How Dodd–Frank’s Orderly Liquidation Authority for Financial Companies Violates Article III of the United States Constitution

Brent J. Horton*

I. INTRODUCTION ...................................................................................................................... 870

II. ARTICLE III OF THE UNITED STATES CONSTITUTION AND THE SUPREME COURT .......... 873
   A. Crowell v. Benson ........................................................................................................ 873
   B. Northern Pipeline v. Marathon ...................................................................................... 874
   C. CFTC v. Schor ................................................................................................................. 877

III. ARTICLE III APPLIED TO THE ORDERLY LIQUIDATION AUTHORITY ................................ 879
   A. Dodd–Frank Unconstitutionally Grants to Administrative Agencies
      the Power to Appoint a Receiver .................................................................................... 880
      1. Appointment of a Receiver: Judicial Power? ......................................................... 882
      2. Judicial Review: Standard ......................................................................................... 885
      3. Judicial Review: Scope .............................................................................................. 886
      4. Judicial Review: Speed .............................................................................................. 887
   B. Dodd–Frank’s Abandonment of Article III Courts Does Not Further
      Legitimate Congressional Concerns ............................................................................ 888
      1. Bankruptcy Law Can Handle Complex Matters ...................................................... 889
      2. Bankruptcy Law Can Be Fast .................................................................................... 889
      3. Bankruptcy Law Can Protect Counterparty Liquidity ........................................... 890
   C. Dodd–Frank and Secrecy ............................................................................................... 891

IV. CONCLUSION ...................................................................................................................... 892

The courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments.1

*Assistant Professor of Law & Ethics, Fordham University Gabelli School of Business. Corporate L.L.M., New York University School of Law; J.D., Syracuse University College of Law. I would like to thank Kenneth Davis and Elizabeth Pinho-Casenza for their comments on prior drafts. I would like to thank my wife Kelley for her support.

I. INTRODUCTION

In 2008 the housing bubble burst, and those financial companies that invested in mortgage-backed securities (MBS) faced insolvency as their MBS became worthless. Secretary of the Treasury Henry Paulson recalls:

Credit markets froze, and banks substantially reduced interbank lending. Confidence was seriously compromised throughout our financial system. Our system was on the verge of collapse, a collapse that would have significantly worsened and prolonged the economic downturn that was already underway. That was the background against which Chairman Ben Bernanke and I met with the congressional bipartisan leadership to request emergency legislation. We needed the financial rescue package so we could intervene, stabilize our financial system, and minimize further damage to our economy.

As reflected in his remarks, 2008 marked a decision point for Paulson. Should he bail out America’s financial institutions, or allow them to go bankrupt? He decided to bail them out, and Congress acquiesced, passing the Emergency Economic Stabilization Act (EESA) and the component Troubled Asset Relief Program (TARP). Pursuant to TARP, some financial companies received a direct federal cash infusion from the Treasury to increase liquidity, including Goldman Sachs, Morgan Stanley, and Wells Fargo. Others received an indirect bailout, such as when the Treasury arranged for the purchase of Merrill Lynch by Bank of America.

However, after facing scathing criticism in the press for bailing out Wall Street “fat cats,” Paulson concluded that TARP was too controversial to continue. It is therefore

4. Henry M. Paulson, Jr., Fighting the Financial Crisis, One Challenge at a Time, N.Y. Times, Nov. 18, 2008, at A27. The decisional struggle between action and non-action was illustrated by Paulson’s decision to allow Lehman Brothers to fail while propping up other financial companies. See Yomarie Silva, The “Too Big to Fail” Doctrine and the Credit Crisis, 28 Rev. Banking & Fin. L. 115, 124 (2009) (“In retrospect, Paulson maintained that letting Lehman fail was the right decision, especially because there was no buyer for Lehman.”); Jon Hilsenrath et al., Paulson, Bernanke Strained for Consensus in Bailout, WALL ST. J., Nov. 10, 2008, at A1 (discussing the controversy arising from Paulson’s decision not to intervene to save Lehman Brothers).
5. Whether Paulson contemplated the constitutional implications of his decision I do not know, nor do I wish to speculate. However, others have prepared excellent discussions of the constitutional implications of TARP. See, e.g., Gary Lawson, Burying the Constitution Under a TARP, 33 Harv. J. L. & Pub. Pol’y 55 (2010) (discussing the constitutional problems with TARP).
8. Id.
Ironic that Paulson later voiced support for an even more controversial legislative enactment, the subject of this Article, the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd–Frank). Title II of Dodd–Frank empowers the Treasury to appoint a receiver to wind up the affairs of a non-bank financial company—a power traditionally reserved to the judiciary—with little or no judicial involvement. For the remainder of this Article, I will refer to this extraordinary grant of power to the Treasury as “Liquidation Authority.”

However, Dodd–Frank’s grant of Liquidation Authority to the Treasury faces a roadblock to implementation—the United States Constitution. The drafters of the Constitution purposefully constrained the federal government by separating powers among the legislative, executive, and judicial branches, and by enumerating each branch’s power. For example, Article I of the United States Constitution grants the legislative power to a Congress of the United States and limits that power to 17 enumerated areas, including taxing, coining and borrowing money, and regulating interstate commerce.

Article II grants the executive power to the President, which as it applies to implementing legislation, is exercised through executive branch rulemaking. However, in addition to rulemaking, executive branch agencies are sometimes called upon to exercise quasi-judicial powers (such as deciding disputes regarding federally administered benefits). As such, some executive branch agencies take on a quasi-judicial role within their sphere of influence.

Article III grants judicial power “proper” (those powers traditionally exercised by courts of law, equity, or admiralty) to the Supreme Court and inferior courts. Article III grants judicial power “proper” (those powers traditionally exercised by courts of law, equity, or admiralty) to the Supreme Court and inferior courts.

12. Dodd–Frank §§ 202(a)(i)(A)(iii), (v) (limiting scope of standard of review and providing that after 24 hours, if the court has not made a determination, “the Secretary shall appoint the Corporation as receiver”).
13. See discussion supra Part III.A.
16. Id. § 8; The Legislative Power of the United States Government, U.S. REV., September 1855, at 234 n.1.
19. Richard Fallon Jr., Of Legislative Courts, Administrative Agencies, and Article III, 101 HARV. L. REV. 915, 923 (1988) (“Although agencies typically have rulemaking power, their functions also include adjudication”). Adjudication of matters by administrative agencies must be distinguished from “Article I courts,” which are “created by Congress for special situations through its legislative powers as defined pursuant to one of its enumerated powers in Article I of the Constitution.” Wendy Lynn Trugman, The Bankruptcy Act of 1984: Marathon Revisited, 3 YALE L. & POL’Y REV. 231, 231 (1984). Throughout this Article, I will refer to both as non-Article III courts.
20. See Fallon, supra note 19, at 925 (acknowledging the “entrenched role” of the administrative agency and its adjudicative role in American government).
provides for a robust and independent Judicial Branch:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may . . . establish . . . . [And the Judges of such courts] shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in office.22

Article III is understood to “safeguard[] the role of the Judicial Branch in our tripartite system by barring congressional attempts ‘to transfer jurisdiction to [to non-Article III tribunals] for the purpose of [weakening]’ constitutional courts, and thereby preventing ‘the encroachment or aggrandizement of one branch at the expense of the other.’”23 Unfortunately, the exercise of judicial power proper by Article III courts is sometimes intruded upon by the aforementioned exercise of quasi-judicial power by the executive branch; that is to say, legislation sometimes improperly grants powers that are traditionally exercised by courts of law, equity or admiralty to the executive branch in violation of Article III of the United States Constitution.24 Such is the problem with Dodd–Frank’s grant of Liquidation Authority to the Treasury.

Part II of this Article discusses the Supreme Court’s reaction to prior congressional attempts to grant traditionally judicial powers to executive branch bureaucrats. The starting point is Crowell v. Benson, where the Court held that Congress cannot, without violating separation of powers principles, “withdraw from judicial cognizance [and assign to an executive branch bureaucrat] any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.”25 Fifty years later, in Northern Pipeline v. Marathon, the Court relied heavily on Crowell, striking down the 1978 Bankruptcy Act because it unconstitutionally assigned to bankruptcy judges (who despite the title, are not judges in the strict sense of Article III, but more akin to magistrates) matters that were traditionally heard by Article III courts.26

Part III of this Article applies the analytical framework set forth in Part II to Dodd–Frank, and argues that Dodd–Frank violates the United States Constitution and separation of powers principles by granting to the Treasury the power to appoint a receiver to wind up the affairs of a non-bank financial company with no meaningful review by an Article III court. Finally, Part III.B discusses how some policymakers seek to rely on a third Supreme Court decision penned by Justice O’Connor, CFTC v. Schor, to argue for a more pragmatic approach to determining whether non-Article III courts should hear and decide matters traditionally heard by courts of law, equity and admiralty.27 They argue

22. Id.
27. Schor, 478 U.S. at 848 (judicial independence may yield where outweighed by “the concerns that drove Congress to depart from the requirements of Article III”); see Erwin Chemerinsky, Ending the Marathon:
that bending Constitutional requirements is acceptable, if the result is a better system for resolving disputes.\textsuperscript{28} Even if one were to subscribe to this more pragmatic approach, which I do not, here such reasoning has little impact. Dodd–Frank is not an improvement over the Bankruptcy Code, which already provides for the speedy winding down of complex financial companies.\textsuperscript{29} All that Dodd–Frank accomplishes is substituting one flawed system for another, while trampling the Constitution. Then again, Dodd–Frank author Congressman Frank does not consider the Constitution relevant when drafting legislation. He famously stated as to the legislative process, the Constitution “makes no difference one way or the other”\textsuperscript{30} and stated that it was not his job to consider the Constitution when drafting legislation, because “[a]nything [Congress is] doing that’s unconstitutional will be thrown out in court.”\textsuperscript{31} He may be correct on that final point.

II. ARTICLE III OF THE UNITED STATES CONSTITUTION AND THE SUPREME COURT

Dodd–Frank does not represent the first time that Congress has threatened to blur the line between the judicial and executive branches of government. On those occasions when Congress has blurred the line, the legislation has faced scrutiny before the Supreme Court. The three most prominent Supreme Court decisions on the matter are \textit{Crowell v. Benson},\textsuperscript{32} \textit{Northern Pipeline v. Marathon},\textsuperscript{33} and \textit{CFTC v. Schor}.\textsuperscript{34}

\textbf{A. Crowell v. Benson}

In \textit{Crowell v. Benson}, the Supreme Court faced the issue of whether Congress’s assignment of personal injury actions to non-Article III courts violated Article III of the United States Constitution.\textsuperscript{35} \textit{Crowell} involved the Harbor Workers’ Compensation Act (Compensation Act), which provided a mechanism for harbor workers to obtain compensation in the event of injury or death.\textsuperscript{36} The Compensation Act granted to United States Employees’ Compensation Commission (ECC) the authority to “order a hearing, upon notice, at which the claimant and the employer may present evidence.”\textsuperscript{37} The Commissioner was empowered to administer oaths and examine witnesses, review documents, and issue compensation orders.\textsuperscript{38} Importantly, the Commissioner’s

\textit{It is Time to Overrule Northern Pipeline}, 65 AM. BANKR. L.J. 311, 316 (1991) (arguing for Schor’s more pragmatic approach); Lawrence G. Baxter, Life in the Administrative Track: Administrative Adjudication of Claims Against Savings Institution Receiverships, 1988 DUKE L.J. 422, 505 (1988) (“Northern Pipeline was the case in which a plurality of the Court gave the article its unexpected vitality; it was also the case in which the dissent-espoused the pragmatic view that has subsequently attracted a majority in the Court [in Schor].”).

\textsuperscript{28} Chemerinsky, supra note 27, at 317; Baxter, supra note 27, at 506.
\textsuperscript{29} See discussion infra Part III.B.
\textsuperscript{34} CFTC v. Schor, 478 U.S. 833 (1986).
\textsuperscript{35} Crowell, 285 U.S. at 49–50.
\textsuperscript{36} Id. at 36–37.
\textsuperscript{37} Id. at 43.
\textsuperscript{38} Id.
compensation order was not final for 30 days, and during that time could be appealed to an Article III court for review, where the Commissioner’s findings would be advisory only, and overturned if “contrary to the indisputable character of the evidence.”

In the event that the employer did not comply with the compensation order, only the Article III court could enter a judgment that could be enforced by property execution.

The employee in Crowell brought a claim before the Commission against his employer, claiming an injury while performing services in the navigable waters of the United States. The employer argued that the Compensation Act unconstitutionally granted to the Commission what were traditionally judicial powers. The Court disagreed, holding that the Compensation Act did not “withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty,” because final authority rested with the Article III court.

The Court concluded that the Compensation Act leaves no doubt of the intention to reserve to the Federal court full authority to pass upon all matters which this Court had held to fall within that category. There is thus no attempt to interfere with, but rather provision is made to facilitate, the exercise by the court of its jurisdiction to deny effect to any administrative finding.

B. Northern Pipeline v. Marathon

Fifty years after Crowell v. Benson, in Northern Pipeline, the Supreme Court had to determine whether the 1978 Bankruptcy Act improperly granted to bankruptcy judges “jurisdiction over all civil proceedings arising under [the Bankruptcy Code] or arising in

39. Id. at 50–51.
40. Crowell, 285 U.S. at 46 (“[J]udgment is to be entered on a supplementary order declaring default only in case the order follows the law (section 18), and by the provision that the issue of injunction or other process in a proceeding by a beneficiary to compel obedience to a compensation order is dependent upon a determination by the court that the order was lawfully made and served (section 21(c)).”).
41. Id. at 37.
42. Id.
43. Id. at 49.
44. Id. at 49–50. One commentator stated:

I read Crowell as holding that all private rights disputes require judicial resolution, whether through the exercise of original or appellate jurisdiction. A variety of factors undergird this interpretation. First, in considering how searchingly an article III court must review the findings of an administrative tribunal, the Crowell Court distinguished between public rights cases, in which it regarded judicial involvement as unnecessary, and private rights cases, in which it asserted that the essential attributes of the judicial power must remain in an article III court. [citations omitted] Second, the distinction between public and private rights in Crowell follows a passage in which the Court approvingly quoted dictum that Congress could not “withdraw from judicial cognizance may matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.” [citation omitted] Although this dictum defines the class of cases inherently requiring judicial resolution somewhat differently than does the distinction between public and private rights, it reinforces the notion that there are some disputes, definable in terms of their subject matter, to which the judicial power necessarily extends.

Fallon, supra note 19, at 924 n.56 (internal citations omitted).
or related to cases under [the Bankruptcy Code].” Bankruptcy judges cannot be considered independent, because they lack life tenure and salary protection. As such, bankruptcy courts cannot be considered Article III courts.

The 1978 Bankruptcy Act’s broad jurisdictional grant to bankruptcy courts included “suits to recover accounts, controversies involving exempt property, actions to avoid transfers and payments as preferences or fraudulent conveyances, and causes of action owned by the debtor at the time of the petition for bankruptcy” whether arising under state or federal law. Thus, the 1978 Bankruptcy Act took matters that were traditionally the province of the independent judiciary and assigned them to non-Article III courts.

Northern Pipeline declared bankruptcy, and to augment the bankruptcy estate, brought a suit against Marathon seeking damages for breach of contract before the bankruptcy court. Marathon sought dismissal of the suit on the ground that the 1978 Bankruptcy Act unconstitutionally conferred judicial power on non-Article III courts. Justice Brennan agreed and delivered the opinion for a plurality of the Court.

Justice Brennan began by discussing the importance of maintaining the structural separation of powers set forth in the Constitution: “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”

However, Justice Brennan held that assigning non-judicial powers (i.e., powers not traditionally heard by courts of law, equity, or admiralty) to non-Article III courts does not offend the structural separation of powers set forth in the United States Constitution. Such non-judicial powers include cases arising in the territories, courts martial, and the final and broadest group, cases involving public rights. According to

46. Id. at 60–61. Bankruptcy judges are appointed to office for only 14-year terms. Id. (citing 28 U.S.C. §§ 152, 153(a) (Supp. IV 1976 ed.). They “are subject to removal by the judicial council of the circuit” on account of “incompetency, misconduct, neglect of duty or physical or mental disability.” Id. (quoting 28 U.S.C. § 153(b) (Supp. IV 1976 ed.)). Finally, “the salaries of the bankruptcy judges are set by statute, and are subject to adjustment under the Federal Salary Act.” Id.
47. Northern Pipeline, 458 U.S. at 56–57.
48. Id. at 54. Under the 1978 Act, bankruptcy judges were also empowered “to hold jury trials, to issue declaratory judgments, to issue writs of habeas corpus under certain circumstances, to issue all writs necessary in aid of the bankruptcy court’s expanded jurisdiction, and to issue any order, process or judgment that is necessary or appropriate to carry out the provisions of Title 11.” Id. at 55. Under the Act, appeals went to a three person panel made of bankruptcy judges, and from there to the applicable circuit court of appeals. Id.
49. Id. at 56.
50. Northern Pipeline, 458 U.S. at 56–57.
51. Id.
52. Id. at 57 (quoting THE FEDERALIST NO. 47, at 300 (James Madison) (H. Lodge ed., 1888)).
53. Id. at 70.
54. Id.
55. The Court stated:

[The exception of courts martial from the general prescription of Article III] involves a constitutional grant of power that has been historically understood as giving the political Branches of Government extraordinary control over the precise subject matter at issue. Article I, § 8, cls. 13, 14, confer upon Congress the power “[t]o provide and maintain a Navy,” and “[t]o make Rules for the Government and Regulation of the land and naval Forces.” The Fifth Amendment, which requires a presentment or indictment of a grand jury before a person may be held to answer for a
Justice Brennan, cases involving public rights arise “between the government and others,” and may include administration of social security, veterans’ benefits, or unemployment benefits. In contrast, private rights are “the liability of one individual to another under the law.” Justice Brennan held that while discharge in bankruptcy may be a public right, it must be “distinguished from the adjudication of state-created private rights [incidental to the bankruptcy].” The former “may well be a public right, but the latter obviously is not.” Justice Brennan concluded, “Northern’s right to recover contract damages to augment its estate is one of private right, that is, of the liability of one individual to another under the law as defined.”

Rocked by this stunning rebuke, Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984. While the amended Bankruptcy Code allows the district court to refer a bankruptcy proceeding to a bankruptcy court, when private rights are implicated, as was the case in Northern Pipeline, the bankruptcy court may only make proposed findings of fact and conclusions of law. It is the Article III court, after reviewing the matter de novo, that enters the final order. To that effect, 28 U.S.C. § 157(c)(1), provides:

A bankruptcy judge may hear a proceeding that is not a core proceeding [a

\[\text{capital or otherwise infamous crime, contains an express exception for “cases arising in the land or naval forces.”} \]


56. Northern Pipeline, 458 U.S. at 67.
57. Id. at 70–72. Or in a more expansive understanding, a matter brought on behalf of the public by the government, e.g., that a utility company is overcharging customers. See Enron Power Mktg., Inc. v. Luzenak Am., Inc., 2006 U.S. Dist. LEXIS 62922, at *31–32, *49 (S.D.N.Y. 2006) (including within public rights “the rights of electric ratepayers across the country to just and reasonable rates”); Jon J. Bancone, Article III and Due Process Limitations on the FSLIC’s Adjudicatory Role During its Receiverships, 76 Geo. L.J. 1845, 1854 (1988) (discussing the Federal Savings and Loan Insurance Corporation’s (FSLIC) flawed argument that matters ancillary to a public right are themselves public rights).

58. Northern Pipeline, 458 U.S. at 70.
59. Id. at 70–72.
60. Id.
61. Id. at 71.
63. Bankruptcy Amendments § 104 (codified as amended at 28 U.S.C. § 157(a)) (“Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.”).
64. Id. § 104 (codified as amended at 28 U.S.C. § 157(c)(1)). Any personal injury or wrongful death action implicates private rights and must be tried in district court. Id. § 104 (codified as amended at 28 U.S.C. § 157(b)(5)).
65. Id. § 104 (codified as amended at 28 U.S.C. § 157(c)(1)).
matter implicating a private right] but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge’s proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.  

C. CFTC v. Schor

*CFTC v. Schor* is the Court’s last major pronouncement on the ability of Congress to assign the resolution of disputes to executive branch bureaucrats. At issue in *Schor* was the fact that the Commodity Exchange Act (CEA) empowered the Commodity Futures Trading Commission (CFTC) to arbitrate disputes between investors and brokers, including state law counterclaims. Schor Mortgage Services of America, Inc. was a disgruntled customer of professional commodity broker ContiCommodity Services, Inc. Schor brought an action before the CFTC claiming that Conti violated various CFTC regulations, resulting in a debit balance in Schor’s account. Schor lost before the CFTC and with no lack of irony (it was Schor that requested that the CFTC hear the matter in the first place), Schor argued that it was improper for the CFTC to hear and decide Conti’s counterclaim, maintaining that “Article III prohibits Congress from authorizing the adjudication of common law counterclaims by the CFTC, an administrative agency whose adjudicatory officers do not enjoy the tenure and salary protections embodied in Article III.” The appellate court had little choice but to agree, quoting *Northern Pipeline*, “Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review.”

Writing for the Court, Justice O’Connor focused on whether the CEA threatened “the role of the independent judiciary within the constitutional scheme of tripartite government.” She stated that the Court must look to “the extent to which the non-

---

66. Id. (emphasis added).
68. Id. at 836.
69. Id. at 837.
70. Id.
71. Conti, for its part, brought a claim for the debit balance in federal district court. Id. at 838. Conti voluntarily dismissed its action in federal district court so that the CFTC could decide the matter at the request of Schor. Schor, 478 U.S. at 838.
72. Id. at 847.
73. Id. at 838–89.
74. Id at 849. Also at issue was the other purpose of Article III, “safeguard[ing] litigants’ right to have claims decided before judges who are free from potential domination by other branches of government.” Id. (quoting U.S. v. Will, 449 U.S. 200, 218 (1980)). Justice O’Connor disposed of this issue quickly, finding that Schor waived its right to an impartial arbiter when it requested that the CFTC hear the matter. Schor, 478 U.S. at 849. She held that by initially acquiescing to—indeed insisting—that the counterclaim be heard before the CFTC, Schor waived any right to have its case heard before an impartial Article III court. Id. However, as to protection of an independent judiciary, Justice O’Connor found that it was a structural issue that could not be cured by consent. Id. at 851. See also Catherine T. Struve, *Greater and Lesser Powers of Tort Reform: The
Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, [and] the origins and importance of the right to be adjudicated."75 Justice O’Connor found that granting the CFTC the power to hear counterclaims did not threaten the Article III courts for two reasons. First, the essential attributes of judicial power are sustained in Article III courts where the parties can opt out of the administrative process altogether.76 Justice O’Connor found that the ability of a party to opt out of the CFTC hearing and into an Article III court if they so wished diminished separation of power concerns.77 She stated, “Congress gave the CFTC the authority to adjudicate such matters, but the decision to invoke this forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction of these matters is unaffected.”78 Indeed, “Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of powers, Congress may make available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences.”79 Second, there is adequate judicial review of the administrative agency’s actions.80 CFTC orders “are enforceable only by order of the district court” with the facts reviewed under a “‘weight of the evidence’ standard” where the “legal determinations of the agency . . . are subject to de novo review.”81 Justice O’Connor’s reasoning is not extraordinary in light of Crowell and Northern Pipeline, and had she stopped there Article III jurisprudence would be clear—or at least intelligible. However, Justice O’Connor added confusion to Article III jurisprudence by stating that it was appropriate for the Court to examine “the concerns that drove Congress to depart from the requirements of Article III.”82 Some commentators have clung to this language as evidence of the court approving a new balancing approach for Article III compliance.83 However, I believe that they place too much value on language apparently inserted as an afterthought, entirely unnecessary to the Court’s determination.84 While Justice O’Connor listed Congressional concerns as a consideration in Schor, the case was not decided on the basis of Congressional concerns but instead turned on the fact that the parties could opt out of CFTC adjudication.85 In fact, Justice Brennan later wrote of the importance to opt-out from the decision in Schor:

The Court ruled in Schor . . . that the Commodities Futures Trading Commission could adjudicate state-law counterclaims to a federal action by investors against their broker consistent with Article III. The Court reached this

---

75. Schor, 478 U.S. at 851.
76. Id. at 855.
77. Id. at 851.
78. Id. at 855.
79. Id.
81. Id. at 853.
82. Id. at 851.
83. Chemerinsky, supra note 27, at 317; Baxter, supra note 27, at 506.
85. Schor, 478 U.S. at 855.
conclusion . . . on the ground that Congress did not require investors to avail themselves of the remedial scheme over which the Commission presided. The investors could have pursued their claims, albeit less expeditiously, in federal court. By electing to use the speedier, alternative procedures Congress had created, the Court said, the investors waived their right to have the state-law counterclaims against them adjudicated by an Article III court. 86

As such, it is unclear what, if anything, Schor adds to the considerations set forth in Crowell and Northern Pipeline.

III. ARTICLE III APPLIED TO THE ORDERLY LIQUIDATION AUTHORITY

Before applying Article III of the United States Constitution to Dodd–Frank, I would like to distill several principles from Part II. Crowell serves as a starting point, finding the Harbor Workers Compensation Act’s scheme for determining awards for injured harbor workers did not violate Article III, because while the Commission made initial findings, final authority to enforce compensation orders rested with the district court, which reviewed factual conclusions to see if they were “contrary to the indisputable character of the evidence.” 87 Fifty years later, the standard set forth in Crowell was upheld by Northern Pipeline, which held that the 1978 Bankruptcy Act violated Article III by assigning matters that were traditionally heard in courts of law, equity, or admiralty, to bankruptcy judges with inadequate review by an Article III court. 88

Finally, Schor is important, not for what it adds to Article III jurisprudence, which is very little, but instead for the uncertainty Justice O’Connor created when she stated that “protect[ing] the role of the independent judiciary within the constitutional scheme of tripartite government” 89 could be subject to political considerations, such as “the concerns that drove Congress to depart from the requirements of Article III.” 90 In so stating, Justice O’Connor seemed to hold that Congress could ignore Article III of the United States Constitution when doing so was convenient to a permissible goal, that is, Justice O’Connor appeared to sanction an “ends-justifies-the-means” approach to Article III jurisprudence. Part III.A applies the principles set forth in Crowell and Northern Pipeline to Title II of Dodd–Frank, and concludes that Dodd–Frank is likely unconstitutional. Part III.B argues that even taking into account the concerns of Congress as suggested in Schor, Dodd–Frank is not safe from Constitutional infirmity.

86. Granfinanciera, 492 U.S. at 59 n.14. The position that Schor is largely decided on the issue of the ability to opt out is advanced by commentators as well, one stating, “Schor, in upholding the Commodity Futures Trading Commission’s (CFTC)’s authority to hear brokers’ state law counterclaims in reparation proceedings brought by customers, relied in part on the notion that the customer in question had consented to have the claims heard by the non-Article-III decision maker.” Struve, supra note 74, at 1039.

87. Crowell v. Benson, 285 U.S. 22, 54 (1932) (stating the statute reserves “full authority to the court to deal with matters of law provided for the appropriate exercise of the judicial function in this class of cases”).


89. Schor, 478 U.S. at 848.

90. Id.
A. Dodd–Frank Unconstitutionally Grants to Administrative Agencies the Power to Appoint a Receiver

Title II of Dodd–Frank, Orderly Liquidation Authority, “provides the necessary authority to liquidate failing financial companies that pose a significant risk to the financial stability of the United States in a manner that mitigates such risk . . . .”91 Liquidation Authority is granted by Congress to the Treasury.92 The Treasury’s first step in exercising Liquidation Authority is to issue a Systemic Risk Determination (SRD),93 stating that the targeted corporation (1) is a financial company, (2) is in default or danger of default, and (3) its default poses a systemic risk to the economy.94

Given the ambiguity of those factors it would be very difficult for a targeted company to rebut a Treasury determination that it is a financial company95 and poses a

92. Id. §§ 201–17 tit. II; see Arthur E. Wilmarth Jr., The Dodd–Frank Act: A Flawed and Inadequate Response to the Too-Big-To-Fail Problem, 89 Ore. L. Rev. 951 (2011) (implying that the true power behind the SRD is the Treasury).
93. The SRD is initially prepared by the FDIC and the Federal Reserve. Dodd–Frank provides:
   On their own initiative, or at the request of the Secretary [of the Treasury], the [Federal Depository Insurance] Corporation and the Board of Governors [of the Federal Reserve] shall consider whether to make a written recommendation described in paragraph (2) with respect to whether the Secretary should appoint the Corporation as receiver for a financial company. Such recommendation shall be made upon a vote of not fewer than 2/3 of the members of the Board of Governors then serving and 2/3 of the members of the board of directors of the Corporation then serving.
   Dodd–Frank § 203(a)(1)(A) (emphasis added). Thereafter, the SRD is confirmed by the Treasury. Id. § 203(b).
94. Id. § 203(a)(2). A complete list of the factors to be considered include:
   (A) an evaluation of whether the financial company is in default or in danger of default;
   (B) a description of the effect that the default of the financial company would have on financial stability in the United States;
   (C) a description of the effect that the default of the financial company would have on economic conditions or financial stability for low income, minority, or underserved communities;
   (D) a recommendation regarding the nature and the extent of actions to be taken under this title regarding the financial company;
   (E) an evaluation of the likelihood of a private sector alternative to prevent the default of the financial company;
   (F) an evaluation of why a case under the Bankruptcy Code is not appropriate for the financial company;
   (G) an evaluation of the effects on creditors, counterparties, and shareholders of the financial company and other market participants; and
   (H) an evaluation of whether the company satisfies the definition of a financial company under section 201.

Id. § 203(a)(2). An analogous list is used for the Treasury’s confirmation of the SRD. Id. § 203(b).

95. Consider that the EESA limited TARP bailouts to financial institutions, defined as “any institution, including, but not limited to, any bank, savings association, credit union, security broker or dealer, or insurance company, established and regulated under the laws of the United States or any State . . . .” 12 U.S.C. § 5202(5) (2008). Despite that limitation, Treasury used TARP to bailout GM, arguing that GM was a financial company. See Brent J. Horton, The TARP Bailout of GM: A Legal, Political and Literary Critique, 14 Tex. Rev. L. & Pol. 216, 219 (2010) (explaining that GM received TARP funds). One commentator pithily points out, “the
systemic risk. Indeed, in hearings before the Financial Crisis Inquiry Commission, Federal Reserve Chairman Ben Bernanke refused to be pinned down as to the definition of “systemic risk.” The relevant transcript of the inquiry is as follows:

COMMISSIONER HENNESSEY: . . . Systemic risk. You hear a lot of people talk about it. I haven’t heard a precise definition.

. . . .

WITNESS BERNANKE: Yes. There’s right now an active academic research literature looking at some of these things, trying to identify, for example, what some of the criteria are; how big; how interconnected, those sorts of things. There is some criteria involving things like correlation. You know, how correlated is the stock of company X with other shares of other companies, and what does that say about its systemic importance, and things of that sort. So there is an academic literature underway.

Chairman Bernanke concluded that when a rule is promulgated it will “ultimately remain subjective, and I think the systemic criticality of any individual firm [will] depend on the environment.” However, this Article is not about the very real danger to liberty posed by executive branch agencies selectively implementing vague legislation, but instead, how Dodd–Frank violates Article III of the United States Constitution. As such, I will return to a discussion of the role—or lack of role—Article III courts play in the exercise of Liquidation Authority.

financing arms of the automakers—which have obtained loans of their own apart from the initial $17.4 billion—would qualify as financial institutions . . . [p]awn shops might [even] make it in. But automakers are no more ‘financial institution[s]’ under this statute than I am.” Lawson, supra note 5, at 71.

96. But see Adam J. Levitin, In Defense of Bailouts, 99 GEO. L.J. 435, 488 (2011) (arguing that it would be difficult to exercise Orderly Liquidation Authority, likening it to the multiple key approach to launching a nuclear missile). Professor Levitin states,

[the OLA process has a complex procedural trigger. First, there must be a determination of systemic risk: a process colloquially called ‘three keys turning.’ This determination requires a two-thirds vote of the Federal Reserve Board (key one) plus a two-thirds vote from the FDIC (key two), unless the firm is a broker-dealer or insurance company, in which case a two-thirds vote from the SEC or the approval of the Director of the Federal Insurance Office is substituted for the FDIC vote. After the systemic risk determination is made, it must be ratified by the Treasury Secretary, in consultation with the President (key three).

Id.


98. Id. at 100–01. See also The Diviner of Systemic Risk; Ben Bernanke as Carnac the Magnificent, WALL ST. J., Sept. 4, 2010, available at http://online.wsj.com/article/SB10001424052748704206804575467872819971324.html (opining that systemic risk is defined as whatever Bernanke decides it is). For academic approaches to defining systemic risk, see Steven L. Schwarz, Systemic Risk, 97 GEO. L.J. 193, 204 (2008) (proposing the following definition of systemic risk: “the risk that (i) an economic shock such as market or institutional failure triggers (through a panic or otherwise) either (X) the failure of a chain of markets or institutions or (Y) a chain of significant losses to financial institutions, (ii) resulting in increases in the cost of capital or decreases in its availability, often evidenced by substantial financial-market price volatility”).

Upon a determination that a financial company poses a systemic risk, the Treasury files a petition with the D.C. District Court, seeking appointment of the FDIC as receiver for the targeted financial company. However, the role of the Article III court is extremely limited, and the filing of the petition by the Treasury is a fait accompli. I reproduce the relevant portions of Section 202(a)(1)(A) of Dodd–Frank below due to the importance to the remainder of this Article:

(i) PETITION TO DISTRICT COURT – . . . If the board of directors (or body performing similar functions) of the covered financial company does not acquiesce or consent to the appointment of the Corporation as receiver, the Secretary shall petition the United States District Court for the District of Columbia for an order authorizing the Secretary to appoint the Corporation as receiver.

. . . .

(iii) DETERMINATION – On a strictly confidential basis, and without any prior public disclosure, the Court, after notice to the covered financial company and a hearing in which the covered financial company may oppose the petition, shall determine whether the determination of the Secretary that the covered financial company is in default or in danger of default and satisfies the definition of a financial company . . . is arbitrary and capricious.

. . . .

(v) PETITION GRANTED BY OPERATION OF LAW – If the Court does not make a determination within 24 hours of receipt of the petition – (I) the petition shall be granted by operation of law; (II) the Secretary shall appoint the Corporation as receiver; and (III) liquidation under this title shall automatically and without further notice or action be commenced and the Corporation may immediately take all actions authorized under this title.101

The foregoing statutory language is troublesome because of the limitations it places on the timing, scope and standard of judicial review. These limitations reduce judicial review to a rubber stamp.

1. Appointment of a Receiver: Judicial Power?

Is the appointment of a receiver a judicial power that was traditionally the “subject of a suit at the common law, or in equity, or admiralty?” To answer that question one must look first to the origins of the power. Appointment of a receiver has traditionally been the province of courts of equity. In eighteenth century England, the Court of

101. Id. § 202(a)(1)(A).
103. United States Commodity Futures Trading Commission v. Schor, 478 U.S. 833, 841 (1986) (“[A]mong the factors upon which we have focused are . . . the origins and importance of the right to be adjudicated.”).
104. Charles F. Beach & William Atkinson Alderson, A Practical Treatise on the Law of Receivers 2 (2d ed. 1897) (stating that appointment of a receiver is an equitable power).
Chancery appointed receivers, \(^{105}\) heard and ruled on any defenses raised, and had the ultimate power to remove the receiver. \(^{106}\) Following independence from England, this approach was retained in the United States. \(^{107}\)

While a historical analysis would appear to establish appointment of a receiver as a matter which, from its nature, is a judicial power, there are very few modern cases discussing the subject. \(^{108}\) The only modern case that discusses whether the appointment of a receiver is a judicial power expressly declined to decide the matter. \(^{109}\)

First Federal Bank & Trust v. Ryan involved a statute analogous to Dodd–Frank, the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA). \(^{110}\) First Federal, a healthy institution, at the urging of the Treasury, merged with an insolvent savings and loan association in order to create one healthy institution. \(^{111}\) However, because “no good deed goes unpunished,” the Office of Thrift Supervision (OTS) found that, as a result of the merger, First Federal was undercapitalized and threatened to appoint a receiver. \(^{112}\) First Federal’s worry over its situation was so severe that it brought an action to enjoin any future decision by the OTS to appoint a receiver, arguing that the accounting method that the OTS utilized was flawed. \(^{113}\) The Sixth Circuit dismissed the action as not yet ripe for adjudication, because OTS had yet to appoint a receiver. \(^{114}\)

However, at the end of this relatively routine dismissal, the Sixth Circuit stated, almost in passing, “First Federal also claims that allowing the Director of the OTS to

\(^{105}\) Id. (discussing appointment of receivers by the Court of Chancery in England). See also Skip v. Harwood, 26 Eng. Rep. 1125 (1747) (enjoining officers and directors from taking any action that would make corporate receivership ineffectual).

\(^{106}\) BEACCH & ALDERSON, supra note 104, at 587 (“To oppose the appointment of a receiver in these cases, the defendant may set up any defense cognizable in a court of equity.”).

\(^{107}\) Id. at 1 (“In both England and America, the administration of justice by the appointment of receivers has been and is considered of as much importance as any power inherent in the courts of equity.”); Garrand Glenn, The Basis of The Federal Receivership, 25 COLUM. L. REV. 434 (1925) (discussing the history of the use of receiverships in federal courts); Florida Constr. Co. v. Young, 59 F. 721, 723 (2d Cir. 1802) (appointing receiver to construction company).

\(^{108}\) Those modern cases that do discuss Article III courts and the appointment of a receiver tend to focus on the ability of the federal courts to appoint receivers, not on whether the appointment of a receiver is a quintessential judicial power (although arguably the former proposition supports the later). See, e.g., Plata v. Schwarzenegger, 603 F.3d 1088, 1095 n.3 (9th Cir. 2010) (stating that it is now well accepted that “federal courts have inherent power under their equity jurisdiction to appoint receivers”); Orth v. Transit Inv. Corp., 132 F.2d 938, 944 (3d Cir. 1942) (“The right of a federal court to entertain a stockholders’ bill against a corporation for the appointment of at least a temporary receiver in order to prevent threatened diversion or loss of assets by the fraud and mismanagement of its officers is well established.”) (citation omitted); Hall v. Ballard, 90 F.2d 939, 943 (4th Cir. 1937) (explaining that federal courts “sitting in equity, [have regularly exercised their power] to appoint a receiver, and through him . . . administer the affairs of an insolvent national bank, to collect the trust fund pledged to its creditors and to liquidate its debts”); Ferguson v. Dent, 29 F. 1 (C.C.W.D. Tenn. 1886) (appointing a receiver).

\(^{109}\) First Fed. Sav. Bank & Trust v. Ryan, 927 F.2d 1345, 1347 (6th Cir. 1991), cert. denied 502 U.S. 864 (1991). But see Carey v. Giles, 9 Ga. 253 (1851) (finding appointment of a receiver may be handled by the executive branch; although this case is distinguishable because it was the executive branch that granted the charter in the first place).

\(^{110}\) Ryan, 927 F.2d at 1347.

\(^{111}\) Id.

\(^{112}\) Id.

\(^{113}\) Id. at 1353.

\(^{114}\) Id. at 1356.
appoint a conservator or receiver . . . violates the provisions of Article III of the United States Constitution. First Federal relies on *Northern Pipeline* for support.”\(^{115}\) The Sixth Circuit then declared without citation that appointment of a receiver is likely not a “judicial power” and that it would rather not “explore one of the most complex and difficult areas of constitutional law.”\(^{116}\) In short, the Sixth Circuit punched, as did the Supreme Court when it refused to grant certiorari in *Ryan*.,\(^{117}\) As the Sixth Circuit itself stated, First Federal was left “face down on the guillotine, waiting for the executioner to pull the handle and loose the blade at any moment.”\(^{118}\) This statement is prescient, given that twenty years later, Congressman Frank would refer to the Treasury’s Liquidation Authority as a death panel, stating, “[i]f a company fails, it will be put to death,” by what he gleefully called a “corporate death panel.”\(^{119}\)

Interestingly, the Sixth Circuit’s decision in *Ryan* appears to recognize the weakness of the conclusory statement that appointing a receiver is not a judicial power.\(^{120}\) In the last sentence of the decision the court backtracks, stating that if the appointment of a receiver is a judicial power, and it is exercised by the OTS, then “the decision [would at that time] be subject to review by an Article III court . . . .”\(^{121}\) As such, the Sixth Circuit appears to take the position that even where a matter is judicial in nature, Article III does not require that the district court hear the matter in the first instance, but instead, Article III will be satisfied by adequately searching appellate review.\(^{122}\) I think that this is a fair conclusion, one supported by the Supreme Court’s decisions in *Crowell*,\(^{123}\) and *Northern Pipeline*,\(^{124}\) and favored by scholars such as Richard H. Fallon, Jr. of Harvard Law

---

115. *Ryan*, 927 F.2d at 1359 (internal citations omitted).

116. Id.


118. Id. at 1354.

119. Interview by Mark Haines with Barney Frank, Rep. for the 4th Cong. Dist. of Mass., CNBC (Dec. 11, 2009), available at http://www.mediabistro.com/tvnewser/barney-frank-cuts-cnbc-interview-short_b28221. *See also* Jay Fitzgerald, *Democrats Plan Push on Bank Reform*, *Boston Herald*, Mar. 25, 2010, at 24 (“There are going to be death panels enacted by the Congress this year, but they’re death panels for large financial institutions that can’t make it,” Frank quipped, referring to GOP warnings during the health-care debate that a bill might include “death panels.”); David Reilly, *How to Live with Bank’s Too Big to Fail*, *Providence Journal-Bulletin*, Oct. 2, 2009, at 6 (“The emphasis on what Congressman Barney Frank last week called death panels for systemically risky firms is getting in the way of finding smarter ways to deal with these firms as they are today.”); John Crudele, *Quick Fix Will Be Anything But*, N.Y. Post, June 26, 2010, at 6 (“. . . there will be what has been described as a ‘death panel’ that’ll help with the ‘orderly liquidation’ of the company.”).

120. *Ryan*, 927 F.2d at 1359.

121. Id.

122. Those few courts that find review unnecessary seem to rely on the fact that the decision involves a matter clearly assigned to the executive branch by the Constitution. Thus, in *Dalton v. Specter*, the Court held that “judicial review was not available to challenge decisions to close military facilities under the Defense Base Closure and Realignment Act of 1990,” but that was because the matter involved “military and foreign affairs.” Thomas W. Merrill, *The Administrative State and the Constitution: Delegation and Judicial Review*, 33 Harv. J.L. & Pub. Pol’y 73, 79 (2010) (citing *Dalton v. Specter*, 511 U.S. 462, 468–70 (1994)).

123. *See supra* Part II.A (discussing the Court’s decision in *Crowell*).

124. *See supra* Part II.B (discussing the Court’s decision in *Northern Pipeline*).
School, who argued:

sufficiently searching review of a legislative court’s or administrative agency’s decisions by a constitutional court will always satisfy the requirements of article III. The most important questions therefore concern not whether reliance on a non-article III tribunal is permissible, but which issues must be reviewable in a constitutional court and how searching the appellate scrutiny must be.\textsuperscript{125}

2. Judicial Review: Standard

If Article III of the United States Constitution is satisfied by adequately searching appellate review of agency determinations of traditionally judicial matters, how searching must that review be?\textsuperscript{126} As to review of conclusions of law:

The standard is always de novo. There are no exceptions. Courts may say that deference is given to an agency’s interpretation of a statute. In other words, deference will be given to the manner in which the agency applies the law. Even though phrased as an issue of law, such a question is really one of mixed law and fact.\textsuperscript{127}

As to conclusions of fact, in response to Northern Pipeline, Congress amended the bankruptcy code to require de novo review of facts relevant to the determination of a private right, that is to say, a right that is traditionally determined by a court of law, equity, or admiralty is subject to de novo review.\textsuperscript{128} However, Crowell implies that a lesser standard will satisfy Article III, upholding a statute that provided for review of facts to see if they are “contrary to the indisputable character of the evidence.”\textsuperscript{129}

Unfortunately, Dodd–Frank falls short of both the Northern Pipeline and Crowell standard, providing for review of conclusions of fact using an arbitrary and capricious standard.\textsuperscript{130} Review under the arbitrary and capricious standard allows almost any

\textsuperscript{125} Fallon, supra note 19, at 933. See also Chemerinsky, supra note 27, at 316 (arguing that non-Article III courts are saved by adequate appellate review). Even those commentators who argue most fervently in favor of the ability of Congress to assign disputes to non-Article III courts do so with the understanding that “Article III courts [must] retain ‘ultimate control.’” David Strauss, Article III Courts and Constitutional Structure, 65 Ind. L.J. 307, 311 (1990) (citing Crowell v. Benson, 285 U.S. 22, 46 (1932) (requiring judicial review of agency determinations)). See also Indraneel Sur, Jealous Guardians in the Psychedelic Kingdom: Federal Regulation of Electricity Contracts in Bankruptcy, 152 U. Pa. L. Rev. 1697, 1724 (2004) (noting that judicial review “is critical to the constitutional validity of agencies and legislative courts”).

\textsuperscript{126} See Fallon, supra note 19, at 974 (discussing how searching the review should be).


\textsuperscript{128} Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 104, 98 Stat. 333, 341 (1984) (codified as amended at 28 U.S.C. § 157(c)(1)). The district court may enter a final order “after considering the bankruptcy judge’s proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.” Id.

\textsuperscript{129} Crowell v. Benson, 285 U.S. 22, 54 (reserving “full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases”).

\textsuperscript{130} Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 202(a)(1)(A)(iii), 124 Stat. 1376, 1445 (2010). Those who defend the arbitrary and capricious standard of review have two possible arguments. The first is that the Administrative Procedure Act (APA) itself calls for an arbitrary and capricious standard of review for most administrative actions. 5 U.S.C. § 706 (2006). However, the Court in Cost Independent Joint Venture v. FSLIC refused to examine whether an arbitrary and capricious
finding to stand, even an unreasonable one, as long as there is a mere scintilla of support for the agency determination.\textsuperscript{131}

3. Judicial Review: Scope

Compounding Dodd–Frank’s extremely deferential standard of review is the Act’s limitation on the scope of review.\textsuperscript{132} The district court may only review two narrow questions: (1) “the determination of the Secretary that the covered financial company is in default or in danger of default,” and (2) whether the company indeed “satisfies the definition of a financial company.”\textsuperscript{133} That is to say, the court cannot review other

standard is appropriate for reviewing agency action. Coit Indep. Joint Venture v. FSLIC, 489 U.S. 561 (1989). The court stated:

Because we conclude that FSLIC has not been granted adjudicatory authority by Congress, and that Coit is entitled to de novo consideration of its state law claims in court, we need not reach Coit’s claim that adjudication by FSLIC subject only to judicial review under the Administrative Procedure Act would violate Article III of the Constitution under Northern Pipeline . . . We note, however, that the usury and breach of fiduciary duty claims raised by Coit, . . . involve "private rights" which are at the "core" of "matters normally reserved to Article III courts." . . . The court below adopted an interpretation of the statutes governing FSLIC and the Bank Board that raises serious constitutional difficulties. In our view, those statutes can and should be read to avoid these difficulties. See Christopher Canterbury, Revising FIRREA To Secure Procedural Due Process For Savings and Loan Owners, 1991 COLUM. BUS. L. REV. 113, 127 n.57 (1991) (citing Fid. Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd., 540 F. Supp. 1374, 1377 (N.D. Cal. 1982), rev'd on other grounds, 689 F.2d 803 (9th Cir. 1982); Tel. Sav. & Loan Ass’n v. FSLIC, 564 F. Supp. 862, 869–70 (N.D. Ill. 1981)). Notably, at least one court chose de novo review, in order to “withstand a constitutional challenge.” Franklin Sav. Assoc. v. Dir. of the Office of Thrift Supervision, 742 F. Supp. 1089, 1097 (D. Kan. 1990). Under such review, the court ordered the Office of Thrift Supervision (OTS) to remove the receiver, and went so far as enjoining the OTS from “plac[ing] Franklin into another conservatorship or a receivership without first obtaining leave of this court to do so.” Id. at 1128. However, the value of this precedent is in question as the receiver was reappointed by the Tenth Circuit. Franklin Sav. Assoc. v. Dir. of the Office of Thrift Supervision, 934 F.2d 1127 (10th Cir. 1991).

\textsuperscript{131} Hauth v. Prudential, 2010 U.S. Dist. LEXIS 81226, at *23 (N.D. Iowa 2010) (“. . . Prudential’s decision to the contrary is not supported by even a scintilla of evidence, and is, thus, arbitrary, capricious, and an abuse of discretion.”); Tim J. Filer, Comment, The Scope Of Judicial Review Of Agency Actions In Washington Revisited—Doctrinal, Analysis, And Proposed Revisions, 60 WASH. L. REV. 653, 660 (1985) (noting that arbitrary and capricious review only asks if there is no support for the agency determination); Paul M. Bangser, An Inherent Role For Cost-Benefit Analysis In Judicial Review Of Agency Decisions: A New Perspective On OSHA Rulemaking, 10 B.C. ENVTL. AFF. L. REV. 365 (1982) (citing K. Davis, ADMINISTRATIVE LAW OF THE SEVENTIES § 29.00, at 646–47 (1976)) (“On the spectrum of standards for judicial review of findings of fact, substantial evidence falls at least nominally between the clearly erroneous test, which gives the court broad and intrusive powers, and the arbitrary and capricious test, which is highly deferential.”).


\textsuperscript{133} Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 202(a)(1)(A)(iii),
matters, such as whether failure of the firm actually poses a systemic risk, or any of the myriad of other factual and legal issues that may arise during the process.

4. Judicial Review: Speed

Finally, Dodd–Frank requires that the district court complete the review (limited as it is in standard and scope) within 24 hours of receipt of the petition. If the district court does not make a decision within twenty-four hours, the petition is deemed granted by operation of law. No court, no matter how well staffed, can review the decision to dissolve a financial company in 24 hours. Under the weight of these limitations, the court’s decision amounts to a rubber stamp of administrative action. Courts regularly reject such encroachment, and do not hold back their displeasure when asked to rubber-stamp the decisions of executive bureaucrats. As one court stated: “the Article III


134. Gray & Shu, supra note 132, at 70.

135. During the appointment of a receiver, related matters may arise that implicate private rights or otherwise require judicial review. For example, disputes may arise as to ownership of the financial company when the treasury is trying to obtain consent. See Dodd–Frank § 202(a)(1)(A)(i) (describing the process to petition the district court). Under Dodd–Frank, the Treasury must determine whether the financial company’s board of directors consents to the appointment of the FDIC as receiver. Id. In Connell v. Coastal Cable T.V., Inc., Justice Breyer examined whether a bankruptcy court could determine the matter of a debtor’s consent to an involuntary bankruptcy proceeding. 709 F.2d 762, 764 (1st Cir. 1983). Justice Breyer, citing Northern Pipeline, held that such a determination of state created private rights must be made by an Article III court: “given the importance of state law to this case, we believe that a federal district court, not a bankruptcy court, should pass upon them in the first instance.” Id. at 765. Likewise, consider In re G.T.L., Corp., where the court had to determine whether a corporation consented to an involuntary bankruptcy proceeding:

... inextricably intertwined with Mr. Davila’s involuntary petition is the issue of who has authority to act on behalf of the putative debtor, G.T.L. If Cicchini controls G.T.L., the answer filed by Mr. Demezyk consenting to the involuntary petition should be allowed. If Galmish controls G.T.L., the answer filed by Mr. Miller contesting the involuntary petition must be recognized. ... in the case at bar, determination of who controls G.T.L. is simply not a core proceeding.

211 B.R. 241, 245, 246 (Bankr. N. D. Ohio June 26, 1997). As such, the court in G.T.L., Corp. found that determining consent required sorting out state created private rights. Id. In so finding, the bankruptcy court recognized the constitutional limits placed upon it as a non-Article III court:

[U]nlike courts created under the provisions of Article III of the United States Constitution, bankruptcy courts have additional restrictions placed on their powers. To comply with these constitutional restrictions ... [t]he bankruptcy judge shall determine ... whether a proceeding is a core proceeding ... or is a proceeding that is otherwise related to a case under Title 11” ... .

Id. at 244 (citing language from 28 U.S.C. § 157(b)(3)). Contrast Dodd–Frank, which recognizes no limit on the power of the treasury to determine consent, and does not even provide that such a determination may be appealed, to an Article III court. See Dodd–Frank § 202(a)(1)(A)(iii) (limiting scope of review to whether the target is a “financial company” and “in default or danger of default”).


137. Id. § 202(a)(1)(A)(v)(I).

138. Gray & Shu, supra note 132, at 69.

139. See Martinez v. Lamagno, 515 U.S. 417, 430 n.6 (1995) (rejecting a statutory construction that would result in “an executive decisionmaker with scant incentive to act impartially, and a court used to rubber-stamp that decisionmaker’s judgment”).

140. United States v. Klein, 80 U.S. 128, 147 (1871) ("Can [Congress] prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in
Courts were not created by our founding fathers to rubber stamp . . . bloated bureaucrats [who too often do the bidding of] the special interest groups who transfer their efforts from the Legislative Branch to the Executive Branch, after a bill has passed.”

B. Dodd–Frank’s Abandonment of Article III Courts Does Not Further Legitimate Congressional Concerns

Let us assume arguendo the wisdom of Justice O’Connor’s statement in Schor, that in determining whether a particular congressional action violates Article III of the United States Constitution, courts may consider the concerns that led Congress to abandon the independent judiciary. What was the congressional concern that led the authors of Dodd–Frank to assign traditionally judicial powers to executive branch bureaucrats? Perhaps a better question, why abandon the Bankruptcy Code, which now complies with Article III jurisprudence, having been developed through the crucible of Northern Pipeline?

During hearings discussing the causes of the financial crises and the propriety of using TARP to bailout financial institutions, politicians pushed for greater executive branch power, claiming that the Bankruptcy Code is insufficient for winding up systemically significant financial institutions. They marshaled arguments common

accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself.”); Religious Tech. Ctr. v. Scott, No. 94-55781, 1996 U.S. App. LEXIS 8954, at *6 (9th Cir. Apr. 11, 1996) (citing Burlington N. R.R. Co. v. Dep’t of Revenue, 934 F.2d 1064, 1073 (9th Cir. 1991) (“A district court's rubber-stamping of a special master's order is unacceptable -- even on pretrial matters: ‘The district court's rubber stamping of the master's order is an inexcusable abdication of judicial responsibility and a violation of article III of the Constitution.’”)); CSX Transp., Inc. v. Williams, No. 05-338, 2005 U.S. Dist. LEXIS 6569 (D.C. Cir. Apr. 18, 2005) (“Furthermore, even if this were a properly constituted enforcement action, this Court would not be deprived of its authority, under Article III of the Constitution, to exercise its equitable authority to independently interpret the law. To decide otherwise would raise serious separation of powers concerns, as it would effectively turn an Article III court into a mere rubber-stamp for an executive branch agency's interpretation of the Constitution.”).
among academic critiques of the use of the Bankruptcy Code to wind down financial institutions, specifically, (1) Article III judges lack the expertise to handle winding down a company as complex as a financial institution, (2) the Bankruptcy Code is too slow, and (3) Bankruptcy Code exceptions to the automatic stay for counterparties encourage a “run-on-the-bank.” However, at best, reasonable persons can disagree on these issues. I mention that reasonable persons can disagree, because if we are to abandon Constitutional norms based on congressional concerns, there should at least be a consensus that those concerns are legitimate. Here, there is not.

1. Bankruptcy Law Can Handle Complex Matters

Are Article III judges capable of overseeing the winding-down of complex financial companies? Some commentators assert that “federal regulators . . . possess expertise that is generally beyond the ken of judges.” However, as the lead attorney on the Lehman Brothers bankruptcy explained, the Lehman Brothers bankruptcy was “the largest, most complex, multi-faceted and far reaching bankruptcy case ever filed in the United States,” and most agree that it was handled well. It is unclear how taking the matter out of the hands of an Article III judge and placing it in the hands of an executive branch bureaucrat would improve the outcome.

2. Bankruptcy Law Can Be Fast

Another often cited complaint is that the Bankruptcy Code is too slow. However, the Bankruptcy Code allows for corporate divisions to be spun off quickly. Specifically, section 363 allows for “[t]he trustee, after notice and a hearing, [to] use, sell, or lease, other than in the ordinary course of business, property of the estate,” and allows for a troubled financial institution to sell off its subsidiaries quickly, minimizing the risk that a firm's failure poses to the financial markets. Lehman Brothers was able to sell its US

144. Edward Morrison, Is the Bankruptcy Code an Adequate Mechanism for Resolving the Distress of Systemically Important Institutions?, 82 TEMP. L. REV. 449, 450–52 (2009); Richard M. Hynes & Steven D. Walt, Why Banks Are Not Allowed in Bankruptcy, 67 WASH. & LEE L. REV. 985 (2010) (explaining why bankruptcy may be a poor fit for financial institutions); Jeffrey N. Gordon & Christopher Muller, Confronting Financial Crisis: Dodd–Frank's Dangers and the Case for a Systemic Emergency Insurance Fund, 28 YALE J. ON REG. 151 (2011) (arguing that Lehman’s bankruptcy exacerbated the financial meltdown); Wilmarth, supra note 92, at 1053 (“[T]he Orderly Liquidation Authority . . . should provide a superior alternative to the ‘bailout or bankruptcy choice’ that federal regulators confronted when they dealt with failing SIFIs during the financial crisis.”).

146. Morrison, supra note 144, at 461.
148. “The September 2008 Lehman Brothers bankruptcy was managed in an orderly fashion, with no major operational disruptions or liquidity problems.” David Tarr, Lehman Brothers and Washington Mutual Show Too Big to Fail is a Myth, (Aug. 23, 2010), (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1533522 (quoting Senior Supervisors Group, Observations on Management of Recent Credit Default Swap Events (March 9, 2009)).
149. Morrison, supra note 144, at 461–62.
Broker Dealer subsidiary to Barclay’s in a “363” transaction just five days after filing. 151 The lead bankruptcy attorney for Lehman Brothers explained:

The [363] sale resulted in the transfer of essentially all of the New York-based Lehman employees to BarCap and enabled the expeditious transfer and satisfaction of customer accounts. It was accomplished because of the ability to effectively use the provisions of the Bankruptcy Code . . . . The sale avoided potentially harsh consequences to customers and employees. The transfer of the North American Capital Markets business essentially was seamless. 152

Commentators argue against such empirical evidence, stating “[t]hough the Lehman bankruptcy was handled very quickly—the North American operations were sold to Barclay’s within a week—it seems overly optimistic to expect that every bankruptcy judge would act with the same dispatch as the judge did in the Lehman bankruptcy case.” 153 This is a somewhat specious argument—unfounded fears of judicial laziness do not justify abandoning Constitutional protections.

3. Bankruptcy Law Can Protect Counterparty Liquidity

The final concern involves Bankruptcy Code exceptions to the automatic stay. 154 Some commentators fear that such exemptions encourage a “run on the bank”:

[T]he [Bankruptcy] Code’s safe harbors permit premature liquidation of failing institutions. Non-debtor counterparties rush to terminate existing contracts, dismembering the failing institution and preventing an orderly wind-down that might yield greater overall value to counterparties. As these counterparties suffer significant losses, they too may encounter financial distress. When Lehman Brothers entered bankruptcy in September 2008, it was party to about 1.5 million transactions with over 8,000 counterparties. Within two weeks, eighty percent of those transactions had been terminated, netted, and liquidated. 155

However, the foregoing argument cuts both ways. Such exemptions from the automatic stay prevent the financial markets from seizing up. Liquidity is furthered when counterparties can “extricate themselves quickly from contract, with a failing debtor and thereby minimize their exposure to its distress,” 156 because it “prevent[s] the ‘insolvency of one commodity or security firm [from] spreading to other firms and possibly threatening the collapse of the affected market.’” 157 That is to say, such ease of liquidity should be part of any resolution regime.

In sum, even if one accepts that the balancing approach set forth in Schor is more

---

152. Examining the Causes, supra note 147.
153. Morrison, supra note 144, at 461.
156. Id.
than mere dicta, the purported concerns about the Bankruptcy Code do not justify abandoning the Article III courts. The Bankruptcy Code already provides a mechanism for liquidating complicated financial firms, quickly, and with limited impact on counterparties and financial market liquidity.158

C. Dodd–Frank and Secrecy

Secrecy is one more feature of the Treasury’s Liquidation Authority that must be discussed. Pursuant to Dodd–Frank, any person that discloses the existence of the petition for the appointment of a receiver, is subject to a $250,000 fine and 5 years in prison.159 Judicial review of the petition must take place in secret.160 The public may not obtain any information after the fact through the Freedom of Information Act (FOIA).161 As one prominent corporate restructuring specialist testified before the House Judiciary Subcommittee on Commercial and Administrative Law, “[Dodd–Frank] appears to have aspects of a covert organization.”162

Secrecy may—in addition to being another argument against the propriety of assigning traditionally judicial matters to executive branch bureaucrats163—help explain the motivations of Dodd–Frank’s authors. My impression—and it is nothing more than that—is that the authors of Dodd–Frank avoided transparency because transparency limits the influence that they can exercise on executive branch bureaucrats. The reality is that high profile corporate restructurings attract political influence. During the restructuring of General Motors, “Treasury officials noted that they receive[d] frequent calls from Members of Congress expressing concern about dealership closings,”164 and

158. See Ayotte & Skeel, supra note 151, at 471 (arguing bankruptcy law is sufficient); Bryant P. Lee, Chapter 18? Imagining Future Uses Of 11 U.S.C. § 363 to Accomplish Chapter 7 Liquidation Goals In Chapter 11 Reorganizations, 2009 COLUM. BUS. L. REV. 520, 524 (2009) (“Bankruptcy law is intended to operate in the instances where other applicable laws break down.”). But see Morrison, supra note 144, at 451 (concluding that the bankruptcy code is not adequate).

159. Dodd–Frank provides: “A person who recklessly discloses a determination of the Secretary under section 203(b) or a petition of the Secretary under subparagraph (A), or the pendency of court proceedings as provided for under subparagraph (A), shall be fined not more than $250,000, or imprisoned for not more than 5 years, or both.” Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 202(a)(1)(C), 124 Stat. 1376, 1446 (2010).

160. Id. § 202(a)(1)(A)(3) (requiring review “on a strictly confidential basis, and without any prior public disclosure”).

161. Id. § 112(d)(5).


163. As set out in Schor, the second purpose of an independent judiciary is to “safeguard litigants’ ‘right to have claims decided before judges who are free from potential domination by other branches of government.’” CFTC v. Schor, 478 U.S. 833, 848 (1986) (quoting United States v. Will, 449 U.S. 200, 218 (1980)). It could be said that Dodd–Frank replaces an impartial judgment with “the politics of pull.” 156 Cong. Rec. HS233 (June 30, 2010) (statement of Congressman Royce) (“What I don’t like about it is the market discipline being replaced. And I think on a massive scale, this bill replaces objectivity with subjectivity. It replaces the market discipline on Main Street with political pull in Washington . . . .”).

TARP overseer Congressman Frank even “reversed a prior GM decision to close a plant in Frank’s congressional district by directly calling GM’s CEO, Fritz Henderson.”165 This is the same Congressman Frank that suffered a scandal recently, admitting that he took sizable campaign contributions from financial institutions he supervises and some that received TARP funds.166 While I do not dispute that such contributions may be legal, I am forced to wonder what impact contributions have on future actions. While it cannot be directly proven that a particular contribution buys any action or nonaction on the part of a lawmaker, “contributions are widely understood as providing donors with access (the ‘politician’s ear’) even if ‘there is little consensus on whether they purchase anything else.’”167

IV. CONCLUSION

Over the past century, from Crowell to Northern Pipeline, and even in Schor, there is one constant in the Supreme Court’s interpretation of Article III of the United States Constitution: powers that are traditionally judicial in nature cannot be assigned by Congress to executive branch agencies without adequate review by an Article III court. Yet this is exactly what Dodd–Frank attempts—granting to the Treasury the power to appoint a receiver to a financial institution with little or no appellate review.

165. Id. at 258–59 (citing Jared Allen, Auto Plan Hits Potholes, THE HILL, June 8, 2009, at 1 (discussing congressional meddling in GM’s restructuring plan)).

166. Dave Wedge, Barney Frank rakes in $40G from bailed out banks, BOSTON HERALD, Oct. 22, 2010, available at www.bostonherald.com/news/politics/view/20101022barney_grabs_bank_execs_____despite_vow_to_shun_bailed-out_lenders/srvc=home&position=1 (“Frank vowed in February 2009 that he wouldn’t accept campaign donations from banks that received money under the $700 billion Troubled Asset Relief Program (TARP) or political action committees tied to such institutions. But Frank has hauled in thousands from top execs at Bank of America, Citizens Bank, Wainwright Bank, JP Morgan Chase and other institutions that received billions in TARP money.”).