inc. v. City of Longmont, 948 P.2d 509, 515 (Colo. 1997).

[137] *See* Saul, *supra* note 122, at 840.

[138] OHIO CONST. art. XVIII, § 3.

[139] *Fondessy Enter.*, 492 N.E.2d at 798.

[140] *Id.* at 800.

[141] *Id.*; Vill. of Struthers v. Sokol, 140 N.E. 519 (Ohio 1923).

After Ohio courts have determined that the applicable state law is "general law" and then moved into a conflict analysis, they have varied inconsistently when using the test to resolve whether a conflict exists. Under a direct conflict analysis, the test set out by the Ohio Supreme Court in *Struthers* is "whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa."[142] In other words, a statute and an ordinance may cover the same general matter where an ordinance regulates an issue not addressed by the statute,[143] but when the ordinance declares something to be prohibited that the state law permits, conflict exists.[144]

In other instances, Ohio courts have varied from this direct standard and instead applied a "conflict by implication" test. This test presents a broader analysis in which "prohibiting one thing is considered the same as allowing what was not prohibited."[145] Under this approach, there is no place for municipal regulations that are stricter than those imposed by the state.[146] Ohio courts have justified applying this approach by claiming the legislature intended for uniformity across the state, and it is not within the province of the court to determine policy.[147] Sometimes courts blur direct and implication conflict analyses to generally "[d]etermining whether a conflict exists" by "examin[ing] inconsistencies and contradictions between the ordinance and the statute."[148]

When Ohio courts have followed a direct analysis, they have held that an ordinance is not inconsistent with a state regulation merely because it governs further matters not covered by the statute.[149] In *Cincinnati v. Baskin*, the defendant was charged with possession of a firearm in violation of a Cincinnati ordinance.[150] Baskin argued that a Cincinnati ordinance prohibiting a semiautomatic rifle with a capacity of more than ten rounds was in conflict with state law prohibiting possession of a semiautomatic rifle of more than thirty-one rounds. In that case, the Ohio Supreme Court did not recognize the conflict by implication argument, in large part because the General Assembly had not expressly or impliedly occupied the entire field of gun regulation, and thus, it held that Cincinnati's ordinance was not in conflict with state law.[151]

Ohio courts have applied a conflict by implication approach whenever the statutory language seems to require it. An example of express language from the General Assembly can be found in *Cleveland Electric Illuminating Co. v.*

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[142] *Sokol*, 140 N.E. at 519.

[143] *See* Traditions Tavern v. City of Columbus, 870 N.E.2d 1197 (Ohio Ct. App. 2006).

[144] *See* City of Cincinnati v. Baskin, 859 N.E.2d 514 (Ohio 2006).

[145] City of Dayton v. Ohio, 813 N.E.2d at 726.

[146] George D. Vaubel, *Toward Principles of State Restraint Upon the Exercise of Municipal Power in Home Rule*, 24 STETSON L. REV. 417, 427 (1995).

[147] Am. Fin. Servs. Ass'n v. City of Cleveland, 858 N.E.2d at 784.

[148] Rispo Realty & Dev. Co. v. City of Parma, 564 N.E.2d 425, 428 (Ohio 1990).

[149] *Baskin*, 859 N.E.2d at 519; Benjamin v. City of Columbus, 146 N.E.2d 854, 864 (Ohio 1957).

[150] *Baskin*, 859 N.E.2d at 515.

[151] *Id.* at 519.

Painesville.[152] In that case, an Ohio statute expressly exempted intercity power lines from the control of municipalities. So even though there was no actual conflict, the court held that the transmission of electricity was in the "paramount interest of the state to provide general laws regulating the intrastate transmission of such current and to see that such transmission is not impeded by local regulation."[153]

In other cases, Ohio courts have found that the intent of the legislature was to forbid municipalities to make any changes to state regulation in a certain field.[154] For example, in *Neil House Hotel Co. v. Columbus*, the court relied on statutory language, allowing a liquor-premises licensee to sell until 2:30 AM, to read into the text the implicit meaning that a municipality could not ban such sales by a licensee prior to that hour.[155] The court based its reasoning in part on a prior case in which a statute had expressly said that municipalities could regulate an earlier time to start prohibiting the sale of alcohol; whereas in *Neil House Hotel Co.*, the statute made no express exception.[156]

Because of the variance in conflict tests amongst Ohio courts, Justice Maureen O'Connor, in her concurring opinion in *Baskin*, warned that the court needed to determine whether Ohio courts were going to recognize conflict by implication.[157] Justice O'Connor gives the following example to demonstrate the effect of recognizing conflict by implication:

> [I]f the state were to pass legislation stating that fireworks could not be used between 2:00 a.m. and 6:00 a.m., that statute would also implicitly grant citizens the right to use fireworks between 6:00 a.m. and 2:00 a.m. Accordingly, any ordinance that purported to prohibit the use of fireworks during different hours would conflict with the statute.[158]

If the Ohio Supreme Court were to adopt the concept of conflict purely by implication, "[the court] would essentially be holding that a statute's prohibiting one thing is the same as permitting everything else."[159]

To resolve which direction the court should move in, O'Connor examined the legislative history behind the Home Rule Amendment. The provision was added in order to overturn prior law where "even in the absence of an express state denial, a stricter municipal regulation was in conflict."[160] As indicated by this change in

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[152] Cleveland Elec. Illuminating Co. v. City of Painesville, 239 N.E.2d 75 (Ohio 1968).

[153] *Id.* at 78

[154] *See generally* Schneiderman v. Sesanstein, 167 N.E. 158 (Ohio 1929); Neil House Hotel Co. v. City of Columbus, 58 N.E.2d 665 (Ohio 1944); City of Lorain v. Tomasic, 391 N.E.2d 726 (Ohio 1979); Clermont Envtl. Reclamation Co. v. Wiederhold, 442 N.E.2d 1278 (Ohio 1982); Rispo Realty & Dev. Co. v. City of Parma, 564 N.E.2d 425 (Ohio 1990); Ohio Ass'n of Private Detective Agencies, Inc. v. City of North Olmsted, 602 N.E.2d 1147 (Ohio 1992).

[155] *Neil House Hotel Co.*, 58 N.E.2d at 667-68.

[156] City of Akron v. Scalera, 19 N.E.2d 279 (Ohio 1939).

[157] *Baskin*, 859 N.E.2d at 520 (O'Connor, J., concurring).

[158] *Id.*

[159] *Id.*

[160] VAUBEL, *supra* note 115, at 679.

language during the amendment process, Framers rejected the concept of conflict by implication.[161] "The delegates believed that as long as the state legislature did not indicate an intent to occupy the field or to prevent a stricter standard, a municipality could freely pass any ordinance stricter than state legislation, as long as the ordinance could coexist with state legislation."[162]

Also at the 1912 Constitutional Convention, Professor George W. Knight, a Franklin County delegate, stated the general purpose of the Home Rule Amendment was to create "a presumption in favor of the lawfulness of the municipalities' act, and that presumption would only be overcome by showing that the power had been denied to the municipalities or that it was against the general laws of the state."[163] Further, Knight said in regards to state general law that "a city can not make [state regulations] less strict than the state, but it can make them more strict."[164] A municipality cannot take power away from a state general law, but the intent of the Home Rule Amendment was to allow municipalities to add to state regulations.[165]

Even though O'Connor reviewed the history of the Amendment, Ohio precedent, and case law from other jurisdictions, her proposed Home Rule analysis would have little to no effect. O'Connor directs Ohio courts to look if the General Assembly intended to occupy a field with validly exercised legislative authority.[166] In the absence of such legislation, O'Connor would then apply a direct conflict analysis.[167] While O'Connor clarifies to an extent the method of the Home Rule analysis Ohio courts should follow, her proposal effectively leaves the analysis in the status quo.

2. Comparing Ohio's Conflict Analysis to Other Jurisdictions

Justice O'Connor's proposed analysis, probing the express and implied intent of the legislature, seems to mirror that of federal law. Under federal law, the Supremacy Clause of the Constitution governs preemption.[168] Based on that clause, Congress has the power to preempt state law as long as it acts within the scope of its powers delegated by the Constitution. Congress can expressly preempt state law when it explicitly states its intent to preempt that law, but if a statute does not contain express preemption language, courts must resolve "whether the federal statute's 'structure and purpose' or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent."[169] Federal courts recognize two

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[161] *Baskin*, 859 N.E.2d at 521.

[162] *Id.*

[163] *Proceedings and Debates of the Constitutional Convention of the State of Ohio: Hearing on Municipal Home Rule*, 64th Day (Ohio 1912) (statement of George W. Knight, representative of Franklin County.).

[164] *Id.* at 1439.

[165] VAUBEL, *supra* note 115, at 680-81.

[166] *Baskin*, 859 N.E.2d at 523-24 (O'Connor, J., concurring).

[167] *Id.*

[168] U.S. CONST. art. VI., cl. 2.

[169] Forrester, *supra* note 26, at 1344-45 (citing Barnett Bank v. Nelson, 517 U.S. 25, 31 (1996)).

kinds of implied preemption: conflict preemption and field preemption.[170] Under a federal conflict analysis, state law is preempted when a person could not comply with both federal and state law because it would be a "physical impossibility."[171] Field preemption takes place when Congress has taken the power of states to legislate in a given field because the federal statute is "so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it."[172]

Other states must also determine conflict under their home rule amendments. While many states share Ohio's case by case approach to conflict analysis,[173] other states vary the test slightly. For instance, California merges its general law and conflict analyses. In California, a municipal ordinance has a chance of surviving a conflict analysis only when a court finds that an area of law is partially covered by general law and the benefit to the municipality outweighs the benefit to all citizens of the state.[174] Michigan is similar to Ohio in that it applies a direct or conflict by implication analysis depending on the circumstances. Michigan, however, has narrowed and explicitly stated four factors for its courts to consider: (1) whether state law expressly preempts the area of law, (2) whether preemption should be implied based upon legislative history, (3) whether preemption may be implied based on the pervasiveness of a state regulatory scheme, and (4) whether the nature of the regulated subject matter demands exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest.[175] While in both of these states municipal ordinances face a greater challenge, the court's considerations are clear to the legislatures at both the municipal and state level when drafting legislation.

In other "Home Rule" states, "absent a clear manifestation of legislative intent to preempt a field of regulation, a municipality may enact an ordinance which neither conflicts with state legislation nor is itself unreasonable."[176] Courts in states such as Missouri, Connecticut, and Kansas have adopted this approach and permit local

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[170] *See* Gade v. Nat'l Solid Wastes Mgmt., 505 U.S. 88 (1992); Fla. Lime and Avocado Growers v. Paul, 373 U.S. 132 (1963).

[171] *See Fla. Lime and Avocado Growers*, 373 U.S. at 132.

[172] Forrester, *supra* note 26, at 1345 (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

[173] States that share Ohio's conflict analysis include Iowa, Minnesota, New Hampshire, New Mexico, Pennsylvania, Utah, and Washington. *See* City of Davenport v. Seymour, 755 N.W.2d 533 (Iowa 2008); City of Morris v. Sax Invs., Inc., 749 N.W.2d 1, 6 (Minn. 2008); Lakeside Lodge, Inc. v. Town of New London, 960 A.2d 1268 (N.H. 2008); City of Las Cruces v. Rogers, 215 P.3d 728 (N.M. 2009); Huntley & Huntley, Inc. v. Borough Council of Oakmont, 964 A.2d 855 (Pa. 2009); Salt Lake City v. Newman, 148 P.3d 931 (Utah 2006); State v. Kirwin, 203 P.3d 1044 (Wash. 2009).

[174] *See* Morehart v. County of Santa Barbara, 872 P.2d 143 (Cal. 1994).

[175] Michigan v. Llewellyn, 257 N.W.2d 902, 905 (Mich. 1977).

[176] 56 AM. JUR. 2D *Municipal Corporations* § 377 (2000).

ordinances that regulate above and beyond what state law prohibits.[177] The Connecticut Supreme Court has explained this approach to conflict analysis:

> [M]erely because a local ordinance, enacted pursuant to the municipality's police power, provides higher standards than a statute on the same subject does not render it necessarily inconsistent with the state law. Whether a conflict exists depends on whether the ordinance permits or licenses that which the statute forbids, or prohibits that which the statute authorizes. If, however, both the statute and the ordinance are prohibitory and the only difference is that the ordinance goes further in its prohibition than the statute, but not counter to the prohibition in the statute, and the ordinance does not attempt to authorize that which the legislature has forbidden, or forbid that which the legislature has expressly authorized, there is no conflict . . . . Where a municipal ordinance merely enlarges on the provisions of a statute by requiring more than a statute, there is no conflict unless the legislature has limited the requirements for all cases.[178]

To simply exemplify this approach, in *Kansas City v. LaRose*, a state crime required a *mens rea* element, while a municipal ordinance did not. Essentially, the ordinance criminalized more conduct than the state statute.[179] The Missouri Supreme Court in that case held there was no conflict between the two because the ordinance had simply "gone further" by expanding the prohibition. [180]

Other jurisdictions have settled on a conflict test, but Ohio courts have shifted erratically from a direct to a conflict by implication analysis, especially when prompted by the General Assembly to do so. Because it is unpredictable exactly how Ohio courts will read the legislative history and intent behind a state enactment, whether it will find an enactment is general law and ultimately whether it will find a conflict with a municipal ordinance it equally unpredictable. Thus, we should heed Justice O'Connor's warning that the courts should clarify their; however, following her approach would only further incentivize the General Assembly to strip municipal home rule power and Ohio courts to follow a conflict by implication analysis. Further exploration of Ohio courts' Home Rule analysis in the context of predatory lending is useful in ascertaining modifications necessary to greatly improve just outcomes.

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[177] *See* Greater New Haven Prop. Owners Ass'n v. City of New Haven, 951 A.2d 551 (Conn. 2008); Steffes v. City of Lawrence, 160 P.3d 843 (Kan. 2007); *Walsh*, 189 N.W.2d at 324 ("Mere differences in detail do not render [statute and ordinance] conflicting. If either is silent where the other speaks, there can be no conflict between them. Where no conflict exists, both laws stand. . . . As a general rule, additional regulation to that of a state law does not constitute a conflict therewith.").

[178] *Greater New Haven Prop. Owners Ass'n*, 951 A.2d at 559. In this case, a state statute did not expressly authorize the licensing and inspections of residential rental real estate required by a New Haven ordinance. The court held that "the statute does not prohibit such requirements, and those requirements do not frustrate the achievement of the state's objectives." *Id.*

[179] Kansas City v. LaRose, 524 S.W.2d 112, 117 (Mo. 1975) (en banc).

[180] *Id.*

IV. OHIO COURTS' APPLICATION OF HOME RULE ANALYSIS TO MUNICIPAL PREDATORY LENDING REGULATION

Because Ohio courts have been unpredictable as to which conflict analysis they will apply in any scenario, it is useful to examine their application of the Home Rule analysis solely in the context of predatory lending regulation in search of some clarity to their methodology. These cases arose when special interest groups of the lending industry quickly challenged that municipal ordinances regulating predatory lending conflicted with state law on the matter. After a number of Ohio's appellate courts came to a wide range of conclusions applying the Home Rule analysis on similar fact patterns, the Ohio Supreme Court in *American Financial Services Ass'n v. Cleveland* sought to provide finality to the issues of whether the state's predatory lending regulation is general law under Ohio's Home Rule Amendment,[181] and, if the regulation constitutes "general law," whether local predatory lending ordinances imposing stricter requirements on lending transactions conflict with the state's predatory lending statutes.[182]

The Ohio Supreme Court's analysis in *American Financial Services Ass'n v. Cleveland* first determined whether an ordinance is enacted under a municipality's local-governance or police powers granted under the Home Rule Amendment.[183] Predatory lending regulation is correctly classified as promulgated under a municipality's police power because it is not solely a matter of local governance.[184] For this reason, the litigants did not dispute whether the predatory lending regulation was enacted under the police power.[185]

Next, the court applied the *Canton* test to determine whether the Ohio regulations were "general laws." Before beginning the *Canton* test, the court recognized that the General Assembly announced its intent to occupy the power to regulate in this matter, making predatory lending a matter of statewide concern, but stated that intent alone is not sufficient to "trump the constitutional authority of municipalities to enact legislation pursuant to the Home Rule Amendment, provided that the local legislation is not in conflict with general laws."[186] The court found that the enactment was part of comprehensive statewide legislation to regulate consumer mortgage lending that would apply equally to all lending entities in the state, and, in context, the enactment did not only seek to limit municipal power.[187] Because the enactment established rules of conduct for all Ohio citizens by regulating lenders and providing recourse for all consumers subject to predatory loans, the court concluded that the *Canton* test was satisfied. Therefore, the court determined that Ohio's predatory lending statutes are "general laws" within the meaning of the Home Rule Amendment.[188]

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[181] OHIO CONST. art. XVIII, § 3. *See infra* Part II.C.

[182] Am. Fin. Servs. Ass'n v. City of Cleveland, 858 N.E.2d at 780.

[183] Saul, *supra* note 122, at 840.

[184] *See id.*

[185] Am. Fin. Servs. Ass'n v. City of Cleveland, 858 N.E.2d at 780-81.

[186] *Id.* at 782.

[187] *Id.* at 785-86.

[188] *Id.* at 783-84.

After making the "general law" determination, the court next considered whether Cleveland's ordinance conflicted with state law. The American Financial Association's argument was that the ordinance was in conflict with the state law because the ordinance imposed additional restrictions in some instances that would have been permissible under state law.[189] Cleveland countered by arguing that the ordinance did not conflict with state law because the ordinance's regulatory scheme was prohibitory, meaning that the ordinance did not authorize loans actually prohibited by the state, it merely placed more preventive measures than state law.[190]

The Ohio Supreme Court in that case also had to resolve an appellate court split. Interestingly, the Ohio Eighth District Court of Appeals, in applying the *Canton* test in this case, concluded that Revised Code section 1.63, which expressly stated that municipal ordinances were preempted by state law in the predatory lending field, did not constitute a "general law": because this enactment seeking to deprive municipalities of their Home Rule police power applies only to legislative bodies, and not to citizens generally, the court held it is not "general law" and is thus unconstitutional.[191] There was no conflict between statutory provisions covering predatory loans and the ordinance because absent the statutory language that was found in Revised Code section 1.63 limiting local governance, "a city is permitted to adopt greater protections, requirements, or standards than those of the state, provided no conflict is presented."[192] The court, applying the direct conflict analysis, held that the ordinance does not permit what state law expressly prohibits, but state law only sets a minimum requirement that does not expressly limit any stricter regulations imposed by a city.[193]

Similarly, the Ohio Sixth District Court of Appeals in *American Financial Services Ass'n v. Toledo* also applied the direct conflict test, thus allowing provisions of the statutes in direct conflict with the state regulation to be severed from the Toledo ordinance.[194] The Ohio Sixth District Court of Appeals held that the state legislation unconstitutionally preempted any municipal regulation of predatory lending in violation of the Home Rule Amendment, and when local and state law conflicted, if possible, that provision could be severed from the ordinance.[195]

In *Dayton v. Ohio*, the City of Dayton brought suit against the State for declaratory and injunctive relief, claiming that Revised Code section 1.63 was not comprehensive, statewide regulation of predatory lending, but merely served to limit Dayton's legislative power.[196] The Second District Court of Appeals held that

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[189] Am. Fin. Servs. Ass'n v. City of Cleveland, 19 Ohio Mun. Serv. 17 (2007).

[190] *Id.* "The local ordinance cannot prohibit something that the statute permits because the statute does not permit anything, and the local ordinance cannot permit something that the statute prohibits because the ordinance does not permit anything." Merit Brief, City of Cleveland at 11, Am. Fin. Servs. Ass'n v. City of Cleveland, 858 N.E.2d 776 (Ohio 2006) (No. 2005-0160).

[191] Am. Fin. Servs. Ass'n v. City of Cleveland, 824 N.E.2d 553, 560 (Ohio Ct. App. 2004).

[192] *Id.* at 560.

[193] *Id.*

[194] Am. Fin. Servs. Ass'n v. City of Toledo, 830 N.E.2d at 1248-49.

[195] *Id.* at 1244-45, 1248-49.

[196] City of Dayton v. Ohio, 813 N.E.2d at 713.

Ohio's law was a general law, expressing that while certain provisions attempt to limit municipal power, the statutes must be read in context of broader legislation.[197] That court recognized that "[u]nder 'conflict by implication,' a court would conclude that a conflict exists" but "[u]nder a narrower construction, another court might find no conflict."[198] The court established that whichever course the court chooses, case law could be found to support their decision.[199] In deciding to follow the intent of the legislature, thus applying a conflict by implication analysis, the court found that Dayton's stricter regulations were preempted by state law.[200]

The Ohio Supreme Court in *American Financial Services Ass'n v. Cleveland* followed the *Dayton* court's approach and applied the broader, conflict by implication analysis rather than a direct conflict test. The court held that "any local ordinances that seek to prohibit conduct that the state has authorized are in conflict with the state statutes and are therefore unconstitutional."[201] Because the Cleveland ordinance sought to regulate loans in a field generally occupied by state regulations and, more specifically, loans that were allowable by state law, the ordinance's loan regulations were held unconstitutional.[202]

V. INCORPORATING LOCAL INTERESTS INTO OHIO'S HOME RULE AMENDMENT ANALYSIS: REMOVING THE PREEMPTION SHIELD PROTECTING PREDATORY LENDING AND RESTORING MUNICIPALITIES' HOME RULE POLICE POWER

A. Preemption as a Shield for Predatory Lending

From a review of statistical evidence, it is apparent that the housing market in Ohio cities became flooded with foreclosures after preemption of local predatory lending regulation.[203] The question that must be asked is: if the Ohio General Assembly truly intended to combat one of the most serious problems facing the state, why were the legislators seemingly content to regulate predatory lending at a less restrictive threshold than cities across the state? When the Ohio Supreme Court held that the stricter local ordinances conflicted by implication with state regulation, it reinforced the shield predatory lenders exploit to escape liability directly from individual consumers subjected to subprime lending and indirectly from municipalities with deteriorating urban areas.[204]

"Legislative concern for public safety is not only a proper police power objective—it is a mandate."[205] Rightfully, both state and local governments sought

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[197] *Id.* at 722.

[198] *Id.* at 726.

[199] *Id.* at 726-27.

[200] *Id.* at 727.

[201] Am. Fin. Servs. Ass'n v. City of Cleveland, 858 N.E.2d at 785.

[202] *Id.* at 785-86.

[203] *See Cuyahoga County Foreclosure Cases*, *supra* note 11. In Cuyahoga County alone, more than 45,000 foreclosure cases were filed from the beginning of 2006 through early 2009. *Id.*

[204] *See Ameriquest Mortg. Sec., Inc.*, 621 F. Supp. 2d at 513.

[205] *Ephraim*, 898 N.E.2d at 978.

to deter predatory lending through their police powers; however, state legislators refused to regulate past a threshold that certain Ohio communities deemed necessary for their own protection. Even though the general purpose of predatory lending is seeking to protect the public, many in the lending industry oppose municipal regulations. Some members of the lending industry contend that municipal regulation would constitute an overly restrictive patchwork of regulation that would create confusion and increase the cost of borrowing, while decreasing the availability of credit for sub-prime borrowers, thus harming the people who should be helped by the legislation.[206] Further, lenders support regulation only on the state level by claiming it is the only true way to prevent an exodus of lenders from Ohio.[207]

While many of these concerns are warranted, municipal ordinances sought only to govern loans at thresholds that were disproportionately affecting their communities. Unfortunately, state legislators bought into the lending industry's argument for uniformity across the state and, in doing so, provided protection for predatory lending by expressly preempting municipalities from regulating predatory lending.[208] The lending industry's arguments, however, lose merit as predatory lending has continued to operate behind the preemption shield created by Ohio law in the absence of more restrictive municipal regulation. By allowing such great influence from lending institutions on state lawmakers, potentially liable parties are, in essence, regulating themselves. The General Assembly, by expressly depriving municipalities of the power of local governance for regulating predatory lending, and the Ohio Supreme Court, by failing to see this enactment as pretext to the extent it only sought to overrule local ordinances by occupying the general field of predatory lending, have created a stalwart wall to allow subprime lending to continue. The Ohio Supreme Court by denying municipalities the Home Rule conflict analysis as intended by the Framers has not acted in "[its] role as guardian of the state Constitution"[209] and should modify its analysis to restore its role as guardian and guarantee consistency.

B. Incorporating Local Interests into Ohio's Home Rule Amendment Analysis Would Allow Cities to Better Protect Themselves from the Disproportionate Impact Experienced from Predatory Lending

The Ohio Supreme Court's Home Rule analysis is not consistent with the original intent behind Ohio's Home Rule Amendment. That Amendment was added to the Ohio Constitution in order to give municipalities powers that they did not have before its enactment, including the ability to legislate and enforce police regulations that did not directly conflict with state law.[210] In other words, the Framers rejected

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[206] Dickerson, *supra* note 28, at 39; Brief of Amicus Curiae, the Ohio Ass'n of Mortgage Brokers, Urging Reversal in Support of Appellant American Financial Services Ass'n, Am. Fin. Servs. Ass'n v. City of Cleveland, 858 N.E.2d 776 (Ohio 2006) (No. 2005-0160).

[207] *See* Brief of Amicus Curiae, *supra* note 206.

[208] OHIO REV. CODE ANN. § 1.63; *see* Tynan, *supra* note 23, at 880. The use of preemption shields is not an isolated occurrence. *See* Adam Liptak, *No Legal Shield in Drug Labeling, Justices Rule*, N.Y. TIMES, Mar. 5, 2009, *available at* http://www.nytimes.com/2009/03/05/washington/05scotus.html?_r=1.

[209] *Fondessy Enter.*, 492 N.E.2d at 803 (Locher, J., concurring).

[210] *See* VAUBEL, *supra* note 115, at 14-15.

solely following the General Assembly's intent over a municipality's interest and required an actual conflict analysis.[211]

Ohio courts originally allowed municipalities to regulate using their police power unless there was a direct conflict with state law,[212] following the express language of the direct conflict test set out in *Struthers*.[213] While some previous courts had used conflict by implication to find municipal ordinances preempted,[214] not until *Cleveland v. Betts* did the court read a conflict by implication approach into the Home Rule Amendment.[215] That court held that although the ordinance did not meet *Struthers* test, it did "contravene the expressed policy of the state with respect to crimes by deliberately changing an act which constitutes a felony under state law into a misdemeanor, and this creates the kind of conflict contemplated by the Constitution."[216]

Where Ohio courts were once praised by commentators as protecting both state and local issues by applying a direct conflict analysis,[217] modern courts seem to have taken to the conflict by implication approach, and, in the process, have taken power that the Framers intended for municipalities and effectively returned it to the state.[218] Today, Ohio courts have been unpredictable in whether they will apply a direct or conflict by implication analysis.[219] The express language of the Amendment, the intent behind the Amendment, and judicial precedent support Ohio courts following a direct approach.[220] Ohio courts, however, have started reaching further and further, in an effort to find general law in order to promote "uniformity," even though ill effects have not been borne equally by the citizens of Ohio. In essence, the courts are merging the finding of general law with whether a statute and ordinance actually conflict with one another.[221] A conflict analysis is devastating to municipal interests when it is based upon the proposition that what the state does not forbid, it permits. When courts apply a conflict by implication analysis, Ohio courts give too much power to the General Assembly, contravening the original intent behind the Home Rule Amendment.[222] Further, it increases the uncertainties of court discretion.[223]

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[211] *Baskin*, 859 N.E.2d at 521.

[212] *Sokol*, 140 N.E. at 519 (paragraph two of court's syllabus).

[213] *Id.*

[214] *See Schneiderman*, 167 N.E. at 158; *Neil House Hotel Co.*, 58 N.E.2d at 665.

[215] City of Cleveland v. Betts, 154 N.E.2d 917, 919 (Ohio 1958).

[216] *Id.*

[217] *See* Vaubel, *supra* note 146, at 440.

[218] *See* VAUBEL, *supra* note 115, at 679.

[219] *See Baskin*, 859 N.E.2d 514; Am. Fin. Servs. Ass'n v. City of Cleveland, 858 N.E.2d at 784; *Fondessy Enter.*, 492 N.E.2d at 800.

[220] *See* VAUBEL, *supra* note 115, at 679.

[221] *See Fondessy Enter.*, 492 N.E.2d at 800.

[222] Vaubel, *supra* note 146, at 427.

[223] *Id.*

When Ohio courts choose to apply a conflict by implication analysis in the context of predatory lending under the cover of "uniformity," the resulting preemption shield protecting predatory lenders has put Ohio's cities in imminent danger due to the negative spillover effects of the ongoing foreclosure crisis. While the outcome of recent increased restrictions on predatory lending remains to be seen, allowing lending institutions to manipulate the law around their interest risks leaving both mortgage consumers and cities without legal recourse. The Ohio Supreme Court contributed to the severe foreclosure and public nuisance crises plaguing Ohio's cities by upholding the General Assembly's bill expressly stripping municipalities of the use of their Home Rule police power to contend with predatory lending.[224]

The General Assembly was not given the power under the Home Rule Amendment to expressly strip municipal police power; on the contrary, the Amendment was passed with the intent to give municipalities that power.[225] By allowing the General Assembly to expressly deny municipal power, the court generally finds a field preempted and voids a municipal ordinance that does not actually conflict with state law.[226] This broad prohibition on municipal power related to predatory lending "emasculates local governments from impacting economic and social problems facing their constituents and has implications beyond the predatory and subprime lending issues."[227]

This protection for predatory lending can be dismantled if Ohio courts considered the local interest and intent behind the ordinance when applying a Home Rule analysis. Ohio courts can do this in two ways. First, the courts could alter their approach for determining general law to a totality of the circumstances test, giving local interests naturally more weight in a court's decision. Along with this modification, Ohio courts must keep this step of the analysis separate, otherwise it risks not even applying a conflict test when the Home Rule Amendment so requires.[228] Second, Ohio courts could apply a narrower, direct conflict analysis, as intended by the Amendment Framers, to capture the local needs of a community. By following these proposed modifications, a municipality will have some degree of control over its own future as the Home Rule Amendment Framers intended. These solutions are generally applicable beyond predatory lending regulation and in other jurisdictions that have denied municipal regulatory power.

1. Proposed Modification to Ohio Courts' General Law Analysis

The determination of general law is an integral part of the Home Rule Analysis. Isolating the analysis to the intent of the General Assembly without any consideration of local interest behind an ordinance, passed by elected representatives of the people of that municipality, is unreasonable, unfair, and not in line with the original intent behind the Home Rule Amendment. This is especially true when

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[224] *See* Am. Fin. Servs. Ass'n v. City of Cleveland, 858 N.E.2d at 785-86.

[225] *See* VAUBEL, *supra* note 115, at 14-15.

[226] *See Fondessy Enter.*, 492 N.E.2d at 800.

[227] Tynan, *supra* note 23, at 884.

[228] *See Fondessy Enter.*, 492 N.E.2d at 800; *Baskin*, 859 N.E.2d at 520 (O'Connor, J., concurring).

Ohio courts merge the finding of general law into an automatic assumption of conflict by implication.[229] Without giving any weight to the legislative intent behind an ordinance or the potential impact of not having such regulation, Ohio's municipalities are left with limited effective recourse in combating a public nuisance that is disproportionately affecting their communities, especially in the context of predatory lending regulation.

Predatory lending affects the entire state, but the most severe cases are concentrated in Ohio's largest cities.[230] In support of its finding that Ohio predatory lending regulation is a general law, the Ohio Supreme Court referenced decisions finding local ordinances unconstitutional for imposing speed limits that were lower than permitted by state law, mandating earlier closing times for liquor stores than were permitted by state liquor regulations, and instituting lower local limits on bingo parlor payouts than were permitted by state gaming laws.[231] Unfortunately, the court failed to acknowledge the special position predatory lending must occupy.

While all of the referenced cases limit certain detrimental activities Ohioans may not want present in their towns, speed limits, closing times, and bingo payouts all apply to people generally, rather than disproportionately to certain demographics—as is the case with predatory lending. Interestingly, these "general law" examples often took into account local variables when determining appropriate regulation. For instance, speed limits on state roads are often lower in crowded, urban areas than in more rural parts of the state for safety reasons based on engineering studies done on local traffic patterns.[232] Because legislators can investigate the individual characteristics of a community to properly govern traffic laws, certainly predatory lending regulation presents another prime area to employ such measures to mend Ohio's disproportionally afflicted cities.

Beyond Ohio courts' apparent contradiction as to what constitutes general law from an abstract standpoint, empirical data shows that predatory lending has had a disproportionate impact on those cities with ordinances that were preempted by state law. A recent study reveals that the financial burden has fallen to the tax base of municipalities. For instance, Cleveland and Dayton households suffer a cost of nearly $200 each, while Columbus households, a city composed of a smaller amount of the populations targeted by predatory lenders, are only faced with a cost of $20 per household.[233] This alarming discrepancy between these figures shows that courts should consider local interests as well when determining if a state enactment is general law. While this consideration may seem to be too political for the judiciary, Ohio courts have a duty to uphold the Ohio Constitution, including protecting municipalities' power to regulate under the authority of the Home Rule

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[229] *See Fondessy Enter.*, 492 N.E.2d at 800.

[230] Nelson, *supra* note 2, at 5.

[231] Am. Fin. Servs. Ass'n v. City of Cleveland, 858 N.E.2d at 784.

[232] *Speed Zones: Ohio Speed Limits*, OHIO DEP'T OF TRANSP., http://www.dot.state.oh.us/districts/D01/PlanningPrograms/trafficstudies/SpeedZones/Pages/default.aspx (last visited Mar. 27, 2011).

[233] CMTY. RESEARCH PARTNERS & REBUILD OHIO, *supra* note 16, at iix (executive summary).

Amendment.[234] A modification of Ohio's general law analysis would serve to better protect municipalities and not allow the General Assembly to deny municipal regulatory police power whenever it deems appropriate.

Ohio currently follows the guidelines set out by the *Canton* court. A statute is "general law" within the meaning of the Home Rule Amendment if it: (1) is part of a statewide, comprehensive legislative enactment, (2) prescribes a rule of conduct upon citizens generally, (3) applies equally to all parts of the state, and (4) sets forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipality.[235] The major flaw of this analysis is that it does not include any consideration of a municipality's interest in its ordinance. Effectively, it is an outright denial of municipal Home Rule police regulations whenever the court sees fit, regardless of the importance or impact on a given community. Further, as seen from the appellate and Ohio Supreme Court decisions from *American Financial Services Ass'n v. Cleveland*, this factors test leads to unpredictable results from Ohio courts as to what constitutes a general law,[236] making it difficult for both state and local legislatures to write effective legislation with a high probability of surviving judicial scrutiny.

While scrapping a factors test in favor of a bright line rule to determine if a statute qualifies as general law would greatly improve the predictability of case outcomes, creating a list of "per se" general laws would be difficult and inherently incomplete. Instead, Ohio should modify its approach to mirror some aspects of other states' analyses. California's approach, for example, looks at the operation of the legislation when the legislature has not expressly preempted municipal regulation.[237] Specifically, California courts must balance the harm to state citizens generally with the local benefits secured through municipal regulation.[238] Ohio courts should consider adding a similar factor to its analysis that would weigh the local benefits in comparison with the harm caused to other state citizens.

An even better solution for Ohio courts may be to do away with the *Canton* guidelines and instead adopt a totality of the circumstances test similar to Colorado's. In Colorado, courts consider the necessity of uniform statewide regulation, extraterritorial impact, other state interests, and local interests, among other considerations.[239] While this may not make Ohio's general law analysis any more predictable, by considering local interests, Colorado's totality of the circumstances approach would offer some protection to municipalities' Home Rule Amendment police power and to the legislative intent behind their ordinances by requiring Ohio courts to consider local interests.

Even outside the context of predatory lending, accounting for a community's interest is not detrimental to situations where the state should properly govern when

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[234] *See* Curtis Rodebush, *Separation of Powers in Ohio: A Critical Analysis*, 51 CLEV. ST. L. REV. 505, 516-17 (2004).

[235] City of Canton v. Ohio, 766 N.E.2d at 968.

[236] *See* Am. Fin. Servs. Ass'n v. City of Cleveland, 858 N.E.2d at 784; Am. Fin. Servs. Ass'n v. City of Cleveland, 824 N.E.2d 553, 560 (Ohio Ct. App. 2004).

[237] *Kruse*, 100 Cal. Rptr. 3d at 14.

[238] *Id.*

[239] *U.S. West Commc'ns, Inc.*, 948 P.2d at 515.

there is "general law," and a municipal ordinance directly conflicts with that law. For example, in *Ohioans for Concealed Carry, Inc. v. Clyde*, a citizens' group challenged a city ordinance prohibiting licensed handgun owners from carrying concealed handguns in city parks.[240] That court applied the *Canton* test and determined that state law set out statewide, comprehensive legislation for police regulations governing concealed carry that proscribed a rule upon Ohio citizens generally to apply uniformly throughout the state.[241] Adding a consideration of local interest to the general law analysis would do little to the outcome of this case because the state's "general law" claim was more compelling than the minimal interest of the municipality. In this case, the state regulation there did "more than merely prevent municipalities from enacting inconsistent laws. It provided a program to foster proper, legal handgun ownership in this state."[242]

By adding a local consideration to the general law analysis, a municipal police regulation that is direly needed by a community—like one needed to prevent predatory lending—will have a much higher survival rate. Modifying the analysis to include such a factor would also prevent the Ohio Supreme Court from merging the general law and conflict analysis because conflict by implication would be much harder to find when local interests are considered against those of the General Assembly.

2. Proposed Modification to Ohio Courts' Conflict Analysis

In *American Financial Services Ass'n v. Cleveland*, the Ohio Supreme Court applied a conflict by implication analysis rather than a direct analysis. The court determined that state law occupied the entire field of predatory lending regulation. Specifically in that case, even though Cleveland sought to regulate loans at a lower threshold than state law, lending institutions could have complied with both state and municipal law. If the court had applied a direct conflict analysis, the stricter regulations of Cleveland's ordinance not in direct contradiction with state law would have remained in effect and could have protected consumer populations who were at greater risk to predatory lending.[243]

Again, Ohio's direct conflict analysis test is "whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa."[244] The Ohio Supreme Court's decision in *Cleveland* was troubling in that it found a conflict between municipal and state law even though the express definition of the words used in this test indicates that laws that are prohibitory cannot conflict when one regulates further. Ohio courts could greatly improve their fairness and consistency by not broadly interpreting this rule. Additionally, Ohio courts would hardly be alone in adopting a stricter interpretation of the conflict test.

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[240] Ohioans for Concealed Carry, Inc. v. City of Clyde, 896 N.E.2d 967, 968-69 (Ohio 2008).

[241] *Id.* at 973-76.

[242] *Id.* at 975.

[243] *See Greater New Haven Prop. Owners Ass'n*, 951 A.2d at 559; *Walsh*, 189 N.W.2d at 326; *LaRose*, 524 S.W.2d at 117.

[244] Am. Fin. Servs. Ass'n v. City of Cleveland, 858 N.E.2d at 784.

Other states that follow a direct conflict analysis have interpreted the rule to uphold municipal ordinances that regulate conduct above and beyond what state law does not expressly prohibit, or that regulate where state law is silent.[245] "Where a municipal ordinance merely enlarges on the provisions of a statute by requiring more than a statute, there is no conflict unless the legislature has limited the requirements for all cases."[246] If the Ohio Supreme Court had followed a stricter interpretation of its conflict analysis as applied by courts such as those in Connecticut or Missouri,[247] the court could have removed only those statutes that were in direct conflict, without denying municipalities their Home Rule police powers.[248]

Ohio courts have justified the conflict by implication analysis by stating "it is not the province of the court to formulate or declare a policy," yet, in essence, that is what the court does by almost automatically assuming that local ordinances are preempted when a state law regulates a matter within the same field.[249] The *Dayton* court even went as far as to say that "uniform legislation is a better way to solve the problem than having many conflicting requirements at the state and local level."[250] While the Ohio Supreme Court was concerned that subjecting lenders to different regulation would deter lending, that was exactly the activity that municipal legislators were trying to control. The municipal ordinances did not seek to stop all lending; only certain lending that had adverse effects on the community. By applying a conflict by implication analysis, instead of a direct conflict test, the court strengthened predatory lenders' ability to continue to operate within Ohio and in the process stripped a municipality's regulatory police power almost entirely.

There are many reasons Ohio courts should apply a direct conflict analysis. First, a direct analysis is consistent with the intent behind the Home Rule Amendment to grant municipalities power. Consequently, there should be a presumption in favor of the lawfulness of a municipality's act unless it directly conflicts with the general laws of the state. In other words, a municipality cannot make state regulations less strict because that would be permitting what the state had expressly prohibited, but they can make regulations that are stricter.[251]

Next, a direct conflict analysis would capture the unique needs of a community's population. Cleveland, for instance, sought to protect its specific demographic makeup exposed to a greater risk of predatory lending by regulating above and

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[245] *See Greater New Haven Prop. Owners Ass'n*, 951 A.2d at 559; *Steffes*, 160 P.3d at 843; *Walsh*, 189 N.W.2d at 324 (a local ordinance that regulates in an area where a state statute also regulates, with mere differences in detail, is not rendered invalid due to conflict).

[246] *Greater New Haven Prop. Owners Ass'n*, 951 A.2d at 559. In this case, a state statute did not expressly authorize the licensing and inspections of residential rental real estate required by a New Haven ordinance. The court held that "the statute does not prohibit such requirements, and those requirements do not frustrate the achievement of the state's objectives." *Id.*

[247] *See Greater New Haven Prop. Owners Ass'n*, 951 A.2d at 559; *LaRose*, 524 S.W.2d at 117.

[248] *See* Am. Fin. Servs. Ass'n v. City of Cleveland, 858 N.E.2d at 784.

[249] *See id.*

[250] City of Dayton v. Ohio, 813 N.E.2d at 730.

[251] *See supra* Part III.C.1.

beyond what the state proscribed.[252] While a number of Ohio's larger cities have sought to protect themselves from predatory lending, many municipalities in Ohio have not sought to prevent predatory lending, indicating the problem does not rise to the level of a statewide concern. In fact, of Ohio's 940 municipalities, few have enacted municipal predatory lending regulation.[253] This suggests that a majority of Ohio's communities do not view predatory lending as a pressing issue, and that conditions in certain communities have created the need for localized predatory lending legislation.

Further, a direct conflict analysis should also be applied because abandoned properties constituting public nuisances tend to concentrate more in Ohio cities than in rural areas.[254] Because public nuisance leads to many safety issues and drains resources, especially when it is concentrated in certain areas, courts should allow local legislatures to determine the best course of action before a problem disproportionally affects their city.[255] Again, a narrow conflict analysis, preempting only those ordinances in direct contradiction to state law, would allow for any regulations above and beyond the minimum state prescribed regulation based on the specific needs of a municipality and would be in line with the intent of the Home Rule Framers.

3. Modifications to Ohio's Home Rule Analysis Will not only Restore Municipalities' Home Rule Police Powers, but Will also Incentivize the General Assembly to Pass More Effective Legislation

Perfect legislation is an impossible ideal, but states should take precautions to ensure the quality and effectiveness of their laws.[256] When adopting the Home Rule Amendment, the Framers of 1912 Ohio Constitution did not view greater municipal power as an "invitation for disaster," but rather welcomed it as "greater control by the people of [Ohio] over their own destinies and an opportunity for municipalities to enact legislation complementing state legislation."[257] When Ohio courts apply a conflict by implication analysis, the General Assembly has no incentive to pass better legislation. Applying a direct conflict analysis would allow local interests to carry greater weight in the Home Rule Analysis, which in turn would incentivize the General Assembly to be precise in the scope of its enactments. Additionally, a direct conflict analysis would demand legislation that shows more explicitly that it constitutes "general law" in substance and not just form. The General Assembly's enactments should be subject to judicial scrutiny and not receive a free pass just because it intends to regulate in a given field.

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[252] CLEVELAND, OHIO, CODIFIED ORDINANCES § 659.01(f) (2002); *see* Nelson, *supra* note 2, at 5.

[253] *Municipalities in Ohio*, OHIO MUNICIPAL LEAGUE, http://www.omunileague.org/Legislation/SenateWaysandMeansTestimony.htm (last visited Mar. 27, 2011).

[254] *See* MALLACH ET AL., *supra* note 3.

[255] *Id.*

[256] "The problem with courts' making judgments about the effectiveness of legislation is that perfect legislation is never written." City of Dayton v. Ohio, 813 N.E.2d at 723.

[257] *Fondessy Enter.*, 492 N.E.2d at 803 (Locher, J., concurring).

In the context of predatory lending, the General Assembly's policy justification is that state law uniformity benefits consumers because it keeps the mortgage process simple and encourages lending beneficial for the state's economy. Yet, this reasoning is flawed. Predatory lending destroys consumers' credit and often wipes out a large portion of a person's wealth because Americans traditionally invest in home ownership.[258] Additionally, because predatory lending is a contributing factor to public nuisances across the state, protecting the practice both deteriorates the tax base while demanding public and private expenditures toward nuisance abatement.[259]

Instead of switching between different analyses, applying a direct conflict analysis would give state and municipal legislatures an incentive to improve clarity, specificity, and thoroughness in its enactments, while denying predatory lenders legal maneuverability. For instance, if states allowed local regulation, even for a limited time, the municipalities could have acted as "laboratories" experimenting with various kinds of regulation.[260] Certain provisions of the municipal predatory lending regulation would have failed, but just as many would have likely been effective in combating predatory lending if they had not been voided under a conflict by implication approach. The legislature could observe the successes and failures of municipalities, and with that knowledge, pass effective, comprehensive legislation that eliminates the need for more restrictive local ordinances by accounting for special local circumstances.

VI. CONCLUSION

Whether in the case of predatory lending or other issues that will differ from location to location, municipalities should continue to protect their cities by exercising their power under the Home Rule Amendment to enforce regulations not in direct conflict with Ohio law.[261] Even though the Framers of the Home Rule Amendment intended to protect municipal power by ensuring that only those ordinances in actual conflict would be voided, Ohio courts have denied municipalities their Home Rule police power by applying a conflict by implication test, contributing to the housing crisis still plaguing Ohio's cities. While Ohio courts have made clear that it is not the position of the judiciary to consider policy, courts can follow the lead of other jurisdictions that consider the totality of the circumstances when determining whether state regulation constitutes a general law. Also, beyond following the intent of the Framers, Ohio courts should apply a direct conflict analysis to better capture local variables and needs, especially when matters have a disproportionate effect on certain communities. By following these proposed modifications a municipality will have better control over its own future as the Framers intended. In turn, the increased consistency from the courts would stimulate both the General Assembly and city councils to enact improved legislation.

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[258] *See* Jack Hough, *Renting Makes More Financial Sense than Homeownership*, SMART MONEY (Apr. 18, 2007), http://www.smartmoney.com/personal-finance/real-estate/renting-makes-more-financial-sense-than-homeownership-21111/.

[259] *See* MALLACH ET AL., *supra* note 3, at 7.

[260] *See* Gonzales v. Raich, 545 U.S. 1, 42 (2005).

[261] Entin & Yazback, *supra* note 93, at 779.