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LETTING THE “SACRED COW” RUN LOOSE  
—THE D.C. CIRCUIT LOOSENS THE  
REGULATORY NOOSE AROUND THE F.D.I.C.  
IN *NATIONAL TRUST FOR HISTORIC  
PRESERVATION V. FEDERAL DEPOSIT  
INSURANCE CORPORATION*  
21 F.3d 469 (D.C. Cir. 1994)

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I. INTRODUCTION

The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA)<sup>1</sup> provides a roadmap for the Federal Deposit Insurance Corporation (FDIC).<sup>2</sup> It serves as a guide for the FDIC’s role in receiving and liquidating the assets of failed thrift institutions.<sup>3</sup> In receiving and liquidating such assets, however, the FDIC often encounters statutory obstacles.<sup>4</sup> Because the FDIC does not want those

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1. 12 U.S.C. § 1811 (1994). See *infra* notes 47-54 and accompanying text for a discussion of the policy reasons behind FIRREA.

2. See *infra* notes 55-60 and accompanying text for a discussion of the FDIC’s purpose.

3. 12 U.S.C. §§ 1821-1823.

4. See *National Trust for Historic Preservation v. FDIC*, 21 F.3d 469 (D.C. Cir. 1994) (encountering a statutory obligation requiring a federal agency to take into account the

statutory requirements to encumber its role as receiver,<sup>5</sup> it periodically violates federally-mandated procedures.<sup>6</sup> Accordingly, the FDIC exposes itself to litigation attempting to enjoin its liquidation sales.<sup>7</sup>

When faced with such an injunction, the FDIC has attempted to shield itself from a suit by claiming that § 1821(j) of FIRREA<sup>8</sup> denies court jurisdiction when the FDIC acts in its conservator or receiver functions.<sup>9</sup> The Third and Fifth Circuit Courts of Appeals have held that § 1821(j) permits courts to exercise jurisdiction over the FDIC in its receivership capacity if a party sues to enjoin the FDIC from violating some law.<sup>10</sup> Both circuit courts concluded that § 1821(j) does not immunize the FDIC from legal challenges where plaintiffs have no alternate remedy.

Unlike the Third and Fifth Circuits, the Court of Appeals for the District of Columbia Circuit took a different approach in *National Trust for Historic Preservation v. FDIC*.<sup>11</sup> The court held that § 1821(j) indeed immunizes the FDIC if the FDIC acts in its receiver or conservator capacity, regardless of whether another remedy is available to the claimant.<sup>12</sup>

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adverse affects of selling historic property under the National Historic Preservation Act), *cert. denied*, 115 S. Ct. 683 (1994); *Sierra Club, Lone Star Chapter v. FDIC*, 992 F.2d 545 (5th Cir. 1993) (facing the National Environmental Policy Act's regulation that the FDIC provide an environmental impact statement prior to selling a tract of land).

5. See *infra* notes 61-64 and accompanying text for a discussion of the policies behind the FDIC's receivership function.

6. Benjamin F. Parks, *Two 10,000 Pound Gorillas That Don't Always Know Their Own Strength—But You Shouldn't!*, C867 A.L.I.-A.B.A. 791, 801 (1993).

7. See *Sierra Club*, 992 F.2d at 547 (attempting to enjoin the FDIC from selling an "[e]nvironmentally sensitive tract of land"); *Cummings Properties Management, Inc. v. FDIC*, 786 F. Supp. 144 (D. Mass. 1992) (regarding a property owner attempting to enjoin the FDIC from removing a fixture from the property).

8. 12 U.S.C. § 1821(j). See *infra* text accompanying note 59 for language of § 1821(j). See also *infra* notes 58-67 and accompanying text (explaining § 1821(j)).

9. 12 U.S.C. § 1821(j). See *infra* note 59 for an explanation of the FDIC's conservator and receivership functions.

10. See *infra* notes 79-97 and accompanying text for a discussion of Third and Fifth Circuit decisions.

11. 995 F.2d 238 (D.C. Cir.), *reh'g granted*, 5 F.3d 567 (D.C. Cir. 1993), *aff'd on reh'g*, 21 F.3d 469 (D.C. Cir.), (*per curiam*), *cert. denied*, 115 S. Ct. 683 (1994).

12. *National Trust*, 995 F.2d at 239-40. See *infra* notes 98-127 and accompanying text for a discussion of the court's interpretation of § 1821(j) in *National Trust*.

This Note examines the two approaches that courts have taken in the § 1821(j) debate: the “restrained immunity” approach of the Third and Fifth Circuits,<sup>13</sup> and the “complete immunity” approach of the District of Columbia Circuit.<sup>14</sup> Additionally, it concludes that the complete immunity view of the District of Columbia Circuit, while the more reasonable statutory interpretation, nevertheless results in an unfavorable outcome for injured plaintiffs and thus warrants a statutory modification. Part II inspects the history behind limited judicial review by examining Supreme Court rulings, the legislative history of § 1821(j), and cases representing disagreements among the circuits in their interpretations of § 1821(j). Part III analyzes the respective approaches, finding the complete immunity approach to be a more plausible reading of the statute despite its granting of untouchable status to the FDIC, and thus concludes that an amendment to § 1821(j) is appropriate. Part IV proposes amending FIRREA so that courts will apply jurisdiction to cases in which the FDIC violates federal law and no other remedy is available.

## II. THE HISTORY OF LIMITING JUDICIAL REVIEW

### A. *Supreme Court Rulings*

The United States Supreme Court has issued several rulings finding a presumption against limiting judicial review. In *South Carolina v. Regan*,<sup>15</sup> the State of South Carolina petitioned the Supreme Court, seeking an injunction against the Secretary of the Treasury of the United States.<sup>16</sup> The State argued that the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA)<sup>17</sup> violated its Tenth Amendment rights, as well as the doctrine of intergovernmental tax immunity.<sup>18</sup> South Carolina claimed that TEFRA section 310(b)(1) limited the instances in which

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13. See *infra* notes 79-97 and accompanying text.

14. See *infra* notes 98-127 and accompanying text.

15. 465 U.S. 367 (1984).

16. *Id.* at 370. South Carolina invoked the Court’s original jurisdiction. *Id.* at 370 n.1 (citing U.S. CONST. art. III, § 2; 28 U.S.C. § 1251(b) (1994)).

17. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 596 (codified as amended at 26 U.S.C. §§ 103, 103(a), 7421(a) (1994)).

18. *Regan*, 465 U.S. at 370.

bond holders' interest income would be tax exempt.<sup>19</sup> Accordingly, the State argued, the statute would restrict its freedom to issue bonds and infringe upon its borrowing power which it contended was "essential to the maintenance of its separate and independent existence."<sup>20</sup> Treasury Secretary Donald Regan maintained that the Anti-Injunction Act,<sup>21</sup> which prohibits suits purporting to restrain the collection of taxes, barred the action.<sup>22</sup>

The Supreme Court concluded that the Anti-Injunction Act did not apply to "aggrieved parties for whom [Congress] has not provided an alternative remedy."<sup>23</sup> Specifically, the Court concluded that without the Anti-Injunctive Act, the State had no other means available to

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19. *Id.* at 371. The court concluded that IRS code § 103(a) "exempts from a taxpayer's gross income the interest earned on the obligations of any [s]tate." *Id.* at 370. See 26 U.S.C. § 103(a) ("[G]ross income does not include interest on any State or local bond."). TEFRA section 310(b)(1) altered § 103(a) of the IRS code "to restrict the types of bonds that qualify for the tax exemption granted by that section." *Id.* at 371. In order to receive the interest tax exemption, the amendment required that publicly-issued bonds be issued in "bearer" form, rather than "registered" form. *Id.* Thus, by broadly defining registration-required bonds, TEFRA section 310(b)(1) effectively eliminated the interest tax exemption for many publicly-issued bond holders. *Id.*

20. *Id.* at 372. The State, maintaining that its ability to raise revenues by borrowing funds through bonds would be frustrated by section 310(b)(1), argued: "[T]he imposition of a tax on bearer bonds would require a State to pay its bondholders a higher rate of interest on such bonds," thereby creating a practical effect of denying a state its "freedom to issue obligations in the form that it chooses." *Id.* at 371, 372.

21. 26 U.S.C. § 7421(a) (providing that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed").

22. *Regan*, 465 U.S. at 372. The defendant further argued that declaratory relief was inappropriate because the Declaratory Judgement Act, 28 U.S.C. § 2201 (1994), which authorizes courts to issue declaratory judgements, contains an exception for suits concerning federal taxes. *Id.* at 370 n.2.

23. *Id.* at 378. The Secretary of the Treasury argued that under the test of *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962), the plaintiff may sue under the Anti-Injunction Act if: (1) the plaintiff established that he was certain to succeed on the merits; and (2) the collection of the tax would cause irreparable harm. *Id.* at 374. The plaintiff in *Williams Packing*, however, did not meet this narrow exception because the plaintiff had an alternative remedy available. *Williams Packing*, 370 U.S. at 6-7. Because the plaintiff in that case could file a suit for a refund, the Anti-Injunction Act prohibited the plaintiff from seeking an injunction against the IRS. *Id.* at 2, 6. In *South Carolina*, however, the Supreme Court distinguished *Williams Packing* because the State did not have an alternative remedy available to challenge the tax. *Regan*, 465 U.S. at 372-73.

challenge the tax.<sup>24</sup> Because the State lacked standing, it was unable to contest the statute's constitutionality.<sup>25</sup> The Court further inferred that Congress did not intend the Anti-Injunction Act to require the plaintiff to urge a third-party to come forward in order to challenge the statute's legality.<sup>26</sup>

Similarly, in *Traynor v. Turnage*,<sup>27</sup> the Supreme Court acknowledged a "strong presumption that Congress intends judicial review of administrative action."<sup>28</sup> The petitioners in *Traynor* were honorably discharged veterans who had not yet exhausted their "GI Bill"<sup>29</sup> educational benefits when the statutorily-allotted time to do so expired.<sup>30</sup> The petitioners sought an extension of the time period for use of the benefits, claiming that they had been disabled by alcoholism for much of that time.<sup>31</sup> The issue presented in *Traynor* was whether the federal court had jurisdiction to hear this claim because 38 U.S.C. § 211(a) prohibited "judicial review of 'the decisions of the Administra-

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24. *Regan*, 465 U.S. at 373.

25. *Id.* at 378-80. If the State issues the bonds, the tax liability for the interest on the bonds shifts from the State to the bondholders. *Id.* at 379.

26. *Id.* at 380-81. The court rejected the Secretary of the Treasury's argument that the State could persuade one of its bondholders to bring a suit challenging section 310(b)'s legality. *Id.* Rather, the court concluded Congress intended the Act to apply when the aggrieved party could not "litigate its claims on *its own behalf*." *Id.* at 381 (emphasis added).

27. 485 U.S. 535 (1988).

28. *Id.* at 542 (quoting *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986)). See also *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975) (requiring the Secretary of Labor to overcome the presumption that Congress did not intend judicial review); *Barlow v. Collins*, 397 U.S. 159, 166-67 (1970) (determining that judicial review of administrative actions is the rule unless Congress intended otherwise).

29. See *Veterans' Readjustment Benefit Act of 1966*, 38 U.S.C. § 1661 (1988).

30. *Traynor*, 485 U.S. at 538 (citing 38 U.S.C. § 1662(a)(1), requiring veterans to use their educational assistance benefits within ten years following their discharge or release from active duty).

Petitioners *Traynor* and *McKelvey* brought separate suits in the Second Circuit and the District of Columbia Circuit, respectively, which the Supreme Court considered together in order to resolve a circuit split between the courts of appeals. *Id.* at 539-41.

31. *Id.* at 538. Section 1662 permitted veterans to extend the ten-year period if they were "prevented from using their benefits earlier by 'a physical or mental disability which was not the result of [their] own willful misconduct.'" *Traynor*, 485 U.S. at 538 (quoting 38 U.S.C. § 1662(a)(1)). However, the Veterans' Administration (VA) denied their request because it considered alcoholism "willful misconduct" under its regulations. *Id.* (citing 38 C.F.R. § 3.301(c)(2) (1987)).

tor on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans."<sup>32</sup>

The Supreme Court granted certiorari to resolve the circuit split on the issue of judicial review of Veterans' Administration decisions.<sup>33</sup> In holding that § 211(a) did not bar judicial review, the Court noted that the VA could rebut the presumption in favor of judicial review if it showed, by "clear and convincing evidence," that Congress specifically intended to prevent judicial review.<sup>34</sup> The Court further stipulated that the preclusion of judicial review demanded specific language, legislative history, or congressional intent that were "fairly discernible in the detail

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32. *Traynor*, 485 U.S. at 539 (quoting 38 U.S.C. § 211(a) (1982)). Section 211 provides:

[T]he decision of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

38 U.S.C. § 211(a) (1982), amended and revised by 38 U.S.C. § 211(a)(1) (1988), repealed by Act of August 6, 1991, Pub. L. No. 102-83, § 2(a), 105 Stat. 378.

Traynor sought judicial review of the VA's denial of administrative relief in the United States District Court for the Southern District of New York. *Traynor*, 485 U.S. at 539. The district court granted Traynor's claim because the complaint "require[d] [the court] to examine constitutional and statutory questions and not merely issues of VA policy." *Id.* at 539 (citing *Traynor v. Walters*, 606 F. Supp. 391, 396 (S.D.N.Y. 1985)). Traynor argued that the VA violated his due process and equal protection rights when it refused to extend the delimiting period. *Id.*

Although the district court rejected Traynor's constitutional claims, it did conclude that the Rehabilitation Act of 1973, 29 U.S.C. § 794, defined alcoholism as a handicap and that therefore the VA had discriminated against the veterans on the basis of their handicap by not extending the delimiting period. *Id.*

The Second Circuit reversed the district court holding that "§ 211(a) barred judicial review of the Rehabilitation Act claim." *Id.* at 539-40 (citing *Traynor v. Walters*, 791 F.2d 226, 231 (2d Cir. 1986)). The Second Circuit reasoned that Congress did not intend for the statute to give handicapped veterans any more right to judicial review than other veterans. *Id.* at 540 (citing *Walters*, 791 F.2d at 229).

In *McKelvey's* case, by contrast, the Court of Appeals for the District of Columbia Circuit determined that it indeed had jurisdiction to hear the case and concluded that § 211(a) did not bar the claim. *Id.* at 540, 541. The District of Columbia Circuit, however, reversed the case on the merits, and ruled that the VA was reasonable in concluding that "alcoholism is a 'willfully caused handicap.'" *Id.* at 541 (citing *McKelvey v. Turnage*, 792 F.2d 194, 200-01 (D.C. Cir. 1986)).

33. *Traynor*, 485 U.S. at 541.

34. *Id.* at 542 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967)).

of the legislative scheme.”<sup>35</sup> Finding no clear intent on the part of Congress to preclude judicial review in this instance, the Court granted jurisdiction and further concluded that doing so would not undermine the purposes of § 211(a).<sup>36</sup>

In an earlier case, the Supreme Court held that depriving injured parties of their only available remedy violates the Due Process Clause of the Fifth Amendment.<sup>37</sup> In *Bob Jones University v. Simon*,<sup>38</sup> the Internal Revenue Service (IRS) revoked a private University’s tax-exempt status<sup>39</sup> on the grounds that the University refused to admit African-Americans.<sup>40</sup> Fearing a crippling effect upon its fundraising capabili-

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35. *Id.* at 542 (quoting *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 673 (1986); *Block v. Community Nutrition Inst.*, 467 U.S. 340, 351 (1984)).

36. *Id.* at 543-44. The Court cited the purposes of § 211(a) as insuring that veteran claims do not burden the courts, and insuring that the VA will adequately and uniformly apply its complex policies. *Id.* at 543.

37. *See* *Bob Jones Univ. v. Simon*, 416 U.S. 725 (1974). *See also* U.S. CONST. amend. V (“[N]or shall any person . . . be deprived of life, liberty, or property, without due process. . .”).

38. 416 U.S. 725 (1974).

39. *Id.* at 735. The IRS revoked the university’s “ruling letter” in 1970, announcing that “it would no longer allow § 501(c)(3) status for private schools maintaining racially discriminatory admissions policies.” *Id.* In order to obtain tax-exempt status, an organization must comply with 26 U.S.C. § 501(c)(3) (1994). The provision defines potential tax-exempt organizations as:

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for . . . educational purposes, . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities . . . [attempt] to influence legislation, . . . and . . . does not participate in, . . . any political campaign . . . .

26 U.S.C. § 501(c)(3).

In addition to meeting the statutory requirements of § 501, the organization must also obtain a ruling letter from the IRS, which certifies the organization’s compliance with § 501(c)(3) and insures a place on the “Cumulative List.” *Bob Jones Univ.*, 416 U.S. at 728-29. The Cumulative List, which is published by the IRS, is an official list of tax-exempt organizations. *Id.* at 729. Contributions made to an organization on the Cumulative List may qualify as a deduction on the donor’s tax return. *Id.* A university stakes its financial livelihood upon its inclusion on the list in light of the fact that “[m]any contributors simply will not make donations to an organization that does not appear on the Cumulative List.” *Id.* at 730.

40. *Id.* at 735. As a fundamentalist Christian university, Bob Jones purportedly based its policy of denying admission to African-Americans on its “adherence to certain religious precepts.” *Id.* These beliefs included the belief “that God intended segregation of the races and that the Scriptures forbid interracial marriage.” *Id.* In order to maintain these beliefs the university excluded all Negroes. *Id.*

ties, the University sought to protect its tax-exempt status by enjoining the IRS action.<sup>41</sup> The Supreme Court concluded that the Anti-Injunction Act prohibited injunctive relief without violating the University's due process rights.<sup>42</sup> Contending that the University had alternative remedies available to it,<sup>43</sup> the Court reasoned "[t]his is not a case in which an aggrieved party has no access at all to judicial review. Were that true, our conclusion might well be different."<sup>44</sup> Thus, by implication, the Court gave great weight to the existence of alternate remedies in considering the preclusion of judicial review, even if such alternatives would be grossly impractical.

The Supreme Court favors judicial review in several situations, including: (1) when Congress has not expressly prohibited review in a statute; (2) when review does not interfere with the statute's purpose; and (3) when plaintiffs have no alternative forms of relief.<sup>45</sup> However, Congress periodically provides federal agencies with immunity.<sup>46</sup> In

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41. *Id.* at 735. Rejecting the IRS' argument that the court lacked jurisdiction to hear the claim, the South Carolina District Court enjoined the IRS. *Id.* at 736 (declining to apply the Anti-Injunction Act, 26 U.S.C. § 7421(a) (1994), which forbids a court from interfering in the collection of taxes). See also *Bob Jones Univ. v. Connally*, 341 F. Supp. 277, 284 (D.S.C. 1971) (concluding that the IRS did not revoke the university's tax-exempt status in order to assess and collect taxes, rather it did so to compel the university to comply with certain political or social guidelines concerning racial integration).

On appeal, the Fourth Circuit determined that the Anti-Injunction Act barred the lawsuit. *Bob Jones Univ.*, 416 U.S. at 736 (citing *Bob Jones Univ. v. Connally*, 472 F.2d 903 (4th Cir.), *reh'g denied*, 476 F.2d 259 (4th Cir. 1973)).

42. *Id.* at 746. The Court, following the *Williams Packing* test, found that petitioner's constitutional claims were debatable, so as to fail the "certainty of success" prong of the test. *Id.* at 737 (citing *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 6-7 (1962)). To avoid the Anti-Injunction Act under the *Williams Packing* test, a party must show both irreparable injury and certainty of success on the merits. *Id.* The Court noted further that the petitioner could not maintain that "under no circumstances could the Government ultimately prevail." *Id.* (quoting *Williams Packing*, 370 U.S. at 7). See *supra* note 23 for a discussion of *Williams Packing*.

43. *Bob Jones Univ.*, 416 U.S. 746-47. Although the university may suffer litigation costs and delay, the other possible remedies include petitioning the Tax Court to review the assessment of expecting income taxes, or paying the taxes and then filing for a refund under the IRS' refund procedures. *Id.* The Court further expounded, that although such a result puts a tax-exempt organization in "a precarious financial position, the problems presented do not rise to the level of constitutional infirmities." *Id.* at 747.

44. *Id.* at 746.

45. See *supra* notes 15-44 and accompanying text.

46. See *infra* notes 98-127 and accompanying text.

such instances, the legislative history behind a provision forbidding judicial review is often replete with unique facts explaining why the agency needs protection from the courts.

### B. Section 1821(j): Statutory Background

Throughout most of its existence, the savings and loan (S&L), or "thrift" industry in the United States committed itself largely to home mortgage lending.<sup>47</sup> Because rising interest rates in the 1970s and early 1980s threatened the entire industry,<sup>48</sup> Congress and the Reagan Administration proposed to expand the S&L's powers and deregulate the industry.<sup>49</sup> The lack of government supervision and ensuing high-risk investments<sup>50</sup> caused the greed-driven and fraud-infested lending system to spiral out of control.<sup>51</sup> In order to save the industry, Congress and the Bush Administration passed the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) of 1989.<sup>52</sup>

Congress enacted FIRREA "to restore the strength of the thrift industry."<sup>53</sup> The Act proposed to increase federal supervision and enforcement power, expedite the liquidation and resolution process of insolvent thrifts, regulate the insurance deposits, and create a stable rate of insurance premiums.<sup>54</sup> To achieve these goals, FIRREA granted the

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47. H.R. REP. NO. 54(1), 101st Cong., 1st Sess. 291 (1989), *reprinted in* 1989 U.S.C.C.A.N. 86, 87.

48. *Id.* During the 1970s and early 1980s, the S&L industry issued low-yielding, long-term, fixed-rate mortgages, which caused it to suffer insurmountable operating losses when interest rates rose. *Id.* As a result, the S&Ls received low interest rates on mortgage loans and paid high interest rates on deposits. Parks, *supra* note 6, at 793.

49. H.R. REP. NO. 54(1), *supra* note 47, at 291, *reprinted in* 1989 U.S.C.C.A.N. at 87. In order to aid the banking industry, the Reagan Administration expanded the S&L's "permissible thrift investment powers" and provided assistance in helping the industry compete for funds. *Id.* See also Parks, *supra* note 6, at 794 (recognizing the need to take corrective action in order to save the S&L industry).

50. Parks, *supra* note 6, at 793 (commenting on the proliferation of investment in risky junk bonds as a specific cause of the S&L industry's problems).

51. *Id.*

52. 12 U.S.C. § 1811 (1994). See also Parks, *supra* note 6, at 793-95 (discussing the history behind FIRREA).

53. H.R. REP. NO. 54(1), *supra* note 47, at 291, *reprinted in* 1989 U.S.C.C.A.N. at 87.

54. Parks, *supra* note 6, at 794 (highlighting the powers gained by the FDIC).

FDIC more power<sup>55</sup> and created new entities to assist it.<sup>56</sup> Congress intended the FDIC to liquidate and resolve failed institutions in a speedy and effective manner, and it demonstrated this intent in § 1821(j), which allows the FDIC “to act quickly in these volatile situations . . . and swiftly to bring stability to the [failed] institution.”<sup>57</sup>

Section 1821(j) provides the FDIC with the power to expedite litigation.<sup>58</sup> Section 1821(j) states: “Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the [FDIC] as a conservator or a receiver.”<sup>59</sup> Conceived to shield the FDIC from court interference when carrying out its statutory duties, Congress designed § 1821(j) “to ensure that the FDIC could ‘act in a quick and decisive manner in reorganizing, operating, or dissolving failed’ financial institutions.”<sup>60</sup>

When the FDIC is appointed receiver, it must make crucial decisions concerning the failed financial institution’s assets and liabilities in a short period of time.<sup>61</sup> In order for the FDIC to respond to changing markets, to collect outstanding loans, and to maintain the value of the institution’s portfolio, the FDIC must act quickly during this arguably unstable

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55. The bill abolished the Federal Savings and Loan Insurance Corporation (FSLIC) and delegated its duties to several new entities and to the FDIC. H.R. REP. NO. 54(1), *supra* note 47, at 291, *reprinted in* 1989 U.S.C.C.A.N. at 87. *See also* Parks, *supra* note 6, at 795 (discussing the grant of power to the FDIC to enabling it to revoke deposit insurance, and the expansion of its enforcement powers, allowing it to act quickly in cases of default or mismanagement).

56. H.R. REP. NO. 54(1), *supra* note 47, at 291, *reprinted in* 1989 U.S.C.C.A.N. at 87. FIRREA created the Office of Thrift Supervision (OTS), the Federal Housing Finance Board (FHFB), and the Resolution Trust Corporation (RTC). *Id.* Like the FDIC, Congress granted the RTC both the power to “resolve” insolvent thrifts, and protection under § 1821(j) when acting as a conservator or receiver of a failed institution. *See* Parks, *supra* note 6, at 795.

57. *Sierra Club, Lone Star Chapter v. FDIC*, 992 F.2d 545, 550 (5th Cir. 1993).

58. 12 U.S.C. § 1821(j) (1994).

59. *Id.* “Conservator” and “receivership” functions refer to the FDIC’s role in taking over and liquidating the assets of failed financial institutions. BLACK’S LAW DICTIONARY 306, 1269 (6th ed. 1990).

60. *Sierra Club*, 992 F.2d at 550 (quoting 281-300 Joint Venture v. Onion, 938 F.2d 35, 39 (5th Cir. 1991)).

61. *Id.* In addition, the FDIC must make crucial decisions regarding properties and accounts which may involve an enormous amount of money. *Id.*

period.<sup>62</sup> Thus, it was the urgency the FDIC faces as a receiver which prompted Congress to protect the FDIC from court actions.<sup>63</sup> Giving the courts jurisdiction over claims against the FDIC and the power to grant an injunction may inhibit the FDIC from serving as an effective conservator or receiver and may impede the FDIC from responding in the first instance.<sup>64</sup>

According to the legislative history behind FIRREA, Congress based § 1821(j) on an analogous protective provision contained in § 1464(d)(2)(D) of the Home Owners' Loan Act (HOLA).<sup>65</sup> HOLA similarly provided that courts could not restrain or affect the Federal Savings and Loan Insurance Corporation's (FSLIC) exercise of its receivership functions.<sup>66</sup> Following this provision, Congress asserted that § 1821(j) should bar courts from restricting the FDIC in the exercise of its power as a conservator or receiver.<sup>67</sup>

The Supreme Court had recently interpreted the scope of HOLA's § 1464(d)(6)(C), currently codified as § 1464(d)(2)(D), at the time Congress incorporated a form of that provision into FIRREA.<sup>68</sup> In *Coit Independence Joint Venture v. FSLIC*,<sup>69</sup> the petitioner sued a savings and loan institution over disagreements regarding loans it had procured.<sup>70</sup> Two months after Coit filed suit, the S&L became insolvent,

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62. *Id.*

63. *Id.*

64. *Id.*

65. 12 U.S.C. § 1464(d)(2)(D) (1994), originally codified as 12 U.S.C. § 1464(d)(6)(C) (1988). See H.R. REP. NO. 54(I), *supra* note 47, at 334, reprinted in 1989 U.S.C.C.A.N. at 130 (explaining that courts shall be similarly barred under FIRREA as they were under HOLA from "restraining or affecting" the agency's powers as conservator or receiver). See also Parks, *supra* note 6, at 801 (noting that § 1821(j) was based on § 1464(d)(6)(C)).

66. 12 U.S.C. § 1464(d)(2)(D) (1994). Section 1464(d)(2)(D) provides: "[e]xcept as otherwise provided . . . no court may take any action for or toward the removal of any conservator or receiver . . . to restrain or affect the exercise of powers or functions of a conservator or receiver." See *supra* text accompanying note 59 for the language of § 1821(j).

67. H.R. REP. NO. 54(I), *supra* note 47, at 334, reprinted in 1989 U.S.C.C.A.N. at 130.

68. *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561 (1989). The Court decided *Coit* three months before Congress passed FIRREA. National Trust's Petition for Certiorari at 19, *National Trust for Historic Preservation v. FDIC*, 21 F.3d 469 (D.C. Cir.) (No. 94-317), cert. denied, 115 S. Ct. 683 (1994).

69. 489 U.S. 561 (1989).

70. *Id.* at 565. Coit alleged that the S&L violated Texas usury laws. *Id.*

and the FSLIC, as appointed receiver, “[s]ubstitut[ed] itself” for the defendant S&L in Coit’s suit.<sup>71</sup> The FSLIC maintained that it had exclusive jurisdiction over claims against an insolvent S&L.<sup>72</sup> The Supreme Court, however, held that the power to adjudicate a creditor’s claim was beyond the scope of the FSLIC’s statutory receivership powers because § 1464(d)(6)(C) simply provided that, “no court may take any action . . . [to] restrain or affect the exercise of powers or functions of a . . . receiver.”<sup>73</sup> The Court distinguished between the claims against the insolvent institution itself and those directly against the FSLIC in its receiver capacity.<sup>74</sup> Having added that § 1464(d)(6)(C) did not divest the courts of jurisdiction to hear a creditor’s claim against an institution under FSLIC receivership, the Court concluded that such claims unresolved by the FSLIC’s administrative procedure would have access to the courts.<sup>75</sup> Thus, the Supreme Court’s interpretation of § 1464(d)(6)(C), the provision upon which Congress based § 1821(j),<sup>76</sup>

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71. *Id.*

72. *Id.* at 565-66.

The district court dismissed the suit for lack of subject matter jurisdiction, concluding that, “suits by creditors against the FSLIC as receiver must be presented first to the FSLIC, then appealed to the [Federal Home Loan Bank Board], and only then appealed to the federal courts under the Administrative Procedure Act.” *Coit Independence Joint Venture v. FirstSouth*, 829 F.2d 563, 564 (5th Cir. 1987).

The district court and the court of appeals both relied on *North Mississippi Savings & Loan Ass’n v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986). *Hudspeth* concluded that Congress intended § 1464(d)(6)(C) to prevent judicial and regulatory authorities from interfering with the FSLIC’s functions. *Id.* at 1101. *Hudspeth* unsuccessfully argued that a claim against a debtor is not a receivership function and therefore a court may adjudicate the claim. *Id.* at 1102.

Following *Hudspeth*, several courts have dismissed claims on jurisdictional grounds. *See, e.g., Red Fox Indus. v. FSLIC*, 832 F.2d 340 (5th Cir. 1987) (transferring borrower’s claim from federal court to FSLIC); *Resna Assoc., Ltd. v. Financial Equity Mortgage Corp.*, 673 F. Supp. 1371 (D.N.J. 1987) (concluding that Congress denied courts jurisdiction over claims against S&Ls by enacting § 1464(d)(6)(C)).

73. *Coit*, 489 U.S. at 574 (emphasis omitted) (quoting § 1464(d)(6)(C)).

74. *Id.* at 574-77. The Supreme Court rejected *Hudspeth* because it assumed that the adjudication of a creditor’s claim against the FSLIC would restrain or affect the FSLIC in its exercise of its power to function as a receiver. *Id.*

75. *Id.* at 575, 577. *See also* National Trust’s Petition for Certiorari at 19, *National Trust for Historic Preservation v. FDIC*, 21 F.3d 469 (D.C. Cir.) (No. 94-317), *cert. denied*, 115 S. Ct. 683 (1994).

76. *Parks, supra* note 6, at 801.

gives the FSLIC and other entities<sup>77</sup> broad protection from court interference when the entity acts as a receiver.<sup>78</sup>

C. *Limited View of § 1821(j)*

The Fifth and the Third Circuits have interpreted § 1821(j) to provide the FDIC with only restrained immunity from judicial interference.<sup>79</sup> In *Sierra Club, Lone Star Chapter v. FDIC*,<sup>80</sup> the Fifth Circuit held that § 1821(j) did not deny the district court equity jurisdiction to enjoin the FDIC when it violated the National Environmental Policy Act (NEPA).<sup>81</sup> The Sierra Club argued that NEPA required the FDIC, as a federal agency, to consider the environmental impact of its actions — here, the approval of the sale of a tract of land containing wetlands.<sup>82</sup> When the FDIC failed to comply with NEPA, the Sierra Club sued to enjoin the agency's approval of the sale.<sup>83</sup> The district court issued a preliminary injunction, and the FDIC appealed to the Fifth Circuit.<sup>84</sup>

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77. See *supra* notes 55-56 and accompanying text (discussing the abolition of the FSLIC and the delegation of its powers to the FDIC, RTC and other bodies).

78. Parks, *supra* note 6, at 801.

79. See *infra* notes 80-97 and accompanying text.

80. 992 F.2d 545 (5th Cir. 1993). The FDIC, upon acquiring certain assets of a failed bank, approved the sale of a tract of environmentally-sensitive wetlands to Heights Bank. *Id.* at 547. The acquisition agreement provided that if the FDIC could approve the sale in advance, it would insure any capital loss the Heights Bank might suffer on resale of the land. *Id.* at 547-48. After the FDIC approved the sale of the wetlands to a prospective buyer, plaintiffs sued to enjoin the sale, alleging the FDIC failed to follow the National Environmental Policy Act (NEPA). *Id.* at 548. See *infra* note 81 for discussion of NEPA.

81. *Id.* at 552. See also National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (1988). NEPA requires federal agencies to prepare an Environmental Impact Statement (EIS) prior to engaging in certain actions which might adversely affect the environment. 42 U.S.C. § 4332(2).

When Congress passed NEPA, it was the "environmental protection counterpart" of the National Historic Preservation Act of 1966. National Trust's Petition for Certiorari at 10, *National Trust* (No. 94-317). Section 47 of the National Historic Preservation Act provides: "[t]he head of any Federal agency . . . shall, prior to the approval of the expenditure of any Federal funds on [an] undertaking . . . take into account the effect of the undertaking on any . . . building . . . that is included in . . . the National Register." 16 U.S.C. § 470f (1994).

82. *Sierra Club*, 992 F.2d at 548.

83. *Id.* The Sierra Club's utmost objective was to prevent the sale of the wetlands to this particular buyer so that a more environmentally conscious buyer, such as the Texas Nature Conservancy, might have an opportunity to acquire the property. *Id.*

84. *Id.*

The court of appeals rejected the FDIC's argument that § 1821(j) barred the district court from exercising equity jurisdiction in these matters.<sup>85</sup> Rather, the court focused on a series of United States Supreme Court rulings which ensured equitable jurisdiction to the federal courts unless Congress, by statute, "clearly and unambiguously" had limited the courts' equitable powers.<sup>86</sup> The Fifth Circuit determined that Congress had not clearly and unambiguously indicated an intent that § 1821(j) should insulate the FDIC from federal courts' equity jurisdiction.<sup>87</sup> The court concluded that because the FDIC was acting in its corporate capacity when it approved the sale of the wetlands, the intended policy reasons for protecting it from court action in its receivership capacity — ensuring the FDIC had the opportunity to act quickly in dissolving failed thrift institutions—did not exist.<sup>88</sup>

The Third Circuit, in *Rosa v. Resolution Trust Corp.*,<sup>89</sup> reached a similar conclusion, holding that § 1821(j) did not operate to bar federal court jurisdiction and deprive plaintiffs of a remedy as long as the court's action did not "restrain or affect" the Resolution Trust Corporation's (RTC)<sup>90</sup> exercise of power as conservator or receiver.<sup>91</sup> In *Rosa*, when

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85. *Id.*

86. *Id.* (citing *inter alia*, *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542 (1987) (holding that full scope of equity jurisdiction is to be recognized unless a statute restricts jurisdiction "in so many words, or by a necessary and inescapable inference.")).

87. *Id.* at 549-50. The Court noted that because the FDIC was acting in its corporate capacity when it approved the land sale, it was not within the protected and statutorily-mandated receiver or conservator capacity. *Id.* at 550-51. The FDIC argued that § 1823(d)(3)(A), pertaining to the FDIC's corporate functions, implied the same immunity from the court's equity jurisdiction by the language: "the Corporation shall have all the rights, powers, privileges, and authorities of the Corporation as receiver under sections 1821 and 1825(b) of this title." *Id.* at 549. Thus, the FDIC argued that § 1823(d)(3)(A) provided it with the same protection in its corporate capacity that it enjoyed under § 1821(j) as a receiver. *Id.* at 548-49. The court, however, ruled that § 1823(d)(3)(A)'s broad referral to § 1821 did not constitute a clear and unambiguous mandate to shield the FDIC from federal equity jurisdiction. *Id.* at 549-51.

88. *Id.* at 550 (stating that "Congress enacted section 1821(j) to ensure that the FDIC could 'act in a quick and decisive manner in reorganizing, operating, or dissolving failed' financial institutions") (quoting 218-300 Joint Venture v. Onion, 938 F.2d 35, 39 (5th Cir. 1991)), *cert. denied*, 502 U.S. 1057 (1992).

89. 938 F.2d 383 (3d Cir.), *cert. denied*, 502 U.S. 981 (1991).

90. Because FIRREA § 1821's administrative claims procedures apply to both the RTC and FDIC, cases citing one can be considered precedent for the other as well. See National Trust's Petition for Certiorari at 11 n.10, National Trust for Historic Preservation v. FDIC, 21 F.3d 469 (D.C. Cir.) (No. 94-317), *cert. denied*, 115 S. Ct. 683 (1994). See

the RTC terminated a retirement benefit plan in violation of the Employee Retirement Income Security Act of 1974 (ERISA),<sup>92</sup> the plan beneficiaries sought an injunction to restrain the termination.<sup>93</sup> The district court granted a preliminary injunction,<sup>94</sup> and the RTC appealed, arguing that the district court lacked subject matter jurisdiction over those claims against it in its receiver and conservator capacities.<sup>95</sup> The Third Circuit held that while § 1821(j) did not protect the RTC from judicial interference with acts done in its corporate capacity, the section did protect the RTC in its receiver and conservator roles.<sup>96</sup> More importantly, however, the court explained that § 1821(j) might not protect the RTC from injunctive relief, even when acting in its receiver or conservator capacities, if no other relief is available to a plaintiff.<sup>97</sup>

Thus, the Fifth and Third Circuits found that § 1821(j) did not restrict federal jurisdiction if Congress failed to clearly and unambiguously limit equitable jurisdiction or if the plaintiff had no alternative remedy available.

#### D. *The Complete Immunity View*

Recently, the United States Court of Appeals for the District of Columbia Circuit sided with those courts that have denied jurisdiction in

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*also supra* note 56 and accompanying text (discussing creation of the RTC).

91. *Rosa*, 938 F.2d at 397-400.

92. 29 U.S.C. §§ 1001-1461 (1988 & Supp. V 1993).

93. *Rosa*, 938 F.2d at 389-90.

94. *Id.* at 390 (citing *Rosa v. Resolution Trust Corp.*, 752 F. Supp. 1231, 1240 (D.N.J. 1990)).

95. *Id.* at 390, 391.

96. *Id.* at 399. Although the RTC conceded that it was not immune to judicial interference when claims directed at it in its corporate capacity were at issue, it successfully argued that the plaintiffs had not met their burden of proving irreparable harm as required for the injunction. *Id.* at 399-401.

97. *Rosa*, 938 F.2d at 400 (citing *South Carolina v. Regan*, 465 U.S. 367, 378 (1984) (permitting an injunction to issue under the Anti-Injunction Act if Congress has not provided the plaintiff with an alternative remedy); *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962) (permitting an injunction to issue if the United States cannot establish its claim).

In *Rosa*, the court noted that plaintiffs indeed had an alternative remedy. Thus, allowing § 1821(j) to bar injunctive relief was appropriate. *Id.* at 399-400.

cases in which the FDIC acted as a receiver.<sup>98</sup> In *National Trust for Historic Preservation v. FDIC*,<sup>99</sup> the District of Columbia Circuit ruled that § 1821(j) denied the court jurisdiction and indeed protected the FDIC from an injunction,<sup>100</sup> despite the FDIC's violation of a federal statute and the claimant's lack of alternate remedies.<sup>101</sup> The FDIC acquired the Dr. Pepper Headquarters Building<sup>102</sup> in Dallas while in the process of liquidating the assets of an insolvent bank and agreed to sell the building to DalMac Investment Corporation (DalMac).<sup>103</sup> After the parties signed the contract, the Dallas Landmark Commission notified the public that the building was eligible for placement on the National Register of Historic Places. Despite this turn of events, the FDIC authorized DalMac to obtain a permit for the building's demolition.<sup>104</sup> Two weeks later the Texas Historical Commission and the federal Advisory Council on Historic Preservation warned the FDIC that the demolition or sale of an historic building, absent compliance with certain sections of the National Historic Preservation Act (NHPA),<sup>105</sup> might

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98. See, e.g., *Telematics Int'l, Inc. v. NEMLC Leasing Corp.*, 967 F.2d 703, 704-06 (1st Cir. 1992) (holding that § 1821(j) evidenced Congress' intent that courts not enjoin the FDIC from foreclosing on a certificate of deposit in which a failed bank in receivership had a security interest); *Automated Business Sys. & Servs., Inc. v. FDIC*, No. 90-1513, 1990 U.S. App. LEXIS 23401, at \*1-\*2 (4th Cir. Aug. 27, 1990) (holding that § 1821(j) expressly prohibits restraining the liquidation of assets, thus refusing to enjoin FDIC "from impounding or freezing the cash flows generated . . . by the FDIC").

99. 21 F.3d 469 (D.C. Cir.), *cert. denied*, 115 S. Ct. 683 (1994).

100. *Id.* at 471.

101. *Id.* at 472-73 (Wald, J., concurring). Justice Wald expressed concern about the FDIC violating civil and criminal statutes, but concluded that a party aggrieved by unlawful conduct could seek administrative relief under § 1821(d) which includes the possibility of judicial review. *Id.* at 472.

102. The Dr. Pepper building was considered "one of the finest examples of Art Moderne architecture in Texas." *National Trust for Historic Preservation v. FDIC*, 995 F.2d 238, 241 (D.C. Cir. 1993) (Wald, J., dissenting).

103. *National Trust's Petition for Certiorari at 6 & n.4, National Trust for Historic Preservation v. FDIC*, 21 F.3d 469 (D.C. Cir.) (No. 94-317), *cert. denied*, 115 S. Ct. 683 (1994). The Dr. Pepper Building was subject to a lien in favor of the First Republic Bank of Dallas, which failed in 1991. *Id.*

104. *Id.* at 6. The FDIC had power of attorney which enabled it to authorize DalMac to apply to the City of Dallas for a demolition permit so that it could clear the land and build a strip shopping mall. *Id.* at 6.

105. 16 U.S.C. §§ 470f, 470h-2 (1994). The NHPA strives to ensure that the nation's "legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations." 16 U.S.C. § 470(b)(4). To this end,

lead to litigation.<sup>106</sup> Nevertheless, the FDIC refused to stop the sale.<sup>107</sup>

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NHPA requires federal agencies “to factor into their decision-making any adverse effect their ‘undertakings’ would have on such property.” *National Trust for Historic Preservation v. FDIC*, No. CIV.A.93-0904-HHG, 1993 WL 328134, at \*1 (D.D.C. May 7, 1993).

Section 470f of the NHPA provides:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.

16 U.S.C. § 470f.

NHPA 16 U.S.C. § 470h-2(a) provides:

(1) The heads of all Federal agencies shall assume responsibility for the preservation of historic properties which are owned or controlled by such agency . . .

(2) Each Federal agency shall establish . . . a preservation program for the identification, evaluation, and nomination to the National Register of Historic Places, and protection of historic properties. Such program shall ensure—

(A) that historic properties under the jurisdiction or control of the agency, are identified, evaluated, and nominated to the National Register;

(B) that such properties . . . as are listed in or may be eligible for the National Register are managed and maintained in a way that considers the preservation of their historic, archeological, architectural, and cultural values in compliance with section 470f of this title . . . ;

(C) that the preservation of properties not under the jurisdiction or control of the agency, but subject to be potentially affected by agency actions are given full consideration in planning . . . .

16 U.S.C. § 470h-2(a).

Furthermore, the NHPA requires that a federal agency provide the Advisory Council on Historic Preservation with the “opportunity to comment with regard to [any] undertaking.”

16 U.S.C. § 470f.

The Advisory Council on Historic Preservation defines undertaking as:

any project, activity, or program that can result in changes in the character or use of historic properties, if any such historic properties are located in the area of potential effects. The project, activity, or program must be under the direct or indirect jurisdiction of a Federal agency or licensed or assisted by a Federal agency. Undertakings include new and continuing projects, activities, or programs and any of their elements not previously considered under section 106.

36 C.F.R. § 800.2(o) (1994).

106. *National Trust’s Petition for Certiorari* at 6-7, *National Trust* (No. 94-317).

107. *Id.* at 7.

In May 1993, the National Trust for Historic Preservation in the United States (National Trust)<sup>108</sup> sued FDIC in the Federal District Court for the District of Columbia to enjoin it from selling the Dr. Pepper building and authorizing the building's destruction without considering its obligations under the NHPA.<sup>109</sup> The FDIC contended that it was not a federal agency when it acted in its liquidator-corporate capacity.<sup>110</sup> Moreover, the FDIC asserted that § 1821(j) prevented the court from restraining its exercise of its powers and functions as a conservator.<sup>111</sup> The district court granted National Trust a temporary restraining order to prevent the FDIC from selling or demolishing the building.<sup>112</sup> A week later, however, a different district court judge denied the plaintiff's motion for a preliminary injunction.<sup>113</sup> The court held that, although National Trust was likely to succeed on the merits of its claim regarding the FDIC's NHPA violation, § 1821(j) prevented the court from exercising jurisdiction and enjoining the sale.<sup>114</sup>

National Trust appealed this ruling to the District of Columbia Circuit.<sup>115</sup> The D.C. Circuit denied National Trust's motion for a stay pending appeal and affirmed the district court's holding that § 1821(j) barred court jurisdiction when the FDIC acted in its conservator or receiver capacity.<sup>116</sup> Moreover, the circuit court rejected National Trust's argument that § 1821(j) only applied to claims brought under the

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108. Additional plaintiff parties included the Historic Preservation League, Inc., and Preservation Texas, Inc. *Id.* at iv.

109. *National Trust*, No. CIV.A.93-0904-HHG, 1993 WL 328134, at \*1. All parties agreed that once title to the Dr. Pepper building passed to the private buyer, the buyer would have no duty to comply with the NHPA, and thus National Trust would have no recourse to prevent the building's destruction. *National Trust for Historic Preservation v. FDIC*, 995 F.2d 238, 239 (D.C. Cir. 1993).

110. *National Trust*, No. CIV.A.93-0904-HHG, 1993 WL 328134, at \*2.

111. *Id.* Defendant FDIC additionally argued that § 1821(d) prohibited courts from maintaining jurisdiction over "any claim 'relating to any act or omission' of the FDIC in its capacity as a receiver." *Id.* (quoting 12 U.S.C. § 1821(d)(13)(D)(ii) (1994)).

112. *Id.* at \*1.

113. *National Trust for Historic Preservation v. FDIC*, No. CIV.A.93-0904-HHG, 1993 WL 211773, at \*1 (D.D.C. May 14, 1993).

114. *Id.*

115. *National Trust for Historic Preservation v. FDIC*, 995 F.2d 238, 239 (D.C. Cir. 1993).

116. *Id.*

administrative claims procedure of § 1821(d),<sup>117</sup> noting that there was nothing in the text of section 1821(j) to suggest that it was limited to claims brought by creditors.<sup>118</sup> Shortly thereafter, National Trust petitioned for and received a rehearing.<sup>119</sup> On rehearing, the D.C. Circuit affirmed its original opinion that § 1821(j) barred jurisdiction.<sup>120</sup> The court rejected the Fifth Circuit's holding in *Sierra Club*, which reasoned that § 1823(d) did not clearly and unambiguously immunize the FDIC from the court's equity jurisdiction.<sup>121</sup>

The court determined that the FDIC had acquired the building in its corporate capacity under § 1823, and that such actions were protected from court interference by § 1823(d)(3)(A).<sup>122</sup> When the FDIC acquires property under § 1823, § 1823(d)(3)(A) grants the Corporation "all of the rights, powers, privileges, and authorities" contained in § 1821.<sup>123</sup> Thus, the court concluded that § 1821(j) protects the FDIC when it acts in its corporate role pursuant to § 1823, even though § 1821(j) only applies to the FDIC in its conservator or receiver capacities.<sup>124</sup>

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117. Section 1821(d) sets forth an administrative claims procedure for creditors to pursue monetary damages. 12 U.S.C. § 1821(d)(3)-(13) (1994).

118. *National Trust*, 995 F.2d at 239. Although the Supreme Court, in *South Carolina v. Regan*, found that the language of the Tax Anti-Injunction Act indicated that Congress intended courts to have jurisdiction in cases where aggrieved parties had no alternative remedy, the District of Columbia Circuit Court ruled that the unique context in that case did not apply to the FDIC. *Id.* at 239 n.1.

The circuit court further reasoned that the "strong language of § 1821(j)" made it counterintuitive to require FDIC's powers to comply with federal laws, in the absence of a provision by Congress limiting the effect of an immunizing statute. *Id.* at 240 (citing e.g., 5 U.S.C. § 7106(a)(2) (1994) (providing that management rights are immunized from arbitral review under Federal Labor Relations Act only when exercised "in accordance with applicable laws")).

119. *National Trust for Historic Preservation v. FDIC*, 5 F.3d 567 (D.C. Cir. 1993) (granting rehearing). The court granted a rehearing because of the Fifth Circuit's recent decision in *Sierra Club, Lone Star Chapter v. FDIC*, 992 F.2d 545 (5th Cir. 1993), which held that § 1821(j) did not protect the FDIC from an injunction. *National Trust for Historic Preservation v. FDIC*, 21 F.3d 469, 470 (D.C. Cir. 1994).

120. *National Trust*, 21 F.3d at 471 (reinstating the opinion stated in 995 F.2d 238 (D.C. Cir. 1993)).

121. *National Trust*, 21 F.3d at 470 (citing *Sierra Club*, 992 F.2d at 550).

122. *National Trust*, 21 F.3d at 470.

123. 12 U.S.C. § 1823(d)(3)(A) (1994).

124. *National Trust*, 21 F.3d at 470, 471.

In rejecting the Fifth Circuit's approach, the D.C. Circuit declared it unimportant that § 1823(d)(3)(A) "does not speak directly to the equitable jurisdiction of the federal courts."<sup>125</sup> The court further asserted that the Fifth Circuit's decision in *Sierra Club*, which held that the FDIC does not enjoy protection in its corporate capacity, would simply lead the agency to choose to act in its immunized receiver capacity instead.<sup>126</sup> The National Trust subsequently petitioned the Supreme Court, which denied its writ of certiorari.<sup>127</sup>

### III. ANALYSIS

In its petition to the Supreme Court for certiorari, National Trust contended that the D.C. Circuit created a circuit split by applying § 1821(j) "to bar jurisdiction to enjoin the FDIC's actions in a context where the court recognized that the plaintiffs had no alternative remedy."<sup>128</sup> Petitioners asserted that the court in *National Trust* had established an "irreconcilable conflict" with decisions from other circuits, and had "significantly depart[ed]" from the rulings of the United States Supreme Court.<sup>129</sup> Specifically, National Trust argued that the FDIC was acting in its corporate capacity when it acquired and sold the Dr. Pepper Building, and therefore the FDIC was not protected by § 1821(j).<sup>130</sup>

This section analyzes the distinguishing factors in the D.C. Circuit's decision in *National Trust*, with the decision by the Fifth Circuit in *Sierra Club*. National Trust argued that one could not distinguish its case against the FDIC from the Fifth Circuit's holding in *Sierra*

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125. *Id.* at 470-71 (finding that § 1823(d)(3)(A)'s reference to the protections of § 1821 necessarily encompassed § 1821(j)).

126. *Id.* at 471. Because the FDIC may elect to act in both corporate and receiver capacities simultaneously, it has every incentive to act in its receiver capacity if it will be insulated from judicial restraint. *Id.* Such an outcome may jeopardize the FDIC's ultimate function, which is "to maximize the value of the failed institution's assets." *Id.*

127. *National Trust for Historic Preservation v. FDIC*, 115 S. Ct. 683 (1994).

128. *National Trust's Petition for Certiorari* at 10, *National Trust for Historic Preservation v. FDIC*, 21 F.3d 469 (D.C. Cir.) (No. 94-317), *cert. denied*, 115 S. Ct. 683 (1994).

129. *Id.* at 9-10.

130. *Id.* at 6.

*Club*,<sup>131</sup> because both cases involved the FDIC acting in its corporate capacity.<sup>132</sup> However, the FDIC's argument for distinguishing *Sierra Club* has merit.<sup>133</sup> This section will additionally examine how National Trust and the FDIC interpret recent Supreme Court rulings concerning judicial review.

#### A. *Distinguishing Corporate Functions and Receivership Functions*

When the FDIC acts in its corporate capacity,<sup>134</sup> the restrained immunity approach advocates that § 1821(j) should not shield the FDIC from judicial interference.<sup>135</sup> This proposition appears sound if one considers the policy reasons for which Congress granted the immunization for the FDIC's conservator and receiver roles.<sup>136</sup> Unlike the urgent need "to act quickly in . . . volatile situations" envisioned by Congress when it promulgated the FDIC's *receivership* role,<sup>137</sup> the agency's *corporate* function seemingly demands "no special need to act quickly."<sup>138</sup> Hence, there appears to be "little justification to extend

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131. 992 F.2d 545 (5th Cir. 1993). See *supra* notes 80-88 and accompanying text for a discussion of the *Sierra Club* case.

132. National Trust's Petition for Certiorari at 10, *National Trust* (No. 94-317). See *infra* note 134 (describing the FDIC's corporate functions). See also 12 U.S.C. §§ 1819, 1823 (describing the corporate functions); 12 U.S.C. §§ 1821, 1822 (addressing the conservator and receiver functions).

133. Respondent FDIC's Brief in Opposition at 9-11, *National Trust for Historic Preservation v. FDIC*, 21 F.3d 469 (D.C. Cir.) (No. 94-317), *cert. denied*, 115 S. Ct. 683 (1994).

134. Generally, the FDIC's corporate function consists of insuring deposits and monitoring the "soundness" of insured banks. 12 U.S.C. §§ 1811, 1814-1821 (1994). However, the FDIC may also acquire assets in its corporate capacity by purchasing assets from a threatened institution pursuant to § 1823. 12 U.S.C. § 1823(c),(d). See Respondent FDIC's Brief in Opposition at 2-3, *National Trust* (No. 94-317).

135. See, e.g., *Sierra Club, Lone Star Chapter v. FDIC*, 992 F.2d 545, 551 (5th Cir. 1993) (refusing to extend § 1821(j) immunity); *Rosa v. Resolution Trust Corp.*, 938 F.2d 383, 399 (3d Cir. 1991) (refusing to allow § 1821(j) immunity when FDIC acts in its corporate capacity). See *supra* notes 79-97 and accompanying text for a discussion of the respective cases. See also *Cummings Properties Management, Inc. v. FDIC*, 786 F. Supp. 144, 146 (D. Mass. 1992) (declaring that § 1821(j) does not divest state and federal courts of subject matter jurisdiction when determining the validity of claims against the agency).

136. See *supra* notes 53-64 and accompanying text.

137. *Sierra Club*, 992 F.2d at 550. See *supra* notes 61-64 and accompanying text.

138. *Sierra Club*, 992 F.2d at 551.

the limit on the court's equity jurisdiction."<sup>139</sup>

In *Sierra Club*, the FDIC became the receiver of a failed institution.<sup>140</sup> Shortly thereafter, it transferred the institution's assets to another bank and agreed to indemnify the other bank for any losses it may incur on the subsequent sale of certain assets.<sup>141</sup> The FDIC, however, had to approve the sale prior to indemnification, which required the FDIC to exercise a corporate function.<sup>142</sup> The Fifth Circuit noted that § 1821(j) only applied when the FDIC exercised the powers and functions of a conservator or receiver.<sup>143</sup> The court went on to demonstrate that the FDIC's decision to approve the sale under § 1823(d)(3)(A) was made "in the ordinary course of its business" and therefore, the FDIC was exercising a corporate function.<sup>144</sup> Although § 1823(d)(3)(A) grants the FDIC the "rights, powers, privileges, and authorities . . . under section [ ] 1821,"<sup>145</sup> the court did extend § 1821(j) because the FDIC was not exercising a power or function of a receiver when it approved the sale.<sup>146</sup>

Shortly after it decided *Sierra Club*, the Fifth Circuit decided *Ward v. Resolution Trust Corp.*,<sup>147</sup> and held that § 1821(j) immunized the Resolution Trust Corporation (RTC) when it acted in its receiver capacity.<sup>148</sup> In *Ward*, the plaintiff sued to enjoin the RTC from completing the allegedly illegal sale of a building the agency had acquired as receiver of a failed thrift.<sup>149</sup> The Fifth Circuit found that if the RTC was exercising an enumerated power, such as the liquidation of receivership assets, the RTC would be protected under § 1821(j),

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139. *Id.*

140. *Id.* at 547.

141. *Id.*

142. *Id.* at 547-48, 549.

143. *Id.* at 550.

144. *Id.* at 550-51.

145. 12 U.S.C. § 1823(d)(3)(A).

146. *Sierra Club*, 992 F.2d at 551.

147. 996 F.2d 99 (5th Cir. 1993).

148. *Id.* at 102.

149. *Id.* at 100. The plaintiff, who wished to acquire the building himself, believed that the RTC sold the building to a third party for a "viciously low price," and failed to "adhere to the requirements of 'fair and consistent treatment of offerors.'" *Id.* at 103.

despite allegations that it was conducting an illegal activity.<sup>150</sup> The Fifth Circuit, noting that *Ward* was like *National Trust*, found that “[n]o court may take any action to restrain or affect the exercise of powers or functions of [the RTC] as a conservator or a receiver.”<sup>151</sup>

Although the FDIC argued that the Fifth Circuit created its own conflict with its decision in *Ward*,<sup>152</sup> the two cases are distinguishable. As *National Trust* argued, the Fifth Circuit’s decision in *Ward* was consistent with that circuit’s decision in *Sierra Club*.<sup>153</sup> *Ward* held that § 1821(j) clearly prohibited a court from exercising jurisdiction over the FDIC when it specifically acted in its receivership capacity—liquidating assets, whereas *Sierra Club* acted in its corporate capacity when it approved the sale of the building.<sup>154</sup>

Similarly, in *National Trust*, the FDIC clearly acted in its receivership capacity when it sold the assets of a failed bank pursuant to § 1823(d)(3)(A).<sup>155</sup> The D.C. Circuit concluded that the FDIC had exercised the powers or functions of a receiver and that a subsequent injunction would “restrain and affect” the FDIC’s efforts.<sup>156</sup> Hence, if the FDIC, while acting as a receiver, acquires assets or liabilities pursuant to § 1823(d)(3)(A), § 1821(j) will protect the FDIC from the

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150. *Id.* at 102-03.

151. *Id.* at 104 (citing 12 U.S.C. § 1821(j)). The Fifth Circuit cited *National Trust* for the proposition that it would not matter if such a result left plaintiff without an alternative remedy, noting that allowing jurisdiction due solely to lack of an alternative remedy would “be tantamount to rendering the provision entirely ineffective.” *Id.* (quoting *National Trust for Historic Preservation v. FDIC*, 995 F.2d 238, 239 n.1 (D.C. Cir. 1993)).

152. Respondent FDIC’s Brief in Opposition at 11, *National Trust for Historic Preservation v. FDIC*, 21 F.3d 469 (D.C. Cir.) (No. 94-317), *cert. denied*, 115 S. Ct. 683 (1994).

153. Petitioner *National Trust*’s Reply Memorandum at 5, *National Trust* (No. 94-317).

154. *Id.* The Fifth Circuit’s *Ward* ruling is further distinguished from *National Trust* by the existence of an alternative remedy for the plaintiff—monetary damages available through an administrative claims proceeding. *Ward v. Resolution Trust Corp.*, 996 F.2d 99, 104 (5th Cir. 1993). Thus, the existence of another remedy in *Ward* hampers the FDIC’s argument that the Fifth Circuit’s decisions have been inconsistent because *Ward* involved simple receivership with an alternative remedy available to its plaintiff, whereas *Sierra Club* involved the FDIC’s corporate functions with no other remedy available for the plaintiff. Petitioner *National Trust*’s Reply Memorandum at 5, *National Trust* (No. 94-317).

155. *National Trust for Historic Preservation v. FDIC*, 995 F.2d 238 (D.C. Cir. 1993).

156. *Id.* at 241.

courts.<sup>157</sup>

The D.C. Circuit correctly distinguished between the FDIC's exercise of a corporate function in *Sierra Club*, and its exercise of the receiver function in *National Trust*. One could infer that it is not merely the FDIC's formal corporate or receivership capacity that a court should examine when determining the applicability of § 1821(j), but also the specific functional role the FDIC played and whether it acted as a receiver while operating under its § 1823 corporate capacity.

### B. *Supreme Court Doctrine*

The Fifth Circuit's decision is consistent with the Supreme Court's ruling favoring the right to judicial review absent an alternative remedy.<sup>158</sup> Specifically, the Court concluded in *South Carolina v. Regan*,<sup>159</sup> that the Anti-Injunction Act did not preclude an aggrieved party from bringing a suit if the party did not have an alternative remedy available.<sup>160</sup> The FDIC asserted that *Regan* merely permits a court "to look beyond the plain language of a broad anti-injunction statute and to consider whether extrinsic evidence of legislative intent supports a narrowing judicial construction."<sup>161</sup> *National Trust*, however, relied on *Regan* for the proposition that "absent[t] . . . an alternative remedy" Congress did not intend to bar action.<sup>162</sup>

The FDIC's conclusion that a court should construe a statute broadly if there is no evidence in the legislative history to support a narrow construction, frustrates the spirit of the Supreme Court rulings.<sup>163</sup> As *National Trust* suggested, such a conclusion contradicts *Regan* and other

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157. *Id.* at 240.

158. See *South Carolina v. Regan*, 465 U.S. 367, 378 (1984). *National Trust* argued that the Fifth Circuit's holding in *Ward* was consistent with *Sierra Club* and *Regan* because the court in *Ward* denied jurisdiction based on the agency's action in its receivership capacity and the availability of an alternative remedy. See Petitioner *National Trust's* Reply Memorandum at 4-5, *National Trust* (No. 94-317). For a discussion of other Supreme Court decisions addressing the availability of judicial review, see *supra* notes 27-36 and accompanying text.

159. 465 U.S. 367 (1984).

160. *Id.* at 378.

161. Respondent FDIC's Brief in Opposition at 12, *National Trust* (No. 94-317). See *supra* notes 17-29 and accompanying text (discussing *Regan*).

162. *National Trust's* Petition for Certiorari at 15, *National Trust* (No. 94-317).

163. Respondent FDIC's Brief in Opposition at 12, *National Trust* (No. 94-317).

Supreme Court rulings which have acknowledged the strong presumption in favor of judicial review in the absence of clear evidence that Congress intended otherwise.<sup>164</sup> Indeed, the FDIC and the “[D.C.] Circuit’s analysis turned the Supreme Court precedent on its head” by conversely making a presumption against judicial review, absent clear evidence that Congress intended a narrow reading.<sup>165</sup>

The Fifth Circuit adopted the opposite approach, and noted that the right to equity jurisdiction “provides an essential safeguard to individual rights against arbitrary government action.”<sup>166</sup> The FDIC argued further that the deprivation of such, when it leaves a party with no remedy, is “too ‘odd’ a result to reach” absent a clear showing of legislative intent.<sup>167</sup> The D.C. Circuit’s decision, which sidestepped this “safeguard to individual rights” failed to address the due process concerns raised by National Trust.<sup>168</sup> Unlike the injured party in *Bob Jones University v. Simon*,<sup>169</sup> the plaintiff in *National Trust* had no alternate recourse.<sup>170</sup> Consequently, the preclusion of the court’s equity jurisdiction denied plaintiff its right to assert an action for injury.<sup>171</sup> This denial of judicial review raises constitutional due process problems because it deprived National Trust of its “opportunity to be heard.”<sup>172</sup>

The D.C. Circuit reasonably interpreted § 1821(j) to distinguish among the FDIC’s corporate functions and to recognize that these

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164. National Trust’s Petition for Certiorari at 13-14, *National Trust* (No. 94-317) (citing *Traynor v. Turnage*, 485 U.S. 535, 542 (1988) and *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967)). See *supra* notes 15-44 and accompanying text for a discussion of the Supreme Court’s presumption in favor of judicial review.

165. Petitioner National Trust’s Reply Memorandum at 6, *National Trust* (No. 94-317).

166. *Sierra Club, Lone Star Chapter v. FDIC*, 992 F.2d 545, 550 (5th Cir. 1993).

167. National Trust’s Petition for Certiorari at 13, *National Trust* (No. 94-317).

168. See *id.* at 14 (noting the effect of the court’s decision violated the Due Process Clause).

169. 416 U.S. 725, 746 (1974). The plaintiff university in *Bob Jones* had options, although less than ideal, aside from enjoining the IRS. See *supra* note 43 and accompanying text for a discussion of the alternative remedies cited by the Court.

170. See *National Trust for Historic Preservation v. FDIC*, 995 F.2d 238, 239 (D.C. Cir. 1993). All of the parties agreed that if the FDIC sold the building to a private buyer, the buyer would not have to comply with the NHPA. *Id.* See also National Trust’s Petition for Certiorari at 13 n.15, *National Trust* (No. 94-317).

171. National Trust’s Petition for Certiorari at 14, *National Trust* (No. 94-317).

172. *Id.*

functions may at times involve receivership roles which invoke the protections of § 1821(j). In effect, however, this interpretation denies plaintiffs a remedy, violates the due process clause, and permits the FDIC to engage in potentially illegal acts. "Section 1821(j) [should] not elevate the FDIC to the position of a sacred cow which may graze upon the rights of others at will, unchecked by the courts."<sup>173</sup> To combat this outcome, it would behoove Congress to amend § 1821(j) in order to prevent abhorrent conduct by the FDIC and to uphold the rights of injured parties.

#### IV. WHY § 1821(j) NEEDS REVISION

The premise that the FDIC may violate federal law and yet remain immune from judicial action is unsettling, even if it must act quickly in its receiver capacity.<sup>174</sup> With such freedom given to the FDIC in its receivership role, the potential exists for it to abuse its discretion in other contexts aside from the National Historic Preservation Act.<sup>175</sup> Indeed, even courts have speculated on the potential hazards of "effectively insulat[ing] the FDIC from judicial intervention even in the face of allegations of egregious violations of federal law threatening grave and irreparable harm."<sup>176</sup> Specifically, the statutes which the FDIC could violate following the D.C. Circuit's approach to § 1821(j) raise concerns about "potentially immunizing an agency from court enforcement of the entire U.S. Code."<sup>177</sup> While such ponderings appear extreme, they are

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173. *Cummings Properties Management, Inc., v. FDIC*, 786 F. Supp. 144, 146 (D. Mass. 1992) (citing *Harrington v. FDIC*, No. 91-122298-C, 1992 U.S. Dist. LEXIS 20822, at \*6-\*7 (D. Mass. Feb. 28, 1992)).

174. See *supra* notes 61-64 and accompanying text.

175. 16 U.S.C. §§ 470f, 470h-2 (1994). See *supra* note 105 and accompanying text for a discussion of the NHPA.

176. *National Trust for Historic Preservation v. FDIC*, 995 F.2d 238, 244 (D.C. Cir. 1993) (Wald, J., dissenting).

177. *National Trust for Historic Preservation v. FDIC*, 21 F.3d 469, 471 (D.C. Cir. 1994) (Wald, J., concurring). In her concurrence, Judge Wald cited her dissenting opinion in *National Trust*, 995 F.2d at 244, in which she speculated that the FDIC, as a receiver, might "operat[e] a factory or even a hazardous waste facility in a manner that was causing serious health or environmental damage and that allegedly violated the Clean Water Act or the Occupational Safety and Health Act [and] court[s] would be] powerless to take 'any action . . . to restrain or affect' that operation, unless the FDIC 'has acted or proposes to act beyond, or contrary to, its statutorily prescribed, constitutionally permitted powers or functions.'" *National Trust*, 21 F.3d at 471. Wald even hypothesized whether the FDIC could get away with selling crack cocaine discovered in a safety deposit box of a failed

just as likely as National Trust's NHPA claim.<sup>178</sup>

Thus, a clear and uniform interpretation of § 1821(j) is necessary in order to ensure the rights of plaintiffs in all circuits. Such an interpretation appears to be beyond the scope of the courts that follow the approach espoused by the D.C. Circuit which broadly gives effect to § 1821(j).<sup>179</sup> As Judge Wald concluded in her concurrence to *National Trust*, only Congress can correct the current "state of affairs" regarding § 1821(j).<sup>180</sup>

#### A. Proposal

This Note proposes Congress amend § 1821(j) of FIRREA so that it does not completely bar court actions brought against the FDIC in its receiver capacity. Under the amended version of § 1821(j), the FDIC would remain protected from court actions which tended "to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver,"<sup>181</sup> unless the FDIC violates or threatens to violate a federal law and the injured party has no alternative remedy.

This amendment would serve two purposes. First, it would prevent the FDIC from violating the law when it liquidates the assets of failed banks. Second, it would protect the due process rights of injured plaintiffs with no alternative recourse by entitling them to the courts' equity jurisdiction. Such a limitation on a statutory immunizing provision is not unprecedented. In the past, Congress has included such limits in provisions purporting to shield federal agencies from outside interference.<sup>182</sup>

Congress should limit the amendment to accommodate the policy reasons for which it enacted § 1821(j)—the urgent need for the FDIC to act quickly when liquidating assets as a receiver.<sup>183</sup> Such a proviso

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bank. *Id.* at 472.

178. National Trust's Petition for Certiorari at 13, *National Trust* (No. 94-317).

179. See *National Trust*, 21 F.3d at 471 (concluding that the FDIC should be free to decide how best to operate as a receiver of assets).

180. *Id.* at 473 (Wald, J., concurring).

181. 12 U.S.C. § 1821(j).

182. In the Federal Labor Relations Act, Congress specified that the agency would enjoy the protection of its decisions if the agency had acted "in accordance with applicable laws." *National Trust*, 995 F.2d at 240 (citing 5 U.S.C. § 7106(a)(2) (1994)).

183. See *supra* notes 61-64 and accompanying text.

might require the district court to consider the FDIC's need to act quickly on a case-by-case basis. Only when the FDIC overcomes a stringent presumption against immunity and shows the limitation would upset the purpose of FIRREA, will the court permit it to act in violation of a law and deny the plaintiff a remedy.

### B. *Advantages of the Proposal*

The primary advantage of the proposal is that it enables the injured plaintiff to bring an action under the court's equity jurisdiction. Securing the aggrieved individual's rights in this manner will not impede the functioning of the FDIC because it will have the opportunity to prove that its invidious action is so imperative that it warrants a court's approval.

Furthermore, society as a whole stands to benefit from this proposal because many of the assets liquidated by the FDIC have historic or aesthetic value that can be enjoyed by the community.<sup>184</sup> A historic landmark or a tract of wetlands, for example, fosters an intrinsic value which society acknowledges by enacting statutes to ensure their survival.<sup>185</sup> Thus, if the FDIC is permitted to exercise its receiver functions in disregard of federal laws, its noncompliance could lead to irreparable harm.

### C. *Criticism of Proposal*

The enactment of this proposal, however, could lead to criticism by the FDIC that amending § 1821(j) in this manner would only frustrate the purpose of FIRREA.<sup>186</sup> If the FDIC becomes subject to court jurisdiction in its receiver capacity, the courts can effectively tie its hands, no doubt causing the FDIC to face unprecedented litigation while liquidating assets. Accordingly, this escalated litigation would crowd court dockets and arguably stifle the wheels of justice in the federal courts. Finally, the inability of the FDIC to "act quickly in . . . volatile

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184. See generally *National Trust*, 995 F.2d at 241 (Wald, J., dissenting) (pointing out that the demolition of Dr. Pepper Headquarters Building would be a loss of one of Texas' "finest examples of Art Moderne architecture").

185. See *id.* (discussing the placement of a historic building on the National Register); *Sierra Club, Lone Star Chapter v. FDIC*, 992 F.2d 545 (5th Cir. 1993) (involving the alleged value of a tract of wetlands).

186. 12 U.S.C. § 1811. See *supra* notes 53-60 and accompanying text for a discussion of FIRREA.

situations"<sup>187</sup> would be costly to society if, in the face of another monumental S&L crisis, the FDIC were unable to efficiently serve as a receiver or a conservator for failing institutions due to the heightened likelihood of litigation.

#### V. CONCLUSION

The Financial Institutions Reform, Recovery, and Enforcement Act's (FIRREA) § 1821(j) is presently ambiguous in its applicability to the FDIC's corporate and receiver or conservator functions. The disparity between circuits utilizing § 1821(j) to shield the FDIC from the courts' equity jurisdiction (1) deprives plaintiffs of the opportunity for redress if they have no alternative remedy, and (2) allows the FDIC to violate federal law without accountability in the courts. Congress must amend FIRREA § 1821(j) so that it protects the due process rights of injured individuals and puts an end to FDIC immunization as a "sacred cow."

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187. *Sierra Club*, 992 F.2d at 550.

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