An Agricultural Law Research Article

Toward Adoption of State Law as the Federal Rule of Decision in Cases Involving Voluntary Federal Creditors

by

Aaron D. Weiner

Originally published in MINNESOTA LAW REVIEW
73 MINN. L. REV. 171 (1988)

Toward Adoption of State Law as the Federal Rule of Decision in Cases Involving Voluntary Federal Creditors

Mortgage foreclosures by voluntary federal creditors, such as the Small Business Administration (SBA), Federal Housing Authority (FHA),[1] or Farmers Home Administration (FmHA),[2] create a unique legal problem. State mortgage law potentially affects the implementation of these federal programs to such an extent that federal courts have held that federal law preempts the state law.[3] Application of federal law, however, is

1. The Department of Housing and Urban Development (HUD) currently administers FHA. References to the FHA or HUD are to the programs HUD administers under the National Housing Act, 12 U.S.C. §§ 1701-1750 (1982 & Supp. IV 1986). This Note refers to the FHA and HUD synonymously.

2. This Note refers to federal entities such as the Small Business Administration, Federal Housing Authority, and Farmers' Home Administration as *voluntary federal creditors*. The phrase emphasizes the distinction between federal creditor/debtor relationships resulting from "voluntarily" undertaken social welfare programs, and federal creditor/debtor relationships resulting from governmental necessity in tax collection. *See* United States v. Kimbell Foods, Inc., 440 U.S. 715, 734-36 (1979) (distinguishing the federal agencies as voluntary and involuntary creditors).

3. The Supreme Court has held that federal law, rather than state law, governs the rights of voluntary federal creditors because the agencies are performing a "constitutional function." *Id.* at 726 (citing Clearfield Trust Co. v. United States, 318 U.S. 363, 366 (1943)). *See also* United States v. View Crest Garden Apartments, Inc., 268 F.2d 380, 382 (9th Cir.) (applying federal law in FHA foreclosure), *cert. denied*, 361 U.S. 884 (1959).

The interaction between state and federal law is a spectrum. On one end state law applies by its own force and on the other end the supremacy clause of the United States Constitution preempts state law. U.S. CONST. art. VI, § 2. Along the spectrum the potential for state law to interfere with the implementation of federal statutory schemes increases. The greater the potential of a state law to affect a federal program's operation, the greater is the chance that a court will deem the state law preempted and will require application of federal law. Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV 797, 805 (1957). *See* Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 408-12 (1964) (examining consequences of *Clearfield Trust*). *See generally* Note, *The Federal Common Law*, 82 HARV. L. REV. 1512, 1526-31 (1969) (viewing overriding of presumed application of state law as justified to protect federal policies); Note, *The Competence of Federal Courts to Formulate Rules of Decision*, 77 HARV. L. REV. 1084, 1089-94 (1964) (discussing role of federal judiciary in creating federal law).

The problem with foreclosures by voluntary federal creditors is that

complicated because Congress, in enacting these programs, did not promulgate federal foreclosure procedures to replace the preempted state law.[4] In the absence of a "congressional directive,"[5] the federal courts must determine a federal rule of decision[6] to apply in foreclosures by voluntary federal creditors.[7] The content of the federal rule of decision may incorporate applicable state law or the courts may choose to disregard state law and formulate their own rule.[8] In choosing between these two alternatives, courts have been unable to establish guide-

---

courts have determined that state mortgage law is preempted with reference to federal social welfare programs but Congress has not filled the gap with federal mortgage legislation. Thus, courts have been forced either to create their own rules or to adopt state law as the federal law.

4. An attempt to pass a Federal Mortgage Foreclosure Act failed in 1973. S. 2507, 93rd Cong., 1st Sess., 119 CONG. REC. 32, 175-76, §§ 401-419 (1973). In 1981, Congress did pass the the Multifamily Mortgage Foreclosure Act (MMFA), Pub L. No. 97-35, 95 Stat. 431 (1981) (codified at 12 U.S.C. §§ 3701-3717 (1982)). The MMFA provides nonjudicial foreclosure procedures for HUD foreclosures of multifamily project mortgages under Section 207 of the National Housing Act.

5. *Kimbell*, 440 U.S. at 740. Where Congress has not expressly preempted state law, the courts have considered whether Congress intended them to apply state law as the federal rule of decision. *See View Crest*, 268 F.2d at 381-82 (finding no congressional intent in FHA legislation that courts should apply state receivership law); Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 160-64, 171-72 (1982) (finding congressional intent that Federal Home Loan Bank Board exclusively regulate savings and loans).

The law is unsettled as to whether courts may rely on regulations as expressions of congressional intent. In United States v. Missouri Farmers Ass'n, 764 F.2d 488, 489-90 (8th Cir. 1985) (per curiam), *cert. denied*, 475 U.S. 1053 (1986), the court held that FmHA regulations implied that state laws governing waiver of security interests were contrary to FmHA interests. Justice White dissented from the Supreme Court's decision to deny certiorari because he thought *Missouri Farmers* was contrary to the Court's holding in *Kimbell*, discussed *infra* notes 48-63 and accompanying text, because it was improper to infer a congressional directive from regulations. Missouri Farmers Ass'n v. United States, 106 S. Ct. 1281, 1282 (1986) (White, J., dissenting), *denying cert. to* United States v. Missouri Farmers Ass'n, 764 F.2d 488 (8th Cir. 1985). *But see* United States v. Great Plains Gasification Assocs., 813 F.2d 193, 195-96 (8th Cir.) (holding that Department of Energy regulations impliedly preempted state redemption laws), *cert. denied*, 108 S. Ct. 285 (1987).

6. The phrase *federal rule of decision* refers to the federal common law rule that governs in the absence of a statute or implied congressional directive. *See* Clearfield Trust Co. v. United States, 318 U.S. 363, 366-67 (1943). The phrase also is used as a reference to the criteria that courts apply in formulating the common law rule.

7. United States v. Kimbell Foods, Inc., 440 U.S. 715, 740 (1979); Chicago Title Ins. Co. v. Sherred Village Assocs., 708 F.2d 804, 807 (1st Cir. 1983); United States v. View Crest Garden Apartments, Inc., 268 F.2d 380, 382 (9th Cir.), *cert. denied*, 361 U.S. 884 (1959).

8. *Clearfield Trust*, 318 U.S. at 367.

lines that allow them consistently to determine when adoption of state law is appropriate in foreclosures by voluntary federal creditors.

Historically, the federal courts have fashioned rules of decision to protect federal entities against loss, adopting state mortgage procedures but rejecting state debtor protections.[9] Thus, courts have adopted and rejected state mortgage law in a piecemeal fashion. For example, courts in some circuits have held that a federal agency may take advantage of state procedures providing for extrajudicial sale, but also have held that nothing prevents the agency from obtaining a deficiency judgment[10] contrary to state law.[11] Other decisions have held that a federal agency may bring a suit for deficiency at its leisure, although the state law requires filing of the claim within a specific period following the foreclosure sale.[12] As a final example, some courts have held that federal creditors are immune from state redemption laws,[13] even though a statute forbids the

9. *See infra* notes 28-47 and accompanying text.

10. If the price paid for foreclosed property is insufficient to pay the entire debt secured by the mortgage, in some cases the creditor may seek a deficiency judgment against the borrower for the balance of the debt. State deficiency laws regulate the procedure for obtaining such judgments. Such laws may require notice of intent to pursue a deficiency, place time limits on the pursuit of a deficiency, or limit the amount of a deficiency. *See* NELSON & WHITMAN, REAL ESTATE FINANCE LAW §§ 8.1-.3 (2d ed. 1985). Some states prohibit creditors from pursuing a deficiency judgment except at the time of the filing of the original foreclosure. *Id.; see generally* Comment, *The Role of State Deficiency Judgment Law in FHA Insured Mortgage Transactions*, 56 MINN. L. REV. 463, 465-66 (1972) (discussing various state deficiency judgment provisions).

11. United States v. Gish, 559 F.2d 572, 575 (9th Cir. 1977) (preempting state anti-deficiency statute by SBA regulation), *cert. denied*, 435 U.S. 996 (1978). *See also* United States v. Haddon Haciendas Co., 541 F.2d 777, 783-85 (9th Cir. 1976) (rejecting adoption of state interpretation of deficiency statute that barred suit for waste).

12. United States v. Merrick Sponsor Corp., 421 F.2d 1076, 1078-79 (2d Cir. 1970) (holding FHA need not abide by requirement that motion for deficiency be filed 90 days after delivery of deed).

13. Redemption statutes generally provide the debtor with a period of time, ranging from six months to two years, in which to repurchase the foreclosed land from the buyer after foreclosure by paying the foreclosure price plus interest. Many states allow the debtor to remain in possession of the land during the redemption period. The statutes are designed to encourage the buyer at foreclosure to bid the market price for the property because failure to do so will give the debtor incentive to redeem. *See* NELSON & WHITMAN, *supra* note 10, §§ 8.4-.8.

States have developed a variety of detailed statutory schemes to govern the relationship between mortgagor and mortgagee. States protect debtors from below market value bids at foreclosure in several ways other than defi-

agency to bid more than the amount of the federal debt, even if that amount is less than the property's fair market value.[14]

Such judicial protection of federal agencies intrudes into an area traditionally governed by the states, disregards states' interests in protecting their citizens from unfair bargaining positions, and impairs states' ability to govern their own economies. Moreover, the piecemeal nature of judicial usurpation of state law creates uncertainty in commercial transactions and involves a balancing of interests better suited to treatment by Congress.

In 1979 the Supreme Court, in *United States v. Kimbell Foods, Inc.*,[15] ostensibly attempted to change the pattern of assuring federal creditors against loss.[16] The Court in *Kimbell* rejected the "choateness doctrine," a federal rule of decision giving federal non-tax liens preferential treatment over private liens in the determination of their priority.[17] In doing so, the Court applied criteria greatly expanding the opportunity to adopt state law as the federal rule of decision in cases involving voluntary federal creditors such as the SBA and FmHA.[18]

Federal courts have not applied the *Kimbell* test consistently in the context of state redemption and deficiency stat-

---

ciency and redemption statutes. Some states protect debtors from bids below fair market value at foreclosure by giving the judiciary the power to determine the property's fair market value and to refuse to confirm a foreclosure sale where the price obtained was less than two-thirds of the court's determination. Some states also discourage low bidding at foreclosure by limiting the deficiency amount available to the mortgagee after foreclosure to the difference between a judicially-determined fair market price (rather than the actual price paid at foreclosure) and the amount of the debt. Many states also have chosen to regulate when and how a creditor obtains deficiency judgments. States also have accommodated mortgagees by providing for extrajudicial sale, thus relieving mortgagees of the burden of judicially supervised foreclosure, but usually at the cost of the mortgagee's right to pursue a deficiency. *See* NELSON & WHITMAN, *supra* note 10, §§ 8.1-.3.

14. The FHA can bid only up to the loan amount outstanding, even if it is less than the fair market value. *See* 12 U.S.C. §§ 1713(k), 1743(f) (1982 & Supp. IV 1986).

15. 440 U.S. 715 (1979).

16. The Court in *Kimbell* addressed the issue of choosing federal rules of decision in voluntary creditor cases, but did not address directly the redemption or deficiency cases. *Kimbell*, 440 U.S. at 727-41.

17. The choateness doctrine at issue in *Kimbell* granted federal liens priority over private liens that were not certain as to person, property, and amount, which for all practical purposes required the private lien be taken to judgment before it could obtain priority even over a subsequent federal lien. *Id.* at 721 n.8 (discussing the history of the choateness doctrine).

18. *Id.* at 727-30.

utes.[19] In pre-*Kimbell* cases, courts generally refused to adopt state laws limiting the remedies of the United States (acting as the FHA, SBA, or FmHA) in mortgage foreclosure proceedings.[20] These courts emphasized the need to protect the federal treasury, which they viewed as a measurement of the volume of social services the agencies could provide.[21]

The Court in *Kimbell*, by contrast, disavowed the argument that social welfare programs have an overriding interest in col-

19. Although there is no direct conflict among the circuits, courts clearly have adopted different interpretations of the *Kimbell* case. For instance, the Fifth Circuit held that *Kimbell* instructed the courts to treat federal agencies as though they were private lenders in their commercial relations in cases involving the SBA. *See* United States v. Irby, 618 F.2d 352, 355 (5th Cir. 1980) (adopting state law to determine reasonableness of SBA foreclosure sale); United States v. Dismuke, 616 F.2d 755, 759 (5th Cir. 1980) (adopting state deficiency law in SBA foreclosure sale); *infra* notes 73-77 and accompanying text (discussing Fifth Circuit decisions). Conversely, the Eighth Circuit has shown great reluctance to adopt state law whenever the state law inconveniences a federal agency. *See* United States v. Landmark Park & Assocs., 795 F.2d 683, 684-87 (8th Cir. 1986) (refusing to adopt state law to determine perfection of HUD interests in rents and profits); United States v. Victory Highway Village, Inc., 662 F.2d 488, 497-98 (8th Cir. 1981) (refusing to adopt state redemption law in HUD case); *infra* notes 86-90 and accompanying text (discussing Eighth Circuit decisions).

The conflict over adoption of state redemption laws in FmHA foreclosures illustrates the different interpretations of *Kimbell*. While a Ninth Circuit decision has adopted state redemption law in an FmHA foreclosure, a federal district court in Kansas, a state within the Tenth Circuit, has rejected such adoption. *See infra* note 90 (discussing difference between New Mexico and Kansas redemption statutes). *Compare* United States v. Ellis, 714 F.2d 953 (9th Cir. 1983) (adopting state redemption law in FmHA forclosure) *with* United States v. Curry, 561 F. Supp. 429 (D. Kan. 1983) (rejecting adopting of state redemption law in FmHA foreclosure).

20. *See infra* notes 28-47 and accompanying text.

21. *See* United States v. Stadium Apartments, Inc., 425 F.2d 358, 360-67 (9th Cir.) (refusing to adopt state redemption law in FHA foreclosure), *cert. denied*, 400 U.S. 926 (1970); United States v. Chester Park Apartments, Inc., 332 F.2d 1, 3-5 (8th Cir.) (refusing to adopt state receivership law in FHA foreclosure), *cert. denied*, 379 U.S. 901 (1964); United States v. View Crest Garden Apartments, Inc., 268 F.2d 380, 382-84 (9th Cir.) (refusing to adopt state receivership law in FHA foreclosure), *cert. denied*, 361 U.S. 884 (1959); United States v. Montgomery, 268 F. Supp. 787, 790 (D. Kan. 1967) (refusing to adopt state redemption law in SBA foreclosure). *But see* United States v. MacKenzie, 510 F.2d 39, 41-43 (9th Cir. 1975) (adopting state deficiency law in SBA foreclosure); Calvert Assocs. v. Harris, 469 F. Supp. 922, 926-27 (E.D. Mich. 1979) (adopting state redemption law in HUD foreclosure by advertisement); United States v. Johansson, 467 F. Supp. 84, 85-86 (D. Me. 1979) (adopting state redemption law in FmHA foreclosure); United States v. Marshall, 431 F. Supp. 888, 891-92 (N.D. Ill. 1977) (adopting state redemption law in SBA foreclosure).

lecting revenue.[22] Voluntary federal creditors, the Court indicated, should be treated as private businesses are treated when undertaking commercial transactions unless state law interferes with the actual operation of the program.[23]

In post-*Kimbell* cases, some courts adopted state law, focusing on the agencies' ability to operate within state law and still achieve federal social welfare objectives.[24] Other courts have continued to reject state law, however, relying primarily on the need to protect the monetary interests of the federal programs, especially in cases involving mortgages insured under the National Housing Act.[25]

This Note analyzes the criteria for selecting federal rules of decision in voluntary federal creditor cases under the *Kimbell* test. Part I considers the pre-*Kimbell* protection of federal interests, examines the *Kimbell* decision, and considers its subsequent application. Part II analyzes the factors post-*Kimbell* courts have considered in rejecting or adopting state redemption and deficiency laws. Part III concludes that courts should adopt state mortgage law as the federal rule of decision in voluntary creditor cases, unless the federal agency demonstrates that adoption would substantially reduce the agency's ability to accomplish its social welfare objectives.

I. *KIMBELL* AS A WATERSHED IN CHOOSING FEDERAL RULES OF DECISION IN VOLUNTARY FEDERAL CREDITOR CASES

In an effort to implement federal policy and to protect the federal treasury, pre-*Kimbell* courts tended to fashion their own rules of decision rather than to adopt state law in cases involving foreclosures by voluntary federal creditors.[26] The Supreme Court in *Kimbell* established new criteria intended to curb unnecessary protection of federal interests at the expense of private expectations based on state law.[27] The tenacity of the pre-*Kimbell* precedents, however, has caused divergent applications of the *Kimbell* criteria.

---

22. *Kimbell*, 440 U.S. at 734-36; *see infra* notes 56-59 and accompanying text.

23. *Kimbell*, 440 U.S. at 738; *see infra* notes 56-59 and 73-77 and accompanying text.

24. *See infra* notes 68-77 and accompanying text.

25. *See infra* notes 78-90 and accompanying text.

26. *See infra* notes 28-47.

27. *See infra* notes 48-63 and accompanying text.

A. REJECTION OF STATE MORTGAGE LAW AS THE FEDERAL RULE OF DECISION IN PRE-*KIMBELL* CASES

In determining whether or not to adopt state receivership law in an FHA foreclosure, the United States Court of Appeals for the Ninth Circuit, in the seminal case *United States v. View Crest Garden Apartments, Inc.*,[28] asserted that a uniform federal rule was necessary to further federal policy.[29] The court rejected adoption of state law in favor of

> the federal policy to protect the treasury and to promote the security of federal investment which in turn promotes the prime purpose of the Act—to facilitate the building of homes by the use of federal credit. . . . [Thus] local rules limiting the effectiveness of the remedies available to the United States for breach of a federal duty can not [sic] be adopted.[30]

In abrogating state receivership law, the court in *View Crest* believed that its decision would not necessarily affect more important state debtor protections such as the right of redemption, because balancing state and federal interests would still allow the adoption of important state debtor protections.[31]

Courts in subsequent cases followed the reasoning in *View Crest* unquestioningly.[32] Emphasizing the need to protect the

---

28. 268 F.2d 380 (9th Cir.), *cert. denied*, 361 U.S. 884 (1959).

29. In *View Crest*, the Federal Housing Authority (FHA) requested the appointment of a receiver to collect rents and to maintain the property prior to foreclosure. *Id.* at 381. State law protected the mortgagor by requiring the mortgagee to show either insufficient security in the property or "waste" by the mortgagor before a receiver could be appointed. In finding that state law did not apply, the court noted that federal law governed the rights of federal agencies and that state law could apply only by virtue of congressional intent or adoption by a federal court. *Id.* at 382. The court found no congressional intent to incorporate state receivership laws under the National Housing Act and declined to adopt the state receivership law because it did not further federal policy. *Id.* at 382-83.

30. *Id.* at 383.

31. *Id.* The court stated that "if the considerations weighed by the court suggest an adoption of local law, such as the local rule on redemption, that could be done." *Id.* (citing Mishkin, *supra* note 3).

The *View Crest* court did not weigh the local interests in regulating the use of receivers, but remanded the case to the trial court to determine whether the facts warranted the appointment of a receiver as a matter of federal law. *Id.* at 384.

32. *See* United States v. Stadium Apartments, Inc., 425 F.2d 358, 360-67 (9th Cir.) (refusing to adopt state redemption law in FHA foreclosure), *cert. denied*, 400 U.S. 926 (1970); Clark Inv. Co. v. United States, 364 F.2d 7, 9-10 (9th Cir. 1966) (rejecting adoption of state law deducting rents collected by receiver from redemption price); United States v. Chester Park Apartments, Inc., 332 F.2d 1, 3-5 (8th Cir.) (refusing to adopt state receivership law in FHA foreclosure), *cert. denied*, 379 U.S. 901 (1964); United States v. Montgomery,

federal treasury from the vagaries of state law, federal courts continued to reject adoption of state law as the federal rule of decision.[33] In the influential case of *United States v. Stadium Apartments, Inc.*,[34] the Ninth Circuit balanced the state right of redemption against federal interests, as contemplated in *View Crest*,[35] and held, contrary to state law, that the FHA[36] may obtain a waiver[37] of the mortgagor's statutory right of redemption.[38] The *Stadium* court followed the policy that, in dealing with the government's foreclosure remedies, federal law must "assure the protection of the federal program against loss, state law to the contrary notwithstanding."[39] The *Stadium* court

---

268 F. Supp. 787, 790 (D. Kan. 1967) (refusing to adopt state redemption law in SBA foreclosure).

33. The lower federal courts continued to follow *View Crest* despite a Supreme Court decision in which the Court adopted state law in a case involving the collection of an SBA loan. The Supreme Court in United States v. Yazell, 382 U.S. 341 (1966), emphasized the need to balance carefully state and federal interests in choosing a federal rule of decision. In *Yazell*, the Court adopted as federal law the Texas rule of coverture barring wives from binding their separate property without first obtaining a court decree, which prevented the United States from recovering a deficiency judgment on an SBA Disaster Loan. *Id.* at 343. In balancing the federal and state interests, the Court found there was no federal interest in uniformity because "SBA transactions in each State are specifically and in great detail adapted to state law." *Id.* at 357. In adopting state law, the Court emphasized "solicitude for state interests" in the family-property area and noted that state policies "should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if state law is applied." *Id.* at 352.

The Court worded the issue in *Yazell* very narrowly and distinguished its decision from *View Crest* in a footnote on the basis of the individualized negotiation of the SBA loan. *Id.* at 348. Consequently, *Yazell* was deemed in later decisions to be limited to its facts. *See infra* note 44.

34. 425 F.2d 358 (9th Cir.), *cert. denied*, 400 U.S. 926 (1970).

35. *See supra* note 31.

36. *Stadium* involved Title VI of the National Housing Act, which is designed to assist veterans in obtaining housing. *See* 12 U.S.C. §§ 1736-1746(a) (1982). The Act operated, in this case, by insuring a loan from a private lender to a developer who qualified under § 1743(b) of the Act. The Secretary of Housing and Urban Development imposed regulations upon the mortgagor and the mortgaged property. *Stadium*, 425 F.2d at 359.

37. The mortgage in *Stadium* provided that "[t]he Mortgagor, to the extent permitted by law, hereby waives the benefit of any and all homestead and exemption laws and of any right to a stay or redemption and the benefit of any moratorium law or laws." *Stadium*, 425 F.2d at 359. The court held that the phrase "to the extent permitted by law" referred to federal law, even though federal law does not provide the protections to waive in the first place. *Id.* at 362.

38. *Id.* at 362.

39. *Id.* The *Stadium* court did not acknowledge the standard, asserted in *Yazell*, that state policies "should be overridden by the federal courts only

stressed that post-foreclosure sale redemption periods increased administrative costs by causing the United States to hold property more frequently and for longer periods of time. According to the court, state redemption laws exposed the government to increased maintenance, tax, and insurance costs which, in many states, were not recouped if the property was redeemed.[40] The court was not convinced by the argument that redemption statutes served a state interest by encouraging foreclosure sale bids closer to market price.[41] Indeed, the court asserted that the redemption laws in many states obstructed dominion over fore-

---

where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if state law is applied." United States v. Yazell, 382 U.S. 341, 352 (1966).

40. *Stadium*, 425 F.2d at 365. The court adopted the theory that post-foreclosure redemption periods lowered bids at foreclosure, thus inducing the United States to buy the property more frequently to cover the debt. *Id.* The court also accepted the assumption that the property tended to depreciate in value during the redemption period and that because repair costs were not added to the redemption price in most states, a mortgagor might be enriched at the United States's expense. *Id.*

41. The court noted that rights of redemption did not accompany the use of trust deeds which had become the dominant form of securing property loans in many states. The court also stated that there was "no evidence that second mortgagees or contractors are less willing to extend credit on the security of junior liens in the states that have no redemption statutes than they are in the states that do." *Stadium*, 425 F.2d at 366. The majority, citing Book 2, Volume VII, Sec. 72926 of the FHA Manual, was assured that the FHA had a policy of bidding market price (although it is not authorized to bid an amount in excess of its debt under 12 U.S.C. § 1713(k)). *Stadium*, 425 F.2d at 366. In addition, the majority asserted that the junior lienors could protect themselves by bidding at the foreclosure sale. *Id.*

The dissent in *Stadium* contended that the majority misconstrued the purpose of redemption statutes. *Id.* at 367-72. The dissent noted that, historically, redemption statutes were adopted precisely because third parties rarely bid at foreclosure sales. *Id.* at 368. Junior lien holders rarely had enough cash to purchase property in which they had an interest, and only the first mortgage holder could purchase the property on the credit of the debt owed. *Id.* Redemption periods encouraged mortgagees to pay market price to remove the incentive to redeem (if the price paid was the amount of the debt owed and was considered by the mortgagor to be more valuable than the debt owed the mortgagee, then the mortgagor would feel robbed of its equity in the property and would profit from redemption). *Id.* at 368-69. The dissent also noted that redemption favored junior lienors, who may also redeem, by inducing a foreclosure price greater than the first mortgagee's debt. *Id.* The dissent argued that redemption statutes protect contractors and suppliers as well as mortgagors, and thus asserted that the majority's holding would discourage use of the federal program. *Id.* at 367-73. The dissent noted that the FHA's inability to bid higher than the amount of its outstanding debt at foreclosure aggravated the situation. *Id.* at 370.

closed property and actually lowered bids.[42] In addition, the court noted that a uniform federal rule was necessary because state redemption laws varied significantly.[43]

Stadium reinforced *View Crest*'s rejection of local rules that limit the effectiveness of federal remedies.[44] Courts have followed the reasoning and conclusions of the court in *Stadium* almost without exception in FHA foreclosures under the National Housing Act,[45] and some courts have adopted the reasoning in cases involving SBA and FmHA foreclosures as well.[46] Lower federal courts have continued to adhere to *Stadium* despite *Kimbell*'s rejection of the notion that federal programs must be "assured" against loss.[47]

---

42. *Id.* at 365-66. The court found that in California, the purchaser at foreclosure could not obtain possession until the end of the redemption period. *Id.* at 366.

43. *Id.* at 364.

44. The *Stadium* court distinguished *Yazell*, in which the Supreme Court had adopted state law that limited the SBA's remedy, on the ground that, although the FHA form was tailored to the state, the form was not individually negotiated. *Id.* at 363. The court also distinguished Bumb v. United States, 276 F.2d 729 (9th Cir. 1960), which held that the SBA must conform to state "bulk sales" laws on the basis that the law dealt with the acquisition of an interest rather than a remedy. *Stadium*, 425 F.2d at 363-64.

45. *See* United States v. Landmark Park & Assocs., 795 F.2d 683, 685-88 (8th Cir. 1986) (rejecting state law determining perfection of interest in rents and profits in FHA foreclosure); United States v. Victory Highway Village, Inc., 662 F.2d 488, 497-98 (8th Cir. 1981) (rejecting state redemption law in FHA foreclosure); United States v. Scholnick, 606 F.2d 160, 164-65 (6th Cir. 1979) (rejecting state redemption law in FHA foreclosure). *But see* Chicago Title Ins. Co. v. Sherred Village Assocs., 708 F.2d 804, 807-13 (1st Cir. 1983) (adopting state mechanic's lien law to determine priority over FHA lien); Calvert Assocs. v. Harris, 469 F. Supp. 922, 926-27 (E.D. Mich. 1979) (adopting state foreclosure-by-advertisement procedures in FHA foreclosure).

46. *See* United States v. Missouri Farmers Ass'n, 764 F.2d 488, 489-90 (8th Cir. 1985) (per curiam) (alternatively rejecting state law concerning waiver of security interests in FmHA case), *cert. denied*, 458 U.S. 1053 (1986); United States v. Elverud, 640 F. Supp. 692, 695-96 (D.N.D. 1986) (rejecting state redemption law in FmHA foreclosure); United States v. Larson, 632 F. Supp. 1565, 1568-69 (D.N.D. 1986) (rejecting state deficiency law in SBA foreclosure); United States v. Curry, 561 F. Supp. 429, 430-31 (D. Kan. 1983) (rejecting state law prohibiting waiver of redemption rights in FmHA foreclosure); Ricks v. United States, 434 F. Supp. 1262, 1265-69 (S.D. Ga. 1976) (rejecting state deficiency law in SBA foreclosure).

47. The Supreme Court in *Kimbell* indicated that voluntary federal creditors generally should be treated as private parties. The Court also stated that "significant differences between federal tax liens and consensual liens counsel against unreflective extension of rules that immunize the United States from the commercial law governing all other voluntary secured creditors." *Kimbell*, 440 U.S. at 733-38. *See infra* notes 55-59 and accompanying text (discussing treatment of voluntary federal creditors).

B. FEDERAL OBJECTIVES AND THE TEST IN *UNITED STATES V. KIMBELL FOODS, INC.*

The Supreme Court in *United States v. Kimbell Foods, Inc.*[48] attempted to clarify and redefine the criteria for selecting state law as the federal rule of decision in cases involving voluntary federal creditors.[49] In adopting state law for determining priority among competing lien creditors, the Court rejected the rigid preference for federal liens that the federal rule of choateness created.[50] In reaching its conclusion, the Court applied a three-part test to decide when courts should adopt state law as the federal rule of decision.[51] The Court considered (1) whether the program by its nature requires application of uniform federal law, (2) whether application of state law frustrates specific objectives of the federal program, and (3) the extent to which application of a uniform federal rule would disrupt commercial relationships predicated on state law.[52]

In applying the first prong of the test to the SBA and FmHA, the Court found that the programs did not require adoption of a uniform federal rule.[53] The Court found that the lack of a uniform federal rule of priority would not burden the loan processing of either the SBA or FmHA because local offices administered the programs and loan processing already received individualized attention.[54]

In applying the second prong of the test, the Court determined that adopting state law would not conflict with the operation or specific objectives of the SBA and FmHA programs, because adoption would not burden the agencies' lending activities.[55] The Court rejected the government's argument that the

---

48. 440 U.S. 715 (1979).

49. For a discussion of the *Kimbell* decision see Comment, *Formulating a Federal Rule of Decision in Commercial Transactions After* Kimbell, 66 IOWA L. REV. 391 (1980).

50. *Kimbell*, 440 U.S. at 733-38. *See supra* note 17.

51. 440 U.S. at 728-29.

52. *Id.*

53. In concluding its analysis of the first prong of the test, the Court stated that "[s]ince there is no indication that variant state priority schemes would burden current methods of loan processing, we conclude that considerations of administrative convenience do not warrant adoption of a uniform federal law." *Id.* at 733.

54. *Id.* at 730-33. The Court cited SBA and FmHA regulations mandating compliance with state procedural requirements in the perfection of security interests. *Id.* at 730-32 & n.25 & 27. In addition, the Court noted that adoption of the Uniform Commercial Code in almost every state lessened the administrative burden of following state law. *Id.* at 733 n.28.

55. The Court stated that "without a showing that application of state

Court should protect against deficient mortgage recoveries under the loan programs to the same extent that it has protected against deficient tax recoveries.[56] The Court noted that the SBA and FmHA have social welfare objectives distinct from the interests of federal agencies that primarily raise and collect revenue.[57] The SBA and FmHA, the Court found, occupy essentially the same position as private lenders and therefore do not require special treatment to remain financially sound.[58] Consequently, even though adoption of state priority law would add to the agencies' costs, the Court held that such adoption would not conflict with the federal objectives of the SBA or the FmHA.[59]

Finally, applying the third prong of the test, the Court noted that the choateness doctrine often allowed federal liens arising later in time to take priority over private liens, in violation of creditors' just expectations.[60] In the absence of "important national interests,"[61] the Court refused to formulate a uniform rule of priority that might bring unforeseen adverse consequences and that might create new uncertainties in commercial transactions.[62] Thus, the Court held that its three-

---

laws would impair federal operations, we decline to extend to new contexts extraordinary safeguards largely rejected by Congress." *Id.* at 738. The Court was referring to retention of the choateness doctrine, even though Congress had amended the tax lien act to allow priority to certain private liens. *See id.*

56. The choateness test developed as a parallel to federal tax lien preferences applied to insolvent taxpayers. *Kimbell*, 440 U.S. at 721 n.8. The Court in *Kimbell* also specifically rejected the argument that a uniform federal rule was necessary to protect the federal treasury, because the Court found that state remedies were adequate. *Id.* at 730.

57. The Court stated that "[w]e believe that had Congress intended the private commercial sector, rather than the taxpayers in general, to bear the risks of default entailed by these public welfare programs, it would have established a priority scheme displacing state law." *Id.* at 735.

58. The Court in *Kimbell* determined that because the SBA and FmHA evaluated the risks in each loan application, the agencies could secure their financial interests. *Id.* at 736-37. Consequently, the Court found that "[t]he Government therefore is in substantially the same position as private lenders, and the special status it seeks is unnecessary to safeguard the public fisc." *Id.* at 737. The Court noted further that "Congress' admonitions to extend loans judiciously supports the view that it did not intend to confer special privileges on agencies that enter the commercial field." *Id.* at 737.

59. *See supra* note 55.

60. *Kimbell*, 440 U.S. at 739.

61. *Id.* at 740.

62. The Court stated that "[b]ecause the ultimate consequences of altering settled commercial practices are so difficult to foresee . . . we hesitate to create new uncertainties, in the absence of careful legislative deliberation." *Id.* at 739-40. The Court noted that government priority might discourage credit to the very people whom the programs were designed to benefit. *Id.* n.43.

prong test mandated adoption of state law as the federal rule of decision in lien priority cases involving voluntary federal creditors.[63]

C. Application of the *Kimbell* Test to Foreclosure by Voluntary Federal Creditors

Federal courts have generated two divergent lines of decisions in applying the *Kimbell* test to foreclosures by voluntary federal creditors. One line interprets *Kimbell* as instructing the courts to treat federal agencies as private parties and to adopt state law when the federal program can function effectively thereunder.[64] The other line of decisions follows *Stadium* and rejects adoption of state law, citing the need for federal uniformity and the need to protect federal agencies from financial loss.[65] Although the circuit courts have distinguished their divergent opinions factually to avoid direct conflict,[66] the different interpretations of *Kimbell* among the circuits have led to inconsistent decisions at the district court level.[67]

1. Application of *Kimbell* Favoring the Adoption of State Law

In *Chicago Title Insurance Co. v. Sherred Village Associates* ("*Sherred*"),[68] a First Circuit case decided soon after *Kimbell*, the court extended *Kimbell*'s holding by adopting a state mechanic's lien law to determine the priority of a HUD security interest.[69] In analyzing the first prong of the *Kimbell* test,

---

63. *Id.* at 740. The Court held that "absent a congressional directive, the relative priority of private liens and consensual liens arising from these Government lending programs [such as SBA and FmHA] is to be determined under nondiscrimatory state laws." *Id.*

State law appears to be "discriminatory" if it singles out federal actors for special treatment. *See* United States v. Little Lake Misere Land Co., 412 U.S. 580, 608 (1973) (Rehnquist, J., dissenting) ("Implicit in the holdings of a number of our cases dealing with state taxation and regulatory measures applied to the Federal Government is that such measures must be nondiscriminatory.").

64. *See infra* notes 68-77 and accompanying text.

65. *See infra* notes 78-90 and accompanying text.

66. *See infra* notes 73-85 and accompanying text.

67. *See infra* note 90.

68. 708 F.2d 804 (1st Cir. 1983).

69. The Supreme Court vacated and remanded the initial First Circuit opinion, which held that the state mechanic's lien law could not be adopted, to be reevaluated in light of the *Kimbell* decision. Chicago Title Ins. Co. v. Sherred Village Assocs., 441 U.S. 901 (1979). The First Circuit had held that a fed-

the First Circuit panel held that, because HUD scrutinized applications individually through field offices staffed by local counsel, the HUD program did not "by its nature" require a uniform federal rule of decision.[70] Applying the second element of the *Kimbell* test, the *Sherred* court decided that even though adoption of state mechanic's lien laws might disrupt HUD's financing system, the agency and its affiliates could nonetheless operate effectively under state law and achieve their objectives.[71] Under the third part of the *Kimbell* test, the

---

eral lien held by HUD had priority over a mechanic's lien under the choateness doctrine. Chicago Title Ins. Co. v. Sherred Village Assocs., 568 F.2d 217, 222 (1st Cir. 1978), *vacated and remanded*, 441 U.S. 901 (1979). On remand the First Circuit stated, "[w]e have been charged by the Supreme Court with the responsibility of determining whether the facts of this case are sufficiently different from those in *United States v. Kimbell Foods, Inc.* . . . to necessitate a federal rule of decision in priority disputes involving HUD mortgages." *Sherred*, 708 F.2d at 806.

70. In *Sherred*, the court found that adoption of state mechanic's lien laws was not distinguishable from adoption of state priority laws covered by the U.C.C., because HUD individually scrutinized applications through field offices staffed by local counsel. *Sherred*, 708 F.2d at 810-11. Furthermore, the court did not find that administration of the HUD program was distinguishable from the SBA and FmHA programs in *Kimbell*, because HUD mortgage forms were not tailored to individual states. *Id.* Thus, the court concluded that adoption of state law would not greatly increase HUD's administrative burden, and the program did not require application of a uniform federal rule of decision. *Id.*

The First Circuit held that the district court's finding that the HUD program did not require application of a uniform rule of decision was not clearly erroneous. *Id.* The court upheld the finding that adoption of state mechanic's lien laws would not excessively burden HUD's administration of the program. *Id.*

71. *Id.* at 811. With reference to the second prong of the *Kimbell* test, HUD argued that the absence of a rule that provided for absolute federal priority would frustrate its program's objectives. *Id.* According to HUD, primary lenders and subsequent purchasers of HUD mortgages would be unwilling to participate in HUD programs if they had to assume the risk of having their interests subordinated to a mechanic's lien. *Id.* HUD claimed that "HUD projects will come to a halt in those states [that allow mechanics' liens to relate back to the time construction began] and there will be no more federally insured low and moderate income housing there." *Id.*

The facts of *Sherred* demonstrate the obstruction of the HUD program. *See id.* at 806. Sherred Village as a developer may apply for a loan to be insured by HUD if the project and financial agreements meet certain specifications. A private lender makes the loan to the developer and HUD insures the loan. Title insurance for the benefit of the private lender insures the developer's title. The private lender warrants to HUD that the mortgage is the first lien on the property. Upon default by the developer, the private lender may assign the mortgage to HUD and HUD will pay the lender some agreed portion of the debt.

Although there is always notice of a contractor's potential mechanic's lien where property is being improved, the contractor may not file the lien until it fails to receive payment that is due. In many states, to protect contractors who

court noted that state mechanic's lien laws were the only protection available to contractors, and that such state protections should be displaced only for compelling reasons.[72]

The Fifth Circuit, when applying the *Kimbell* test, consistently has adopted state law as the rule of decision. It adopted state deficiency law in an SBA foreclosure,[73] adopted state law to determine the reasonableness of an SBA foreclosure sale,[74] and held that federal insolvency statutes do not apply to consensual liens.[75] The Fifth Circuit characterized *Kimbell* as a "very detailed opinion for a unanimous Court that sought to carefully instruct Government agencies that in their commer-

---

have improved the property, courts deem a mechanic's lien perfected at the time work began. Thus, a mechanic's lien that did not appear in the title search may arise after the mortgage is taken, yet a court will deem it prior in time and interest by state law.

HUD maintained a policy of not enforcing the warranty of the lender as to title, and argued that lenders would not participate in the program if title insurance would not cover the mechanic's lien. *Id.* at 811. Based on testimony of initiating lenders, however, the court in *Sherred* concluded the district court had not clearly erred in finding that the potential risk of mechanic's liens would not deter lenders because they would be able to obtain title insurance coverage. *Id.*

HUD also contended that adoption of state law would undermine the mortgage-backed securities program, the Government National Mortgage Association (GNMA), which funds 80% of HUD programs. *Id.* at 811-12. By purchasing low-cost construction mortgages from primary lenders and then by auctioning the mortgages at a loss, the GNMA subsidizes and encourages low-cost construction loans. *Id.* In response to HUD's argument that purchasers at the GNMA auction would be unwilling to risk exposure to mechanics' liens, the district court noted that GNMA contracts obligated GNMA to make good such defects, and that GNMA could then collect on the warranty from the lender. *Id.* GNMA also guarantees securities issued by private lenders holding pools of HUD mortgages as collateral, and HUD argued that late-arising mechanics' liens could undermine the stability of the securities and force the GNMA to repurchase securities if a mechanic's lien interest intervened. The court acknowledged that application of state law to the priority of mechanics' liens might cause GNMA to repurchase securities if a mechanic's lien arose. *Id.* at 812.

Although problems in GNMA operation would arise from the adoption of state law, the court believed that HUD and GNMA could still function effectively under the mechanic's lien laws. The court stated that GNMA will "find other ways of satisfying themselves that the risk is small enough to proceed with most of the mortgage portfolios despite the presence of a mechanics' lien on one of the mortgages." *Id.* at 812. The court stated that if it misunderstood the impact on HUD, a legislative or regulative remedy would be forthcoming. *Id.* at 813.

72. The court stated that "[a]bsent compelling reasons to displace state law, the relationships are best governed by those local rules." *Id.* at 813.

73. United States v. Dismuke, 616 F.2d 755, 758-59 (5th Cir. 1980).

74. United States v. Irby, 618 F.2d 352, 355 (5th Cir. 1980).

75. United States v. S.K.A. Assocs., 600 F.2d 513, 516 (5th Cir. 1979).

cial lending activities they are subject to 'customary commercial practices,' and should fare no better, and no worse, than a private lender."[76] The Fifth Circuit determined that the SBA could comply with state procedures and protect its interests without being hindered in its administration or frustrated in its objectives.[77]

2. Narrowing the Application of *Stadium* in the Ninth Circuit by Adoption of State Law in SBA and FmHA Foreclosures

The Ninth Circuit has developed its own criteria to determine when to adopt state law in voluntary federal creditor cases.[78] Although the circuit narrowed the application of *Sta-*

---

76. *Id.* at 516 (citation omitted). This quote appears in both *Irby* and *Dismuke*. *Irby*, 618 F.2d at 355; *Dismuke*, 616 F.2d at 759.

77. *See Irby*, 618 F.2d at 355 ("It has not been demonstrated that adoption of the nondiscriminatory laws of Mississippi would prejudice the SBA's administration of its loan programs."); Dismuke, 616 F.2d at 759 ("state law incorporation would in no way hinder the administration of the loan program and . . . the statute [requiring judicial confirmation to obtain deficiency judgment] presents no difficulty to the SBA in protecting itself").

78. Although the Ninth Circuit acknowledges *Kimbell* for the proposition that federal law applies to cases involving foreclosure by voluntary federal creditors, the court has not applied the *Kimbell* test explicitly. Instead, the court has developed its own tests over time that consider factors similar to the *Kimbell* factors.

The Ninth Circuit acknowledged the first element of the *Kimbell* test when it indicated that individualized negotiation was a prerequisite to adoption of state redemption laws. *See* United States v. MacKenzie, 510 F.2d 39, 40-41 (9th Cir. 1975) (en banc) (courts should recognize state redemption rights when: (1) a contract is individually negotiated with no provision purporting to waive state rights; (2) no federal statute or regulation purports to nullify the right; and (3) there is no overriding federal interest).

In United States v. Pastos, 781 F.2d 747 (9th Cir. 1986), however, the Ninth Circuit adopted state redemption law in an SBA foreclosure, abandoning the uniformity aspect of its test. The court recognized that the SBA loan was similar to the FHA loan in *Stadium* because both agreements expressly waived redemption rights and were not individually negotiated. *Id.* at 750. Although the court had used negotiation, waiver, and uniformity factors to distinguish cases in the past, *see* United States v. Stadium Apartments, Inc., 425 F.2d 358, 363 (9th Cir.), *cert. denied*, 400 U.S. 926 (1970), the court held that such factors were not conclusive and relied on the balancing of state and federal concerns, *Id.*

The Ninth Circuit has relied on a rule, similar to the distillation of the second and third prongs of the *Kimbell* test, as reformulated *infra* notes 136-157 and accompanying text, that "courts should not 'create federal law by implication that is antithetical to state laws protecting debtors unless doing so is necessary to achieve the overriding purposes of Congress in enacting the statutes under which the loans were made or to preserve some other paramount

dium[79] in decisions adopting state redemption laws in foreclosures by the SBA[80] and the FmHA,[81] it has not disavowed entirely its reasoning in *Stadium*.[82] The Ninth Circuit no longer maintains that courts cannot uphold any nonuniform state debtor protections restricting the remedies of the United States.[83] The circuit continues to maintain, however, that application of state redemption rights to an FHA foreclosure, as in *Stadium*, is distinguishable from application of state redemption rights in SBA and FmHA foreclosures.[84] The court recently stated that adoption of state redemption laws would obstruct the FHA's objective of increasing available housing by causing the FHA higher foreclosure costs, whereas the adoption of state redemption law furthers the SBA's and FmHA's respective goals of assisting small businesses and farmers.[85]

---

federal interest.' " *Pastos*, 781 F.2d at 751 (citing United States v. MacKenzie, 510 F.2d 39, 40 (9th Cir. 1975) (en banc)).

Ninth Circuit acknowledgment of the third *Kimbell* factor is evident from the court's statement that "[a]lthough we recognize that application of state redemption laws to SBA loans upsets federal uniformity, rejection would also unnecessarily introduce a lack of uniformity into debtor-creditor relationships within a state. 'No federal interest requires such an intrusion into state regulation of commercial transactions.' " *Id.* at 752 (citing United States v. Crain, 589 F.2d 996, 1000 (9th Cir. 1979)).

79. *See supra* notes 34-47 and accompanying text.

80. United States v. Pastos, 781 F.2d 747, 751-52 (9th Cir. 1986).

81. United States v. Ellis, 714 F.2d 953, 957 (9th Cir. 1983).

82. The Ninth Circuit began narrowing the applicability of *Stadium* even before *Kimbell*. In United States v. MacKenzie, 510 F.2d 39 (9th Cir. 1975) (en banc), the court adopted state deficiency law in an SBA foreclosure sale. The court discounted the federal interest in protecting the federal fisc by noting that the SBA is required to make loans only "so . . . as *reasonably* to assure repayment." *Id.* at 42 n.2 (citing 15 U.S.C. § 636(2)(7)) (emphasis added by the court). The court followed United States v. Yazell, 382 U.S. 341 (1966), and distinguished *Stadium* on the grounds that the SBA loan had been individually negotiated. *Mackenzie*, 510 F.2d at 42. The court expressly withheld approval of *Stadium*, noting that it expressed no view on the merits of that case. *Id.*

83. This proposition is evident from the Ninth Circuit cases that adopted state redemption and deficiency laws, although the laws were not uniform and restricted the remedies of the United States. *See Pastos*, 781 F.2d at 752 (adopting state redemption law in SBA foreclosure despite lack of uniformity and added costs); *Ellis*, 714 F.2d at 955 (adopting state redemption law despite added costs to FmHA); *MacKenzie*, 510 F.2d at 42 (stating that adoption of state debtor protections does not pose any significant threat to federal government interests in loan repayment).

84. *See Pastos*, 781 F.2d at 752 (distinguishing *Stadium* in adoption of Montana's redemption law in SBA foreclosure).

85. The court stated that "FHA [National Housing Act] cases such as *Stadium Apartments* are distinguishable from the SBA and FmHA cases because higher foreclosure costs decrease the amount of funds available for the Na-

3. Eighth Circuit Adherence to the Reasoning in *Stadium* Despite *Kimbell*

The Eighth Circuit has been reluctant to adopt state law and has continued uncritically to follow the reasoning in *Stadium*.[86] The court has relied on the arguments that it cannot adopt state law as the federal rule of decision if the substance of the law varies from state to state,[87] if state law limits the effectiveness of the federal creditors' remedies,[88] or if the United States has an overriding interest in protecting government investments.[89] Although no Eighth Circuit decision has acknowl-

---

tional Housing Act's primary purpose of making available as much housing as possible." United States v. Pastos, 781 F.2d 747, 752 (9th Cir. 1986) (citing United States v. Ellis, 714 F.2d 953, 956 (9th Cir. 1983)).

The *Pastos* court acknowledged that redemption laws served the important state interest of preventing the government from "reaping double recovery" by purchasing the property below market price and then obtaining a deficiency judgment. *Id.* at 751. The court found that applying state redemption law in an SBA foreclosure would be consistent with the SBA's goal of assisting small business. *Id.*

The court did not indicate why application of redemption laws creates a greater financial burden on the FHA than on the other programs, nor did the court state why it did not equate financial loss by the SBA with a decrease in loans to small businesses in the same manner as it equated loss by the FHA with fewer loans for housing. The court has acknowledged that adoption of "state redemption laws does not impair . . . the federal interest in having the loans repaid." *Id.* at 751 (citing United States v. MacKenzie, 510 F.2d 39, 41-42 (9th Cir. 1975) (en banc)).

Although an insurance fund backs the HUD loans, such backing would constitute a valid distinction only on a showing that adoption of state redemption laws would significantly impair the fund.

86. The Eighth Circuit has indicated that it would adopt state law if the applicable state law were the Uniform Commercial Code. The court in United States v. Landmark Park & Assocs., 795 F.2d 683, 686 (8th Cir. 1986), stated that "[w]e have incorporated state law as the federal rule of decision when the state law is derived from a uniform statute such as the Uniform Commercial Code and to do so would therefore not hinder the 'federal interest in uniformity of the law.'" (citing United States v. Kukowski, 735 F.2d 1057, 1058 (8th Cir. 1984) (adopting state U.C.C. notice requirement in the sale of collateral)).

87. *See Landmark*, 795 F.2d at 687 (refusing to adopt state law governing interests in rents and profits because of variation in state law); United States v. Victory Highway Village, Inc., 662 F.2d 488, 498 (8th Cir. 1981) (refusing to adopt state law in HUD foreclosure primarily because redemption law varies from state to state).

88. Both *Landmark* and *Victory* quote the *View Crest* language, *see supra* notes 28-31 and accompanying text, that "[l]ocal rules limiting the effectiveness of the remedies available to the United States for breach of a federal duty can not [sic] be adopted." *Landmark*, 795 F.2d at 686; *Victory*, 662 F.2d at 497. The *Landmark* decision acknowledged that courts could adopt state law if a uniform rule were not necessary to protect a federal interest. *Id.* at 686.

89. The Eighth Circuit in *Victory* stated that the court could not support local rules limiting the effectiveness of United States remedies because of an

edged conflict with decisions from other circuits, district court decisions within the Eighth Circuit directly contradict decisions in the Fifth and Ninth Circuits, reflecting the Eighth Circuit's reluctance to adopt state law.[90]

II. MISAPPLICATION OF *KIMBELL* AS A RESULT OF ADHERENCE TO *STADIUM*

In view of the Court's analysis in *Kimbell*, the Eighth and Ninth Circuit decisions that refused to adopt state law relied on factual distinctions that do not justify results different from those reached in similar cases in the First, Fifth, and Ninth Circuits. In choosing rules of decision in voluntary federal creditor cases, some courts either have failed to recognize the relevance of *Kimbell*,[91] or have applied the *Kimbell* test in a cursory fash-

---

"'overriding federal interest in protecting the funds of the United States and in securing federal investments. . . .'" *Victory*, 662 F.2d at 497 (citing United States v. Scholnick, 606 F.2d 160, 164 (6th Cir. 1979)). *Landmark* stated the same argument. *Landmark*, 795 F.2d at 686.

In *Victory*, the court did not recognize *Kimbell* as applicable authority, but instead followed *Stadium* and *Scholnick*. *See Victory*, 662 F.2d at 497. In *Landmark*, however, the court addressed each prong of the *Kimbell* test without specifically stating it was doing so. *See Landmark*, 795 F.2d at 685-88.

90. *Compare* United States v. Elverud, 640 F. Supp. 692, 696 (D.N.D. 1986) (rejecting state redemption law in FmHA foreclosure) and United States v. Larson, 632 F. Supp. 1565, 1568 (D.N.D. 1986) (rejecting state deficiency procedure in SBA case) *with* United States v. Ellis, 714 F.2d 953, 957 (9th Cir. 1983) (adopting state law providing a redemption right in FmHA case) and United States v. Dismuke, 616 F.2d 755, 759 (5th Cir. 1980) (adopting state deficiency law in SBA case).

Courts within the Tenth Circuit have arrived at varying results in applying the *Kimbell* test. *Compare* United States v. Curry, 561 F. Supp. 429 (D. Kan. 1983) (upholding FmHA contractual waiver of state redemption rights contrary to state law) *with* United States v. Hargrove, 494 F. Supp. 22 (D.N.M. 1979) (adopting state law that prohibits waiver of state redemption rights). The decision in *Curry* also conflicts with the decision in *Ellis*.

Arguably, the difference in judgment may result from differences in the state redemption laws. The redemption period in New Mexico is only nine months, whereas the Kansas redemption period is one year and provides that the debtor may remain in possession during the redemption period. *Compare* N.M. STAT. ANN. § 39-5-18 (Supp. 1987) *with* KAN. STAT. ANN. § 60-2414 (1983). On the other hand, the federal agency can obtain a receiver if the security for the loan is endangered, and the Kansas law indicates the strong state interest in protecting debtors.

91. In United States v. Victory Highway Village, Inc., 662 F.2d 488, 494-95 (8th Cir. 1981), which refused to adopt state redemption law in an FHA foreclosure, the Eighth Circuit failed even to mention *Kimbell*. The *Victory* court cited United States v. Scholnick, 606 F.2d 160 (6th Cir. 1979). In that case the Sixth Circuit cited both *Kimbell* and *Sherred* for the proposition that federal lien priority is based on the doctrine of "first in time . . . is first in right," but

ion, failing adequately to distinguish the facts in *Kimbell*.[92] The following analysis demonstrates that the decisions rejecting adoption of state redemption and deficiency laws are not factually distinguishable from *Kimbell* and suggests that, had the courts correctly applied *Kimbell*, they would have adopted state law.

A. Federal Programs Do Not "By Their Nature" Require Application of a Uniform Federal Rule of Decision

The Supreme Court in *Kimbell* declared that state law could not prevail when federal programs "by their nature" required a uniform federal rule of decision.[93] In addressing the need for uniformity in adoption of state lien priority law, the *Kimbell* Court considered the effect of adopting state law on the administration of the SBA and FmHA programs.[94] The Court held that because these agencies administered their pro-

---

then determined without analysis that there was no federal right of redemption under *Stadium*. *Scholnick*, 606 F.2d at 166-67.

92. In its decision to reject adoption of state redemption laws in an SBA case, the district court in United States v. Larson, 632 F. Supp. 1565 (D.N.D. 1986), analyzed the *Kimbell* factors in one paragraph. The court's analysis was as follows:

> In considering the need for a nationally uniform body of law, this court feels the state has a strong interest in its laws affecting real estate liens and that the state interest is at least as strong as the need for a nationally uniform body of law on remedies available to SBA. To the extent the objectives of the SBA's lending program include the government's recoupment of monies loaned, application of the state law would frustrate objectives of the SBA program. The final factor to be considered under *Kimbell Foods*, the extent to which application of a federal rule would disrupt commercial relationships predicated on state law, is of less significance. The loan documents specify that federal law governs, so it does not appear the SBA-Larson transaction was predicated on state law. Further, there are not commercial relationships involving parties outside the SBA-Larson transaction to be considered; the question addressed in this order is different in that respect from the lien priority questions addressed in the May 29, 1985 order.

Larson, 632 F. Supp. at 1568. The case cited *Victory* and two other Eighth Circuit cases finding that federal law preempted state law, and explicitly refused to acknowledge contrary decisions in other circuits. *Id.* at 1569.

93. United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979). The Court in *Kimbell* cited United States v. Yazell, 382 U.S. 341, 354 (1966), for the above proposition. The Court in *Yazell* held that an emergency loan program under the SBA did not require a uniform federal rule of decision and adopted state coverture laws (laws limiting the right of married women to dispose of property). *Yazell*, 382 U.S. at 348-58; *see supra* note 33.

94. *Kimbell*, 440 U.S. at 730-33. The Court found that "[b]y using local lending offices and employees who are familiar with the law of their respec-

grams locally and scrutinized applications individually, adoption of state priority law would not hinder the effective administration of their programs.[95]

The post-*Kimbell* courts that refused to adopt state law because of the perceived need for a uniform federal rule of decision failed properly to apply the analysis in *Kimbell*.[96] For example, the Eighth Circuit has made determinations based on an abstract federal interest in uniformity, rather than by analyzing the actual administrative burden created by the adoption of state law, as the Court did in *Kimbell*.[97] The Eighth Circuit's cursory uniformity analysis[98] emanates from an overly broad and uncritical reading of frequently cited language from *Clearfield Trust Co. v. United States*, in which the Court stated that when law varies from state to state, adoption of state law will create uncertainty in transactions and subject federal government interests to the vagaries of state law.[99] The *Clearfield*

---

tive localities, the agencies function effectively without uniform procedures and legal rules." *Id.* at 732.

95. *Id.*

96. *See supra* notes 84-90 and accompanying text.

97. The Eighth Circuit in United States v. Landmark Park & Assocs., 795 F.2d 683, 686-87 (8th Cir. 1986), rejected the adoption of state law on the sole ground that a mortgagee's right to rents and profits varied from state to state. The court failed to analyze the administrative burden resulting from the variations in state laws and rested its decision on an abstract need for uniformity. *Id.* The Eighth Circuit's shallow analysis also appeared in United States v. Kukowski, 735 F.2d 1057 (8th Cir. 1984), where the court adopted state law to determine a loan guarantor's right to notice upon disposition of collateral by the SBA. The court, citing *Kimbell*, looked only to the uniformity factor in making its determination and stated that "[i]n this case, where the state law on which private creditors base their daily commercial transactions is derived from a uniform statute, there is little or no concern that the federal interest in uniformity of the law will be hindered." *Kukowski*, 735 F.2d at 1058 (citing *Kimbell*, 440 U.S. at 729).

98. *See Landmark*, 795 F.2d at 686-87 (stating that courts cannot accept varying state law determining perfection of assignment of rents because to do so would create uncertainty); United States v. Victory Highway Village, Inc., 662 F.2d 488, 498 (8th Cir. 1981) (stating that adoption of state redemption rights as federal rule of decision would subject FHA to vagaries of state law).

99. In the *Clearfield Trust* Court's words:

> The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law . . . would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states.

318 U.S. 363, 367 (1943). Adoption of state mortgage law, on the other hand, would not create uncertainty because the law of the state where the mortgage originated would determine the rights and duties of the federal agency.

Trust argument does not apply to foreclosure cases, however, because courts can easily determine the relevant state law.[100]

The *Kimbell* test did not ask whether the law is uniform among the states, but rather asked whether adoption of state law would burden the effective administration of the federal program.[101] *Kimbell* reasoned that any agency scrutinizing individual applications through local or regional offices could function effectively under state mortgage law.[102] Only diverse state law requiring local "machinery" that such an agency did not have the power to obtain would hinder that agency's administration. The SBA, the FHA (administered by HUD), and the FmHA each give individual scrutiny to applications for financial assistance through local offices.[103] Consequently, these agencies should be able to administer their programs effectively despite variations in mortgage law from state to state.[104] Anal-

100. Commentators have criticized the *Clearfield Trust* case for asserting an administrative burden that may be minimal in view of the availability of conflict of laws doctrines used to determine rights for privately issued commercial paper. *See* Mishkin, *supra* note 3, at 828-32.

The court in *Stadium* also made the analogy to *Clearfield Trust* and stated that because redemption laws varied from state to state, adoption of state law would subject the FHA to the vagaries of state law. United States v. Stadium Apartments, Inc., 425 F.2d 358, 364 (9th Cir. 1970), *cert. denied*, 400 U.S. 926 (1970). Further confusing the uniformity issue, the court in *Stadium* argued that to adopt state law would require the court to choose a particular state law and apply it in every state. *Id.* This argument is quite different from *Clearfield Trust*'s argument that because commercial paper may pass through many states with different laws, the legal rights of the United States would be uncertain at any particular point in time. *See* Note, *State Statutory Redemption Rights and the Federal Housing Administration: Reconciliation of Real and Illusory Conflicts*, 49 B.U.L. REV. 717, 727 (1969). Other courts have not had trouble conceptualizing the adoption of the law of the state where the mortgage was originated as the federal rule of decision. *See* United States v. Ellis, 714 F.2d 953, 954-57 (9th Cir. 1983) (adopting state redemption laws as the federal rule of decision in FmHA case).

101. *See supra* text accompanying notes 51-54.

102. Even though the Court in *Kimbell* noted that the administrative burden on the SBA and FmHA would be minimal because of the applicability of the U.C.C., the Court did not indicate that application of the U.C.C. was a decisive factor. United States v. Kimbell Foods, Inc., 440 U.S. 715, 732 n.28 (1979).

103. *See supra* notes 54, 70.

104. The Supreme Court in *Kimbell* expressly found that the adoption of state lien priority law would not burden the administration of the SBA and FmHA because local offices individually scrutinized the loans. *Kimbell*, 440 U.S. at 730-33. For the same reason, the adoption of mortgage law would not be significantly more burdensome in the processing of loans under the programs.

Adoption of state mortgage law would not burden the administration of the FHA loan programs because each loan already is scrutinized individually. *See* Chicago Title Ins. Co. v. Sherred Village Assocs., 708 F.2d 804, 811 (1st Cir.

ysis of the first part of the *Kimbell* test indicates that none of these programs by their nature requires the application of a uniform federal rule of law.

B. Frustration of Federal Objectives By the Adoption of State Mortgage Law

Courts that declined to adopt state redemption and deficiency laws relied primarily on the need to protect the federal treasury.[105] Restating this argument in terms of the second element of the *Kimbell* test, the courts argued that adoption of state laws would increase agency costs and thereby frustrate specific objectives of the programs,[106] especially when the FHA receives assignment of a mortgage through its insurance program and attempts to foreclose.[107] Courts that rejected the

---

1983) (upholding district court finding that adoption of state lien priority law would not burden HUD administration of FHA loan program).

Some courts distinguished the administration of the FHA from that of the SBA and FmHA based upon the lack of individualized negotiation in loans by the FHA. *See* United States v. MacKenzie, 510 F.2d 39, 41-42 (9th Cir. 1975) (en banc) (considering individualized negotiation in adopting state law in SBA foreclosure); *Stadium*, 425 F.2d at 363 (distinguishing individualized negotiation in *Yazell* from FHA loan). The Ninth Circuit, however, subsequently held that individualized negotiation is not relevant in determining whether courts should apply state law. United States v. Pastos, 781 F.2d 747, 750 (9th Cir. 1986).

Incidentally, it appears that loans granted by the FHA are the product of extensive negotiation and regulation. *See* Note, *State Statutory Redemption Rights and the Federal Housing Administration; Reconciliation of Real and Illusory Conflicts*, 49 B.U.L. Rev. 717, 731-32 (1969). Local offices use state procedures and forms tailored to the individual states that administer the FHA. *Id.* The FHA also may negotiate terms and specifications. *Id.* The Multifamily Mortgage Act now governs foreclosure of multifamily project loans, such as the loan at bar in *Stadium*. *See supra* note 4. Even if individualized negotiation is relevant, it seems that the FHA gives adequate individualized attention to prevent an excessive burden on the agency. *Kimbell*, 440 U.S. at 731-33.

105. *See supra* notes 84-90.

106. *See* United States v. Victory Highway Village, Inc., 662 F.2d 488, 495 (8th Cir. 1981) (declining to adopt state redemption rights because of overriding federal interest in protecting treasury and preserving assets of FHA insurance fund); United States v. Scholnick, 606 F.2d 160, 164 (6th Cir. 1979) (declining to adopt state redemption rights because of overriding federal interest in protecting treasury and preserving assets of FHA insurance fund); United States v. Elverud, 640 F. Supp. 692, 696 (D.N.D. 1986) (declining to adopt state redemption rights because adoption would frustrate federal objectives by increasing costs of FmHA); United States v. Larson, 632 F. Supp. 1565, 1568 (D.N.D. 1986) (declining to adopt state deficiency laws because adoption would frustrate federal objective by increasing costs of SBA).

107. The "protection of the treasury" rationale was first presented in United States v. View Crest Garden Apartments, Inc., 268 F.2d 380, 383 (9th Cir.), *cert. denied*, 361 U.S. 884 (1959). *See supra* notes 28-31 and accompany-

adoption of state law on the basis of increased costs to the FHA, however, failed to distinguish *Kimbell*. These courts did not demonstrate any difference between the additional expense caused by the adoption of state debtor protections and the additional expense incurred by the adoption of state priority law in *Kimbell*.[108] To justify rejecting adoption of state redemption or deficiency laws, a court should find that adoption would not only be more costly to federal agencies than the cost of the loss of lien priority in *Kimbell* to the SBA and FmHA, but would result in a loss so substantial as to prevent the agencies from successfully pursuing their objectives.[109]

In determining whether adoption of state lien priority law would frustrate specific objectives of the FmHA and SBA, the Court in *Kimbell* held that the respective objectives of the programs were to make loans to assist farmers and businesses, rather than to protect the federal treasury.[110] The Court

---

ing text. In *View Crest* the court rejected the adoption of state receivership laws, stating that "[n]ow the federal policy to protect the treasury and to promote the security of federal investment which in turn promotes the prime purpose of the [National Housing] Act—to facilitate the building of homes by use of federal credit—becomes predominate." *Id.* at 383.

The court in *Stadium* found, from the testimony of agency representatives, that statutory redemption laws increased costs to the FHA and the court adopted the *View Crest* language verbatim. United States v. Stadium Apartments, Inc., 425 F.2d 358, 363, 365 (9th Cir.), *cert. denied*, 400 U.S. 926 (1970). Other courts have followed *Stadium* apparently without analysis of the actual financial impact of state redemption or deficiency laws on the program. *See, e.g., Victory*, 662 F.2d at 497-98; *Scholnick*, 606 F.2d at 166-67; *Larson*, 632 F. Supp. at 1568-69; United States v. Curry, 561 F. Supp. 429, 430 (D. Kan. 1983).

108. *See Victory*, 662 F.2d at 497-98; *Scholnick*, 606 F.2d at 167; *Elverud*, 640 F. Supp. at 695-96; *Larson*, 632 F. Supp. at 1568; *Curry*, 561 F. Supp. at 430; *see also* United States v. Pastos, 781 F.2d 747, 752 (9th Cir. 1986) (asserting that adoption of state redemption law in FHA foreclosure would increase foreclosure costs and reduce funds available for housing loans).

109. The loss of lien priority preference may have resulted in substantial losses in SBA and FmHA loan collections. *See* Chicago Title Ins. Co. v. Sherred Village Assocs., 708 F.2d 804, 811 (1st Cir. 1983). Nonetheless, the Supreme Court in *Kimbell* found that the amounts expended on the SBA and FmHA programs as a whole were not substantial enough to warrant special protection by the Court. United States v. Kimbell Foods, Inc., 440 U.S. 715, 734 (1979). The Court stated that "when the United States operates as a moneylending institution under carefully circumscribed programs, its interest in recouping the limited sums advanced is of a different order. Thus, there is less need here than in the tax lien area to invoke protective measures against defaulting debtors in a manner disruptive of existing credit markets." *Id.*

110. The Court in *Kimbell* distinguished the SBA and FmHA liens from federal tax liens and held that the agencies' interests lay not in protecting the treasury, but in advancing their social welfare objectives "designed to assist farmers and businesses that cannot obtain funds from private lenders on reasonable terms." *Kimbell*, 440 U.S. at 735 (footnotes omitted).

clearly indicated that analysis of the second element of the *Kimbell* test requires more than showing additional cost to an agency before a court may refuse to adopt state law.[111] Instead, the Court required a showing that adoption of state law would obstruct the social welfare objectives of the program at issue.[112]

No court rejecting the adoption of state mortgage law has discussed evidence that losses on the collection of loans or increased administrative costs would adversely affect the ability of the agencies to provide their respective financial services.[113] Loan assistance is based primarily on the qualifications of the applicants rather than on the availability of funds.[114] Moreover, private lenders and mortgage insurers function profitably under state mortgage law.[115] Thus, federal agencies, which the

111. *Id.* at 734-35.

112. The Court in *Kimbell* stated that "without a showing that application of state laws would impair federal operations, we decline to extend to new contexts extraordinary safeguards largely rejected by Congress." *Id.* at 738. Thus, the Court in *Kimbell* must have found that the additional losses to federal agencies caused by adoption of state priority law would not obstruct the operation of those agencies.

Moreover, Congress rejected an opportunity to preempt state mortgage law explicitly by failing to pass the Federal Mortgage Act. *See supra* note 4. Congress has passed the Multifamily Mortgage Act, which preempts state redemption law where HUD forecloses on multifamily projects. *See id.* The court in *Sherred*, however, rejected the argument that Congress intended to preempt state law beyond the area explicitly covered by the Act. Chicago Title Ins. Co. v. Sherred Village Assocs., 708 F.2d 804, 809-10 (1st Cir. 1983).

113. In the redemption cases, the courts appeared to rely on the testimony cited in *Stadium* that statutory redemption rights increase costs. *See Victory*, 662 F.2d at 497-98; *Scholnick*, 606 F.2d at 167; *Elverud*, 640 F. Supp. at 695-96; *Larson*, 632 F. Supp. at 1568; *Curry*, 561 F. Supp. at 430. No case has discussed the relative amount of these costs, or cited evidence that the amount was so large as to necessarily reduce the volume of loans available from the agencies. *See supra* note 108.

114. Financial constraints obviously exist. Loan amounts are limited and premiums are calculated based upon collective risk. The point is that the FHA could maintain its current service under state redemption and deficiency laws. *See infra* note 118.

115. Private mortgage insurance has expanded over the last 20 years, albeit charging higher premium rates on lower amounts than the FHA. *See* Williamson, *The Private Mortgage Insurance Industry*, THE MORTGAGE BANKER, Feb. 1980, at 30. States are unlikely to pass legislation that disadvantages lenders greatly. The trend since the depression has been toward facilitating foreclosure through power of sale procedures. This Note seeks to emphasize that the federal agencies should not be able to take advantage of the beneficial aspects of the new procedures and yet not bear the burden of state schemes that protect debtors. Moreover, should the states ever desire to respond to economic pressures by reintroducing debtor protections such as moratoriums or workout procedures, the courts should be very careful not to cripple the state scheme by excepting federal creditors from the plan. Mandatory mediation

Court in *Kimbell* found to occupy substantially the same position as private lenders,[116] cannot claim persuasively that costs created by state redemption and deficiency laws are prohibitive.

The Eighth and Ninth Circuits have asserted that the FHA has a unique interest in preserving its insurance funds and that it would suffer a greater burden than either the SBA or FmHA from adoption of state redemption laws.[117] There is no evidence, however, that adoption of state redemption laws would reduce the amount of services the FHA provides.[118] The FHA already has repaid the initial federal investment and has accumulated large net surpluses in the funds intended to be actuarially sound.[119] The FHA appears to be capable of protect-

---

statutes, however, such as the Minnesota law that prescribes special procedures for federal creditors, need not be adopted to the extent that they treat federal creditors specially. MINN. STAT. §§ 583.26-.32 (1988). See *supra* note 63 for a discussion of discriminatory state law.

116. *Kimbell*, 440 U.S. at 738.

117. *See supra* note 85.

118. It appears that the FHA generally abides by state redemption and deficiency laws. Letter from Joseph James, HUD Regional Counsel (Region VII), to Aaron Weiner (January 29, 1988) (discussing HUD policy in FHA foreclosures). HUD may foreclose on loans made for multifamily projects under the Multifamily Mortgage Act. *Id.* The Multifamily Mortgage Act does not provide redemption rights and the FHA multifamily insured loans are nonrecourse, so that no deficiency judgments may be sought. *Id.* If HUD forecloses on either multifamily or single-family loans in state court, state redemption rights and deficiency procedures are respected. Thus, formal adoption of state law would not cause a general increase in costs because current procedures absorb costs from redemption and deficiency laws already. On the other hand, formal adoption would guarantee equal treatment of debtors.

Moreover, lenders who hold mortgages insured by the FHA have the option of foreclosing themselves and transferring clear title to the FHA rather than taking a one percent discount on the insurance settlement and assigning the mortgage to the FHA. NELSON & WHITMAN, REAL ESTATE TRANSFER, FINANCE, AND DEVELOPMENT 837 (3d ed. 1987) (citing 24 C.F.R. §§ 203.355-.417). If the lender chooses to foreclose itself, the FHA will reimburse the lender for foreclosure expenses, which will include added expenses due to redemption laws as well as the balance of the loan. *Id.*

The FHA has proposed a regulation to reduce HUD's inventory of properties by encouraging lenders to foreclose themselves. *Id.* at 837. The FHA's desire to have lenders foreclose themselves rather than transfer their rights to the FHA demonstrates that costs associated with state redemption and deficiency laws are not prohibitive, because the FHA pays such costs when the lender forecloses.

119. The FHA is actuarially sound and has repaid the initial capital invested by the federal government. NELSON & WHITMAN, *supra* note 118, at 826 (3rd ed. 1987). In 1986 the FHA accumulated a $4,073 million surplus from insuring single family mortgages and a $22 million surplus from its insurance of cooperatives. The general and special risk insurance funds, by contrast, ran a $5.5 billion deficit. OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF UNITED STATES GOVERNMENT, app. at I-M10 (1988). The net deficit in FHA funds and

ing its interests in securing adequate repayment in the same manner as private lenders who must abide by state laws.[120]

Thus, the argument that adoption of state redemption or deficiency laws would frustrate federal objectives by reducing the ability of the agency to fulfill its loan objectives on a sound financial basis is unsubstantiated factually.[121] The Court indicated in *Kimbell* that the SBA and FmHA are essentially in the same position as private lenders and concluded that the federal agencies do not need preferential treatment.[122] The presumption against disturbing commercial relations in the third aspect of the *Kimbell* analysis requires that courts adopt state law unless adoption of state law would seriously frustrate achievement of federal social welfare objectives.

C. The Effect of Adoption of a Uniform Federal Rule On Commercial Stability

The third prong of the *Kimbell* test focuses on the disruption of commercial relationships that could result from applying uniform federal rules to voluntary federal creditors instead of using the state law on which commercial relationships traditionally are predicated. In light of the uncertain effect on commercial relationships generated by displacing state law, the Court in *Kimbell* declared that courts should adopt state law unless a contrary rule is necessary to protect important federal interests.[123] The Court's reluctance to disrupt commercial rela-

---

the budgeted congressional appropriation of $169.7 million in 1988 results from the money lost in special-risk loan programs that were not designed to be actuarially sound. *See* National Housing Act, §§ 235-237, 12 U.S.C. §§ 1701-1750 (1982 & Supp. IV 1986).

120. *See supra* notes 73-77 and accompanying text; note 115.

121. Courts have accepted the assertion from *View Crest* that losses to the FHA programs translate directly into fewer loans, despite the apparent lack of empirical evidence of the actual impact of adoption of state redemption or deficiency laws. *See supra* notes 105-08 and accompanying text. The surplus that the FHA programs create indicates that lack of funds does not constrain the volume of loans. It appears that if courts upheld state mortgage law, the FHA could still make the loans it otherwise would make on a sound financial basis.

122. *See supra* note 58.

123. The Court in *Kimbell* stated:

> Because the ultimate consequences of altering settled commercial practices are so difficult to foresee, we hesitate to create new uncertainties, in the absence of careful legislative deliberation. Of course, formulating special rules to govern the priority of federal consensual liens in issue here would be justified if necessary to vindicate important national interests.

United States v. Kimbell Foods, Inc., 440 U.S. 715, 739-40 (1979) (footnote omitted).

tionships by adoption of uniform federal rules suggests a presumption in favor of state law.[124] The Court's analysis of the third prong suggests that, absent the need to protect important federal interests, it is for Congress to choose whether to displace state law and not for the courts to balance the net benefits of a uniform federal rule against the net benefits of adopting state law.[125] Thus, under *Kimbell*, courts should uphold state law that inconveniences federal agencies or necessitates minor adjustments because a uniform federal rule is not necessary to protect an important federal interest.[126]

It is difficult to assess the disruptive impact of the uniform rule, adopted in *Stadium*, that no right of redemption exists in FHA foreclosures.[127] The courts in some post-*Kimbell* cases rejected adoption of state redemption law, arguing that no justified expectation of redemption exists because it is well

---

124. *See* Comment, *supra* note 49, at 407 (arguing that *Kimbell* established presumption in favor of adopting state law as federal rule of decision in commercial transactions).

125. The Court in *Kimbell* considered the federal interest in protecting the federal treasury to be insufficient to justify "rejecting well-established commercial rules which have proven workable over time. Thus, [because of the uncertain effect of altering commercial practices] the prudent course is to adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation." *Kimbell* 440 U.S. at 740 (footnote omitted). The Court in *Kimbell* indicated that the courts were ill-suited to balance the federal interest against the impact on commercial relationships because of the uncertainty involved. *Id.* at 739 n.42.

Adoption of state lien priority schemes, as in *Kimbell*, is not distinguishable from adoption of state redemption law. A court should not override state regulatory schemes merely because the court decides the scheme is unimportant. The Court in *Kimbell* held that unless a uniform federal rule is "necessary to vindicate important national interests," courts should adopt state law. *Id.* at 740. It appears from *Kimbell* that minor financial burdens on federal agencies are not important enough to justify displacement of state law.

In establishing its three-prong test, the Court in *Kimbell* rejected the straight balancing of state and federal interests approach that the court used in *Stadium*. The *Stadium* court expressed doubts that redemption laws served the purpose of enhancing foreclosure bidding or were necessary to protect junior lienors, and consequently found that the value of redemption laws did not outweigh the federal interest in avoiding the added expense that would result from adoption of state law. *Stadium*, 425 F.2d at 365-66. The second and third prongs of the *Kimbell* test do not provide for balancing unless it is first found that the application of state law obstructs an important federal interest.

126. The third prong of the *Kimbell* test suggests that even if a uniform federal rule is necessary to protect an important national interest (ostensibly derived from the second aspect of the *Kimbell* analysis), a court may still uphold state law if the disruption to commercial relationships outweighs the national interest. *Kimbell*, 440 U.S. at 741.

127. United States v. Stadium Apartments, Inc., 425 F.2d 358, 367 (9th Cir.), *cert. denied*, 400 U.S. 926 (1970).

established that federal law applies to cases involving voluntary federal creditors.[128] These courts discounted the importance of the third prong of the *Kimbell* analysis in redemption and deficiency cases. *Kimbell* involved priority questions affecting the rights of third parties without notice of the federal interest,[129] whereas the debtors involved in a mortgage foreclosure by a federal agency would be aware that the mortgage or mortgage insurance created a federal interest.[130] Although the debtor may be aware of federal involvement, that involvement might not indicate to the debtor which state procedures are abrogated.[131] Moreover, courts should respect state regulatory schemes in areas traditionally governed by state law.[132] Statu-

128. Neither *Scholnick* nor *Victory* applied the *Kimbell* test because each assumed that no right to redemption exists under federal law. *See* United States v. Victory Highway Village, Inc., 662 F.2d 488, 498 (8th Cir. 1981); United States v. Scholnick, 606 F.2d 160, 167 (6th Cir. 1979). The court in *Elverud* assumed that all parties should be aware of the FmHA's involvement and thus found that there were no relationships predicated on state law for a uniform federal rule to disrupt. United States v. Elverud, 640 F. Supp. 692, 696 (D.N.D. 1986). These courts ignored federal law's ability to look to state law for content, and thus assumed their conclusion that federal law did not include redemption rights.

129. The *Kimbell* Court noted that the choateness rule created undisclosed security interests and undermined the notice filing system. *Kimbell*, 440 U.S. at 739 n.42.

130. In assessing the third prong of the *Kimbell* test, the court in *Elverud* found that the loan transaction between Elverud and the FmHA did not affect relationships with third parties because the debtor as well as junior lienors, for the most part, would have notice of the FmHA interest. *Elverud*, 640 F. Supp. at 696.

The court in United States v. Larson, 632 F. Supp. 1565 (D.N.D. 1986), in holding that state deficiency laws could apply in an SBA foreclosure, noted that "there are not commercial relationships involving parties outside the SBA-Larson transaction to be considered; the question addressed in this order is different in that respect from the lien priority question addressed in the May 29, 1985 order." *Larson*, 632 F. Supp. at 1568. *See also* United States v. Landmark Park & Assocs., 795 F.2d 683, 687 (8th Cir. 1986) (stating that commercial relationships are not adversely affected by a uniform federal rule on the perfection of interests in rents and profits because sufficient notice of federal interest exists by virtue of recorded assignment).

131. In fact, many jurisdictions have no case law indicating whether or not courts should apply state redemption or deficiency laws. Moreover, in the case of HUD, the agency generally abides by state redemption and deficiency laws, thus giving rise to the expectation that the debtor will enjoy such rights. *See infra* note 118.

132. *See Kimbell*, 440 U.S. at 740 n.44 (citing cases deferring to state law in absence of congressional action).

Property law is an area of local concern traditionally. *See* United States v. Little Lake Misere Land Co., 412 U.S. 580, 591 (1973) (stating that state law traditionally controls property relationships); United States v. Yazell, 382 U.S.

tory redemption rights were enacted to protect debtors' equity in their property, as well as the interests of junior lienors. Moreover, evaluating the effectiveness of the law is not the federal courts' role.[133]

The state legislatures regulate mortgagor-mortgagee relationships and parties depend on those regulations in commercial transactions.[134] Imposition of preferential rules for federal agencies by the rejection of one aspect of debtor protection creates uncertainty about the validity of other protections in situations involving a federal creditor.[135] For example, if the redemption statute of one state is rejected, then the applicability of the redemption, upset price, and appraisal statutes of other states are uncertain.[136] Both debtors and creditors will be unsure which state procedures and rights courts will adopt and which they will ignore.

The First and Fifth Circuits correctly adopted state law that frustrated no specific federal objective. These circuits also properly refused to give federal agencies special treatment when the agencies occupied essentially the same position as private creditors. Conversely, the Eighth, Sixth, and Ninth Circuits misinterpreted the uniformity aspect of the *Kimbell* test and failed to acknowledge the importance of state interests recognized in the *Kimbell* decision.

III. REFORMULATION OF THE *KIMBELL* TEST TO ACHIEVE UNIFORM APPLICATION

The diversity of results reached by courts ruling on similar fact situations indicates that the *Kimbell* test has not provided sufficient guidance to lower courts in selecting federal rules of decision in voluntary federal creditor cases. The following analysis of the interrelationship of the three prongs of the *Kimbell* test reformulates the test and reduces the three elements to one rule. The reformulated test requires that courts uphold nondiscriminatory state law unless doing so would substantially reduce the ability of the agency to accomplish its fundamental

341, 352 (1966) (stating federal courts should respect state law where family and family-property relationships are involved).

133. *See supra* note 125.

134. *See* Note, *Federal Courts Choice of Controlling Law In Cases Involving Federally Insured Mortgages*, 49 N.C.L. REV. 358, 365-66 (1971) (arguing that adoption of a federal rule makes applicability of other state law uncertain).

135. *See id.*

136. *See supra* notes 10-13 and accompanying text.

objectives.[137] Such a reformulation promotes more consistent application among the courts and greatly favors use of state law.

The first prong of the *Kimbell* test gives credence to shallow arguments favoring uniformity for its own sake, rather than directing analysis toward the central issue embodied in the second prong of the test, whether court adoption of state law would obstruct the operation of the federal program. It is possible to interpret the first prong of the *Kimbell* test to mean that mere administrative convenience is sufficient to override state statutory schemes. This interpretation, however, is inconsistent with the stronger standard in the second prong of the *Kimbell* test that requires frustration of specific objectives. By treating frustration of administration separately from attainment of social welfare objectives, the Court in *Kimbell* created conflicting criteria and diluted the content of the second prong of its test.

The following example demonstrates the inconsistency of the first and second prongs of the *Kimbell* test. If the first prong of the *Kimbell* test mandates rejection of state deficiency procedures because they vary from state to state and thereby increase the administrative costs of a federal agency by $100,000 a year, then courts should also reject adoption of lien priority law under the U.C.C., as in *Kimbell*, if adoption would cost the agency an extra $100,000 a year in lost debt recoveries, although the extra expense is not administrative. Making the source of costs a dispositive issue leads to nonsensical results. Certainly an extra $100,000 in costs would not frustrate the SBA, FmHA, or FHA in the pursuit of their specific objectives, regardless of the source of the cost.

In such a case the court should adopt both the state deficiency law and the lien priority law out of respect for state legislative schemes and reluctance to disrupt relationships predicated on state law. The relevant factor is frustration of the agency's ability to attain legislative objectives, not the source of the frustration (administrative or financial). Nothing peculiar about administrative expenses warrants a separate discussion of them beyond their potential amount, and that amount is properly considered under the second prong of the *Kimbell* test. The need for uniformity under the second prong of the test is relevant only if lack of uniformity would frustrate

137. The reformulation is similar to the "major damage" test in *Yazell*. *See supra* note 33.

specific objectives of the federal program. Because the second prong of the *Kimbell* test fully encompasses the first, the first prong should be left out of a reformulation of the test intended to achieve more consistent application.[138]

Reading the second and third prongs of the *Kimbell* test together reveals that adoption of uniform federal rules, rather than state law, is necessary where "application of state law would frustrate specific objectives of the federal programs,"[139] or "to vindicate important federal interests."[140] The Court rejected the notion that a uniform federal rule was necessary merely because application of state law inconveniences federal agencies. What is clear from the holding in *Kimbell* is that courts may adopt state law even though it does not advance the objectives of the federal program and even if application of state law creates additional expense for federal agencies.[141] The Court's indication that the judiciary should not treat federal agencies differently from private parties, its apprehension that adoption of uniform federal rules might cause unforeseen dislocations in commercial transactions, and its respect for state legislatures' determinations all indicate that courts should adopt state law unless adoption would frustrate specific objectives of a federal program. Thus, the second and third prongs of the *Kimbell* test can be reformulated into a rule that courts should apply nondiscriminatory state law in the absence of proof that it will substantially frustrate the accomplishment of federal objectives.

---

138. Adoption of the uniformity test is questionable in the context of choosing a federal rule of decision in mortgage law cases. The Supreme Court in *Kimbell* acknowledged the analogy to *Clearfield Trust* that *View Crest* first espoused, but in its analysis altered the discussion from whether the program "by its nature" required a uniform federal rule to whether adoption of state law would "burden administration." *Kimbell*, 440 U.S. at 728-29. Whether adoption of state law would burden the administration of a federal program does not warrant discussion separate from consideration of whether adoption of state law would frustrate specific federal objectives. *See* Comment, *Adopting State Law as the Federal Rule of Decision: A Proposed Test*, 43 U. CHI. L. REV. 823, 834-41 (1976) (distinguishing "conflict" from "uniformity" criteria). The new test would consider the need for uniformity only when the additional costs in administration which state law creates are so great as to bar the functioning of the program on a sound financial basis.

As discussed above, the SBA, FmHA, and FHA individually scrutinize transactions and the courts have concluded that compliance with state law does not burden the administration of these agencies, whether state laws are varying or uniform. *See supra* notes 101-104 and accompanying text.

139. *Kimbell*, 440 U.S. at 728.

140. *Id.* at 740.

141. *See supra* notes 55-59 and accompanying text.

The reformulated *Kimbell* test is open to criticism because it does not provide for adoption of a uniform federal rule even if the federal interest, although not compelling, is greater than the state interest.[142] A rule requiring the balancing of federal and state interests, however, gives little guidance, requires courts to measure intangibles and make uncertain predictions, and often leads courts to make subjective judgments about the effectiveness of state schemes that state legislatures should make in the absence of compelling federal interests.[143]

Leaving flexibility in the test will allow the courts to intercede where a state law has, for all practical purposes, cut off creditors' remedies. In such a case, support of those in need of government financial assistance in one state would consume a grossly disproportionate amount of government resources. Alternatively, such a state law could cause a federal agency to discontinue its program in that state, contravening federal objectives. The following examples should help define "substantial frustration."

The flexibility of the reformulated test is not intended to allow a court to intervene because it disagrees with a rational state policy. For example, in *United States v. Haddon Haciendas Co.*,[144] the Ninth Circuit rejected adoption of a state antideficiency statute because the Supreme Court of California had interpreted the statute to bar mortgagee suits for waste.[145] The court found the state-law policy that suits for waste aggravate economic downturns in the same fashion as deficiency judgments[146] conflicted with the general federal policy that suits for

142. *See* Comment, *supra* note 138, at 846 (criticizing proposal to adopt state law in absence of "conflict" between state law and federal programs).

143. Mishkin described a spectrum with state law applying of its own force on one end and state law that directly conflicts with federal law and is preempted on the other. *See* Mishkin, *supra* note 3, at 805. The new formulation merely recognizes that although state mortgage law potentially may conflict with federal operations to such an extent that courts have held it is preempted, courts should adopt state law that does not in fact obstruct federal programs.

144. 541 F.2d 777 (9th Cir. 1976).

145. *Id.* at 783-85. *See* Cornelison v. Kornbluth, 15 Cal. 3d 590, 602-04, 125 Cal. Rptr. 557, 566-67, 542 P.2d 981, 990-91 (1975) (applying state statutory proscription of deficiency judgment after any foreclosure sale to deny recovery in actions for waste following foreclosure sale, except in instance of "bad faith" waste).

146. The court in *Haddon* stated that the policy behind *Cornelison* was "that downturns in land values often force owners to defer maintenance in order to meet mortgage payments. To impose personal liability for waste resulting from such economic pressures would aggravate the downturn in the same way that allowing deficiency judgments would." *Haddon*, 541 F.2d at 782.

waste advance the prevention of slums.[147] *Haddon* rejected state law on the basis of a broad principle rather than because of financial concerns.[148] The reformulated test's heavy presumption in favor of state law will not prevent courts from characterizing federal objectives so that they conflict with state law, but the test does emphasize that the conflict should be real and that state policies should be given great weight.

The reformulated rule arguably goes beyond *Kimbell*, but it was the constrained and inconsistent language of the *Kimbell* decision that generated inconsistent application of the test and which makes necessary a more strongly and concisely worded test. The interpretation embodied in the reformulation is similar to the First and Fifth Circuits' interpretation of *Kimbell*,[149] is in accord with scholastic commentary on the subject,[150] and is

147. *Id.* at 784.

148. The reformulated test is difficult to apply to conflicts between state and federal policies based on principle rather than financial concerns. For instance, in United States v. Med O Farm, Inc., 701 F.2d 88 (9th Cir. 1983), a case involving an emergency FmHA loan, the court refused to adopt a Washington state judicial policy voiding "due-on-sale" clauses. Such clauses cause an assignment of a mortgage to automatically accelerate the underlying loan. The state policy viewed due-on-sale clauses as an unreasonable restraint on alienation if the transfer of the loan obligation would not increase the risk of default. The court held that the state policy conflicted with the FmHA policy restricting the parties eligible for such emergency loans. *Id.* at 90. Allowing eligible parties to sell their FmHA loans appears, from one perspective, to defeat the eligibility requirements. From another perspective, however, whether the eligible party repays the FmHA loan which has favorable terms or sells the favorable loan, it is still the eligible party who benefits from the federally subsidized loan. *Med O Farm* presents a difficult scenario. The state policy interferes with the manner in which federal benefits are conferred. The Washington state policy appears to aim at private lenders who use due-on-sale clauses as leverage to take advantage of rising interest rates, rather than at public lenders who seek to control the nature of their subsidy. Perhaps the Court in *Med O Farm* should have held the judicial policy inapplicable as a matter of state law rather than finding that the policy frustrated federal objectives under the *Kimbell* test.

149. *See supra* notes 68-77 and accompanying text.

150. Commentary on *Stadium* rejected the outcome of that case and proposed tests favoring adoption of state law by requiring a greater quantum of conflict between federal operation and state law before state law could be rejected. *See* Note, 734 *supra* note 100, at (suggesting adoption of state law, but rejecting state law aspects that inflict major damage on federal objectives); Note, *supra* note 134, at 367 (finding federal interest in *Stadium* insufficient to abrogate local interest); Note, *Federal Housing Loans: Is State Mortgage Law Preempted?*, 19 SANTA CLARA L. REV. 431, 446 (1979) (stating that uniformity and protection of federal fisc are given too much weight in balancing of interests); Note, *Property Mortgages State Redemption Statutes Not Applicable to Foreclosure by United States on FHA Insured Mortgage*, 23 VAND. L. REV. 1384, 1389-90 (1970) (suggesting adoption of state law whenever significant lo-

in harmony with past Supreme Court decisions.[151]

Application of the reformulated *Kimbell* test to redemption and deficiency cases involving voluntary federal creditors would prevent misapplication of the general principles espoused in *Kimbell*. Application of the new test would resolve the split in authority in favor of the decisions adopting state law in the redemption and deficiency areas, as well as in other areas of mortgage law. The split in authority resulted from the ease with which courts have overlooked the spirit of the *Kimbell* decision by applying only the black letter of the three-pronged analysis.[152] Adoption of the new test would create greater uniformity in results and greater certainty as to the applicable rules of law in foreclosures by voluntary federal creditors.[153] The new test also embodies the traditional respect for state authority in commercial and property matters and avoids

---

cal interests arise unless adoption created "irreconciliable conflict" with long-range federal policy objectives); Note, *Federal Courts Refusal to Apply State Redemption Statute to FHA-Insured Mortgage Foreclosure*, 17 WAYNE L. REV. 178, 188 (1971) (arguing that courts should not be overprotective of federal programs that already function under local law).

151. In United States v. Yazell, 382 U.S. 341, 352 (1966), the Court stated that the judiciary should adopt state law in areas of traditionally local concern unless adoption would cause "major damage" to federal interests. In United States v. Little Lake Misere Land Co., 412 U.S. 580, 596 (1973), the Court suggested that the judiciary could adopt state law as long as that law was not "aberrant" or "hostile" to federal interests.

152. The language of the *Kimbell* test leaves great room for judicial discretion. Words like *burden* and *frustrate*, used in the *Kimbell* analysis, are words of degree. The words should be given content with reference to other principles stated in *Kimbell*. In coming to its conclusion, the *Kimbell* Court noted that the community should fund social welfare programs through taxes and not by avoiding costs by changing the rules on private individuals. United States v. Kimbell Foods, Inc., 440 U.S. 715, 735 (1979). The Court also noted that federal interests could be adequately protected by adoption of state law that did not discriminate against federal interests. *Id.* at 729 (state law that mandates separate treatment for federal goverment cannot be adopted). Finally, the Court in *Kimbell* indicated that courts should respect state law until Congress provides to the contrary. *Id.* at 740.

As discussed above, many cases rejecting adoption of state law have failed adequately to distinguish *Kimbell*, despite going through the motions of applying the suggested analysis. *See supra* notes 86-92 and accompanying text.

153. The adoption of uniform federal rules of decision engenders uncertainty with reference to both the specific issue decided and to other areas of law. Adoption by a district court of a uniform rule may not in fact create a uniform rule until the Supreme Court decides the issue, as was evidenced in the application of the uniform federal priority rule rejected in *Kimbell*, and as is currently evidenced by the differing federal redemption and deficiency decisions among the circuits. Adoption of a uniform federal rule also creates uncertainty in similar areas of law that must be litigated to be resolved. *See* Note, *supra* note 134, at 366-67 (arguing rejection of state law as federal rule

substitution of judicial for legislative judgment.[154] At the same time, the test would assure that specific federal objectives are attained.[155]

The proposed test strongly favors adoption of state law as the federal rule of decision. The test is likely to bar only application of novel state laws, because the federal agencies have, as have private lenders, already demonstrated their ability to operate responsibly under current state law.[156] Should an economic downturn strain the resources of federal agencies or produce strong pro-debtor legislation, the proposed rule favors state remedies until Congress acts.[157] As the above analysis suggests, a Supreme Court case applying the proposed test would overrule the decisions rejecting adoption of state redemption rights: *Stadium* and its progeny.[158]

CONCLUSION

Historically, in foreclosures by voluntary federal creditors, courts adopted only those state mortgage laws and procedures that the courts believed would forward federal policy and refused to adopt state law that limited the remedies of the federal creditors. Thus, federal creditors received the benefit of state procedures without the burden of the debtor protections incorporated into state mortgage schemes. The Supreme Court in *Kimbell* promulgated a three-pronged test ostensibly directing the courts to adopt state law unless such adoption would obstruct specific objectives of the federal programs. First and Fifth Circuit decisions interpreted *Kimbell* to place voluntary

---

confuses mortgage law by posing two laws on same subject and raising doubts about applicability of other state rules).

154. *See supra* note 132 and accompanying text.

155. The test is less stringent than a rule adopting nondiscriminatory state law unless Congress has specifically preempted state law in the area. Adoption of the proposed test will result in outcomes similar to *Sherred*, where the court found that the FHA and related entities could find a way to cope with adoption of state mechanic's lien laws; and, if not, Congress or HUD could preempt the rule by specific legislation or regulation. *See* Chicago Title Ins. Co. v. Sherred Village Assocs., 708 F.2d 804, 812-13 (1st Cir. 1983).

156. *See supra* notes 115, 118.

157. The theory behind the preference is that the community as a whole should pay for social welfare programs rather than homeowners, farmers, small businesses, and developers whose rights would be affected if a uniform federal rule were adopted rather than state law. United States v. Kimbell Foods, Inc., 440 U.S. 715, 735 (1979).

158. *Stadium* involved a multifamily mortgage that may now be foreclosed under the MMFA. *See supra* note 4. There would be no redemption rights and no deficiency. *See supra* note 118.

federal creditors on a par with private lenders and adopted state law if adoption did not obstruct the effective operation of federal programs. Sixth, eighth, and Ninth Circuit decisions, however, either ignored or misapplied the *Kimbell* test and rejected adoption of state law in favor of abstract uniformity arguments and the perceived need to protect the federal treasury by assuring federal creditors against loss. Contradictory elements of the *Kimbell* test and the lack of integrated analysis in the *Kimbell* decision are, in part, responsible for the inconsistent interpretations of the decision. Reformulation of the three-pronged test into one rule mandating that courts adopt state law unless adoption would substantially reduce a federal agency's ability to serve its social welfare objectives would resolve the conflict of authority in favor of the First and Fifth Circuit interpretations and would leave less room for inconsistent results. The rule favors the determinations of state legislatures until Congress acts explicitly to displace state law.

Aaron D. Weiner