The Court Giveth and Congress Taketh Away: Statutory Preemption and the Federal Common Law D'Oench Doctrine

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This article examines the continued validity of the federal common law component of the D'Oench powers after the O'Melveny and Atherton decisions, concluding that by enacting Section 1823(e), Congress has preempted the D'Oench rule and the courts should no longer treat D'Oench as good law.

INTRODUCTION

The late 1980's saw the largest bank failures in the history of the United States.1 In 1984, the nation suffered "the greatest bank run in history" when Continental Illinois National Bank collapsed.2 The total bailout of Continental Illinois cost around $15 million, $4 million of which came from the federal government.3 Additionally, nearly one-third of the Savings and Loan institutions in existence in 1980 failed or reached insolvency by the early 1990's, resulting in costs to the American taxpayer estimated at $500 billion.4 Due to fears that the federal government's bank insurance fund would soon run out of money as a result of bailing out the failed institutions,5 the Bush administration, in 1991, requested that Congress increase the borrowing authority of the Federal Deposit Insurance Corporation ("FDIC" or "Corporation"), the entity which man-

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3 Id.
4 Id.
ages the fund, to $70 billion. Currently, because the FDIC seems to be in dire financial straits itself, some observers fear the Corporation may not be closing banks which are economically insolvent, eventually resulting in more bailouts at taxpayer expense.

The FDIC acts as the federal government's primary agent in dealing with failed financial institutions. The Corporation insures monies deposited in member institutions and acts as receiver when these institutions fail. When a bank or other institution becomes insolvent, the FDIC, as receiver, has the duty of sorting out the bank's assets and liabilities. In collecting assets or paying off liabilities, the Corporation often encounters agreements between the failed banks and third parties that have no documentation in the records of the institution. These agreements sometimes have great significance for the receivership process, by either forming a defense by which debtors may relieve themselves from paying their obligations or providing the basis for an action to collect damages from the Corporation. Obviously, such undocumented agreements could potentially cost the FDIC enormous sums of money by preventing the collection of outstanding debts owed to the bank or by requiring the Corporation to pay damages for the fraudulent actions of the failed institution. Increased costs to the FDIC result in increased costs to taxpayers.

The Corporation's primary tools in limiting such costs are the D'Oench powers, a set of federal common law and statutory rules designed to prevent claims and defenses based on undocumented agreements from being raised against the FDIC. The heart of the D'Oench powers, the 1942 D'Oench Supreme Court decision, initially sought to protect the FDIC from

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7 Id. at 11.
8 See Swire, supra note 5, at 481 (explaining that FDIC is now exclusive receiver for both banks and thrifts).
10 Id.
11 See Fred Galves, Might Does Not Make Right: The Call for Reform of the Federal Government's D'Oench, Dubme and 12 U.S.C. § 1823(e) Superpowers in Failed Bank Litigation, 80 Minn. L. Rev. 1323, 1341 (1996) ("Such claims and defenses usually are based on either (1) alleged verbal side agreements or special arrangements the borrower made with the institution, or (2) the borrower's alleged reliance on negligent or intentional verbal misrepresentations made by the institution.").
12 The D'Oench powers are named after the 1942 Supreme Court case creating the federal common law rule that forms the basis of the powers: D'Oench, Dubme & Co. v. FDIC, 315 U.S. 447 (1942). See infra notes 32-56 and accompanying text (discussing the facts and holding of the D'Oench decision).
collusive agreements, fraudulent misrepresentations, or other hidden trans-
actions that tended to mislead the Corporation. The Court in that case
prohibited the maker of a note acquired by the FDIC from raising, as a
defense to payment, a secret agreement intended to deceive a bank exam-
iner about the actual assets of the failed bank. The purpose of the rule
was to prevent the FDIC from relying on inaccurate records, thereby pro-
tecting the public funds administered by the Corporation. Eight years after
the D'Oench decision, Congress enacted 12 U.S.C. § 1823(e) to accomplish
the same purpose.

Because both the statute and the common law doctrine address
the same issue and accomplish the same purpose, the statute should act as
the source of authority regarding that issue. In the years since the Court
fashioned its common law rule, however, that rule has not only been relied
on but has also been broadened by the federal courts. Moreover, despite
the apparent codification of the common law rule in FIRREA, the courts
continue to push the common law rule to apply in contexts where the statute
would not. By prohibiting all claims and defenses based on agree-

11 Galves, supra note 11, at 1327-28. The statutory component of the D'Oench powers reads, in relevant
part, as follows:

"(e) Agreements against interests of Corporation

(1) In general
No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under
this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository
institution, shall be valid against the Corporation unless such agreement—

(A) is in writing,

(B) was executed by the depository institution and any person claiming an adverse interest thereunder, including
the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(C) was approved by the board of directors of the depository institution or its loan committee, which approval shall
be reflected in the minutes of said board or committee, and

(D) has been, continuously, from the time of its execution, an official record of the depository institution."

12 U.S.C. § 1823(e)(1)(1994). The statute was first enacted in 1950 as part of the Federal Deposit Insurance
Act, ch. 967, 64 Stat. 873, 889 (1950)(codified at 12 U.S.C. § 1823(e)(1)(1994)). The statute was made a part
of the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) by Pub. L. No. 101-73, 103
Stat. 183 (1989). FIRREA also provided that "any agreement which does not meet the requirements set
forth in section 1823(e) of this title shall not form the basis of, or substantially comprise, a claim against

13 D'Oench, Dubne & Co., 315 U.S. at 460.
14 Id.
15 See id. ("The test is whether the note was designed to deceive the creditors or the public authority or
would tend to have that effect. It would be sufficient in this type case that the maker lent himself to a
scheme or arrangement whereby the banking authority on which respondent relied in insuring the bank
was or was likely to be misled."

17 While most commentators refer to § 1823(e) as a codification of the rule established in the D'Oench case,
many courts consider the statute to be a separate and distinct line of authority. See, e.g., Motorcity of
Jacksonville, Ltd. v. Southeast Bank, N.A., 120 F.3d 1140, 1143 (11th Cir. 1997) (holding that Congress did
not intend FIRREA to displace D'Oench doctrine); Young v. FDIC, 103 F.3d 1180, 1187 (4th Cir. 1997) ("The
common-law doctrine and the statute remain separate and independent grounds for decision.").

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ments not documented in bank records, the *D'Oench* doctrine places the FDIC in a more advantageous position than the banks it takes over. Although the purpose of protecting the FDIC against misleading records, and thereby reducing the costs to taxpayers, remains fully in tact through § 1823(e), the courts have consistently broadened the Corporation’s protection through the common law rule at the expense of innocent borrowers.

Recent developments suggest, however, that the judicial utilization and expansion of the *D'Oench* doctrine may be at an end. The Supreme Court has recently handed down a pair of decisions that call the continued validity of *D'Oench* into question. Some lower courts, relying on these precedents, accordingly have held that the common law prong of the doctrine has been displaced by congressional action. Other courts, however, maintain that *D'Oench* has not been preempted. The resolution to the preemption question will vitally impact the FDIC’s rights and powers in relation to failed banks and their borrowers. If the federal common law no longer forms valid authority, the FDIC could face a loss in its funds as certain claims and defenses not allowed under *D'Oench* suddenly become valid because they are not barred by the specific text of § 1823(e).

This Article examines the continued validity of the federal common law component of the *D'Oench* powers after the *O'Melveny* and *Atherton* decisions, concluding that by enacting § 1823(e), Congress has preempted the *D'Oench* rule and the courts should no longer treat *D'Oench* as good law. Part II.A discusses the background of the *D'Oench* decision, paying special attention to the original case, the federal common law issues surrounding it, and the judicial expansion of the common law rule. Part II.B

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19 See Young, 103 F.3d at 1187 (observing that *D'Oench* doctrine “now applies virtually to all cases where the FDIC is confronted with an agreement not documented in the institution’s records.”). Sen. William S. Cohen remarked that the *D'Oench* doctrine was invoked in 5,145 instances between 1989 and 1995, resulting in the dismissal of ninety-seven percent of the claims filed against the FDIC. *The D'Oench, Dubme Reform Act: Hearings Before the Senate Comm. on Banking, Hous., and Urban Affairs,* 104th Cong. 2 (1995)(statement of Sen. William S. Cohen).

20 See Ira Blumberg, *Borrower Prepare: D'Oench Maps the Escape from the Dungeon of Dubme,* 14 *Ann. Rev. Banking L.* 269 (1995)(’In particular, when a bank fails, the FDIC can collect money from the bank’s borrowers even when the bank itself would have been powerless to collect.’). *Atherton v. FDIC,* 117 S. Ct. 666 (1997); *O'Melveny & Myers v. FDIC,* 512 U.S. 79 (1994).

21 Eg., *DiValle Insured Income Fund Ltd. Partnership v. Boatmen's First Nat'l Bank,* 69 F.3d 1398, 1402-03 (8th Cir. 1995)(holding that the “comprehensive regulatory framework of FIRREA” preempts the federal common law *D'Oench* doctrine); *Murphy v. FDIC,* 61 F.3d 34, 40 (D.C. Cir. 1995)(holding same).

22 *Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A.,* 120 F.3d 1140, 1143 (11th Cir. 1997); *Young v. FDIC,* 103 F.3d 1180, 1187 (4th Cir. 1997).
describes § 1823(e) and addresses the ways in which D’Oench influenced the statutory rule, as well as the different ways in which the statute and the common law are applied. Part III.A explores the propriety of federal common law in the area of bank regulation, focusing on the Supreme Court’s guidelines for determining when a statute preempts an existing common law rule and reviewing the Court’s decisions in O’Melveny and Atherton. Part III.B provides a discussion of the current circuit split concerning the statutory preemption of D’Oench. Part IV analyzes the D’Oench doctrine in light of the Supreme Court’s statutory preemption guidelines and recent case law relating to bank regulation, arguing that FIRREA preempts the common law rule and that the courts should cease using the D’Oench decision as authority.

BACKGROUND

The D’Oench rules have existed in some form or another for more than half a century, and in that time the rights and powers of the FDIC under those rules have greatly expanded. What initially amounted to an equitable doctrine designed to keep the Corporation’s funds intact eventually turned into a powerful two-pronged weapon utilized by the FDIC to shift its costs to innocent borrowers. Because the common law prong of the D’Oench rules provides a broader and more flexible tool through which the Corporation can protect itself, its continued vitality will prove crucial to the FDIC in subsequent failed bank litigation. If the common law doctrine is determined to be preempted by FIRREA, as this article proposes it should be, the FDIC’s so-called “superpowers” would no longer appear quite as super since the Corporation would find itself forced to deal exclusively within the confines of the statutory text.

To understand the importance of the statutory preemption issue, the history of the D’Oench rules must be examined. Thus, this Part reviews

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25 See In re NBW Commercial Paper Litig., 826 F. Supp. 1448, 1467 (D.D.C. 1992) (“D’Oench determines, as between two ‘innocents’ (the FDIC and the ‘wronged’ bank customer), who should bear the cost of the failed bank’s wrongs. If the customer bears the slightest blame—by failing to protect himself by getting an agreement in writing—the scale tips in favor of the FDIC and D’Oench bars the claim or defense.”).
26 See infra notes 124-131 and accompanying text (exploring differences between federal common law D’Oench doctrine and analogous statutory provisions of FIRREA).
27 See Swire, supra note 5, at 483 (referring to D’Oench rules as “superpowers”).

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the Supreme Court decision from which the *D'Oench* rules grew, including the policies underlying the Court's decision as well as the federal common law issues presented by that case. This Part also examines the judicial expansion of the common law doctrine in recent years. Finally, this Part presents an overview of \(\text{§} 1823(e)\) and \(\text{§} 1821(d)(9)\), exploring the purpose of these statutory provisions and explaining the differences between these provisions and the federal common law rule.

**Overview of DiLench, Duhme & Co. v. FDIC**

The principal component of the *D'Oench* doctrine remains the Supreme Court's 1942 decision in *D'Oench, Duhme & Co. v. FDIC*.\(^28\) Despite the fact that \(\text{§} 1823(e)\) has existed for over forty years and seemingly codifies the *D'Oench* rule,\(^29\) the FDIC and several courts consider the statute and the common law rule to provide independent grounds for decision.\(^30\) Furthermore, the common law doctrine "provides the FDIC with broader protections in certain instances."\(^31\) To fully understand the scope of the *D'Oench* rules, as well as why \(\text{§} 1823(e)\) preempts the common law rule, one must understand the factual situation and policies underlying the Court's decision in *D'Oench*.

**Facts and Holding.** The Supreme Court created the common law component of the *D'Oench* powers in *D'Oench, Duhme & Co. v. FDIC*,\(^32\) decided only eight years after the statutory birth of the Corporation.\(^33\) *D'Oench, Duhme & Co. (D'Oench, Duhme)*, a St. Louis securities dealer, in 1926 sold a number of bonds to Belleville Bank & Trust Co. (Belleville), a bank located in Belleville, Illinois.\(^34\) For some reason, unexplained by the

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\(^28\) 315 U.S. 447 (1942).

\(^29\) See *supra* note 13 and accompanying text (providing actual text and legislative history of \(\text{§} 1823(e)\)).

\(^30\) See *supra* note 18 (citing court decisions that treat the statute and common law doctrine independently).

\(^31\) See also Statement of Policy Regarding Federal Common Law and Statutory Provisions Protecting FDIC, as Receiver or Corporate Liquidator, Against Unrecorded Agreements or Arrangements of a Depository Institution Prior to Receivership, 62 Fed. Reg. 5984 (1997) ("The strict approval and recording requirements of section 1823(e) supplemented the protection afforded by the *D'Oench* doctrine." (emphasis added)).

\(^32\) DiVall Insured Income Fund Ltd. Partnership v. Boatmen's First Nat'l Bank, 69 F.3d 1398, 1401 (8th Cir. 1995).

\(^33\) 315 U.S. 447 (1942).

\(^34\) The FDIC was created as part of the Banking Act of 1933, ch. 89, 48 Stat. 168 (1933), which added section 12B to the Federal Reserve Act, ch. 6, 38 Stat. 103 (codified as amended at 12 U.S.C. \(\text{§} 1811\text{-}1831a\)).

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Court in its decision, the bonds later went into default. D'Oench, Duhme then executed promissory notes covering the amount of the defaulted bonds and gave them to Belleville so that no past due bonds would appear on the bank’s records. D'Oench, Duhme had no intention of paying off the notes, however, and reached an agreement with the bank that no collection would be attempted.

In 1933, D'Oench, Duhme executed another note renewing those originally provided to Belleville. The FDIC, which insured the bank in 1934, acquired the renewal note when Belleville failed a few years later. The Corporation attempted to collect payment on the note, and when D'Oench, Duhme refused to pay, the FDIC filed suit.

In answering the FDIC’s complaint, D'Oench, Duhme argued that the FDIC was not a holder in due course because the renewal note lacked consideration and because of the understanding between D'Oench, Duhme and Belleville that the note would not be paid. The district court held D'Oench, Duhme liable on the note under Illinois law. The Eighth Circuit affirmed, applying general law to determine that, since the note was an Illinois contract, Illinois law governed the dispute.

34 D'Oench, Dubme & Co., 315 U.S. at 454.
35 Id.
36 Id.
37 Id. The receipts for the notes included the following statement: This note is given with the understanding it will not be called for payment. All interest payments to be repaid. Id.
38 Id.
39 Id. The acquisition of the note by the FDIC was part of the process for resolving Belleville’s failure. Such a process usually includes three primary steps: (1) the bank’s regulator appoints a receiver who manages the bank’s operations; (2) the receiver attempts to collect the fair market value of the bank’s assets; and (3) the receiver makes certain the bank’s liabilities are satisfied. Michael D. Floyd, Could D’Oench Be Doomed? The Impact of ‘O’Melveny & Myers v. FDIC, 15 Ann. Rev. Banking L 325, 329 (1996). Although the FDIC typically acts as receiver for failed financial institutions, the Corporation did not act as receiver for Belleville. Rather, the FDIC arranged for another bank to assume Belleville’s deposit liabilities, and acquired the note as part of this transaction. D’Oench, Dubme & Co., 315 U.S. at 454. Such an arrangement—where one bank takes over another—is referred to as a “purchase and assumption” transaction. Milton R. Schroeder, The Law and Regulation of Financial Institutions & 12.02(2) (1995).
40 D’Oench, Dubme & Co., 315 U.S. at 453-54.
41 Id. at 456.
42 Id. at 455.
43 Id.
The primary issue for consideration before the Supreme Court concerned which body of law actually applied to the case. D'Oench, Duhme maintained that, since the suit was filed in a federal district court located in Missouri, that court should have applied Missouri's conflict of laws rules under existing precedent. The Court held, however, that it did not need to decide whether Missouri or Illinois law applied because federal law governed the case.

Because no federal statute provided a substantive rule with which to determine whether D'Oench, Duhme had to pay, the Court fashioned a common law rule based on its earlier decision in Deitrick v. Greaney. Deitrick concerned a promissory note provided to a bank by its coconspirator for the purpose of concealing the bank's acquisition of 190 shares of its own stock in criminal violation of the National Banking Act. As in D'Oench, the bank in Deitrick eventually failed, and its receiver sought to collect on the note. The Supreme Court rejected the defendant's argument that the note lacked consideration, holding that the defendant could not rely on his own criminal conduct to prevent payment. Critical to the Court's decision in Deitrick was the existence of a federal statute:

[The doctrine with which we are now concerned...is a principle which derives its force from the circumstance that respondent's act, apart from its possible injurious consequences to creditors, is

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45 Id.
46 Id. Under the law of commercial paper, a holder in due course generally takes a negotiable instrument free of defenses. See U.C.C. § 3-302 (1995) (stating that a holder in due course takes "without notice that any party has a defense or claim in recoupment").
47 D'Oench, Duhme & Co., 315 U.S. at 455.
48 Id. D'Oench, Duhme argued that Klaizon Co. v. Senator Electric Manufacturing Co., 313 U.S. 487 (1941), controlled the choice of law issue. Klaizon held that, in a diversity action, a federal court must apply the conflict of laws rules of the state in which the court sits. Id. The Court noted that federal jurisdiction in this case did not depend on diversity of citizenship because the FDIC brought the action under authority of a federal statute allowing the Corporation to sue or be sued in federal court. D'Oench, Duhme & Co., 315 U.S. at 455.
49 Id. D'Oench, Duhme & Co., 315 U.S. at 456.
50 Id. (citing Deitrick, 309 U.S. 190 (1940)).
51 Id. at 192.
52 Id. at 198.
itself a violation of the statute; and that the statute read in the light of its purposes and policy, precludes resort to the very acts which it condemns, as the means of thwarting those purposes by visiting on the receiver and creditors...the burden of the bank's unlawful purchase.52

In *D'Oench*, the Court expanded its rule in *Deitrick* by barring D'Oench, Duhme's defense even though its conduct violated no federal statute.53 Noting that D'Oench, Duhme executed the renewal note before Congress created the FDIC, and therefore could not have intended to deceive the Corporation,54 the majority nonetheless found the secret agreement between D'Oench, Duhme and Belleville contrary to a federal policy of protecting the FDIC against misrepresentations.55 The test, according to the Court, was whether an undocumented agreement existed to deceive the creditors or the public authority or would tend to have that effect.56 The Court obviously wanted to protect the relatively new Corporation, as well as American taxpayers, from the unscrupulous actions of banking officials and other interested parties in banking transactions. Since no statute afforded that protection in the instant case, the Court formed its own rule to implement the policy it thought Congress intended.

**Policies Behind the Court's Decision.** The test set forth by the Supreme Court in *D'Oench* was obviously designed to further a legitimate policy goal—protecting the FDIC against fraudulent or misleading bank records to aid the Corporation in resolving bank failures.57 Looking to section 12B(s) of the Federal Reserve Act,58 the Court observed that the statute provided criminal sanctions for anyone who knowingly or willfully misled the FDIC.59 The Court also noted that the statute, at the time the

52 Id.
53 See *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 458 (1942) ("[T]he reach of the rule which prevents an accommodation maker of a note from setting up the defense of no consideration against a bank or its receivers or creditors is not delimited to those instances where he has committed a statutory offense.").
54 Id. at 459.
55 Id
56 Id. at 460.

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Corporation initially insured Belleville, required certification of solvency by a state banking authority and examination by the FDIC before a bank was eligible for insurance. The majority read the statute as evincing a congressional intent to safeguard the Corporation: "These provisions reveal a federal policy to protect [the FDIC] and the public funds which it administers against misrepresentations as to the securities or other assets in the portfolios of the banks which [the Corporation] insures or to which it makes loans." By prohibiting defenses based on secret agreements from being raised against the Corporation, the Court helped ensure that the FDIC could perform its obligations without undue surprise caused by a bank's hidden liabilities.

The economic and political tenor of the previous decade bolstered the Court's interpretation of legislative intent. Congress created the FDIC to help the banking industry, and the country as a whole, recover from the brutal effects of the Great Depression. The economic crisis hit the banking community hard. One-third of the nation's banks failed during the banking crisis, and 398 banks, with total deposit liabilities of about $500 million, closed between 1934 and 1940. The effect of the banking industry's deterioration was devastating to the American economy, as one com-

51 A recent opinion by the Eleventh Circuit described the purpose of D'Oench quite well. D'Oench, Dubme and its progeny enable the FDIC, and banks that acquire insolvent banks' assets from the FDIC, to make quick and accurate appraisals of the value of insolvent banks' assets by protecting the FDIC and its transferees against undisclosed agreements that would unexpectedly diminish the value of those assets. First Union Nat'l Bank v. Hall, 123 F.3d 1374, 1379 (11th Cir. 1997). Note, however, that the original rule articulated by the Supreme Court applied only to the FDIC, not its transferees or assignees. The Eleventh Circuit's description, then, provides a subtle example of how the doctrine has been expanded over the years. See infra notes 84-130 and accompanying text (exploring the judicial expansion of the D'Oench doctrine).

52 Section 12B was withdrawn from the Federal Reserve Act by the Federal Deposit Insurance Act, ch. 967, 64 Stat. 873 (codified as amended at 12 U.S.C. § 1811-1831a (1994)).

53 D'Oench, Dubme & Co., 315 U.S. at 456-57. The Court referred specifically to a portion of the statute which established a fine of up to $5,000 and/or a prison term of not more than one year for attempting to defraud the FDIC. The statute, then 12 U.S.C. § 264(s), is now a part of the criminal code and codified at 18 U.S.C. § 1007 (1994).

54 D'Oench, Dubme & Co., 315 U.S. at 457. The Court here referred to then 12 U.S.C. § 264(y). The provisions of subsection (y) were dropped from the statute by amendment in 1935. Id. at 457 n.3.

55 See id. ("The genuineness of assets ostensibly held by a bank is certainly germane to a determination of solvency.")

56 See Helen M. Burns, The American Banking Community and the New Deal Banking Reforms 1933-1935 77-93 (1974) (describing events underlying passage of Banking Act of 1935). see also D'Oench, Dubme & Co., 315 U.S. at 472 (stating that FDIC was "created and financed...to bolster the entire banking and credit structure.") (Jackson, J., concurring).
mentator has explained: "The economic impact of the banking collapse was profoundly damaging, as the money supply and income fell by a third, business investment plummeted, and unemployment reached 25%." In light of the economic environment which fostered the creation of the FDIC, the Court naturally sought to give the Corporation a tool with which to protect itself from having to pay more than expected.

The political climate surrounding the FDIC’s creation similarly provided support for the Court’s opinion. Testimony before the Senate subcommittee investigating the banking crisis revealed malpractice on the part of many of the country’s bankers, and several members of Congress sought to reform the industry by strengthening federal control over the banking system. Part of the plan to enhance the federal government’s role in bank regulation was a deposit insurance structure. Not surprisingly, the banking community opposed strict federal control and dubbed deposit insurance unsound and unfair. Despite this opposition, strong public support for federal deposit insurance helped make the FDIC a reality. In sum, the Court, looking at the moral tone set by the congressional hearings as well as the public’s interest in deposit insurance, would undoubtedly have had little trouble concluding that the Corporation needed protection against fraud in the banking industry, and the D’Oench decision was designed to afford just such protection by barring D’Oench, Duhme’s defense.

**Federal Common Law Issues.** The Court no doubt found support for its decision in the economic and political situations surrounding the
FDIC's creation by Congress. The Court faced an obstacle, however, in that Congress had failed to directly address the issue before the Court. Because the case involved a federal question, federal law governed the dispute. Because no federal statute directly addressed the problem presented by the case, the Court looked to federal common law to provide the rule of decision.

Such a determination necessarily implicated *Erie Railroad Co. v. Tompkins*, where the Supreme Court held that "[t]here is no federal general common law." Although *Erie* can be read to prohibit the federal courts from ever creating common law rules, subsequent decisions showed that federal common law remained proper after *Erie,* provided that the federal common law rule touched a subject within national legislative power. Thus, *Erie* did not wipe away federal common law. The Court in *Erie* simply demanded that, to fashion a common law rule, a federal court show that it has authority to do so.

The majority opinion in *D'Oench* did not specifically address the origin of its authority to fashion a federal common law rule, stating only that the case involved decision of a federal question. Justice Jackson's concurring opinion, however, outlined the source of the Court's lawmaking power. After observing the absence of a governing federal statute, Justice Jackson explained the impact of *Erie* in cases like the one at hand:

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73 Id. at 455-56.
74 Id.
75 304 U.S. 64 (1938).
77 See, e.g., *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943) (finding that federal law governs rights and duties of United States on commercial paper it issues). In discussing its authority to fashion a federal common law rule, the *Clearfield* Court stated: "The authority to issue the check had its origin in the Constitution and the statutes of the United States.... In absence of an applicable Act of Congress it is for federal courts to fashion the governing rule of law according to their own standards." *Id.* See also Henry J. Friendly, *In Praise of Erie - And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 405 (1964) ("The clarion yet careful pronouncement of *Erie,* 'There is no federal general common law,' opened the way to what, for want of a better term, we may call specialized federal common law.").
78 See id. at 79 ("Law in the sense in which courts speak of it today does not exist without some definite authority behind it.") (quoting *Black & White Taxi Cab Co. v. Brown & Yellow Taxi Cab Co.*, 276 U.S. 518, 533 (1928) (Holmes, J. dissenting)).
The federal courts have no general common law, as in a sense they have no general or comprehensive jurisprudence of any kind, because many subjects of private law which bulk large in the traditional common law are ordinarily within the province of the states and not the federal government. But this is not to say that wherever we have occasion to decide a federal question which cannot be answered from federal statutes alone we may not resort to all of the source materials of the common law or that when we have fashioned an answer it does not become a part of the federal non-statutory or common law....[Federal law] is found in the federal Constitution, statutes, or common law. Federal common law implements the federal Constitution and statutes, and is conditioned by them.81

In short, Justice Jackson understood that the Court possessed the power to fashion its rule in D'Oench because Congress, although authorizing the action as one arising under the laws of the United States, neglected to statutorily provide an adequate rule with which to decide the controversy.82 Because no federal statute defined the rights of the Corporation as holder of the note in question, the Court had the authority “to apply the traditional common-law technique of decision and to draw upon all sources of the common law”83 to define such rights.

**Expansion of the Common Law Rule.** In defining the rights of the FDIC as holder of the note, the Court prohibited D'Oench, Duhme from raising a defense founded on a “secret agreement” that either was designed to deceive the regulators or was likely to have that effect.84 The Court fash-

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81 Id. at 469, 472 (Jackson, J., concurring).
82 Id. at 468 (Jackson, J., concurring).
83 Id. at 472 (Jackson, J., concurring).
tioned its rule to protect the Corporation, but principles of equity additionally seemed to guide the Court's decision. Although the majority allowed for the application of the rule regardless of the subjective intent of the parties involved, it implied that factors such as business sophistication and culpable conduct may be considered. In short, the common law doctrine found its roots in the concept of equitable estoppel.

Unfortunately, the doctrine has grown beyond its equitable origins and is now applied to bar claims or defenses based on undocumented agreements regardless of the innocence, culpability, or sophistication of the parties. Moreover, since its inception over half a century ago, the \textit{D'Oench} common law rule has seen enormous expansion as the federal courts have applied it to almost every situation in which the FDIC intervenes in the affairs of insolvent institutions. As one court stated in defining the \textit{D'Oench} doctrine:

In a suit over the enforcement of an agreement originally executed between an insured depository institution and a private party,
a private party may not enforce against a federal deposit insurer any obligation not specifically memorialized in a written document such that the agency would be aware of the obligation when conducting an examination of the institution's records.\textsuperscript{92}

Thus, the doctrine now covers claims as well as defenses,\textsuperscript{93} torts as well as contracts,\textsuperscript{4} and the Corporation's assignees as well as the FDIC itself.\textsuperscript{95} Accordingly, most claims and defenses that could be raised in litigation against the insolvent institution become invalid once the institution fails.

In its desire to protect the FDIC, the federal bench has, based on the reasoning of \textit{D'Oench}, developed a conceptually distinct yet related federal common law rule known as the federal holder-inDueCourse ("HDC") doctrine.\textsuperscript{6} The federal HDC doctrine, like \textit{D'Oench}, "gives the FDIC the power to collect money owed to failed banks in situations where the bank itself could not have collected the money."\textsuperscript{97} Under the federal HDC doctrine, the FDIC has a complete defense to state and common law fraud claims "on a note acquired by the FDIC in the execution of a purchase and assumption transaction, for value, in good faith, and without actual knowledge of the fraud at the time the FDIC entered into the purchase and assumption agreement."\textsuperscript{98}

\textsuperscript{92} Baumann v. Savers Federal Sav. & Loan Assoc., 934 F.2d 1506, 1515 (11th Cir. 1991).

\textsuperscript{93} For a concise look at the scope of the \textit{D'Oench} doctrine, as well as \$ 1823(c) and the federal holder-in-Due-Course doctrine, see Fred Galves, \textit{FDIC and RTC Special Powers in Failed Bank Litigation}, 26 Colo. Law. 473 (1993).

\textsuperscript{94} Baumann v. Savers Federal Sav. & Loan Assoc., 934 F.2d 1506, 1515 (11th Cir. 1991).

\textsuperscript{95} See Young v. FDIC, 103 F.3d 1180, 1187-88 (4th Cir. 1997) (prohibiting, under the \textit{D'Oench} doctrine, plaintiff's wrongful death, unfair trade practice, and fraud claims).

\textsuperscript{96} See RTC v. Dunmar, 43 F.3d 587, 594 (11th Cir. 1995) ("Where... a tort claim arises in the course of regular banking transactions, such that exclusion of the alleged 'secret agreement' accords with the underlying policies of \textit{D'Oench} set forth in \textit{Langley}, that claim is barred.") The Eleventh Circuit referred to \textit{Langley} v. FDIC, 484 U.S. 86, 91-92 (1987). It is worth mentioning here that in \textit{Langley}, the Supreme Court expressly addressed the policies underlying \$ 1823(c), not the policies underlying \textit{D'Oench}. Id.

\textsuperscript{97} Kilpatrick v. Riddle, 907 F.2d 1523, 1528 (5th Cir. 1990). The \textit{D'Oench} doctrine likewise applied to the FSLIC and its successors-in-interest before Congress eliminated the FSLIC by statute. See Newton v. Univest Financial Corp., 967 F.2d 340, 347 (9th Cir. 1992) (extending \textit{D'Oench} to FSLIC's successor-in-interest); FSLIC v. Gemini Management Corp., 921 F.2d 241, 245-46 (9th Cir. 1990) (considering purpose of \textit{D'Oench} doctrine and concluding doctrine applies in case where FSLIC acted as receiver and debtor relied on unrecorded, unwritten agreement).

\textsuperscript{98} Gunter v. Hutchenson, 674 F.2d 862, 872 n. 14 (11th Cir. 1982). Although, the federal HDC doctrine remains a separate rule, at least one commentator considers it a component of the \textit{D'Oench} rules. Floyd, supra note 39, at 330. The federal HDC doctrine is mentioned here as an example of how the federal courts have used the reasoning of \textit{D'Oench} to broaden the FDIC's powers rather than adhering to the text of \$ 1823(c).

\textsuperscript{99} Floyd, supra note 39, at 339.
The Sixth Circuit's opinion in *FDIC v. Wood* illustrates well how the federal HDC doctrine, although technically distinct from the *D'Oench* rule, expands the rights of the Corporation as holder of assets acquired from failed banks and thereby affords the FDIC a *D'Oench*-like weapon. The issue before the court in *Wood* concerned whether the FDIC could recover the full amount of interest (at an annual percentage rate of 15.21%) payable on a note made out for $12,000 when a jury found the rate usurious under state law. The Michigan usury statute did not apply to an HDC, but the court noted that § 1823(e) does not confer HDC status on the FDIC. Therefore, the court followed the rule in *Gunter*, declaring the Corporation an HDC as a matter of federal common law.

The court apparently wanted to afford the Corporation as much protection as possible, and since that protection could not be found in the text of the statute, the court, as in *D'Oench*, resorted to federal common law. The difference between *Wood* and *D'Oench*, however, is that in the latter, Congress had not yet spoken to the FDIC's rights as holder whereas in the former, it had. Therefore, the application of a *D'Oench*-like common law rule enabling the Corporation to collect, even though the failed bank could not, lacked legitimacy under Justice Jackson's concurrence in *D'Oench*.


In his *D'Oench* concurrence, Justice Jackson made clear that the Court had authority to create a federal common law rule because Congress had failed to address the specific issue before the Court—whether the FDIC...
could collect on the note despite the undocumented agreement that the note was not to be paid.\textsuperscript{106} In 1950, however, Congress did address the enforceability of undocumented agreements in litigation against the FDIC by enacting 12 U.S.C. § 1823(e).\textsuperscript{106} The statute has remained relatively unchanged since that time, and today exists as part of the FIRREA framework for regulating the banking industry.\textsuperscript{107}

Another FIRREA provision, 12 U.S.C. § 1821(d)(9), also addresses the propriety of raising undocumented agreements against the Corporation. That provision states that "any agreement which does not meet the requirements set forth in section 1823(e) of this title shall not form the basis of, or substantially comprise, a claim against the receiver or the Corporation."\textsuperscript{108} Thus, it now appears that Congress has expressly addressed the question which \textit{D'Oench} was designed to resolve.

Because a federal statute currently exists, logic dictates that the statute not only controls the issue but also displaces any analogous common law rule. Many of the federal courts, however, fail to acknowledge the aforementioned point and continue to use the federal common law \textit{D'Oench} doctrine in cases where the statute should apply. Whether or not § 1823(e) codifies \textit{D'Oench} is subject to differing opinions,\textsuperscript{109} and some courts view the common law doctrine as a sort of protective "safety net" for the FDIC.\textsuperscript{110} The Supreme Court, however, has identified the purposes of § 1823(e),\textsuperscript{111} and after reviewing those purposes, one can easily conclude that the statute was intended to serve the same function as the rule in \textit{D'Oench}.

\textbf{Section 1823(e) and the Influence of \textit{D'Oench}.} Section 1823(e) is both broader and narrower than the \textit{D'Oench} doctrine. As one court

\textsuperscript{106} Id. at 468-69.
\textsuperscript{107} Id.
\textsuperscript{109} Indeed, even within the same court, cases suggest different answers to the codification question. The Ninth Circuit, for example, has provided conflicting responses to the query. \textit{Compare Brooksode Associates v. Rykin}, 49 F.3d 490, 493 (9th Cir. 1995) ("Congress codified the policy embodied in the \textit{D'Oench, Dubme} holding in 12 U.S.C. § 1823(e) ...") and \textit{RTC v. Midwest Financial Savings Bank of Minot}, 36 F.3d 785, 797 (1995) (discussing "\textit{D'Oench, Dubme Doctrine} [sic], codified at 12 U.S.C. § 1823(e)" with \textit{Murphy v. FDIC}, 12 F.3d 1485, 1487 (9th Cir. 1995) (describing § 1823(e) as a "partial codification" of the \textit{D'Oench} rule).
\textsuperscript{110} See \textit{E.I. du Pont de Nemours & Co. v. FDIC}, 32 F.3d 592, 596 (D.C. Cir. 1994) ("[Section] 1823(e) and § 1821(d)(9)(A) are Congress's attempts to codify, at least in part, the policy represented by \textit{D'Oench}, but \textit{D'Oench} remains to cover situations which fall through the cracks.") (quoting \textit{In re NBW Commercial Paper Litigation}, 825 F. Supp. 1448, 1466 (D.D.C. 1992)).
explained:

It is broader in that the statute makes the fault of the party asserting the unwritten agreement irrelevant, whereas the common law doctrine is based upon the concept of equitable estoppel; non-fault may be asserted as a defense. It is narrower, however, in that most courts have read the statute as applicable only to cases involving a specific asset, usually a loan, which in the ordinary course of business would be recorded and approved by the bank's loan committee or board of directors.\textsuperscript{12}

Thus, the statute broadens the scope of the original doctrine by applying the prohibition to any undocumented agreement regardless of the intentions of the parties, yet retains the spirit and purpose of the common law rule by seeking to protect the FDIC only from agreements that tend to put it at a disadvantage.

The Supreme Court tacitly acknowledged this retention of the spirit and purpose of \textit{D'Oench} in \textit{Langley v. FDIC}\textsuperscript{13} by identifying two purposes of § 1823(e). According to the Court, the first purpose of the statute "is to allow federal and state bank examiner's to rely on a bank's records in evaluating the worth of the bank's assets."\textsuperscript{14} The second purpose of the statute is to "ensure mature consideration of unusual loan transactions by senior bank officials, and prevent fraudulent insertion of new terms, with collusion of bank employees, when a bank appears headed for failure."\textsuperscript{15} These two purposes—aiding reliance on bank records and protecting the Corporation from fraud and misrepresentation—appear almost identical to the purposes of the common law rule as articulated in \textit{D'Oench} itself.\textsuperscript{16}

The requirements of § 1823(e) fall roughly into three divisions: (1) there must be an "agreement;"\textsuperscript{17} (2) the agreement must "tend to diminish or defeat the interest of the Corporation in any asset acquired by it" under FIRREA; and (3) the FDIC must have notice of the agreement.\textsuperscript{18} Each of these three requirements finds support in the \textit{D'Oench} decision, demon-

\textsuperscript{12} \textit{du Pont}, 32 F.2d at 597 (citations omitted).
\textsuperscript{13} 484 U.S. 86 (1987).
\textsuperscript{14} \textit{id.} at 91.
\textsuperscript{15} \textit{id.} at 92.
\textsuperscript{16}
The statutory requirement that there be an agreement resembles D'Oench's bar on the use of "secret agreements," and the statute's second requirement reflects the facts of D'Oench by mandating that the agreement affect the FDIC's interest in an asset of the failed bank.

The third requirement of § 1823—that the FDIC have notice of any agreement that forms the basis of a claim or defense against it—similarly reflects the spirit of the D'Oench decision by providing a mechanism through which the Corporation may protect itself from reliance on misleading records. To meet the notice requirement an agreement must: (1) be in writing; (2) be contemporaneous with the bank's acquisition of the asset; (3) be approved by the bank's loan committee or board of directors; and (4) be continuously present in the official records of the bank. While protecting the FDIC in the spirit of D'Oench, these requirements simultaneously extend the protection afforded by the D'Oench rule by mandating that an agreement specifically satisfy all four conditions and by ignoring equitable considerations such as the culpability and sophistication of the parties involved. Even so, the influence of the D'Oench decision on the statutory framework remains evident.

Application of § 1823(e) and D'Oench. Despite the apparent influence D'Oench had on the enactment of § 1823(e), the federal courts continued to apply the common law rule after the codification of the statute, viewing § 1823(e) and the D'Oench doctrine as separate lines of authori-
ty. Apparently not wanting to be confined to the textual requirements of the statute, the courts often use the *D’Oench* doctrine to aid the FDIC in situations where the statute would not. By retaining the *D’Oench* rule as an independent rule of decision, the courts have provided the FDIC with two weapons to use in failed bank litigation instead of just one, adapting the federal common law rule to fit situations where the plain text of the statute will not allow it to apply.

While the common law rule, like the statute, still requires the existence of an undocumented agreement, unlike § 1823(e), the *D’Oench* rule can bar agreements relating to liabilities of the failed bank. The statute, as noted, limits the prohibition to agreements “tending to diminish...any asset.” The common law rule also applies to bar an agreement even where the FDIC has notice. Recall that the statute allows the use of an agreement as long as it meets the heightened notice requirements of § 1823(e): (1) writing; (2) contemporaneous acquisition; (3) authoritative approval; and (4) continuous documentation. Thus, the *D’Oench* rule and § 1823(e) often lead to different results.

In sum, § 1823(e) somewhat alters the scope and applicability of the *D’Oench* doctrine, yet retains the purposes of the common law rule and directly addresses the issue to which the original rule spoke. Despite this apparent codification of the doctrine, however, many federal courts continue to treat the common law rule as independent authority and apply it to circumstances not covered by the statute. In doing so, these courts ignore the interstitial nature that federal courts play in our system of gov-

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123 It is worth mentioning here that Justice Scalia, writing for the majority in *Langley*, referred to *D’Oench* as “the leading case in this area prior to the enactment of § 1823(e) in 1950.” *Langley*, 484 U.S. at 92. Such a reference suggests that Justice Scalia did not view *D’Oench* as an authority under which the present case could be decided, but considered it merely an outdated common law rule that influenced, but did not survive, the enactment of § 1823(e).
124 *E.g.*, *Young v. FDIC*, 103 F.3d 1180, 1187 (4th Cir. 1997) (“The common-law doctrine and the statute remain separate and independent grounds for decision.”)
125 See *E.I. du Pont de Nemours & Co. v. FDIC*, 32 F.3d 592, 596 (D.C. Cir. 1994) (describing common law *D’Oench* rule as “safety net” for FDIC to cover situations not covered by § 1823(e)).
126 *Hanson v. FDIC*, 13 F.3d 1247, 1251 (8th Cir. 1994).
127 See *Young*, 103 F.3d at 1189 (stating that purposes of *D’Oench* do not support finding that common law rule is limited to barring only agreements affecting specific assets of failed bank).
129 *First State Bank v. City & County Bank*, 872 F.2d 707, 717 (6th Cir. 1994).
131 Compare *Young*, 103 F.3d at 1187-89 (applying *D’Oench* to bar claims against FDIC based on undocumented letter of credit) with *Murphy v. FDIC*, 38 F.3d 1490, 1500-01 (9th Cir. 1994) (finding letter of credit not barred by § 1823(e) because letter constituted liability and not asset).
ernment and overlook the fact that "federal common law is a 'necessary expedient,' and when Congress addresses a question previously governed by decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears."13

THE PROPRIETY OF FEDERAL COMMON LAW

As noted in Part II, the D’Oench decision provided a federal common law rule which defined the rights and powers of the FDIC as holder of commercial paper acquired from failed banks.14 The absence of a federal legislative answer to the question presented in the D’Oench case provided the impetus for the Supreme Court’s creation of federal common law.15 Since the Court’s decision in D’Oench, Congress has provided a statutory framework designed to address the enforceability of undocumented agreements against the FDIC and has consistently maintained that framework for almost half a century.16 Despite the existence of §§ 1823(e) and 1821(d)(9), however, the federal courts have continued to use the D’Oench rule, ignoring the fact that the lawmaking power of the federal judiciary is subordinate to that of Congress.17

Recent developments, however, suggest that the federal bench is beginning to recognize that the D’Oench common law rule no longer constitutes valid authority. The Supreme Court has handed down two decisions this decade that strongly imply FIRREA remains the only source of federal law governing the FDIC in its role as insurer and receiver, thereby foreclosing the use of any federal common law doctrines that purport to address circumstances involving the FDIC’s rights and obligations.18 Accordingly, two federal circuit courts of appeals have expressly held that

132 See U.S. Const. art. III, § 2 (limiting the power of the federal judiciary to specific cases and controversies).
135 Id. at 468 (Jackson, J., concurring).
136 See supra note 13 (discussing legislative history of § 1823(e)).
FIRREA preempts the use of *D’Oench*.139 Two other circuits, however, have held fast to the federal common law doctrine, finding that FIRREA does not preempt *D’Oench*.140

The resolution of the preemption issue has significant consequences for failed bank litigation because the nonviability of the common law rule would confine the FDIC to the often narrower application of § 1823(e).141 Such a result could potentially lead to increased depletion of the FDIC’s funds by preventing the collection of certain assets because of, or requiring the FDIC to pay claims on, agreements heretofore barred by *D’Oench*. This Part therefore reviews the Supreme Court’s guidelines for determining when a federal statute preempts federal common law, and looks at the implications of the Court’s *O’Melveny* and *Apherton* decisions on federal common law in the area of banking regulation. This Part also examines the current circuit split concerning the statutory preemption of the *D’Oench* doctrine.

**Relevant Supreme Court Decisions**

A basic characteristic of the federal government is that Congress possesses the primary lawmaking power,142 and the federal courts exercise only limited ability to create law.143 Thus, when Congress speaks to an issue, its statement prevails over any existing federal common law rules.144 In addition to articulating certain standards for determining when Congress has spoken directly to an issue, the Supreme Court has also indicated its reluctance to apply federal common law in the area of banking regulation. A discussion of the Court’s relevant federal common law jurisprudence follows.

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140 *Motorcity of Jacksonville, Ltd. v. Southeast Bank*, N.A., 120 F.3d 1140, 1144 (11th Cir. 1997); *Young v. FDIC*, 103 F.3d 1180, 1187 (4th Cir. 1997).

141 See supra Part II.B.2 (discussing differences in application of *D’Oench* and § 1823(e)).

142 See U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States...").

143 *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

**City of Milwaukee v. Illinois.** The seminal case regarding statutory preemption of existing federal common law remains *City of Milwaukee v. Illinois*, where the Court explained the proper analysis for determining whether a federal statute governs an issue previously subject to federal common law. The issue before the Court in *Milwaukee* concerned the continued validity of a federal common law rule allowing abatement for public nuisance caused by interstate water pollution after the enactment of the Federal Water Pollution Control Act Amendments of 1972 ("Amendments"). The Court held that the Amendments evinced a congressional intent to displace the existing common law rule, and therefore, the common law rule was preempted and no longer represented valid authority.

The test set forth in *Milwaukee* "was whether the legislative scheme 'spoke directly to a question' [previously governed by a federal common law]. . . not whether Congress had affirmatively proscribed the use of federal common law." Noting that federal common law is justified "in a 'few and restricted' instances," the Court nonetheless "recognized that federal common law is 'subject to the paramount authority of Congress.'" Congress exercised its paramount authority by enacting the Amendments, which constituted a comprehensive scheme for controlling and abating water pollution. As such, the statute left no room for the existing federal common law rule. In other words, even though Congress had not expressly forbidden the use of federal common law, it had created a comprehensive scheme that so occupied the water pollution field as to fore-

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146 Id. at 310-17.
148 *Milwaukee*, 451 U.S. at 310.
149 Id. at 317-19.
150 Id. at 315.
151 Id. at 313 (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963)).
152 Id. (quoting *New Jersey v. New York*, 283 U.S. 336, 348 (1931)).
153 Id. at 318-19.
154 See id. at 319-32 (addressing the particular claims involved in *Milwaukee* and concluding that "no federal common-law remedy was available").
close the application of any other source of federal law. Therefore, the earlier common law rule no longer had any impact on the rights of the parties before the Court.

**United States v. Texas.** The Supreme Court reiterated the standard of *Milwaukee* in *United States v. Texas*, the Court’s most recent decision concerning statutory preemption of federal common law. In *Texas*, the Court held that Congress had not intended the Debt Collection Act of 1982 to abrogate the government’s federal common law right to collect prejudgment interest on debts owed to it by the states. While acknowledging that *Milwaukee* does not require Congress to affirmatively proscribe common law doctrines in order to preempt them, the Court noted that “Congress does not write upon a clean slate.” The Court explained that statutes are interpreted with a presumption that well-established common law principles were intended to be retained, although a statutory purpose to the contrary defeats that presumption. Referring to *Milwaukee*, the Court stated that “[i]n order to abrogate a common-law principle, the statute must ‘speak directly’ to the question addressed by the common law.” Thus, *Texas* retained *Milwaukee*’s “speak directly” standard while simultaneously providing that federal statutes should be presumed not to abrogate existing common law rules without some indication that they are intended to do so.

Together, *Milwaukee* and *Texas* furnish guidelines for determining whether a federal legislative scheme preempts an existing federal common law doctrine. First, a presumption exists that Congress has legislated with an expectation that the common law rule will be retained. Moreover, a comprehensive, all-encompassing leg-

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155 See id. at 318-19 ("Congress' intent in enacting the Amendments was clearly to establish an all-encompassing program of water pollution regulation....The establishment of such a self-consciously comprehensive program by Congress...strongly suggests that there is no room for courts to attempt to improve on that program with federal common law.").
158 *Texas*, 507 U.S. at 530.
159 Id. at 534.
160 Id.
161 Id.
162 Id.
163 Id.
islative scheme that regulates an area of law in its entirety strongly suggests that Congress intended to preempt any collateral sources of federal law.164 Finally, when Congress speaks directly to an issue previously governed by a federal common law rule, that common law rule is preempted.165 A decision handed down by the Court in 1994, O'Melveny & Myers v. FDIC,166 found FIRREA to be comprehensive legislation, thus suggesting that Congress intended to preempt federal common law rules which addressed issues of bank regulation.

**O'Melveny & Myers v. FDIC.** The primary issue before the Court in O'Melveny concerned whether state law or federal common law determined whether the knowledge of corporate officers of a failed savings and loan ("S & L") that the institution's assets were fraudulently overvalued could be imputed to the S & L itself in a tort action.167 Concluding that state law governed the issue, the Court explained that FIRREA "specifically created special federal rules of decision regarding claims by, and defenses against, the FDIC as receiver."168 Because the statute did not address the imputation of liability issue, state law provided the applicable rule of decision.169

Although O'Melveny can be read simply as a choice of law decision, its reasoning has great significance in determining the role of federal common law in the area of banking regulation. The Court recognized that in deciding the issue before it, it could not "contradict an explicit federal statutory provision."170 Likewise, the Court could not "adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed."171 The Court further identified FIRREA as a "comprehensive" statutory regulation of the banking industry172 which created an exclusive grant of rights to the FDIC.173 As the majority opinion stated:

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165 *Id.* at 315.
167 *Id.* at 84-85.
168 *Id.* at 86.
169 *Id.* at 86-87.
170 *Id.* at 85.
171 *Id.*
172 *Id.* at 85-86.
173 *Id.* at 86.
It is hard to avoid the conclusion that [the statute] places the FDIC in the shoes of the insolvent S & L, to work out its claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise. To create additional “federal common-law” exceptions is not to “supplement” this scheme, but to alter it.  

Although the Court addressed outright only the propriety of creating (rather than retaining) federal common law, the O'Melveny decision implied that FIRREA constituted the only source of federal law concerning the rights of the FDIC in failed bank litigation. Thus, the statute rendered invalid any other sources of federal law purporting to do the same. Moreover, the Court specifically mentioned § 1821(d)(9), one of the statutory provisions codifying the D’Oench rule, in its list of those exclusive rights granted to the Corporation by FIRREA. Consequently, O'Melveny implicates not just federal common law, but the D’Oench doctrine itself.

**Atherton v. FDIC.** In early 1997, the Supreme Court handed down another ruling which, like O'Melveny, demonstrated that FIRREA supplied the sole source of federal law regarding the position of the FDIC in failed bank litigation. The primary issue before the Court in Atherton concerned the legal standard for determining whether the behavior of corporate officers of a federally chartered and insured financial institution was improper. In deciding this issue, the Court held that state law sets the standard of conduct as long as the state standard remains stricter than that of FIRREA. More importantly for D’Oench analysis, the Court refused to recognize or create a federal common law rule to deal with the issue.

The Resolution Trust Corporation (“RTC”), as receiver for the failed institution, initiated the action against officers and directors of the bank, alleging gross negligence, simple negligence, and breach of fiduciary

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174 Id. at 86-87.
175 Id. at 86.
177 Id. at 669.
178 Id.
179 Id. at 674.
180 The FDIC replaced the RTC as receiver pursuant to 12 U.S.C. § 1441a(b)(4)(A) (1994).
duty. The defendants argued that 12 U.S.C. § 1821(k) authorized actions for gross negligence or more seriously culpable conduct, and therefore all claims but those of gross negligence should be dismissed. The district court agreed, but the Third Circuit reversed, holding that the statute did not prohibit negligence or breach of duty claims available to the receiver as a matter of federal common law.

The Supreme Court vacated the Third Circuit decision, stating that “[t]here is no federal common law that would create a general standard of care applicable to this case.” While Atherton focuses more on federal preemption of state law than on congressional preemption of federal common law, the Court’s reluctance to fashion a federal common law rule bolsters the implication of O’Melveny that Congress intended FIRREA to be the singular source of federal law governing the FDIC.

Circuit Split Over Statutory Preemption of D’Oench Doctrine

The O’Melveny and Atherton decisions prompted several federal courts to reconsider the relationship between FIRREA and the common law D’Oench rule. The District of Columbia Circuit became the first federal Court of Appeals to appraise O’Melveny’s impact on the continued validity of the D’Oench doctrine, concluding that O’Melveny compelled a finding that FIRREA preempted the federal common law rule.

Not long after the that ruling, the Eighth Circuit similarly determined that O’Melveny removed D’Oench as an independent ground for decision. Other courts have likewise concluded that O’Melveny and Atherton significantly affect

181 Atherton, 117 S. Ct. at 669.
182 The statute provides that officers of a federally insured bank may be held personally responsible for damages resulting from gross negligence or similar conduct demonstrating a greater disregard of duty than gross negligence. 12 U.S.C. § 1821(k) (1994).
183 Atherton, 117 S. Ct. at 669.
184 Id.
185 Id. at 674.
186 Indeed, the Supreme Court recognized Atherton’s significance for the continued validity of the D’Oench doctrine. The Court granted certiorari in the Motorcity case, discussed infra notes 213-221 and accompanying text, which held that FIRREA did not preempt the D’Oench common law rule. Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A., 83 F.3d 1317, 1345 (11th Cir. 1996) (en banc). The Court subsequently vacated the judgment and remanded the case for consideration in light of Atherton. Hess v. FDIC, 117 S. Ct. 760 (1997).
187 Murphy v. FDIC, 61 F.3d 34, 40 (D.C. Cir. 1995).
the applicability of the federal common law rule, although none has expressly held *D'Oench* to be preempted by FIRREA.189

Some courts, however, have continued to use *D'Oench* as a separate line of authority after *O'Melveny* and *Atherton*, refusing to find the common law doctrine preempted by congressional action. The Eleventh Circuit, for example, concluded *O'Melveny* did nothing to change the relationship between FIRREA and *D'Oench*.190 The Supreme Court subsequently remanded the case for consideration in light of *Atherton*, and the Eleventh Circuit again found that *D'Oench* constituted valid authority.191 The Fourth Circuit recently agreed with the Eleventh Circuit, stating simply that "[section 1823(e) does not . . . preempt the *D'Oench* doctrine."192

As mentioned earlier, the resolution of this split in the circuits could have great importance for the rights of the FDIC, as well as the rights of innocent borrowers, when litigating obligations in the aftermath of bank failures. If the common law *D'Oench* doctrine no longer represents good law, the Corporation will be forced to structure its arguments within the confines of § 1823(e), probably resulting in more rulings for borrowers and less money in the FDIC's coffers. To enable the reader to understand the dynamics of the circuit split over preemption, a brief discussion of the leading cases for each side follows.

**Murphy.** Not long after the Supreme Court’s decision in *O'Melveny*, the District of Columbia Circuit held that the reasoning of that decision decided the question whether FIRREA’s comprehensive scheme preempted the federal common law *D'Oench* doctrine.193 The plaintiff in *Murphy* brought suit against the FDIC as receiver for a failed bank that allegedly

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189 See FDIC v. Craft, No. 93-35138, 1998 WL 656169, at *7 (9th Cir. Sept. 25, 1998) (concluding that *D'Oench* does not apply when FDIC acts as receiver); Leido Financial Corp. v. Summers, 122 F.3d 825, 828-29 (9th Cir. 1997) (finding that *O'Melveny* and *Atherton* rendered *D'Oench* inapplicable because no sufficient federal interest existed to justify use of federal common law); Dimuzio v. RTC, 68 F.3d 777, 780 n.2 (3d Cir. 1995) ("We note that the *D'Oench*, DuBme doctrine may no longer be a separate bar to plaintiff's claims") (citing *O'Melveny*); FDIC v. Parkway Executive Office Center, No. Civ.A. 96-121, 1997 WL 535164, at *15 (E.D. Pa. Aug. 18, 1997) (noting that *Atherton* “reeforces and strengthens the legal precepts articulated in *O'Melveny* with respect to the diminishing significance of federal common law in the FIRREA context”) (not reported).


191 Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A., 120 F.2d 1140, 1143 (11th Cir. 1997) (Motorcity II).

192 Young v. FDIC, 103 F.3d 1180, 1187 (4th Cir. 1997).

193 Murphy v. FDIC, 61 F.3d 34, 39 (D.C. Cir. 1995).
had entered into a real estate venture with the plaintiff as a joint investor. The bank had also loaned Murphy approximately $50 million for financing the venture. Alleging among other things that the bank was both negligent and fraudulent in its role as Murphy's partner, Murphy pointed to no written agreement supporting the existence of a joint venture. Indeed, the loan agreements contained the following provision: "The Lender is a lender only and shall not be considered a shareholder, joint venturer or partner of the Borrower." Accordingly, the district court barred Murphy's claims under both the D'Oench doctrine and § 1823(e).

The District of Columbia Circuit reversed the district court's decision, first noting that § 1823(e) did not bar the plaintiff's suit because that statute applies only to cases involving a specific asset, usually a loan, which meets the approval of the bank's loan committee. The court also noted that the terms of the statute "effectively limit that provision to conventional loan transactions." Because Murphy did not try to avoid paying off the loan, and because the FDIC could point to no specific asset that would be diminished by Murphy's claims, the court held that § 1823(e) did not apply.

Moving to the federal common law issue, the court determined that the FDIC likewise could not rely on the D'Oench doctrine to bar Murphy's claims because O'Melveny indicated that Congress had intended to preempt the D'Oench rule. Recognizing that Supreme Court decisions should be given a broad reading rather than one limiting them to the particular facts, the court reasoned:

That point has particular force in this instance, for while the vitality of D'Oench was not directly at issue in O'Melveny & Myers, the Court was specifically advised by both sides on brief and at oral argument that resolution of the issue before it could also affect the

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194 Id. at 35.
195 Id.
196 Id. at 36.
197 Id.
198 Id.
199 Id. at 37.
200 Id. (Quoting E.I. du Pont de Nemours & Co. v. FDIC, 32 F.3d 592, 597 (D.C. Cir. 1994)).
201 Id. at 37-38. "The court determined that the Corporation's failure to effectively address the asset requirement "amounted to a near concession that the statute does not bar Murphy's claims and that if the FDIC is to find any refuge it must be in federal common law." Id.
202 Id. at 40.
203 Id. at 39.
D'Oench doctrine. Moreover, although the opinion for the Court does not specifically mention D'Oench, it does expressly include one of the D'Oench-like statutory provisions...in the list of special federal statutory rules of decision....In so doing the Supreme Court, we think, necessarily decided the D'Oench question. To translate: the inclusion of § 1821(d)(9) in the FIRREA implies the exclusion of overlapping federal common law defenses not specifically mentioned in the statute—of which the D'Oench doctrine is one.204

Accordingly, the FDIC could not use the D'Oench rule to bar Murphy's claims against it, and the case was remanded to the district court for further proceedings.205

**DiVall.** Relying on Murphy, the Eighth Circuit also decided that O'Melveny required a finding that FIRREA preempted D'Oench.206 The plaintiff in DiVall had executed a promissory note for $600,000 payable to Metro North State Bank, which subsequently entered receivership under the FDIC.207 Boatmen's First National Bank of Kansas City ("Boatmen's") acquired the note in a purchase and assumption transaction and demanded payment; the plaintiff filed a declaratory judgment action asserting that it was not liable on the note due to lack of consideration.208 The district court ruled that Boatmen's qualified as a holder in due course under the federal HDC doctrine and therefore was entitled to summary judgment in its favor.209

The Eighth Circuit reversed the district court decision, finding that any federal bar to the plaintiff's lack of consideration defense had to originate in a specific provision of FIRREA.210 In the words of the court:

*O'Melveny* states that federal courts may not invoke federal common law to "supplement" the specific exceptions provided by FIR-
REA. When Congress enacted the comprehensive framework of FIRREA, it preempted the federal common law rules that restricted the claims and defenses which parties could raise against the FDIC. Accordingly, we hold that O'Melveny removes the federal common law D'Oench, Dubme doctrine and the federal holder in due course doctrine as separate bars to DiVall's defense. If DiVall's defense is to be barred, it must be barred either by a specific provision of FIRREA or by state law.211

Because the plaintiff did not rely on an agreement that was prohibited by § 1823(e) or Missouri law, the lack of consideration defense survived summary judgment.212

Motorcity. While the courts in Murphy and DiVall found the D'Oench doctrine preempted by FIRREA based on the reasoning of the O'Melveny decision, the Eleventh Circuit reached quite the opposite result in Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A.213 Disagreeing with the Murphy and DiVall courts, the Eleventh Circuit relied on the Supreme Court's Texas analysis,214 concluding that, despite FIRREA's comprehensive statutory scheme, the statute evinced no intent on the part of Congress to abrogate the D'Oench rule.215 The court distinguished O'Melveny, emphasizing that the Supreme Court never specifically addressed the validity of D'Oench in that case and stating that the question in O'Melveny "was whether the federal courts should create new federal common-law doctrine in an area in which Congress had not expressed any special concern."216 In the present case, the court noted, the question was whether Congress intended to preempt an existing federal common law rule.217 As noted, the court answered that question in the negative.

Following the Eleventh Circuit's Motorcity I ruling, the Supreme Court

211 Id. (citations omitted).
212 Id. at 1404.
213 83 F.3d 1317, 1327-34 (11th Cir. 1996)(en banc) (Motorcity I).
214 See United States v. Texas, 507 U.S. 529, 534 (1993) (recognizing presumption exists for retention of well-established common law rules unless Congress evinces purpose to the contrary); see also supra Part III.A.2 (discussing Texas decision).
215 Motorcity I, 83 F.3d at 1330-34.
216 Id. at 1330.
217 Id.
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granted certiorari, vacated the judgment, and remanded the case for con-
sideration in light of the *Atherton* decision.218 On remand, however, the
Eleventh Circuit stuck to its guns, finding that *Atherton*, like *O'Melveny*,
focused on whether to create new federal common law and not whether
an existing federal common law doctrine should be retained.219 The
*Atherton* decision, according to the court, simply did not control the issue
at hand, and nothing in the Supreme Court's opinion in that case com-
pelled a result different from that of the Eleventh Circuit's earlier deci-
sion.220 Again relying on *Texas*, the court concluded that *D'Oench* was not
preempted by FIRREA and therefore remained good law.221

**Young.** The Eleventh Circuit's position—that FIRREA did not preempt
the *D'Oench* doctrine—found approval by the Fourth Circuit in *Young v.
FDIC*.222 The case involved a complicated series of transactions that were
intended ultimately to secure $600 million to finance Young's oil and gas
investments.223 Young brought several claims against those involved in the
financing arrangement, including an institution that eventually went into
receivership under the FDIC.224

Young's claims against the FDIC primarily concerned a letter of credit
designed to secure one of the loans made to Young.225 Because the bank's
records did not contain the letter of credit, however, the court concluded
that the *D'Oench* doctrine prohibited any claims based on the letter.226 The
court recognized that § 1823(e) might not bar Young's claims against the
Corporation because the letter of credit represented a liability of the failed
bank rather than an asset.227 Nonetheless, the court determined it did not
need to reach the asset limitation issue because there was no such limita-
tion on the common law rule228 and § 1823(e) did not preempt *D'Oench*.229
Because *D'Oench* remained valid authority, the doctrine barred Young's

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219 *Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A.*, 120 F.3d 1140, 1143 (11th Cir. 1997) (*Motorcity Id.*).
220 *Id.* at 1144.
221 *Id.*
222 103 F.3d 1180 (4th Cir. 1997).
223 *Id.* at 1183-86.
224 *Id.* at 1185 n.3.
225 *Id.* at 1186.
226 *Id.* at 1187-89.
227 *Id.* at 1188-89.
228 *Id.* at 1189.
claims, and the court never reached the issue of whether or not § 1823(e) would apply.

PUTTING IT ALL TOGETHER

The current circuit split concerning the statutory preemption of D'Oench leaves unresolved a question of great consequence to future failed bank litigation. If the FDIC can no longer rely on the common law rule, then its position in regard to borrowers of the insolvent institutions it regulates will be minimized by the strictures of § 1823(e)'s statutory language. As the decisions in Murphy and DiVall indicate, the statute has very specific requirements that, if unmet, will not trigger the statute's protection. The statutory requirements, as the FDIC has recently discovered, cut both ways. If the borrower cannot meet the notice requirements of § 1823(e)(A)-(D), then he cannot raise a claim or defense against the FDIC based on the insufficiently documented agreement. On the other hand, if the FDIC cannot show that the borrower's claim or defense rests on an agreement which affects a specific asset of the failed bank, usually a loan agreement, then the Corporation will likely not be able to prohibit that agreement from being raised. Because the D'Oench doctrine generally provides the FDIC with broader protection, the resolution of the statutory preemption question remains very important to the Corporation's rights and powers under federal law.

This Part analyzes the statutory preemption issue, drawing upon the guidelines advanced by the Supreme Court in Milwaukee and Texas, as well as the Court's implication of the propriety of federal common law in the FIRREA context from O'Melveny and Atherton. Concluding that the reasoning of Murphy and DiVall present the better approach in resolving the issue than do Motorcity and Young, this Part presents two reasons why D'Oench should be considered preempted by §§ 1823(e) and 1821(d)(9) and should therefore no longer be relied on by the courts. First, FIRREA evinces a legislative purpose to preempt the D'Oench doctrine, thus overcoming the presumption that common law doctrines should be retained

229 Id. at 1187.
230 See supra Part II.B (discussing statutory requirements and differences in application of statute and common law rule).
after the enactment of a statute. Second, FIRREA codifies the *D'Oench* holding and speaks directly to the same issue as the common law rule.

**FIRREA Evinces Statutory Purpose to Preempt *D'Oench***

FIRREA represents a comprehensive statutory regulation of the banking industry. As such, FIRREA strongly suggests a statutory purpose to preempt the use of any federal common law rules. Indeed, the crux of the *O'Melveny* decision is that FIRREA’s extensive framework, which specifically defines the rights and powers of the FDIC, forecloses the application of any other sources of federal law, including the *D'Oench* doctrine. Congress apparently wanted FIRREA to be the last word regarding the FDIC’s position under federal law, and any federal common law exceptions to its framework do not supplement the statute but illegitimately alter it. *Atherton* supports this proposition, if only minimally, by refusing to implement any federal common law rule defining the standard of care owed by bank officers and directors. If a federal court finds it cannot answer a question by looking to a specific provision of FIRREA, state law must control the issue because no other source of federal law exists to provide an answer. Thus, the *D'Oench* doctrine did not survive the enactment of FIRREA.

The all-encompassing nature of FIRREA’s regulatory scheme provides sufficient evidence of a congressional purpose to eliminate the presumption established in *Texas* that federal common law rules are to be retained. The Eleventh Circuit, however, relied on the *Texas* presumption in deter-

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232 See *City of Milwaukee v. Illinois*, 451 U.S. 304, 319 (1981) (stating that enactment by Congress of comprehensive program “strongly suggests that there is no room for courts to attempt to improve on that program with federal common law”).
233 See *O'Melveny*, 512 U.S. at 86-87 (explaining that FDIC’s argument that portions of FIRREA can be supplemented or modified by federal common law “is demolished by those provisions...which specifically create special federal rules of decision” regarding FDIC’s role as receiver).
234 *Id.* at 87; see *DiVall Insured Income Fund Ltd. Partnership v. Boatmen’s First Nat’l Bank*, 69 F.3d 1398, 1402 (8th Cir. 1995) (reading *O'Melveny* to prohibit federal courts from “supplementing” specific provisions of FIRREA).
236 Cf. *DiVall*, 69 F.3d at 1402-03 (“If DiVall’s defense is to be barred, it must be barred either by a specific provision of FIRREA or by state law.”).
mining that FIRREA did not preempt D'Oench. The Motorcity II court itself recognized that the Texas presumption disappears when there exists a statutory purpose to the contrary. The opinion, however, did not explicitly deal with the fact that FIRREA is comprehensive legislation, instead citing the discussion of that point in Motorcity I.

In Motorcity I, the court acknowledged the significance of FIRREA's comprehensive nature, but nevertheless concluded that such a scheme did not show a congressional intent to preempt D'Oench because the common law rule presented no inconsistency with the primary purpose of FIRREA—"to strengthen the FDIC's long-established right to protect itself from secret agreements executed by failing banks." Moreover, the Motorcity I opinion reasoned, FIRREA preserved § 1823(e) as it existed prior to FIRREA, thereby showing an intent to keep the common law rule and the statute coexistent. Accordingly, the court found that the Texas presumption applied and D'Oench survived FIRREA.

The Motorcity I analysis overlooks two important points. First, the O'Melveny decision shows that federal common law exceptions to FIRREA alter its legislative scheme. Therefore, any federal common law rule that purports to define the FDIC's rights under federal law is, as a matter of course, inconsistent with the statute. Assuming that the Eleventh Circuit's identification of FIRREA's purpose is correct—that Congress enacted the statute to strengthen the FDIC's power to protect itself from secret agreements—the statute nevertheless provides an extensive assortment of weapons to accomplish that purpose. Anything not found in that arsenal, even something that aids the FDIC in protecting itself, conflicts with the statutory framework. Bolstering the argument that FIRREA left no room for judicial lawmaking are the O'Melveny and Atherton decisions. Each of those cases arose during a banking crisis equalling, if not surpassing, that of the Great Depression. Unlike the D'Oench Court, however, the

238 Id.
239 Id.
240 Id. at 1332-33.
241 Id. at 1333.
242 Id. at 1333-34.
244 See id. at 86-87 (listing various provisions of FIRREA that aid FDIC in its role as receiver).
O'Melveny and Atberon Courts refused to supplement the legislative scheme constructed by Congress, even though doing so might well have aided the federal policy of protecting the FDIC and saving taxpayer money.

Second, that the Supreme Court recognized the D'Oench rule as independent authority after the initial enactment of §1823(e) in 1950 is not necessarily a foregone conclusion. The Court has not applied D'Oench to bar a claim or defense since doing so in D'Oench itself, and the Court's opinion in Langley v. FDIC referred to D'Oench not as the source of an applicable rule, but as "the leading case in this area prior to enactment of §1823(e)." Despite the wide-spread use of D'Oench after 1950, this reference at least leaves open the question whether such use should be considered legitimate. Thus, the Eleventh Circuit's rationale that Congress intended to keep the D'Oench rule coexistent with §1823(e) because the statute was reenacted in its pre-FIRREA form is not airtight.

O'Melveny and its progeny show that FIRREA constitutes comprehensive legislation that leaves no room for federal common law rules that define the rights and powers of the FDIC. By enacting FIRREA, Congress revealed a statutory purpose to preempt any existing federal common law. Therefore, the Texas presumption disappears, clearing the way for a finding that Congress preempted D'Oench by speaking directly to the same issue previously governed by the common law rule.

FIRREA Codifies D'Oench and Speaks Directly to Same Issue

The Supreme Court emphasized in both Milwaukee and Texas that Congress can preempt federal common law by speaking directly to the issue addressed by the common law doctrine. Since §§1823(e) and 1821(d)(9) directly address the same issue as D'Oench—the enforceability of undocumented agreements against the FDIC—those provisions of FIRREA preempt the federal common law doctrine. In Motorcity I, however, the Eleventh Circuit concluded that the aforementioned provisions did not speak directly to the D'Oench issue because they do not "comprehensively address the substance of the federal common law" rule. In other words, because §§1823(e) and 1821(d)(9) do not apply in every situation

248 See supra Part II.B.2 (discussing statutory provisions and how they relate to D'Oench doctrine).
where the courts have found *D'Oench* to apply, FIRREA does not speak directly to the *D'Oench* question.

The Eleventh Circuit’s analysis, however, disregards that *D'Oench* heavily influenced the requirements of § 1823(e), and the purposes of the statute as identified in *Langley* correspond to the purposes the *D'Oench* Court gave for creating the common law rule in the first place. Thus, §§ 1823(e) and 1821(d)(9) speak directly to the question that the *D'Oench* Court attempted to resolve. That the statutes do not provide as broad protection for the FDIC as the common law doctrine remains irrelevant. Congress has identified when an undocumented agreement may form the basis of a claim or defense against the FDIC—the very issue before the Court in *D'Oench*—and therefore has preempted the *D'Oench* doctrine, rendering it invalid as an independent ground for decision.

Furthermore, there currently exists no need for the *D'Oench* rule because Congress has provided a rule of decision. The Eleventh Circuit’s reasoning overlooks the fact that the *D'Oench* rule came to life because Congress had not statutorily defined the rights of the FDIC in regard to its status as holder of commercial paper acquired from insolvent institutions. A statutory definition of those rights now exists, eliminating the need for the federal common law rule:

Insofar as one justification for the exercise of federal common law is that Congress has not spoken on the matter before the court, that justification is removed once Congress has spoken on a particular matter. Moreover, if the justification for the creation of federal common law is that it is necessary in an area of strong federal concern, once Congress has legislated on the subject, its decision prevails over the judicial lawmaking since it has primary responsibility for determining federal policy.

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250 *See supra* Part II.B.1 (discussing influence of *D'Oench* on § 1823(e)).

251 *See supra* notes 113-116 and accompanying text (identifying purposes of § 1823(e) as articulated in *Langley*).


253 *Wright, supra* note 144, § 4514, at 480-81.
CONCLUSION

The answer to the question whether FIRREA preempts the federal common law *D'Oench* doctrine will significantly affect the rights and powers of the FDIC as regulator of failed financial institutions. The *D'Oench* doctrine provides a broad and fluid weapon through which the Corporation can safeguard its funds by barring virtually any agreement that tends to place the FDIC at a disadvantage. The statute, on the other hand, presents a more structured tool that provides hurdles over which both the borrower and the Corporation must step. Because the common law rule applies in a broader range of circumstances, a finding that *D'Oench* is preempted could cost the FDIC large amounts of money.

Recognizing the federal policy of protecting the FDIC's funds, however, Congress has shown that it intends that protection to come from the express language of FIRREA. While there exists a presumption that Congress does not intend to abrogate existing common law rules when it enacts legislation unless a contrary purpose appears evident, FIRREA's comprehensive framework in the field of banking regulation shows that Congress intended FIRREA to be the sole basis of the FDIC's rights under federal law, thereby eliminating the use of federal common law. Moreover, § 1823(e) directly addresses the same issue as the *D'Oench* doctrine, sufficiently preempting that doctrine under the rule of *Milwaukee*.

Congress has spoken, and its message suggests that it no longer wants the FDIC protected at all costs to the innocent borrower. Keeping intact the basic requirements of the *D'Oench* holding, Congress has nonetheless opted for a scheme that places the FDIC in an identical position as the failed institution unless the statute explicitly provides otherwise, meaning that the Corporation may be forced to pay damages for the bank's wrongdoing or may have to ward off certain defenses that the *D'Oench* rule would categorically prohibit. In doing so, however, Congress has retained the *D'Oench* doctrine's basic protections. The FDIC still has enormous power under FIRREA, a power very similar, though not quite as broad, as that enjoyed by the Corporation under federal common law.

In determining the statutory preemption question, the courts should be aware that the continued use of *D'Oench* not only affects the relationship between the FDIC and parties to banking transactions, it also implicates separation of powers. Congress has directly spoken to the *D'Oench* issue, and as the branch of government that is charged with determining federal
policy, its word should govern. The judiciary must listen to Congress and follow its command, and when the courts rely on their own rule of decision despite applicable legislation, they begin to overstep their constitutional bounds. The continued application of federal common law despite statutory intervention not only violates separation of powers, but constitutes judicial aggrandizement of legislative power. As one of the Framers indicated long ago: "The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body."\textsuperscript{254}

\textsuperscript{254} The Federalist No. 78, at 404 (Alexander Hamilton) (George W. Carey & James McClellan eds., 1990)