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## ARTICLE

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### DODD–FRANK ORDERLY LIQUIDATION AUTHORITY: TOO BIG FOR THE CONSTITUTION?

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*Title II of the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 establishes a new specialized insolvency regime, known as orderly liquidation, for systemically significant nonbank financial companies. While well intended, Title II unfortunately raises a number of serious constitutional questions. To vest authority in an Article III judge to appoint a receiver for such companies, yet also avoid a financial panic, Dodd–Frank requires that the judicial proceedings be conducted in secret, with no notice to the public or other interested parties on pain of criminal penalties, and that the judge rule on the petition to appoint the receiver within twenty-four hours of its filing. These unprecedented procedures raise serious questions under the Due Process Clause, Article III of the Constitution, and the First Amendment. The very broad discretion given to the executive branch to decide whether a distressed financial firm should be subject to mandatory liquidation under Title II, as opposed to conventional bankruptcy, also raises questions under the uniformity requirement of the Constitution’s Bankruptcy Clause. Finally, Title II raises a number of potential issues under the Takings Clause. Given the extremely abbreviated time for judicial appointment of a receiver, the prohibition on any stay pending appeal, and the absence of any post-appointment judicial review of the*

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*decision to place a firm into receivership, there are a number of vexing questions about how and when the constitutional issues raised by Title II might be presented to the courts. This Article examines these constitutional and procedural questions and argues that Congress should amend the Dodd–Frank Act to provide for plenary judicial review after rather than before a receiver is appointed. This simple change, along with amendments tightening some of the language that indicates when orderly liquidation rather than bankruptcy is appropriate, would help ensure that the new Title II authority is not undermined by a welter of constitutional claims—if and when it becomes necessary to use this authority to avert a future financial crisis.*

|   |     |
|---|-----|
| INTRODUCTION .....  | 167 |
| I. TITLE II'S ORDERLY LIQUIDATION AUTHORITY (OLA) .....   | 174 |
| A. <i>Bank Receiverships and Bankruptcy</i> .....         | 176 |
| 1. FDIC Receivership Procedure .....                      | 176 |
| 2. Bankruptcy Procedure .....                             | 180 |
| B. <i>Legislative History of Dodd–Frank's OLA</i> .....   | 183 |
| C. <i>OLA as Enacted</i> .....                            | 189 |
| II. CONSTITUTIONAL CHALLENGES: THE WHO AND THE WHEN ..... | 194 |
| A. <i>Raising Claims by Defense</i> .....                 | 194 |
| B. <i>Enjoining the Receiver</i> .....                    | 197 |
| C. <i>Suit for Anticipatory Relief</i> .....              | 198 |
| D. <i>The Tucker Act Defense</i> .....                    | 201 |
| III. CONSTITUTIONAL ISSUES: PROCESS OBJECTIONS .....      | 204 |
| A. <i>Due Process</i> .....                               | 204 |
| B. <i>Article III</i> .....                               | 215 |
| C. <i>Avoidance, Anyone?</i> .....                        | 222 |
| IV. CONSTITUTIONAL ISSUES: SUBSTANTIVE OBJECTIONS .....   | 225 |
| A. <i>Uniform Laws of Bankruptcy</i> .....                | 225 |
| B. <i>First Amendment</i> .....                           | 230 |
| V. TAKINGS ISSUES .....                                   | 235 |
| A. <i>Some Possible Takings Claims</i> .....              | 236 |
| 1. Assessments .....                                      | 236 |
| 2. Executive Pay Clawbacks .....                          | 238 |
| 3. Revival of Barred Actions .....                        | 239 |
| B. <i>Impairment of Security Interests</i> .....          | 240 |
| CONCLUSION .....  | 246 |

## INTRODUCTION

The Dodd–Frank Act<sup>1</sup> is the federal government’s most significant response to the financial crisis of 2007–2009 and the severe recession that followed. If the precipitating event of the Great Depression was the 1929 stock market crash, the September 15, 2008 filing of Lehman Brothers’s bankruptcy petition was the analogous triggering event for the Great Recession.<sup>2</sup> Within hours of the filing, credit markets froze up, and the Dow Jones Industrial Average plunged 504 points.<sup>3</sup> One day later, the federal government advanced funds, eventually totaling \$182 billion, to prevent the collapse of insurance giant AIG.<sup>4</sup> Within weeks, a reluctant Congress created a \$700 billion fund, known as the Troubled Asset Relief Program (TARP), to provide emergency funds to financial firms regarded as “too big to fail.”<sup>5</sup>

Observers drew two main lessons from these traumatic events. The first was that conventional bankruptcy tools were inadequate when dealing with insolvency of a major investment bank like Lehman Brothers.<sup>6</sup> A significant portion of Lehman’s business consisted of making long-term loans funded by short-term borrowing.<sup>7</sup> Unlike a traditional bank, which makes long-term loans funded by government-insured deposits, Lehman obtained funds to support its lending activity through short-term borrowing from other financial firms secured by collateral such as mortgage-backed securities.<sup>8</sup> When the housing bubble started to burst in 2007–2008, the value of this collateral became uncertain. Lehman’s counterparties demanded more and better collateral, and when rumors began circulating that Lehman might be insolvent, they refused to deal with Lehman at all, causing a general panic

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<sup>1</sup> Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank Act), Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 7, 12 and 15 U.S.C.).

<sup>2</sup> Report of Anton R. Valukas, Examiner, vol. 1 at 13, *In re Lehman Bros. Holdings Inc.*, No. 08-13555 (Bankr. S.D.N.Y. Mar. 11, 2010) [hereinafter Examiner’s Report].

<sup>3</sup> *Id.* (citation omitted).

<sup>4</sup> *Id.* (citation omitted).

<sup>5</sup> The Emergency Economic Stabilization Act of 2008 created TARP. See Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (codified in scattered sections of 12 and 26 U.S.C.) (providing the requisite authority for the federal government to purchase distressed assets from financial institutions in an attempt to stabilize the U.S. economy and significant financial institutions).

<sup>6</sup> John L. Douglas & Randall D. Guynn, *Resolution of US Banks and Other Financial Institutions*, in DEBT RESTRUCTURING 311, 359 (Look Chan Ho & Nick Segal eds., 2011).

<sup>7</sup> Examiner’s Report, *supra* note 2, vol. 1 at 3.

<sup>8</sup> For background regarding the rise of the rehypothecation (repo) market and its role in the financial crisis, see generally GARY B. GORTON, SLAPPED BY THE INVISIBLE HAND: THE PANIC OF 2007, at 13-59 (2010).

among financiers analogous to a run on a bank by depositors.<sup>9</sup> For a variety of reasons, including the fact that collateralized debt obligations are exempt from the Bankruptcy Code's automatic stay,<sup>10</sup> the bankruptcy court was utterly helpless to stop the Lehman crisis from unfolding.

The second lesson that quickly became evident was that the only alternative to bankruptcy under existing law was government bailouts of financial firms deemed too big to fail.<sup>11</sup> Nearly all observers recognized the problem inherent in a policy of bailing out large financial firms when they become overextended. If the government issues a standing promise to bail out the biggest financial firms, it encourages such firms to engage in excessively risky behavior, increasing the likelihood of the very type of financial crisis everyone would like to avoid.<sup>12</sup> Moreover, a government bailout guarantee,

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<sup>9</sup> Former Secretary of the Treasury Timothy Geithner's explanation of Lehman's collapse was that investors and counterparties lost confidence in its ability to meet its obligations, reminiscent of an old-fashioned run on the bank. TIMOTHY F. GEITHNER, *STRESS TEST: REFLECTIONS ON FINANCIAL CRISES* 152, 164-68, 172-74, 176-83, 189 (2014). For a similar explanation from an academic economist, see generally GORTON, *supra* note 8.

<sup>10</sup> The Bankruptcy Code was amended in 2005 to exempt so-called "qualified financial contracts" (QFCs) from resolution in bankruptcy. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, §§ 903-904, 119 Stat. 23, 160-66 (codified as amended in scattered sections of 12 U.S.C.); *see also* Federal Deposit Insurance Reform Act of 2005, Pub. L. No. 109-171, 120 Stat. 9 (2006) (codified as amended at 12 U.S.C. § 1821(e)(8) (2012)) (establishing that the appointment of the Federal Deposit Insurance Corporation (FDIC) as a conservator or receiver will not affect a party's right to terminate, liquidate, accelerate, set-off, transfer, or modify previously entered QFCs).

Some academic commentators have suggested that a better response to the Lehman Brothers's experience and the financial crisis would be to eliminate this carveout in the Bankruptcy Code. *See* David A. Skeel, Jr., & Thomas H. Jackson, *Transaction Consistency and the New Finance in Bankruptcy*, 112 COLUM. L. REV. 152, 200-01 (2012); *see also* BANKRUPTCY NOT BAILOUT: A SPECIAL CHAPTER 14 (Kenneth E. Scott & John B. Taylor eds., 2012) (urging the adoption of a new chapter of the Bankruptcy Code to deal with systemically significant financial firms). This complex topic, however, is beyond the scope of this Article.

<sup>11</sup> The Senate Report that laid the foundation for the Dodd-Frank Act noted that

[w]hen Lehman Brothers declared bankruptcy, the markets panicked and the crisis escalated. With no other means to resolve large, complex and interconnected financial firms, the government was left with few options other than to provide massive assistance to prop up failing companies in an effort to prevent the crisis from spiraling into a great depression.

Despite initial efforts of the government, credit markets froze and the U.S.[.] problem spread across the globe. The crisis on Wall Street soon spilled over onto Main Street, touching the lives of most Americans and devastating many.

S. REP. NO. 111-176, at 43-44 (2010).

<sup>12</sup> Reducing this moral hazard was explicitly recognized as a basic purpose of the Dodd-Frank Act. *See* Dodd-Frank Act § 204(a), 12 U.S.C. § 5384(a) (2012) (stating that the Act's purpose is "to provide the necessary authority to liquidate failing financial companies that pose a

even if only implicit, allows the largest financial firms to obtain credit on more favorable terms than ordinary financial firms, distorting incentives and altering the competitive landscape in undesirable ways.<sup>13</sup>

The American public, while perhaps not appreciating the nuances of the policy arguments, unquestionably regarded the bailouts as grossly unfair. Once the immediate crisis subsided, the bailed-out firms and their well-paid officers and directors appeared to have survived quite nicely, while ordinary folks still suffered the lingering effects of the downturn.

The idea that the federal government rescued large financial firms with taxpayer dollars while ordinary citizens lost their jobs and watched their savings evaporate resulted in widespread anger. Politicians seemed to agree, at least publicly, that the general public should never again be taxed to prop up giant financial firms that the government deems too big to fail.<sup>14</sup>

In light of these perceived lessons from the Lehman Brothers bankruptcy and the regime of bailouts that followed, the Obama administration quickly concluded that a new insolvency regime was needed—one that would unwind “systemically significant” financial firms like Lehman Brothers while avoiding the undesirable incentives and public hostility to government bailouts. The administration therefore proposed a new type of resolution authority, modeled after the process for shutting down insolvent banks and savings and loan associations, as part of the package of proposed financial reforms that eventually became the Dodd–Frank Act.<sup>15</sup> Ordinary banks and savings and loan associations that accept government-insured

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significant risk to the financial stability of the United States in a manner that mitigates such risk and minimizes moral hazard”).

<sup>13</sup> Recent studies have suggested that this advantage is significant. See Kenichi Ueda & B. Weder di Mauro, *Quantifying Structural Subsidy Values for Systemically Important Financial Institutions*, 37 J. BANKING & FIN. 3830, 3840 (2013) (using the expectation of government bailouts embedded in inflated credit ratings to estimate that the value of the structural subsidy given to systemically important financial institutions is as much as eighty basis points); see also *Why Should Taxpayers Give Big Banks \$83 Billion a Year?*, BLOOMBERG VIEW (Feb. 20, 2013, 6:30 PM), <http://www.bloombergvview.com/articles/2013-02-20/why-should-taxpayers-give-big-banks-83-billion-a-year->, archived at <http://perma.cc/SYM6-FM8Q> (“Small as it might sound, 0.8 percentage point makes a big difference. Multiplied by the total liabilities of the 10 largest U.S. banks by assets, it amounts to a taxpayer subsidy of \$83 billion a year[,] . . . tantamount to the government giving the banks about 3 cents of every tax dollar collected.”).

<sup>14</sup> For example, in 2013, the Senate unanimously approved an amendment to a proposed budget for the 2014 fiscal year (which was not itself enacted) that called for eliminating all subsidies or other funding advantages for any financial firm having more than \$500 billion in assets. 159 CONG. REC. S2284, S2289 (daily ed. Mar. 22, 2013).

<sup>15</sup> EXEC. OFFICE OF THE PRESIDENT, RESOLUTION AUTHORITY FOR LARGE, INTERCONNECTED FINANCIAL COMPANIES ACT OF 2009, tit. XII (July 23, 2009), available at <http://www.treasury.gov/press-center/press-releases/Documents/title%20xii%20resolution%20authority%207232009finala.pdf> [hereinafter Administration’s Combined Draft].

deposits have long been subject to special resolution procedures that use a receivership or conservatorship; this authority was augmented before the enactment of Dodd–Frank to include provisions allowing the receiver or conservator to take systemic financial risk into account in certain circumstances.<sup>16</sup> The Administration’s Combined Draft would create a similar type of authority that applied to systemically significant financial firms, other than banks and savings and loan associations, such as bank holding companies and their subsidiaries.<sup>17</sup> Under this new resolution authority, government agencies would be given broad discretion to decide on a case-by-case basis when a bank holding company was in trouble and if its failure would pose a threat to the economy.<sup>18</sup> This decision would lead to a takeover by a government receiver or conservator, typically the FDIC, which would proceed to run the company as it resolved claims of creditors until the firm was liquidated or reorganized.<sup>19</sup> Positive-value assets could be transferred to a “bridge financial company” and eventually folded into another firm.<sup>20</sup> If, while the firm was being wound down, financing was required to meet its obligations, the administration proposed that the necessary funds would be supplied by the Treasury.<sup>21</sup>

Like other provisions of the financial reform, the proposed resolution authority was politically controversial. Opponents argued that the proposal would institutionalize the hated regime of bailouts.<sup>22</sup> Proponents insisted that the new resolution authority would put an end to bailouts.<sup>23</sup> The legislative back-and-forth produced amendments that added further constraints on the discretion of the executive branch in using the new authority.<sup>24</sup> One

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<sup>16</sup> The FDIC is charged with administering the resolution of failed or capital-deficient government-insured depository institutions. The payment of deposits and other creditor claims by the FDIC is generally governed by the “least-cost resolution” rule. 12 U.S.C. § 1823(c)(4)(A) (2012). Under certain circumstances, however, the FDIC is allowed to diverge from the priority scheme established by the least-cost resolution rule. Specifically, if adherence to the rule would have serious adverse effects on economic conditions or financial stability, the FDIC is allowed to take alternative actions to mitigate these adverse effects, including making selective payments to non-depository creditors. *Id.* § 1823(c)(4)(G).

<sup>17</sup> Administration’s Combined Draft, *supra* note 15, § 1204.

<sup>18</sup> *Id.* § 1203.

<sup>19</sup> *Id.* § 1209.

<sup>20</sup> *Id.* § 1209(a)(1)(G)(i).

<sup>21</sup> *Id.* § 1209(n).

<sup>22</sup> See DAVID SKEEL, *THE NEW FINANCIAL DEAL: UNDERSTANDING THE DODD–FRANK ACT AND ITS (UNINTENDED) CONSEQUENCES* 117–18 (2011) (“The Obama administration made the same argument: Their framework for administrative resolution of large financial institutions didn’t ‘institutionalize bailouts,’ as critics complained; it would provide the benefits of bankruptcy without the uncertainty.”).

<sup>23</sup> *Id.*

<sup>24</sup> See *infra* text accompanying notes 112–39.

of these new constraints added by the Senate at the last minute—the requirement that a federal district judge make the final decision to appoint a receiver for a firm undergoing resolution—introduced the constitutional questions that are a substantial focus of this Article.<sup>25</sup> Other changes enhanced the punitive effects of the new resolution authority, raising further constitutional questions.

In keeping with Alexis de Tocqueville’s famous adage that “[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question,”<sup>26</sup> Dodd–Frank’s orderly liquidation authority is now the subject of a lawsuit. Eleven state attorneys general have sued in the United States District Court for the District of Columbia, charging that the Act’s Title II violates the Due Process Clause, Article III of the Constitution, and the uniformity requirement of the Bankruptcy Clause.<sup>27</sup> The suit was dismissed by the district court for lack of standing and ripeness<sup>28</sup> and is now on appeal before the United States Court of Appeals for the District of Columbia Circuit.<sup>29</sup> Whether or not the D.C. Circuit allows the case to proceed in its present posture, the plaintiffs’ arguments on the merits are surprisingly strong. Indeed, if the dismissal on jurisdictional grounds is upheld, the constitutional arguments are likely to reemerge at the worst possible time—if and when another financial crisis hits and one or more systemically significant financial firms are slated for orderly liquidation. Sorting out these constitutional questions in the midst of a financial crisis could disrupt, or at least delay, the resolution process envisioned by Congress. It would be far better to fix these problems now by appropriate legislative amendment while the legal machinery associated with Title II is being established.

Most of Title II’s constitutional infirmities stem from the decision to have a federal district judge appoint the receiver for a systemically significant nonbank financial firm. In order to confer appointment authority on a

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<sup>25</sup> See *infra* Sections III.A, IV.B.

<sup>26</sup> ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 280 (Phillips Bradley ed., Alfred A. Knopf 1945) (1835).

<sup>27</sup> See generally Second Amended Complaint for Declaratory and Injunctive Relief, State Nat’l Bank of Big Spring v. Lew, 958 F. Supp. 2d 127 (D.D.C. 2013) (No. 12-1032) [hereinafter Big Spring Second Amended Complaint]. The eleven states are Alabama, Georgia, Kansas, Michigan, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Texas, and West Virginia.

<sup>28</sup> State Nat’l Bank of Big Spring v. Lew, 958 F. Supp. 2d 127, 166 (D.D.C. 2013).

<sup>29</sup> Final briefs have been filed. Final Opening Brief for the State Appellants, State Nat’l Bank of Big Spring v. Lew, Nos. 13-5247 & 13-5248 (D.C. Cir. May 12, 2014), ECF No. 45; Final Opening Brief of Private Plaintiffs–Appellants, State Nat’l Bank of Big Spring v. Lew, Nos. 13-5247 & 13-5248 (D.C. Cir. May 12, 2014), ECF No. 47; Final Brief for Appellees, State Nat’l Bank of Big Spring v. Lew, Nos. 13-5247 & 13-5248 (D.C. Cir. May 9, 2014), ECF No. 44.

federal judge, and yet prevent the modern-day equivalent of a run on the bank, the statute prescribes a clandestine process giving the district judge just twenty-four hours to rule on a petition to appoint a receiver,<sup>30</sup> prohibits providing any notice of the proceedings to creditors or other interested third parties,<sup>31</sup> and imposes criminal penalties on anyone who publicly discloses the pendency of the proceedings.<sup>32</sup> Moreover, the district judge is permitted to consider only two factual issues under a highly deferential standard of review in deciding whether to order the liquidation of a major financial firm.<sup>33</sup> For good measure, the statute proscribes any stay pending appeal.<sup>34</sup> In effect, the statute seeks to draw on the prestige of the federal courts in making the appointment of a receiver while depriving parties with a vital stake in the matter of any notice or meaningful opportunity to be heard, handcuffing the court from acting in a manner consistent with judicial authority.

The statute also gives the executive branch broad discretion to subject some nonbank financial firms to resolution leading to liquidation under Title II, while letting other firms remain subject to the ordinary bankruptcy process, including the possibility of reorganization.<sup>35</sup> Allowing the executive to pick and choose from different resolution regimes for firms in the same industry based on necessarily subjective determinations of the impact of the firm's insolvency on "financial stability in the United States"<sup>36</sup> arguably violates the uniformity requirement of the Bankruptcy Clause.<sup>37</sup> And within the new regime of orderly liquidation, the statute gives a federal agency—typically the FDIC—wide latitude to depart from the principle that all creditors of the same class should be treated equally.<sup>38</sup> This too arguably violates the typical understanding of uniformity in the bankruptcy context.

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<sup>30</sup> Dodd–Frank Act § 202(a)(1)(A)(v), 12 U.S.C. § 5382(a)(1)(A)(v) (2012).

<sup>31</sup> *Id.* § 202(a)(1)(A)(ii)–(iii), 12 U.S.C. § 5382(a)(1)(A)(ii)–(iii) (stating that the petition must be filed under seal and hearing is conducted on a strictly confidential basis).

<sup>32</sup> *Id.* § 202(a)(1)(C), 12 U.S.C. § 5382(a)(1)(C).

<sup>33</sup> *Id.* § 202(a)(1)(A)(iii)–(iv), 12 U.S.C. § 5382(a)(1)(A)(iii)–(iv).

<sup>34</sup> *Id.* § 202(a)(1)(B), 12 U.S.C. § 5382(a)(1)(B).

<sup>35</sup> *Id.* § 201(a)(8), 12 U.S.C. § 5381(a)(8) (defining a covered financial firm as any firm so identified by the Secretary of the Treasury pursuant to the criteria set forth in § 203(b), 12 U.S.C. § 5383(b)). For a more extensive discussion of what these criteria entail, see *infra* text accompanying notes 144–50.

<sup>36</sup> Dodd–Frank Act § 203(b)(4), 12 U.S.C. § 5383(b)(4) (2012).

<sup>37</sup> The Constitution authorizes Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art I, § 8, cl. 4 (emphasis added).

<sup>38</sup> Dodd–Frank Act § 210(b)(4)(A), 12 U.S.C. § 5390 (b)(4)(A) (authorizing departure from equal treatment of similarly situated claimants if the FDIC determines that such action is "necessary" to maximize the value of the liquidated company's assets, continue essential operations, maximize the value of the sale of assets, or minimize losses on the sale of assets).

The general question addressed by this article is whether the Dodd–Frank Act’s effort to end the “too big to fail” regime entails an exercise of power by the executive branch that is too big for the Constitution. We ultimately conclude that in its current form, the answer is yes. Nevertheless, the constitutional infirmities could easily have been avoided and hence are relatively easy to fix.

Ordinary bank receiverships are commenced by an executive appointment of a receiver, followed by a right of judicial review unlimited as to the issues that can be raised<sup>39</sup>—a process that allows affected interest holders to challenge the appointment of a receiver after the fact and permits the reviewing court to function in an appropriate judicial manner. This kind of ex post judicial review is undoubtedly constitutional in the context of a statutory regime designed to prevent a financial crisis. In fact, both the Obama administration’s proposed legislation and the House bill called for a receiver appointment process closely modeled after the bank receivership scheme. For reasons not fully explained, however, the Senate rejected this model and substituted the provisions calling for *ex ante* judicial appointment of a receiver. These provisions, coupled with draconian limitations on the court while making the appointment and the elimination of ex post judicial review, render the judicial process virtually meaningless. Thus, the constitutional infirmities associated with Title II’s provisions for appointment of a receiver could be alleviated by simply amending the statute to incorporate the House provisions for appointing the receiver.

Whether the Dodd–Frank Act’s alleged violations of the uniformity requirement of the Bankruptcy Clause can be fixed is a harder question. Title II’s central objective is to provide the government with a new tool to avoid government bailouts or takeovers of troubled financial firms. It is debatable if such can be achieved via predictable rules laid down in advance. However, the loosely written provision that allows the FDIC to depart from equal treatment of similarly situated creditors<sup>40</sup> could almost certainly have been drafted more narrowly. Of course, in today’s legislative environment, obtaining such legislative fixes may be nearly impossible, making it much more likely that the courts will have to confront these issues.

In Part I, we begin by examining the two statutory models for establishing the resolution authorities that served as a backdrop to the Dodd–Frank Act—bank receivership and bankruptcy law—and summarize the ways in which Dodd–Frank’s Title II deviates from both models. In Part II, we consider various legal avenues for raising a constitutional challenge to Title II,

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<sup>39</sup> 12 U.S.C. § 1821(c)(7); *see also infra* text accompanying notes 55–59.

<sup>40</sup> Dodd–Frank Act § 210(b)(4)(A), 12 U.S.C. § 5390 (b)(4)(A).

each of which is problematic. Part III analyzes the due process and Article III objections to Title II in greater detail, including possible strategies for avoiding these difficulties. Part IV turns to the potential constitutional issues under the Bankruptcy Clause and the First Amendment. Part V lists some possible takings issues, including an analysis of how the authority to impair or disregard security interests created prior to the enactment of Title II might be analyzed under the Takings Clause.

### I. TITLE II'S ORDERLY LIQUIDATION AUTHORITY (OLA)

Title II of the Dodd–Frank Act sets forth a new “orderly liquidation authority” (OLA) designed to serve as a substitute for bankruptcy or government bailouts of financial firms deemed “too big to fail.”<sup>41</sup> Implicit in this newly created authority is the notion that the resolution of these large financial firms’ affairs under ordinary bankruptcy law or other insolvency laws would threaten the stability of the financial markets. The Lehman Brothers bankruptcy is the obvious object lesson here.<sup>42</sup> To avoid financial panic or various contagions analogous to a run on the bank, the statute assumes that the resolution of these systemically significant firms must occur rapidly and without any advance public notice. Thus, the process of appointing a receiver must occur “on a strictly confidential basis” without any public disclosure,<sup>43</sup> and the judge who makes the appointment must rule within twenty-four hours.<sup>44</sup> This clandestine process deprives stakeholders of any notice of a process that will lead to the liquidation of a major financial firm. Moreover, the extremely short deadline renders judicial oversight essentially meaningless, given the complexity of the matters involved. These draconian procedures represent a classic example of an unforced legislative error, for they render the statute vulnerable to constitutional challenge on due process, Article III, and First Amendment grounds.

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<sup>41</sup> Dodd–Frank Act, tit. II, 12 U.S.C. §§ 5381–5394.

<sup>42</sup> See U.S. DEPT OF THE TREASURY, FINANCIAL REGULATORY REFORM, A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION 76–77 (2009), available at [http://www.treasury.gov/initiatives/Documents/FinalReport\\_web.pdf](http://www.treasury.gov/initiatives/Documents/FinalReport_web.pdf) (“The federal government’s responses to the impending bankruptcy of Bear Stearns, Lehman Brothers, and AIG were complicated by the lack of a statutory framework for avoiding the disorderly failure of nonbank financial firms, including affiliates of banks or other insured depository institutions. In the absence of such a framework, the government’s only avenue to avoid the disorderly failures of Bear Stearns and AIG was the use of the Federal Reserve’s lending authority. And this mechanism was insufficient to prevent the bankruptcy of Lehman Brothers, an event which served to demonstrate how disruptive the disorderly failure of a nonbank financial firm can be to the financial system and the economy.”).

<sup>43</sup> Dodd–Frank Act § 202(a)(1)(A)(iii), 12 U.S.C. § 5382(a)(1)(A)(iii) (2012).

<sup>44</sup> *Id.* § 202(a)(1)(A)(v), 12 U.S.C. § 5382(a)(1)(A)(v).

The OLA process may never be used. It may remain a proverbial “musket in the closet” that the government holds in reserve while arranging workouts with creditors or the sale or merger of a troubled firm in lieu of “orderly liquidation.”<sup>45</sup> If implemented with the consent of the distressed financial firm, the OLA process may not be contested. The statute specifically invites the troubled financial firm’s directors to consent to the OLA, dangling a carrot in front of them in the form of promised immunity from any shareholder or creditor actions for “acquiescing in or consenting in good faith to the appointment of the [FDIC] as receiver.”<sup>46</sup> It would take an intrepid director to battle with the executive branch over the fate of a financially troubled firm, knowing that any diminution in financial value attributable to such resistance could be challenged in future litigation by disgruntled creditors and shareholders, whereas capitulation to the government would result in the director’s immunity from such lawsuits.

In any event, whether the OLA is used or merely threatened, the government’s credibility to use the new procedure will depend on whether relevant actors perceive this authority as constitutional. As we shall see, there are several features of Title II that give rise to serious questions on that front.

The basic model for the OLA process is existing law that provides for administrative receiverships of FDIC-insured banks.<sup>47</sup> Dodd–Frank takes this bank receivership law and adds to it a number of provisions borrowed from the Bankruptcy Code, which is essentially a judicially supervised resolution process.<sup>48</sup> As a result, the OLA is an administrative, rather than a judicial, resolution process—but one that hews more closely to the substantive law of bankruptcy than the law governing bank receiverships. Many of the constitutional issues raised by Title II stem from the unique provisions that govern the appointment of a receiver under the OLA.<sup>49</sup> These provisions do not follow the template of either bank receivership law or bankruptcy law. Rather, they were adopted by the Senate during the final days of intense negotiation over what was to become the final version of the law. Accordingly, we begin with a brief review of the benchmarks established by bank

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<sup>45</sup> See SKEEL, *supra* note 22, at 139–40 (arguing that even though Dodd–Frank’s resolution rules may violate the Due Process Clause of the Constitution, they are unlikely to ever be invoked and are more likely to be used as leverage in negotiations).

<sup>46</sup> Dodd–Frank Act § 207, 12 U.S.C. § 5387.

<sup>47</sup> SKEEL, *supra* note 22, at 117–27.

<sup>48</sup> See generally Douglas G. Baird & Edward R. Morrison, *Dodd–Frank for Bankruptcy Lawyers*, 19 AM. BANKR. INST. L. REV. 287 (2011).

<sup>49</sup> See *infra* Sections III.A, IV.B.

receivership and bankruptcy law and then trace these within the evolution of the Title II provisions by examining Dodd–Frank’s legislative history.

### A. Bank Receiverships and Bankruptcy

#### 1. FDIC Receivership Procedure

Under current practice, banks that become financially distressed are nearly always put into a conservatorship or receivership in which the FDIC acts as conservator or receiver exercising powers under federal law.<sup>50</sup> It is theoretically possible for state-chartered banks to have a state-appointed receiver, but the FDIC can take over a state receivership if the bank has FDIC-insured deposits, which virtually all banks do.<sup>51</sup> Federal law requires either that the FDIC be appointed as conservator or receiver by the relevant bank-supervising agency, such as the Office of the Comptroller of the Currency (OCC) in the case of a federally chartered bank,<sup>52</sup> or that the FDIC appoint itself as receiver if the assets of the federal deposit insurance fund are at risk.<sup>53</sup> Once the FDIC assumes control of the bank, the “depository institution” may commence an action in federal district court seeking an

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<sup>50</sup> See PATRICIA A. MCCOY, BANKING LAW MANUAL: FEDERAL REGULATION OF FINANCIAL HOLDING COMPANIES, BANKS AND THRIFTS § 15.01 (Matthew Bender, 2d ed. 2014) (“Closure can either take the form of an FDIC conservatorship or receivership. The purpose of a conservatorship is to conserve an institution’s assets until it can be sold or restored to viability as a going concern. The purpose of a receivership, in contrast, is to liquidate an institution or wind up its affairs. In virtually every case today, the conservator or receiver is the FDIC.”).

<sup>51</sup> See 12 U.S.C. § 1821(c)(4)-(5) (2012) (permitting the FDIC to “appoint itself as sole conservator or receiver of any insured State depository institution” if any of certain enumerated conditions are met).

<sup>52</sup> See *id.* § 1821(c)(2)(A)(ii) (“The Corporation shall be appointed receiver, and shall accept such appointment, whenever a receiver is appointed for the purpose of liquidation or winding up the affairs of an insured Federal depository institution by the appropriate Federal banking agency, notwithstanding any other provision of Federal law.”). For any national bank, the decision to appoint a receiver is determined by the OCC at the discretion of the Comptroller. *Id.* § 191. The OCC’s decision to appoint a receiver is generally not subject to judicial review before the appointment takes effect. See *U.S. Sav. Bank v. Morgenthau*, 85 F.2d 811, 814 (D.C. Cir. 1936) (holding that “where the Comptroller of the Currency has held a bank to be insolvent and has appointed a receiver for it, the court will not substitute its judgment for the judgment of the Comptroller, unless it appears by convincing proof that the Comptroller’s action is plainly arbitrary, and made in bad faith”).

<sup>53</sup> See *id.* § 1821(c)(4) (providing that “[n]otwithstanding any other provision of Federal law, the law of any State, or the constitution of any State, the Corporation may appoint itself as sole conservator or receiver of any insured State depository institution,” if the FDIC makes certain determinations, as described in 12 U.S.C. § 1821(c)(4)(A)-(B), in regards to the financial insufficiency of the insured State depository institution at issue).

order to dissolve the conservatorship or receivership.<sup>54</sup> The statutes authorizing this form of review generally require that the action be commenced within thirty days of the appointment of the conservator or receiver.<sup>55</sup> The review provisions instruct the court either to confirm or dismiss the appointment of the conservator or receiver “on the merits” and include no limit on the issues the court may consider or the time the court may take in rendering its decision.<sup>56</sup> The statute authorizing *ex post* review of a decision by the FDIC to appoint a *conservator* for a federal bank specifies that the standard of review is whether the OCC’s appointment was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>57</sup> But the other review provisions are silent as to the standard of review.

Taken as a whole, the statutory language strongly suggests that Congress contemplated that the district courts would engage in *de novo* review of any challenge to the FDIC’s appointment as *receiver*. The instruction to decide the matter “on the merits,” the juxtaposition of the arbitrary and capricious standard for conservatorships with silence about the standard for receiverships, the more serious implications of receiverships—which lead to liquidation of the bank—and the fact that ordinarily there will be nothing resembling a formal record compiled by the relevant appointment authority to review all point to this conclusion. The few courts of appeals that have considered the matter have nevertheless held that the “arbitrary or capricious” standard of the Administrative Procedure Act (APA)<sup>58</sup> applies,<sup>59</sup> although some district courts have disagreed.<sup>60</sup> Whatever the correct standard of review, it is clear

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<sup>54</sup> *Id.* § 1821(c)(7) (2012). Parallel provisions authorize judicial review of the OCC’s decision to appoint the FDIC as receiver of a federally chartered bank, *id.* § 191(b), review of a decision by the OCC to appoint the FDIC as conservator of a federally chartered bank, *id.* § 203(b), and the appointment of a conservator or receiver for a federally chartered savings association by the appropriate federal banking agency, *id.* § 1464(d)(2)(B).

<sup>55</sup> An exception is review of a decision by the OCC to appoint the FDIC as conservator, which must be commenced in twenty days. *Id.* § 203(b)(1).

<sup>56</sup> *See id.* § 191(b); *id.* § 203(b); *id.* § 1464(d)(2)(B); *id.* § 1821(c)(7).

<sup>57</sup> 12 U.S.C. § 203(b)(1) (2012).

<sup>58</sup> 5 U.S.C. § 706(2)(A) (2012).

<sup>59</sup> *See, e.g.,* Woods v. Fed. Home Loan Bank Bd., 826 F.2d 1400, 1406-09 (5th Cir. 1987) (finding that a provision of the Home Owners’ Loan Act permitting the district court to remove a receiver appointed by the Federal Home Loan Bank Board requires the district court to engage in only arbitrary and capricious review of the Board’s decision); Guaranty Sav. & Loan Ass’n v. Fed. Home Loan Bank Bd., 794 F.2d 1339, 1342-43 (8th Cir. 1986) (finding that the district court correctly applied the APA’s arbitrary and capricious standard in an action challenging the appointment by the Federal Home Loan Bank Board of a receiver for a state-chartered, federally insured savings and loan association).

<sup>60</sup> *See* MCCOY, *supra* note 50, § 15.04[4] n.1 (citing the “smattering of district court opinions, which have been rejected by the courts of appeal[s] in other circuits, [that] have interpreted the

that there is no limitation on the issues that can be presented to the court in seeking to overturn the appointment of a conservator or receiver, nor is there any time limitation placed on the court in resolving these issues.

What actually happens in a bank receivership, according to recent descriptive accounts, is roughly as follows.<sup>61</sup> First, the appropriate state or federal bank regulatory authority sends the FDIC a “failing bank letter” or the FDIC determines, based on its own information, that a bank is in distress. The FDIC then sends a “planning team” to the distressed bank to make a confidential assessment of its assets and liabilities. Based on this information, the FDIC develops an appropriate resolution strategy, most commonly a sale to another bank.<sup>62</sup> The FDIC creates an informational package about the bank, which it distributes to potential bidders identified by FDIC staff. Each bidder signs a confidentiality agreement and, if it so wishes, submits a bid for the bank or its assets. FDIC officials then evaluate the bids and recommend the lowest cost resolution to the FDIC Board. If the Board approves, the FDIC is officially appointed as the conservator or receiver. Such appointments typically occur late on a Friday afternoon. Over the weekend, the bank is shut down, its books are seized, its locks are changed, and its signage is modified; a new bank opens for business on Monday morning.<sup>63</sup> Subsequently, creditors of the failed bank will submit claims to the FDIC, which the agency resolves, giving priority to secured creditors and depositors.<sup>64</sup> Any creditor dissatisfied with the FDIC’s resolution of its claim can bring an action in federal court seeking review of

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term ‘upon the merits’ found in statutory provisions for judicial review to authorize a broader standard of review”).

<sup>61</sup> The following summary is drawn from FDIC, *THE RESOLUTION HANDBOOK* (2003), available at <https://www.fdic.gov/bank/historical/reshandbook>; John L. Douglas & Randall D. Guynn, *supra* note 6, at 311-77; Stanley V. Ragalevsky & Sarah J. Ricardi, *Anatomy of a Bank Failure*, 126 *BANKING L.J.* 867 (2009); see also David A. Skeel, Jr., *The Law and Finance of Bank and Insurance Insolvency Regulation*, 76 *TEX. L. REV.* 723, 727-31 (1998) (providing a brief overview of the regulatory framework for the banking and insurance industries).

<sup>62</sup> Ragalevsky & Ricardi, *supra* note 61, at 876. The disposition of a failing bank in this manner is often referred to as a purchase and assumption transaction (P&A), because the healthy bank selected by the FDIC agrees to purchase some portion of the failed bank’s assets and assume some portion of the failed bank’s deposit and other liabilities. *Id.* at 877. P&A transactions made up thirty-four of the forty resolutions that were carried out by the FDIC from January 2000 to August 2008. *Id.* at 876; see also SKEEL, *supra* note 22, at 122 (2011) (noting that P&A transactions are used in fifty-four percent of bank failures).

<sup>63</sup> Ragalevsky & Ricardi, *supra* note 61, at 885.

<sup>64</sup> See 12 U.S.C. § 1815(e)(2)(C)(ii) (2012) (enumerating the subordination hierarchy for a failed bank’s liabilities).

the agency’s determination.<sup>65</sup> Such actions are occasionally brought but rarely successfully.<sup>66</sup>

Although judicial review of the decision to commence a receivership is expressly authorized by statute,<sup>67</sup> it is fair to say that it is “extremely difficult” to persuade a court to set aside a receivership.<sup>68</sup> Once a receivership has commenced, courts are highly unlikely to unwind it, because doing so would require reversing transfers of deposits and assets already completed. Moreover, it is unclear what, if anything, a bank stands to gain by securing a judicial order overturning a receivership. The suit would likely generate publicity about the regulators’ negative assessment of the bank’s financial condition, causing depositors to flee and potential borrowers to look elsewhere for loans. As a result, if the bank was not fully insolvent when the receivership commenced, it likely would be insolvent by the time the court set aside its receiver determination. Nevertheless, despite being rarely sought, judicial review is not meaningless. The very existence of the right to seek judicial review undoubtedly helps ensure that the power to seize banks will not be abused for illegitimate ends.

In sum, there are several noteworthy points about bank receivership. First, the process is almost entirely administrative: the FDIC runs the process from beginning to end. Banks rarely mount a judicial challenge to a decision to appoint the FDIC as receiver, and courts play only a minor and episodic role in reviewing the FDIC’s resolution of claims once a receivership

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<sup>65</sup> See *id.* § 1815(e)(3)(B) (providing for judicial review and administrative hearings by the FDIC for review of “the amount of any loss incurred by the [FDIC] in connection with any insured depository institution,” “the liability of individual commonly controlled depository institutions for the amount of such loss,” and “the schedule of payments to be made by such commonly controlled depository institutions”); *id.* § 1821(d)(6) (providing that a claimant may request administrative review by the FDIC of a claim or file suit on such a claim in the federal district court in the district within which the depository institution’s principal place of business is located).

<sup>66</sup> See GIBSON, DUNN & CRUTCHER LLP, OVERVIEW OF THE FDIC AS CONSERVATOR OR RECEIVER 6 (2008), available at <http://www.gibsondunn.com/publications/Documents/092608-Overview-FDICasConservator-Receiver.pdf> (noting that “cases reviewing FDIC actions as receiver have largely upheld the FDIC’s approaches”); see also SKEEL, *supra* note 22, at 123 n.8 (citing an email from an FDIC official stating that few creditors seek judicial review of an FDIC action and that even when judicial review is sought, “changes in the outcome are rare”).

<sup>67</sup> See 12 U.S.C. § 1821(c)(7) (granting a failed bank the right to challenge receivership in federal district court).

<sup>68</sup> MCCOY, *supra* note 50, § 15.04[4]. For examples of courts conducting post-seizure review, see generally *James Madison Ltd. v. Ludwig*, 82 F.3d 1085 (D.C. Cir. 1996); *McMillian v. FDIC*, 81 F.3d 1041 (11th Cir. 1996); *DPJ Co. v. FDIC*, 30 F.3d 247 (1st Cir. 1994); *Haralson v. Federal Home Loan Bank Board*, 837 F.2d 1123 (D.C. Cir. 1988); *FDIC v. Parkway Executive Office Center*, Nos. 96-0121, 96-0122, 1998 WL 18204 (E.D. Pa. Jan. 9, 1998); *Nashville Lodging Co. v. FDIC*, 934 F. Supp. 449 (D.D.C. 1996); *Citibank (S.D.), N.A. v. FDIC*, 857 F. Supp. 976 (D.D.C. 1994).

is underway. Second, the process proceeds in secret until the moment the FDIC seizes control of the bank. Bank regulators and the FDIC do not announce a contemplated receivership, and they do not conduct public hearings before announcing the seizure. While bank officers and directors know a receivership is imminent, they understand that it is not in the bank's best interest to disclose this information. Potential bidders for bank assets are subject to confidentiality agreements and communicate with the FDIC through secure channels so that their involvement remains secret. This secrecy is justified in that it helps avoid public alarm and a run on deposits, thereby minimizing government losses on deposit insurance.

## 2. Bankruptcy Procedure

Bankruptcy is very different from the FDIC's receivership procedure. The bankruptcy process is not initiated by a government regulator but rather by the creditors of a distressed entity or, more commonly, by the debtor entity itself.<sup>69</sup> For financial firms likely to be subject to Dodd–Frank's orderly liquidation, the most likely bankruptcy option would be a petition seeking reorganization under Chapter 11 of the Bankruptcy Code.<sup>70</sup> A Chapter 11 petition presupposes that the value of keeping the firm in operation (the going concern value) after restructuring its debts is greater than a liquidation, the amount that would be obtained by selling off the firm's assets and closing its doors.<sup>71</sup> If it turns out that the going concern value is less than the liquidation value of the firm, the petition will either be dismissed or converted to a Chapter 7 action during the proceedings.<sup>72</sup> Although the Bankruptcy Code provides that a trustee can be named to manage the firm during reorganization, the existing management, which has greater expertise in running the firm, is commonly allowed to remain in place during reorganization.<sup>73</sup> Creditors are divided into classes, depending on their relative priority in demanding satisfaction of their claims.<sup>74</sup>

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<sup>69</sup> See 11 U.S.C. § 301 (2012) (setting out the petition procedure for voluntary bankruptcy by the debtor); *id.* § 303 (setting forth the petition procedure for involuntary bankruptcy of the debtor by creditors).

<sup>70</sup> See generally *id.* §§ 1101–1174.

<sup>71</sup> See, e.g., *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 452 (1999) (noting that the two recognized policies underlying Chapter 11 are preserving the going concern of the debtor and maximizing property available to satisfy creditors).

<sup>72</sup> See 11 U.S.C. § 1112(b) (allowing any party to request conversion from a Chapter 11 case to a Chapter 7 case for cause, including for continuing loss and the "absence of a reasonable likelihood of rehabilitation").

<sup>73</sup> DOUGLAS G. BAIRD, *THE ELEMENTS OF BANKRUPTCY* 12 (5th ed. 2010).

<sup>74</sup> 11 U.S.C. § 1122 (2012).

If creditors are numerous, a creditors' committee will represent them.<sup>75</sup> The overall goal of a Chapter 11 filing is to develop a plan of reorganization for the firm, which may call for the sale of some firm assets and restructuring the terms of the firm's debts.<sup>76</sup> The debtor in possession will negotiate with major creditors or the creditors' committee to develop a plan that is "fair and equitable" to each class of claims.<sup>77</sup> Certain consequences flow from filing any petition for bankruptcy, most importantly the automatic stay of any collection of debts.<sup>78</sup> While the Bankruptcy Code sets forth deadlines for certain actions, such as submitting a plan of reorganization,<sup>79</sup> extensions are commonly obtained in proceedings of any complexity.<sup>80</sup>

The bankruptcy process is essentially a judicial process. Federal district courts have original and exclusive jurisdiction over all bankruptcy cases governed by title 11 of the U.S. Code.<sup>81</sup> District courts routinely refer bankruptcy filings to bankruptcy judges, who are considered Article I judges rather than Article III judges.<sup>82</sup> Bankruptcy judges enjoy significant independence and resolve contested matters in the same manner as district court judges, with adversarial public hearings featuring sworn witnesses, briefs, and written opinions.<sup>83</sup> Nevertheless, bankruptcy courts are regarded as "adjuncts" to district courts, and district courts have the power to withdraw the reference of cases or proceedings from bankruptcy judges, in whole

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<sup>75</sup> *Id.* § 1102.

<sup>76</sup> *See id.* §§ 1121–1129 (outlining procedures for filing a reorganization plan, the contents of such a plan, and methods for accepting, modifying, and confirming the plan).

<sup>77</sup> *Id.* § 1129(b); *see also* BAIRD, *supra* note 73, at 77 ("The ambition of every lawyer whose client files a Chapter 11 petition is to persuade each group of creditors to consent to a plan of reorganization.").

<sup>78</sup> *Id.* § 362.

<sup>79</sup> The debtor in possession has the exclusive right to file a plan for 120 days, a deadline which can be extended. *Id.* § 1121(b), (d). After that, other parties in interest may file a plan. *Id.* § 1121(c).

<sup>80</sup> *See id.* § 1121(d)(1) (providing that upon request of a party in interest, and pursuant to notice and hearing, the bankruptcy court may extend the time period for filing a plan of reorganization); *see also* Novica Petrovski, *The Bankruptcy Code, Section 1121: Exclusivity Reloaded*, 11 AM. BANKR. INST. L. REV. 451, 453 ("It is also commonly known that bankruptcy courts, almost routinely, extend the exclusivity period [for filing a plan of reorganization] two or more times after the first 120 days.").

<sup>81</sup> 28 U.S.C. § 1334(a) (2012).

<sup>82</sup> *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 60–61 (1982) (explaining that "there is no doubt that . . . bankruptcy judges . . . are not Art. III judges" because bankruptcy judges are appointed for fourteen-year terms, can be removed by the judicial council of the circuit in which they serve for "incompetency, misconduct, neglect of duty, or physical and mental disability," and do not enjoy salary protection).

<sup>83</sup> District courts often have standing reference orders in place that automatically refer all bankruptcy matters to the bankruptcy court. 28 U.S.C. § 157(a) (2012).

or in part, for good cause.<sup>84</sup> So-called “core” matters that arise under federal bankruptcy law can be decided by bankruptcy judges, subject to review by district courts under the appropriate appellate review standard.<sup>85</sup> So-called “non-core” matters that arise under nonbankruptcy law, such as claims involving contract and tort law, are subject to de novo review by district courts.<sup>86</sup> Many provisions of the Code require that such actions can be taken only after notice and hearing are provided to creditors.<sup>87</sup> Whether actual notice and hearing are given in any particular instance is governed by norms derived from the law of due process.<sup>88</sup>

In short, bankruptcy is a debt resolution process based predominately on negotiation and compromise, subject to judicial oversight. Bankruptcy judges operate much like other federal judges, federal district courts retain control over key decisions, and appellate review is available to challenge virtually any judgment. Prominently, bankruptcy is an open process. Of course, negotiations occur among different classes of creditors behind closed doors. However, all affected parties are entitled to notice and participation in critical decisions, such as approval of any reorganization plan. While bank receivership is essentially an administrative process, subject only to ex post judicial review, bankruptcy is a party-centered process in which negotiated solutions are judicially supervised and approved.

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<sup>84</sup> *Id.* § 157(d); see also *Stern v. Marshall*, 131 S. Ct. 2594, 2603-05 (2011) (summarizing the division of authority between the district courts and bankruptcy courts under the Bankruptcy Code).

<sup>85</sup> See 28 U.S.C. § 158(a) (granting the district courts jurisdiction to hear appeals of all core proceedings arising under Title 11); *Stern*, 131 S. Ct. at 2603 (“Parties may appeal final judgments of a bankruptcy court in core proceedings to the district court, which reviews them under traditional appellate standards.”).

<sup>86</sup> See 28 U.S.C. § 157(c) (permitting a bankruptcy judge to hear a proceeding that is not a core proceeding but that is otherwise related to a case under Title 11 but requiring the judge to submit proposed findings of fact and conclusions of law to the district court, which in turn must consider the bankruptcy judge’s proposed findings and conclusions and review de novo any matters as to which a party has timely and specifically objected). As a matter of constitutional law, “non-core” claims include common law counterclaims and fraudulent conveyance claims, without regard to how they are designated by statute. See *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2172-75 (2014) (allowing common law counterclaims and fraudulent conveyance claims to proceed as non-core claims, subject to de novo review by the district court).

<sup>87</sup> See U.S. BANKR. COURT FOR S. DIST. OF N.Y., GUIDELINES FOR THE CONDUCT OF ASSET SALES 2-3 (2013), available at <http://www.nysb.uscourts.gov/sites/default/files/6004-1-j-Guidelines.pdf> (identifying the procedures for the sale process of the debtor company pursuant to section 363 of Bankruptcy Code—including notice procedures, protections for the stalking horse buyer, bidding procedures, the form of the purchase agreement and auction guidelines, and the approval of the sale to the successful bidder—as matters which must be adjudicated before the bankruptcy court).

<sup>88</sup> See BAIRD, *supra* note 73, at 7-8.

*B. Legislative History of Dodd–Frank’s OLA*

The process of commencing an OLA proceeding under Title II of the Dodd–Frank Act does not fully conform to either the FDIC banking model or the bankruptcy model. The Obama administration proposed legislation on July 22, 2009 (Administration’s Combined Draft) that contained the initial draft of what was to become Title II.<sup>89</sup> Title XII of this draft, titled “Enhanced Resolution Authority,” was largely drawn from existing banking legislation authorizing FDIC receiverships.<sup>90</sup> In keeping with the banking model, the Administration’s Combined Draft provided for administrative appointment of a receiver, in this case by the Secretary of the Treasury.<sup>91</sup> The draft also provided for a system of elaborate administrative checks before making such an appointment. The Federal Reserve Board and the Board of the FDIC, by a two-thirds vote, were to provide the Secretary with a “recommendation” as to the nature and extent of actions that should be taken regarding the bank holding company, and the Secretary was required to make certain prescribed findings.<sup>92</sup> The required concurrence of the three administrative bodies, a concept borrowed from FDIC receivership law, was known as the “three keys turning.”<sup>93</sup> The draft also followed banking law by authorizing the seized firm to file a judicial action within thirty days, requesting that the receivership be set aside.<sup>94</sup> As under banking law, the administration’s draft language did not restrict the issues that the reviewing court was allowed to consider in such a proceeding, nor did it impose any time limit on the court’s review. The administration was undoubtedly aware that such a right of review is almost never exercised in the banking context. Consequently, although a firm’s right to seek judicial relief would be symbolically important to assure that the new resolution authority would not be abused, it would have little practical impact on the resolution process.

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<sup>89</sup> See generally Administration’s Combined Draft, *supra* note 15.

<sup>90</sup> *Id.* §§ 1201–1211.

<sup>91</sup> *Id.* §§ 1203(b), 1204(b).

<sup>92</sup> *Id.* § 1203(a)-(c).

<sup>93</sup> See SKEEL, *supra* note 22, at 121 (“The decision whether to put a financial company into the resolution regime is governed by a process that has become known as ‘three keys turning.’”). The three agency or “three key” endorsement mechanism first appeared in the Federal Deposit Insurance Corporation Improvement Act (FDICIA) of 1991, Pub. L. No. 102-242, 105 Stat. 2236 (codified as amended in scattered sections of 12 U.S.C.). In order for the FDIC to diverge from the least-cost resolution rule required under the FDICIA, the Treasury must determine, in consultation with the President and following a recommendation by a two-thirds vote of the FDIC and Federal Reserve Board, that such divergence is justified in order to mitigate adverse effects to the financial stability of the economy as a whole. 12 U.S.C. § 1823(c)(4)(G) (2012).

<sup>94</sup> Administration’s Combined Draft, *supra* note 15, § 1205.

The House version of what became the Dodd–Frank Act, H.R. 4173, largely tracked the Obama administration’s proposal in terms of appointment authority.<sup>95</sup> The House bill followed the administration’s draft by providing for administrative appointment of a receiver by the Secretary of the Treasury and by prescribing a “three keys turning” procedure before the Secretary could act.<sup>96</sup> Further, like the administration bill, the House version provided for a thirty-day period to seek judicial review after the receivership commenced.<sup>97</sup>

The Senate had somewhat different ideas. The Senate bill, proposed by the Democratic leadership in April 2010, followed the House bill in requiring “three keys turning” before a receiver could be appointed.<sup>98</sup> However, the Senate bill lodged the appointment authority not in the Secretary of the Treasury but rather in a panel composed of three bankruptcy judges from the Bankruptcy Court for the District of Delaware, acting on petition by the Secretary of the Treasury.<sup>99</sup> The discretion of the three-judge panel was, however, tightly constrained. The panel could consider only a single issue: whether the Secretary of the Treasury’s determination that the firm was in default or in danger of default was supported by “substantial evidence.”<sup>100</sup>

The only explanation provided by the Senate Report for adding the bankruptcy judge panel—what might be regarded as a fourth “key turning”—was that orderly liquidation of nonbank financial firms should be reserved for truly exceptional cases.<sup>101</sup> The Report stated that “the threshold for triggering orderly liquidation authority should be very high,” which apparently provided the rationale for adding “review and determination by a judicial panel.”<sup>102</sup>

One can speculate further as to why the bill’s sponsors selected a panel of bankruptcy judges for this role. Bankruptcy judges have expertise in recognizing when firms are in default or in danger of default. Thus, although not mentioned by the Senate Report, injecting a panel of bankruptcy judges into the appointment process was presumably aimed at enhancing the

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<sup>95</sup> Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. §§ 1601–1617 (2009).

<sup>96</sup> *Id.* § 1603(a)(1).

<sup>97</sup> *Id.* § 1605.

<sup>98</sup> Restoring American Financial Stability Act of 2010, S. 3217, 111th Cong. § 203 (as substituted Apr. 29, 2010).

<sup>99</sup> *Id.* § 202(a).

<sup>100</sup> *Id.* § 202(b)(1)(A)(iii)–(iv).

<sup>101</sup> See S. REP. NO. 111-176, at 4 (2010) (explaining that “[t]he orderly liquidation authority could be used if and only if the failure of the financial company would threaten U.S. financial stability”).

<sup>102</sup> *Id.*

legitimacy of what would otherwise be a purely executive branch determination to liquidate a major nonbank financial firm.

The introduction of this new condition to the orderly liquidation process nevertheless created a serious practical difficulty relative to the “three keys” approach advocated by the administration and adopted in the House bill. The three keys—the Federal Reserve, the FDIC, and the Treasury—are all administrative agencies and are conditioned to act in secret, as when banking regulators and the FDIC move to declare a bank receivership. Thus, unless there is a leak, the administrative recommendations and determinations required by the three keys should not trigger a panic in financial markets or a contagion analogous to a run on the bank. Bankruptcy judges, in contrast, are accustomed to operating in an open fashion characteristic of American judicial processes. This difference in the conventions of administrative and judicial actors raised the question of how the “substantial evidence” review required of the bankruptcy judge panel could be included in the receivership appointment process without jeopardizing its confidential nature.

The Senate bill’s answer (although not discussed in the Senate report) was to impose a series of extraordinary constraints upon the bankruptcy judge panel. The petition for appointment of a receiver would be filed under seal<sup>103</sup> and the proceedings before the panel of bankruptcy judges held “[o]n a strictly confidential basis,”<sup>104</sup> with criminal penalties for disclosure.<sup>105</sup> Although the subject financial firm would be notified, its creditors, counterparties, and other stakeholders would be kept in the dark.<sup>106</sup> The panel would also have to rule very quickly—within twenty-four hours of receiving the filed petition.<sup>107</sup> The Senate bill did not address what would happen if the panel failed to make its decision within the requisite

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<sup>103</sup> Restoring American Financial Stability Act of 2010, S. 3217, 111th Cong. § 202(b)(1)(A)(ii) (as substituted Apr. 29, 2010).

<sup>104</sup> *Id.* § 202(b)(1)(A)(iii).

<sup>105</sup> *Id.* § 202(b)(1)(C).

<sup>106</sup> *Id.* § 202(b)(1)(A)(iii) (“On a strictly confidential basis, and without any prior public disclosure, the Panel, after notice to the covered financial company and a hearing in which the covered financial company may oppose the petition, shall determine, within 24 hours of receipt of the petition filed by the Secretary, whether the determination of the Secretary that the covered financial company is in default or in danger of default is supported by substantial evidence.”).

<sup>107</sup> *Id.*

time period.<sup>108</sup> Once the petition was granted, any stay or injunction pending appeal to the courts would not be permitted.<sup>109</sup>

These provisions are jarring if one thinks of the panel of bankruptcy judges as operating as a court. However, the constitutional issues presented by the provisions are diminished by bankruptcy judges' status as Article I judges. For constitutional purposes, bankruptcy judges are very similar to administrative law judges (ALJs) in the executive branch.<sup>110</sup> Thus, the role of the bankruptcy judge panel under the Senate bill was not significantly different from a hypothetical provision requiring a panel of Treasury Department ALJs to determine that there is substantial evidence a firm is in default or danger of default.<sup>111</sup> Moreover, the Senate provision precluding any stay of the panel's order pending appeal is not terribly different from the judicial review provision under the banking law, which provides for judicial review only after a receivership has commenced.<sup>112</sup> Allowing an appeal without a stay is functionally similar to allowing an appeal only after a receivership has commenced, provided the court has authority to set aside the receivership.

There was, however, a further important difference in the Senate bill's judicial review provisions. The Obama administration's proposal and the House bill contained no limitation on the legal or factual issues that could be presented to the court in an ex post challenge of the appointment of a receiver. These proposals, like the banking legislation on which they were modeled, thus allowed the reviewing court virtually unbridled discretion in the issues it could consider and appeared to contemplate de novo review as to both fact and law. Under the Senate bill, by contrast, any appeal to the courts from the determination of the bankruptcy panel would be limited to whether the Secretary's determination that the firm was in default or in

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<sup>108</sup> *Id.* § 202(b)(1)(A)(iv) (stating merely that the panel's order authorizing the Secretary of the Treasury to appoint the FDIC as receiver, or its written statement of reasons it will not issue such an order, shall be provided to the Secretary "immediately").

<sup>109</sup> *Id.* § 202(b)(1)(B).

<sup>110</sup> See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 60-61 (1982) ("It is undisputed that the bankruptcy judges . . . do not enjoy the protections constitutionally afforded to Art. III judges. The bankruptcy judges do not serve for life subject to their continued 'good Behaviour.' Rather, they are appointed for 14-year terms, and can be removed by the judicial council of the circuit in which they serve on grounds of 'incompetency, misconduct, neglect of duty, or physical or mental disability.' Second, the salaries of the bankruptcy judges are not immune from diminution by Congress. In short, there is no doubt that the bankruptcy judges created by the Act are not Art. III judges." (citation omitted)).

<sup>111</sup> Such a provision, if not subject to review by the Secretary of the Treasury, might nevertheless give rise to objections under Article II.

<sup>112</sup> 12 U.S.C. § 1821(c)(7) (2012) (allowing depository institutions to seek judicial review of the FDIC's appointment as receiver but only within thirty days after the appointment).

danger of default was supported by substantial evidence<sup>113</sup>—a far more restrictive right of judicial review than that provided by the bank receivership laws. Of course, as we have seen, the right of judicial review is virtually never exercised in the bank receivership context. Still, a right to judicial review is an important safeguard, and limiting review to a single factual question under a deferential standard of review is a much weaker form of protection against executive abuse than that provided by the banking laws.

Less than a month after the Senate bill was released, Senator Chris Dodd, the Chairman of the Senate Finance Committee and the floor manager of the legislation in the Senate, along with Senator Richard Shelby—the senior Republican on the Senate Finance Committee, who had filed a dissenting report to the original Senate bill<sup>114</sup>—proposed a series of amendments to the Senate bill.<sup>115</sup> The first of these amendments changed the method of appointing a receiver to commence the orderly liquidation process. Rather than appointment of a receiver by a panel of bankruptcy judges on petition by the Secretary of the Treasury, the amendment provided that the receiver would be appointed by the United States District Court for the District of Columbia.<sup>116</sup> For the first time, the receiver was to be appointed by an Article III judge, not by an executive branch agency or a panel of Article I judges. The modified Senate bill also changed the standard of review that the District Court would apply from substantial evidence to “arbitrary and capricious” and added that the court was to consider whether the firm satisfied the statutory definition of a “financial company,” as well as whether the firm was in default or in danger of default.<sup>117</sup> No explanation for these changes was offered. These amendments were adopted and incorporated into the final Senate version of the legislation, described as an amendment in the nature of a substitute of H.R. 4173.<sup>118</sup> The Senate passed this revised bill on May 20, 2010.<sup>119</sup>

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<sup>113</sup> Restoring American Financial Stability Act of 2010, S. 3217, 111th Cong. § 202(b)(2)(A)(iv) (2010).

<sup>114</sup> S. REP. NO. 111-176, at 231-51 (2010) (providing minority views of Senator Shelby, Senator Bennett, Senator Bunning, and Senator Vitter).

<sup>115</sup> 156 CONG. REC. S3139-40 (daily ed. May 5, 2010) (statement of Sen. Richard Shelby) (describing the “Dodd–Shelby amendment,” which aimed to “clarif[y] and tighten[] the language in the bill regarding resolution and the powers of the Fed, Federal Deposit Insurance Corporation, the Treasury, and others to prevent bailouts”).

<sup>116</sup> Restoring American Financial Stability Act of 2010, H.R. 4173 EAS, 111th Cong. § 202(a)(1)(A)(i) (as substituted in Senate, May 20, 2010).

<sup>117</sup> *Id.* § 202(a)(1)(A)(iii). For the Senate’s proposed definition of “financial company,” see *id.* § 201(10).

<sup>118</sup> See generally *id.*

<sup>119</sup> 156 CONG. REC. S4078 (daily ed. May 20, 2010).

The public record is silent as to who proposed that the receiver be appointed by an Article III judge or why this change was thought to be important. Circumstantial evidence suggests at least one Senator must have insisted on this unusual form of ex ante review as a condition of his or her vote. Senator Dodd needed sixty votes to avoid a filibuster.<sup>120</sup> To obtain sixty votes, Senator Dodd had to secure the support of several shaky Democrats plus at least two Republicans, including that of the newly elected Senator from Massachusetts, Scott Brown.<sup>121</sup>

When the divergent House and Senate bills went to the Conference Committee, the House conferees listed as one of their requested changes the elimination of the Senate's recently adopted provision for ex ante judicial review.<sup>122</sup> The Senate refused, without explanation.<sup>123</sup> The House again insisted on the change,<sup>124</sup> but the Senate refused to relent.<sup>125</sup> At that point, the House capitulated. A plausible inference is that the Senate conferees believed they could not abandon the provision for judicial appointment authority without endangering the razor-thin margin needed for sixty votes to approve the legislation. Regardless, the Senate version, calling for appointment of the FDIC as receiver by an Article III court, was

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<sup>120</sup> See ROBERT G. KAISER, ACT OF CONGRESS: HOW AMERICA'S ESSENTIAL INSTITUTION WORKS AND HOW IT DOESN'T 278 (2013) (commenting that the Senate of the 111th Congress (2009-2010) "began to operate on the assumption that nothing contentious could win approval without a supermajority of sixty votes, a new impediment to legislative action").

<sup>121</sup> *Id.* at 267-328; see also GEITHNER, *supra* note 9, at 416-24; Jia Lynn Yang, *A Key Republican Vote Keeps Banking Curbs In Play*, WASH. POST, June 23, 2010, at A12 (noting that Senator Brown was likely to get the concessions he demanded, because his vote was critical for approval of the House-Senate draft).

<sup>122</sup> STAFF OF H. FIN. SERVS. SUBCOMM. ON DOMESTIC MONETARY POLICY & TECH., 111TH CONG., HOUSE PROPOSED AMENDMENTS TO TITLE II (Comm. Print June 16, 2010), available at [http://democrats.financialservices.house.gov/FinancialSvcsDemMedia/file/key\\_issues/Financial\\_Regulatory\\_Reform/TITLEII\\_OFFER.pdf](http://democrats.financialservices.house.gov/FinancialSvcsDemMedia/file/key_issues/Financial_Regulatory_Reform/TITLEII_OFFER.pdf).

<sup>123</sup> STAFF OF H. FIN. SERVS. SUBCOMM. ON DOMESTIC MONETARY POLICY & TECH., 111TH CONG., HOUSE COUNTEROFFER (Comm. Print June 23, 2010), available at [http://democrats.financialservices.house.gov/FinancialSvcsDemMedia/file/key\\_issues/Financial\\_Regulatory\\_Reform/Conference\\_on\\_HR\\_4137/Title\\_II/Title\\_II\\_House\\_Counteroffer\\_6\\_23\\_2010.pdf](http://democrats.financialservices.house.gov/FinancialSvcsDemMedia/file/key_issues/Financial_Regulatory_Reform/Conference_on_HR_4137/Title_II/Title_II_House_Counteroffer_6_23_2010.pdf) (stating that "THE HOUSE INSISTS ON ITS ORIGINAL OFFER").

<sup>124</sup> *Id.* (stating that "[t]he Senate . . . [d]oes not accept the House offer to replace the ex ante judicial review process with an ex post judicial review process").

<sup>125</sup> STAFF OF THE S. COMM. ON BANKING, HOUS. & URBAN AFFAIRS, 111TH CONG., REVISED SENATE COUNTEROFFER (Comm. Print June 24, 2010), available at [http://democrats.financialservices.house.gov/FinancialSvcsDemMedia/file/key\\_issues/Financial\\_Regulatory\\_Reform/Conference\\_on\\_HR\\_4137/Title\\_II/Senate\\_Title\\_II\\_Counteroffer\\_Revised\\_6\\_24.pdf](http://democrats.financialservices.house.gov/FinancialSvcsDemMedia/file/key_issues/Financial_Regulatory_Reform/Conference_on_HR_4137/Title_II/Senate_Title_II_Counteroffer_Revised_6_24.pdf)

approved by the Conference Committee, adopted by both the House and Senate, and signed by the President.<sup>126</sup>

### C. OLA as Enacted

The relevant provisions of Title II, as enacted, can be briefly summarized. The process preceding a petition to the District Court for the District of Columbia for appointment of a receiver is described as a “systemic risk determination” by the statute.<sup>127</sup> A systemic risk determination requires the Department of the Treasury to establish that the conditions warranting orderly liquidation have been met, as specified through seven affirmative findings:

1. The financial company must be in default or in danger of default;<sup>128</sup>
2. The failure of the financial company would have serious adverse effects on financial stability in the United States;<sup>129</sup>
3. No viable private sector alternative is available to prevent default;<sup>130</sup>
4. Any effect of a receivership on creditors, counterparties, and shareholders would be “appropriate” given the benefits of a receivership in terms of preserving financial stability;<sup>131</sup>
5. Establishing a receivership would avoid or mitigate the adverse effects on stakeholders relative to not undertaking such action;<sup>132</sup>
6. The company has been ordered by regulators to convert all of its convertible debt instruments;<sup>133</sup> and
7. The company satisfies the definition of a financial company.<sup>134</sup>

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<sup>126</sup> H.R. REP. NO. 111-517 (2010) (Conf. Rep.); *see also* Remarks on Signing the Dodd–Frank Wall Street Reform and Consumer Protection Act, 2010 DAILY COMP. PRES. DOC. 617 (July 21, 2010), available at <http://www.gpo.gov/fdsys/pkg/DCPD-201000617/pdf/DCPD-201000617.pdf>.

<sup>127</sup> Dodd–Frank Act § 203, 12 U.S.C. § 5383 (2012).

<sup>128</sup> *Id.* § 203(b)(1), 12 U.S.C. § 5383(b)(1).

<sup>129</sup> *Id.* § 203(b)(2), 12 U.S.C. § 5383(b)(2).

<sup>130</sup> *Id.* § 203(b)(3), 12 U.S.C. § 5383(b)(3).

<sup>131</sup> *Id.* § 203(b)(4), 12 U.S.C. § 5383(b)(4).

<sup>132</sup> *Id.* § 203(b)(5), 12 U.S.C. § 5383(b)(5).

<sup>133</sup> *Id.* § 203(b)(6), 12 U.S.C. § 5383(b)(6).

<sup>134</sup> *Id.* § 203(b)(7), 12 U.S.C. § 5383(b)(7). There are four categories of financial companies subject to the Title II orderly liquidation authority under Dodd–Frank:

1. Bank holding companies, *id.* § 102(a)(1), 12 U.S.C. § 5302(a)(1); *id.* § 201(a)(11)(B)(i), 12 U.S.C. § 5381(a)(11)(B)(i); *id.* § 203(a)(1)(A), 12 U.S.C. § 5383(a)(1)(A);
2. Nonbank financial companies having at least eighty-five percent of their gross revenue or consolidated assets derived from activities that are financial in nature or incidental to financial activity, including the ownership or control of one or more insured depository institutions, *id.* § 102(a)(4), 12 U.S.C. § 5302(a)(4); *id.* § 201(a)(11)(B)(ii)-(iii), 12 U.S.C. § 5381(a)(11)(B)(ii)-(iii); *id.* § 203(a)(1)(A), 12 U.S.C. § 5383(a)(1)(A);

The statute also adopts the three keys turning approach that initially appeared in the Administration's Combined Draft, meaning that the Secretary of the Treasury must obtain the written recommendation, supported by a two-thirds vote, of the members of both the Federal Reserve Board and the FDIC.<sup>135</sup> In addition, the statute requires the Secretary to consult with the President before filing a petition.<sup>136</sup>

The statute does not establish any right to participate in this administrative process, although the Treasury could promulgate regulations providing affected private interests with notice and an opportunity to be heard before appointment of a receiver.<sup>137</sup> But the assumed need for secrecy would seem to preclude granting any such rights, and there is no indication that the Treasury has contemplated such regulations. However, the statute does require the Secretary to notify the covered financial company when making the determination to file a petition, and there could be a gap in time between the Secretary's notification of the "determination" and the filing of the petition in court.<sup>138</sup> This would give the financial company some time to prepare for the court proceedings. But again, the statute does not require

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3. Subsidiaries of the financial companies identified in the first two categories, except for those subsidiaries that otherwise qualify as insured depository institutions or insurance companies, *id.* § 201(a)(11)(B)(iv), 12 U.S.C. § 5381(a)(11)(B)(iv); *id.* § 203(a)(1)(A), 12 U.S.C. § 5383(a)(1)(A); and

4. Entities that qualify as brokers and dealers and are accordingly registered with the SEC and members of the Securities Investor Protection Corporation, *id.* § 201(a)(7), 12 U.S.C. § 5381(a)(7); *id.* § 203(a)(1)(B), 12 U.S.C. § 5383(a)(1)(B).

<sup>135</sup> *Id.* § 203(a)(1)(A), 12 U.S.C. § 5383(a)(1)(A). Different administrative entities must provide written recommendations if the covered financial firm is a broker/dealer or an insurance company. *Id.* § 203(a)(1)(B)-(C), 12 U.S.C. § 5383(a)(1)(B)-(C).

<sup>136</sup> *Id.* § 203(b), 12 U.S.C. § 5383(b).

<sup>137</sup> The FDIC's regulations implementing Title II do not address the process leading up to appointment of a receiver. See generally Orderly Liquidation Authority, 12 C.F.R. §§ 380.1-53 (2014). To date, the Department of the Treasury has not promulgated any regulations regarding how notice of its receivership determination must be provided to the failing financial company, much less whether such notice must also be provided to affiliated parties with significant interests at stake. While the possibility of some future regulation along these lines is not out of the question, given the Treasury's objection to the forty-eight hours' advance notice requirement for any receivership petition to the D.C. District Court (a requirement contained in the originally issued Local Civil Rule 85), any rule regarding the provision of advance notice to anyone implicated by the Treasury's receivership decision certainly seems unlikely. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-735, BANKRUPTCY: AGENCIES CONTINUE RULEMAKINGS FOR CLARIFYING SPECIFIC PROVISIONS OF ORDERLY LIQUIDATION AUTHORITY 15-16 (2012) (reporting that the Treasury Department objected to requirements in the original D.C. District Court Local Civil Rule 85 that it provide an additional forty-eight hours' notice before filing a petition to invoke OLA and, as a result, the court revised the final rule to add the language "to the extent feasible").

<sup>138</sup> Dodd-Frank Act § 202(a)(1)(A)(i), 12 U.S.C. § 5382(a)(1)(A)(i) (2012).

that the notification of the determination occur before filing of the petition, and the concern for swift, secret action would work against giving the covered firm any realistic amount of time to prepare to do battle in court.

Once the executive branch decides that a financial firm should be placed in receivership, it files a petition for appointment of a receiver under seal with the District Court for the District of Columbia.<sup>139</sup> The statute provides for stiff criminal penalties for anyone who “recklessly” discloses a determination to file a petition, the content of the petition, or “the pendency of court proceedings.”<sup>140</sup> Creditors and other stakeholders receive no notice and have no statutory way of intervening to defend their interests. If the court does not rule on the petition within twenty-four hours, it is automatically granted.<sup>141</sup> A covered financial firm will thus be given a mere twenty-four hours’ notice that the Treasury wants it liquidated, during which time the firm and its attorneys must review the Treasury’s petition and findings, prepare a rebuttal and file it with the court, and persuade the court, in a hastily convened hearing, to reject the petition.<sup>142</sup>

The statute also severely limits what issues the court can consider. The court is permitted to consider only the Secretary’s determinations that the firm is a “financial company,” as defined by the Act, and that the firm is “in default or in danger of default.”<sup>143</sup> Moreover, the court may consider only whether these two determinations are “arbitrary and capricious.”<sup>144</sup> The statute provides that if the District Court finds either of the Secretary’s determinations to be arbitrary and capricious, the court must remand to the Secretary and afford the Secretary “an immediate opportunity to amend and refile the petition.”<sup>145</sup> No other relief is mentioned, implying that the Secretary can continue to refile until the District Court finally grants the petition.

The firm may appeal the District Court’s findings within thirty days to the Court of Appeals for the District of Columbia Circuit and petition for a writ of certiorari to the Supreme Court within thirty days of the circuit

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.* § 202(a)(1)(C), 12 U.S.C. § 5382(a)(1)(C).

<sup>141</sup> *Id.* § 202(a)(1)(A)(v), 12 U.S.C. § 5382(a)(1)(A)(v).

<sup>142</sup> The statute directs the District Court for the District of Columbia to adopt rules implementing the provisions for appointment of a receiver. *Id.* § 202(b), 12 U.S.C. § 5382(b). They were adopted by Local Civil Rule 85 on July 6, 2011. D.D.C. CIV. R. 85; *see also* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-735, BANKRUPTCY: AGENCIES CONTINUE RULEMAKINGS FOR CLARIFYING SPECIFIC PROVISIONS OF ORDERLY LIQUIDATION AUTHORITY 15-16 (2012). For further discussion, *see infra* text accompanying notes 275-276.

<sup>143</sup> *Id.* § 202(a)(1)(A)(iii), 12 U.S.C. § 5382(a)(1)(A)(iii).

<sup>144</sup> *Id.* § 202(a)(1)(A)(iv)(I)-(II), 12 U.S.C. § 5382(a)(1)(A)(iv)(I)-(II).

<sup>145</sup> *Id.* § 202(a)(1)(A)(iv)(II), 12 U.S.C. § 5382(a)(1)(A)(iv)(II).

court's ruling.<sup>146</sup> But no stay is allowed pending appeal, so the receivership moves forward once the petition is granted, even if the firm appeals.<sup>147</sup> The statute again limits the issues that can be considered by the court of appeals and the Supreme Court; like the district court, these appellate courts may only inquire about whether the findings that the firm is a covered financial firm and is in default or in danger of default are "arbitrary and capricious."<sup>148</sup> Indeed, the language of the statute is emphatic in limiting the issues that may be considered on appeal, stating that review "shall be limited" to these two issues.<sup>149</sup> It is not clear what relief the D.C. Circuit and the Supreme Court can grant if they conclude that one or both of the reviewable determinations is arbitrary and capricious. Since the only relief the district court can provide is a remand, arguably the only relief available from the appellate courts would be a remand to the district court with instructions to remand to the Secretary for more detailed findings.

Once the district court grants the petition appointing the FDIC as receiver of the covered financial firm, the process moves out into the open. The statute describes in excruciating detail a special kind of receivership that in some respects resembles an FDIC receivership of a bank and in other respects resembles ordinary bankruptcy, with the FDIC exercising most of the powers of a debtor in possession or trustee in bankruptcy.<sup>150</sup> After its appointment, the FDIC as receiver exercises all the powers of the financial firm, including the power to oversee the firm's daily operations, hire and fire employees, and retain the services of third-party vendors.<sup>151</sup> But the FDIC also has powers resembling those of a bankruptcy court, including the powers to order a stay of further proceedings to collect debts against the covered financial firm,<sup>152</sup> unwind fraudulent and preferential transactions,<sup>153</sup> bring actions to collect monies owed to the firm,<sup>154</sup> and consider and resolve claims of various classes of creditors against the firm.<sup>155</sup>

It is important to note that any creditor dissatisfied with the FDIC's resolution of a "claim" can bring a judicial action in the United States District Court where the covered financial firm has its principal place of

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<sup>146</sup> *Id.* § 202(a)(2)(A)(i), (B)(i), 12 U.S.C. § 5382(a)(2)(A)(i), (B)(i).

<sup>147</sup> *Id.* § 202(a)(1)(B), 12 U.S.C. § 5382(a)(1)(B).

<sup>148</sup> *Id.* § 202(a)(2)(A)(iv), (B)(iv), 12 U.S.C. § 5382(a)(2)(A)(iv), (B)(iv).

<sup>149</sup> *Id.*

<sup>150</sup> See generally Baird & Morrison, *supra* note 48 (highlighting the core congruities between the OLA under the Dodd–Frank Act and the Bankruptcy Code).

<sup>151</sup> Dodd–Frank Act § 210(a)(1)(A), 12 U.S.C. § 5390(a)(1)(A).

<sup>152</sup> *Id.* § 210(a)(8), 12 U.S.C. § 5390(a)(1)(B).

<sup>153</sup> *Id.* § 210(a)(11)(A)–(B), 12 U.S.C. § 5390(a)(11)(A)–(B).

<sup>154</sup> *Id.* § 210(a)(1)(B)(ii), 12 U.S.C. § 5390(a)(1)(B)(ii).

<sup>155</sup> *Id.* § 210(a)(2), 12 U.S.C. § 5390(a)(2).

business, and the court will rule on the claim.<sup>156</sup> A “claim” is “any right to payment.”<sup>157</sup> Thus, insofar as the interests implicated by orderly resolution under Title II can be reduced to monetary claims against the firm in receivership, the statute affords an opportunity for the claimant to have her day in court. As adopted, however, Title II requires that every firm be liquidated,<sup>158</sup> that stockholder equity be wiped out before creditor claims are compromised,<sup>159</sup> that creditors are entitled to no more than they would have received in a liquidation in bankruptcy,<sup>160</sup> that all officers and directors responsible for the financial collapse be dismissed,<sup>161</sup> and that the compensation received by such officers within two years of the receivership be clawed back.<sup>162</sup> Because these consequences are mandated by law once a receiver is appointed, the only possible avenue for challenging them is to challenge the appointment of the receiver. And, as described above, the provisions for making such a challenge are so severely limited that they are meaningless. Some decisions, such as a determination that an officer was “responsible” and hence must be dismissed, could conceivably be challenged by filing a claim for backpay with the receiver, and, upon denial of this claim, challenging the denial of the claim in court. But, under the Dodd–Frank Act, there is no mechanism to seek review of the decision to strip an officer or director of his or her position before dismissal.<sup>163</sup> Nor is there any provision for court approval of other significant actions by the FDIC, such as the creation of a bridge financial company,<sup>164</sup> the sale of assets,<sup>165</sup> or the final liquidation of the covered firm.<sup>166</sup> In its current form, the Dodd–Frank Act includes no provision that would allow any of these decisions to be reviewed by any court.

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<sup>156</sup> *Id.* § 210(a)(4), 12 U.S.C. § 5390(a)(4).

<sup>157</sup> *Id.* § 201(a)(4), 12 U.S.C. § 5381(a)(4).

<sup>158</sup> *Id.* § 214(a), 12 U.S.C. § 5394(a).

<sup>159</sup> *Id.* § 206(2), 12 U.S.C. § 5386(2) (2012).

<sup>160</sup> *Id.* § 210(d)(2)(B), 12 U.S.C. § 5390(d)(2)(B).

<sup>161</sup> *Id.* § 206(4)-(5), 12 U.S.C. § 5386(4)-(5).

<sup>162</sup> *Id.* § 210(s), 12 U.S.C. § 5390(s).

<sup>163</sup> *See id.* § 206(5), 12 U.S.C. § 5386(5) (the FDIC is required to “ensure that the members of the board of directors (or body performing similar functions) responsible for the failed condition of the covered financial company are removed, if such members have not already been removed at the time the Corporation is appointed as receiver”); *see also id.* § 210(e), 12 U.S.C. § 5390(e) (stating that “no court may take any action to restrain or affect the exercise of powers or functions of the receiver”).

<sup>164</sup> *Id.* § 210(a)(1)(D), 12 U.S.C. § 5390(a)(1)(D).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

## II. CONSTITUTIONAL CHALLENGES: THE WHO AND THE WHEN

A variety of potential constitutional challenges could be made to Title II. The secret, twenty-four hour proceeding in which the FDIC is appointed receiver by the District Court of the District of Columbia could be challenged for violating due process or Article III. The scheme could also be challenged for violating the “uniformity” requirement of the Bankruptcy Clause or the First Amendment. One could also imagine challenges under the Takings Clause, depending on how certain issues are resolved during the receivership. But we must first consider who can bring these sorts of constitutional claims and when they might be advanced.

We will discuss three possibilities: (1) raising constitutional claims defensively in the district court in response to the petition by the Secretary of the Treasury asking for appointment of a receiver; (2) filing an independent action under 28 U.S.C. § 1331 to enjoin the receivership once it is approved (but before it has taken significant steps to unwind the firm); and (3) filing an action to enjoin the appointment of a receiver before the Secretary files a petition to appoint a receiver. The last option is the avenue being pursued by the state attorneys general in the pending *Big Spring* litigation.<sup>167</sup>

### A. Raising Claims by Defense

Ordinarily, raising constitutional claims defensively would be the least problematic course of action. If the government files a legal action demanding the defendant’s person or property, there is no doubt the defendant can raise any constitutional objections he or she may have by way of defense.<sup>168</sup> Standing is clearly established: concrete injury has either occurred or is “certainly impending.”<sup>169</sup> Jurisdiction is based on the authority invoked by

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<sup>167</sup> *Big Spring* Second Amended Complaint, *supra* note 27.

<sup>168</sup> See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1372 (1953) (“Perhaps a plaintiff does have to take what Congress gives him or doesn’t give him [by way of jurisdiction] . . . . But surely not a defendant. It’s only a limitation on what a court can do once it has jurisdiction, not a denial of jurisdiction, that can hurt a defendant. And if the court thinks the limitation is invalid, it’s always in a position to say so, and either to ignore it or let the defendant go free.”).

<sup>169</sup> *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1147 (2013) (citation omitted); see also Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983) (“[W]hen an individual who is the very *object* of a law’s requirement or prohibition seeks to challenge it, he always has standing.”).

the government in bringing its action.<sup>170</sup> There is no need to demonstrate a cause of action, since the defendant is acting defensively.

The government might argue that raising constitutional defenses is implicitly precluded by statute. Specifically, by limiting review to whether the Secretary's two determinations are arbitrary and capricious, the Dodd–Frank Act implicitly precludes consideration of other issues. Given the established canon that implied preclusion of review of constitutional questions is disfavored, however, it is difficult to see how this would succeed. It is well established that Congress must speak with clarity before it cuts off constitutional claims, and the Court has said a “serious constitutional question” would be presented if such a clear statement of preclusion were ever encountered.<sup>171</sup> Nothing in Title II comes close to a clear statement precluding constitutional defenses.<sup>172</sup> Thus, if and when the Secretary of the Treasury files a petition in the District Court for the District of Columbia asking for the appointment of a receiver to liquidate a financial firm, the firm (and possibly its officers or directors) can raise constitutional defenses in response to the petition.

The peculiar procedures set forth in Title II greatly complicate this conventional approach. One problem is notice. Some stakeholders—namely, the directors and principal officers of the firm targeted for receivership and liquidation—will know about the Secretary's petition. But other stakeholders—including creditors, counterparties, most employees of the firm, and the shareholders of the firm—cannot raise constitutional objections defensively, because Dodd–Frank makes no provision for giving them notice, requires that the court proceedings be conducted “on a strictly confidential basis,”<sup>173</sup> and indeed makes it a criminal offense for anyone who is aware of the proceeding to give notice to any third party.<sup>174</sup> If there is no legal way to obtain notice of adverse action by the government, one cannot defend

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<sup>170</sup> See 28 U.S.C. § 1345 (2012) (providing the district courts with original jurisdiction in “all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress”).

<sup>171</sup> *Webster v. Doe*, 486 U.S. 592, 603 (1988); see also *Johnson v. Robison*, 415 U.S. 361, 373–74 (1974) (holding that there must be clear and convincing evidence of congressional intent in order for a statute to permissibly restrict access to judicial review).

<sup>172</sup> Various provisions of the Act address questions of judicial review, but these provisions all cut off judicial proceedings asserting most claims against the firm while it is in receivership or most actions against the FDIC in its capacity as receiver. Dodd–Frank Act § 210(a)(9)(D), 12 U.S.C. § 5390(a)(9)(D) (2012). These provisions do not address review of the Secretary's decision to seek appointment of a receiver nor do they address possible constitutional challenges to the Act or any of its provisions.

<sup>173</sup> *Id.* § 202(a)(1)(A)(iii), 12 U.S.C. § 5382(a)(1)(A)(iii).

<sup>174</sup> *Id.* § 202(a)(1)(C), 12 U.S.C. § 5382(a)(1)(C).

against it on constitutional or any other grounds. It is equally problematic that the district court cannot conceivably give adequate consideration to a constitutional defense in only twenty-four hours. The Secretary will insist that the statute requires adhering to the twenty-four-hour deadline, at which point the petition is deemed automatically granted and no stay is possible.<sup>175</sup> Further, the Secretary would likely claim that urgent action is necessary to avert financial crisis. Faced with a conflict between a strict statutory deadline and government warnings of financial crisis, on the one hand, and the court's duty to enforce the Constitution, on the other, what is the court going to do?

The court could resolve the conflict by invoking the Constitution as authority to make modest modifications to the statutory procedures.<sup>176</sup> For example, the court might grant a temporary stay of further action on the petition to afford an adequate period of time to brief and consider the constitutional issues presented. After all, at this point the proceedings are confidential and the papers have been filed under seal.<sup>177</sup> If the court is persuaded that the constitutional defenses are serious, it might grant a short stay, perhaps of a few days, to give the issues full consideration. If, after this period of expedited consideration, the court concludes that the statute is unconstitutional in one or more respects, it could order permanent injunctive relief that cures the constitutional defect and allows the court to consider the petition in a manner consistent with constitutional requirements.<sup>178</sup> This constitutional ruling would, of course, be subject to appeal by the government (which could request a stay or emergency relief) under the ordinary rules of appellate procedure.

This solution is problematic, however, because it requires the court to effectively rewrite the statute before deciding its constitutionality. This

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<sup>175</sup> *Id.* § 202(a)(1)(A)(v), 12 U.S.C. § 5382(a)(1)(A)(v).

<sup>176</sup> *See* United States v. Booker, 543 U.S. 220, 258-60 (2005) (removing two provisions from the Federal Sentencing Act that made the federal sentencing guidelines mandatory and hence unconstitutional rather than invalidating the legislation in its entirety); *see also* United States v. Monsanto, 924 F.2d 1186, 1198-1202 (2d Cir. 1991) (en banc) (requiring post-indictment hearing procedures for any finding of probable cause in connection with a restraint on pretrial disposition of assets); Lee v. Thornton, 538 F.2d 27, 32-33 (2d Cir. 1976) (declaring a federal provision allowing for seizure of vehicles for customs violations unconstitutional for lack of procedural due process and remedying the infirmity by requiring action on petitions for mitigation or remission within twenty-four hours and a probable cause hearing within seventy-two hours).

<sup>177</sup> Dodd-Frank Act § 202(a)(1)(A)(ii)-(iii), 12 U.S.C. § 5382(a)(1)(A)(ii)-(iii).

<sup>178</sup> An issue of severability would be presented, at least implicitly. But it seems unlikely that the entire Dodd-Frank Act should fall on constitutional grounds due to a few constitutional infirmities in the process for appointing a receiver.

fix also does nothing to provide notice to other stakeholders who may wish to raise constitutional objections.

### B. *Enjoining the Receiver*

A second possible approach is for any stakeholder aggrieved by the appointment of a receiver and pending liquidation of the firm to file an independent action in the district court seeking to enjoin the receivership on constitutional grounds. Jurisdiction would be based on 28 U.S.C. § 1331, which applies to actions grounded in the Constitution.<sup>179</sup> Standing would be established by the prospective liquidation of the firm, loss of rights, or loss of claims having monetary value.<sup>180</sup> The cause of action could be based on the APA, which provides that “[a]gency action made reviewable by statute and final agency action for which there is *no other adequate remedy in a court* are subject to judicial review.”<sup>181</sup> The Secretary’s decision to petition for a receivership would be considered final agency action, and Dodd–Frank’s draconian twenty-four-hour time limit and requirement that judicial proceedings remain in camera would preclude the Act from affording “an adequate remedy in court.”<sup>182</sup> The virtue of this approach is that the suit would be filed immediately after establishing the receivership, so the automatic stay powers given to the receiver would be in effect, temporarily stabilizing the situation and hopefully forestalling financial panic analogous to a run on the bank.

Unfortunately, Dodd–Frank appears to eliminate this option, at least for some constitutional claims: “Except as provided in this title, no court may take any action to restrain or affect the exercise of powers or functions of the receiver hereunder, and any remedy against the Corporation or receiver shall be limited to money damages determined in accordance with this title.”<sup>183</sup> This provision seems to preclude any action to “restrain or affect” the receiver based on constitutional claims in an action brought under 28 U.S.C. § 1331.<sup>184</sup> Thus, for example, no court could entertain an action to

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<sup>179</sup> 28 U.S.C. § 1331 (2012) (providing that “[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution”).

<sup>180</sup> Any claimant who is “likely to suffer economic injury as a result of an agency action satisfies” the requirement of injury in fact. 3 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 16.4, at 1416 (5th ed. 2010).

<sup>181</sup> 5 U.S.C. § 704 (2012).

<sup>182</sup> *Id.*

<sup>183</sup> Dodd–Frank Act § 210(e), 12 U.S.C. § 5390(e) (2012).

<sup>184</sup> *Id.* The courts of appeals have interpreted other financial statutes with nearly identical wording as precluding claims based on the APA or violations of federal statutory law. *See, e.g.*, *Cnty. of Sonoma v. Fed. Hous. Fin. Agency*, 710 F.3d 987, 993 (9th Cir. 2013) (holding that the

enjoin the receiver on the ground that the statute violates the uniformity requirement of the Bankruptcy Power or the just compensation requirement of the Takings Clause. This preclusion of review, however, might not apply to constitutional claims—including those based on Article III, the First Amendment, or due process—concerning the initial proceeding in the district court to appoint a receiver. Such claims challenge the judicial process to appoint the receiver and so do not seek to “restrain or affect” the powers of the receiver once appointed.<sup>185</sup>

### C. *Suit for Anticipatory Relief*

The third option is to file an action challenging the constitutionality of the Act before the Secretary files a petition to appoint a receiver. Here, standing likely would be the most serious problem, particularly if the firm or the stakeholder bringing the action cannot demonstrate that action by the government is threatened or “certainly impending.”<sup>186</sup> It would likely be

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Housing and Economic Recovery Act of 2008, which substantially limits judicial review of the Federal Housing Finance Agency’s actions as conservator, barred the court from taking jurisdiction over the plaintiffs’ claims, so long as the directive being challenged was a lawful exercise of the Agency’s power as conservator); *Town of Babylon v. Fed. Hous. Fin. Agency*, 699 F.3d 221, 227-28 (2d Cir. 2012) (holding that a statute that empowers the Federal Housing Finance Agency, as conservator for the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), to take necessary actions to put those regulated entities in sound and solvent condition and which limits judicial review of the Agency’s exercise of actions as conservator, did not authorize judicial review of FHFA’s issuance of a directive that caused Fannie Mae and Freddie Mac to stop purchasing mortgages secured by properties subject to priority lien obligations under local governments’ first-lien Property Assessed Clean Energy programs); *Freeman v. FDIC*, 56 F.3d 1394, 1399-1400 (D.C. Cir. 1995) (holding that a provision of the Financial Institutions Reform, Recovery, and Enforcement Act prohibited the court from restraining the powers of the FDIC and thus the court could not grant relief to prevent the FDIC from foreclosing on plaintiffs–debtors’ residences, which served as collateral for notes held by a failed bank for which the FDIC was receiver). The only apparent exception, recognized in dicta, is if the agency acts “beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions.” *Nat’l Trust for Historic Pres. v. FDIC*, 995 F.2d 238, 240 (D.C. Cir. 1993); *see also Sharpe v. FDIC*, 126 F.3d 1147, 1155 (9th Cir. 1997).

<sup>185</sup> As for defects in the appointment process, one might also file a motion under Federal Rule of Civil Procedure 60(b) to set aside the final judgment approving the receiver on the ground that the judgment was obtained under procedures that violate the Constitution. FED. R. CIV. P. 60(b). The Rule 60(b) motion would not be governed by Dodd–Frank’s time limits or gag order and hence would not encounter the problems that doom any constitutional defense raised in response to the petition itself. Still, even if a Rule 60(b) motion works for claims directed to the judicial process for appointing a receiver, it would not work for other constitutional objections to Title II.

<sup>186</sup> *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1147 (2013) (citation omitted). In the case of the stakeholders, standing may be even more difficult to establish. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (“[W]hen the plaintiff is not himself the object of the government

necessary to demonstrate that the government is seriously contemplating using the OLA to appoint a receiver, but such a showing will be difficult if the government is successful in keeping its internal deliberations secret.

Do the state attorneys general in the *Big Spring* litigation stand on firmer footing in mounting a challenge to Title II before it has been applied to any particular firm? Arguably, they do. Although the Supreme Court has rejected state standing to challenge the constitutionality of federal legislation on behalf of its citizens through *parens patriae* suits,<sup>187</sup> recent decisions suggest growing liberality toward state standing. For example, in *Massachusetts v. EPA*, where Massachusetts sought to challenge the federal government's failure to regulate global warming, the Supreme Court, in determining the State's standing to sue, spoke mysteriously about states enjoying "special solicitude" relative to private parties.<sup>188</sup> More recently, in the Affordable Care Act litigation, serious questions were raised about state standing, with the Fourth Circuit ruling that Virginia lacked standing to challenge the individual mandate.<sup>189</sup> The Supreme Court declined to review this ruling<sup>190</sup> and, in a separate case, went on to consider a wide-ranging challenge to the individual mandate brought by twenty-six States, as well as several other plaintiffs, without uttering a word about the States' standing.<sup>191</sup> This, of course, does not mean the Court found that the States had standing. There were other plaintiffs in the case, including private individuals, and the Court may have implicitly concluded these individuals had standing to challenge the mandate. Nevertheless, the Affordable Care Act case may lend further support to the idea that state standing is to be liberally construed.

The attorneys general lawsuit challenging the constitutionality of Title II of Dodd–Frank rests on the States' interest in their employee pension funds, which include investments in firms that are potentially eligible for liquidation under Title II.<sup>192</sup> Although none of these firms is currently threatened with orderly resolution under Dodd–Frank, the States argue that the Act has taken away their federal statutory right to have their interests as

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action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." (citation omitted)).

<sup>187</sup> See *Massachusetts v. Mellon*, 262 U.S. 447, 485–86 (1923) (finding that a state cannot institute judicial proceedings as *parens patriae* to protect its citizens, who are also citizens of the United States, from the operation of a federal statute, because the federal government, not the state, represents those citizens as *parens patriae*).

<sup>188</sup> 549 U.S. 497, 520 (2007).

<sup>189</sup> See *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 272 (4th Cir. 2011).

<sup>190</sup> *Virginia ex rel. Cuccinelli v. Sebelius*, 133 S. Ct. 59 (2012) (denying petition for writ of certiorari).

<sup>191</sup> See generally *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

<sup>192</sup> See generally *Big Spring Second Amended Complaint*, *supra* note 27.

creditors treated the same as other similarly situated creditors.<sup>193</sup> They claim that the abrogation of their rights is a present invasion of a legally protected interest and hence satisfies the Article III requirement of actual immediate injury.<sup>194</sup> The right to equal treatment of creditors under the Bankruptcy Code, however, is one that comes into play only when a debtor is bankrupt. If the mere existence of a debt were enough to confer standing to challenge a change in the legal treatment of creditors, then any person would be able to challenge any change in the law that might conceivably affect their interests as creditors sometime in the future. This is clearly not the law.<sup>195</sup> Also, an injury caused by Dodd–Frank’s authorization of departures from equal treatment of similarly situated creditors bears no causal relationship to Article III, First Amendment, or due process objections to the Act.<sup>196</sup> Thus, it is not clear that this alleged injury, even if otherwise sufficient to confer standing, would support standing to challenge the OLA’s constitutionality prior to the actual commencement of an OLA receivership. Therefore, we are inclined to agree with the District Court that the States’ suit is premature,<sup>197</sup> and we anticipate that the D.C. Circuit will agree as well, at least in the absence of further evidence that a particular invocation of the OLA would affect the States’ financial interests.

Finding a cause of action could also be problematic. The APA, to repeat, provides that “[a]gency action made reviewable by statute and *final agency action* for which there is no other adequate remedy in a court are subject to judicial review.”<sup>198</sup> If the Secretary of the Treasury has not yet made a determination to file a petition, it would be difficult to claim that there is a *final agency action* to review. Absent a cause of action under the APA, the cause of action would have to be implied directly from the Constitution.

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<sup>193</sup> State Plaintiffs’ Memorandum in Opposition to Defendants’ Motion to Dismiss the Second Amended Complaint at 16-19, *State Nat’l Bank of Big Spring v. Lew*, 958 F. Supp. 2d 127 (D.D.C. 2013) (No. 12-1032).

<sup>194</sup> *Id.* at 19-24.

<sup>195</sup> See, e.g., *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) (noting that allegations that an injury may occur “some day” without “any specification of *when* that some day will be” do not satisfy the imminent injury requirement for standing (citation and internal quotation marks omitted); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572-73 (1992) (stating that a plaintiff does not state an Article III case or controversy when he “rais[es] only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large”).

<sup>196</sup> It is not clear that this provision of Dodd–Frank even implicates the uniformity requirement of the Bankruptcy Clause if it is interpreted to require that debtors be treated uniformly, as opposed to creditors. See *infra* Section IV.A.

<sup>197</sup> *State Nat’l Bank of Big Spring v. Lew*, 958 F. Supp. 2d 127, 141-46 (D.D.C. 2013).

<sup>198</sup> 5 U.S.C. § 704 (2012) (emphasis added).

Specifically, it would be necessary to bring an *Ex parte Young*–style action seeking to enjoin federal officers, including the Secretary of the Treasury, from threatening action alleged to violate the Constitution.<sup>199</sup> Although there is controversy about the rationale and scope of actions based on *Ex parte Young*,<sup>200</sup> the decision is firmly established in federal jurisprudence as a means of securing equitable relief for violations of the Constitution, and presumably it remains a valid fallback when the APA does not apply.<sup>201</sup>

If the standing obstacle can be overcome, an *Ex parte Young*–style action might be the best of the three options. The action would not be subject to Dodd–Frank’s time limits or notice prohibitions, which only come into play after the petition is filed. Nor would the action be limited by the preclusion of actions that seek to “restrain or affect” the powers of the receiver, because the receiver would not have been appointed.

#### D. The Tucker Act Defense

Whichever option is chosen, the government would likely seek to defeat any request for injunctive or declaratory relief on the ground that the firm and its stakeholders will suffer no irreparable injury if the constitutional arguments are postponed until after the OLA process is complete. A likely doctrinal vehicle for advancing this defense would be the Tucker Act<sup>202</sup> and the accompanying proposition that takings claims should not be adjudicated by a court of general jurisdiction, provided that all the interests at stake can be fully protected by a suit for just compensation in the Court of Federal Claims under the Tucker Act.<sup>203</sup> Dodd–Frank contains language that cuts

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<sup>199</sup> See generally *Ex parte Young*, 209 U.S. 123 (1908) (allowing suits for prospective injunctive relief against officials acting on behalf of a state government to proceed in the federal courts, despite the state’s sovereign immunity under the Eleventh Amendment, when those state officials act unconstitutionally).

<sup>200</sup> See David L. Shapiro, *Ex Parte Young and the Uses of History*, 67 N.Y.U. ANN. SURV. AM. L. 69, 70 (2011) (remarking that “the range of justifications for the result [in *Ex parte Young*], and the analyses of its implications, are almost as diverse as the ethnic makeup of a typical subway car on a New York City 1 train”).

<sup>201</sup> See *Verizon Md. Inc. v. Pub. Serv. Comm’n*, 535 U.S. 635, 645 (2002) (reaffirming that, under the doctrine of *Ex parte Young*, “a court need only conduct a ‘straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective’” (citation omitted)).

<sup>202</sup> 28 U.S.C. § 1491 (2012) (providing that “[t]he United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort”).

<sup>203</sup> See *Preseault v. Interstate Commerce Comm’n*, 494 U.S. 1, 13 (1990) (finding that “the Tucker Act is an ‘implied promise’ to pay just compensation which individual laws need not

off any remedy against the *FDIC as receiver*, except an action for money damages as authorized by Title II.<sup>204</sup> But the Tucker Act authorizes suits against the United States for takings or breach of contract, and Dodd–Frank does not specifically disclaim such a remedy.

Whether such a “no irreparable harm” argument would succeed is uncertain. The Supreme Court’s most recent pronouncement on the Tucker Act is that the Act’s remedy is not exclusive and may be displaced entirely if another applicable statute supplies a “comprehensive remedial scheme.”<sup>205</sup> Dodd–Frank certainly seems to fit this description. Thus maybe even a takings claim could be raised in an anticipatory challenge to the constitutionality of Dodd–Frank’s Title II, at least by way of declaratory judgment. If the court finds that the receivership resulted in a taking, then the aggrieved party could bring a suit for just compensation in the Court of Federal Claims.<sup>206</sup>

The government would likely seek to bolster its “no irreparable harm” argument by claiming that the interests at stake are exclusively monetary claims and that such interests, by their very nature, can be vindicated by ex post monetary awards with interest to reflect the time value of money. Creditors who claim their security interests have been violated, officers who claim their salaries have been wrongfully clawed back, directors who claim to be unfairly deprived of their paid positions—all of these aggrieved persons can be made whole by an award of money damages. Unlawful actions that can be rectified by such damages are generally not regarded as presenting the kind of irreparable harm justifying injunctive relief.<sup>207</sup>

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reiterate” (citation omitted)); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018–19 (1984) (finding that an action under the Tucker Act remained available as a remedy for any uncompensated taking that an applicant for registration of the pesticide might suffer as a result of the operation of the Federal Insecticide, Fungicide, and Rodenticide Act’s data consideration and disclosure provisions). For application of the principle in the bankruptcy context, see *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126–27 (1974), which viewed the Tucker Act remedy as covering any shortfall between the remedy provided by the Regional Rail Reorganization Act and just compensation.

<sup>204</sup> See Dodd–Frank Act § 210(e), 12 U.S.C. § 5390(e) (2012) (providing that “any remedy against the corporation or receiver shall be limited to money damages determined in accordance with this title”); see also *id.* § 210(a)(8)(D), 12 U.S.C. § 5390(a)(8)(D) (“Except as otherwise provided in this title, no court shall have jurisdiction over . . . any claim relating to any act or omission of . . . the Corporation as receiver.”). By and large, any claims against the FDIC will be brought by creditors and others with various rights stemming from their pre-receivership relationship with a covered financial company that were extinguished or modified by FDIC receivership under the OLA.

<sup>205</sup> *Horne v. Dep’t of Agric.*, 133 S. Ct. 2053, 2062 (2013).

<sup>206</sup> Thomas W. Merrill, *Anticipatory Remedies for Takings*, 128 HARV. L. REV. (forthcoming 2015) (manuscript at 30) (on file with authors).

<sup>207</sup> See, e.g., *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (“According to well-established principles of equity, a plaintiff seeking a permanent injunction . . . must

If the only constitutional questions presented were takings and impairment of contract claims and the government's authority was otherwise uncontested, this argument would be well founded. But if the government's authority to proceed in the manner directed by the statute is challenged on other constitutional grounds, an ex post award of damages would not be a sufficient remedy.<sup>208</sup> The Due Process Clause says that no one shall be deprived of property without due process of law.<sup>209</sup> This generally means, at least where conventional property interests are at stake, that a person must be given an opportunity to challenge the legal authority of the government *before* his or her property is taken.<sup>210</sup> Thus, if a firm makes a credible contention that government is seeking its liquidation in a manner contrary to law, this issue should be resolved *before* the government liquidates the firm. Once the firm's assets are sold off and it is liquidated, the firm cannot be put back together again. Claims based on Article III of the Constitution, on the Bankruptcy Clause's uniformity requirement, or on the First Amendment would also seem to be the sort of claims that cannot be rectified by ex post damages awards. At least as to these constitutional claims, the firm facing liquidation will suffer irreparable harm if the inquiry is postponed until after the firm is fully dissolved.

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demonstrate[, among other things,] . . . that remedies available at law, such as monetary damages, are inadequate to compensate for that injury . . .” (citation omitted)); *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542 (1987) (“In brief, the bases for injunctive relief are irreparable injury and the inadequacy of legal remedies.”); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (“The Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies.” (citation omitted)).

<sup>208</sup> Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 707-08 (1990) (noting that injunctions are the standard remedy in cases asserting violations of constitutional rights). Even takings claims are subject to this limiting principle. The Takings Clause has been interpreted to mean that the government can take property only for a public use. *See Kelo v. City of New London*, 545 U.S. 469, 477-78 (2005) (differentiating between permitted takings for public use and prohibited takings for purely private benefit). If a property owner contends the taking is not for a public use, the owner's claim must be resolved before the taking occurs, not after. *See Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (citing of cases supporting the proposition that property cannot be taken “without a justifying public purpose, even though compensation be paid,” implying that this is a threshold issue requiring resolution at the outset (citations omitted)). If the court postpones considering the issue, and the taking is later determined not to be for a public use, there will be no way to correct the constitutional violation. An award of just compensation simply cannot remedy a constitutional right that property not be taken in the first place. Note that we are not suggesting a firm could mount a successful public use argument against a Dodd–Frank receivership. The point is more general.

<sup>209</sup> U.S. CONST. amend. V.

<sup>210</sup> *See, e.g., Connecticut v. Doehr*, 501 U.S. 1, 17-18 (1991) (holding that a Connecticut statute authorizing prejudgment attachment of real estate without prior notice or hearing and without requiring a showing of exigent circumstances did not satisfy due process requirements).

### III. CONSTITUTIONAL ISSUES: PROCESS OBJECTIONS

The prospect of the appointment of the FDIC to liquidate a firm under Title II would likely spark deep anxiety in a variety of the targeted firm's stakeholders. Creditors would worry that they will not get any of their money back or that they will get only liquidation value, as opposed to the potentially greater "going concern" value available through reorganization. Officers and directors would worry that they will be out of a job or, worse, that they will be held personally liable for the failure of the firm.<sup>211</sup> Shareholders would be concerned by the prospect of having their investments wiped out. Each of these groups would have an incentive to bolster its position by raising constitutional objections to the OLA process. Arguments conceivably could be advanced under the Due Process Clause of the Fifth Amendment, Article III of the Constitution, the Uniformity Clause of the Bankruptcy Power, the First Amendment, and the Takings Clause of the Fifth Amendment. In this Part, we consider the various process objections that could be brought in under the Due Process Clause and Article III.

#### A. *Due Process*

In order to establish a due process violation, a claimant must show that he or she has a life, liberty, or property interest; that the government is threatening to deprive him or her of that interest; and that the deprivation will take place without affording him or her adequate notice or opportunity to be heard.<sup>212</sup>

We assume that all relevant parties who might feel threatened by the prospect of a Title II liquidation would satisfy the threshold requirement of having a "property" interest at stake. For purposes of due process, property includes money and securities; thus, creditors of all stripes have constitutionally protected property interests in the assets of a debtor firm.<sup>213</sup>

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<sup>211</sup> Dodd-Frank Act § 204(a)(2)-(3), 12 U.S.C. § 5384(a)(2)-(3) (2012) (establishing that management deemed by the FDIC to be responsible for the failing of the financial firm must be terminated and, perhaps more significantly, that "all parties, including management, directors, and third parties, having responsibility for the condition of the financial company bear losses consistent with their responsibility, including actions for damages, restitution, and recoupment of compensation and other gains not compatible with such responsibility"). Given that the Title II regulations promulgated by the FDIC establish a presumption that the failed financial firm's chairman, CEO, president, CFO, and other similarly situated management personnel are "substantially responsible for the failed condition" of the company, there is a good chance that such persons would incur some type of personal liability or monetary penalty. 12 C.F.R. § 380.7(b)(1)(i).

<sup>212</sup> U.S. CONST. amend. V.

<sup>213</sup> See *Tulsa Prof'l Collection Serv., Inc. v. Pope*, 485 U.S. 478, 485 (1988) (holding that an unsecured creditor's claim is "property" for purposes of procedural due process).

Property also includes gainful employment, at least if the employee has an unexpired employment contract that makes him or her more than an at will employee.<sup>214</sup> Consequently, officers and directors who will lose their positions through an exercise of the OLA have a property interest under the Due Process Clause, provided they are working under an unexpired employment contract. It is also undeniable that the actions taken by the FDIC in completing an orderly liquidation would constitute action that would deprive these parties of their respective interests.

In assessing what process is due, the Supreme Court has tended to treat notice as a requirement distinct from other procedural elements.<sup>215</sup> Notice by mail or a similarly effective method is generally required for any proceeding that will adversely affect the property rights of an affected party as long as their name and address are “reasonably ascertainable.”<sup>216</sup> The notice requirement calls into question the constitutionality of the Act’s criminal penalties for providing notice to anyone other than the firm possibly facing receivership.<sup>217</sup> Shareholders, counterparties, creditors, and officers deemed to be responsible for the financial distress of the firm may have their interests compromised or completely wiped out by mandatory liquidation under Title II, and yet the statute makes it a criminal offense to provide them with the notice that would allow them to voice their objections before liquidation commences.

In response, the government would undoubtedly point to bank receiverships, where traditionally no formal notice is given before a receiver is appointed

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<sup>214</sup> See *FDIC v. Mallen*, 486 U.S. 230, 240 (1988) (finding that “appellee’s interest in the right to continue to serve as president of the bank and to participate in the conduct of its affairs is a property right protected by the Fifth Amendment Due Process Clause”); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538–41 (1985) (finding that, absent a valid cause for termination, civil service employment is a property interest under applicable state law and thus subject to due process protection).

<sup>215</sup> See *Jones v. Flowers*, 547 U.S. 220, 223 (2006) (“Before a State may take property[,] . . . the Due Process Clause of the Fourteenth Amendment requires the government to provide the owner notice and opportunity for hearing appropriate to the nature of the case.” (citation and internal quotation marks omitted)); see also *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (“For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.” (citations and internal quotation marks omitted)).

<sup>216</sup> See *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983) (“Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interest of *any* party.”); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections.” (citations omitted)).

<sup>217</sup> Dodd–Frank Act § 202(a)(1)(C), 12 U.S.C. § 5382(a)(1)(C) (2012).

and property seized.<sup>218</sup> In practice, however, the appointment of a receiver will typically come as no surprise to the bank and its officers and directors. As the D.C. Circuit has observed, bank regulators ordinarily raise concerns about the adequacy of the bank's reserves or other financial issues with bank officers over an extended period of time before initiating receivership procedures, giving the bank an idea of the relevant issues and an opportunity to respond, albeit informally.<sup>219</sup> Whether nonbank financial firms will similarly be alerted to the possibility of seizure under Title II through informal communications with regulators is unclear; certainly, the statute does not require it. Further, even if the firm has been given effective notice, notice cannot legally be given to creditors and other stakeholders.

The government would inevitably fall back on the position that exigent circumstances, such as public health emergencies, sometimes require it to act without giving advance notice. The government would argue that advance notice to all reasonably ascertainable stakeholders cannot be given before seizing the firm pursuant to the OLA, because such notice could trigger the very financial panic or instability Dodd–Frank was designed to prevent. Such arguments have been accepted in other emergency contexts, but almost invariably with the caveat that a prompt post-deprivation hearing is made available, during which the legality of the seizure may be challenged and the property restored to its rightful owner if the seizure turns out to have been unwarranted.<sup>220</sup> Justice Jackson, in *Fahey v. Mallonee*, described bank seizure as a “drastic procedure” justified by “the delicate nature of the institution and the impossibility of preserving credit during an investigation.”<sup>221</sup> But the procedure at issue there<sup>222</sup> provided for extensive

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<sup>218</sup> See David Zaring, *A Lack of Resolution*, 60 EMORY L.J. 97, 119 (2010) (noting that twenty-one banks were closed in 2009 “without any prior notice by the agency”).

<sup>219</sup> *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1099–1101 (D.C. Cir. 1996) (finding that the numerous opportunities for both the bank and its officers to respond to bank examiners' findings served as adequate replacement for a formal pre-seizure hearing).

<sup>220</sup> See, e.g., *FDIC v. Mallen*, 486 U.S. 230, 240–41 (1988) (finding that the public interest in an orderly liquidation of the seized bank necessitated holding the hearing after the seizure had already occurred); *Fahey v. Mallonee*, 332 U.S. 245, 253–54 (1947) (permitting seizure of a bank prior to a hearing in light of the risks to the bank's assets and operations posed by delay and public awareness of an investigation into the bank); *Coffin Bros. & Co. v. Bennett*, 277 U.S. 29, 30 (1928) (holding that deprivation prior to formal proceedings is permissible, provided that some means to challenge the deprivation is provided before it becomes final); *N. Am. Cold Storage Co. v. Chicago*, 211 U.S. 306, 315–21 (1908) (allowing seizure and destruction of tainted food prior to a hearing due to public health dangers, provided that a post-seizure hearing must be permitted).

<sup>221</sup> *Fahey*, 332 U.S. at 253.

<sup>222</sup> The procedure being challenged in *Fahey* was set forth in section 5(d) of the Home Owners' Loan Act of 1933, Pub. L. No. 73-43, § 5(d), 48 Stat. 128, 133 (codified as amended at 12 U.S.C. §1464(d) (2012)). This provision gave the Board of the Federal Home Loan Administration the authority to reorganize, consolidate, merge, or liquidate federal savings and loan associations,

hearing rights, including a full particularization of the reasons for the seizure, within a matter of days after the seizure.<sup>223</sup> Dodd–Frank’s OLA, as amended by the Senate, *eliminates* the right to post-seizure judicial review routinely available (even if rarely invoked) in the banking industry. Under Dodd–Frank, creditors who dispute the FDIC’s determination of the priority or the valuation of their individual claims can seek judicial review.<sup>224</sup> But the government could point to no provision in the statute that provides a post-seizure remedy to any other stakeholder, including creditors who believe they would obtain more for their claims in a reorganization in bankruptcy, making it much more difficult to justify the absence of notice to these affected persons or institutions.

Beyond notice, the extremely abbreviated twenty-four-hour period required by Title II between the filing of the petition and the automatic grant of the petition also presents due process concerns. Realistically, it is hard to imagine that this is adequate time for the firm to mount an effective defense or for the court to engage in meaningful deliberation.<sup>225</sup> To be sure, the only issues the court may consider are whether the Secretary acted in an arbitrary and capricious fashion in determining that the firm is a “financial company,” as defined by the statute,<sup>226</sup> and that the firm is in default or in danger of default.<sup>227</sup> But if these elements are contested, it is inconceivable that the firm could put together and present to the court a coherent rebuttal and that the court could digest the issues and render a well-considered

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including the power to appoint a conservator or a receiver to take charge of the affairs of any association. *Id.*

<sup>223</sup> *Fahey*, 332 U.S. at 252–53.

<sup>224</sup> Dodd–Frank Act § 210(a)(4), 12 U.S.C. § 5390(4) (2012).

<sup>225</sup> See Kenneth Scott, *Dodd Frank: Resolution or Expropriation* (Feb. 29, 2012) (Stanford Law Sch.), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1673849](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1673849) (“The Dodd–Frank Act squeezes pre-seizure due process down to the vanishing point.”).

<sup>226</sup> Dodd–Frank Act § 201(11), 12 U.S.C. § 5381(11). The section defines “financial company” as a bank holding company, nonbank financial company supervised by the Federal Reserve Board, or any company or subsidiary of a company previously determined by the Federal Reserve to be predominately engaged in activities “financial in nature.” *Id.* For a more comprehensive overview of what constitutes a financial company for the purposes of Title II, see *supra* note 134.

<sup>227</sup> The standard for determining whether a financial firm is in default or in danger of default is defined by Dodd–Frank Act § 203(c)(4), 12 U.S.C. § 5383(c)(4), which sets forth four alternative conditions for such a finding. Some of these conditions, such as that a bankruptcy case is likely to be promptly commenced, *id.* § 203(c)(4)(A), 12 U.S.C. § 5383(c)(4)(A), might be proven by documentary or testimonial evidence, and could conceivably be resolved in one day, provided the evidence was already in hand. But other conditions, such as that the firm “has incurred, or is likely to incur, losses that will deplete all or substantially all of its capital, and there is no reasonable prospect for the company to avoid such depletion,” *id.* § 203(c)(4)(B), 12 U.S.C. § 5383(c)(4)(B), would seem to require complex expert witness testimony that would be impossible to rebut or sort out in twenty-four hours.

decision within the extremely compressed time period. The impracticality of the deadline would be particularly apparent in any review of the FDIC's finding that the firm is in default or in danger of default, which could entail examining hundreds of disputed accounting issues, many of great complexity.

The judicial review process is made even more problematic by the lack of guidance on the intended meaning of Dodd–Frank's "arbitrary and capricious" standard of review.<sup>228</sup> While the APA directs courts to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,"<sup>229</sup> a standard which expressly encompasses questions of law as well as fact, Dodd–Frank uses only the term "arbitrary and capricious."<sup>230</sup> Does Dodd–Frank's omission of the phrase "otherwise not in accordance with law" mean that the district court may not review disputed questions of law? Such a construction would very likely be unconstitutional.<sup>231</sup> The fundamental objective of the Due Process Clause is to assure that the government deprives persons of their property only in accordance with the law, that is, with "due process of law."<sup>232</sup> An attempt by Congress to cut off any ability to challenge the lawfulness of a taking of property—at both the administrative and the judicial level—would almost certainly contravene due process.

The statute's limitation of judicial review to just two of the seven factors that the Secretary of the Treasury must consider in determining whether to petition for appointment of a receiver creates further due process problems. Dodd–Frank requires the Secretary to petition for a receivership if he makes seven enumerated determinations listed in the statute.<sup>233</sup> However, there is no provision for an administrative hearing to review any of the seven determinations, and only two of the seven are subject to judicial scrutiny, which must occur in the previously described twenty-four-hour hearing pursuant to the rather ambiguous "arbitrary and capricious" standard of review.<sup>234</sup> How can the government seize and liquidate a major financial firm based on five determinations that are never subject to any administrative

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<sup>228</sup> *Id.* § 202(a)(1)(A)(iv)(I)-(II), 12 U.S.C. § 5382(a)(1)(A)(iv)(I)-(II).

<sup>229</sup> 5 U.S.C. § 706(2)(A) (2012).

<sup>230</sup> Dodd–Frank Act § 202(a)(1)(A)(iv)(I)-(II), 12 U.S.C. § 5382(a)(1)(A)(iv)(I)-(II).

<sup>231</sup> *See* *Crowell v. Benson*, 285 U.S. 22, 60 (1932) ("In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function."); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 943-49 (1988) (discussing the importance of independent determinations of law by Article III courts).

<sup>232</sup> U.S. CONST. amend. V.

<sup>233</sup> Dodd–Frank Act § 203(b), 12 U.S.C. § 5383(b) (2012).

<sup>234</sup> *Id.* § 202(a)(1)(A)(iii), 12 U.S.C. § 5382(a)(1)(A)(iii).

or judicial review? Ordinarily, persons may not be deprived of property by administrative action that is immune from all review by the courts.<sup>235</sup> Why, then, can financial firms be liquidated without any opportunity to contest the legal determinations that support this action?

Admittedly, some determinations required by Dodd–Frank involve discretionary judgments best left to an agency’s expertise, such as the finding that resolution of the firm under ordinary bankruptcy law “would have serious adverse effects on financial stability in the United States.”<sup>236</sup> But others are highly factual, such as the finding that the financial firm has been ordered “to convert all convertible debt instruments.”<sup>237</sup> Eliminating all avenues of challenging this latter type of factual determination, either through ex ante or ex post review, is hard to justify as consistent with due process.

Is it possible to defend the extremely limited judicial review provided by Title II based on the government’s paramount interest in preventing financial meltdown? The general due process standard for procedural adequacy is the *Mathews v. Eldridge* balancing test, which focuses on three factors: (1) “the private interest that will be affected by the official action;” (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;” and (3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.”<sup>238</sup> The magnitude of the private interest at stake will depend on who is bringing the challenge. The firm, its directors and officers, and its shareholders may have the greatest interests. First, the statute mandates that any firm placed in an OLA receivership must be liquidated and that all shareholder equity must be wiped out before other creditors take a hit.<sup>239</sup> Second, all responsible directors are presumptively subject to dismissal.<sup>240</sup> Directors of systemically significant financial firms may not elicit as much sympathy from the courts

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<sup>235</sup> See, e.g., *Chi., Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U.S. 418, 456–57 (1890) (holding that a statute giving a regulatory commission authority to prescribe rates without any possibility of judicial review violated due process).

<sup>236</sup> Dodd–Frank Act § 203(b)(2), 12 U.S.C. § 5383(b)(2) (2012).

<sup>237</sup> *Id.* § 203(b)(6), 12 U.S.C. § 5383(b)(6).

<sup>238</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

<sup>239</sup> See Dodd–Frank Act § 206(2), 12 U.S.C. § 5386(2) (mandating that shareholders “of a covered financial company do not receive payment until after all other claims and the Fund are fully paid”).

<sup>240</sup> See *supra* note 211.

as school janitors or welfare recipients,<sup>241</sup> but directorships are paid positions and, under the statute, the appointment of receiver is the critical decision that determines whether a director keeps or loses her position. Once a receiver is appointed, directors will invariably be terminated.<sup>242</sup> Third, creditors will have more difficulty arguing that their interests are significant. Although Title II gives creditors the right to bring a judicial proceeding to determine the validity of their claims, it limits a creditor's compensation to the amount that the claimant would receive in a liquidation of the firm.<sup>243</sup> Finally, officers who fear dismissal may be met with the argument that consideration of this prospect at the time of appointment of a receiver is premature. Dismissal of an officer is required only if that person is found "responsible for the failed condition of the covered financial company."<sup>244</sup> Thus, any challenge by officers may not be ripe until the FDIC determines those officers warrant dismissal.

The government will undoubtedly argue that the procedures prescribed by Title II serve public interests of the highest magnitude. Dodd-Frank's limited notice and rocket-like hearing requirements are designed to prevent a financial panic analogous to a run on the bank, which could occur if ordinary judicial procedures were followed. In order to prevent future financial crises caused by the collapse of a too big to fail nonbank financial firm, Congress determined that the government must be able to seize and liquidate the firm in an expeditious, in camera process. Stated in these terms, it is difficult to see how the interests of a single firm or its shareholders and directors and officers in avoiding liquidation outweigh the prevention of

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<sup>241</sup> See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (ruling that a school janitor with an undisclosed criminal record was entitled to a hearing before termination given the importance of employment to an individual's welfare); *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970) (holding that welfare recipients are entitled to an adjudicatory hearing before termination of their benefits given the "brutal need" eligible recipients have for such funds).

<sup>242</sup> See Dodd-Frank Act § 206(5), 12 U.S.C. § 5386(5) (requiring removal of the directors "responsible for the failed condition" of the company).

<sup>243</sup> *Id.* § 210(a)(7)(B), 12 U.S.C. § 5390(a)(7)(B); *id.* § 210(d)(2)-(3), 12 U.S.C. § 5390(d)(2)-(3). The confusing language used in these sections appears to establish liquidation value as both a ceiling and a floor. Section 210(a)(7)(B) speaks to what a creditor, at minimum, must receive, specifically providing that "[a] creditor shall, in no event, receive less than the amount that the creditor is entitled to receive under paragraphs (2) and (3) of subsection (d), as applicable." *Id.* § 210(a)(7)(B), 12 U.S.C. § 5390(a)(7)(B). However, section 210(d)(2) does not actually address the issue of a creditor's minimum recovery. *Id.* § 210(d)(2), 12 U.S.C. § 5390(d)(2). Instead, it speaks to the "maximum liability of the Corporation," explicitly limiting the amount that the FDIC, as receiver, will have to pay out to any creditor of the financial firm to what the creditor would have received if the firm was liquidated under Chapter 7 of the Bankruptcy Code. *Id.*

<sup>244</sup> *Id.* § 206(4), 12 U.S.C. § 5386(4).

an economic crisis. If forced to choose between patent unfairness and economic disaster, courts will likely acquiesce in patent unfairness.

Notice, however, that the *Mathews v. Eldridge* test appears to contemplate a marginalist inquiry. The test’s primary question is not whether the totality of private interests outweighs the totality of governmental interests but whether “additional or substitute procedural safeguards” would be worth more or less than the “fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”<sup>245</sup> In the context of an OLA petition, the *Mathews* standard implies, for example, that the court should ask whether affording a financial firm, say, an additional twenty-four hours to mount a defense (with the proceedings remaining under seal) is worth more in terms of preventing unfairness than the costs of increasing the risk of financial disaster. There is, of course, no definitive answer to such a question, which highlights a key problem associated with *Mathews*’s risk–utility test more generally.<sup>246</sup> However, posing the question in this way would at least increase the odds that a court would agree that Dodd–Frank violates due process in that at least some additional procedures in the expedited process would be worth more than the administrative burdens those procedures would create.

Given the intractable nature of the *Mathews* balancing test, especially as applied to such a high-stakes situation as a looming financial crisis, it is virtually certain that the parties and the court would look to similar processes in other contexts in order to decide whether Title II comports with due process. In particular, the government would inevitably emphasize that existing bank receivership laws allow regulators to seize banking companies with no advance judicial process at all.<sup>247</sup>

The problem with this analogy is twofold. First, as emphasized above, the banking receivership statutes provide for judicial review *after* the seizure takes place.<sup>248</sup> Both the Administration’s Combined Draft and the House bill followed this model, providing for judicial review after the seizure of a systemically significant nonbank financial firm, without restriction as to the

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<sup>245</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

<sup>246</sup> See, e.g., Jerry L. Mashaw, *Administrative Due Process as Social-Cost Accounting*, 9 HOFSTRA L. REV. 1423, 1429–30 (1980–1981) (describing objections to the *Mathews* balancing test).

<sup>247</sup> See Notice of Proposed Rulemaking Implementing Certain Orderly Liquidation Authority Provisions of the Dodd–Frank Wall Street Reform and Consumer Protection Act, 75 Fed. Reg. 64173, 64178 (proposed Oct. 19, 2010) (to be codified at 12 C.F.R. pt. 380) (emphasizing that the proposed rule’s treatment of long-term unsecured senior debt is consistent with existing treatment of such debt in FDIC bank receivership regulations).

<sup>248</sup> 12 U.S.C. § 1821(a)(7) (2012); see also *supra* text accompanying notes 65–67.

issues presented or the time the court takes to reach a decision.<sup>249</sup> The Senate, however, eliminated post-seizure review and substituted an extremely limited, one-day pre-seizure review restricted to just two determinations.<sup>250</sup> The Senate's revisions thus made it far more difficult to defend the statute against a due process challenge.

Second, the rationale for dispensing with *ex ante* procedures in the bank receivership context depends in significant part on a *quid pro quo* or waiver argument linked to government deposit insurance. The leading precedent is *Fahey v. Mallonee*, which involved a constitutional challenge to the takeover of a federally chartered savings and loan association by the Federal Home Loan Bank Board.<sup>251</sup> In denying the saving and loan association's constitutional challenge, Justice Jackson alluded to the heightened need for public regulation of banks, given their susceptibility to panics and their potential impact on the wider economy.<sup>252</sup> He also reasoned that the association in that case was "estopped" from challenging the law because it had voluntarily sought a federal charter, knowing that a takeover was possible should the Bank Board become concerned about its financial condition.<sup>253</sup> As Justice Jackson put it, "[i]t would be intolerable that the Congress should endow an Association with the right to conduct a public banking business on certain limitations and that the Court at the behest of those who took advantage from the privilege should remove the limitations intended for public protection."<sup>254</sup>

The *quid pro quo* theme has recurred in more recent cases involving due process challenges to various administrative actions taken by bank regulators; often, the courts in these cases emphasize the benefit of deposit insurance to banks, namely that it greatly promotes public confidence in the banking system.<sup>255</sup> Ordinary bank receiverships and related summary actions occur

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<sup>249</sup> See *supra* text accompanying notes 89-97.

<sup>250</sup> See *supra* note 113.

<sup>251</sup> 332 U.S. 245, 247-48 (1947). The challenge was grounded in the nondelegation doctrine, but the Supreme Court addressed the limited procedural protections in its analysis. *Id.* at 252-55 & n.1.

<sup>252</sup> *Id.* at 256.

<sup>253</sup> *Id.* at 250, 256.

<sup>254</sup> *Id.*

<sup>255</sup> See, e.g., *FDIC v. Mallen*, 486 U.S. 230, 248 (1988) (rejecting a due process challenge to a statutory provision authorizing the FDIC to suspend from office a bank official indicted for crime); *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1099-1101 (D.C. Cir. 1996) (rejecting a due process challenge to OCC and FDIC actions declaring a bank holding company insolvent and seizing company assets); *Bd. of Governors of Fed. Reserve Sys. v. DLG Fin. Corp.*, 29 F.3d 993, 1000-03 (5th Cir. 1994) (rejecting a due process challenge to a preliminary injunction freezing assets of a corporation and its sole shareholder for possible violations of the Bank Holding Company Act); *Spiegel v. Ryan*, 946 F.2d 1435, 1439-42 (9th Cir. 1991) (rejecting a due process challenge to a temporary cease and desist order requiring a former bank officer to pay \$21 million

in a context in which the most significant assets of the insolvent bank—the deposits made by its customers—are insured by the federal government, giving the federal government strong justification for moving quickly and without advance notice to take over an insolvent bank in order to limit the government’s exposure on its insurance obligations. This context also allows the government to say that the bank voluntarily assumed the risk of summary action in exchange for taxpayers’ promise to foot the bill for any missteps or even misconduct by the bank. The banks, one could say, must take the bitter with the sweet.<sup>256</sup>

This sort of quid pro quo argument cannot easily be extended to the nonbank financial firms subject to Title II orderly liquidation.<sup>257</sup> Large nonbank financial firms are not chartered by the government and do not have the close interaction with regulatory agencies that characterizes banks. They may be subject to oversight by the Securities Exchange Commission or the Commodity Futures Trading Commission, but such oversight does not rise to the same level of scrutiny as the visitorial authority that regulators exercise over banks.<sup>258</sup> And, of course, the government does not formally insure funds and investments held by clients in these nonbank financial firms. Perhaps TARP and the bailout regime could be characterized as an implicit guarantee by the government that systemically significant firms will not be allowed to fail, but Title II is designed to *eliminate* such a guarantee. Indeed, Title II was designed to ensure the government will never again foot the bill for any capital infusions required by the resolution process. Framed in these terms, it is much more difficult to claim that the government has delivered enough of the “sweet” to declare that firms liquidated under

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dollars in restitution pending administrative review); *FDIC v. Bank of Coughatta*, 930 F.2d 1122, 1129-32 (5th Cir. 1991) (holding that review of a capital directive to a bank was prohibited since issuance of the directive was left to the FDIC’s discretion, and the administrative process from which the directive and the enforcement order resulted satisfied due process); *Haralson v. Fed. Home Loan Bank Bd.*, 837 F.2d 1123, 1126-27 (D.C. Cir. 1988) (rejecting a due process challenge to the appointment of a conservator pursuant to a statute providing for review only after seizure of assets).

<sup>256</sup> *Cf. Arnett v. Kennedy*, 416 U.S. 134, 152-54 (1974) (plurality opinion) (advancing a “bitter with the sweet” argument in the context of a due process challenge); *id.* at 166-67 (Powell, J., concurring in part and concurring in the result in part) (rejecting the argument); *id.* at 177-78, 185 (White, J., concurring in part and dissenting in part) (same); *id.* at 211 (Marshall, J., dissenting) (same).

<sup>257</sup> *See Zaring*, *supra* note 218, at 129-30 (arguing that the FDIC should not be able “to act to take over and shut down institutions that it does not insure or regulate”).

<sup>258</sup> *See Cuomo v. Clearing House Ass’n, L.L.C.*, 557 U.S. 519, 526-27 (2009) (explaining that “visitorial” powers give the controlling authority the right to superintend the management of the entity, standing in stark contrast to the powers of a regulator possessing only the authority to redress grievances and frauds).

Title II have voluntarily assumed the risk of getting the “bitter.” Consequently, Dodd–Frank’s OLA cannot be justified by the kind of estoppel argument adopted in *Fahey v. Mallonee*.<sup>259</sup>

Sadly and ironically, the short notice required by the statute will produce an advantage in litigation for the government that will be extremely difficult for the financial company to overcome. The government, for example, can prepare briefs in advance suggesting that the sky will fall if a systemically significant firm is not immediately placed in receivership. The government can also anticipate the due process objections and can have its briefs well prepared with extensive citations to banking and public health emergency cases. The financial firm and other interested parties, on the other hand, may be caught by surprise and find it nearly impossible to rebut these authorities in the condensed period of time they have to respond. The violation of due process may itself assure that the due process defense fails, at the very least for those stakeholders who receive no notice until after the receivership is approved.

The last point to make in connection with the due process issues raised by Title II is that these problems would have been easily avoided if Congress had followed the Administration’s Combined Draft and the House bill that both provided for administrative appointment of a receiver followed by a statutory right to post-seizure judicial review.<sup>260</sup> It is well established that some kind of hearing is required before a property owner is conclusively deprived of a protected property interest.<sup>261</sup> However, it is not always necessary that the hearing occur before the initial taking.<sup>262</sup> Specifically, the

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<sup>259</sup> 332 U.S. 245, 255-56 (1947) (providing that “[i]t is an elementary rule of constitutional law that one may not retain the benefits of the Act while attacking the constitutionality of one of its important conditions” (citation and internal quotation marks omitted)).

<sup>260</sup> See Administration’s Combined Draft, *supra* note 15, § 1205; see also Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. § 1605 (2009).

<sup>261</sup> See, e.g., *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433-434 (1982) (“[T]he state may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement.” (citation omitted)); *Fuentes v. Shevin*, 407 U.S. 67, 80-82 (1972) (providing that “the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner” (citation and internal quotation marks omitted)).

<sup>262</sup> See, e.g., *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19 (1978) (noting that “[o]n occasion, th[e] Court has recognized that where the potential length or severity of the deprivation does not indicate a likelihood of serious loss and where the procedures underlying the decision to act are sufficiently reliable to minimize the risk of erroneous determination, government may act without providing additional advance procedural safeguards” (citation and internal quotation marks omitted)); *Ingraham v. Wright*, 430 U.S. 651, 680 (1977) (finding that the need to provide additional procedural safeguards depends on a balancing of the benefits and costs of those procedures); *Mathews v. Eldridge*, 424 U.S. 319, 333-34 (1976) (describing cases in which a full-fledged evidentiary hearing was not required before the initial taking); *Bragg v. Weaver*, 251 U.S.

timing, nature and procedural requirements of any mandatory hearing under the Due Process Clause will depend on balancing the competing interests involved.<sup>263</sup> These include the importance of the private interest, the length or finality of the deprivation at issue, the probability of government error, and the importance of governmental interests involved, including the administrative practicality of providing an *ex ante* hearing and the sufficiency of substitute *ex post* procedures.<sup>264</sup> Given the substantial public interest in avoiding a financial panic, the practical constraints on providing advance notice to numerous creditors with property interests at stake and the need for expedition, it is hard to imagine a court finding *ex post* review unjustified.

As we have seen, for practical reasons, banks only rarely invoke their right to seek post-seizure review. But the availability of such review is an important safeguard against executive abuse of the enormous power conferred by Title II. Post-seizure review eliminates the notice problem, because all the world will know about the receiver's appointment. *Ex post* review also eliminates the need to rush through the proceeding in twenty-four hours or truncate the issues so that only a fraction of the potential points of legal controversy are subject to review. The Senate blundered in thinking that a sham review before appointment of a receiver is preferable to a right to plenary review afterwards.

### B. *Article III*

The compressed process for obtaining a judicial order establishing a FDIC receivership is also vulnerable to challenge on Article III grounds. Indeed, the Article III objection may strike an even more sympathetic chord with courts than the due process claim, because it implicates the constitutional authority and autonomy of the courts as a separate branch of the federal government.

We hasten to point out that the Article III issue is not the one typically associated with bankruptcy laws, as in *Stern v. Marshall*<sup>265</sup> or *Northern*

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57, 62 (1919) (upholding the constitutionality of a taking that precedes the determination of just compensation).

<sup>263</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (explaining that “resolution of the issue of whether the administrative procedures provided . . . are constitutionally sufficient requires analysis of the governmental and private interests that are affected” (citation omitted)).

<sup>264</sup> *FDIC v. Mallen*, 486 U.S. 230, 240-41 (1988); *Mathews*, 424 U.S. at 339-49.

<sup>265</sup> See 131 S. Ct. 2594, 2618 (2011) (holding that a non-Article III bankruptcy judge cannot constitutionally enter a final judgment on a counterclaim based on state law unless the counterclaim “stems out of the bankruptcy” or “would necessarily be resolved in the claims allowance process”).

*Pipeline Construction Co. v. Marathon Pipe Line Co.*<sup>266</sup> In those cases, the Court was concerned with whether the Bankruptcy Court—an Article I tribunal—could resolve claims of private right under the common law of contract and tort subject only to deferential review by an Article III district court. The initiation of a Dodd–Frank OLA proceeding, in contrast, would almost surely be classified as involving public, rather than private, rights.<sup>267</sup> An OLA action is commenced by a federal official, the Secretary of the Treasury, and seeks the appointment of a federal agency (typically, the FDIC) as receiver. The decision to grant the petition and the standards for conducting the receivership are governed by federal, rather than state, law. The goal of the action is grounded in public interest considerations—preventing a panic that would disrupt the financial markets and lead to economic distress—rather than in resolving claims between private debtors and creditors. Although the receivership will result in the resolution of numerous private claims, disposing of these claims is incidental to its primary purpose. Thus, although the Supreme Court has never identified a bright-line distinction between private and public rights, the OLA action seems to clearly fall on the public rights side of the line. The Supreme Court has repeatedly affirmed that public rights actions need not be tried in Article III courts, meaning Congress can choose whether such actions should be tried in either Article III courts or administrative tribunals.<sup>268</sup>

Moreover, in contrast to the claims at issue in *Marshall* and *Northern Pipeline*, the decision to appoint a receiver and initiate a liquidation of a financial firm is formally made by an Article III court—the District Court for the District of Columbia—and not by an administrative body or an Article I court. The statute provides that, “[i]f the Court determines that

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<sup>266</sup> See 458 U.S. 50, 70 (1982) (holding that, while Congress may transfer traditional judicial functions to non-Article III tribunals for those matters concerning statutorily created rights, it is precluded from altering the adjudication of rights not created by statute and, accordingly, must limit the functions of the adjunct court to preserve a party’s rights to adjudication by an Article III court).

<sup>267</sup> Thus, we question the analysis in Brent J. Horton, *How Dodd–Frank’s Orderly Liquidation Authority for Financial Companies Violates Article III of the United States Constitution*, 36 J. CORP. L. 869 (2011), which implicitly treats the appointment of a receiver as a matter of private right for Article III purposes. On the constitutional distinction between public and private rights, as reflected in the jurisprudence of Article III, see generally *Northern Pipeline*, 458 U.S. at 67–70; Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559 (2007).

<sup>268</sup> See *Crowell v. Benson*, 285 U.S. 22, 57–58 (1932) (explaining that Congress can create administrative tribunals by statute, with limitations on their scope of review); *Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1855) (“[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which [C]ongress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.”).

the determination of the Secretary [on the two reviewable determinations] is not arbitrary and capricious, *the Court* shall issue an order immediately authorizing the Secretary to appoint the [FDIC] as receiver of the covered financial company.”<sup>269</sup> There is no attempt here to transfer authority away from an Article III court to some other tribunal. The authority to appoint the receiver is formally conferred by an order issued by the district court.<sup>270</sup> The statute further avoids traditional *Northern Pipeline*–type problems by allowing creditors of the financial firm subject to the OLA to bring an action in federal district court if they are dissatisfied with the receiver’s resolution of their claims.<sup>271</sup> The statute appears to contemplate that these judicial proceedings will be tried *de novo*—not under a standard of deferential administrative review.<sup>272</sup>

The principal Article III problem with Dodd–Frank, rather, arises from its severe restrictions on the time that the Article III court is given to consider an important question, as well as the scope of the issues it can consider in resolving that question.<sup>273</sup> In effect, the statute calls upon an Article III court to make a significant decision, for both the financial firm and the economy, yet constrains the court in such a way that it cannot execute its duty to make this decision in a manner consistent with its Article III judicial power. One might say that Dodd–Frank commandeers the courts to lend their prestige and legitimacy to what is essentially an administrative process without respecting the traditional mode and manner in which Article III courts function.<sup>274</sup> In our view, any court told that it must rule on a petition to establish a receivership to liquidate a huge financial firm, and

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<sup>269</sup> Dodd–Frank Act § 202(a)(1)(A)(iv), 12 U.S.C. § 5382(a)(1)(A)(iv) (2012) (emphasis added).

<sup>270</sup> The issue is admittedly murkier if the district court fails to make a determination within twenty-four hours. In such situations, the statute declares—in the passive voice—that “the petition shall be granted by operation of law” and then adds that “the Secretary shall appoint the Corporation as receiver.” *Id.* § 202(a)(1)(v)(A)(I)–(II), 12 U.S.C. § 5382(a)(1)(v)(I)–(II). Arguably, the Secretary of the Treasury is the appointing authority in these circumstances.

<sup>271</sup> *Id.* § 210(a)(4), 12 U.S.C. § 5390(a)(4).

<sup>272</sup> *See id.* (“[A] claimant may file suit on a claim (or continue an action commenced before the date of appointment of the Corporation as receiver) in the district or territorial court of the United States for the district within which the principal place of business of the covered financial company is located (and such court shall have jurisdiction to hear such claim).”).

<sup>273</sup> Perhaps this should be termed a separation of powers issue, rather than an Article III issue, to avoid confusion with *Northern Pipeline*–style claims.

<sup>274</sup> *Cf.* *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that “[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program” because “such commands are fundamentally incompatible with our constitutional system of dual sovereignty”); *New York v. United States*, 505 U.S. 144, 188 (1992) (finding that the principles of federalism do not permit Congress to commandeer state governments to act as enforcement agents of federal law).

that it has only twenty-four hours to consider the question, will be unhappy with its appointed role.

One sign of judicial discomfort with Dodd–Frank is the D.C. District Court’s Local Civil Rule 85, which was amended to implement Dodd–Frank’s in camera procedure for appointment of a receiver.<sup>275</sup> The new Rule provides in part that “[t]he [Treasury] Secretary shall provide written notice under seal to the Clerk of the Court that a petition will likely be filed with the Court, and to the extent feasible, the notice will be provided at least 48 hours prior to filing the petition.”<sup>276</sup> Dodd–Frank provides no authority for this advance notice requirement, although presumably the Secretary of the Treasury will attempt to comply. The additional forty-eight-hour notice is evidently designed to facilitate assignment of a judge to the matter and to allow that judge to clear his or her docket (as well as personal schedule) for the twenty-four-hour marathon that is to come.<sup>277</sup> This procedural requirement will relieve some pressure on the judge deciding the petition, although the content of the petition itself and any objections by the financial firm will not be made available until the twenty-four-hour clock starts ticking. Local Civil Rule 85 thus cannot obviate the reality that a single judge must decide whether to order the liquidation of a systemically significant financial firm under circumstances reminiscent of a law school take-home examination.

The Article III problem is exacerbated by the statute’s restriction preventing the court from reviewing five of the seven threshold determinations that must be resolved before an OLA receivership is established. The court may consider only whether the Secretary of the Treasury acted arbitrarily and capriciously in finding that the firm (1) met the statutory definition of a “financial company” and (2) “is in default or in danger of default.”<sup>278</sup> The other five statutory triggering conditions cannot be considered by the court.<sup>279</sup> Yet the judgment the court is asked to render—granting a petition to appoint a receiver leading to mandatory liquidation—necessarily presupposes that *all* of the statutory triggering conditions have been met. The court may—and should—be uncomfortable rendering a judgment that rests on legal and factual determinations it is not empowered to review. Again, the objective of the statute appears to draw upon the prestige of the court as an

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<sup>275</sup> D.D.C. CIV. R. 85.

<sup>276</sup> D.D.C. CIV. R. 85(b).

<sup>277</sup> See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-735, BANKRUPTCY: AGENCIES CONTINUE RULEMAKINGS FOR CLARIFYING SPECIFIC PROVISIONS OF ORDERLY LIQUIDATION AUTHORITY 15 (2012) (explaining that the forty-eight-hour warning was intended to give the court time to prepare for the review).

<sup>278</sup> Dodd–Frank Act § 202(a)(1)(A)(iii), 12 U.S.C. § 5382(a)(1)(A)(iii) (2012).

<sup>279</sup> See *supra* text accompanying notes 129-134.

independent tribunal to legitimize a process that is actually driven by the executive branch. Courts will not take kindly to being conscripted in this fashion.

There is little precedent to draw upon in considering the Article III claim. The scope of judicial review under Dodd–Frank is arguably analogous to *Hayburn’s Case*, in which the courts were asked to render judgments subject to revision by the executive.<sup>280</sup> This practice was condemned on the ground that it made the courts’ judgments nothing more than advisory opinions.<sup>281</sup> The same conclusion should follow when the executive renders a decision that the court is asked to incorporate into a judgment without being given the time or the authority to make the independent determinations of fact and law necessary to render a proper judicial judgment. The judicial input in both instances lacks substance and serves only to transfer a measure of judicial prestige to an executive enterprise. Justice Douglas once warned that a statute that makes “the federal judiciary a rubber stamp for the President” would violate Article III.<sup>282</sup> “If the federal court is to be merely an automaton stamping the papers an Attorney General presents,” he wrote, “the judicial function rises to no higher level than an IBM machine.”<sup>283</sup> Justice Douglas’s colleagues in the majority disagreed with his interpretation of the statute under review but not with his understanding that such a statute would violate Article III.<sup>284</sup>

The absence of meaningful precedent to assess the Article III claim is both a strength and a weakness for potential challengers. It is a strength insofar as Congress has never before attempted to draw upon the authority of the courts while simultaneously constraining their ability to function as a court in such a dramatic fashion. The unprecedented nature of Title II’s judicial appointment provisions makes them inherently suspect. Conversely, the novelty of this scheme is a weakness insofar as there is a presumption in favor of the constitutionality of duly enacted legislation, and courts like to draw upon clear constitutional language or settled authority before rendering a judgment that a congressional enactment is unconstitutional.

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<sup>280</sup> See generally *Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792).

<sup>281</sup> See RICHARD H. FALLON, JR., ET AL., *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 83-90 (6th ed. 2009) (explaining the significance of *Hayburn’s Case* for understanding the role of Article III courts and noting that “judicial independence requires that the Article III courts not be subject to requisition by Congress or the executive to act as subordinates to those two branches in the performance of their characteristic functions”).

<sup>282</sup> *United Steelworkers of Am. v. United States*, 361 U.S. 39, 70-71 (1959) (Douglas, J., dissenting).

<sup>283</sup> *Id.* at 71.

<sup>284</sup> See *id.* at 43 (majority opinion) (“Of matters decided judicially, there is no review by other agencies of the Government.”).

The provisions authorizing an appeal from a district court order appointing a receiver raise further Article III questions. If the district court grants the petition to appoint a receiver, or if the petition is granted as a matter of law because the district court fails to act within twenty-four hours, the decision “shall be final, and shall be subject to appeal only in accordance with [the appeal provisions of Title II].”<sup>285</sup> Moreover, “[t]he decision shall not be subject to any stay or injunction pending appeal.”<sup>286</sup> If this last sentence is interpreted to mean that the D.C. Circuit (and, later, the Supreme Court on a petition for certiorari) has no authority to enjoin or set aside the decision of the district court once it becomes final, then the “appeal” would have no function other than to render an advisory opinion as to whether the district court acted correctly. This would be a plain violation of Article III.<sup>287</sup> To avoid this conclusion, one must focus on the word “pending” in the sentence that prohibits any stay or injunction “pending appeal.” This language should be interpreted to mean that no stay or injunction can be entered while an appeal is *pending* before the court of appeals and the Supreme Court, but once the *final* appellate decision is rendered, those appellate courts have authority to overturn the district court decision if they conclude that the Secretary acted arbitrarily and capriciously.<sup>288</sup>

Nevertheless, we are not out of the woods yet. As previously noted, Dodd–Frank appears to provide that the only *relief* the court of appeals or the Supreme Court can grant, if either concludes that the district court erred, is a remand for further explanation of the findings by the Secretary of the Treasury.<sup>289</sup> If the receivership goes forward and the only authority of the appellate courts is to require a better administrative explanation for what is already a *fait accompli*, how does this virtually meaningless appellate review satisfy the prohibition on advisory opinions? Unless the statute is interpreted to allow the court of appeals or the Supreme Court to *enjoin* the receivership, Dodd–Frank’s appeals provisions violate Article III. However, it is hardly clear that Congress intended to confer the authority to issue an injunction.

If Dodd–Frank is interpreted as allowing the court of appeals or the Supreme Court to enjoin a receivership on appeal or a petition for certiorari, and as imposing no time limit on the court of appeals or the Supreme Court

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<sup>285</sup> Dodd–Frank Act § 202(a)(1)(B), 12 U.S.C. § 5382(a)(1)(B) (2012).

<sup>286</sup> *Id.*

<sup>287</sup> See FALLON ET AL., *supra* note 281, at 52 (“The prohibition against advisory opinions has been termed ‘the oldest and most consistent thread in the federal law of justiciability.’” (citation omitted)).

<sup>288</sup> We thank Ron Levin for suggesting this interpretation.

<sup>289</sup> Dodd–Frank Act § 202(a)(1)(A)(iv)(II), 12 U.S.C. § 5382(a)(1)(A)(iv)(II).

in reaching its determination as to whether the Secretary's two findings are arbitrary and capricious, does this solve the Article III problem? Such an interpretation means that these two courts would not be dragooned into rendering decisions in a time period too compressed to allow them to act in proper judicial fashion. However, this interpretation would still subject the district court to the incredibly tight turnaround time. And the court of appeals and the Supreme Court would still be limited to considering only two of the seven factors that authorize the Secretary of the Treasury to petition for a receivership in the first place. As previously discussed, this limitation presents an independent due process problem, and might also be construed as presenting an Article III problem, insofar as the court of appeals and the Supreme Court are being asked to restrict their review to only a subset of the legal issues that led to the receiver's appointment. Again, this restriction arguably represents an attempt by Congress to exploit the prestige of the judiciary while preventing it from properly discharging its judicial function.

Can the district court avoid any insult to its judicial independence by simply declining to rule on the petition, in which case the petition would take effect in twenty-four hours by operation of law? By refusing to lend its prestige to a process that forces the court to act in a nonjudicial manner, the district court would preserve its dignity.<sup>290</sup> However, the financial firm could still appeal, in which case the Article III question regarding limiting the courts' review to two of the seven determinations would still come up. More seriously, refusing to rule would spare the court's dignity at the expense of the parties subject to orderly liquidation. Indeed, by declining to participate in the OLA schema, the court would only exacerbate the due process problem. Not only would the parties be denied all post-seizure judicial review, they would not even get the extremely abbreviated pre-seizure review provided under the statute. Seizure of systemically significant financial firms would therefore take place based on the unreviewable say-so of the executive branch.

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<sup>290</sup> *Cf.* *Korematsu v. United States*, 323 U.S. 214, 246 (Jackson, J., dissenting) (“A military commander may overstep the bounds of constitutionality, and it is an incident. But if [the Court] review[s] and approve[s] [those actions], that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does the Court’s opinion in this case.”). Even if the petition is granted by operation of law (because the district court declined to rule within the twenty-four-hour timeframe), the district court is still required to “provide . . . for the record a written statement of each reason supporting [its] decision.” Dodd–Frank Act § 202(a)(1)(B), 12 U.S.C. § 5382(a)(1)(B).

### C. Avoidance, Anyone?

Before concluding our discussion of the process objections to Title II, another wrinkle should be considered—namely, whether the statute can be construed in a way that would eliminate these constitutional problems.<sup>291</sup> An avoidance reading of Dodd–Frank might find that, although the statute severely limits what the court can consider and how the court must go about its review, the APA can be construed in a way that would supplement the court’s review authority, thereby eliminating possible due process and Article III objections.

Recall again that the statute requires the Secretary to make seven determinations before seeking appointment of a receiver but allows the district court to review only two of those determinations.<sup>292</sup> Is it possible for a financial firm facing appointment of a receiver to obtain review of the other five determinations under the APA, without being shackled by Dodd–Frank’s twenty-four-hour time limit and arbitrary and capricious standard of review? The APA provides that “[a]gency action[s] made reviewable by statute and final agency action[s] for which there is *no other adequate remedy in a court* are subject to judicial review.”<sup>293</sup> This would seem to fit the supposed situation, given that there is no other adequate remedy in court if the Secretary of the Treasury has committed legal or factual error with respect to five of the determinations. Indeed, because Dodd–Frank’s review provisions severely constrain the court with respect to the two determinations it can review—imposing a time limit so short it effectively deprives a firm of any adequate judicial remedy—one could argue that all seven determinations meet the criteria for review under the APA: the review process prescribed by Dodd–Frank is plainly not “adequate.”

Can we say the Secretary of the Treasury’s decision to file a petition is a “final agency action” under the APA? The Supreme Court has instructed that “two conditions must be satisfied for agency action to be ‘final’: First, the action must mark the ‘consummation’ of the agency’s decisionmaking process—it must not be of a tentative or interlocutory nature. And second, the action must be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’”<sup>294</sup>

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<sup>291</sup> See, e.g., *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 507 (1979) (interpreting the National Labor Relations Act to not cover lay employees of religious schools in order to avoid deciding whether such authority would violate the Free Exercise Clause of the First Amendment).

<sup>292</sup> Dodd–Frank Act § 202(a)(1)(A)(iii), (iv)(I), 12 U.S.C. § 5382(a)(1)(A)(iii), (iv)(I) (2012).

<sup>293</sup> Administrative Procedure Act, 5 U.S.C. § 704 (2012) (emphasis added).

<sup>294</sup> *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citations omitted).

Here, the first factor is clearly met. The Secretary’s decisionmaking process culminates in filing the petition to appoint a receiver, after which he bows out and turns the proceedings over to the court and the FDIC.

The second factor is more problematic. In formal terms, the D.C. District Court, not the Secretary of the Treasury, authorizes appointment of the receiver. The “legal consequences” (which are considerable) therefore flow from the court’s decision to grant the petition, not the Secretary’s decision to file it. Realistically speaking, however, the Secretary’s decision is the one that matters. The court has only limited grounds available for rejecting a petition (and then may only remand to the Secretary for further findings) and has only twenty-four hours to make its determination. One way to think through this problem is to focus on the way the statute handcuffs the court by permitting it to review only two of the Secretary’s seven determinations. As to the remaining five factors, the Secretary’s decision is fully and effectively “final,” since the Dodd–Frank Act does not permit judicial review. And the factors that are unreviewable by the court are among the most critical ones to financial firms regulated under Dodd–Frank.<sup>295</sup>

A more serious problem is presented by section 701(a) of the APA, which exempts matters from APA review when the relevant “statute preclude[s] judicial review” or the “agency action is committed to agency discretion by law.”<sup>296</sup> The government would surely move to dismiss any action seeking review under the APA of the Secretary of the Treasury’s five determinations (or all seven) on the ground that Dodd–Frank makes these findings unreviewable. Absent a constitutional avoidance issue, we would regard the government’s argument as a dispositive objection. While Dodd–Frank does not expressly preclude review of these five determinations, it specifically states that the district court can only consider the two delineated determinations. And the D.C. Circuit and the Supreme Court are expressly limited to those two determinations in their review. Courts have previously found that a statute’s inclusion of one type of review should be regarded as excluding other types of review.<sup>297</sup> That inference is particularly strong under Dodd–Frank’s language. Once the constitutional avoidance canon is added to the mix, however, it becomes a closer call. Given the strong arguments that Dodd–Frank’s review provisions violate due process and Article III, a court would likely strain mightily to find that APA review has

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<sup>295</sup> See *supra* text accompanying note 237.

<sup>296</sup> Administrative Procedure Act, § 5 U.S.C. 701(a) (2012).

<sup>297</sup> See, e.g., *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 347 (1984) (finding that the omission of a provision in the Agricultural Marketing Act of 1937 allowing for judicial review of the Secretary of Agriculture’s issuance of market orders was “sufficient reason to believe that Congress intended to foreclose consumer participation in the regulatory process”).

not been precluded and can therefore supplement Dodd–Frank’s procedural deficiencies.<sup>298</sup> A sensible court would, of course, seek to harmonize APA review with the congressional judgment that the appointment of a receiver must be resolved quickly and confidentially and, accordingly, would likely set a timetable for APA review that requires considerable dispatch and maintains secrecy, at least until a final judgment is reached.

The government might also argue that, even if review of the five determinations is not precluded by statute, these determinations are committed to agency discretion by law. One common refrain here is that matters are presumptively reviewable as long as there is “law to apply.”<sup>299</sup> The five determinations Dodd–Frank sets out for the Secretary’s consideration (in addition to the two made reviewable by the district court) vary in terms of whether they seem to be left to the Secretary’s discretion or require the Secretary’s application of law to fact. For example, whether the failure of a financial firm would have “serious adverse effects on financial stability in the United States” would seem to be a determination one would want the Secretary of the Treasury, not an Article III court, to make.<sup>300</sup> On the other hand, whether “a Federal regulatory agency has ordered the financial firm to convert all of its convertible debt instruments that are subject to the regulatory order” seems to be a factor as to which there is abundant “law to apply.”<sup>301</sup> As long as at least one contested determination includes debatable legal or factual issues of the sort that courts often adjudicate, the “committed to agency discretion” argument would fail. Again, courts’ desire to avoid deeply unsettling constitutional questions might well tip the balance in favor of finding that at least some of the Secretary of the Treasury’s determinations are not committed to agency discretion by law.

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<sup>298</sup> Judicial attitudes about the canon of avoiding constructions of doubtful constitutionality are mixed. Some decisions say that the canon comes into play only when the underlying statute (here, the APA) is genuinely ambiguous or indeterminate. *E.g.*, *Salinas v. United States*, 522 U.S. 52, 59–60 (1997). Other decisions invoke the canon to support reading implicit limitations into seemingly unqualified statutory language. *E.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 688–99 (2001); *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 505 (1979). For decisions discussing the use of the avoidance canon in the bankruptcy context, see *Stern v. Marshall*, 131 S. Ct. 2594, 2605 (2011); *United States v. Sec. Indus. Bank*, 459 U.S. 70, 81–82 (1982).

<sup>299</sup> *See, e.g.*, *Webster v. Doe*, 486 U.S. 592, 599–600 (1988) (providing that “review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion” (citation and internal quotation marks omitted)); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (stating that “the Administrative Procedure Act is applicable in those rare instances where statutes are drawn in such broad terms that there is no law to apply” (citation and internal quotation marks omitted)).

<sup>300</sup> Dodd–Frank Act § 203(b)(2), 12 U.S.C. § 5383(b)(2) (2012).

<sup>301</sup> *Id.* § 203(b)(6), 12 U.S.C. § 5383(b)(6).

## IV. CONSTITUTIONAL ISSUES: SUBSTANTIVE OBJECTIONS

Dodd–Frank’s orderly liquidation authority may be vulnerable on other constitutional grounds that implicate the authority of Congress to mandate the kind of receivership contemplated by Title II. This Section looks at two possible constitutional objections—one grounded in the uniformity requirement of the Bankruptcy Clause and the other based on the First Amendment.

A. *Uniform Laws of Bankruptcy*

The Constitution confers power on Congress to adopt “uniform Laws on the subject of Bankruptcies throughout the United States.”<sup>302</sup> One possible objection to Dodd–Frank’s OLA is that it does not constitute a uniform bankruptcy regime. Instead, the government is instructed to determine, on a case-by-case basis, whether to subject a nonbank financial firm to ordinary rules of bankruptcy or to put the firm on a different track reserved for systemically significant nonbank financial firms. The result is different resolution processes for different financial firms, based on a highly discretionary determination by executive branch agencies as to which is more appropriate. The fact that Title II contains significantly more punitive elements than the ordinary bankruptcy regime makes this discretionary authority especially problematic. A distinct uniformity objection to the OLA is that the statute authorizes the FDIC to treat similarly situated creditors differently if necessary to maximize the value of the failing firm’s assets, to initiate or continue operations essential to receivership, or to minimize losses.<sup>303</sup> In the *Big Spring* litigation, the state plaintiffs cite this potential lack of uniformity as grounds for establishing their standing to challenge the constitutionality of Dodd–Frank.<sup>304</sup>

The meaning of the “uniform laws” limitation in the Bankruptcy Clause is not entirely clear.<sup>305</sup> The leading case, *Railway Labor Executives Ass’n v. Gibbons*, construed the limitation to mean that Congress has no power to

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<sup>302</sup> U.S. CONST. art. I, § 8, cl. 4.

<sup>303</sup> Dodd–Frank Act § 210(b)(4), 12 U.S.C. § 5390(b)(4).

<sup>304</sup> See *supra* text accompanying notes 192–194.

<sup>305</sup> *The Federalist Papers* contain only one sentence about the Bankruptcy Power. THE FEDERALIST NO. 42, at 221 (James Madison) (Gideon ed., 2001) (“The power of establishing uniform laws of bankruptcy, is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie, or be removed into different States, that the expediency of it seems not likely to be drawn into question.”).

enact a law reorganizing a single debtor.<sup>306</sup> Thus, under *Gibbons*, if Congress were to enact a law prescribing an orderly liquidation procedure applicable only to a single nonbank financial firm, the law could be challenged as an unconstitutional exercise of the bankruptcy power. The question is whether a similar conclusion follows when Congress prescribes a specialized resolution authority for a subset of financial firms and gives the executive branch broad discretion in applying this specialized regime.

In *Gibbons*, the Supreme Court considered the Rock Island Railroad Transition and Employee Assistance Act (RITA), a law passed specifically to address the circumstances of the Rock Island Railroad bankruptcy.<sup>307</sup> Among other things, the law required the railroad's bankruptcy trustee to provide certain economic benefits to railroad employees who were not hired by other railroad carriers.<sup>308</sup> In considering whether RITA was constitutional, the Court addressed two issues: First, whether RITA should be regarded as having been enacted pursuant to the Bankruptcy Clause, which requires laws passed under it to be "uniform," or pursuant to the Commerce Clause, which lacks this uniformity requirement.<sup>309</sup> Second, whether the Bankruptcy Clause's uniformity requirement prohibits a bankruptcy law that applies to only one debtor.<sup>310</sup>

The first issue—whether RITA was enacted pursuant to the Bankruptcy Clause or the Commerce Clause—was critical, because the Court recognized that "if [the Court] were to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause, [it] would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws."<sup>311</sup> The Court therefore had to determine whether RITA fell within the ambit of the bankruptcy power. After surveying its prior decisions, the *Gibbons* court concluded that the bankruptcy power "extends to all cases where the law causes to be distributed, the property of the debtor among his creditors."<sup>312</sup> Congress's bankruptcy power "includes the power to discharge the debtor from his contracts and legal liabilities, as well as to distribute his property."<sup>313</sup> In short, the Court held that any law

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<sup>306</sup> See 455 U.S. 457, 471 (1982) ("[T]he uniformity requirement of the [Bankruptcy] Clause prohibits Congress from enacting bankruptcy laws that specifically apply to the affairs of only one named debtor.").

<sup>307</sup> *Id.* at 462-63.

<sup>308</sup> *Id.* at 462.

<sup>309</sup> *Id.* at 468-69.

<sup>310</sup> *Id.* at 470-71.

<sup>311</sup> *Id.* at 468-69.

<sup>312</sup> *Id.* at 466 (quoting *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 186 (1902)) (internal quotation marks omitted).

<sup>313</sup> *Id.* (quoting *Hanover Nat'l Bank*, 186 U.S. at 188) (internal quotation marks omitted).

that discharges the contracts and other legal liabilities of a debtor and distributes its property among creditors is a law adopted under the bankruptcy power.<sup>314</sup> Under the rationale of *Gibbons*, therefore, Title II of Dodd–Frank must be regarded as enacted pursuant to the Bankruptcy Clause and thus subject to its “uniform laws” requirement.

With respect to the second issue, the *Gibbons* court acknowledged that the uniformity requirement of the Bankruptcy Clause “is not a straightjacket that forbids Congress to distinguish among classes of debtors, nor does it prohibit Congress from recognizing that state laws do not treat commercial transactions in a uniform manner.”<sup>315</sup> In addition, the Court recognized Congress’s power to “take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems,” as it had done in the Conrail bankruptcy.<sup>316</sup> But RITA was a different matter:

The employee protection provisions of RITA cover neither a defined class of debtors nor a particular type of problem, but a particular problem of one bankrupt railroad. Albeit on a rather grand scale, RITA is nothing more than a private bill such as those Congress frequently enacts under its authority to spend money.<sup>317</sup>

The Court concluded that “[t]he language of the Bankruptcy Clause itself compels us to hold that such a bankruptcy law is not within the power of Congress to enact.”<sup>318</sup>

The Court supported this conclusion by examining the history of the Bankruptcy Clause.<sup>319</sup> The Clause was added to the Constitution during deliberations about the problem of affording full faith and credit to the legal actions of other states.<sup>320</sup> Several states had followed the practice of passing private bills to relieve individual debtors, and questions had been raised about whether other states were obliged to recognize the relief granted by these acts.<sup>321</sup> The Court thus opined that “the Bankruptcy Clause’s

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<sup>314</sup> *Id.* at 466-67.

<sup>315</sup> *Id.* at 469.

<sup>316</sup> *Id.* (quoting *Reg’l Rail Reorganization Act Cases*, 419 U.S. 102, 159 (1974)) (internal quotation marks omitted).

<sup>317</sup> *Id.* at 470-71.

<sup>318</sup> *Id.* at 471.

<sup>319</sup> *Id.* at 471-72.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

uniformity requirement was drafted in order to prohibit Congress from enacting private bankruptcy laws.”<sup>322</sup>

After *Gibbons*, therefore, it is presumably unconstitutional for Congress to enact a law providing special rules applicable solely to the resolution of a specific nonbank financial firm. It should thus also be unconstitutional for Congress to delegate authority to the executive branch to adopt specialized rules for the reorganization of a single nonbank financial firm. Congress cannot delegate to an agency power that exceeds Congress’s own authority to act.<sup>323</sup> Does Dodd–Frank overstep the limitations of Congress’s bankruptcy power? It certainly comes close, given the extraordinary discretion granted to the Treasury Department and allied federal agencies in determining whether a financial company should be reorganized under Title II, as opposed to under general bankruptcy laws. Title II’s OLA may never be invoked, or may be invoked so rarely that it is tantamount to a one-off bankruptcy regime. Nonetheless, the decision whether to apply such a regime will be left almost entirely to the executive branch’s discretion, under a statute that disallows review of most of that branch’s determinations.

There is, however, a distinction between Dodd–Frank and a bankruptcy regime that amounts to a private bill. After Dodd–Frank, there are two insolvency laws applicable to large nonbank financial firms—one for most nonbank financial firms (the Bankruptcy Code) and the other for firms deemed too big to fail by the executive (Dodd–Frank Title II). Congress enacted both laws and has further instructed the executive to decide, on an ad hoc basis, which of the two packages of insolvency rules should apply in an individual case. If Congress had prescribed clear legal criteria for determining when Package A, as opposed to Package B, applies and had allowed ordinary judicial review of the executive’s determination, the coexistence of these two sets of laws would likely be constitutional. After all, Congress has legislated different approaches to resolve insolvency in different industries, like railroads,<sup>324</sup> federally insured depository banks,<sup>325</sup> and insurance companies.<sup>326</sup> Legislation targeting particular industries inevitably presents

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<sup>322</sup> *Id.* at 472.

<sup>323</sup> *See, e.g.,* *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 473 (2001) (holding that an unconstitutional delegation of legislative power cannot be cured by a limiting administrative interpretation).

<sup>324</sup> *See* 11 U.S.C. §§ 1164–1174 (2012) (delineating provisions pertaining exclusively to the bankruptcy of railroads).

<sup>325</sup> *See* Federal Deposit Insurance Act of 1950, 12 U.S.C. § 1813 (2012) (establishing the FDIC as the receiver for all federally insured banks).

<sup>326</sup> *See* 11 U.S.C. § 109(b)(2)–(3), (d) (establishing that insurance companies are not entitled to relief pursuant to the Bankruptcy Code and hence the exclusive venue for such companies’ insolvency relief is found under state law).

classification questions, which historically have been resolved using ordinary tools of statutory interpretation.

Dodd–Frank presents a less clear case under the “uniformity” requirement, because it provides for two different insolvency regimes within a single industry. Moreover, the factors used to decide which package of rules applies are highly discretionary and, as previously discussed, the provisions for judicial review are severely truncated. By enacting Dodd–Frank, Congress has essentially proclaimed the following: here is a new package of bankruptcy rules for firms that are too big to fail, and the executive gets to decide, with essentially unreviewable discretion, which firms fall into that category.<sup>327</sup> It is difficult to describe this as a “uniform law” of bankruptcy, but it presents a problem of a different order from the statute invalidated in *Gibbons*. So the uniformity objection, as applied to Dodd–Frank, would sail into largely uncharted waters. Given that Dodd–Frank sets forth a regime for resolving the insolvency of firms that are too big to fail and does not seek to dictate special treatment for specific classes of creditors in pending cases, we doubt that the courts would extend *Gibbons* to reach this situation. But the argument is not frivolous.

What then about the other uniformity problem cited by the *Big Spring* plaintiffs—that is, the Dodd–Frank provision allowing the FDIC to treat similarly situated creditors differently in order to maximize the value of the

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<sup>327</sup> A constitutional purist might insist that Dodd–Frank gives so much discretion to the executive in this regard that it violates the nondelegation doctrine. We do not pursue this inquiry here, because the Supreme Court has refused to find a nondelegation violation provided Congress has laid down any kind of standard to govern executive decisionmaking. See, e.g., *Whitman*, 531 U.S. at 474–76 (finding that the Clean Air Act’s instruction to the EPA to set “ambient air quality standards” as “requisite to protect the public health,” without providing outer bounds for such EPA regulations, “fits comfortably within the scope of [agency] discretion permitted by [the Court’s] precedent”); *Fahey v. Mallonee*, 332 U.S. 245, 249–53 (1947) (holding that the Federal Home Loan Bank Board’s regulatory discretion is guided by “well-known and generally acceptable standards” drawn from the long history of banking regulation and corporate management and hence does not violate the nondelegation doctrine). Dodd–Frank sets forth seven “determinations” that must be made before a receivership is commenced, which is more than enough to meet the lax requirements of the contemporary nondelegation doctrine. To be sure, decisions like *Fahey* have stressed that broad delegations are permissible, in part, because judicial review is available to hold the executive in check. 332 U.S. at 256; see also *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (1976) (Leventhal, J., concurring) (“Congress has been willing to delegate its legislative powers broadly—and courts have upheld such delegations—because there is court review to assure that the agency exercises the delegated power within statutory limits, and that it fleshes out objectives within those limits by an administration that is not irrational or discriminatory.”). As previously discussed, judicial review of the decision to seize a firm and put it into receivership is sharply limited under Dodd–Frank. Whether courts will continue to stress the need for judicial review, however, is unclear. See Thomas W. Merrill, *Delegation and Judicial Review*, 33 HARV. J.L. & PUB. POL’Y 73 (2010) (considering the constitutionality of broad delegations of power in the absence of judicial review).

firm's assets?<sup>328</sup> Assuming that Dodd–Frank does in fact contemplate that the FDIC can pick and choose among similarly situated creditors,<sup>329</sup> it is not clear that such discretion would constitute a violation of the “uniform laws” requirement. One can have a law that uniformly provides for dissimilar, or even random, treatment of similarly situated claimants. An example might be a bankruptcy law providing that creditors will be selected for payment by lottery. We do not suggest that such a law would be desirable; uniform treatment of similarly situated creditors is an unquestionably important policy of the bankruptcy laws and is critical to overcoming the competitive race among creditors to capture a limited pool of assets, which bankruptcy is designed to prevent.<sup>330</sup> By permitting the FDIC to treat similarly situated creditors differently, Dodd–Frank may incite a competitive race between creditors to influence federal regulators to favor one over others. Nevertheless, deviation from sound bankruptcy principles does not necessarily equate to a violation of the uniformity requirement. In our view, “uniform laws” means that one debtor cannot constitutionally be singled out for dissimilar treatment, but it is probably a stretch to say the Constitution requires that all similarly situated creditors be treated alike.

### B. First Amendment

The Dodd–Frank Act's provision imposing stiff criminal penalties on persons who disclose truthful information about pending cases in an Article III judicial proceeding is also vulnerable to constitutional challenge.<sup>331</sup> Of course, judicial proceedings are sometimes conducted in camera, such as when a grand jury considers whether to bring a criminal indictment or when the government seeks a search or arrest warrant. Discovery materials or settlement agreements can also be kept under seal, as when the parties stipulate to a confidentiality agreement. However, the idea that a defendant

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<sup>328</sup> Dodd–Frank Act § 210(b)(4), 12 U.S.C. § 5390(b)(4) (2012).

<sup>329</sup> The statute, in fact, says that all claimants “that are similarly situated . . . shall be treated in a similar manner,” subject to exception where the FDIC determines it is necessary to deviate from equality in order to maximize the value of estate assets. *Id.* The government argued in *Big Spring* that this exception would apply only in narrow circumstances, such as where payment to utilities should be continued to keep on the company's lights. A narrowing construction to this effect would greatly undermine the States' argument regarding dissimilar treatment of creditors. See Memorandum in Support of Defendants' Motion to Dismiss the Second Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(1) at 46–48, *State Nat'l Bank of Big Spring v. Lew*, 958 F. Supp. 2d. 127 (D.D.C. 2013) (No. 12-1032), ECF No. 26.

<sup>330</sup> See, e.g., Thomas H. Jackson, *Avoiding Powers in Bankruptcy*, 36 STAN. L. REV. 725, 758 (1984) (“The essence of a collective proceeding such as bankruptcy is ratable distribution among those similarly situated.”).

<sup>331</sup> Dodd–Frank Act § 202(a)(1)(C), 12 U.S.C. § 5382(a)(1)(C).

in an adversarial judicial proceeding brought by the government can, without his or her consent, be criminally punished for disclosing truthful facts about that proceeding is without precedent.

One can readily imagine circumstances in which Dodd–Frank’s statutory gag rule would raise serious First Amendment concerns. For instance, suppose a financial firm is notified that a petition has been filed to appoint a receiver to liquidate the firm under Title II. The firm believes that the petition has been filed because it has been placed on the President’s “enemies list,” aimed at punishing those firms that have not contributed to his reelection campaign. The firm further concludes that its only hope of salvation is to leak information about the pending receivership to the press in an effort to rally opposition to the executive’s move. Dodd–Frank would deter such a disclosure by imposing criminal punishment of up to five years’ imprisonment for speaking out about these occurrences.<sup>332</sup>

A First Amendment challenge to Dodd–Frank’s gag rule may never arise, because, typically, none of the parties to the receivership proceeding will have an interest in disclosure. Other than the executive branch officials and court personnel involved, only the officers and directors of the targeted firm will know about the proceeding, “and they are probably the last ones who would want the petition for a receivership to be disclosed.”<sup>333</sup> This is particularly true in a case where the firm is about to collapse and the government is acting in good faith when invoking the OLA. But, as with other provisions of the Bill of Rights, Congress adopted the First Amendment on the assumption that the government would not always operate in good faith. It is likely that Dodd–Frank’s criminal penalties for disclosing truthful information about an OLA proceeding could be challenged only by someone proposing to engage in potentially criminal conduct.<sup>334</sup> So the critical question is whether its constitutionality would be sustained in such a context.

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<sup>332</sup> *Id.*

<sup>333</sup> Baird & Morrison, *supra* note 48, at 298.

<sup>334</sup> *Clapper v. Amnesty International USA* appears to bar an anticipatory challenge to the gag rule by a creditor anxious to receive information about a petition to put a financial firm into receivership. 133 S. Ct. 1138, 1146–54 (2013) (explaining that a party’s standing theory cannot rest on a speculative chain of possibilities that does not establish that its potential injury is certainly impending). The Court has occasionally allowed parties to challenge statutes that impair the First Amendment rights of third parties, but only if they can show some kind of actual injury to themselves. *See, e.g., Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (explaining that the Supreme Court has altered its traditional rules on standing to permit litigants “to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression”). We assume that a purely anticipatory challenge to Dodd–Frank’s gag rule would fail unless the party bringing the challenge could show that it, or some other entity with which it had a close relationship, was likely to be subject to the gag rule in

The government might argue that the gag rule is analogous to rules prohibiting witnesses in grand jury proceedings from disclosing their testimony.<sup>335</sup> But grand jury proceedings are not a final determination of criminal liability. If the grand jury returns an indictment, the defendant is free at trial to call relevant witnesses to testify in open court in an effort to be exonerated.<sup>336</sup> In contrast, once a petition to appoint a receiver is approved under Dodd–Frank’s OLA, a receivership commences that inevitably leads to liquidation of the targeted firm and other irrevocable consequences, such as the elimination of stockholder equity, the limitation on creditors’ rights to recover more than the liquidation value of their claims, and the dismissal of all “responsible” officers and directors. In this sense, the Dodd–Frank gag rule is more analogous to an order closing a public trial—something highly disfavored under the First Amendment.<sup>337</sup>

The government may also seek to analogize the gag rule to the rules of secrecy associated with proceedings to obtain search warrants, confidentiality agreements, civil commitment proceedings, or juvenile trials. But these various secrecy rules can be explained on grounds of consent. Government employees involved in judicial proceedings for issuing warrants or orders for national security wiretaps can be prohibited from disclosing what goes on in these proceedings, because they have explicitly or implicitly agreed to these constraints by accepting public employment.<sup>338</sup> Confidentiality agreements

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the near future. See generally FALLON ET AL., *supra* note 281, at 165-74 (discussing the cases permitting “overbreadth” challenges under the First Amendment).

<sup>335</sup> See *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 222 (1979) (explaining the importance of the gag rule for grand jury testimony, noting that “[f]ear of future retribution or social stigma may act as powerful deterrents to those who would come forward and aid the grand jury in the performance of its duties”); *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681-82 (1958) (“One [reason for maintaining the secrecy of grand jury proceedings] is to encourage all witnesses to step forward and testify freely without fear of retaliation.”).

<sup>336</sup> Cf. *Butterworth v. Smith*, 494 U.S. 624, 633-36 (1990) (holding that publication of grand jury testimony may not be prohibited once the term of the grand jury is over).

<sup>337</sup> In the context of adult criminal trials, the Court has held that even if the prosecutor and the defendant agree to make the proceedings confidential, the First Amendment allows interested third parties (such as the press) to object on First Amendment grounds. See, e.g., *Press-Enter. Co. v. Superior Court of Cal.*, 464 U.S. 501, 505-08 (1984) (discussing the importance of open trials and explaining their origin in pre-Norman Conquest England); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564-73 (1980) (chronicling the history of the modern trial and the presumption of openness and noting that “[t]his is no quirk of history; rather, it has long been recognized as an indispensable attribute of an Anglo-American trial”).

<sup>338</sup> See *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (holding that the requirement that a former CIA agent get the CIA’s approval prior to publishing a memoir regarding his time at the agency was not an unconstitutional restraint on free speech, because the agent had voluntarily signed an agreement to that effect both at the commencement and at the termination of his employment).

are also based on consent, as when parties agree not to disclose the existence of a civil action or, more commonly, the settlement of a civil action.<sup>339</sup> Civil commitment and juvenile justice proceedings are also often confidential. Typically, though, the party against whom the action is directed, due to the sensitive nature of the information about him or her that may be revealed, fully supports maintaining the confidentiality of the proceeding. Given that government employees and parties to lawsuits can consent to secrecy, Dodd–Frank’s gag rule is presumably justifiable as applied to Treasury Department or FDIC officials, as well as to court personnel, because these officials have consented to preserve confidential information pertaining to their public functions.<sup>340</sup> But threatening officers or directors of a targeted firm with criminal punishment for disclosing truthful information about a court proceeding in which they are involuntarily involved is different. When the government brings a civil action against a party and that party seeks to disclose truthful information about the proceeding, there is little precedent suggesting that the party can be criminally punished for doing so.

A possible analogy is provided by the National Security Letters (NSLs) authorized by the USA PATRIOT Act.<sup>341</sup> The Act allows the government to issue NSLs requesting records from wire or electronic communications providers as part of an investigation of potential terrorist activity and prohibits those service providers from disclosing that such information has been requested.<sup>342</sup> The Second Circuit has held that there can be a compelling governmental interest in preserving the confidentiality of NSLs,<sup>343</sup> but the relevant First Amendment authority requires that any such restraint on speech must be narrowly tailored to serve the government’s interest in confidentiality.<sup>344</sup> The court further concluded that the government must bear the burden of proving, in each case, that there is good reason to believe that disclosure of a NSL would jeopardize a national security investigation.<sup>345</sup>

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<sup>339</sup> See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36-37 (1984) (holding that a protective order prohibiting a newspaper from publishing information that it had obtained through civil discovery procedures did not offend the First Amendment).

<sup>340</sup> See *United States v. Nat’l Treasury Emp. Union*, 513 U.S. 454, 465-66 (1995) (recognizing that “Congress may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large”).

<sup>341</sup> *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 8, 15, 18, 22, 31, 42, 49, and 50 U.S.C.).

<sup>342</sup> 18 U.S.C. § 2709(a), (c) (2012).

<sup>343</sup> See generally *John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2009).

<sup>344</sup> *Id.* at 871.

<sup>345</sup> See *id.* at 883 (upholding the nondisclosure requirement only when “senior FBI officials certify that disclosure may result in an enumerated harm that is related to an authorized investigation

There are, of course, significant differences between the nondisclosure requirement in the PATRIOT Act and Dodd–Frank. One question is whether the governmental interest in preserving the confidentiality of an OLA petition is as compelling as that in preserving the secrecy of an investigation aimed at preventing terrorism. If one assumes premature disclosure of an OLA proceeding could trigger widespread financial panic, the answer is presumably yes. A financial panic would be devastating to the national economy, inflicting damage of a different sort than a terrorist attack, but nevertheless something to be equally avoided if possible.

Another question under Dodd–Frank is whether the First Amendment requires a case-specific justification of the need for secrecy, as the Second Circuit held in the context of a NSL.<sup>346</sup> Dodd–Frank, in its current form, does not require the government to demonstrate the need for confidentiality each time it initiates an OLA proceeding. Congress apparently assumed that confidentiality would *always* be required in order to prevent a financial crisis analogous to a run on the bank. But this assumption is not necessarily correct. One can imagine a case in which the insolvency of a systemically significant nonbank financial firm is publicly known before the government commences an OLA proceeding, perhaps because the firm has filed for bankruptcy. In such a case, news of the firm's failure would already have been absorbed by the market, and it is not clear why application of the gag rule would be necessary. So perhaps an individualized justification of secrecy ought to be required in the OLA context, too.

There is a more fundamental reason why Dodd–Frank's gag rule fails the narrow tailoring requirement. When enacting the statute, Congress had the option of structuring the OLA like an ordinary bank receivership, providing for plenary judicial review of the decision to appoint a receiver *ex post* rather than *ex ante*. Allowing for judicial hearing only after appointment of the receiver eliminates any need for secrecy, as well as any need for a rush to judgment and the other problems previously considered in connection with a due process or Article III challenge. Once again, we see that the Senate's injection of a federal district court into the process of appointing a receiver was an unforced error generating constitutional problems that could have readily been avoided.

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to protect against international terrorism or clandestine intelligence activities" (citation and internal quotation marks omitted)).

<sup>346</sup> *Id.*

## V. TAKINGS ISSUES

We conclude with a discussion of takings issues presented by Dodd–Frank. Title II contains a number of provisions that could conceivably give rise to takings claims. It is difficult to speak with any certainty about how these might be resolved because, short of outright seizure or destruction of a recognized property right by the government, takings claims are resolved under an ad hoc regime that critically depends on the specific facts presented.<sup>347</sup> We will briefly note some situations that seem particularly likely to generate future takings claims and then offer a more complete analysis of the largest takings issue looming on the horizon: impairment of secured creditor claims to avoid taxpayer-funded bailouts.

Tracking the language of the Constitution,<sup>348</sup> takings claims can potentially present four issues: (1) Does the claimant have an interest in “private property?” (2) Has the government “taken” this property? (3) If so, was the taking for a “public use?” (4) Has the government made adequate provision to provide “just compensation” for the taking?<sup>349</sup>

Of these four issues, the “public use” question is the least likely to be contested. Most would agree that vigorous government action to prevent or forestall a financial crisis—the very premise for exercising Title II authority—is a legitimate public use.<sup>350</sup> To be sure, just because the Title II process as a whole satisfies the public use requirement, it does not necessarily follow that every seizure of property undertaken pursuant to a Title II proceeding is also for a public use. Still, assuming there is some nexus between the seizure and the purposes of Title II, a public use challenge will likely fail.<sup>351</sup> The “property,” “taking,” and “just compensation” issues are more likely to

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<sup>347</sup> See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (characterizing the Court’s approach to resolving takings claims as “essentially ad hoc, factual inquiries”).

<sup>348</sup> See U.S. CONST. amend. V (“[N]or shall private property be taken for public use without just compensation.”).

<sup>349</sup> For an overview of these four issues, see generally DAVID A. DANA & THOMAS W. MERRILL, *PROPERTY: TAKINGS* 58-209 (2002).

<sup>350</sup> The Supreme Court has defined public use broadly to include public benefit or advantage. See *Kelo v. City of New London*, 545 U.S. 469, 480-81 (2005) (noting that the Supreme Court has historically defined the “public purpose” as needed to justify exercise of eminent domain power broadly, reflecting the longstanding policy of judicial deference to legislative judgments in this field); see also DANA & MERRILL, *supra* note 349, at 191-98 (tracing emergence of the broad definition).

<sup>351</sup> The public use issue must ordinarily be resolved before the taking occurs, because the taking should be enjoined if the government cannot proffer a public use rationale. See generally D. Zachary Hudson, *Eminent Domain Due Process*, 119 YALE L.J. 1280 (2010). Dodd–Frank’s OLA provisions offer no clear mechanism to raise the public use issue before the seizure of a financial firm. If a claimant has a legitimate public use objection, this would be an additional constitutional reason to condemn the statute.

arise, if and when the OLA is used and an aggrieved stakeholder elects to pursue a takings claim.

### A. *Some Possible Takings Claims*

#### 1. Assessments

Given its desire to avoid anything resembling a bailout of failed financial firms, Dodd–Frank requires repayment if Treasury funds are used to support a financial firm during the resolution process.<sup>352</sup> The first source of repayment is the firm’s stakeholders: shareholders are wiped out and unsecured creditors have their claims reduced, to zero if necessary. If this still leaves a debt to the Treasury, then Dodd–Frank provides that the FDIC can impose “assessments” on a broad list of financial institutions.<sup>353</sup> Those eligible to be tapped include any bank holding company with at least fifty billion dollars in assets, any nonbank financial company subject to systemic risk oversight under Title I, and any other “financial company” with assets of at least fifty billion dollars.<sup>354</sup>

Financial firms that are assessed to pay for the resolution of some other insolvent financial firm may argue that such a monetary exaction constitutes an unconstitutional taking of property. Although the Supreme Court has not enforced the principle for many decades, older authority exists for the proposition that special assessments disproportionate to any benefits conferred constitute takings.<sup>355</sup> Today, a threshold question would be whether such a general monetary liability can be challenged as a taking at all. The Court has held that the Takings Clause applies only to takings of identified property rights or the imposition of monetary liabilities tied to identified property rights and does not apply to general financial liabilities, such as taxes, fines, or fees.<sup>356</sup> A general assessment, if not tied to particular assets of financial firms, seems to fall on the “general liability” side of the line.

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<sup>352</sup> Dodd–Frank Act § 204(d), 12 U.S.C. § 5384(d) (2012).

<sup>353</sup> *Id.* § 210(o)(1)(B), 12 U.S.C. § 5390(o)(1)(B).

<sup>354</sup> *Id.* § 210(o)(1)(A), (D)(ii)(II), 12 U.S.C. § 5390(o)(1)(A), (D)(ii)(II).

<sup>355</sup> *See, e.g.,* Vill. of Norwood v. Baker, 172 U.S. 269, 279 (1898) (“[T]he exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation.”); *cf.* Louisville & Nashville R.R. Co. v. Barber Asphalt Paving Co., 197 U.S. 430, 435 (1905) (permitting assessments based on general criteria such as frontage footing). For a discussion of the evolution of federal law on special assessments, see Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 *YALE L.J.* 385, 469–73 (1977).

<sup>356</sup> *See* Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2599 (2013) (holding that the demands for money at issue in the case operated upon an identified property interest by

Whether or not the Takings Clause applies, the government will likely argue that liability for such assessments is analogous to a constitutionally permissible special tax to help redress a problem unique to the industry being taxed, such as a tax on chemical feedstock to pay for hazardous waste cleanups.<sup>357</sup> A financial firm that objects to paying assessments would likely stress the unfairness of forcing it to fund a general public good—prevention of a financial crisis—when there is no required finding that it was at fault or even causally connected to behavior that gave rise to the crisis. Whether this argument would succeed if framed as a takings claim is doubtful but not entirely implausible.<sup>358</sup>

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directing the owner of a particular piece of property to make a monetary payment, which constituted a monetary obligation burdening the petitioner’s ownership of a specific parcel of land); *E. Enters. v. Apfel*, 524 U.S. 498, 540-42 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) (finding that the Coal Act did not present a takings issue because it did not “operate upon or alter an identified property interest”); *id.* at 554-56 (Breyer, J., dissenting) (agreeing that “[t]his case involves not an interest in physical or intellectual property, but an ordinary liability to pay money, and not to the Government, but to third parties,” and hence the Takings Clause does not apply). For an argument that general financial obligations should be immune from scrutiny under the Takings Clause, see Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 974-78 (2000).

<sup>357</sup> An earlier version of the Dodd–Frank Act provided for the creation of such a fund, supplied by taxes on qualifying financial firms. See Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. § 1609(n)-(o) (2009) (creating a \$150 billion “Systemic Dissolution Fund” funded by ex ante assessments on financial firms with more than \$50 billion in assets). The Senate’s version also provided for assessments on large financial companies, but these would be imposed ex post. 156 CONG. REC. S4078, § 210(n)-(o) (daily ed. May 20, 2010). This divergence was almost certainly motivated by the Senate’s desire to reduce the perception that the statute contemplated taxpayer-funded bailouts. See GIBSON, DUNN & CRUTCHER LLP, FINANCIAL REFORM: 2010, PREPARING FOR THE HOUSE-SENATE CONFERENCE ON H.R. 4173 38-39 (2010), available at <http://www.gibsondunn.com/publications/Documents/PreparingForHouse-SenateConferenceOnHR4173.pdf> (noting that the House’s version contained no explicit prohibitions on the use of taxpayer funds to prevent the liquidation of a covered financial company). Similarly, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or, as more commonly known, Superfund), as originally enacted, provided for a tax on chemical companies. Pub. L. No. 96-510, § 4461, 94 Stat. 2767, 2798-99 (codified at 26 U.S.C. § 4661 (1982)) (imposing a tax on certain chemicals); *id.* at § 4481, 94 Stat. at 2804 (1980) (codified at 26 U.S.C. § 4681 (1982)) (imposing a tax on receipt of hazardous waste). These taxes, in turn, supplied a fund for cleanup of hazardous waste sites. *Id.* § 221, 94 Stat. at 2801-02 (codified at 42 U.S.C. § 9631 (1982)) (establishing a “Hazardous Substance Response Trust Fund”); *id.* § 232, 94 Stat. at 2804-05 (codified at 42 U.S.C. § 9641 (1982)) (establishing a “Post-closure Liability Trust Fund”). The tax expired in 1995 and has not been reauthorized. See JONATHAN L. RAMSEUR & MARK REISCH, CONG. RESEARCH SERV., RL33426, SUPERFUND: OVERVIEW AND SELECTED ISSUES 10-11 (2006) (noting that the Superfund taxing authority expired on December 31, 1995).

<sup>358</sup> For an analogous argument, albeit in a dissenting opinion, see *Pennell v. City of San Jose*, 485 U.S. 1, 15-16 (1988) (Scalia, J., concurring in part and dissenting in part) (arguing that forcing landlords to accept reduced rents based on “tenant hardship” when the landlord bears no responsibility for that hardship constitutes a taking).

## 2. Executive Pay Clawbacks

Dodd–Frank requires the removal of financial firm officers and directors if they are found to have been “responsible” for the company’s financial failure.<sup>359</sup> It also permits the FDIC to claw back any compensation those individuals received during the two-year period prior to the start of the receivership.<sup>360</sup> The clawback is not limited to excessive compensation nor is there any statutory requirement of specific misconduct on the part of the officer that produced inflated compensation. To the contrary, the statute instructs the FDIC to weigh the “financial and deterrent benefits” of a clawback against “the cost of executing the recovery.”<sup>361</sup> This seems to mandate a clawback whenever it would be cost effective to do so, without regard to the officer’s culpability or the size of his or her compensation package.

Executives subject to such clawbacks might argue that Dodd–Frank goes far beyond traditional notions of avoidable preferences and fraudulent conveyances in bankruptcy,<sup>362</sup> amounting to nothing more than an expropriation of their wealth in order to promote the general good of financial stability. The government would likely respond that Dodd–Frank’s executive clawbacks are consistent with other recently enacted clawback provisions,<sup>363</sup> such as those in the Sarbanes–Oxley Act<sup>364</sup> and the TARP legislation<sup>365</sup>—both of which are generally recognized as equitable and fair. The outcome, again, is difficult to predict, and will likely turn on what a court deems the relevant baseline for establishing legitimate expectations about the vulnerability of executives to salary clawbacks. If the baseline is that of the Bankruptcy Code, executives would have a chance of prevailing; if the baseline traces more recent legislative trends, their chances diminish.

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<sup>359</sup> Dodd–Frank Act § 204(a)(2), 12 U.S.C. § 5384(a)(2) (2012).

<sup>360</sup> *Id.* § 210(s)(1), 12 U.S.C. § 5390(s)(1).

<sup>361</sup> *Id.* § 210(s)(2), 12 U.S.C. § 5390(s)(2).

<sup>362</sup> *See* 11 U.S.C. § 547(b)(4)(B) (2012) (allowing the trustee to avoid transfers made by the debtor to insiders between ninety days and one year of the debtor filing for bankruptcy); *cf. id.* § 547(c) (prohibiting a trustee from avoiding a transfer that was made to any creditor in “a contemporaneous exchange for new value given to the debtor”).

<sup>363</sup> *See generally* Spencer C. Barasch & Sara J. Chesnut, *Controversial Uses of the “Clawback” Remedy in the Current Financial Crisis*, 72 TEX. B.J. 922 (2009) (summarizing the use of clawback legal remedies in the recent financial scandals and predicting aggressive use of clawbacks in the future).

<sup>364</sup> *See* 15 U.S.C. § 7243 (2012) (requiring the forfeiture of certain payments received by CEOs and CFOs within twelve months of the release of any financial statement that has to be restated due to a reporting error resulting from “misconduct”).

<sup>365</sup> *See* 12 U.S.C. § 5221(b)(3)(B) (2012) (requiring senior executives and other top paid employees to return any incentive compensation they received in connection with the release of favorable financial statements later found to be materially inaccurate).

### 3. Revival of Barred Actions

Dodd–Frank contains an unusual provision that allows the FDIC as receiver to bring tort claims on behalf of the entity in receivership, even though the statute of limitations for the state-based cause of action has expired.<sup>366</sup> The provision permits the FDIC to recover funds from former managers and others who allegedly caused financial loss to the covered financial firm. The covered claims include those arising from “fraud, intentional misconduct resulting in unjust enrichment, or intentional misconduct resulting in a substantial loss to the covered financial company.”<sup>367</sup> Fraud and unjust enrichment are well-established common law causes of action; “intentional misconduct resulting in substantial loss,” however, is not, which makes the exact scope of this provision unclear. The statute of limitations must have expired within five years of appointing the FDIC as receiver for the claim to be eligible for revival.<sup>368</sup>

Those targeted in such cases may claim that reviving a cause of action for damages previously barred by the statute of limitations is a taking of property. The Supreme Court has held that reviving actions barred by the statute of limitations is a taking,<sup>369</sup> but more often finds that such actions are not takings.<sup>370</sup> Reviving liabilities previously barred by the statute of limitations interferes with the repose these statutes are designed to promote. Perhaps, not surprisingly, the Supreme Court has declared legislative revivals of liability unconstitutional under provisions other than the Takings Clause.<sup>371</sup> Thus, it is difficult to predict with any confidence how such legislative action reviving tort liability would ultimately be assessed today under a takings challenge.

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<sup>366</sup> Dodd–Frank Act § 210(a)(10)(C), 12 U.S.C. § 5390(a)(10)(C).

<sup>367</sup> *Id.* § 210(a)(10)(C)(ii), 12 U.S.C. § 5390(a)(10)(C)(ii).

<sup>368</sup> *Id.* § 210(a)(10)(C)(i), 12 U.S.C. § 5390(a)(10)(C)(i).

<sup>369</sup> *See, e.g.,* *William Danzer & Co., Inc. v. Gulf & Ship Island R.R. Co.*, 268 U.S. 633, 637 (1925) (finding that allowing the plaintiff to file a claim with the Interstate Commerce Commission previously barred by the statute of limitations “would be to deprive defendant of its property without due process of law in contravention of the Fifth Amendment”).

<sup>370</sup> *See, e.g.,* *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 315-16 (1945) (“[I]t cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment.”). *See generally* *Campbell v. Holt*, 115 U.S. 620 (1885) (distinguishing between actions to recover real or personal property, where the expiration of the statute of limitations confers a title by adverse possession or prescription, and actions to recover a debt, where the statute merely bars enforcement in court).

<sup>371</sup> *See* *Stogner v. California*, 539 U.S. 607, 632-33 (2003) (holding that once the statute of limitations bars a criminal proceeding, reviving the prosecution violates the Ex Post Facto Clause); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217-19 (1995) (holding that once a federal court has dismissed an action as barred by a statute of limitations, legislation allowing the judgment to be reopened under a longer statute of limitations violates Article III).

### B. Impairment of Security Interests

The most significant takings issues potentially implicated by Dodd–Frank involve security interests.<sup>372</sup> In the quest to find sources of funding other than tax revenues to prop up financial firms undergoing resolution, the House bill, H.R. 4173, required certain secured creditors to take a haircut of up to ten percent of the value of their security interest if the “amounts realized from the resolution are insufficient to satisfy completely any amounts owed to the United States.”<sup>373</sup> Neither of the Senate bills nor the enacted statute includes such a provision.<sup>374</sup> In a tip of the hat to the House, the final version of the Act did include a section requiring the Financial Stability Oversight Council to conduct a study considering whether secured creditors should be required to take a haircut in future OLA proceedings.<sup>375</sup> The study, completed in July 2011, recommended against amending the statute to permit impairment of security interests, largely on the ground that the other powers given by the Act are sufficient to avoid future taxpayer bailouts without going after secured creditors.<sup>376</sup> Given the Council’s advice,

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<sup>372</sup> Unsecured claims are commonly reduced or disallowed in bankruptcy and other insolvency proceedings. See Andrew A. Wood, *The Decline of Unsecured Creditor and Shareholder Recoveries in Large Public Company Bankruptcies*, 85 AM. BANKR. L.J. 429, 436 (2011) (noting that recovery amounts in large public company bankruptcy cases in 2009 and 2010 declined to fifty-three cents on the dollar for general unsecured creditors, seventeen cents on the dollar for senior subordinate debt, and thirteen cents on the dollar for senior unsecured creditors). A state law that retroactively impairs unsecured creditors’ rights could give rise to a claim under the Contracts Clause. See *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 270 (1827) (Washington, J.), 292 (Johnson, J.), 313 (Thompson, J.), 331 (Trimble, J.) (seriatim opinions limiting the Contract Clause to impairments of existing contracts). But for purposes of the Takings Clause, unsecured claims are regarded as contract rights, not property rights, and hence impairment by the federal government through bankruptcy proceedings does not give rise to a Takings Clause issue. As previously noted, unsecured claims are regarded as property for due process purposes. See *Tulsa Prof’l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 485 (1988) (finding that a cause of action against an estate for an unpaid bill qualified as an unsecured claim and that “[l]ittle doubt remains that such an intangible interest is property protected by the Fourteenth Amendment”).

<sup>373</sup> Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. § 1609(a)(4)(D)(iv) (2009). The interests that would have been subject to this haircut requirement were enforceable or perfected security interests in assets arising under qualified financial contracts. *Id.*

<sup>374</sup> Title II as enacted does, however, authorize the FDIC to prescribe rules and regulations concerning the “rights, interests, and priorities of creditors, counterparties, security entitlement holders, or other persons with respect to any covered financial company” subject to the OLA. Dodd–Frank Act § 209, 12 U.S.C. § 5389 (2012).

<sup>375</sup> *Id.* § 215 (not codified).

<sup>376</sup> FINANCIAL STABILITY OVERSIGHT COUNCIL, REPORT TO THE CONGRESS ON SECURED CREDITOR HAIRCUTS 30 (2011), available at <http://www.treasury.gov/initiatives/Documents/report%20to%20congress%20on%20secured%20creditor%20haircuts.pdf>.

Former Secretary of the Treasury Geithner regards the proposed ten percent haircut as a “surefire panic accelerant.” GEITHNER, *supra* note 9, at 409.

an amendment of the law to permit impairment of security interests currently appears unlikely. Nevertheless, there is a very real possibility that Congress will demand the impairment of secured creditor rights in a future financial crisis in the interest of avoiding taxpayer liability.

A security interest or a lien is essentially a contingent property right held by a creditor in specific assets owned by a debtor.<sup>377</sup> In terms of conventional property forms, security interests can be analogized to executory interests: they are a nonpossessory future interest that may or may not vest depending on some future contingency, which is often the debtor’s failure to satisfy the obligation owed to the creditor.<sup>378</sup> If the debt is repaid in a timely manner, the security interest is released. However, if the debt is not repaid on time, the security interest holder gains the right to seize or compel the sale of the property that secures the debt to generate funds to satisfy the debt.<sup>379</sup>

The Bankruptcy Code implicitly treats security interests like property rights that belong to the secured creditor, although the Code studiously avoids labeling the interests as “property.” In a liquidation proceeding, a secured creditor is entitled to the full amount of its secured claim.<sup>380</sup> The trustee in bankruptcy can either sell the property subject to the security interest,<sup>381</sup> in which case the security interest will follow the property, or sell the property free of the security interest,<sup>382</sup> using proceeds of the sale to satisfy the secured debt.<sup>383</sup> If the value of the asset is equal to or less than the unpaid balance due on the debt, the trustee can abandon the property to the security holder.<sup>384</sup> Security interests are subject to the automatic stay in bankruptcy, which potentially impairs the value of the security.<sup>385</sup> The Code requires the trustee to provide “adequate protection” to secured creditors to minimize losses due to the stay.<sup>386</sup>

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<sup>377</sup> See Douglas G. Baird, *Security Interests Reconsidered*, 80 VA. L. REV. 2249, 2257 (1994) (“Security interests under Anglo-American law have always been tied to particular assets. A creditor acquired an interest in a particular piece of real and personal property and looked to it first to obtain repayment.”).

<sup>378</sup> THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* 808-10 (2d ed. 2012).

<sup>379</sup> *Id.*

<sup>380</sup> See *Dewsnup v. Timm*, 502 U.S. 410, 417 (1992) (forbidding “strip[ping] down” a party’s claim when the claim is a secured lien and fully allowed under the Bankruptcy Code).

<sup>381</sup> 11 U.S.C. § 363(b)-(c) (2012).

<sup>382</sup> *Id.* § 363(f).

<sup>383</sup> *Id.* § 363(j).

<sup>384</sup> *Id.* § 554.

<sup>385</sup> *Id.* § 362.

<sup>386</sup> *Id.* § 363(e).

Things are more complicated in a reorganization proceeding than in a liquidation proceeding. In a reorganization proceeding, the bankruptcy trustee (frequently the debtor in possession) can, with the approval of the bankruptcy court, decide that the specific asset in which a creditor holds a security interest is necessary to the success of the reorganized firm.<sup>387</sup> In this event, the court decides whether or not to keep the secured asset for the use by the reorganized firm.<sup>388</sup> However, if the court decides to let the firm keep the asset, the court must perform a valuation of the asset and give the secured creditor a substitute for its property right—a “secured claim to the extent of the value of such creditor’s interest.”<sup>389</sup> The Code again requires that secured creditors given these substitute rights must be given “adequate protection” to ensure that the secured creditors will receive an “indubitable equivalent” to the value of the property in which they previously held a security interest.<sup>390</sup> By allowing the bankruptcy court to substitute other assets of equivalent financial value for the security interest, the Code treats security interests as fungible assets equivalent to money and hence as an asset that the court can exchange for money.

The Dodd–Frank Act follows the Bankruptcy Code in recognizing the distinctive status of security interests and that security interests are entitled to adequate protection without regard to the impact protecting such interests has on other creditors, or on larger objectives such as preventing the collapse of a systemically significant firm.<sup>391</sup> As in the Bankruptcy Code, the Dodd–Frank Act does not acknowledge that security interests are property or that the enlargement of a pool of assets through abrogation of security interests might raise constitutional questions.<sup>392</sup>

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<sup>387</sup> *Id.* § 362(d)(2), (g); see also Siobhan Rafferty, *Chapter 11 Cases Under Section 362(d)(2): Does This Include Liquidation?*, 1 BANKR. DEV. J. 159, 163–64 (1984) (describing the trustee’s high burden of proof on the issue that the property is essential to the reorganization).

<sup>388</sup> See, e.g., *In re Terra Mar Assocs.*, 3 B.R. 462, 465–66 (Bankr. D. Conn. 1980) (identifying the factors that the court should consider in determining whether the bankrupt debtor can retain a particular asset, including whether “(1) the secured creditor will suffer imminent and irreparable injury from the continuation of the stay, (2) the property [at issue] is necessary to effect a reorganization, and (3) there is a reasonable probability of a successful rehabilitation within a reasonable time” (citation omitted)).

<sup>389</sup> 11 U.S.C. § 506(a)(1) (2012).

<sup>390</sup> *Id.* § 361; *id.* § 362(d)(1); *id.* § 1129(b)(2)(A).

<sup>391</sup> Dodd–Frank Act § 210(a)(3)(B), 12 U.S.C. § 5390(a)(3)(B) (2012) (“The receiver shall allow any [secured] claim . . . which is proved to the satisfaction of the receiver.”).

<sup>392</sup> Academic commentary about security interests frequently ignores the status of such interests as property and hence the possible relevance of the Takings Clause. For example, some commentators have argued that secured creditors lack adequate incentives to monitor distressed firms and that eliminating the absolute priority rule for secured creditors would encourage better monitoring. See Baird, *supra* note 377, at 2259 (citing scholarly opinions explaining when departures from the absolute priority rule may be warranted). Other scholars have worried that secured

While Dodd–Frank generally favors preserving security interests, Title II deviates, in certain respects, from the way security interests are treated in bankruptcy. The clearest example concerns setoffs, where a creditor holds funds of an insolvent debtor and then seeks to take those funds as full or partial satisfaction of an unpaid claim.<sup>393</sup> The Bankruptcy Code treats setoffs as a type of secured claim;<sup>394</sup> Dodd–Frank does not.<sup>395</sup> Therefore, it is foreseeable that some creditors holding a setoff which is denied treatment as a secured claim will argue that this is a taking of property. The question is whether this type of deviation from the treatment of security interests in bankruptcy—or other reductions in secured creditor rights in response to demands for alternative sources of funding for resolutions of systemically significant firms—could be challenged as a taking.

Under the relevant decisions of the Supreme Court, it is clear that security interests are “property” protected by the Takings Clause. The Court so held in a series of Depression-era cases under the Frazier–Lemke Act<sup>396</sup> and in a later decision involving the abrogation of a materialman’s lien<sup>397</sup> and more

creditors will leave insufficient assets in a bankrupt enterprise to satisfy the claims of nonadjusting creditors such as tort claimants. *See, e.g.*, Lucian Arye Bebchuk & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy*, 105 *YALE L.J.* 857, 934 (1996) (arguing that “full priority causes excessive use of security interests, reduces the incentive of firms to take adequate precautions . . . and distorts the monitoring arrangements chosen by firms and their creditors”). Both arguments presuppose that the absolute priority rule for security interests can be modified without implicating the Takings Clause.

<sup>393</sup> *See* *Citizens Bank of Md. v. Strumpf*, 516 U.S. 16, 18 (1995) (“The right of setoff (also called ‘offset’) allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding ‘the absurdity of making A pay B when B owes A.’” (quoting *Studley v. Boylston Nat’l Bank of Bos.*, 229 U.S. 523, 528 (1913))).

<sup>394</sup> 11 U.S.C. § 506(a) (2012).

<sup>395</sup> Dodd–Frank Act § 210(a)(7)(B), 12 U.S.C. § 5390(a)(7)(B). The Bankruptcy Code does not grant setoff rights *per se*; creditors’ setoff rights are governed by state law. *See Strumpf*, 516 U.S. at 18 (noting that under the Bankruptcy Code, “whatever right of setoff otherwise exists is preserved in bankruptcy”). Section 553 of the Bankruptcy Code preserves setoff rights and acknowledges that a creditor has the right of setoff under state law. 11 U.S.C. § 553. Section 506(a)(1) treats valid setoff rights as a secured claim. *See id.* § 506(a)(1) (“An allowed claim of a creditor . . . is a secured claim . . . to the extent of the amount subject to setoff . . .”).

<sup>396</sup> 11 U.S.C. § 203(s) (1934) (permitting a farmer to amend his bankruptcy petition and retain possession of his property under certain alternative payment schemes), *invalidated by* *Louisville Joint Stock Bank v. Radford*, 295 U.S. 555 (1935); *Radford*, 295 U.S. at 601-02 (finding that the Frazier–Lemke Act violated the Fifth Amendment by taking property rights from a bank without just compensation); *see also* *Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke*, 300 U.S. 440, 470 (1937) (upholding an amended version of the Frazier–Lemke Act as causing a reasonable modification of property rights).

<sup>397</sup> *Armstrong v. United States*, 364 U.S. 40, 45-46 (1960) (determining that the petitioners possessed “compensable property interests within the meaning of the Fifth Amendment”); *see also* *United States v. Sec. Indus. Bank*, 459 U.S. 70, 81-82 (1982) (construing a provision of the

recently reaffirmed these holdings.<sup>398</sup> These decisions nevertheless leave many unanswered questions.

One question is whether the status of security interests as property is subject to prospective modification by legislation or regulatory pronouncement.<sup>399</sup> There is a strong suggestion in *United States v. Security Industrial Bank*, a decision arising under the Bankruptcy Code, that prospective modification of the degree of protection afforded to security interests in bankruptcy would not be a taking.<sup>400</sup> This might mean, for example, that creditors who obtain setoff rights after the enactment of Dodd–Frank’s Title II cannot claim that the failure to treat these rights as property for bankruptcy purposes is a taking, because Title II announced to the world that henceforth these rights would not be treated as such. Setoff rights are close enough to the line between property and contract rights (which are subject to compromise or even disallowance in bankruptcy) that this kind of reclassification may be permissible. It is less clear whether an announcement by Congress (or a federal agency) modifying the absolute priority given to security interests in bankruptcy would be enough to immunize the government from any takings claims arising in security interests created thereafter. At least with respect to interests in land, the Court has been reluctant to regard every newly legislated or regulated land use restriction as an immediate qualification of property rights, such that persons who acquire restricted property in the future are automatically barred by the

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Bankruptcy Reform Act to apply only to liens created in the future in order to avoid the constitutional question whether abrogating an existing lien would be a taking).

<sup>398</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2599 (2013) (“[T]he government must pay just compensation when it takes a lien—a right to receive money that is secured by a particular piece of property.”); *id.* at 2600 (referring to the taking of a lien as a “*per se* taking”).

<sup>399</sup> Compare James Steven Rogers, *The Impairment of Secured Creditors’ Rights in Reorganization: A Study of the Relationship Between the Fifth Amendment and the Bankruptcy Clause*, 96 HARV. L. REV. 973, 1006–09 (1983) (arguing that Congress has complete discretion to modify the priority or other treatment of secured creditor rights under the Bankruptcy Clause without raising constitutional issues), with Julia Patterson Forrester, *Bankruptcy Takings*, 51 FLA. L. REV. 851, 893 (1999) (arguing that prospective modification of secured creditor rights that go beyond settled background principles of property law can give rise to takings liability).

<sup>400</sup> The Court specifically reserved the question whether a provision of the Bankruptcy Reform Act would apply to security interests established after the Act was passed but before it became effective. *Sec. Indus. Bank*, 459 U.S. at 82 n.11. But the Court did *not* similarly reserve the question whether the amendment would apply to a security interest established *after* the Act became fully effective. In effect, the Court implicitly assumed the provision could be applied in a fully prospective fashion, notwithstanding diminished protection for security interests in bankruptcy.

restriction.<sup>401</sup> The Court has acknowledged that property rights are qualified by “background principles” of property law, such as the understanding that landowners can be barred from engaging in uses that create nuisances.<sup>402</sup> However, the question whether changes in positive regulations that affect property automatically qualify as background principles has been met with inconsistent responses,<sup>403</sup> leaving considerable uncertainty about how the Court would respond to a law that prospectively modified the absolute priority of security interests. Delays in foreclosure proceedings have been around for a long time and might qualify as “background principles”;<sup>404</sup> subordination of security interests to avoid taxpayer bailouts, on the other hand, might be regarded as a novelty that does not so qualify.

Another question is how haircuts of security interests or other modifications in the rights of security interest holders should be analyzed in terms of total or partial takings. *Armstrong v. United States* held that the total destruction of a security interest is a taking,<sup>405</sup> anticipating the analysis of *Lucas v. South Carolina Coastal Council*<sup>406</sup> in terms of real estate. But if Congress or the FDIC as receiver shaves ten percent off the principal value of a security interest in order to reimburse the federal treasury for temporarily financing a failing firm, would this be regarded as a total taking of ten percent of the security or only a partial, ten percent taking of the security? In the case of land, shaving ten percent off the existing acreage is regarded as a total

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<sup>401</sup> See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 629-30 (2001) (declining to recognize a per se rule that land use regulations in effect at the time of purchase qualify property rights and are immune from constitutional challenge by subsequent landowners); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031-32 (1992) (holding that, in takings cases brought by a landowner, the State would need to show that the landowner’s actions violated background principles of nuisance and property law in order to sustain a claim that no taking occurred); see also *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 167 (1998) (holding that a regulatory requirement imposed on client funds held in trust by lawyers did not qualify the common law understanding that interest follows principal).

<sup>402</sup> *Lucas*, 505 U.S. at 1029.

<sup>403</sup> Compare *Palazzolo*, 533 U.S. at 628 (holding that notice of regulation does not automatically disqualify a takings claim), with *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005-08 (1984) (treating notice of regulation as virtually dispositive of takings claim).

<sup>404</sup> See *Forrester*, *supra* note 399, at 882-85 (surveying cases involving foreclosure delays as potential takings).

<sup>405</sup> 364 U.S. 40, 48 (1960) (“The total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment ‘taking.’”).

<sup>406</sup> 505 U.S. at 1031-32 (holding that any regulation that destroys all economically beneficial value of real property is a taking unless it tracks the common law of nuisance in the relevant jurisdiction).

taking of ten percent.<sup>407</sup> But imposing a use regulation on the land that reduces its value by ten percent is only a partial taking and is typically not compensable.<sup>408</sup> This distinction might suggest, by analogy, that imposing a ten percent haircut on secured interest holders would be a taking, whereas a regulation that diminished the value of the security by ten percent (perhaps by imposing a moratorium on foreclosure) would not be.

Still more questions are presented about what constitutes just compensation when security interests are impaired. For example, must compensation be paid for the time value of money when recovery of the equivalent value of the secured interest is delayed by a resolution process? Under the Bankruptcy Code, the Court has held, as a matter of statutory construction, that value lost due to delay is not compensated.<sup>409</sup> But the matter might come out differently when framed as a takings claim under the Fifth Amendment.

#### CONCLUSION

The constitutional questions presented by Dodd–Frank’s orderly liquidation authority can be seen either as a dark portent of an inverted constitutional order or as a set of easily avoidable mistakes caused by careless last-minute drafting.

The dark vision goes something like this: The U.S. Constitution, like American law more generally, is designed for a world in which the government is seen as a potential threat to private rights, but private rights are not individually significant enough to pose a threat to government or society more generally. The Constitution was not designed for a world in which some privately owned firms are “systemically significant” such that special rules must be devised to allow the government to take them over and operate them if those firms take on too much risk and are in danger of collapse. In order to construct a world in which a central function of the government is to protect society from firms that are too big to fail, while nevertheless permitting such firms to continue to exist, constitutional rules

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<sup>407</sup> See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421-22, 441 (1982) (holding that a regulation that permitted a cable television company to permanently install cable lines and small cable boxes on the roof of a building was categorically a taking despite its limited intrusiveness).

<sup>408</sup> See *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 498-500 (1987) (concluding that a percentage of coal subject to a regulation did not constitute “a separate segment of property for takings law purposes”).

<sup>409</sup> See *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 377-79 (1988) (holding that the Bankruptcy Code does not require compensation for the time value of a secured interest).

must be fundamentally adjusted. Conventional norms of due process, understandings about the proper functioning of courts, limits on the legislative power reflected in the Bankruptcy Clause, and even free speech rights must give way. Property rights must be dissolved into a general mass of claim rights, subject to reallocation by the government in order to advance its perception of the requirements of the general welfare. If the Constitution is supposed to be a bulwark that protects us from our government, is the Dodd–Frank Act a foretaste of what to expect when the government becomes the handmaiden of a financial oligarchy?

A more benign vision would stress that most of Dodd–Frank’s constitutional problems stem from a single ill-considered decision by the Senate to abandon the judicial review provisions in the Obama administration’s draft and the House bill in favor of a novel scheme calling for appointment of a receiver by an Article III court. The Administration’s Combined Draft and the House bill called for administrative appointment of a receiver, coupled with a right of plenary post-seizure judicial review. Had Congress adhered to this conception, which was borrowed from existing banking law, it would have eliminated serious due process questions, Article III questions, and the need for a gag rule that raises potential First Amendment questions. Constitutional issues arising under the Bankruptcy Clause’s uniformity requirement could have been laid to rest by drafting a more rule-like and less discretionary conception of what type of firm is eligible for resolution under Title II. Additionally, the various takings issues could have been avoided or made more manageable by tracking more closely to established common law and bankruptcy law precepts regarding clawbacks, assessments, and the status of security interests.

These enumerated revisions are relatively minor in the larger scheme of things. They suggest that Dodd–Frank’s orderly liquidation authority is not too big for the Constitution—if only Congress had given sufficient consideration to the Constitution when it drafted this complex and far-reaching legislation.