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# THE FDIC'S FRAUDULENT CONVEYANCE POWER UNDER THE CRIME CONTROL ACT OF 1990: BANK INSOLVENCY LAW AND THE POLITICS OF THE IRON TRIANGLE

*Edward J. Janger\**

An "iron triangle" forms when a regulated industry "captures"<sup>1</sup> both its regulating agency and that agency's congressional oversight committee.<sup>2</sup> Concern about this phenomenon has given rise to the sug-

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1. See *infra* text accompanying note 7.

2. MARTHA DERTHICK & PAUL QUIRK, *THE POLITICS OF DEREGULATION* 12 (1985). The metaphor of the iron triangle has been applied in a wide variety of contexts. In the direct expenditure context, it has been suggested by Gordon Adams to describe the dynamics of defense contracting. GORDON ADAMS, *THE IRON TRIANGLE* 15 (1981) ("A powerful flow of people and money moves between the defense contractors, the Executive Branch (DoD and NASA), and Congress, creating an 'iron triangle' on defense policy and procurement that excludes outsiders and alternative perspectives."). The existence of iron triangles has been used as an argument for term limits. William Kristol, *Term Limitations: Breaking up the Iron Triangle*, 16 HARV. J.L. & PUB. POL'Y. 95 (1993). Edward Zelinsky has argued that, because tax writing committees are less subject to development of iron triangles than direct expenditure committees, tax subsidies may be preferable to direct expenditures as a mechanism for enacting distributive policy choices. Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 YALE L.J. 1165 (1993). Mancur Olson has even offered the iron triangle as an explanation of the "stagflation" that occurred during the 1970s. MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS* 41-7, 61-5 (1982) ("[D]istributional coalitions slow down a society's capacity to adopt new technologies and to reallocate resources in response to changing conditions and thereby reduce the rate of economic growth."). See also RANDALL B. RIPLEY AND GRACE A. FRANKLIN, *CONGRESS, THE BUREAUCRACY AND PUBLIC*

gestion by proponents of regulatory reform that destabilizing iron triangles—either by limiting the influence of the regulated industry<sup>3</sup> or by enacting congressional term limits<sup>4</sup>—will remedy the problem.

This article tests this assertion that smashing iron triangles<sup>5</sup> will improve the quality of regulation by examining the FDIC's fraudulent conveyance power under the Crime Control Act of 1990,<sup>6</sup> a statute enacted in the wake of the collapse of the iron triangle in the financial services industry, and concludes that the proposed cure may be worse than the disease; weakened and collapsed iron triangles may present an even greater risk of political process failure and substantive mistake than the functioning triangles they replace.

### *The Problem:*

The metaphor of the iron triangle arose as an explanation for the perceived pervasiveness and persistence of agency capture in certain regulatory contexts. Capture occurs when a regulated industry gains control of the agency that is supposed to be providing regulatory supervision.<sup>7</sup> Capture of the executive agency alone is not necessarily fatal to the regulatory enterprise, because the relevant congressional committee may still supervise the agency. When an iron triangle forms,

POLICY (4th ed. 1987).

3. See, e.g., MICHAEL WALDMAN, *WHO ROBBED AMERICA* (1990).

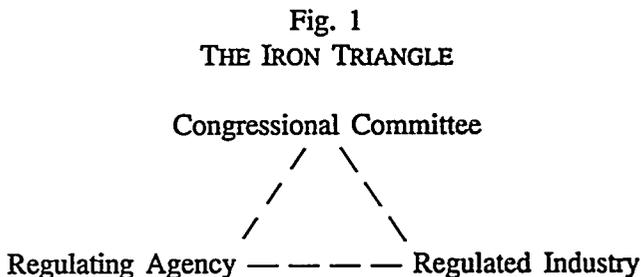
4. See Kristol, *supra* note 4; Einer R. Elhauge, *Term Limits: Voters Aren't Schizophrenic*, WALL ST. J., March 14, 1995, at A14. Others go even further, arguing that the regulatory enterprise itself ought to be scrapped, and the regulatory agencies abolished. DENNIS C. MUELLER, *PUBLIC CHOICE II* 245 (1989) ("[T]he best and simplest way to avoid the rent seeking problem is to avoid establishing the institutions that create rents, that is, the regulations and regulatory agencies that lead to rent seeking."). While this latter position has an attractive simplicity, as a practical matter, administrative agencies are likely to be with us for the foreseeable future. This article therefore focuses on proposals applying to the other two legs of the triangle.

5. See Kristol, *supra* note 2.

6. Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (1990) (codified as amended, in pertinent part, at 12 U.S.C. §§ 1821(d)(17)-(19) (1994)). The FDIC's fraudulent conveyance power is contained in Title XXV of the Crime Control Act which is also known as the Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990.

7. Monopoly Problems in Regulated Industries: Hearings Before the Antitrust Subcomm. of the House Judiciary Comm. on Monopoly Problems in Regulated Industries, 84th Cong. 2d Sess., pt. 1, vol. 1, at 61-62 (1956) (testimony of Marver S. Bernstein, Associate Professor of Politics, Princeton University, Princeton, N.J.) ("In the long run, a commission is forced to come to terms with the regulated groups as a condition of its survival . . . . In their mature stage, their concept of the public interest is hardly distinguishable from the view of the dominant regulated interests."); George W. Hilton, *The Basic Behavior of Regulatory Commissions*, 62 AM. ECON. REV. 47 (1972); George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SERVICE 3 (1971) ("[R]egulation is acquired by the industry and is designed and operated primarily for its benefit.").

however, the regulated industry captures the oversight committee as well.



When such a triangle forms, the regulated industry gains control of the content of regulation and may turn that regulation to its own private ends. Political scientists have identified this phenomenon of triangular capture by a number of different names, including “policy whirlpool,”<sup>8</sup> “subgovernment,”<sup>9</sup> and “subsystem.”<sup>10</sup> The common characteristic is that a triangular alliance, consisting of congressional committees and subcommittees, administrative agencies, and the regulated industry or benefitted group, forms to influence a specific public policy.<sup>11</sup> Once such triangular alliances form, they are perceived to be quite stable.<sup>12</sup>

8. ERNEST S. GRIFFITH, *CONGRESS: ITS CONTEMPORARY ROLE* (3d ed. 1961).

9. DOUGLASS CATER, *POWER IN WASHINGTON* (1964).

10. J. LEIFER FREEMAN, *THE POLITICAL PROCESS* (rev. ed. 1965).

11. DANIEL MCCOOL, *COMMAND OF THE WATERS* 5 (1987) (“[T]hese tripartite coalitions influence the allocation of government goods and services in such a way that the congressional committee members get credit for ‘bringing home the bacon’ to their constituents, the administrative agencies expand their budgets, personnel, and turf, and the interest groups get what they want from government.”). See DERTHICK & QUIRK, *supra* note 2, at 12 (“The general view was that a triumvirate (an ‘iron triangle’) of regulators, regulated industries and key members of Congress, influenced by campaign contributions from the regulated industries constituted an insuperable barrier to any reform that was contrary to industry interests.”).

12. Thomas H. Hammond & Jack H. Knott, *The Deregulatory Snowball: Explaining Deregulation in the Financial Industry*, 50 *J. Pol.* 3, 4 (1988).

A variety of political arguments have also been advanced to account for the stability and extension of regulation . . . . Often stressed for example, is the strength of relationships among regulatory agencies, congressional committees and the regulated interests . . . . The regulated interests benefit from policies which maintain profitability. The price they pay is campaign support for legislators on the committees supervising the agencies. Civil servants of the regulatory agencies benefit from civil service protected jobs, and the appointed commissioners have the prospect of future employment with the regulated interests.

*Id.* See Timothy B. Clark, *The President Takes on the “Iron Triangles” and So Far Holds His Own*, 13 *NAT’L J.* 516 (1981) (“It has become a truism in the past decade that any change in

As James Q. Wilson has put it:

When a program supplies particular benefits to an existing or newly-created interest, public or private, it creates a set of political relationships that make exceptionally difficult further alteration of that program by coalitions of the majority. What was created in the name of the common good is sustained in the name of the particular interest. Bureaucratic clientelism becomes self-perpetuating, in the absence of some crisis or scandal, because a single interest group to which the program matters greatly is highly motivated and well situated to ward off the criticisms of other groups that have a broad but weak interest in the policy.<sup>13</sup>

Thus, according to Wilson and others, once an iron triangle is in place, regulation is likely to diverge from the public interest and regulatory reform will be very difficult to achieve.

#### *The Destabilizing Solutions:*

Proponents of regulatory reform and proponents of deregulation have made a number of proposals to deal with the bureaucratic inertia created by the iron triangle. Most of these proposals are designed to disrupt the functioning of one or another leg of the triangle. One such approach seeks to reduce the influence of the regulated industry on the legislative and regulatory processes through restrictions on lobbying and implementation of certain types of campaign finance reform.<sup>14</sup> Another

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government programs is hard to achieve because of the combined opposition of middle-level bureaucrats, members of highly specialized congressional panels and lobbyists for the beneficiaries of government programs.”). See also MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* (1955); THEODORE J. LOWI, *THE END OF LIBERALISM* (1969); GRANT MCCONNELL, *PRIVATE POWER AND THE AMERICAN DEMOCRACY* (1966); DAVID TRUMAN, *THE GOVERNMENTAL PROCESS* (1951); Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 *YALE L.J.* 467 (1952).

13. James Q. Wilson, *The Rise of the Bureaucratic State*, in *THE AMERICAN COMMONWEALTH* 93-94 (Nathan Glazer & Irving Kristol eds., 1976).

14. WALDMAN, *supra* note 3, at 155 (“[T]here is only one surefire way to get the tainted special-interest money out of politics: replace it with voluntary public funds.”). Waldman emphasizes the power of industry campaign contributions and lobbying efforts on key committee members. For some current theories of campaign finance reform see Bruce Ackerman, *Crediting the Voters: A New Beginning for Campaign Finance*, 13 *AM. PROSPECT* 71 (Spring 1993); Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principal of Campaign Finance*, 94 *COLUM. L. REV.* 1204 (1994); Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 *COLUM. L. REV.* 1160 (1994); Fred Wertheimer & Susan W. Manes, *Campaign Finance Reform: A Key to Restoring the*

related approach, which has gained much recent currency, seeks to reduce the influence of special interests by enacting congressional term limits. Term limits, it is argued, will eliminate the long term entrenched relationships between members of Congress and the regulated industry that result from long legislative tenure.<sup>15</sup>

*Testing the Destabilizing Solutions—A Case Study:*

This article uses a case study approach to evaluate these proposed destabilizing solutions. Congress enacted the FDIC's fraudulent conveyance power as part of the Crime Control Act of 1990, in response to the failure of bank deregulation. This statute can therefore be viewed as a statute enacted in the wake of the collapse of an iron triangle, and offers an opportunity to test the effect of an iron triangle's collapse on the content of regulation.

The case study reveals that the collapse of the iron triangle in the financial services industry led to the exclusion of the banking lobby from the negotiations over the Crime Control Act generally, and the FDIC's fraudulent conveyance power in particular. The result is a statutory provision that is ill-conceived, but ill-conceived in an interesting way. The fraudulent conveyance provisions' weaknesses bear the earmarks of unchecked pursuit of institutional interests by Congress and the FDIC. More importantly, the legislative history of the statute provides strong evidence that the statute's shortcomings would have been avoided had the participation of affected groups, including banks and thrifts, been encouraged.

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*Health of Our Democracy*, 94 COLUM. L. REV. 1126 (1994). These articles focus on the related evils of corruption and inequality. To the extent that these proposals seek to limit corruption, by limiting the quid pro quo of campaign contributions for votes, these efforts are to the good. To the extent that they seek to reduce the success of incumbents, or to limit the substantive participation of interested groups, this article seeks to point out that the effort may have certain unintended consequences. See David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1378-79 (1994) ("[S]ome positions on certain issues may be less well represented in the public debate than their merits warrant; intermediary organizations, by speaking forcefully for these interests, might improve the quality of public deliberation over what would prevail if intermediaries were discouraged."); Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1410 (1994) ("PAC limits will in some circumstances diminish the power of minority candidates . . . . A ban on PACs may . . . diminish the influence of labor unions without materially affecting corporate PACs.").

15. Kristol, *supra* note 2; Elhauge, *supra* note 4.

*Some Problems with the Solutions:*

This analysis suggests that there are peculiar risks associated with legislating in the wake of the collapse of an iron triangle. An appreciation of these risks in turn casts doubt on the wisdom of the destabilizing solutions. A functioning iron triangle combines two failures of the political process: first, it is a form of the principal/agent problem,<sup>16</sup> in that the principal (the chief executive, Congress, or the electorate)<sup>17</sup> is unable to ensure that the agent (the agency) acts in accordance with its instructions (regulates in the public interest); and second, it is a failure of pluralism, in that inadequate participation by affected groups allows the regulated industry to dominate the regulatory process. The destabilizing solutions do not eliminate the principal/agent problem, while they exacerbate the failure of pluralism by silencing an affected group. In the case of the FDIC's fraudulent conveyance power, the silencing of the regulated industry allowed the FDIC and Congress to adopt a statute that was driven by their own particular institutional interests rather than the public interest. More importantly, however, silencing the regulated industry resulted in a failure of quality control—Congress adopted a statute that didn't work. For these reasons, to the extent that advocates of term limits and campaign finance reform seek to exclude the regulated industry from the regulatory process, their prescriptions may not improve the content of regulation and are likely, in important respects, to make it worse.

This article is divided into two sections. Section I analyzes the FDIC's power to avoid fraudulent conveyances under the Crime Control Act of 1990 and concludes that the inclusion of a superpriority for the FDIC is likely to reduce both the number of fraudulent conveyances

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16. Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 433-34 (1989) (citing Bengt Holmstrom, *Moral Hazard & Observability*, 10 BELL J. ECON. 74 (1979) (moral hazard and imperfect information in principal-agent relations)); Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984).

17. Compare Edward L. Rubin, *Law and Legislation in The Administrative State*, 89 COLUM. L. REV. 369 (1989) with Peter L. Strauss, *Legislative Theory and the Rule of Law: Some Comments on Rubin*, 89 COLUM. L. REV. 427, 438 (1989) ("[Professor Rubin] proceeds as if there were only one such [principal/agent] problem—that between Congress and its agent, the agency. In fact, there are two principal/agent problems immediately at work, and others in the wings. Congress is also an agent of the citizens; it is neither our only agent, nor our only agent in what could be called a principal/agent relationship with the agencies."). For the purposes of the argument made in this article it does not matter whether the chief executive, Congress, or the electorate is viewed as the principal. Once an iron triangle forms, the principal, however characterized, loses control of the agency.

avoided and the amount received by the FDIC, thereby serving neither the articulated nor the unarticulated goals of Congress. Section II is in turn divided into four parts. The first part develops the concept of the iron triangle. The second part shows (1) that the bank regulatory scheme that existed through the mid 1970s and the deregulation that occurred in the late 1970s and early 1980s were each, to a large extent, the product of an iron triangle, and (2) that the Crime Control Act of 1990 is an example of legislation enacted after the collapse of that iron triangle. The third part demonstrates that the failings of the FDIC's superpriority are directly traceable to the exclusion of the regulated industry from the drafting process. The fourth part explains why this example suggests that the destabilizing solutions described above may not provide an effective solution to the problem of iron triangles. Finally, this article very briefly seeks to derive some lessons for legislators who seek to legislate after an iron triangle has collapsed.

#### I. THE FDIC'S FRAUDULENT CONVEYANCE POWER—AN ANALYSIS

When Congress enacted the Crime Control Act of 1990, the savings and loan industry was in disarray. The Senate Ethics Committee's hearings on the failure of Lincoln Savings were in full swing, and the depth of the crisis in the financial industry as a whole had only recently become apparent to the electorate. The Crime Control Act was a product of this political climate. Congress stated its purpose clearly in the statute's legislative history—to recover assets from the Charles Keatings of the world.<sup>18</sup> As part of this effort to clean up the S&L mess, Congress conferred on the FDIC, in its capacity as receiver, an enhanced power to avoid intentional fraudulent conveyances by affiliates of, or borrowers from, a failed institution made within five years of the commencement of the receivership.<sup>19</sup> However, because the legislative

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18. The House Report states:

*Title XXI responds to the public outcry to bring to justice those who defrauded the savings and loan industry by providing Federal regulating agencies, Federal prosecutors, and law enforcement agencies with additional tools to combat fraud and abuse affecting financial institutions.*

H.R. REP. NO. 101-681, 101st Cong., 2d Sess., pt. 1, at 171 (1990) (emphasis added). Indeed, on November 29, 1990, the day the statute was enacted, the New York Times ran an editorial characterizing the defense offered by the so-called "Keating Five" as "embarrassing." *How to Judge the Keating Five*, N.Y. TIMES, Nov. 29, 1990 at A28.

19. 12 U.S.C. § 1821(d)(17)(A) provides:

The Corporation, as conservator or receiver for any insured depository institution, and any conservator appointed by the Comptroller of the Currency or the Director of the

drafters did not consider the interaction between bank insolvency law and bankruptcy law, the statute, as enacted, does not serve this goal.

*A. The FDIC's Power to Avoid Fraudulent Conveyances Under 12 U.S.C. § 1821(d)(17)*

The FDIC's power to avoid fraudulent conveyances comes into play in the following familiar circumstance: Theodore ("The") Donald, a real estate developer who has previously borrowed from Failed Bank, recognizes that his real estate portfolio is grossly overvalued and that he is insolvent. Concerned that his many other creditors will shortly arrive at

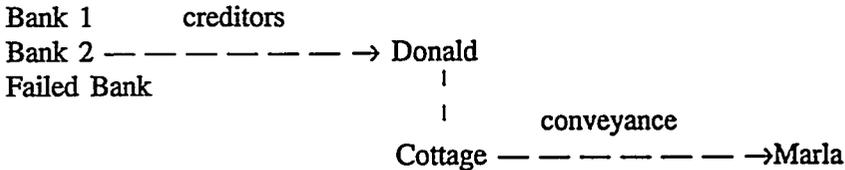
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Office of Thrift Supervision may avoid a transfer of any interest of an institution-affiliated party, or any person who the Corporation or conservator determines is a debtor of the institution, in property, or any obligation incurred by such party or person, that was made within 5 years of the date on which the Corporation or conservator was appointed conservator or receiver if such party or person voluntarily or involuntarily made such transfer or incurred such liability with the intent to hinder, delay, or defraud the insured depository institution, the Corporation or other conservator, or any other appropriate Federal banking agency.

The FDIC has relied on this section in actions to avoid, and investigations into, fraudulent conveyances by bank affiliated parties. *See In re McVane*, 44 F.3d 1127 (2d Cir. 1995) (quashing administrative subpoenas of family members of officers and directors of Landmark Bank of Hartford); *Resolution Trust Corp. v. Walde*, 18 F.3d 943, 947 (D.C. Cir. 1994) (upholding subpoena duces tecum against directors and officers of Trustbank Savings, F.S.B.); *Linde, Thomson, Langworth, Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1512-18 (D.C. Cir. 1993) (upholding administrative subpoena against former law firm of failed bank); *Resolution Trust Corp. v. Cruce*, 972 F.2d 1195, 1199 (10th Cir. 1992) (upholding asset freeze against former officers and directors of Peoples Heritage Savings); *Resolution Trust Corp. v. Burke*, 869 F. Supp. 15, 18 (D.D.C. 1994) (enforcing administrative subpoenas against former officers and directors of Home Savings Bank); *see also Resolution Trust Corp. v. Heiserman*, 839 F. Supp. 1457 (D. Colo. 1993) (suit against wife of director, as transferee of fraudulent transfer by director); *Resolution Trust Corp. v. Heiserman*, 151 F.R.D. 367 (D. Colo. 1993) (fraudulent conveyance action against officers and directors of failed savings and loan); *Resolution Trust Corp. v. Fleischer*, 826 F. Supp. 1273 (D. Kan. 1993) (fraudulent conveyance action against former officers and directors of failed bank); *Resolution Trust Corp. v. Spagnoli*, 811 F. Supp. 1005 (D.N.J. 1993) (fraudulent conveyance action against embezzler employee of failed bank); *Resolution Trust Corp. v. Feffer*, 793 F. Supp. 11 (D.D.C. 1992) (fraudulent conveyance action against former officers and directors of Sun State Bank). The FDIC has also brought actions under this section against mere borrowers of a failed bank. *See FDIC v. Elio*, 39 F.3d 1239, 1245 (1st Cir. 1994) (borrowers from Boston Trade Bank); *FDIC v. Anchor Properties*, 13 F.3d 27, 31 (1st Cir. 1994) (setting aside fraudulent conveyance by borrower from Bank of New England); *In re Pasquareiello*, 16 F.3d 525 (3d Cir. 1994) (borrowers from North Jersey Federal Savings and Loan); *In re Colonial Realty Corp.*, 980 F.2d 125, 131 (2d Cir. 1992) (holding action against bankrupt borrowers from failed bank barred by automatic stay); *FDIC v. Yemelos*, 778 F. Supp. 329 (D. La. 1991) (fraudulent conveyance action against borrowers from Bossier Bank and Trust Co.); *FDIC v. Cafritz*, 762 F. Supp. 1503, 1506 (D.D.C. 1991) (freezing assets of Conrad and Peggy Cooper Cafritz).

the same conclusion, and to guard against the impending attack of nervous bankers, Donald conveys his modest cottage in the Hamptons to his new wife, Marla, for no consideration.<sup>20</sup>

Fig. 2  
FRAUDULENT CONVEYANCE



Donald's conveyance to Marla is subject to challenge under 12 U.S.C. § 1821(d)(17)(A), enacted as part of the Crime Control Act, because Donald is a borrower from Failed Bank, and because the transfer was intended to hinder, delay, and possibly defraud his creditors (including Failed Bank). The cottage, or its value, is recoverable from Marla pursuant to § 1821(d)(17)(B).<sup>21</sup> If Marla gave value (in the form of cancellation of debt, for example) in return for the conveyance, and was unaware of her husband's financial condition at the time, she may have a defense pursuant to § 1821(d)(17)(C).<sup>22</sup>

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20. These facts are similar, but not identical, to those at issue in *Cafritz*, 762 F. Supp. at 1503, involving Washington D.C. real estate magnate Conrad Cafritz and his wife Peggy Cooper Cafritz.

21. 12 U.S.C. § 1821(d)(17)(B) provides:

To the extent a transfer is avoided under subparagraph (A), the Corporation or any conservator described in such subparagraph may recover, for the benefit of the insured depository institution, the property transferred, or, if a court so orders, the value of such property (at the time of such transfer) from—

- (i) the initial transferee of such transfer or the institution-affiliated party or person for whose benefit such transfer was made; or
- (ii) any immediate or mediate transferee of any such initial transferee.

22. 12 U.S.C. § 1821(d)(17)(C) provides:

The Corporation or any conservator described in subparagraph (A) may not recover under subparagraph (B) from—

- (i) any transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith; or
- (ii) any immediate or mediate good faith transferee of such transferee.

In the *Cafritz* case, Mrs. Cafritz argued that her husband had conveyed certain assets to her in return for cancellation of certain existing and outstanding intrafamilial debts. However, Judge Richey found it unlikely that Mrs. Cafritz had not had notice of her husband's financial condition and concluded that the FDIC was likely to succeed on the merits. 762 F. Supp. at 1506-07.

So far, the FDIC's power to avoid fraudulent conveyances under the Crime Control Act is non-controversial. Indeed, it is a power that is conferred by state law upon any of Donald's creditors,<sup>23</sup> and, should he go bankrupt, upon his trustee by 11 U.S.C. §§ 544(b)<sup>24</sup> and 548(a)(1).<sup>25</sup> Except for the five year statute of limitations,<sup>26</sup> this power would be available to the FDIC without specific authorization because, under 12 U.S.C. § 1821(d)(2)(A), a provision which predates the Crime Control Act, the FDIC succeeds to the rights of Failed Bank as a creditor under state law.<sup>27</sup>

Congress was not content, however, to enact a statute that merely mirrored existing fraudulent conveyance law. To do so would have been redundant.<sup>28</sup> Congress also conferred on the FDIC the power to seek an order freezing the assets of a party against whom it was asserting a

23. Every state has enacted some form of law invalidating intentional fraudulent conveyances. Such statutes take as their common ancestor the Statute of 13 Elizabeth which provides:

[C]onvicious and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and of tenements as of goods and chattels, . . . devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent, to delay, hinder or defraud creditors and others . . . shall be utterly void, frustrate and of no effect.

13 Eliz., ch. 5 (1570). The Statute of 13 Elizabeth has been replaced in about half of the states by section 7 of the Uniform Fraudulent Conveyance Act (UFCA). DAVID G. EPSTEIN & STEVE H. NICKLES, *DEBT: BANKRUPTCY, ARTICLE 9 AND RELATED LAWS: MODERN CASES AND MATERIALS* 47-50 (1994). Recently, the Conference of Commissioners on Uniform State Laws promulgated the Uniform Fraudulent Transfers Act (UFTA) as a successor to the UFCA. Section 4 of the UFTA is a direct descendant of the Statute of 13 Elizabeth. *Id.* at 49.

24. 11 U.S.C. § 544(b) (1994) provides: "The trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim . . . ."

25. 11 U.S.C. § 548 (1994) provides:

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily —

(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted . . . .

26. The statute of limitations for avoiding fraudulent conveyances varies widely under state law. Some jurisdictions have limitations periods as short as 3 years. *See, e.g.*, ARK. CODE ANN. § 4-59-209 (Michie Supp. 1993). Others states extend the limitations period to as many as six years. N.Y. CIV. PRAC. L. & R. 213(8) (McKinney 1990).

27. 12 U.S.C. § 1821(d)(2)(A)(i) ("The Corporation shall, as conservator or receiver, and by operation of law, succeed to . . . all rights, titles, powers and privileges of the insured depository institution . . . .").

28. *Id.*

claim,<sup>29</sup> and to obtain such relief without making the usual showing of irreparable harm.<sup>30</sup> This allows the FDIC to freeze Donald's assets without making a showing that he is presently secreting assets. Even this injunction power, however, is relatively noncontroversial and arguably would have been available in the absence of specific statutory authorization.<sup>31</sup>

B. *The FDIC's Superpriority Under 12 U.S.C. § 1821(d)(17)(D)*

The principal innovation contained in the Crime Control Act is contained in 12 U.S.C. § 1821(d)(17)(D), which renders the FDIC's avoidance power "superior" to the rights of a trustee in bankruptcy. That section provides, "The rights under this paragraph of the Corporation and any conservator described in subparagraph (A) shall be superior to any rights of a trustee or any other party (other than a party which is a Federal Agency) under Title 11."<sup>32</sup> Section 1821(d)(17)(D) thus places the FDIC at the front of the bankruptcy queue.<sup>33</sup> By com-

29. 12 U.S.C. § 1821(d)(18); see *FDIC v. Cafritz*, 762 F. Supp. 1503, 1505 (D.D.C. 1991).

30. 12 U.S.C. § 1821(d)(19); see *Cafritz*, 762 F. Supp. at 1505.

31. Even the relaxation of the irreparable harm requirement mirrors existing case law, which holds that a showing that an important federal policy has been violated vitiates the need for the separate showing of irreparable harm usually required under Federal Rule of Civil Procedure 65. John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978); see *Elrod v. Burns*, 427 U.S. 347 (1976); *U.S. v. Schmitt*, 734 F. Supp. 1035, 1048 (E.D.N.Y. 1990) ("irreparable harm is presumed when the government seeks a preliminary injunction pursuant to a statute which expressly authorizes entry of an injunction upon a showing of a violation of law by the Government"); *EEOC v. Pacific Southwest Airlines*, 587 F. Supp. 636, 690 (N.D. Cal. 1984) (irreparable harm requirement relaxed in Title VII cases brought by the EEOC). See also *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1032, 1100-01 (2d Cir. 1972) (asset freeze under the securities laws). One court has limited the scope of this exception, holding that an asset freeze under 12 U.S.C. § 1821(d)(18) is not available in the absence of a showing of likelihood of success of a claim under §1821(d)(17), or a showing that the asset is likely to be dissipated:

[I]n a case brought under §1821(d)(17), the issue is necessarily addressed in the traditional requirement of showing a substantial likelihood of success on the merits. If the underlying lawsuit does not allege fraudulent activity . . . a petition for preliminary injunction must show some potential injury evidenced by a clear nexus between past fraudulent conduct and the property for which restraint is sought . . . .

*FDIC v. Floyd*, 827 F. Supp. 409, 414 (N.D. Tex. 1993).

32. 12 U.S.C. § 1821(d)(17)(D) (emphasis added).

33. In *In re Colonial Realty Corp.*, 980 F.2d 125 (2d Cir. 1992), the court stated:

[A]lthough § 1821(d)(17)(D) is framed in terms of the FDIC having "rights" that are "superior" to those of a Title 11 trustee or any other party, the exception for federal agencies indicates that a preferential claim, rather than any exemption from established statutory procedures, is at the heart of the FDIC's enhanced "rights." Thus drawing upon *Whiting Pools* [, 462 U.S. 198 (1983)], the bankruptcy court concluded

parison to the other powers contained in § 1821(d)(17)-(19), the effect of the plain language of this provision is sweeping. If Donald goes bankrupt, the FDIC, as receiver for Failed Bank, has the power to recover the fraudulently conveyed family cottage ahead of all of Donald's other creditors, including Donald's bankruptcy trustee.

This "priority" for the FDIC is no ordinary bankruptcy priority. Its effects are quite extraordinary and arguably unprecedented. While § 507 of the Bankruptcy Code contains a number of provisions which similarly reflect a legislative intention to benefit one class of creditors at the expense of others,<sup>34</sup> and §§ 1113 and 1114 may even elevate certain prepetition claims to administrative priority status,<sup>35</sup> the effect of §

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in this case that the "word 'superior' in §1821(d)(17)(D) means 'prior in right.'" . . .

Pertinent legislative history supports this view.

*Id.* at 134. See *In re Still*, 963 F.2d 75, 78 (5th Cir. 1992) (stating in dicta that the "FDIC's right to pursue fraudulent transfers from its debtors is 'superior to any rights of a trustee or any other party (other than any party which is a federal agency) under the [Bankruptcy Code]"; H.R. REP. NO. 101-681, 101st Cong., 2d Sess., pt. 1, at 181 (1990) ("Paragraph [17(D)] gives the Federal Deposit Insurance Corporation superior rights to the trustee or any other party (other than a federal agency) in bankruptcy with respect to the property transferred.").

34. Some of these priorities are tightly linked to the Bankruptcy Code's goal of encouraging reorganization and orderly distribution of assets. Section 507(a)(1)'s priority for administrative expenses of the estate, and § 507(a)(2)'s priority for involuntary gap creditors fall into this category. 11 U.S.C. §§ 507(a)(1)-(a)(2) (1994). Other of these priorities are intended to assist groups who are particularly likely to be harmed by bankruptcy. The claims of employees of the debtor under §§ 507(a)(3) and 507(a)(4) appear to fall into this category. 11 U.S.C. §§ 507(a)(3)-(a)(4). Finally, some of these priorities, such as the priorities for claims of farmers and fishermen under § 507(a)(5), appear to be transfers to interest groups who were particularly successful in the legislative process. 11 U.S.C. § 507(a)(5).

35. 11 U.S.C. §§ 1113, 1114 (1994). Under § 1114, retiree medical benefits which accrued prepetition, but which either have not been paid as of the petition date, or which become payable after the petition date are accorded administrative priority status. *In re GF Corp.*, 115 B.R. 579 (Bankr. N.D. Ohio 1990). Courts are divided over whether the same is true under 11 U.S.C. § 1113 for wages, vacation and sick pay accrued prepetition under a collective bargaining agreement. Compare *In re Roth American, Inc.*, 975 F.2d 949, 955, 957 (3d Cir. 1992) ("[Severance pay claims based on length of service,] like vacation pay claims, only have administrative priority to the extent that they are based on services provided to the bankruptcy estate post-petition"); *In re Ohio Corrugating*, 115 B.R. 572, 575 (Bankr. N.D. Ohio 1990) (holding that wages, severance pay and vacation benefits are only accorded priority if it can be shown that they were earned post-petition); and *In re Murray Industries*, 110 B.R. 585, 587 (Bankr. M.D. Fla. 1990), *vacated as moot*, 140 B.R. 298 (Bankr. M.D. Fla. 1992) (holding that vacation pay claims vesting before petition, the payment of which is triggered by post-petition events, are considered pre-petition claims and are not afforded priority status) with *In re Canton Castings, Inc.*, 103 B.R. 874, 875 (Bankr. N.D. Ohio 1989) (holding that vacation benefits earned prepetition may be paid to hourly employees pursuant to collective bargaining agreement). See Daniel Keating, *Bankruptcy Code § 1114: Congress' Empty Response to the Retiree Plight*, 67 AM. BANKR. L.J. 17 (1993); Janell M. Kurtz et al., *Rejection of Collective Bargaining Agree-*

1821(d)(17)(D) is at once broader and more uncertain than the priorities and superpriorities created within the Bankruptcy Code.<sup>36</sup> Because the FDIC's rights under § 1821(d)(17)(D) are superior even to those of the bankruptcy trustee, the FDIC appears to receive what might be called a "super-duper" priority. It is this super-duper priority which causes substantial mischief.

### C. Redistributive Effect of § 1821(d)(17)(D)

Viewed in isolation, the net effect of the FDIC's superpriority might appear to be positive: it enhances the FDIC's incentive to recover assets which can be used to replenish the insurance fund. However, this enhanced power has certain costs. In most cases, the FDIC will not be the only entity with the right to avoid a challenged fraudulent conveyance. For example, Donald's transfer of his house to Marla for no consideration is fraudulent as to all of his creditors, not just the FDIC.<sup>37</sup> As noted above, the transfer violates equally a creditor's

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*ments in Bankruptcy: A Review, Update and Guide for Debtors*, 96 COM. L.J. 31 (1991); Mitchell Rait, *Rejection of Collective Bargaining Agreements Under Section 1113 of the Bankruptcy Code: The Second Circuit Enters the Arena*, 63 AM. BANKR. L.J. 355 (1989).

36. The *Colonial Realty* court called the FDIC's claim a "preferential claim" that would be "prior in right." 980 F.2d at 134. What this means is not clear by any means. The FDIC's claim does not fit within the definition of a secured claim under 11 U.S.C. § 506, in that it is not secured by a "lien on property" or "setoff." Neither does it fit within the definition of any of the priority claims detailed in 11 U.S.C. § 507. Indeed, it is not even clear that the property subject to the FDIC's priority becomes property of the estate. To the extent that the trustee has any rights, in property, they are granted pursuant to 11 U.S.C. § 541, which defines property of the estate. The bankruptcy estate consists of "all legal or equitable interests of the debtor in property as of the commencement of the [bankruptcy] case." *Id.* at 130. Courts are divided over whether fraudulently transferred property is property of the estate. Compare *In re S.I. Acquisitions, Inc.*, 817 F.2d 1142, 1149-50 (5th Cir. 1987) (holding that creditor's action belonged to debtor and was property of the estate to which an automatic stay applied) and *In re MortgageAmerica Corp.*, 714 F.2d 1266, 1275 (5th Cir. 1983) (holding that debtor who fraudulently transferred property is considered to have continuing legal interest in it, therefore it is property of the estate and automatic stay is applicable); with *In re Saunders*, 101 B.R. 303, 305-06 (Bankr. N.D. Fla. 1989) (holding that fraudulently transferred property is not to be considered property of the estate until it is recovered). Cf. *In re Sherk*, 918 F.2d 1170, 1175-77 (5th Cir. 1990) ("Once either the trustee or the debtor has avoided the transfer, the [fraudulently transferred] property becomes property of the estate and the debtor may then exempt it if he meets the statutory requirements."). The *Colonial Realty* court chose to follow *Saunders* and held that the property conveyed is not property of the estate. *Colonial Realty*, 980 F.2d at 131.

37. Because the FDIC's avoidance power reaches conveyances that occurred as many as five years before the insolvency of Failed Bank, in those states where the limitations period for fraudulent conveyances is less than five years, the FDIC may in fact be alone in its power to avoid the transaction. This distinction, however, is likely to be of little practical importance. Tolling doctrines, applicable in many states, see, e.g., *Rio v. Edward Hospital*, 472 N.E.2d 421

rights under state fraudulent conveyance law and the FDIC's rights under the Crime Control Act. In bankruptcy, Donald's trustee would have the power to avoid the conveyance for the benefit of *all* of his creditors under either 11 U.S.C. § 544 or, if the transfer occurred within a year of bankruptcy, 11 U.S.C. § 548(a)(1). The benefit to the FDIC comes, therefore, at the expense of Donald's other creditors. Because of the FDIC's superpriority, and because by happenstance Donald borrowed from Failed Bank, the FDIC gets all of the money, and his other creditors receive nothing.

Thus, with the exception of the FDIC's superpriority, 12 U.S.C. §§ 1821(d) (17)-(19) confer upon the FDIC powers it already has, and, the primary effect of that superpriority is likely to be redistribution of fraudulent conveyance recoveries, rather than furtherance of the stated legislative goal of increasing the number of fraudulent conveyances avoided. In other words, while sold as a statute which would increase the likelihood that secreted funds would be recovered for the benefit of taxpayers, the principal effect of the fraudulent conveyance provisions of the Crime Control Act, and in particular § 1821(d)(17)(D), will be to redistribute funds recovered from private creditors of the debtor to the federal bank insurance fund. Indeed, for the reasons discussed below, the effect of this redistribution will likely be to reduce rather than to increase the degree to which fraudulent conveyance laws are enforced, and may even be to reduce the dollar amount recovered by the bank insurance fund itself.

#### D. *Elimination of the Trustee's Incentive to Bring Avoidance Actions*

While redistribution may have been Congress' actual (if unarticulated) goal, this redistribution does nothing to punish fraud, and it has other consequences that Congress does not appear to have anticipated. In most bankruptcies, it is the trustee or the creditors' committee of the debtor that analyzes the affairs of the debtor, identifies and seeks to avoid preferential and fraudulent transfers, and recovers those transfers for all of the creditors of the estate (including the FDIC). Indeed, once a debtor has filed for bankruptcy, it is virtually impossible for an indi-

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(Ill. 1984) (applying discovery rule under Illinois law); ILL. ANN. STAT. ch. 735, para. 5/13-215 (Smith-Hurd 1992) (formerly ILL. ANN. STAT. ch. 110, para. 13-215) (tolling of statute of limitations where cause of action is fraudulently concealed), and problems of proof associated with proving fraud more than five years in the past are likely to result in this class of cases being relatively small.

vidual creditor to pursue a fraudulent conveyance claim on its own behalf.<sup>38</sup> The FDIC's superpriority, however, eliminates any incentive for the trustee or committee to pursue such actions.<sup>39</sup>

The impact of this problem is greater than it might first appear. A bankruptcy trustee has the power to avoid a wide variety of prepetition transfers.<sup>40</sup> While the FDIC's superpriority extends only to intentional

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38. The Bankruptcy Code provides the trustee alone (and by implication a debtor-in-possession) with standing to invoke the avoidance powers set forth in, among other provisions, §§ 544, 547, and 548. *See, e.g., In re V. Savino Oil & Heating Co.*, 91 B.R. 655, 656 (Bankr. E.D.N.Y. 1988); *In re Monsour Medical Ctr.*, 5 B.R. 715, 718 (Bankr. W.D. Pa. 1980). A creditors' committee has the implied authority to bring an avoidance action on behalf of the estate, on approval of the bankruptcy court, if the debtor does not object, or if the trustee abuses its discretion in not suing. *See, e.g., In re Prime Motor Inns, Inc.*, 135 B.R. 917, 919 (Bankr. S.D. Fla. 1992); *Savino Oil & Heating Co.*, 91 B.R. at 656-577.

There are significant impediments to avoidance actions brought by parties other than the debtor, trustee, or official committee. Four requirements must be satisfied before a party other than the trustee may bring an avoidance action over the trustee's objection: (1) the party must have made a demand upon the trustee to bring the action; (2) the trustee must have unjustifiably refused the demand; (3) the party must have made a prima facie showing of a colorable claim; and (4) the party must have obtained leave of the court. *See, e.g., Prime Motor Inns*, 135 B.R. at 919. Any action brought by a creditor or creditors' committee must be brought on behalf of and benefit the estate. "[E]ven official committees" must demonstrate "extraordinary circumstances" before receiving permission to bring an avoidance action over the debtor's objection. *See Prime Motor Inns*, 135 B.R. at 919. Noting the distinction between an official committee bringing the action and an individual creditor, Judge Cristol stated that "[i]t is the rare case where a party in interest other than a trustee or debtor-in-possession may prosecute an estate's causes of action, and rarer still that such party may be anyone other than a court appointed committee." *Id.* It is only under "extreme circumstances" that courts permit an individual creditor to pursue avoidance actions on behalf of the estate. *Id.* at 920, n.4. *See also In re Feldbahn*, 92 B.R. 834, 836 (Bankr. S.D. Iowa 1988) (court must balance the competing interests and determine whether the initiation of the action would aid the reorganization effort or impede it).

39. In addition to the redistribution and incentive effects discussed below, an additional unanticipated effect of this superpriority may be to reduce the creditworthiness of borrowers of troubled banks. Where a debtor has not borrowed from a failed, or troubled bank, the creditors can expect to have recourse to fraudulent conveyance recoveries. By contrast, creditors of a borrower of a failed or troubled bank can expect to see those assets swept up by the FDIC. This has the further effect of reducing the value of the troubled bank's assets at just the time when it needs those assets most. Peter P. Swire, *Bank Insolvency Law Now That It Matters Again*, 42 DUKE L.J. 469, 548-550 (1992). Professor Swire has noted:

The possibility of insolvency is itself a reason for borrowers to seek alternative funding. Loans are unlikely to be renewed once the bank enters receivership, and loan officers who approved the existing loan may well lose their jobs. Because borrowers will perceive the "black hole" phenomenon, they will have reason to move their business. The best borrowers will leave first, saddling the nearly insolvent bank with a growing proportion of riskier loans that cannot get alternative financing. Profits on lending will thus become difficult to achieve at just the time that the three-percent-capital bank has few other sources of funding.

*Id.* at 549-50.

40. The trustee may avoid preferences under 11 U.S.C. § 547, constructive fraudulent con-

frauds,<sup>41</sup> a conveyance can be simultaneously a preference, a constructive fraud, and an intentional fraud.<sup>42</sup> Moreover, the line is frequently difficult to draw. Preferences are easier to prove—there is no need to establish intent or the insolvency of the debtor—but it is not difficult to imagine the FDIC asserting that an avoided preference is also an intentional fraudulent conveyance and therefore subject to the FDIC's superpriority.<sup>43</sup> In a bankruptcy case where the FDIC is a major creditor, a creditors' committee faced with spending significant amounts of money to recover preferences may be dissuaded by two very real possibilities: either (1) the fruits of their labor will be claimed by the FDIC; or (2) the estate may be forced to engage in protracted and otherwise unnecessary litigation over the basis for avoiding transactions that are concededly avoidable.

This problem is compounded further when one recognizes that the FDIC's superpriority primes the administrative claims of the trustee's counsel for fees, and therefore increases the contingent risk associated with pursuing even ordinary preferences.<sup>44</sup> Indeed, it is likely that

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veyances under 11 U.S.C. § 548(a)(2), intentional fraudulent conveyances under 11 U.S.C. § 548(a)(1), unperfected security interests under 11 U.S.C. § 544(a), and state law fraudulent conveyances under 11 U.S.C. § 544(b).

41. Even if the class of winnable intentional fraud cases is relatively small, as discussed below, the FDIC's superpriority is likely to effect a larger number of cases, where the FDIC will assert its superpriority. Even if the effect was limited to those few winnable intentional fraud claims, the impact on the insurance fund would be negative with regard to those cases.

42. For example, assume that the conveyance of the cottage by Donald to his wife Marla occurred within 90 days of Donald's bankruptcy filing, ostensibly in satisfaction of a preexisting debt. The transfer would be both a preference and an intentional fraud.

43. This is precisely what happened when the estate of Dominic Antonelli (a real estate developer in Maryland and the District of Columbia) attempted to avoid Mr. Antonelli's conveyance of his house to his children. The estate sought to avoid the transfer as an insider preference, and the FDIC sought to intervene, asserting that the transfer was an intentional fraudulent conveyance and therefore subject to the FDIC's superpriority. *In re* Dominic and Judith Antonelli, Case No. 91-4-0254-PM (Bankr., D. Md.) (conversation with Rick Schifter, counsel to the Debtors).

44. Normally, the administrative expenses of the estate, which include the trustee's fees, and the fees of trustee's counsel, are accorded first priority. 11 U.S.C. § 507(a)(1). However, the language of 12 U.S.C. § 1821(d)(17)(D) states that the rights of the FDIC are superior to the rights of the trustee. Therefore, if the trustee avoids a preference, and then the FDIC successfully asserts that the preference was also an intentional fraudulent conveyance, the trustee will not be compensated for his or her effort. If the FDIC's claim could be considered a secured claim under 11 U.S.C. § 506, the trustee could deduct his expenses from any recovery by the secured creditor pursuant to 11 U.S.C. § 506(c). Under the plain language of 12 U.S.C. § 1821(d)(17)(D), however, the FDIC's rights under § 1821(d)(17)(A) are superior to those of the trustee under 11 U.S.C. § 506(c) (discussed *infra* part I.F).

many trustees and creditors' committees will conclude that even the preference game is not worth the candle.<sup>45</sup>

Thus, to the extent that it does anything, the practical effect of the FDIC's superpriority will be to dissuade trustees and creditors' committees from pursuing preferences and fraudulent conveyances on behalf of all of a debtor's creditors (including the FDIC). Where the FDIC's superpriority applies, even arguably, the responsibility for identifying and pursuing fraudulent transfers will likely fall to the FDIC and the FDIC alone.

### E. *Evaluation of the FDIC as an Instrument of Enforcement*

Assuming that Congress intended the redistribution described above, there is a problem only if the FDIC is not up to the job assigned to it. However, for two reasons — one institutional and one procedural—it is not.

#### 1. The Institutional Reason—Lack of Information

The FDIC is simply not the entity best situated to uncover and prosecute fraudulent conveyance actions. It is the FDIC's institutional job to learn about the financial affairs of *banks*, *not* the financial affairs of *borrowers* or *bank-affiliated parties*.<sup>46</sup>

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45. It might be possible for the FDIC and the estate to contract around this problem. In a world without transaction costs and with full information, this might solve the problem. See R.H. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960). There are, however, a number of significant obstacles to such a Coasean bargain. The nature of the FDIC's superpriority and the factual context in which any such bargain must be negotiated create significant information problems and entail significant transaction costs. First, the scope of the FDIC's superpriority is not certain by any means. Second, since the priority only applies in cases of intentional fraud, there is likely to be considerable uncertainty at the beginning of the case (which is when such a bargain must be struck) over whether the FDIC's priority will apply. Again, the Antonelli case provides an example of this dynamic in action. Although the FDIC and the estate ultimately reached an agreement over cost-splitting, it was not until both the FDIC and the Antonelli estate had run up significant legal fees in litigating over the scope and applicability of the FDIC's superpriority. *In re Dominic and Judith Antonelli*, Case No. 91-4-0254-PM (Bankr., D. Md.) (conversation with Rick Schifter, counsel to the Debtors).

46. The powers conferred on the FDIC by 12 U.S.C. § 1821(d) are directed toward allowing the FDIC to administer (and/or liquidate) the institution, not to administer the reorganization or liquidation of borrowers or affiliates of the bank. Sections 1821(d)(2)(A)-(K) are directed toward allowing the FDIC to: (1) function as a successor to the failed institution; (2) to operate the institution; and (3) to fulfill the functions of the institution's officers and directors.

While the FDIC is well situated to identify fraudulent conveyances of the assets of the failed institution itself to affiliated entities, it does not know about the financial affairs of bank

When the FDIC commences a receivership, FDIC employees immerse themselves in the financial affairs of the failed bank.<sup>47</sup> In some cases this will yield a familiarity with the financial affairs of certain of the bank's borrowers. However, in most cases, the familiarity will extend only as far as the loan documents for the particular credit. (This is the insight that motivates the so called "*D'Oench*" doctrine.)<sup>48</sup> As such, while the FDIC may be in an excellent position to identify malfeasance by officers of the bank, it is rarely well positioned to identify malfeasance by the bank's borrowers.

Trustees and creditors' committees, by contrast, are appointed for the sole purpose of familiarizing themselves with the debtor's affairs. They frequently have access to insiders of the debtor, and may even have the insiders' cooperation in identifying fraudulent transfers. Yet, the effect of the FDIC's superpriority is to rob the trustee or the creditors' committee of any incentive to make use of these resources.

## 2. The Procedural Problem—the Automatic Stay

If Donald goes bankrupt, these institutional impediments are compounded by the procedural barrier imposed by the automatic stay.<sup>49</sup> The Second Circuit held, in *In re Colonial Realty*,<sup>50</sup> that the automatic stay bars the FDIC from acting unilaterally to recover fraudulent conveyances under § 1821(d)(17).<sup>51</sup> Instead, the FDIC must either piggy-

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officers and directors. Indeed, a significant number of the published cases brought against bank affiliated parties, involve motions to quash administrative subpoenas filed by the FDIC in an effort to learn about the financial affairs of bank affiliates. *In re McVane*, 44 F.3d 1127 (2d Cir. 1995) (quashing administrative subpoenas of family members of officers and directors of Landmark Bank of Hartford); *Resolution Trust Corp. v. Walde*, 18 F.3d 943, 947 (D.C. Cir. 1993) (upholding subpoena duces tecum against directors and officers of Trustbank Savings, F.S.B.); *Linde, Thomson, Langworth, Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508 (D.C. Cir. 1993) (upholding administrative subpoena against former law firm of failed bank); *Resolution Trust Co. v. Burke*, 869 F. Supp. 15 (D.D.C. 1994) (enforcing administrative subpoenas against former officers and directors of Home Savings Bank). If these affiliates are solvent, then this effort is unnecessary. If they ultimately file for bankruptcy, it is duplicative at best.

47. See *In re NBW Commercial Paper Litigation*, 826 F. Supp. 1448 (D.D.C. 1992).

48. Under the rule first stated in *D'Oench Duhme v. FDIC*, 315 U.S. 447 (1942), oral agreements between a bank and a borrower are not binding on the FDIC as receiver, should the bank fail. The Court in *D'Oench* was concerned that such oral agreements might be used to deceive bank examiners. For that reason, under the *D'Oench* doctrine, the FDIC is entitled to rely on the books and records of the failed bank. This power has been codified in part at 12 U.S.C. §§ 1821(d)(9) and 1823(e). For a discussion of the codification of *D'Oench*, see *NBW Commercial Paper Litigation*, 826 F. Supp. at 1456-67.

49. 11 U.S.C. § 362 (1994).

50. 980 F.2d 125 (2d Cir. 1992).

51. In *In re Colonial Realty*, the FDIC initiated a lawsuit in Florida to recover assets alleged

back on the trustee's investigation and avoidance efforts, or seek relief from stay.<sup>52</sup> Relief from stay will only be available, however, where the fraudulent transaction has previously been identified, and where the FDIC has sufficient information to explain why the transaction was an intentional fraud, not just a constructive fraud or preferential transfer.<sup>53</sup>

The end result is likely to be a double-whammy. The transfers won't be identified. Avoidance actions won't be brought, and the Charles Keatings of the world won't have to repay their ill-gotten gains. Indeed, even if the transfers are avoided, there is likely to be costly litigation over whether the FDIC's superpriority applies. As a result, the likely net effect of the superpriority will be to cause the FDIC to recover less, not more, for the insurance fund.

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to have been fraudulently conveyed by a debtor who had filed for bankruptcy in Connecticut. The FDIC argued that 12 U.S.C. §§ 1821(d)(17)-(19) exempted the FDIC from the operation of the automatic bankruptcy stay of 11 U.S.C. § 362. 980 F.2d at 127.

The court held that, while a fraudulent conveyance action was not itself property of the estate within the meaning of 11 U.S.C. § 541(a)(1), the Florida action was still subject to the automatic stay under U.S.C. § 362(a)(1) as an action "against the debtor." *Id.* at 131-32. The court rejected the argument that 12 U.S.C. §§ 1821(d)(17)-(19) worked an implicit partial repeal of 11 U.S.C. § 362, noting (1) that Congress had given "careful consideration" to the coordination of the banking law amendments with the existing provisions of the Bankruptcy Code and had made amendments where necessary; (2) that allowing the FDIC to proceed outside the bankruptcy case would place an undue burden on the bankruptcy trustee, who would be required to identify actions brought by the FDIC, and then seek to intervene; and (3) that the FDIC was free to seek relief from the automatic stay. *Id.* at 133-34. Also the court held that 12 U.S.C. § 1821(j), which provides that "no court may take any action . . . to restrain or affect the exercise of powers or functions of the [FDIC] as a conservator or receiver," did not preclude application of the automatic stay, because the stay arises by operation of law, not as an injunction issued by a court. *Id.* at 135-36.

52. Under the reasoning of *Colonial Realty*, even actions to recover property conveyed beyond the applicable statute of limitations might be barred, even though the trustee could not otherwise seek to avoid the transfer. Presumably, relief from stay would be appropriate here. 11 U.S.C. § 362(d) (1994). However, it might be argued that under 11 U.S.C. § 544(b) the trustee could assert the FDIC's right to avoid fraudulent conveyances accomplished as many as five years preceding the appointment of the FDIC as receiver. Under the rule of *Moore v. Bay*, 284 U.S. 4 (1931), the trustee can avoid the entire transaction for the benefit of the estate, and is not limited to the amount owed to the particular creditor. *See also* 11 U.S.C. § 544(b) (1994). As such, relief from stay might not be appropriate, in that the trustee would have rights to the remaining proceeds of avoidance once the FDIC's debt was repaid in full.

53. 11 U.S.C. § 362(d) sets out the two permissible bases for relief from stay: (1) lack of adequate protection; or (2) the debtor does not have any equity in such property and the property is not necessary to an effective reorganization. Only the second rationale is likely to matter. The argument over whether to lift the stay will force the court to determine at the outset of the preference litigation whether the claim is subject to the FDIC's superpriority.

### F. Integrating the FDIC's Superpriority into the Bankruptcy Code's Distribution Scheme

This is a terrible outcome, and one that could have been avoided had members of the drafting committee paid even minimal attention to integrating the FDIC's superpriority under § 1821(d)(17)(D) into the Bankruptcy Code's distribution scheme. As noted above, the Bankruptcy Code contains numerous group-specific priorities, for employees,<sup>54</sup> farmers and fisherman,<sup>55</sup> the IRS,<sup>56</sup> union members,<sup>57</sup> and retirees.<sup>58</sup> In each case, however, Congress took steps to ensure that Congress' redistributive decision did not operate to reduce the aggregate size of the estate.<sup>59</sup>

With the priorities contained in § 507(a) of the Bankruptcy Code, this integration is accomplished by ensuring that the administrative expenses of the estate are accorded top priority.<sup>60</sup> Under §§ 1113 and 1114 the Code's mechanism is somewhat more complicated. While these sections accord administrative expense priority to retiree medical benefits<sup>61</sup> and to certain wage claims of union members,<sup>62</sup> the Code mandates an ingenious (if complicated) bargaining process<sup>63</sup> under which (1) the absence of a similar priority under Chapter 7<sup>64</sup> creates a powerful incentive for employees who benefit from the priority under Chapter 11 to ensure the success of the reorganization, and (2) judicial review is available where no agreement can be reached.<sup>65</sup> Neither of these devices provides a blueprint for integrating the FDIC's

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54. 11 U.S.C. §§ 507(a)(3)-(a)(4).

55. 11 U.S.C. § 507(a)(5).

56. 11 U.S.C. § 507(a)(8).

57. 11 U.S.C. § 1113.

58. 11 U.S.C. § 1114.

59. Oddly, as the *Colonial Realty* court noted, the Crime Control Act itself contains provisions amending the priority scheme of the Bankruptcy Code. 980 F.2d at 132. Section 2522 of the Crime Control Act amends § 523 of the Bankruptcy Code to provide an exception from discharge for claims based on a failure to honor a commitment to maintain capital of an insured institution, and creates an eighth priority claim under § 507 for such claims.

60. 11 U.S.C. § 507(a)(1).

61. 11 U.S.C. § 1114(e)(1).

62. 11 U.S.C. § 1113.

63. The procedure for modifying collective bargaining agreements is set forth in subsections (b)-(f) of 11 U.S.C. § 1113. The procedure for modifying retiree medical benefit plans is set forth in subsections (f)-(k) of 11 U.S.C. § 1114.

64. 11 U.S.C. § 726 (1994).

65. 11 U.S.C. § 1113(c); 11 U.S.C. § 1114(g).

superpriority into the Bankruptcy Code's distribution scheme. The bargaining process used in §§ 1113 and 1114 is simply too cumbersome and bears no relation to the legislative goal of encouraging avoidance actions.<sup>66</sup> In addition, enacting a § 507 priority is imperfect, because the FDIC has a claim only to the proceeds of certain assets.

Instead, the most obvious solution to the problem created by § 1821(d)(17)(D) would be to grant the FDIC a lien on any recovery of an intentional fraudulent conveyance instead of a superpriority. The FDIC would then obtain an allowed secured claim under 11 U.S.C. § 506, and, under 11 U.S.C. § 506(c), the trustee could deduct the cost of recovering the conveyance from the proceeds otherwise payable to the FDIC, thereby preserving the trustee's incentive to investigate and pursue fraudulent conveyances. This proposed solution is not complete. It leaves open the possibility for litigation over whether a particular avoided transfer is an intentional fraud or merely a constructive fraud or preference. The need for this litigation could be further reduced, though not entirely eliminated, if the superpriority were construed to apply only to avoidance actions based solely on an intentional fraud theory which do not fall within any of the bankruptcy trustee's other avoiding powers (i.e. preferences or constructive fraudulent conveyances). This approach would leave intact the trustee's incentive to identify fraudulent conveyances and prosecute avoidance actions; it would eliminate the need for most litigation over the application of the priority; and, it would also accomplish at least some of the redistribution apparently desired by Congress.

While this solution is not perfect, it appears to approximate what Congress intended when it granted the FDIC its superpriority. However, this proposal is also inconsistent with the plain language of the statute, and therefore not a solution that can be adopted by judicial interpretation. No lien interest is created by § 1821(d)(17), and there is therefore no basis for treating the FDIC's claim as a secured claim under § 506.

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66. Both 11 U.S.C. § 1113 and 11 U.S.C. § 1114 are intended to ameliorate the hardship which would be inflicted on employees and retirees if the debtor were permitted to reject collective bargaining agreements and retiree medical benefit plans under 11 U.S.C. § 365 without being required to bargain. Section 1113 was enacted in response to the Supreme Court's decision in *NLRB v. Bildisco*, 465 U.S. 513 (1984). Thomas R. Haggard, *The Continuing Conflict Between Bankruptcy and Labor Law - The Issues that Bildisco and the 1984 Bankruptcy Amendments Did Not Resolve*, 1986 B.Y.U. L. REV. 1, 3-4. Section 1114 was enacted in response to the Supreme Court's decision in *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633 (1990). Keating, *supra* note 35, at 17-18.

## II. THE DANGERS OF LEGISLATING IN THE WAKE OF THE COLLAPSE OF AN IRON TRIANGLE—THE INADEQUACY OF DESTABILIZING SOLUTIONS

This wrongheaded superpriority could simply be dismissed as an example of bad statutory drafting. However, when placed in historical context, and viewed through the lens of interest group theory, a richer explanation emerges. This statute emerges as a paradigmatic and cautionary example of legislation enacted in the wake of the collapse of an iron triangle. To understand why this is the case, it is necessary to lay some groundwork: first, by explaining the term iron triangle and the problem that it presents for democratic theory; and second, by describing the iron triangle in the banking industry, its growth, and its collapse. Then it is possible to explain how the politics of the collapsed iron triangle caused both the passage of and the problems with the FDIC's fraudulent conveyance power; the statute is a product of the unchecked pursuit by legislators and regulators of their respective institutional interests, made possible by the exclusion of the regulated industry from the regulatory process.

### A. *The Collective Action Problem and Iron Triangles*

#### 1. Political Participation as a Public Good

The Madisonian vision of representative government articulated in Federalist 10<sup>67</sup> acknowledges the risk that any single arm of government is susceptible to control by faction (or to put it in modern parlance, susceptible to "capture"). In order to guard against this risk, Madison proposed a system of government premised on the principle of separation of powers.<sup>68</sup> By distributing power, various interests could pursue their goals in the political process, while the risk that any one interest or coalition of interests would gain control of all branches would be reduced. This perception has informed what has been described as the optimistic strand of pluralist theory, exemplified by the work of Robert Dahl.<sup>69</sup>

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67. THE FEDERALIST No. 10, at 77-84 (James Madison) (Clinton Rossiter, ed., 1961).

68. *Id.*

69. William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory For Statutory Interpretation*, 74 VA. L. REV. 275, 281 n.20 (1988). See ROBERT DAHL, A PREFACE TO DEMOCRATIC THEORY (1956). See also TRUMAN, *supra* note 14.

In his book *The Logic of Collective Action*,<sup>70</sup> Mancur Olson argues that this risk of faction may be more intractable than the early Federalists believed. Olson's insight goes to the very heart of the American aspiration to self government. The Madisonian vision is based on the conviction that given a proper set of checks and balances, representative government can be relied upon to govern in the public interest. Olson argues, however, that microeconomic principles dictate that the problem of faction will be much more pervasive and intractable than Madison, and pluralists inspired by the Madisonian vision, imagined.<sup>71</sup>

The problem for Olson begins with the problem of public goods. The market, he argues, if left to itself, will not provide the appropriate amount of a public good.<sup>72</sup> Public goods are defined as goods (a common example is a street lamp) for which (1) there is jointness of supply (in other words, the use of the resource by one consumer does not reduce the supply of the resource to another consumer); and (2) the benefits are non-excludable (all who use the thoroughfare benefit from the placement of the street lamp, regardless of whether they contributed to its construction).<sup>73</sup> Where these two conditions are met, even where the sum of the benefit to all consumers exceeds the cost of providing the public good (if even one accident or mugging is avoided, the street lamp will have paid for itself), the good will likely not be provided because each individual consumer, acting rationally, will seek to free ride (no individual driver is willing to bear the cost of the street lamp).<sup>74</sup> Without some method for compelling contributions, the public

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70. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (2d ed. 1971).

71. The concept of the collective action problem as a Madisonian nightmare is more fully developed in Eskridge, *supra* note 69, at 280.

72. OLSON, *supra* note 70, at 36 ("The larger a group is, the farther it will fall short of obtaining an optimal supply of any collective good, and the less likely that it will act to obtain even a minimal amount of such a good. In short, the larger the group, the less it will further its common interests.").

73. *Id.* at 14 n.21. Olson notes that the free riding problem may present itself even when the jointness of supply requirement is relaxed somewhat. *Id.*

74. This free rider problem has been likened to a prisoner's dilemma game. In the prisoner's dilemma, partners in crime are brought to the police station and interrogated separately. Each is faced with the following hypothetical set of alternatives. If both suspects cooperate with each other and refuse to confess to the crime, they will both go free. If one suspect confesses and the other refuses, the non-confessing suspect will serve 17 years, and the confessing suspect will serve one year. If both suspects confess, then both will serve 10 years.

good is either not provided or is underprovided.<sup>75</sup>

Olson takes this common sense example one step further: he notes that political participation is like a street lamp. Interest groups organize to further the objectives of their members in the political process. As Dennis Mueller has put it, "The commonality of the goals of an interest group's members makes the achievement of these goals a public good for the group, and thus gives rise to the same incentives to free ride as exist in all public good prisoners' dilemma situations."<sup>76</sup> Olson's work leads to two conclusions: "(1) It is easier to form an interest group when the number of potential members is small than when the number

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		Prisoner 1	
		Confess	Refuse to Confess
Prisoner 2	Confess	10, 10	1, 17
	Refuse to Confess	17, 1	0, 0

The rational suspect will look at this game and will recognize that both he and his accomplice face a similar incentive to confess. Acting rationally and strategically, he will confess himself, in the hope of getting the reduced sentence of 10 years and to avoid getting the longer sentence of 17 years, in the event that his accomplice acts rationally and confesses himself. As a result, both serve 10 years, when, if they had both refused to confess, they would both have gone free. Both players would benefit from cooperation, but each individual player acting rationally has an incentive to defect. MUELLER, *supra* note 4, at 9-15. See DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* (1994). For an excellent description of the role of the collective action problem in the development of bankruptcy law, see THOMAS JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* (1986) (arguing that resolving the collective action problem faced by creditors of an insolvent debtor is the sole purpose for the federal bankruptcy scheme); Douglas G. Baird, *Loss Distribution, Forum Shopping and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815 (1987). *But see*, Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 MICH. L. REV. 336 (1993) (the purpose of the bankruptcy scheme is to distribute the losses associated with business failure); Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775 (1987) (arguing same proposition).

75. MUELLER, *supra* note 4, at 13; OLSON, *supra* note 70, at 36, 50-51, 132-67.

76. MUELLER, *supra* note 4, at 308; OLSON, *supra* note 70, at 9-16 ("the achievement of any common goal or the satisfaction of any common interest means that a public or collective good has been provided for that group").

is large . . . [; and (2)] the appearance of organizations that effectively represent large numbers of individuals requires that 'separate and selective' incentive(s)' be used to curb free-riding behavior."<sup>77</sup>

## 2. The Logic of Iron Triangles

Once it is recognized that political participation is a public good, the development of iron triangles appears as an obvious consequence of the collective action problem, at least where a governmental program will benefit a concentrated group and the costs will be distributed over a relatively larger group. Thus, when Olson's insight is applied to the legislative and regulatory processes, it yields the prediction, amplified by Stigler,<sup>78</sup> Posner,<sup>79</sup> and others, that the regulatory process will become a mechanism for transferring benefits from large diffuse groups to smaller, well organized, groups. To put it in Olson's terms, "there is a systematic tendency for 'exploitation' of the great by the small."<sup>80</sup>

The iron triangle metaphor describes the way in which the collective action problem can allow concentrated interest groups to overcome the Madisonian system of checks and balances and yield a legislative process that is controlled, at least in certain areas, by either the benefitted group or regulated industry. Where the costs and benefits of a particular program are distributed asymmetrically (where the benefitted group is concentrated and the group bearing the costs is diffuse or vice versa), as in the context of government expenditures and government regulation, it is likely that the system of checks and balances will not prevent the capture of the legislative or regulatory process by the benefitted class or by the regulated industry. For example, where the relevant outcome of the political process is a defense expenditure, no individual taxpayer has an economic incentive to become involved in the appropriations process. Only the defense contractor has sufficient stake

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77. MUELLER, *supra* note 4, at 308 (characterizing OLSON, *supra* note 70, at 9-16, 22-65, 51).

78. Stigler, *supra* note 7, at 3 ("[R]egulation is acquired by the industry and is designed and operated primarily for its benefit").

79. Richard Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 86 (1969) (hereinafter Posner, *Federal Trade Commission*). See RICHARD POSNER, *THE ECONOMIC ANALYSIS OF LAW* 524-37 (4th ed. 1992) (hereinafter POSNER, *ECONOMIC ANALYSIS*). See also, Joseph D. Kalt and Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV. 279 (1984); Fred McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987).

80. OLSON, *supra* note 70, at 29. See MUELLER, *supra* note 4, at 309.

in the outcome to take an interest in the substance of legislation. Similarly, where the legislative output is a regulation, only the regulated industry has a sufficient stake to be a consistent player in the regulatory process.

An iron triangle develops when the regulated industry or benefitted group captures both the executive agency charged with regulating a particular industry or administering certain expenditure programs, and the relevant legislative committees. In the classic case, the agency is captured through the phenomenon of the "revolving door." The executive agency draws its officials from the regulated industry or benefitted group, while the regulated industry exercises power over the regulators by holding out the prospect of jobs in the private sector once the regulators' days of public service are over.<sup>81</sup> Similarly, capture of the legislative committee is accomplished through the selective application of political campaign contributions.<sup>82</sup> But, even in the absence of a revolving door or campaign contributions, the collective action problem suggests that a concentrated group will have disproportionate influence in the political process, because only where the costs or benefits of regulation are concentrated will individuals have sufficient incentive to participate.

## B. *The Collective Action Problem and the Iron Triangle in the Banking Industry*

### 1. The Iron Triangle and Bank Deregulation

It is not difficult to discern the influence of the regulated industry

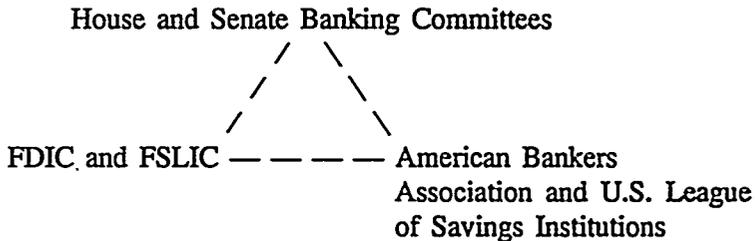
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81. ROBERT C. FELLMETH ET AL., *THE INTERSTATE COMMERCE OMISSION: THE RALPH NADER GROUP REPORT ON THE INTERSTATE COMMERCE COMMISSION AND TRANSPORTATION* 311-325 (1970), reprinted in Stephen Breyer & Richard B. Stewart, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 139 (2d ed. 1985) ("Job interchange levels between the ICC and industry have grown, with 'deferred bribes' becoming the norm. Many officials admit they receive job offers from industry while in government employ. In the past decade all but one Commissioner who has left the agency has ended up working for a carrier or a carrier association directly, or indirectly as an ICC Practitioner."); Posner, *Federal Trade Commission*, *supra* note 79, at 86 ("He [the staff member] will receive no bonus upon entry (or reentry) into private practice for the vigorous championing of the consumer interest. The gratitude of consumers . . . cannot be translated into a larger practice. On the other hand, the enmity of the organized economic interests . . . may do him some later harm.").

82. Posner, *Federal Trade Commission*, *supra* note 79, at 82 ("Congress is organized in a manner calculated to protect and foster parochial economic interests at the expense of the larger consumer interest . . . Moreover, in bidding for the favor of members of Congress, consumers are at a disadvantage in comparison with trade associations, labor unions, and other more familiar pressure groups.").

on the shape of bank deregulation during the 1980s, or to identify the participants in the iron triangle: the regulators in this instance were the FDIC and Federal Savings and Loan Insurance Corporation (FSLIC); the relevant legislators were those on the House and Senate banking committees; and the most evident lobbyists on behalf of the industry were the U.S. League of Savings Institutions and the American Bankers Association.<sup>83</sup>

Fig. 3  
THE TRIANGLE OF BANK REGULATION



Even at the outset, however, the federal insurance regime for savings and loans showed signs of industry influence on the regulatory scheme.<sup>84</sup> The rationale for bank regulation during the early 1930s was that excessive competition created instability in an industry where instability could lead to industry-wide collapse. Concern about the health of one institution could trigger a bank run and the failure of that institution.

Such runs were perceived to be contagious and to endanger the entire banking system. To deal with the problem of bank runs, Congress created the federal bank insurance scheme. However, when the FSLIC and FDIC were created, Congress rejected the normal insurance

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83. See *infra* text accompanying note 99. Financial regulation is certainly not the only area where the regulated industry has had significant effect on legislation. For a number of years, the Pentagon opposed the continued efforts to develop the V-22 Osprey helicopter (in their view it was crash prone and had no particular mission). Nonetheless, defense contractors managed to replace the program in the budget each year. *House Leader Fights Back on V-22*, DEF. DAILY, April 13, 1992, at 75. See also David H. Hackworth, *Rancor in the Ranks: The Troops vs. the President*, NEWSWEEK, June 28, 1993, at 24, 25 (“[Clinton] has wasted scarce defense dollars on pork like the unneeded Seawolf submarine, unflyable C-17 cargo aircraft and the accident-prone Osprey Helicopter.”).

84. LAWRENCE J. WHITE, *THE S&L DEBACLE* 55 (1991). See also Hammond & Knott, *supra* note 13, at 13; Robert C. West, *The Evolution and Devolution of Bank Regulation in the United States*, 17 J. ECON. ISSUES 361 (1983).

structure of risk based premiums, and chose instead to rely on a lower rate structure.<sup>85</sup> The rationale was that "tighter federal regulatory procedures would lessen future losses."<sup>86</sup> Toward this end, Congress placed restrictions on the types of investments that thrifts could make, limiting them to long term, fixed rate residential mortgages. To deal with the problem of excessive competition, federal and state regulatory agencies enacted regulation that expressly limited competition:

These restrictions (which usually applied at least as stringently to commercial banks) included: (1) a reluctance at both the federal and state levels to grant new charters to de novo entrants or even to grant applications for new branches to incumbent thrifts, where the new branch would encroach on another incumbent's territory; (2) limits by some states on the within-state geographic regions in which branching was permissible under any circumstances; (3) restrictions by virtually all states that made interstate branching impossible; and (4) a federal regulation that limited a thrift to making mortgage loans on properties that were no greater than fifty miles from the thrift's home or branch offices . . . .<sup>87</sup>

A cynical view would suggest that these restrictions were a product not of public-interested regulation, but of rent seeking<sup>88</sup> behavior by the industry, which received the benefits of restricted competition and artificially inexpensive insurance.<sup>89</sup> Regardless of the reasons, the system

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85. WHITE, *supra* note 84, at 55.

86. *Id.*

87. *Id.* at 59. "A justification that was frequently offered for these restrictions was that excessive competition among banks had been a contributory cause to the widespread failures of the early 1930s; hence, banks and thrifts had to be protected and prevented from competing too vigorously with one another." *Id.*

88. For a discussion of rent seeking, see MUELLER, *supra* note 4, at 229 ("The government can, for example, help create, increase, or protect a group's monopoly position. In so doing, the government increases the monopoly rents of the favored groups, at the expense of the group's products or services. The monopoly rents that the government can help provide are a prize worth pursuing, and the pursuit of these rents has been given the name of rent seeking.").

89. One such commentator put it this way:

Over the years the S&Ls developed an unusually cozy relationship with the regulators who were supposed to be watching over them. In fact, the S&Ls were put in charge of their own regulation. The twelve Home Loan Banks were actually *owned* by the thrifts themselves, even though they took the form of an arm of the government. In practice, nearly all the board members of these regulatory banks were thrift executives or people with close ties to the S&L industry, with no allegiance or obligation to the

worked for more than a generation. Savings and loans were by and large successful, *and* there were very few failures.<sup>90</sup> As one commentator has put it:

As a consequence of the financial regulations, features characteristic of cartels began to emerge. Under the regulated regime, banks and S&Ls achieved exceptionally high profit margins compared to other comparable-sized industries. High profit margins were combined with a low probability of business failure. Between 1944 and 1974 fewer than ten banks failed per year in the United States.<sup>91</sup>

The first major flaw in the regulatory scheme appeared during the mid-1960s. The principal business of savings and loans was "borrowing short and lending long."<sup>92</sup> Savings and loans would invest primarily in long term, fixed rate mortgages. They would fund these loans with short term obligations—typically demand deposits.<sup>93</sup> The problem inherent in this capital structure is that it is extremely sensitive to interest rate volatility. So long as interest rates remained stable or fell, savings and loans made healthy profits. However, when America's increasing involvement in the Vietnam war and constriction of the money supply by the federal reserve caused interest rates to rise,<sup>94</sup> thrifts found themselves borrowing at higher interest rates, with no corresponding increase in income from their investments (a 6% mortgage yields 6% even if the bank must pay 8% interest on passbook savings accounts).<sup>95</sup>

The first regulatory response was through the use of Regulation Q, which limited the rates on passbook accounts.<sup>96</sup> This approach worked until the mid 1970s when interest rates rose so high that savings accounts were no longer attractive investments and depositors started

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taxpayer.

WALDMAN, *supra* note 3, at 18.

90. WALDMAN, *supra* note 3, at 18; White, *supra* note 84, at 61.

91. Hammond & Knott, *supra* note 12, at 14.

92. WHITE, *supra* note 84, at 61.

93. *Id.*; see also WALDMAN, *supra* note 3, at 15.

94. Hammond & Knott, *supra* note 12, at 15 ("In the late 1960s the . . . Federal Open Market Commission (FOMC), became concerned about the inflationary potential of the Vietnam war and the growing domestic expenditures for social welfare. The FOMC decided to squeeze credit out of the banking system . . . . The FOMC did this in 1966 and 1969 by raising the discount rate . . . .").

95. WHITE, *supra* note 84, at 61.

96. *Id.* at 62-65; Hammond & Knott, *supra* note 12, at 15.

moving their money elsewhere, in particular to money market mutual funds, which bore interest and had limited check writing privileges.<sup>97</sup>

The regulatory response to the interest rate squeeze of the 1970s was the deregulation of the late 1970s and early 1980s. Regulators removed the restrictions on the types of investments that thrifts could make, lowered net capital requirements, expanded the protection of deposit insurance, and liberalized accounting rules.<sup>98</sup> This move to deregulate started during the Carter administration and gathered momentum as a result of the first Reagan administration's generalized efforts to deregulate.<sup>99</sup> But, an important reason for the success and shape of the deregulation program was the effort expended by the S&L lobby to win over key legislators. For example, during the 1980s, the S&L lobby contributed over \$200,000 to the campaigns of Senator Don Riegle, a member, and later chairman, of the Senate Banking Committee.<sup>100</sup> Former FSLIC director Peter Stearns once commented, "The Bank Board doesn't regulate anything unless the U.S. League and the top S&Ls agree."<sup>101</sup> As a result, deregulation occurred without regard to the facts that: (1) insured deposits were involved, and (2) the insurance regime did not rely on risk based premiums. Little existed in the new regulatory structure to force the newly deregulated thrifts to internalize

97. Nicole Fradette et al., *Project: Regulatory Reform: A Survey of the Impact of Reregulation and Deregulation on Selected Industries and Sectors*, 47 ADMIN. L. REV. 461, 643-664 (1995).

98. WHITE, *supra* note 84, at 72-90. One other aspect of deregulation occurred in the early 1970s: the relaxation of the rules regulating who could own an S&L. WALDMAN, *supra* note 3, at 21.

99. Some commentators have suggested that the deregulation of the late 1970s and early 1980s disproves the economic model of regulation. See DERTHICK & QUIRK, *supra* note 2, at 26-27. At least in the banking industry, however, this does not appear to be the case. A number of authors have offered explanations which suggest that the deregulation in the banking industry was more a product of the iron triangle than its refutation. Michael Waldman shows that the industry lobbied heavily for the passage of the Garn-St. Germain bill, the principal legislation deregulating the industry. WALDMAN, *supra* note 3, at 50-67. Hammond and Knott discuss a process they describe as a "deregulatory snowball" which occurred in the financial services sector. As they put it:

[e]conomic and technological change, coupled with important legal decisions, reduced the value of the regulatory status quo for many regulated firms and provided outside competitors with incentive and opportunity to enter the industry. Initial changes in regulation put pressure on other regulations, and these too were modified. Still other regulations now became critical, and pressure to modify these [began to build].

HAMMOND & KNOTT, *supra* note 13, at 22. See also, HELEN A. GARTEN, WHY BANK REGULATION FAILED 1-20 (1991).

100. WALDMAN, *supra* note 3, at 61.

101. *Id.* at 64.

the costs associated with making risky investments.<sup>102</sup> Indeed, the new regulatory regime unintentionally encouraged troubled thrifts to gamble with taxpayers' money. The more losses increased, the more the bankers were encouraged to make increasingly risky investments in the hope of returning the institution to profitability.

The end of this story is well known. The failure of deregulation created a crisis in the thrift industry that is still being resolved.<sup>103</sup> The failures of savings and loans during the late 1980s depleted and ultimately destroyed the FSLIC, and forced the recapitalization of the bank insurance fund at taxpayers' expense.

## 2. *The Bank Bailout and the Collapse of the Iron Triangle*

If the metaphor of the iron triangle explains the development of the bank regulatory scheme prior to the bank bailout, that metaphor remained apt through the early stages of the bailout as well.<sup>104</sup> However, as the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") moved toward passage,<sup>105</sup> and certainly by the time Congress enacted the Crime Control Act of 1990,<sup>106</sup> the new metaphor had become legislation in the wake of a collapsed iron triangle.

Michael Waldman notes that by the time FIRREA made its way through the House of Representatives, public attention had focused on the crisis in the thrift industry, and "the mood of the House [had] swung to a new unaccustomed stance: being *tough* on the S&Ls."<sup>107</sup> When Congress returned to the field a year later to enact the Crime Control Act of 1990, the terms of the discussion had shifted; the focus was on punishing the industry and recovering assets. The House Report begins:

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102. WHITE, *supra* note 84, at 67-82.

103. For accounts of the crisis in the thrift industry see, KATHLEEN DAY, *S&L HELL* (1993); EDWARD J. KANE, *THE S&L INSURANCE MESS: HOW DID IT HAPPEN?* (1989); PAUL Z. PILZER, *OTHER PEOPLE'S MONEY: THE INSIDE STORY OF THE S&L MESS* (1989); STEPHEN PIZZO ET AL., *INSIDE JOB: THE LOOTING OF AMERICA'S SAVINGS AND LOANS* (1989).

104. WALDMAN, *supra* note 3, at 102-117.

105. *Id.* at 109 ("By the time the legislation reached the House floor, a full fledged stampede against the S&Ls was underway.")

106. *Id.* at 109, 116.

107. *Id.* at 116. FIRREA passed in August of 1989, shortly before the depth of the savings and loan crisis was understood. Congress had not yet begun investigating Lincoln Saving, and the names of the Keating Five were not yet familiar to the American public. By 1990, Congress had a much greater public relations problem on its hands. See *supra* note 18.

The Purpose of Title XXI, Banking Law Enforcement, is to enhance the enforcement powers of the Department of Justice and the Federal financial institution regulatory agencies with respect to unlawful activities affecting federally insured financial institutions . . . . Since last August, when [FIRREA] became effective, the losses from failed financial institutions have ballooned. Reports of criminal activity and grossly excessive behavior that led to the dramatic decline of the savings and loan industry have proliferated. *Title XXI responds to the public outcry to bring to justice those who defrauded the savings and loan industry* by providing Federal regulating agencies, Federal prosecutors, and law enforcement agencies with additional tools to combat fraud and abuse affecting financial institutions.<sup>108</sup>

The iron triangle had disintegrated.

Thus, the Crime Control Act can be viewed as legislation enacted in the wake of a collapsed iron triangle. As such, it offers an opportunity to test the wisdom of the proposed destabilizing solutions to the problem of the iron triangle.

*C. Legislating in the Wake of a Collapsed Iron Triangle: Enhancing the Principal/Agent Problem as a Result of Reduced Participation*

Given the amount of criticism that has been directed at the bank regulatory scheme, it might appear to be an unequivocally good thing to reverse the trend, smash the iron triangle, and exclude the regulated industry from the regulatory process. However, the FDIC's superpriority under 12 U.S.C. § 1821(d)(17)(D) demonstrates that legislation in the wake of a collapsed iron triangle has its own peculiar set of risks.

These risks are of two types. The first is an increased risk of principal/agent problems. When an iron triangle collapses, there is an increased risk that either Congress or the agency will go unchecked in pursuing its respective institutional interests, rather than the public interest generally. Second, there is an increased risk of substantive mistake which results from reduced participation by the industry. Both risks are plainly manifested in the superpriority granted to the FDIC as part of the Crime Control Act.

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108. H.R. REP. No. 681, 101st Cong., 2d Sess., pt. 1, at 170-1 (1990) (emphasis added).

## 1. The Principal/Agent Problem—Players and Their Goals

The principal/agent problem in administrative law can be viewed from either of two related perspectives: some scholars focus on the problem of agency control by the electorate, while others focus on the control of the agency by the executive or Congress.<sup>109</sup> The iron triangle is problematic on both fronts. By concentrating influence in the regulated industry, it undercuts presidential and congressional control of the bureaucracy, and it causes regulation to diverge from the public interest.

To understand the effect of this principal/agent problem on the shape of the FDIC's fraudulent conveyance power as enacted, it is necessary to identify the players responsible for its enactment and to detail how their peculiar interests contributed to the enactment of the FDIC's ill-conceived superpriority. After the collapse of the iron triangle, the major relevant players were the FDIC and the House and Senate banking committees. Noticeably absent from the table were the banks and the banking industry.<sup>110</sup>

### a. *The FDIC—Protect the Fund*

William Niskanen's "iron law of bureaucracy" posits that agencies act to maximize their budgets.<sup>111</sup> Peter Swire has argued persuasively, however, that where the FDIC is concerned, a slight twist is necessary.<sup>112</sup> The FDIC, he suggests, learned from the demise of FSLIC that the key to institutional survival is to maximize and protect the insurance fund rather than its budget per se.<sup>113</sup> The FDIC's legislative goal, Swire asserts, is to protect the fund by shifting the cost of bailing out failed banks to other sources.<sup>114</sup>

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109. See *supra* note 17 and accompanying text.

110. Peter Swire has suggested that the FDIC's superpowers in the bank insolvency regime can be traced to a desire by the FDIC to protect the insurance fund and a desire by Congress to hide the costs associated with financing the bank bailout. Swire, *supra* note 39, at 521. While Swire does not discuss the FDIC's superpriority in fraudulent conveyance recoveries, this superpriority fits comfortably within his analysis.

111. WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 36-41 (1971).

112. Swire, *supra* note 39, at 521.

113. Swire points out that if the FDIC were seeking to maximize its budget, it might be expected to seek to hold and manage properties, rather than selling them off as quickly as possible. *Id.* at 523.

114. *Id.* at 521-5.

b. *Congress—Shoot the Bad Guys*

While the FDIC seeks to protect the insurance fund, members of Congress seek to protect their jobs. Legislators seeking reelection<sup>115</sup> seek to take credit for positive outcomes and to avoid responsibility for policy failures.<sup>116</sup>

When this model of legislative self-interest is applied to the politics of the bank bailout, it suggests an interesting set of motives. Legislators wish to ensure simultaneously (1) that they take none of the blame for the banking crisis, and (2) that they are identified with the solution. In other words, first, legislators will seek to deflect attention from the deregulation of the thrift industry and FIRREA, as causes for the current crisis in the banking industry. Who better to blame than the Charles Keatings of the world?<sup>117</sup> Second, once the scapegoat has been identified, legislators will choose a legislative strategy which purports to shift the costs to the scapegoat but in fact shifts the costs to anyone but the voters in their district (at least not in a traceable way) (i.e., no new taxes to prop up the insurance fund).

In the case of the FDIC's superpriority, the interests of the FDIC and Congress complemented each other extremely well. Both the FDIC and the Congress wanted to shift the costs of the bank bailout. Further, they wanted to ensure both that the blame for the problem landed on the so called "thrift kingpins," and that the cost of the solution rested,

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115. Eskridge, *supra* note 69, at 288 (1988) ("Public choice theory argues that legislative behavior is driven by one central goal — the legislator's desire to be reelected."). See MORRIS P. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* (1977) (arguing that the primary goal of the typical member of Congress is reelection); DAVID MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974) (characterizing the modern Congress as an assembly of professional politicians seeking continual reelection). Legislative self interest is not the only force which motivates legislators. Judge Mikva has argued convincingly that most legislators at least think they are legislating in the public interest. Abner J. Mikva, *Foreword*, 74 VA. L. REV. 167 (1988). But where an iron triangle has collapsed, or has been smashed, concern about reelection is likely to loom particularly large for legislators associated with the failed regulatory regime. See *supra* note 18.

116. Swire, *supra* note 39, at 526-27 (citing R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* (1990)). The three elements that make a position traceable are (1) a perceptible effect (i.e., does the position affect the voters); (2) an identifiable government action; and (3) a visible contribution by the legislator.

117. Representative Frank Annunzio, the chairman of the House Subcommittee on Financial Institutions and a well known friend to the S&L industry, found himself in a particularly tight race while the Crime Control Act was pending in Congress. He took to wearing a lapel pin which read "Jail the S&L Crooks." He was reelected. Paul Starobin, *Beyond the Bailout*, 22 NAT'L J. 2238 (1990); Janet Hook, *On the Hill: Unencumbered*, NEW REPUBLIC, Dec. 3, 1990, at 13.

or at least appeared to rest, on these bad guys. The effects of this alliance are evident in language from the legislative history of the Crime Control Act, which cites criminal activity as the cause for the crisis and offers shooting the bad guys as the solution. The effects of this alliance are also apparent in the substance of the FDIC's superpriority. The redistribution caused by the superpriority can be seen as a hidden tax passed in order to help fund the bank bailout.

While critics of the iron triangle focus on rent seeking by the regulated industry, it is easy to forget that the agency and the legislators each have their own interests as well, which may or may not coincide with the public interest. These distinct interests do not miraculously converge with the public interest just because one of the participants in the triangle has disappeared. Under this view, the FDIC's superpriority can be seen as the product of legislators and regulators pursuing their own institutional interests, rather than the public interest *per se*.

## 2. Reduced Participation—A Failure of Pluralism

Legislation in the wake of the collapse of an iron triangle presents yet another more troubling risk: the risk of reduced participation. As discussed above, the iron triangle is a problem of pluralism. As a result of the collective action problem (discussed *supra* part II.A), and of the fact that the regulated industry is a concentrated group, while the public is diffuse, the iron triangle is attributable to too little participation in the political process by affected groups. Therefore, weakening any one leg of the triangle or excluding an affected group from the regulatory process is likely to make this problem worse. While the critics of the iron triangle focus on mutual back scratching, the iron triangle also facilitates mutual oversight of legislation; this quality control mechanism is weakened when one leg of the triangle is eliminated.

Here, because the banks were perceived as the principal proponents of bank deregulation—a product of the iron triangle in the early 1980s—they had little leverage in the negotiations over how the problems that deregulation created would be resolved. Where smashing the iron triangle means that fewer groups will be at the table, the result may be to eliminate a check on the agency and the legislators, and to reduce the amount of scrutiny that the legislation receives. When this is recognized, a collapsed iron triangle looks not like an improvement, but instead like a new, and perhaps worse, failure of the political process.

The legislative history of the Crime Control Act provides support for this hypothesis. In an earlier draft of the legislation, the FDIC was

given a similar priority over all private claimants in suits against the officers, directors, attorneys, accountants, and other employees and agents of a failed depository institution (the "O&D Priority"). However, both Republican and Democratic members of Congress noted that the O&D Priority would eliminate the incentive to bring private suits and would lead to underenforcement. The provision was removed.<sup>118</sup> Indeed, although it never made it through the House of Representatives, the Senate adopted the O&D Priority three times: in its versions of FIRREA in 1989;<sup>119</sup> in the Omnibus Budget Reconciliation Act of 1990;<sup>120</sup> and in its version of Title XXV of the Crime Control Act of 1990.<sup>121</sup>

Thus, the desire to protect the fund and shift the cost of the bank bailout generated two equally ill-considered superpriorities. Where the superpriority was aimed at a group which could organize easily to challenge legislation—lawyers who bring shareholder derivative suits—the problem with the statute was identified in Congress. Where, by contrast, the affected group was the diffuse group of general unsecured creditors in unspecified bankruptcies, whose best organized representative is the banking lobby,<sup>122</sup> which was viewed as the cause of

118. The House Report notes:

During the House Judiciary Committee's consideration of H.R. 5269, the Committee rejected by a voice vote an amendment that would have changed current law and given the Resolution Trust Corporation and the Federal Deposit Insurance Corporation a priority over all private claimants in suits against the officers, directors, attorneys, accountants, and other employees and agents of a failed depository institution. A similar priority provision was rejected last year by the House-Senate conference on the Financial Institutions Reform, Recovery, and Enforcement Act of 1989. Subsequently, the United States Court of Appeals for the Eleventh Circuit rejected the Federal Deposit Insurance Corporation's argument that such a priority exists under current law. *Members of the Judiciary Committee on both sides of the aisle who opposed the amendment noted that the effect of such a provision would be to eliminate private rights of action, which in turn would lead to more savings and loan fraud and ultimately a higher cost to the American taxpayer.* Such a provision, therefore, has not been included . . . .

H.R. REP. No. 681, 101st Cong., 2d Sess., pt. 1, at 170-71 (1990) (emphasis added). For an excellent discussion of the history of this provision, see Samantha Evans, Note, *An FDIC Priority of Claims Over Depository Institution Shareholders*, 41 DUKE L.J. 329, 359-66 (1991), and compare *Gaff v. FDIC*, 919 F.2d 384 (6th Cir. 1990), *reh'g granted*, 933 F.2d 400 (6th Cir. 1990) (holding that the FDIC's claims against bank officers and directors had priority over stockholders' direct claims against officers and directors) with *FDIC v. Jenkins*, 888 F.2d 1537 (11th Cir. 1989) (holding that the FDIC was not entitled to absolute priority over other claims).

119. S. 774, 101st Cong., 1st Sess. § 214(o) (1989).

120. S. 3209, 101st Cong., 2d Sess. § 2006 (1990).

121. S. 3194, 101st Cong., 2d Sess. § 208 (1990).

122. While the creditor's lobby is not usually without power, see Robert E. Scott, *The Politics*

the problem, no effective opposition materialized, and the problem with the statute was not identified.

Because of a lack of opposition, the FDIC got what it asked for in the Crime Control Act. However, due to the same lack of opposition, the FDIC failed to realize that because of sloppy drafting, it was shooting itself in the foot. If the banks had been present at the drafting table, it is likely that they too would have pointed out that the FDIC's superpriority would lead to both reduced enforcement of fraudulent conveyance laws (the same infirmity in the statute that was raised by opponents of the O&D Priority) and to reduced recoveries for the FDIC.

#### D. *The Inadequacy of Destabilizing Solutions: Conclusions*

The phenomenon of the iron triangle constitutes a distortion of the political process and creates an opportunity for rent seeking. The preceding analysis suggests the inadequacy of the solutions suggested by those who would solve the problem by weakening one or another leg of the triangle.<sup>123</sup> The history of the FDIC's priority in fraudulent conveyance recoveries reveals that such solutions may make the problem worse in two important respects: (1) there is a greater risk that weakening one leg may make it easier for the remaining participants in the regulatory process to pursue their own institutional or parochial interests; and (2) because the number of participants in the regulatory process is reduced, a check is eliminated and the risk of substantive

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of Article 9, 80 VA. L. REV. 1783, 1807 (1994) (explaining the influence of financial institutions on the revision to Article 9 of the Uniform Commercial Code), for the reasons discussed above, they had little leverage in the negotiations over the shape of the Crime Control Act.

123. While this example only applies to efforts to exclude the regulated industry from deliberations, concern about enhancement of the principal/agent problem as a result of reduced participation applies equally to weakening the committee structure, by enacting term limits. Indeed, there may be additional concerns. It is also likely that inexperienced legislators will be forced to rely on more experienced professional committee staff, and the lobbyists themselves for guidance through complex regulatory schemes. The effect here too might be to exacerbate, rather than eliminate the problem.

error is increased. It is therefore more likely that statutes will be enacted that are in nobody's best interest, and it is also more likely that these statutes will not work properly.

### III. CONCLUSION

What can be done to remedy the problem of iron triangles? The destabilizing solutions discussed above create their own set of problems and may do more harm than good. There is substantial literature on whether judicial review<sup>124</sup> and statutory interpretation<sup>125</sup> can provide a solution to the problem of regulatory capture. An evaluation of this literature is beyond the scope of this article. Indeed, the jury is still out over whether any of these approaches are justified or workable.<sup>126</sup> More importantly, judicial review is at best a corrective; it does not fix the process which created the problematic legislation in the first place.

If the destabilizing proposals discussed here are not a solution, and if judicial review is a second best solution, the only practical response, short of abandoning the regulatory enterprise entirely, may have to be twofold: Madisonian and pluralist on the one hand; and, for lack of a better term, Burkean<sup>127</sup> on the other.

On the Madisonian/Pluralist side, if there is to be any hope for regulation and legislation in the public interest, it is necessary for legislators and regulators to recognize the risks associated with legislating in

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124. Richard Epstein advocates searching judicial review under the Takings and Contract Clauses of the Constitution in order to curb rent seeking. RICHARD A. EPSTEIN, *TAKINGS* (1985). See also BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 265-303 (1980) (proposing heightened judicial review of regulations). Cass Sunstein has argued that heightened constitutional scrutiny should be applied to legislation which effectuates transfers to powerful political groups. Cass R. Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.*, 29, 69-72 (1985); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 *COLUM. L. REV.* 1689 (1984).

125. Eskridge, *supra* note 69, at 303-309 (statutes should be narrowly construed when the benefits are received by a concentrated, well organized group, and the costs are borne by a diffuse, disorganized group, and vice versa); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 *COLUM. L. REV.* 223, 230-31 (1986) (statutes should be construed in light of their public regarding purpose in order to limit the effect of capture); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 *HARV. L. REV.* 405, 471 (1989) (advocating narrow construction of statutes which represent interest group transfers).

126. See Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 *YALE L.J.* 31 (1991).

127. In Burke's view, legislators should act in the public interest, rather than according to the interests of their constituents. Edmund Burke, *Speech to the Electors of Bristol*, in 2 *THE WORKS OF EDMUND BURKE* 89, 95-97 (3d ed. 1869).

the wake of the collapse of an iron triangle and to seek to ensure that all affected groups are active participants in the legislative and regulatory process. Recent experiments at the agency level with regulatory negotiation may be on the right track, with their effort to reduce the cost and increase the effectiveness of early participation in the rulemaking process.<sup>128</sup> Similar efforts might be made by House and Senate subcommittees as well.

Perhaps the most important lesson of interest group theory, however, is that it is impossible to rely on the interplay of interest groups to identify the public interest, particularly when a previously stable regulatory scheme has collapsed. The political process cannot, by itself, do the work of the legislator, or for that matter, the legislature. The second response is thus Burkean: one must put procedure and interest group theory to the side and focus on substance. Legislators and regulators must recognize that there is a danger in consensus, whether it is as a result of an iron triangle or of a collapsed iron triangle. It can breed bad drafting. Where there is no opposition, and therefore no discussion, there is a greater likelihood that the governing coalition may err. Such errors may be costly. Disorganized groups who are harmed by a statute may later organize and express their anger at the polls (thereby achieving a solution, although delayed, and at considerable institutional cost).

Therefore, even purely self-interested legislators who wish to ensure

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128. The Negotiated Rulemaking Act of 1990, 5 U.S.C. §§ 561-570 (1994) establishes procedures under which an agency, prior to beginning a rulemaking proceeding under the Administrative Procedures Act, can conduct a regulatory negotiation, or "reg neg." The agency identifies representatives of the interests who are likely to be affected by a proposed rule and invites them to participate in a negotiation over the final shape of the regulation. This process has certain advantages. By identifying affected groups and bringing them into the process early, the cost of participation may be reduced, and the effectiveness of participation may be increased. There are risks associated with regulatory negotiation as well. For example, it must be recognized by the regulators that agreement and consensus are not necessarily the goals of regulation. If consensus is sought rather than regulation in the public interest, then regulatory negotiation may become yet another way of facilitating capture. However, to the extent that it is used to increase the number of affected groups whose views are considered, and to reduce the costs of that participation, regulatory negotiation may be a useful innovation. See OFFICE OF THE VICE PRESIDENT, ACCOMPANYING REPORT OF THE NATIONAL PERFORMANCE REVIEW: IMPROVING REGULATORY SYSTEMS 29-33 (1993). For a critical discussion of regulatory negotiations, see Susan Rose-Ackerman, *Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation*, 43 DUKE L.J. 1206 (1994) (noting the limitations of regulatory negotiations and proposing structural incentive-based reform). For contrasting perspectives on regulatory negotiation, compare Henry H. Perritt, *Negotiated Rulemaking and Administrative Law*, 38 ADMIN. L. REV. 471 (1986) (emphasizing the positive features of regulatory negotiation) with William Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest—EPA's Woodstove Standards*, 18 ENVTL. L. 55 (1987) (offering an example of regulatory negotiation run amok).

that their votes are only traceable to good (or popular) outcomes must recognize the risks associated with legislating in the wake of a collapsed iron triangle. They must make particular efforts to seek participation by affected groups, *and* they must pay closer attention to the substance of the legislation. Only then will the quality of regulation improve.