GEORGETOWN UNIVERSITY LAW CENTER

Adam J. Levitin
Professor of Law

Written Testimony of

Adam J. Levitin
Professor of Law
Georgetown University Law Center

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Subcommittee on The Constitution

"The Administrative State v. The Constitution: Dodd-Frank at Five Years"

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Witness Background Statement

Adam J. Levitin is a Professor of Law at the Georgetown University Law Center, in Washington, D.C., where he teaches courses in financial regulation, structured finance, contracts, bankruptcy, and commercial law. Among his publications is *Financial Restructuring: Business Bankruptcy in the Modern Commercial World* (Wolters Kluwer 2015).

Professor Levitin has previously served as the Bruce W. Nichols Visiting Professor of Law at Harvard Law School, as the Robert Zinman Scholar in Residence at the American Bankruptcy Institute, and as Special Counsel to the Congressional Oversight Panel supervising the Troubled Asset Relief Program (TARP). Professor Levitin currently serves on Consumer Financial Protection Bureau's Consumer Advisory Board.

Before joining the Georgetown faculty, Professor Levitin practiced in the Business Finance & Restructuring Department of Weil, Gotshal & Manges, LLP in New York, and served as law clerk to the Honorable Jane R. Roth on the United States Court of Appeals for the Third Circuit.

Professor Levitin holds a J.D. from Harvard Law School, an M.Phil and an A.M. from Columbia University, and an A.B. from Harvard College. In 2013 he was awarded the American Law Institute's Young Scholar's Medal.

Professor Levitin has not received any federal grants or any compensation in connection with his testimony, and he is not testifying on behalf of any organization. The views expressed in his testimony are solely his own.

Chairman Cornyn, Ranking Member Durbin, Members of the Committee:

Good afternoon. Thank you for inviting me to testify at this hearing. My name is Adam Levitin. I am a Professor of Law at the Georgetown University, where I teach courses in financial regulation and bankruptcy, among other topics. I also serve on the Consumer Financial Protection Bureau's statutory Consumer Advisory Board. I am here today solely as an academic who studies financial regulation and insolvency and am not testifying on behalf of the CFPB or its Consumer Advisory Board.

This hearing is on the constitutionality of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Simply put, there is no credible constitutional problem with the Dodd-Frank Act. Not surprisingly, none of the litigation challenges to the core provisions of Dodd-Frank have even gotten to first base within the legal system.[1] While the Dodd-Frank Act does create some novel administrative structures, the financial regulatory world already has a unique bestiary of regulatory agencies that do not neatly conform to hornbook administrative law paradigms. Somehow none of these agencies have previously caused constitutional consternation—the Office of the Comptroller of the Currency, for example, has been around for over 150 years without a constitutional challenge despite being equivalently sheltered from Presidential and Congressional control as today's bugbear, the Consumer Financial Protection Bureau (CFPB).

So let's be clear what the real issue is behind constitutional challenges to the Dodd-Frank Act. The issue is not principled concerns about the constitutionality of the CFPB's particular structure or Financial Stability Oversight Council (FSOC) authority. The issue is that certain businesses do not want to be subject to regulatory oversight and are opposed to a CFPB of any shape or form. These businesses want to be able to continue profiting from sharp practices against their customers or being too-big-to-fail without being answerable to anyone. The Constitution is not being invoked in any sort of principled way to protect fundamental liberties, but is instead, being cited as part of a campaign to preserve corporate profits.

Professor Rao—one of the witnesses called by the Majority—herself recognizes this broader goal of constitutional challenges to the Dodd-Frank Act in her scholarship. Professor Rao argues that any constitutional problems with the CFPB's structure can be remedied by interpreting the removal provision for the CFPB Director as being "at will."[2] At will removal is a remedy that keeps the basic structure and function of the Bureau intact. In contrast, the remedy sought in the litigation brought by Ambassador Gray—another Majority witness—is an injunction against the CFPB's operations altogether. Professor Rao rightly notes that the remedy sought by Ambassador Gray indicates that the real goal of his litigation is the elimination of the CFPB: "No doubt eliminating the

[1] An SEC rulemaking implementing the Dodd-Frank Act's conflicts minerals disclosure requirement was struck down by the D.C. Circuit as violating the First Amendment, Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359 (D.C. Cir. 2014), but a subsequent en banc ruling by the D.C. Circuit expressly overturned the basis for that opinion, Am. Meat Inst. v. United States Dept. of Agric., 760 F.3d 18, 22-23 (D.C. Cir. 2014), and has granted a rehearing on the conflicts minerals rule.

[2] Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1272-73 (2014). I disagree with Professor Rao's analysis that there are constitutional problems, but that is beside the point.

CFPB and its functions is at least partly at issue for many politicians and for some of the parties initiating this lawsuit."[3]

I. THE CONSTITUTIONALITY OF THE DODD-FRANK ACT

To date there have been several lawsuits challenging the constitutionality of core parts of the Dodd-Frank Act.[4] None of these suits have received favorable rulings from the courts. While they have generally been dismissed on procedural grounds like standing and ripeness, courts have given no indication that there is ultimately merit to the suits, and few scholars (all of whom happen to have impeccable conservative movement credentials) have even suggested that there might be constitutional problems with the statute. Moreover, even those who do see constitutional problems in the Dodd-Frank Act find them to be narrow and capable of being remedied by targeted judicial interpretation, rather than requiring the wholesale demolition of the financial regulatory system.[5]

Those constitutional challenges to the Dodd-Frank Act have largely focused on three issues: the status of the Consumer Financial Protection Bureau, the status of the Financial Stability Oversight Council, and the Title II Orderly Liquidation Authority given to the FDIC. I will review these issues briefly before turning to the benefits of the Dodd-Frank Act, which should not be overlooked when considering its merits.

A. The Consumer Financial Protection Bureau

The CFPB is an independent bureau within the Board of Governors of the Federal Reserve System. While the CFPB is technically part of the Federal Reserve, the CFPB has complete regulatory independence from the Board of Governors of the Federal Reserve.[6] The CFPB is headed by a single Director appointed by the President with the advice and consent of the Senate.[7] The CFPB Director is appointed for a five-year term and is removable only for cause,[8] a status long-held to be acceptable for independent agencies.[9]

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[3] *Id.* at 1273.

[4] *See, e.g.*, State Nat. Bank of Big Spring v. Lew, 958 F. Supp. 2d 127 (D.D.C. 2013) (dismissing constitutional challenges to Dodd-Frank Titles I, II and X on standing/ripeness grounds; currently on appeal to D.C. Circuit); CFPB v. Morgan Drexen, Inc., 60 F. Supp. 3d 1082 (C.D. Cal. 2014) (rejecting arguments about unconstitutionality of CFPB); Morgan Drexen, Inc. v. Consumer Fin. Prot. Bureau, 979 F. Supp. 104 (D.D.C. 2013) (memo.op.), *affirmed* Morgan Drexen, Inc. v. Consumer Fin. Prot. Bureau, 785 F.3d 684 (D.C. Cir. 2015) (affirming dismissal of constitutional challenge to the CFPB based on lack of standing); Illinois v. Alta Colleges, Inc. 2014 U.S. Dist. LEXIS 123053 (N.D. Ill. Sept. 4, 2014) (rejecting arguments about unconstitutionality of CFPB); Illinois v. CMK Investments, Inc., 2015 U.S. Dist. LEXIS 84277 (N.D. Ill. June 30, 2015) (rejecting arguments about unconstitutionality of CFPB); CFPB v. ITT Educ. Servs., Inc., 2015 WL 1013508 (S.D. Ind. Mar. 6, 2015) (rejecting arguments about unconstitutionality of CFPB); TCF Nat. Bank v. Bernanke, 643 F.3d 1158 (8th Cir. 2011) (affirming dismissal of suit seeking preliminary injunction of Fed rule imposing debit card fee regulations because of takings, due process and equal protection concerns).

[5] Rao, *supra* note 2, at 1272-73.

[6] 12 U.S.C. §§ 1012(c)(2), 5491(a).

[7] *Id.* § 5491(b)(2).

[8] *Id.* § 5491(c)(1)–(3) ("Removal for cause. The President may remove the Director for inefficiency, neglect of duty, or malfeasance in office.").

[9] *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935) (holding that removal of officers of independent agencies may be restricted to "for cause" removal).

The CFPB is not funded through the congressional appropriations process.[10] Instead, the CFPB is funded by the Fed, which must transfer to the CFPB an inflation-adjusted sum equal to 12% of the Federal Reserve's 2009 annual operating expenses.[11] By exempting the CFPB's budget from appropriations, Congress ensured that the CFPB's ability to protect the financial security of American families is not subject to the opaque horse-trading and hostage-taking of the appropriations process.

While the CFPB's budget is not determined by congressional appropriations, neither are the budgets of other federal bank regulators. There are no appropriations for the OCC, the FDIC, the Federal Reserve Board, and the NCUA. These agencies set their budgets based on the fees they charge regulated institutions, which means they can increase their budgets on their own. In contrast, the CFPB's budget is subject to a cap.[12] The CFPB is also the only federal financial regulatory subject to an annual audit by the Government Accounting Office.[13]

Although Congress does not possess the usual power of the purse over the CFPB, the Constitution does not mandate such control, and, in any event, important restrictions exist on the CFPB's actions. First and foremost, general administrative law rules apply. The CFPB is bound by both its statutory authorities and the Administrative Procedure Act. The CFPB is also required to submit significant rulemakings to the White House's Office of Information and Regulatory Affairs (OIRA) for pre-proposal review as part of the Small Business Regulatory Enforcement Fairness Act (SBREFA). This is a privilege the CFPB shares with only two other agencies, the EPA and OSHA. No other financial regulator is required to submit rulemakings to SBREFA review panels. Additionally, all CFPB rulemakings are potentially subject to a veto by the Financial Stability Oversight Counsel (FSOC).[14] No other federal agency has its rulemakings subject to such an FSOC veto.

There are also restrictions on specific CFPB authorities. The CFPB is required to make particular findings in order to exercise its authority to restrict or prohibit acts and practices as unfair, deceptive, or abusive.[15] The CFPB is also prohibited from imposing

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[10] *Id*. § 5497(a)(2)(C).

[11] *Id.* §5497(a)(1)–(2). The CFPB may also receive an additional appropriation of up to $200 million annually for its first five years of operations. *Id.* § 5497(e)(2). Additionally, civil penalties obtained by the CFPB that are not used for compensation of victims of consumer financial protection law violations may be used to fund consumer education and financial literacy programs. *Id.* § 5497(d). The Federal Reserve's 2009 operating expenses were $3.649 billion. BD. OF GOVERNORS OF THE FED. RESERVE SYS., 96TH ANNUAL REPORT 186–87 (2009) *available at* http://www.federalreserve.gov/ boarddocs/rptcongress/annual09/pdf/ar09.pdf. Therefore, the CFPB's annual budget is $437.88 million, adjusted for inflation annually according to the Bureau of Labor Statistics' employment cost index for total compensation for State and local government workers. 12 U.S.C. § 5497(a)(2)(B). To the extent that this inflation adjustment measure often lags real inflation, the CFPB's real spending power will decline over time. On the other hand, unused excess funds transferred from the Federal Reserve are not returned to the Treasury, but are instead invested for the CFPB, which may draw on the funds in the future. *Id*. §§ 5497(b)(3), (c)(2).

[12] *Id*. § 5497(a)(2).

[13] *Id*. § 5497(a)(5)(A).

[14] 12 U.S.C. § 5513.

[15] 12 U.S.C. §§ 5531, 5536. Contrary to claims that the "abusive" power, 12 U.S.C. § 5531(d) is an unfettered grant of discretion, it is actually fairly detailed in terms of providing four situations in which the CFPB can prohibit or restrict an act or practice as "abusive." Indeed, the "abusive" standard seems quite similar to the Federal Trade Commission's pre-1980 interpretation of "unfair" under section 5 of the FTC Act. *See S*tatement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of

usury caps[16] and from regulating non-financial businesses.[17]

Second, despite its freedom from the congressional appropriations process, the CFPB is subject to considerable oversight from Congress. The CFPB Director must make periodic reports to Congress and appear before congressional committees, which can exercise considerable moral suasion.[18] In the four years that the CFPB has been in existence, its senior officials have testified before Congress fifty-five times.[19] The Congressional Review Act enables Congress to override specific CFPB rulemakings on a simple majority basis.[20] And Congress is always free to amend title X of the Dodd-Frank Act and change the powers and structures of the CFPB.

The CFPB is also subject to moral suasion from the executive branch. Although the President may only dismiss the Director for cause, such limitations are not unique among financial regulatory agencies, and history suggests there are few individuals that would refuse a Presidential request to resign even if they were within their legal rights to do so.

Table 1 shows in succinct form a comparison between the structural restrictions on the CFPB and that of certain other federal regulatory agencies. What should be apparent is that there is far greater oversight for the CFPB than there is for the other federal bank regulators—OCC, the Fed, and the FDIC—or for the SEC.

Smoking. 29 Fed. Reg. 8355 (1964). This interpretation withstood Supreme Court review. *See* FTC v. Sperry & Hutchinson, 405 U.S. 233 (1972).

[16] 12 U.S.C. § 5517(o).

[17] *Id*. § 5517(a).

[18] *Id*. § 5496(a)–(b).

[19] CFPB, Consumer Financial Protection Bureau by the Numbers, July 15, 2015, *at* http://files.consumerfinance.gov/f/201507_cfpb_factsheet-by-the-numbers.pdf.

[20] 5 U.S.C. §§ 801–808 (2006).

TABLE 1. COMPARISON OF OVERSIGHT OF CFPB AND OTHER AGENCIES[21]

	EPA	FDIC	FRB	FTC	OCC	SEC	SSA	CFPB
APA Rulemaking	YES	YES	YES	YES	YES	YES	YES	YES
APA Adjudication	YES	YES	YES	YES	YES	YES	YES	YES
Budget Subject to Appropriations	YES			YES		YES	YES	
Budget Capped								YES
OIRA Review of Economically Significant Regulations	YES						YES	
OIRA SBREFA Review	YES							YES
Statutory Cost-Benefit Analysis for Certain Regulations				YES		YES		YES
FSOC Veto								YES
Annual GAO Audit								YES
Term in Office <5 Years	YES							
5-member Commission		YES	YES	YES		YES		
Bipartisan Representation Requirement		YES		YES				
Presidential Removal without Cause	YES				?			
Congressional Oversight	YES	YES	YES	YES	YES	YES	YES	YES
Congressional Review Act Override of Rulemakings	YES	YES	YES	YES	YES	YES	YES	YES
Moral Suasion by Administration	YES	YES	?	YES	YES	YES	YES	YES

All told, the CFPB was deliberately designed to have a degree of political insulation in order to protect it from the financial regulatory industry's concentrated interest in deregulation, but it is not totally insulated from political control. While its particular form is novel, it does not raise any acute constitutional issues. Nothing in the Constitution prohibits some degree of political insulation so long as either a regulatory agency is ultimately subject to a meaningful check from one of the branches of government.

If there are constitutional issues with the CFPB, they are not the ones raised so far in litigation. Instead, they relate to the constitutionality of the OIRA SBREFA review for the CFPB, and the FSOC veto over the CFPB. Both the SBREFA review and FSOC veto raise separation of powers issues because they involve an executive agency or a council that includes executive agency officers having the ability to impede or actually veto a rulemaking by an independent agency. Notably, critics of the CFPB's constitutionality have not raised these concerns, which, if addressed, would unbind, rather than muzzle the CFPB. The CFPB has long been politically unpopular with the less reputable part of the financial services industry, but that does not mean there is a constitutional issue with the agency.

B. The Financial Stability Oversight Council

Title I of the Dodd-Frank Act created the Financial Stability Oversight Council (FSOC).[22] The FSOC is charged with identifying systemic financial stability risks and taking appropriate action to address the risks. The FSOC consists of ten voting members—the heads of the various federal financial regulatory agencies as well as an

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[21] A memorandum opinion from the Department of Justice's Office of Legal Counsel assumes as a passing point that the OTS Director (and presumably the Comptroller of the Currency) serves at the pleasure of the President, but the United States Code is silent on the matter. *See* Memorandum Opinion from the Gen. Counsel, Dep't of the Treasury, and Chief Counsel, Office of Thrift Supervision on Post Employment Restriction of 12 U.S.C. § 1812(e) (Sept. 4, 2001), *available at* http://www.justice.gov/olc/2001/otspost2.pdf. The OCC was subject to OIRA review of economically significant regulations prior to 2011.

[22] 12 U.S.C. § 5321.

independent insurance expert appointed by the President with advice and consent of the sent—and five non-voting members, and is chaired by the Treasury Secretary.[23] The FSOC is authorized to designate certain "nonbank financial companies" as "systemically important financial institutions" (SIFIs) upon a two-thirds vote, including the affirmative vote of the Treasury Secretary.[24] SIFI designation is based on an analysis of eleven enumerated factors that contribute to a determination that "material financial distress at the U.S. nonbank financial company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the U.S. nonbank financial company, could pose a threat to the financial stability of the United States."[25]

If a firm is designated as a SIFI, it "will be subject to supervision by the Federal Reserve Board and more stringent government regulation in the form of prudential standards and early remediation requirements established by the Board."[26] SIFI designation is based on notice and a hearing, and is subject to judicial review on an arbitrary and capricious standard.[27]

The FSOC's authority has been challenged in *State National Bank v. Lew* (for which Majority witness Ambassador Grey is plaintiffs' counsel) arguing that the FSOC raises separation of powers problems because it "has sweeping and unprecedented discretion to choose which nonbank financial companies to designate as 'systematically important," which is not limited by any meaningful statutory directives."

The FSOC's structure as an inter-regulatory council that combines both executive and independent agencies (as well as a non-agency member) is certainly novel. But that structure does not raise meaningful concerns about unfettered discretion or separation of powers issues in regard to SIFI designation. SIFI designation is not an unfettered exercise of discretion. Instead, it requires consideration of no less than eleven detailed factors, as well as an ultimate finding about the nature of risks posed by a firm to the economy.

Moreover, contrary to the claims of the FSOC's critics, there are several layers of oversight over the FSOC. First, the executive exercises a meaningful check on the FSOC by virtue of the President's ability to remove the Treasury Secretary at will. Because the Treasury Secretary's vote is required for a SIFI designation, this is a critical check on the FSOC. Moreover, the FSOC's budget comes from the Office of Financial Research within the Treasury Department. While the Office of Financial Research is funded by assessments on SIFIs, release of the funds to the FSOC is dependent upon the consent of Director of the Office of Financial Research, who is removable at will by the President.

Second, Congress exercises meaningful checks on all voting members of the FSOC (except arguably the independent insurance representative), through its appointment power and oversight power for all of the FSOC's members, and also its appropriations power vis-à-vis the Treasury.

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[23] See 12 U.S.C. § 5321(b)(1), (3).

[24] 12 U.S.C. §§ 5323(a)(1), (b)(1). The term SIFI does not itself appear in the Dodd-Frank Act, but is used as short-hand for an FSOC-designated firm.

[25] 12 U.S.C. § 5323(a)(1).

[26] *See id.*

[27] 12 U.S.C. § 5323(e)(1)-(2), (h).

Third, the FSOC's determinations are subject to judicial review. It is hard, then, to see how the FSOC has unconstrained power. In fact, the FSOC is subject to meaningful checks from all three branches of government.

To the extent that the FSOC's structure raises a true separate of powers problem it is in the form of the FSOC's veto power over CFPB rulemakings. The FSOC's veto power gives executive agencies the ability to veto the action of an independent agency, effectively depriving the independent agency of its independence. Not surprisingly, anti-regulatory litigants have not complained about the appropriateness of the FSOC veto, as it does not serve their political ends.

The FSOC, like the CFPB, represents another permutation of the administrative state. But there is nothing that requires cookie-cutter administrative agency structures, and indeed, I would encourage Congress to continue experimenting with agency structures. Some structures may be more appropriate for certain regulated industries than others. In some cases it may make sense to create agencies that are more insulated from political pressure than in other cases. For example, if an agency regulates an industry that deals with consumers, there will be an inherent imbalance of political power in terms of lobbying the agency. Congress might well want to insulate such an agency from political pressure. On the other hand, if an agency regulates multiple competing parts of an industry, it might make sense to lean into politics and let there be a "fair fight" between equally matched interest groups (which might well cancel each other out).

In any event, novel administrative agency structures are not inherently unconstitutional, any more than the administrative state itself (as the title of this hearing provocatively suggests). More critically, I suspect that the complaints about the Dodd-Frank Act are not about the structure of administrative agencies, but about the fact of regulation itself. Would the plaintiffs in *State National Bank* be satisfied if all of the substantive powers of the CFPB and FSOC were exercised by an executive agency? I doubt it. Their beef is with regulation itself, not with the structure of the administrative state.

C. Orderly Liquidation Authority

Title II of the Dodd-Frank Act authorizes the appointment of the FDIC as receiver of a failing "financial company." This is known as "Orderly Liquidation Authority" (OLA)—the authority to place a systemically significant non-bank financial institution into receivership.

To invoke OLA, two-thirds of the Federal Reserve Board and two-thirds of the FDIC Board must provide a written recommendation to the Treasury Secretary based on an evaluation of eight statutory factors.[28] The Treasury Secretary must then make seven findings regarding the need for invoking OLA prior to appointing the FDIC as receiver.[29] If the firm does not acquiesce to the receivership, the Treasury Secretary can petition the courts for an order appointing a receiver.[30] The Treasury Secretary's appointment of a receiver is subject to only limited and expedited judicial review, and the petition is required to be kept under seal, so creditors are not notified, lest the petition trigger a run

[28] *See* 12 U.S.C. § 5383(a).
[29] 12 U.S.C. § 5383(b).
[30] 12 U.S.C. § 5832(a)(1).

on the firm.[31] As receiver under OLA, the FDIC has the same broad range of tools available to it as it does for bank receiverships.[32] There has yet to be a regulatory implementation of OLA, much less the actual use of OLA.

It is hard to see how OLA is possibly unconstitutional. Congress clearly had the power to enact it under either the Bankruptcy Clause or the Commerce Clause. The Bankruptcy Clause gives Congress the broad power to enact "uniform laws on the subject of Bankruptcies through the United States".[33] That is precisely what OLA is—it is a statute that applies uniformly throughout the nation. Moreover, given that Orderly Liquidation Authority applies to a regulated industry, it effectively puts everyone on notice of special rules, which include judicial review, so there is no due process argument.

The arguments that have been raised against OLA's constitutionality are baseless and reflect complete unfamiliarity with bankruptcy law. First, the plaintiffs in *State National Bank v. Lew* argue that OLA violates the Bankruptcy Clause because it lets the FDIC both choose which companies will be subject to liquidation and what the treatment of creditors will be. This, the *State National Bank* plaintiffs, argue, is inconsistent with "uniform laws."[34]

This argument should make any self-identified Originalist cringe. The *State National Bank* plaintiffs appear unaware that "uniform laws" is an established term of art with a well-documented historical context. It does not mean uniform treatment of debtors or uniform treatment of creditors. Instead, it refers to having uniform laws among the states, as opposed to state-specific bankruptcy laws, which presented a major federalism problem at the time of the Constitution's ratification because of states refusing to recognize each others' discharges of their citizens' debts. There is *no* debate whatsoever on this question within the scholarly community, and the entire Supreme Court has agreed on this reading.[35] Some basic legal research should have kept this specious argument out of the *State National Bank* plaintiffs' pleadings.

The *State National Bank* plaintiffs are particularly concerned with alleged arbitrary favoritism of certain creditors by the FDIC in an OLA receivership. Specifically, the plaintiffs allege that "as investors in the unsecured debt of financial companies, they were protected by the federal bankruptcy laws' guarantee of equal treatment of similarly situated creditors, and that OLA abridged that guarantee."[36]

The District Court dismissed this claim for lack of standing, as "holding of certain statutory rights does not amount to an inalienable property right under the Bankruptcy Code."[37] The District Court was correct in holding that a statutory right is not a property right. Were it otherwise, any amendment of the bankruptcy laws would be a taking. The

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[31] 12 U.S.C. § 5382(a).

[32] 12 U.S.C. § 5390.

[33] U.S. Const. Art. I, sec. 8, cl. 4.

[34] State National Bank of Big Spring v. Wolin, Second Amended Complaint, No. 1:12-cv-01032-ESH (D. D.D.C. Feb. 19, 2013), ¶ 11.

[35] *See* Central Va. Community College v. Katz, 546 U.S. 356 (2006).

[36] State National Bank of Big Spring v. Wolin, States' Memorandum in Opposition to Motion to Dismiss, No. 1:12-cv-01032-ESH (D. D.D.C. Feb. 19, 2013), at 14.

[37] State Nat'l Bank of Big Spring v. Lew, 958 F. Supp. 2d 127, 142 (D.D.C. 2013).

Supreme Court has made clear that amendments to bankruptcy laws may be applied retroactively, at least as to unsecured creditors.[38]

But even if statutory rights could through some wishful alchemy be transformed into property rights, the *State National Bank* plaintiffs mischaracterize federal bankruptcy law. Federal bankruptcy laws do not guarantee equal treatment of similarly situated creditors. To suggest otherwise is an argument only someone with very superficial knowledge of bankruptcy law could concoct.

As an initial matter, to the extent that OLA represents a non-uniform bankruptcy law, then all of federal bankruptcy law is non-uniform and unconstitutional. There are multiple chapters of federal bankruptcy law, not all of which are available to all debtors. Chapter 7, Chapter 9, Chapter 11, Chapter 12, Chapter 13. These chapters have significant differences in their treatment of debtors and creditors. OLA represents just one more flavor of bankruptcy law, and the fact that it has not been codified by the National Archivist in Title 11 of the U.S. Code is constitutionally irrelevant.

Second, federal bankruptcy law guaranties the equal treatment of similar creditors only in a Chapter 7 liquidation.[39] There is no such requirement in Chapter 11. While Chapter 7 bankruptcy is usually thought of as the liquidation chapter of the Bankruptcy Code, Chapter 11 is also frequently used for liquidation. Thus, Lehman Brothers, Inc. and the holding companies of Washington Mutual and IndyMac were all Chapter 11 bankruptcies, even though there was no meaningful reorganization of any of those firms. Critically, a voluntary bankruptcy filing gets to choose the applicable Chapter of the Bankruptcy Code, and because of issues like retention of control of the firm and of attorney-client privilege, as well as attorney compensation, Chapter 11 is often the preferred Chapter for liquidations.

Chapter 11 requires that a plan provide at least as much for a creditor as in a hypothetical Chapter 7 liquidation.[40] But that is not the same as requiring equal treatment. It just sets a floor for recoveries. For Chapter 11, the Bankruptcy Code requires that creditors' claims be classified[41] and that each class contain only substantially similar claims,[42] which must receive identical treatment.[43] The Code does not itself require that all similar claims be placed in the same class, although some Circuits have interpreted the Code to so require.[44] But this requirement has never been interpreted as requiring all unsecured creditors to be in the same class. At most, the Bankruptcy Code prohibits "unfair discrimination" in the context of a Chapter 11 "cramdown" plan.[45]

For both Chapter 7 and Chapter 11 bankruptcies, the Bankruptcy Code are filled with provisions that effectively shift the priority of similarly situated creditors, be they exceptions to the automatic stay for certain creditors, or cure requirements for assuming executory contracts, as well as non-Code practices like critical vendors motions, cross-

[38] U.S. v. Sec. Indus. Bank, 459 U.S. 70 (1982).
[39] 11 U.S.C. § 726(b).
[40] 11 U.S.C. § 1129(a)(7).
[41] 11 U.S.C. § 1123(a)(1).
[42] 11 U.S.C. § 1122(a).
[43] 11 U.S.C. § 1123(a)(4).
[44] *See* 7-1122 COLLIER ON BANKRUPTCY (16TH ED.), ¶ 1122.03 (describing nuances in classification jurisprudence).
[45] 11 U.S.C. § 1129(b).

collateralized financing, and roll-up financing that effectively prioritize certain creditor's claims. Additionally, trustees in bankruptcy exercise considerable discretion about whether to file claims objections or pursue avoidance actions, all of which affect distributions. In short, the idea that bankruptcy guaranties equal treatment of creditors is a fantasy world vision of bankruptcy that could only be concocted by attorneys not well-versed in bankruptcy law.

The best case against the constitutionality of the OLA relates to the limited and expedited judicial review, but there is undeniably judicial review of the appointment of the FDIC as a receiver. It is review under a very forgiving standard,[46] but it is within Congress's power to set the standard for judicial review; were it otherwise the entire Administrative Procedures Act and other acts would not stand.[47] Title II also provides for a default judgment for the Treasury Secretary if a ruling is not issued within 24 hours.[48] While this is a tight time-frame, it is appropriate for the urgency of the issue, and again within the scope of Congressional power to set deadlines for default judgments, as Congress does for the Federal Rules of Civil Procedure. OLA provides for due process, even if it is not as much process as some might like.

Moreover, but for OLA, such distressed financial firms would likely file for bankruptcy. But bankruptcy law hardly helps the concerns of the *State National Bank* plaintiffs. Bankruptcy law rarely allows for interlocutory judicial review, rendering many issues moot, and bankruptcy law specifically provides that certain key transactions, such as financing agreements and asset sales cannot be reversed even if successfully appealed.[49] Moreover, bankruptcy law does not even require that creditors be notified about motions, and emergency motions are often granted ex parte. While many Bankruptcy Code provisions reference "after notice and a hearing," the Code defines "notice and a hearing" as requiring only whatever notice and an opportunity for a hearing "as is appropriate in the particular circumstances" and "authorizes an act without an actual hearing if such notice is given properly and if … there is insufficient time for a hearing".[50]

There is good reason to be concerned about what the regulatory implementation of OLA will look like.[51] But the problems with OLA are policy problems, not constitutional ones.

II. THE BENEFITS OF THE DODD-FRANK ACT

The Dodd-Frank Act, like all legislation, creates winners and losers. The winners are American families, the real economy, and small financial institutions. American families are protected from predatory financial practices. The real economy is protected from being pulled down by excessive risk-taking from the financial sector. And small financial institutions gain a competitive leg up on larger ones because of the Dodd-Frank Act. This is not to say that the Dodd-Frank Act is perfect. There are places where the

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[46] 12 U.S.C. § 5382(a).
[47] *See* 5 U.S.C. § 706. *See also* Veterans Judicial Review Act, 38 U.S.C. § 7261(a)(4).
[48] 12 U.S.C. § 5382(a)(1)(A)(v).
[49] 11 U.S.C. §§ 363(m), 364(e).
[50] 11 U.S.C. § 102(1).
[51] *See, e.g.*, Arthur Wilmarth, '*Single Point of Entry' Plan Ensures More Megabank Bailouts*, AM. BANKER, July 16, 2015.

Dodd-Frank Act should have gone farther, places where it might have erred in particular policy judgments, and most critically, sectors of the financial economy it did not address at all, like repo markets.

The American economy has benefitted tremendously from the Dodd-Frank Act through enhanced financial stability. While there work remains to be done, provisions like the Title XIV ability-to-repay mortgage rules, the creation of the FSOC, and the promulgation of Orderly Liquidation Authority are all important steps toward protecting the real economy against the spillover effects from a financial sector collapse like in 2008-2009. It is easy to overlook these benefits—nobody notices when there isn't a crisis—but part of the reason we are not repeating 2008-2009 is because of the Dodd-Frank Act.

American families have also benefitted from the creation of the CFPB. The CFPB's actions have resulted in safer and more sustainable consumer financial products and practices in the mortgage and credit card space, and other financial products are soon to be addressed. The CFPB has also taken enforcement actions that have cracked down on illegal marketing, billing, and debt collection practices. The results have been remarkable. In the CFPB's first four years it has obtained over $11 billion in consumer relief through enforcement and supervisory actions, including $2.6 billion in restitution and $7.5 billion in principal reductions, cancelled debts, and other relief.[52] These actions have benefitted over 18.8 million consumers.[53] These recoveries are even more remarkable given that they include a period of time when the CFPB was still ramping up its staffing and finding its sea legs, and do not include pending actions.

In contrast, all of the federal bank regulators combined—the Federal Reserve, FDIC, OCC, OTS, and NCUA—plus the Federal Trade Commission achieved less than a billion in consumer relief over the decade prior to the operation of the CFPB despite these agencies having the very same power as the CFPB to prohibit unsafe and deceptive acts and practices.

The CFPB's activities, however, are not confined to enforcement actions. The CFPB is the only federal financial regulator to finish all of its Dodd-Frank Act rulemakings on time. The CFPB has launched the first-ever program of supervision over non-banks in the consumer financial services marketplace, including credit reporting agencies, debt collectors, money transmitters, student loan servicers, and nonbank auto lenders.

The CFPB has also developed innovative informational tools to help consumers with the financial shopping process. Its Know-Before-You-Owe homeownership website, its Paying for College website, and its AskCFPB compendium of common financial questions are free, clear, and unbiased sources of information for consumers. Moreover, because of the complexity of American financial terminology, the CPFB has taken care to ensure that its resources are available to Spanish speakers through its CFPB en Español website that carefully translates complicated financial idioms (e.g., "balloon mortgage") into Spanish.

[52] CFPB, Consumer Financial Protection Bureau by the Numbers, July 21, 2015, *at* http://files.consumerfinance.gov/f/201507_cfpb_factsheet-by-the-numbers.pdf.
[53] *Id.*

The CFPB has also worked to improve financial disclosures both through voluntary initiatives and through regulation. Better disclosures help consumers make better financial decisions for themselves and are key to an efficient market. The CFPB's Financial Aid Shopping Sheet has been voluntarily adopted by thousands of colleges and universities, enabling students to get apples-to-apples comparisons of financial aid offers. And the pending TILA-RESPA integrated mortgage disclosures are so good that they have been called "a home run" by one commentator with long mortgage industry experience.[54] When was the last time another financial regulator's work product was called a "home run"? When the FTC and Federal Reserve Board attempted to reconcile the TILA and RESPA disclosures, the result was so unsatisfactory that Congress tasked the CFPB with redoing the work.

Additionally, the CFPB has launched a consumer complaint database that serves as an important market intelligence for the Bureau. Since launched, the Bureau has received over 650,000 complaints,[55] an indication that work remains to be done in the consumer financial marketplace.

The impetus behind the creation of the CFPB was the recognition that meaningful consumer financial protection requires a motivated and unconflicted regulator with authority over the entire consumer financial space. That is what the CFPB is, and it is already paying dividends in terms of better financial security for consumers. The CPFB is still an incredibly young agency, but it has already shown energy, initiative, and results that surpass all of the other federal financial regulators.

Benefits for Community Financial Institutions

Finally, one of the biggest beneficiaries of the Dodd-Frank Act have been community banks. Community banks are generally defined as depositories with less than \$10 billion in assets.[56] By this measure, almost all depositories in the United States are considered community banks. Of the 6,509 depositories in the United States only 109 have over \$10 billion assets, so there are 6,400 community banks in the United States.

Community banks play an important role in the American financial system: they are key sources of credit in small business and commercial real estate lending, they tend to pride themselves on more personalized customer service and products, and they are often deeply engaged with the civic fabric of their communities. The health of community banks is also important for preserving choices for consumers in the financial products market place.

Community banks have been ailing for some time. The number of community banks in the United States has fallen nearly in half over the last decade. As Figure 1

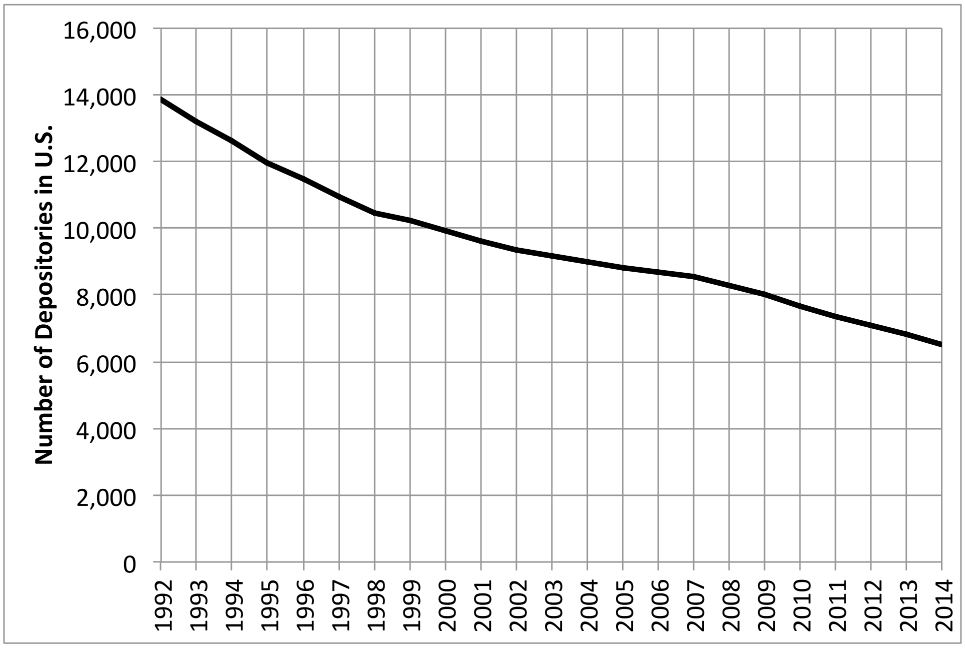
[54] Mark Greene, "Know Before You Owe" Has One Major Flaw, Forbes.com, July 19, 2015, *at* http://www.forbes.com/sites/markgreene/2015/07/19/know-before-you-owe-has-one-major-flaw/.

[55] CFPB, Consumer Financial Protection Bureau: Helping Consumers Help Themselves, July 15, 2015, *at* http://files.consumerfinance.gov/f/201507_cfpb_factsheet-helping-consumers-help-themselves.pdf.

[56] While \$10 billion in assets is the commonly used threshold, it is unreasonably high and includes institutions that cannot reasonably be considered community banks. To give a sense of perspective, \$10 billion in assets is more than the entire endowment of the University of California system or University of Michigan. It is also greater than the annual revenue of the entire National Football League. A more reasonable threshold for what constitutes a community bank would be under \$1 billion (or perhaps \$2 billion) in assets. As of the end of 2014, there were 580 U.S. depositories with between \$1 billion and \$10 billion in assets.

(below) shows, this is the continuation of a long-term trend. In 1992 there were nearly 14,000 depositories in the United States, virtually all of which were community banks. Many small financial institutions failed during the savings and loan crisis, and the removal of interstate branch banking restrictions in 1994 encouraged bank mergers and the emergence of megabanks. Community banks continue to fail, be gobbled up by larger banks, or more rarely grow out of being community banks.[57] For the past twenty-two years nearly 300 community banks have disappeared annually at a remarkably steady rate.

Figure 1. Number of Depositories in United States, 1992-2014[58]



None of the problems of community banks has anything to do with the Dodd-Frank Act, the CFPB or the post-financial crisis consumer financial protection reforms. Community banks' problems are structural and long-standing; they pre-dated the CFPB's existence (much less the key CFPB regulations, which only became effective in January 2014) by decades. There is zero evidence that the CFPB's regulations have been harming community banks. The CFPB and post-financial crisis reforms have actually given community banks a leg up by putting a friendly thumb on the regulatory scale.

Community banks already receive significant relief from consumer finance regulation. Indeed, as an initial matter, it is important to recognize that absent regulatory intervention community banks would not exist in the first place.

The existence of community banks in the United States is a legacy of historic interstate branch banking restrictions, which were repealed in 1994. The United States has nearly 6,000 depository institutions. Only around 100 of those institutions have more

[57] While community banks' share of total banking system assets is shrinking, their total size is actually growing. This is consistent with a more optimistic view that community banks are reasonably healthy, but that large banks continue to enjoy economies of scale and too-big-to-fail benefits.

[58] FDIC Statistics on Depository Institutions (year end figures). The slope of the line has a coefficient of -295, with a r^2 of over 95%, meaning it is very close to a straight line.

than $10 billion in assets, which is the cut-off typically used for defining "community" banks. In other words, virtually all U.S. depositories are community banks, and most of those depositories have under $1 billion in assets. No other country in the world has as many depositories as the United States by a couple of orders of magnitude. What we are witnessing now in the consolidation of the banking industry is the mean reversion one would expect absent restrictions on interstate branch banking.

Even today, regulation helps support the community banking industry. Absent FDIC insurance, depositors would never use small institutions instead of large ones—banks like the State National Bank of Big Springs—simply would not exist but for regulation. And merger approval requirements and entry restrictions help protect the community banking business.

The Dodd-Frank Act codifies special solicitude for community banks through several provisions:

- Community banks are exempt from the Durbin Interchange Amendment's debit card fee regulation.[59] This gives community banks a significant competitive advantage over megabanks, by allowing them to receive higher interchange fees than the megabanks.
- All financial institutions with less than $10 billion in assets are exempt from examination and enforcement actions by the CFPB.[60] There are only 147 banks and credit unions that are subject to CFPB examination and enforcement.[61] Instead, smaller banks and credit unions are examined and subject to enforcement by their regular prudential regulators. This means that community banks have to deal with fewer examinations and are not subject to the scrutiny of a dedicated consumer protection agency.
- In addition to the regular notice and comment requirements of the Administrative Procedures Act, the CFPB is required to go through a special rulemaking process under the Small Business Regulatory Enforcement Fairness Act when it promulgates rules that will affect small businesses, including community banks.[62] The SBREFA process lets small businesses comment on proposed rules when they are in an early stage, before the "train has left the station."

The CFPB has also codified special provisions for community banks in its regulatory implementations of the Dodd-Frank Act, even though it is not required to do so. The CFPB has built in numerous exceptions for smaller financial institutions to its rule:

[59] 15 U.S.C. § 1693o-2(a)(6).
[60] 12 U.S.C. §§ 5515, 5516(d).
[61] CFPB, Consumer Financial Protection Bureau by the Numbers, July 15, 2015, *at* http://files.consumerfinance.gov/f/201507_cfpb_factsheet-by-the-numbers.pdf.
[62] 5 U.S.C. §§ 603(d), 609(d)(2).

- Small creditors (with less than $2 billion in assets) can make mortgage loans at APRs 200 basis points (2%) higher than larger creditors and still qualify for the absolute safe harbor to the Ability to Repay Rule.[63]
- Small creditors (with less than $2 billion in assets) that originate less than 500 mortgage loans per year can qualify for the absolute safe harbor to the Ability to Repay Rule for the loans they retain on portfolio even if those loans have debt-to-income ratios above 43%.[64] If these loans are held in portfolio for three years, they retain their safe harbor even if subsequently sold to another small creditor. [65]
- Small creditors (with less than $2 billion in assets) that operate predominantly in rural and underserved areas are exempt from the requirement of maintaining escrow accounts for high-cost mortgages.[66]
- Small creditors (with less than $2 billion in assets) in rural and underserved areas are exempt from the prohibition on high-cost balloon loans.[67]
- Small creditors in rural and underserved areas may until 2016 make balloon mortgages that qualify for the safe harbor from the ability-to-repay rule.[68]
- Implementation of balloon payment limitations is delayed for two-years (until 2016) for all small creditors (with less than $2 billion in assets) irrespective of whether they operate predominantly in rural or underserved areas.[69]
- Loans made against rural properties are not subject to the same rules regarding appraisals for high-cost mortgage loans.[70]
- Small mortgage servicers are exempted from the Truth in Lending Act requirement of periodic statements.[71]
- Small servicers are exempted from most of the Real Estate Settlement Procedures Act loss mitigation requirements (other than prohibition on commencing foreclosure until 120 days delinquency)
- Entities that handle 100 or fewer remittances per year are exempt from the Remittance Rulemaking under Regulation E under the Electronic Fund Transfers Act.[72]

CFPB has also proposed rules that would expand the definition of "rural" creditor and as well as increase the small creditor debt-to-income exemption from 500 loan originations to 2,000 loans sold annually (and unlimited originations).[73]

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[63] 12 C.F.R. § 1026.43(b)(4), (e)(5).
[64] 12 C.F.R. § 1026.43(e)(5)(i); 1026.35(b)(2)(iii)(B)-(C).
[65] 12 C.F.R. § 1026.43(e)(5)(ii)(A).
[66] 12 C.F.R. § 1026.35(b)(2)(iii).
[67] 12 C.F.R. § 1026.43(e)(6).
[68] 12 C.F.R. § 1026.43(f)(1)(vi).
[69] 12 C.F.R. § 1026.43(e)(6).
[70] 12 C.F.R. § 1026.35(b)(4)(vii)(H)
[71] 12 C.F.R. § 1026.41(e)(4).
[72] 12 C.F.R. § 1005.30(f)(2).
[73] 80 FED. REG. 7769 (Feb. 11, 2015).

Beyond this, the CFPB has voluntarily taken actions to ensure that the voices of small institutions are heard in the regulatory process:

- The CFPB has voluntarily created a Community Bank Advisory Board and a Credit Union Advisory Board, in addition to its statutorily required Consumer Advisory Board.
- The CFPB has included representatives of small financial institutions on its Consumer Advisory Board, which is currently chaired by the chairman of rural community development credit union.

All of this is to say that the CFPB has shown particular solicitude for small financial institutions, attempting to balance their particular concerns and cost structures with the need for uniform consumer protection laws.

Community banks are ailing, but their problems are not because of the CFPB. The central problem for community banks is that size matters in consumer finance. Community banks lack the economies of scale necessary to compete in mortgages and credit cards. Increasingly, they will have trouble competing for deposits as they lose locational advantages to mobile banking platforms and find themselves unable to keep up in the technological cybersecurity arms race. It is unclear whether commercial and agriculture lending alone will be enough to support many community banks. Although the CFPB has actually put a friendly thumb on the regulatory scale to ease regulatory burdens for community banks, no amount of regulatory relief will offset the structural problem faced by community banks. There is really no way to avoid the fact that size matters in consumer finance.

CONCLUSION

Reasonable minds can differ about the policy choices embodied in the Dodd-Frank Act. But the constitutionality of the Dodd-Frank Act is not seriously in question, and the Constitution should not be abused as a tool to achieve policy goals lest its principles begin to be seen as nothing more than what is politically convenient. As we celebrate the fifth anniversary of the Dodd-Frank Act, let us look for ways to improve and extend that legislation rather than attempt to return to the Dark Ages of a poorly regulated financial marketplace.