WHO'S DOWN WITH OCC('S DEFINITION OF "BANKS")?

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ABSTRACT

This article wrestles with a seemingly straightforward question that turns out to be surprisingly complex: what is a bank? The Office of the Comptroller of the Currency (the OCC) recently began offering special purpose national bank (SPNB) charters to entities that are, at best, bank-like. But are they banks or not? Although the OCC considers SPNBs to be banks, not everyone is sure to agree, including bankruptcy judges. The question matters because banks are ineligible for bankruptcy relief. This Article considers the legal and policy arguments that are likely to be presented to bankruptcy judges about whether SPNBs are banks and concludes that bankruptcy judges are likely to disregard the OCC's interpretation and conclude SPNBs are not banks. If SPNBs are bankruptcy-eligible because they are not banks, a host of issues arise. For example, can a SPNB rush to bankruptcy court to take advantage of the automatic stay if the OCC tries to revoke its charter? Will bankruptcy courts or the OCC control the resolution of a financially distressed SPNB? How fast and by what processes will their financial trouble be resolved? This Article explores these questions.

INTRODUCTION

The number and importance of fintech companies, such as Venmo, CashApp, SoFi, Square, PayPal, and Plaid, continue to rise.[1] Some of the companies, like the payment processor PayPal, are often household names. Others have less name-recognition but are widely used. For example, most people have probably used Square's ubiquitous and eponymous credit card reader. Still others are more specialized lenders, such as SoFi—known to refinance student loans for a limited subset of consumers.[2] And Plaid, which provides behind-the-scenes financial services infrastructure that many

1. There is no singular definition of a fintech company. A common definition is that they are "predominantly online, nonbank financial companies using [artificial intelligence or machine learning techniques] to parse unconventional data" in an attempt to increase credit access, lower costs, and/or improve customer satisfaction. *See, e.g.*, Matthew Adam Bruckner, *Artificial Intelligence and Machine Learning: The Opportunities and Challenges of Using Big Data*, in OPEN BANKING (OXFORD U. PRESS 2022, Linda Jeng, ed.); *see infra* note 45.

2. *See* David Zaring, *Modernizing the Bank Charter*, 61 WM. & MARY L. REV. 1397, 1449 (2020) (discussing various banking-adjacent fintech companies and noting several of them ". . . exist on the Internet and can serve anyone with Internet access. . . .").

consumers use, may be the most used and least known fintech out there.[3]

Inevitably, some of these firms, or others like them, will go broke.[4] When they do, there are various legal processes available to address the firms' financial woes and resolve the claims of their employees, landlords, financiers, shareholders, and other stakeholders. Yet the available legal processes are distinctly different depending on whether a distressed firm is a bank or a non-bank entity.[5] As a result, whether an entity is classified as a bank matters.

Bankruptcy is a commonly used pathway for resolving the financial problems of distressed entities, and is available to for-profit businesses, non-profit entities, family farms, individual debtors, and even cities.[6] But a few types of entities are excluded from using bankruptcy, including "banks."[7] Failed banks with deposits insured by the Federal Deposit Insurance Corporation ("FDIC") are typically resolved through an FDIC receivership.[8]

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3. *See* https://plaid.com/company/ [https://perma.cc/Y3SV-E3EW] (last accessed, Mar. 20, 2021).

4. *See* David A. Skeel, Jr., *The Law and Finance of Bank and Insurance Insolvency Regulation*, 76 TEX. L. REV. 723, 726 (1998) [hereinafter Skeel, *Law & Finance*] ("As competition in . . . [banking and insurance] markets has intensified, it has become inevitable that some banks and insurance companies will fail as a consequence of market pressures.").

5. Insurance companies also have a different set of legal processes available.

6. *See, e.g.*, Matthew A. Bruckner, *Special Purpose Municipal Entities and Bankruptcy: The Case of Public Colleges*, 36 EMORY BANKR. DEVELOPMENTS J. 341 (2020) (discussing the availability of bankruptcy relief for public universities).

7. *See* 11 U.S.C. § 109 (detailing who may be a debtor under the U.S. Bankruptcy Code); *see also* Michael I. Sovern, *Section 4 of the Bankruptcy Act: The Excluded Corporations*, 42 MINN. L. REV. 171, 171–72 (1957). Some entities that are not specifically excluded by section 109 are nevertheless denied access to bankruptcy. For example, marijuana-related businesses generally may not be debtors under the Bankruptcy Code. *See* Vivian Cheng, *Medical Marijuana Dispensaries in Chapter 11 Bankruptcy*, 30 EMORY BANKR. DEV. J. 105 (2013). Other entities are not legally excluded but will find that Chapter 11's use presents an effective death sentence. *See, e.g.*, Matthew Adam Bruckner, *Bankrupting Higher Education*, 91 AM. BANKR. L.J. 697, 714 (2017) (discussing why colleges and universities tend not to use bankruptcy). Still, others may use bankruptcy but are "bankruptcy misfits." *See* Laura N. Coordes, *Bespoke Bankruptcy*, 73 FLA. L. REV. 359, 373 (2021)

> [S]ome bankruptcy misfits do exhibit a need for bankruptcy and are not accommodated by the Bankruptcy Code. There is a 'default assumption' among scholars and policymakers that bankruptcy relief should be widely available to those that need it. And although some bankruptcy misfits exhibit a demonstrated need for bankruptcy relief, use of the Bankruptcy Code creates significant problems that may outweigh any practical benefits of the bankruptcy process.

8. Robert R. Bliss & George G. Kaufman, *U.S. Corporate and Bank Insolvency Regimes: An Economic Comparison and Evaluation*, FRB OF CHICAGO WORKING PAPER No. 2006-0142 (Jan. 10, 2006), at 1 [hereinafter Bliss & Kaufman, *Economic Comparison*].

However, not all banks are FDIC insured. The Office of the Comptroller of the Currency ("OCC"), which charters national banks, recently finalized new rules for addressing the financial troubles of the subset of uninsured national banks.[9] While historically this has been a small subset of banks, it is a subset with rapidly increasing importance because it is the form many fintechs may take.

Excluding banks from bankruptcy has traditionally been justified by the differences between banks and non-bank entities, especially the propensity for banks to hold consumer deposits.[10] Bank deposits are widely held by residents, making bank depositors a group that politicians are particularly keen to protect. But there are other traditional justifications for special rules for addressing bank insolvency, including banks' role in regulating the country's money supply, the need to avoid bank runs, and concerns about banks' systemic importance, among others.[11] Whether these traditional justifications are sufficient to defend the exclusion of depository institutions from bankruptcy is contested.[12] But this Article argues these justifications

9. *See* 12 C.F.R. § 51. It is possible that some entities will be resolved through the Orderly Liquidation Authority ("OLA") instead of the OCC receivership process. To be eligible for OLA, an entity must not be an insured depository institution and the Secretary of the Treasury must have determined that

> (1) the financial company is in default or in danger of default; (2) the failure of the financial company and its resolution under otherwise applicable Federal or State law would have serious adverse effects on financial stability in the United States; (3) no viable private sector alternative is available to prevent the default of the financial company; (4) any effect on the claims or interests of creditors, counterparties, and shareholders of the financial company and other market participants as a result of actions to be taken under this subchapter is appropriate, given the impact that any action taken under this subchapter would have on financial stability in the United States; (5) any action under section 5384 of this title would avoid or mitigate such adverse effects, taking into consideration the effectiveness of the action in mitigating potential adverse effects on the financial system, the cost to the general fund of the Treasury, and the potential to increase excessive risk taking on the part of creditors, counterparties, and shareholders in the financial company; (6) a Federal regulatory agency has ordered the financial company to convert all of its convertible debt instruments that are subject to the regulatory order; and (7) the company satisfies the definition of a financial company under section 5381 of this title." 12 U.S.C. § 5383(b) and § 5381(a)(8) (defining a "covered financial company

10. *See infra* Section III.; *see also* Bliss & Kaufman, *Economic Comparison*, *supra* note 8, at 2–3. *But see* Sovern, *supra* note 7, at 172–75 (reviewing the legislative history of the Bankruptcy Act and concluding that the reason why banks are excluded from bankruptcy is not well-established).

11. *See infra* Section III.

12. *See also* Bliss & Kaufman, *Economic Comparison*, *supra* note 8, at 3, n.3 ("The 'banks are special' argument focuses primarily on the banking system as whole and individual

cannot justify the exclusion of non-depository institutions from bankruptcy, as the OCC's regulatory scheme plans to do.[13]

Whether an entity can access the bankruptcy system has important implications, both for the nation and for the entity's management, creditors, and customers.[14] The OCC's bank resolution process differs from the bankruptcy process in important ways, including: who initiates the financial resolution process, control over the process, participation rights for interested parties, the automatic stay, and others.[15] In particular, the Bankruptcy Code favors retaining existing management's control over the entity during the bankruptcy case and attempting to rehabilitate debtors by, among other things, staying all actions against the debtor or its property during the course of the bankruptcy case.[16] By contrast, the OCC

large systemically important banks. Less of a case has been articulated for the special importance of individual small banks."). *Compare* Richard M. Hynes & Steven D. Walt, *Why Banks are Not Allowed in Bankruptcy*, 67 WASH. & LEE L. REV. 985, 991 (2010) ("Unlike corporate bankruptcy, bank resolution procedures concentrate decision-making in a single entity with the financial interest in making the right decision about how to dispose of the assets.") *with* Kenneth Ayotte & David A. Skeel, Jr., *Bankruptcy or Bailouts?*, 35 J. CORP. L. 469, 481 (2010) ("Drexel showed, nearly two decades before Lehman, that bankruptcy need not take too long to effectively resolve the financial distress of a financial institution.").

13. *See generally* Arthur E. Wilmarth, Jr., *The OCC's and FDIC's Attempts to Confer Banking Privileges on Nonbanks and Commercial Firms Violate Federal Laws and Are Contrary to Public Policy*, 39 BANKING & FIN. SRVC.'S POL'Y REP. 1 (2020). *But see* RECEIVERSHIPS FOR UNINSURED NATIONAL BANKS, OFFICE OF THE COMPTROLLER OF THE CURRENCY, [Docket ID OCC-2016-0017], https://www.occ.gov/news-issuances/news-releases/2016/nr-occ-2016-160a.pdf [https://perma.cc/39EH-7U9H] at *10, n.4 ("The OCC is not aware of any opinion of a U.S. Bankruptcy Court, or any other U.S. court, finding that an uninsured national bank is eligible to be a debtor subject to a petition under the Code.");

14. *See infra* Section IV.

15. *See infra* Section IV. and Appendix; *cf*. Robert R. Bliss & George G. Kaufman, *A comparison of U.S. corporate and bank insolvency resolution*, *Economic Perspectives*, Vol. 30, 2nd, No. 2, 2006, https://www.chicagofed.org/publications/economic-perspectives/2006/2qtr-part4-bliss-kaufman [https://perma.cc/M2RX-PKXY] [hereinafter Bliss & Kaufman, *Comparison*]. This paper will not draw a comparison to OLA for several reasons, including my view that the failure of firms with a SPNB charter are not likely to have "serious adverse effects on financial stability in the United States." 12 U.S.C. § 5383(b)(2). *See infra* text following note 50. Some commentators disagree. *See, e.g.*, HILARY J. ALLEN, DRIVERLESS FINANCE, 222 (forthcoming OXFORD U. PRESS 2022) (". . . fintech isn't 'too small to care' about. Regulators' current 'wait and see' approach is sometimes justified on the grounds that fintech is too niche a sector to have a real impact on financial stability, but this view is misinformed at best, and disingenuous at worst.")

16. This is only true as a general matter. *See* Bliss & Kaufman, *Comparison*, *supra* note 15 (discussing how the Bankruptcy Code offers greater rights for existing management than the OCC receivership process and noting that restructuring is possible in bankruptcy but not in an OCC receivership). More recently, bankruptcy sales and restructuring support agreements have grown in importance and lenders are routinely able to displace old management. *See, e.g.*, Kenneth Ayotte & Jared Elias, *Bankruptcy Process for Sale*,

receivership process is an administrative, rather than judicial, process that displaces existing management and shareholders.[17] Differences are further summarized in the Appendix.

(unpublished manuscript on file with the author) (Dec. 4, 2020 draft) (providing empirical support that "[t]he lenders that fund Chapter 11 reorganizations exert significant influence over the bankruptcy process through the contract associated with the debtor-in-possession ('DIP') loan."); David A. Skeel Jr., *Distorted Choice in Corporate Bankruptcy*, 130 YALE L. J. 366, 373–74 (2020) (arguing that distortive techniques surrounding restructuring support agreements ought to be permitted because "[f]inancial distress must now be resolved much more quickly, both because the value of many troubled companies is evanescent and because lenders and other creditors use debtors' need for liquidity as leverage to compress the timeline of the case."); Edward J. Janger & Adam J. Levitin, *The Proceduralist Inversion – A Response to Skeel*, 130 YALE L. J. 335, 350 (2020) (in contrast to Skeel, Janger and Levitin offer a proceduralist approach by "advocat[ing] three reforms to limit the ability of various types of claimants to exercise power over plan confirmation beyond that reflected by their real economic interest."); Barry E. Adler, *The Creditors' Bargain Revisited*, 166 U. PA. L. REV. 1853 (2018); Robert K. Rasmussen, *Taking Control Rights Seriously*, 166 U. PA. L. REV. 1749, 1755, 1757 (2018) (noting " . . . the past two decades have seen an increase in the ability of debt holders to influence the conduct of the business and the course of the Chapter 11 proceeding. It is now commonplace for creditors to be the driving force behind reorganization efforts." Also demonstrating how "[l]ending contracts . . . often provide a basis by which the lender can affect and constrain management's exercise of the control that it enjoys over the company."); Matthew A. Bruckner, *Improving Bankruptcy Sales by Raising the Bar: Imposing a Preliminary Injunction Standard for Objections to § 363 Sales*, 62 CATH. U. L. REV. 1, 22 & n.142 (2012) [hereinafter, Bruckner, *Bankruptcy Sales*] (highlighting " . . . the perception that . . . secured creditors have too much influence over the debtor [in sales] . . . particularly if they have provided the debtor-in-possession financing on which the debtor is relying or if they have liens on the debtor's cash collateral.").

17. *See* Helen Garten, *What Price Bank Failure?*, 50 OHIO ST. L.J. 1159, 1172 (1989) (". . . regulatory dispositions of failed banks generally result in the prompt removal of shareholders and management from the bargaining process. Whether the bank is liquidated or its assets and liabilities are transferred to another bank, its managers immediately lose their jobs."); *see also* Bliss & Kaufman, *Comparison*, *supra* note 15, at 44

> In particular, the general corporate bankruptcy code in the U.S. tends to favor debtors over creditors and, especially for large insolvent firms, in-place managers and attempted rehabilitation (Chapter 11) rather than liquidation (Chapter 7). In contrast, the bank insolvency code favors depositors (usually the major class of bank creditors) over debtors, and encourages speedy legal closure and resolution at the expense of in-place management and attempts at rehabilitation. Differences with the general corporate bankruptcy code are further widened through an emphasis on formalized early intervention prior to insolvency, quick declaration of insolvency, prompt termination of the bank charter and shareholder control rights, ousting of senior management, strict enforcement of legal priorities of the different creditor classes, potential speed of resolution, lack of creditor standing, limited judicial review, and administrative, rather than judicial, proceedings. The fundamentally different approaches to insolvency resolution of banks and nonbanks derive in part from differences in the goals that these procedures seek to achieve.

In December 2016, the OCC finalized the rules that it intends should govern the resolution of uninsured national banks.[18] Nineteen months later, the OCC announced that it would begin accepting applications for its so-called Special Purpose National Bank (SPNB) charters from non-depository fintech lending firms.[19] Since then, the OCC has also begun accepting applications for a SPNB charter for companies that handle payments.[20] Its authority to do so has been fiercely contested as being *ultra vires* and remains deeply uncertain at this time because of litigation against the OCC, litigation that has been brought repeatedly by the New York State Department of Financial Services (NYSDFS) and the Conference of State Bank Supervisors (CSBS).[21]

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18. *See* 12 C.F.R. § 51.

19. *See* OCC, *Policy Statement on Financial Technology Companies' Eligibility to Apply for National Bank Charters* (July 31, 2018), available at: https://www.occ.treas.gov/publications/publications-by-type/other-publications-reports/pub-other-occ-policy-statement-fintech.pdf/ [https://perma.cc/8AY5-ETJW] [hereinafter OCC, Policy Statement].

20. *See* OCC, *Exploring Special Purpose National Bank Charters for Fintech Companies* (2016), at 2 https://www.occ.gov/topics/supervision-and-examination/responsible-innovation/comments/pub-special-purpose-nat-bank-charters-fintech.pdf/ [https://perma.cc/WYC3-XCUK] (last accessed Mar. 21, 2021) [hereinafter, OCC, *Exploring SPNB Charters*] (writing that it may be in the "public interest" to offer bank charters to nonbank companies that offer banking-related products); *see also* Mindy Harris, *OCC Previews Plans to Introduce Special Purpose National Bank Charter for Payment Companies*, CONSUMER FIN. MONITOR (July 9, 2020), https://www.consumerfinancemonitor.com/2020/07/09/occ-previews-plans-to-introduce-special-purpose-national-bank-charter-for-payment-companies/ [https://perma.cc/HME9-6AR8] ("As envisioned, the payments charter would replace the state-by-state money transmitter licensing approach currently used by many non-bank payment processors and FinTechs.").

In addition, at least two crypto companies have recently received special purpose trust bank charters from the OCC. *See* Nikhilesh De & Ian Allison, *Anchorage Becomes First OCC-Approved National Crypto Bank*, COINDESK (Jan. 14, 2021, 11:33 AM), https://www.coindesk.com/anchorage-becomes-first-occ-approved-national-crypto-bank (Anchorage) [https://perma.cc/G6SQ-BHYY]; John Reosti, *OCC approves trust charter for second crypto firm*, AM. BANKER (Feb. 05, 2021, 4:46PM), https://www.americanbanker.com/news/occ-approves-trust-charter-for-second-crypto-firm (Protego) [https://perma.cc/9W83-SBHA]. The analysis contained herein should generally apply to those entities as well, as their charters are national bank charters. Other crypto firms have received bank charters from state regulators. *See* Patrick J. Boot & Marysia Laskowski, *Wyoming Issues Second Crypto Bank Charter*, NAT'L L. REV. (Nov. 10, 2020), https://www.natlawreview.com/article/wyoming-issues-second-crypto-bank-charter [https://perma.cc/24JZ-WHWG]. The analysis is different for these firms because, as explained further in the state classification test section below, those firms are defined as banks in the chartering state.

21. The OCC lost on the merits in 2019 to the NYDFS, but that decision was reversed for lack of standing by the Second Circuit. *See* Lacewell v. Office of Comptroller of Currency, No. 19-4271, (2d Cir. June 3, 2021), https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2021/06/f1.pdf [https://perma.cc/9P4P-AMBF]. If the OCC ever grants a SPNB charter, the NYDFS is likely to reassert their claims.

But even if the OCC's decision to issue SPNB charters to fintech companies is ultimately validated, it is not clear the rules the OCC intends to apply to the resolution of these firms will ever be used. After all, the OCC's decision to label a non-depository entity a "bank" may not be recognized by other regulators or by courts because the OCC intends to offer bank charters to entities that are, at best, only bank-like. Like that contract law case that bedevils law students with questions of " . . . what is [a] chicken?,"[22] whether an entity is a " . . . 'bank' is not self-evident. . . ."[23]

The remainder of this paper is organized as follows. Section one discusses various features of the OCC's new fintech lending and payment charters, including the purpose of the charter, which entities are eligible, the advantages of a bank charter, and some of the concerns with the SPNB charter. This section also discusses litigation over the OCC's authority to issue a SPNB charter.

Section two considers whether the OCC's decision to issue a SPNB charter to a fintech company would transform that entity into a bank for bankruptcy purposes. As the term "bank" is not defined in the Bankruptcy Code, this section focuses on the three judicially created tests for determining whether an entity is a bank (and therefore ineligible for bankruptcy). The two most commonly used tests to determine whether an entity is a bank for Bankruptcy Code purposes—the state classification test and the independent classification test—point in opposite directions. This section also analyzes whether the definitions of "bank" from the Bank Holding Company Act and from the Federal Deposit Insurance Act have bite in the context of SPNBs, concluding that they do not.[24] Thus, current doctrine cannot tell us whether SPNBs are "banks" within the meaning of the Bankruptcy Code.

As a result, Section three explores some of the historic rationales for excluding banks from bankruptcy to see if they justify excluding SPNBs from bankruptcy. These rationales include most banks' status as depository institutions and the harm caused to depositors when banks close unexpectedly, the fragility of banks and potential harm to the broader economy when banks close unexpectedly, the existence of alternative liquidation procedures, banks' role in providing liquidity to the economy, and several other rationales. This Article applies these rationales to the case of an entity with a SPNB charter and concludes that most have little

22. Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116 (S.D.N.Y. 1960).

23. Saule T. Omarova & Margaret E. Tahyar, *That Which We Call a Bank: Revisiting the History of Bank Holding Company Regulations in the United States*, 31 REV. OF BANKING AND FIN. L. 113, 115 (2011-2012).

24. *See infra* text accompanying notes 136-155.

relevance. On balance then, this Article concludes that the policy case for excluding OCC-chartered fintech companies—SPNBs—from bankruptcy is a weak one, particularly for non-depository fintech lenders.

Finally, Section four explains why this conclusion matters to customers, companies, and their financiers. It does so by highlighting the most salient differences between bankruptcy and the OCC's receivership processes. This section also helps explain when and why bankruptcy is likely to be preferred by a SPNB's creditors or other stakeholders and when these parties are likely to contest the OCC's decision to initiate its new liquidation procedures for SPNBs. For example, a SPNB's creditors will prefer bankruptcy to the OCC process when they think the entity would be more valuable after restructuring its obligations instead of being liquidated, because bankruptcy is biased towards reorganization and away from liquidation, but the OCC process is primarily a liquidation process.[25] A conclusion follows.

I. THE OCC'S FINTECH CHARTER

The OCC has decided, on the basis of contested legal authority,[26] to offer national bank charters to entities that do not take FDIC-insured deposits but instead merely lend money or facilitate payments.[27] As the OCC explained, "[a] national bank charter is a federal form of corporate organization that authorizes a bank to conduct business on a nationwide basis and subjects the bank to uniform standards and rigorous federal oversight."[28]

For example, SPNBs will be subject to the same laws, rules, regulations, and federal supervision that apply to all national banks, including the minimum leverage and risk-based capital requirements.[29] The OCC will not

25. *See infra* text accompanying notes 239–241. That said, the OCC regulations appear to allow for purchase and assumption transactions.

26. *See* Lacewell v. Office of Comptroller of Currency, No. 19-4271, (2d Cir. June 3, 2021), https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2021/06/f1.pdf [https://perma.cc/2VQQ-9KYC]; *see also* Wilmarth, *supra* note 13, at 3 ("Congress's 1978 amendment to Section 27(a) confirms that the NBA does not allow the OCC to approve nondepository charters for national banks other than special-purpose trust companies.").

27. *See supra* note 20.

28. *See* OCC, *Exploring SPNB Charters*, *supra* note 20, at 4 ("All national banks, including special purpose national banks, are organized under, and governed by, the National Bank Act.").

29. *See* 12 C.F.R. Part 3; *Comptroller's Licensing Manual Supplement: Considering Charter Applications From Financial Technology Companies*, OFF. OF THE COMPTROLLER OF THE CURRENCY (2018), https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-licensing-manual/files/considering-charter-apps-from-fin-tech-companies.html [https://perma.cc/7AP8-ZBW6] (last accessed, Mar. 21, 2021) [hereinafter, *Licensing Supplement*]; OCC, *Exploring SPNB Charters*, *supra* note 20, at 4 ("A special purpose

grant a charter unless the proposed bank has complied with all statutory and regulatory requirements and has met the OCC's chartering standards.[30] The charter-seeking fintech entity must also demonstrate a commitment to financial inclusion that includes providing or supporting fair access to financial services and fair treatment of customers.[31] And it must develop a contingency plan to address significant financial stress that could threaten the viability of the entity.[32]

To date, no entity has received a SPNB charter. The application process for a SPNB charter is similar to the one used for other OCC bank charters.[33] Importantly, the OCC has said that it would consider applications for SPNB charters " . . . from financial technology (fintech) companies that are engaged in the business of banking but do not take deposits."[34] But it has not defined what it means for an entity to "take deposits." For fintech firms that are primarily engaged in lending money to borrowers, it seems clear that they do not take deposits because they are providing funding *to* borrowers and not taking money *from* borrowers. By contrast, for fintech firms that are primarily engaged in transmitting money between people—like CashApp, Paypal, and Venmo—it is quite easy to argue that these firms take deposits, at least in a colloquial sense.[35] For example, Venmo has begun offering a

national bank may engage only in activities that are permissible for national banks . . . [and] is subject to the same laws, regulations, examination, reporting requirements, and ongoing supervision as other national banks.").

30. The OCC's chartering standards include that there is a reasonable chance that the proposed bank will be operated in a safe and sound manner, provide fair access to financial services, promote fair treatment of customers, and ensure compliance with applicable laws and regulations. *See Licensing Supplement*, *supra* note 29. This does, of course, raise the question of who would want a SPNB charter since it has most of the burdens of a regular bank charter without the benefit of funding loans with low-cost deposits. *See* Brian Knight, *Federalism and Federalization on the Fintech Frontier*, 20 VAND. J. ENT. & TECH. L. 129, 200 (2017) ("If the OCC's charter simply applies regulations built for universal banks to much more limited companies, or if it otherwise imposes significant costs, it may be of little value to new entrants that lack the resources to manage the associated regulatory burden.").

31. *See Licensing Supplement*, *supra* note 29.

32. *See Licensing Supplement*, *supra* note 29.

33. *See Licensing Supplement*, *supra* note 29; OCC, *Exploring SPNB Charters*, *supra* note 20, at 5

> The OCC's chartering regulation and licensing policies and procedures also would apply to a special purpose national bank. The established charter policies and procedures are set forth in 12 CFR Part 5 and the 'Charters' booklet of the *Comptroller's Licensing Manual* and are discussed in the Chartering process section below.

34. *See* OCC, *Policy Statement*, *supra* note 19.

35. *Cf.* Andrés Guadamuz González, *PayPal: The Legal Status of C2C Payment Systems*, COMP. L. AND SEC. REP. 293, 296 (2004) (explaining "Deposit has been defined by the

debit card and it advertises that "Venmo Debit Card goes where you go, and brings your Venmo balance along."[36] But for the reasons discussed further below, these entities appear to share more similarities with money transmitters than with banks.[37]

Fintech companies might consider applying for a SPNB charter to obtain " . . . the same status and attributes under federal law as a full-service national bank,"[38] because according to the OCC, an entity that obtains a SPNB charter will be a national bank.[39] Because national banks receive their charter directly from the OCC (rather than from any particular state),[40]

Directive 94/19/EC as a credit balance that results from funds entered into an account and which the credit institution must pay back" and arguing that Paypal is a " . . . bank for all regulatory purposes.").

36. https://venmo.com/about/debitcard/ [https://perma.cc/6DHQ-ESNY].

37. *See* Madison Thompson, *Money Transmitters Face Ambiguity In State, Federal Law*, Troutman Pepper (Dec. 4, 2018), https://s3.amazonaws.com/documents.lexology.com/632480c8-9c16-4062-aaf9-9f8a256ba86a.pdf?AWSAccessKeyId=AKIAVYILUYJ754JTDY6T&Expires=1629143464&Signature=pxaNpuK1D5FvG%2BLFWz5Xl7hbnBk%3D [https://perma.cc/R3H2-AN6E] (quoting 31 C.F.R. § 1010.100(ff)(5) (2018))

> (A) A person that provides money transmission services. The term "money transmission services" means the acceptance of currency, funds, or other value that substitutes for currency from one person and the transmission of currency, funds, or other value that substitutes for currency to another location or person by any means. "Any means" includes, but is not limited to, through a financial agency or institution; a Federal Reserve Bank or other facility of one or more Federal Reserve Banks, the Board of Governors of the Federal Reserve System, or both; an electronic funds transfer network; or an informal value transfer system. . . .

38. OCC, *Exploring SPNB Charters*, *supra* note 20, at 5.

39. *See* 12 U.S.C. § 1813(a)(1)(A) (defining a bank as " . . . any national bank and State bank, and any Federal branch and insured branch").

40. *See* 12 U.S.C. § 21 through 12 U.S.C.S. § 95b, including 12 U.S.C. § 24 (providing "Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate . . . "); *see also* 12 U.S.C. § 35 (discussing national banks that are a bank " . . . incorporated by special law of any State or of the United States or organized under the general laws of any State or of the United States . . . "); Instructions – Articles of Association, OFF. OF THE COMPTROLLER OF THE CURRENCY, https://www.occ.gov/static/licensing/form-instruct-articles-assoc-v2.pdf [https://perma.cc/KU9N-KXXV]; *Licensing Manual: Articles of Association, Charter, and Bylaw Amendments*, OFF. OF THE COMPTROLLER OF THE CURRENCY (2017), https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-licensing-manual/files/licensing-booklet-articles-of-assoc-charter-bylaw-amend.html [https://perma.cc/PN8T-LCZY]; Brief of Thirty-Three Banking Law Scholars as *Amici Curiae* in Support of Appellee, *Lacewell v. OCC*, at 23–24 [hereinafter Banking Law Scholars Brief]; *cf*. Atherton v. FDIC, 519 U.S. 213, 219 (1997) (discussing Congress' undisputed power to, among other things, form national banks.); Boyd v. Schneider, 124 F. 239, 242 (N.D. Ill. 1903) ("National banks are the creatures of the national legislature.").

national banks have been called " . . . the most significant exception . . . " to the " . . . bedrock principle of American business law that corporate formation and governance are the province of state, not federal, law."[41] National formation may have important implications for assessing whether these entities will be treated like banks for bankruptcy's purposes.[42]

There are at least three advantages of being a national bank.[43] First, a national bank need not comply with certain state licensing requirements. For example, some states require that state-chartered banks operating within their boundaries have a brick-and-mortar presence in that state.[44] The ability to avoid such requirements could be very attractive to non-depository fintech companies, which often operate the bulk of their operations entirely online.[45]

41. Banking Law Scholars Brief, *supra* note 40, at 23–24.

42. *See infra* text accompanying notes 89–93.

43. A fourth potential advantage is that national banks *may* be able to gain access to heavily subsidized loans from the Federal Reserve. And if an entity is granted access to such loans, it increases the incentives for federal bank regulators to regulate those firms and thereby protect the federal fisc. *See* Brian Knight, *BankThink Fed Should Open the Payments System to Fintechs*, AM. BANKER (Jan. 24, 2019, 10:00 AM), https://www.americanbanker.com/opinion/fed-should-open-the-payments-system-to-fintechs [https://perma.cc/AE7Q-3XY9] (highlighting the Federal Reserve's reluctance to allow fintech companies access to its payment system); Sabrina Chartrand, *The OCC's Step Towards Innovation: The Fintech Charter*, 38 REV. BANKING & FIN. L. 511, 517 (2019); Barbara S. Mishkin, *Fed reported to have reservations about fintech charter*, CONSUMER FINANCE MONITOR (Jan. 14, 2019), https://www.consumerfinancemonitor.com/2019/01/14/fed-reported-to-have-reservations-about-fintech-charter/ [https://perma.cc/EU5G-XHKK] ("Federal Reserve officials have expressed reservations about allowing such access to fintech companies.").

44. Zaring, *supra* note 2, at 1451 ("Some states require a brick and mortar presence before a state banking charter can be obtained, but fintech lenders have business plans premised on the ability to avoid these sorts of institutional investments."). This does not, by itself, explain why they would want a SPNB charter instead of a traditional bank charter. In *Federalism and Federalization on the Fintech Frontier*, Brian Knight discusses some rationales for justifying the federalization of banking policy. *See* Knight, *Federalism and Federalization on the Fintech Frontier*, *supra* note 32, at 184-198. Curiously, some national banks continue to comply with many state licensing laws even though those laws may be preempted. *See* Wells Fargo Bank v. Boutris, 419 F.3d 949 (9th Cir. 2005) (holding that national banks do not need state licenses to engage in lending). For example, Varo Bank—which is among the first fintech lenders to hold a national bank charter (but not a SPNB charter)—appears to have twenty-one active state lending licenses. *See* https://www.varomoney.com/licenses/ [https://perma.cc/9RAJ-PDW3]. Perhaps Varo and other national banks are just being good neighbors. But it might also be that the line between generally applicable laws that national banks need to follow and preempted laws is not particularly clear.

45. *See* Matthew A. Bruckner, *The Promise and Perils of Algorithmic Lenders' Use of Big Data*, 93 CHI.-KENT L. REV. 3, 12–13 (2018) [hereinafter Bruckner, *Promise and Perils*] (defining fintech lenders as non-bank financial companies that operate mostly online and use non-traditional methods—such as Big Data and machine learning—to evaluate prospective borrowers' creditworthiness and market their products, sometimes to nontraditional

Second, holders of SPNB charters may also be exempt from complying with other state laws, including usury limits and certain fair lending laws, because those laws would be preempted.[46] Third, they can also reduce the number of entities they report to by consolidating supervision under the OCC's authority.[47] A variety of other rationales have also been proffered.[48]

Commentary on the SPNB charter has been mixed. Some commentators laud the OCC's charter innovation, suggesting that some of the companies that may pursue the SPNB charter are small fintech startups bringing innovative new ideas to a stale and stodgy sector of the economy.[49] In this view, fintech companies are small, scrappy upstarts disrupting the banking orthodoxy. In addition, they suggest that it could disrupt the business of banking if larger companies, such as Amazon, Apple, Facebook, and Google, pursue a SPNB charter.[50] In my own view, larger companies are more likely to pursue bank charters than smaller ones because of the compliance costs involved. That said, if Walmart's experience in trying to

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borrowers); *see also* Christopher K. Odinet, *Consumer Bitcredit and Marketplace Lending*, 69 ALA. L. REV. 781, 787–88 (2018) (offering a similar definition).

46. *See* Brief of the Center for Responsible Lending, National Consumer Law Center, and National Community Reinvestment Coalition as *Amici Curiae* in Support of Appellee, Lacewell v. OCC, at 1–2 ("The foremost reason why nonbanks will seek out a 'special purpose national bank' is to take advantage of preemption of state consumer protection laws, particularly interest rate caps."); *see also* Saule T. Omarova, *Dealing with Disruption: Emerging Approaches to Fintech Regulation*, 61 WASH. U. J. L. & POL'Y 25 (2020). Some commentators think that this would be a problem. *See, e.g.*, Kristin Johnson, Frank Pasquale & Jennifer Chapman, *Artificial Intelligence, Machine Learning, and Bias in Finance*, 88 FORDHAM L. REV. 499 (2019).

47. Zaring, *supra* note 2, at 1448 (" . . . national charters offer the promise of a single regulator and the possibility of a technically superior, if more expensive, form of supervision."); Knight, *Federalism and Federalization on the Fintech Frontier*, *supra* note 30.

48. *See Licensing Supplement*, *supra* note 29. Another possible reason to get a SPNB charter is to apply for access to the Federal Reserve's discount window or to the special relief facilities the Federal Reserve sometimes offers for institutions experiencing liquidity problems. *See* Chartrand, *supra* note 43.

49. Zaring, *supra* note 2, at 1451 (explaining that fintech lenders and payments companies would both be attracted to reducing their " . . . licensing and regulatory cost[s] by consolidating supervision under one primary national regulatory structure.") (quoting U.S. Dep't of the Treasury, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: NONBANK FINANCIALS, FINTECH, AND INNOVATION, 71 (July 31, 2018), https://home.treasury.gov/sites/default/files/2018-08/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financials-Fintech-and-Innovation.pdf [https://perma.cc/82VN-6XV8]).

50. Zaring, *supra* note 2, at 1452 (discussing the bank-like products offered by each of these "most serious disrupters"); *see also* Donna Fuscaldo, *Fintechs Will Have Some Big Tech Competition In 2020*, FORBES (Dec. 31, 2019, 9:18AM), https://www.forbes.com/sites/donnafuscaldo/2020/12/31/fintechs-will-have-some-big-tech-competition-in-2020/?sh=61dc78ae44a8 [https://perma.cc/X83R-SECC].

obtain a bank charter tells us anything, it is that it is not easy for some of the world's largest companies to obtain a bank charter.[51] In other words, if any entity successfully obtains a SPNB charter, it is likely to be larger than a tech start up but smaller than the Walmarts of the world.

My view aligns with that of those commentators who have bemoaned the possibility that the OCC's decision could radically remake the U.S. economy by inviting " . . . much of the finance, insurance, and real estate sector . . . into a federal charter."[52] These critics note that a SPNB charter could, in theory, be available to "[p]ayment[s] processors, credit card networks, investment advisers, hedge funds, private equity funds, securities exchanges, derivatives clearinghouses, finance companies, payday lenders, securitization vehicles, and mortgage Real Estate Investment Trusts" and that this would radically expand our idea of what it means to be a "bank."[53] Some of these worries have already come to pass.

Moreover, the NYSDFS and the CSBS have repeatedly sued the OCC, claiming that the proposed charter oversteps the OCC's chartering authority.[54] The OCC has successfully fended off litigation so far because of plaintiff's lack of standing, but further substantive litigation seems exceedingly likely.[55] However, the litigation over the fintech charter itself may be causing some fintech companies to pursue traditional national bank charters instead of the new SPNB charter.[56] For example, Figure, Varo and

51. *See* Bernard Wysocki Jr., *How Broad Coalition Stymied Wal-Mart's Bid to Own a Bank*, WALL ST. J. (Oct. 23, 2006 12:01AM), https://www.wsj.com/articles/SB116118495912296504 [https://perma.cc/J4ZV-F7F5].

52. Banking Law Scholars Brief, *supra* note 41, at 25.

53. Banking Law Scholars Brief, *supra* note 41, at 25–26.

54. *See* Zaring, *supra* note 2, at 1459 (noting state bank supervisors have opposed the SPNB charter, but that the initial lawsuits were dismissed as premature); *see also Lacewell v. Office of Comptroller of Currency*, No. 19-4271, (2d Cir. June 3, 2021), https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2021/06/f1.pdf [https://perma.cc/9ZV4-PF3J]; *cf.* Jeremy T. Rosenblum, James Kim & Scott A. Coleman, *Conference of State Bank Supervisors files new lawsuit to block OCC approval of Figure Technologies charter application*, CONSUMER FIN. MONITOR (Jan. 5, 2021) (discussing various lawsuits by the CSBS against the OCC related to charter applications), https://www.consumerfinancemonitor.com/2021/01/05/conference-of-state-bank-supervisors-files-new-lawsuit-to-block-occ-approval-of-figure-technologies-charter-application/ [https://perma.cc/H83U-WARE].

55. *See Lacewell v. Office of Comptroller of Currency*, No. 19-4271, (2d Cir. June 3, 2021), https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2021/06/f1.pdf [https://perma.cc/2Q5X-QZXA] (describing the various lawsuits the OCC successfully defeated).

56. Though it is not clear that the SPNB charter was ever going to attract a lot of serious interest. Other OCC charter innovations have only had a handful of takers. *See, e.g.*, Zaring, *supra* note 2, at 1463 (discussing various innovations in chartering, such as credit card banks and trust charters, and noting there are only nine credit card banks and fifty-five trust chartered

SoFi have all received at least preliminary approval for a traditional national bank charter.[57]

But even if the OCC eventually grants a SPNB charter and prevails in ligation likely to be brought by state banking supervisors, a host of potential issues remain unanswered. Several of these issues revolve around how creditors and other parties-in-interest would fare if a non-depository fintech "bank" were to become financially distressed. Although the OCC has approved a final rule to address the insolvency of uninsured national banks in a receivership, those processes have never been used.[58] And the rule is sufficiently bare bones that there is substantial uncertainty about how it would apply. In addition, an entity with a SPNB charter might prefer to use bankruptcy. Whether a SPNB would be a "bank" for Bankruptcy Code purposes is the question taken up next.

II. ARE SPNBS "BANKS" FOR BANKRUPTCY PURPOSES?

The Bankruptcy Code excludes certain entities, including a "bank, savings bank, cooperative bank, savings and loan association, . . . credit union, or industrial bank or similar institution which is [a FDIC] insured bank" from being a debtor in a bankruptcy case.[59] Thus, whether a SPNB would be eligible for bankruptcy depends on whether they are considered a "bank." And so, this Article asks, what is a bank? As Saule T. Omarova & Margaret E. Tahyar write, "contrary to what most ordinary Americans may think, what makes an institution a 'bank' is not self-evident and depends on

entities).

57. *See Office of the Comptroller of the Currency Conditionally Approves SoFi's Application to Establish a National Bank*, OFF. OF THE COMPTROLLER OF THE CURRENCY (Oct. 28, 2020), https://www.occ.gov/news-issuances/news-releases/2020/nr-occ-2020-141.html [https://perma.cc/WER6-VUPG]; Letter from Stephen A. Lybarger, Deputy Comptroller for Licensing, Office of the Comptroller of the Currency, to Paul Mayer, Vice President of Strategy, Soc. Fin., Inc. (Oct. 27, 2020), https://www.occ.gov/news-issuances/news-releases/2020/nr-occ-2020-141a.pdf [https://perma.cc/H4Q9-PJ34]. https://uk.reuters.com/article/us-sofi-bank-charter/fintech-startup-sofi-gets-preliminary-approval-for-u-s-bank-charter-idUKKBN27D27W [https://perma.cc/RQA6-BB7J]; *Acting Comptroller of the Currency Presents Varo Bank, N.A. Its Charter*, OFF. OF THE COMPTROLLER OF THE CURRENCY (July 31, 2020), https://www.occ.treas.gov/news-issuances/news-releases/2020/nr-occ-2020-99.html [https://perma.cc/AL3W-LBB3] (approving Varo's charter); *Why Figure Applied for the US National Bank Charter and What It Means for the Industry*, FIGURE (Dec. 1, 2020), https://www.figure.com/blog/why-figure-applied-for-the-us-national-bank-charter-and-what-it-means-for-the-industry/ [https://perma.cc/KN97-P5SX].

58. Differences between the OCC's new wind-down process for SPNBs and the Bankruptcy Code are described more fully in the attached Appendix and some of the key differences are discussed in Part IV.

59. *See* 11 U.S.C. § 109(b)(2).

whether the statute defines it as such."[60] Unfortunately, the Bankruptcy Code does not define these terms. While the OCC may consider a SPNB to be a bank, bankruptcy judges are not bound to agree.[61] And, for the reasons set forth in this section, this Article argues that they are not likely to agree.[62]

It's true, as the OCC wrote, that there are no opinions "of a U.S. Bankruptcy Court, or any other U.S. court, finding that an uninsured national bank is eligible to be a debtor subject to a petition under the Code."[63] However, the lack of decisions highlighted by the OCC does not support a conclusion that uninsured national banks are not eligible for bankruptcy, especially considering how few uninsured national banks have been wound down.[64] And, courts have found determined that uninsured state-chartered banks are bankruptcy-eligible.[65]

For example, in *In re Colo. Indus. Bank of Fort Collins*, the court allowed an uninsured, Colorado-chartered industrial bank to remain in bankruptcy. The Colorado State Bank Commissioner had sought to dismiss the entity's chapter 11 petition,[66] arguing that the entity was a bank within

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60. Omarova & Tahyar, *supra* note 23, at 115.

61. Although this exact issue does not appear to have arisen previously, an analogous problem has arisen in the case of business trusts. In that case, the court determined that "the weight of authority" cuts against deference to the chartering entity. *Compare* In re EHT US1 Inc., 21-10036 at *20 (Bankr. D. Del. June 1, 2021) (citing *Butner* for the proposition that the court should look to the law of an entity's incorporation—Singapore in this case—to determine if the entity is the type of trust eligible for bankruptcy relief) *with* Catholic Sch. Emps. Pension Tr. v. Abreu (*In re* Catholic Sch. Emps. Pension Tr., 599 B.R. 634, 654 (1st Cir. B.A.P. 2019) ("there is consensus that federal law should govern the determination of eligibility for trusts"). *See also infra* text accompanying notes 106-107.

62. Congress could, of course, change the rules of the road and specifically exclude SPNBs from bankruptcy. Congress' creation of the Orderly Liquidation Authority in 2010 via the Dodd-Frank Act may signal lawmakers belief that bankruptcy is not well-suited to address the financial distress of bank-like financial companies.

63. 81 Fed. Register 92597 (Dec. 20, 2016), https://thefederalregister.org/81-FR/Issue-244/FR-2016-12-20.pdf [https://perma.cc/R7KH-5VUE].

64. For example, there have never been very many non-depository credit card banks, and none of them appear to have been a debtor in a bankruptcy case. *See* Zaring, *supra* note 2, at 1463. Members of the Conseco corporate family used bankruptcy, but not their banking subsidiary, Conseco Bank, Inc., which was a so-called credit card bank.

65. *See* RECEIVERSHIPS FOR UNINSURED NATIONAL BANKS, OFF. OF THE COMPTROLLER OF THE CURRENCY, *supra* note 13, at *10 n.4; *In re* Prudence Co., 79 F.2d 77, 80 (2d Cir.), *cert. denied*, 296 U.S. 646 (1935); *In re* Colo. Indus. Bank of Fort Collins, 84 B.R. 735, 738–40 (Bankr. D. Colo. 1988); *cf.* First Am. Bank & Tr. Co. v. George, 540 F.2d 343 (8th Cir. 1976).

66. *See* 84 B.R. 735, 737 (Bankr. D. Colo. 1988) ("This matter comes before the Court on the motion of the Colorado State Bank Commissioner requesting that the Court dismiss or abstain from hearing the petition filed by the Colorado Industrial Bank of Fort Collins for relief under Chapter 11 of the Bankruptcy Code."); *see also In re* Bankwest Boulder Indus. Bank, 82 B.R. 559 (Bankr. D. Colo. 1988) (denying the Colorado State Bank Commissioner and United States Trustee's motion to dismiss the chapter 11 case of debtor, Bankwest

the meaning of section 109(b)(2) because it "has the right to accept savings deposits and make installment loans."[67] The court disagreed, holding that debtor was an uninsured industrial bank because "unlike state chartered commercial banks and national banks, the debtor is prohibited from carrying demand bank accounts."[68] Because only FDIC-insured industrial banks are specifically made ineligible for bankruptcy relief,[69] the court held that there is "no justification to classify this debtor as anything other than an entity which is eligible for Bankruptcy Code protection."[70] In other words, the court engaged in straight-forward statutory interpretation. In addition, the court did not agree with the "Commissioner's contention that the Colorado Industrial Bank of Fort Collins should not be a debtor in the bankruptcy court [because of] the existence of a Colorado statutory scheme for either liquidating or reorganizing this industrial bank . . . ."[71]

In summary, once Colo. Indus. Bank of Fort Collins filed for bankruptcy, Colorado's state banking regulator could not wrest control away from the bankruptcy court even though the relevant state statute gave the Commissioner " . . . full and exclusive power and control . . . to manage the affairs and liquidate an industrial bank."[72] And courts have also allowed bankruptcy cases to be filed even after state banking supervisors initiate liquidation proceedings against the entity. For example, in *In re Prudence*, three creditors of the debtor filed an involuntary bankruptcy petition under the Bankruptcy Act shortly after "the superintendent of banks of the state of New York . . . took possession of the property and business of the Prudence Company, Inc. [the debtor]."[73] There, the Second Circuit declined to force the bankruptcy court to refrain from exercising jurisdiction. In other words, creditors of an entity in an administrative wind-down process found it advantageous to have the bankruptcy court affirmatively wrest control over

Boulder Industrial Bank, because the debtor was neither a bank nor an FDIC-insured industrial bank within the meaning of section 109(b)(2)).

67. 84 B.R. 735, 738 (Bankr. D. Colo. 1988) (discussing that having the right to accept savings deposits and make installment loans would bring an entity within the generally used definition of banks used by the BHCA, but pointing out that certain industrial loan companies are specifically excepted from that definition); *see also* 12 U.S.C. § 1841(c)(2)(H)(ii); *cf.* Omarova & Tahyar, *supra* note 23, at 160–61 (discussing industrial loan companies and the reasons they are excepted from the definition of bank in the BHCA).

68. 84 B.R. 735, 738 (Bankr. D. Colo. 1988).

69. *See* 11 U.S.C. § 109(b)(2) (stating ineligible entities include an "industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act . . . ").

70. 84 B.R. 735, 738 (Bankr. D. Colo. 1988).

71. *Id*. at 737.

72. *In re* Bankwest Boulder Indus. Bank, 82 B.R. 559, 564 (Bankr. D. Colo. 1988).

73. *In re* Prudence, 79 F.2d 77, 78 (2d Cir. 1935).

the proceeding away from the entity's primary regulator.[74]

While a Bankruptcy Court might defer to the OCC's decision to label fintech companies "national banks," there are many reasons to doubt that they will. And this is particularly true for non-depository fintech lenders. Federal judges, including most bankruptcy judges to address the issue, have held that an essential element of being a bank is "the power to receive deposits."[75] For example, in recent litigation over the OCC's power to issue SPNB charters, Judge Victor Marrero wrote that "the term 'business of banking,' as used in the [National Bank Act], unambiguously requires federally chartered institutions to accept deposits."[76] And most commentators agree.[77] Yet, fintech lenders almost surely do not take deposits no matter how deposit-taking is defined. And while some fintech payment processors may take deposits (at least in the colloquial sense), most fintech payment processors are likely to be categorized as money transmitters and not banks under state law.[78] In any case, though, deposit-taking alone is not dispositive.[79]

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74. *Id.* at 80 (describing it as "well settled that the appointment of receivers for a corporation does not deprive its directors of the power to file a petition in bankruptcy").

75. See *id.* at 79–80 (discussing the consensus among courts construing the words "'banking corporation,' as used in the Bankruptcy Act," that "the legal power to receive deposits [is] the essential thing") (citing Gamble v. Daniel, 39 F.2d 447, 450 (8th Cir. 1930); State of Kansas v. Hayes, 62 F.2d 597, 598 (10th Cir. 1932); Clemons v. Liberty Sav. & Real Est. Corp., 61 F.2d 448, 450 (5th Cir. 1932); and Woolsey v. Sec. Tr. Co., 74 F.2d 334, 337 (5th Cir. 1932)); *see also In re Bankwest Boulder Indus. Bank*, 82 B.R. at 564 (calling demand bank accounts (i.e., checking accounts) "a recognized hallmark of a true banking institution"). *But see* In re Trade Fin. Bank, 163 B.R. 558, 563 (Bankr. S.D. 1994) ("Although the power to receive deposits may be a critical factor in some states' classification of banks, it may not be in others.").

76. Lacewell v. Office of Comptroller of Currency, No. 18-8377, 2019 WL 6334895, at *38 (S.D.N.Y. Oct. 21, 2019), *rev'd on other grounds by Lacewell v. Office of Comptroller of Currency*, No. 19-4271, (2d Cir. June 3, 2021), https://www.consumerfinancemonitor.com /wp-content/uploads/sites/14/2021/06/f1.pdf [https://perma.cc/9W6P-N6UF].

77. *See, e.g,*, Wilmarth, *supra* note 13, at 3 (arguing "that the NBA does not allow the OCC to approve nondepository charters for national banks other than special-purpose trust companies"); *see also* Banking Law Scholars Brief, *supra* note 40, at 31. *But see* Brief of Professor David Zaring as *Amici Curiae* in Support of Appellants Office of the Comptroller of the Currency and Joseph Otting, Lacewell v. OCC, at 7 (writing that there are many chartered institutions that do not take deposits (including trust banks and credit card banks chartered by the OCC) and claiming that there are "[a]lmost no cases have held that firms must take deposits if they want to obtain a bank charter").

78. *See supra* note 37.

79. *See In re Republic Tr. & Sav. Co.*, 59 B.R. at 613 ("An entity cannot be a bank if it lacks the power to receive deposits (although it may still not be a bank even if it has the power to receive deposits)."); *see also In re Prudence Co.*, 79 F.2d at 79 (holding that the entity was not a bank even though "the state has so classified it by permitting it to be incorporated under the Banking Law, subjecting it to supervision by the superintendent of banks, and providing

Because the Bankruptcy Code does not define "bank, savings bank, cooperative bank, savings and loan association, . . . credit union, or industrial bank or similar institution which is [a FDIC] insured bank . . . ,"[80] courts have used at least three tests to determine what these terms mean: the state classification test, the independent classification test, and the alternative relief test. Although these tests have not been carefully delineated in practice,[81] in the three following subsections this Article will apply the three judicially crafted tests to the question of whether an entity with a SPNB charter constitutes a bank. It will also consider the policies underlying the definitions of bank in the Bank Holding Company Act (the BHCA) and the Federal Deposit Insurance Act (the FDIA) to consider whether courts will borrow from those statutes to aid in their analysis.[82]

To highlight my conclusion, bankruptcy judges are likely to conclude that SPNBs are not banks. The state classification test points towards affirming the OCC's view that SPNBs are "banks" and are ineligible for bankruptcy. However, the other two tests counsel in favor of bankruptcy eligibility for SPNBs, particularly for fintech lenders.[83] Finally, the policies underlying the BHCA and the FDIA are so different from the Bankruptcy Code that a SPNB's status under either law is not particularly relevant to the question of a SPNB's status under the Code.[84]

A. *The state classification test*

The state classification test is often considered the predominant test for determining whether an entity is a bank.[85] There are only a few cases that

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a procedure by which the said superintendent might take it over for liquidation").

80. *See supra* note 59.

81. While courts have described three different tests for determining whether an entity is a bank—the state classification, independent classification, and alternative relief tests—these courts often do not apply the tests in the same manner. For example, while many courts label their inquiry as "independent classification," some courts use this label to refer to the traditional role of statutory interpretation, while others use this label when they are considering legislative policy objectives. But other courts use the "alternative relief" label when they are reviewing legislative policy. In other words, the doctrinal labels are not universally agreed upon.

82. *See infra*, text accompanying notes 136-155.

83. *See infra*, text accompanying notes 110-167.

84. Even if the laws were more directly relevant as an analogy, they lead to different conclusions. *See infra*, text accompanying notes 136-155.

85. Unfortunately, the case law in this area can be confusing because courts often use the same label to refer to different sets of inquiries, though this is truer for the other two tests than of the state classification test.

have addressed the meaning of "bank" as used in the Bankruptcy Code,[86] but there are many cases that used the state classification test to analyze similar language from the Bankruptcy Act.[87] For example, in interpreting the Bankruptcy Act the Second Circuit wrote that if a state "classes the company as a bank or a railroad or an insurer, that too should be authoritative."[88]

The "state classification test" emphasizes "the categorization, status and operations of an entity under nonbankruptcy [*i.e.*, state] law."[89] If nonbankruptcy (usually state) law treats the entity as a bank,[90] the state

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86. See 11 U.S.C. § 109(b)(2); *see* also *In re* Southern Indus. Banking Corp., 59 B.R. 978 (E.D. Tenn. 1986) (describing the "relatively few cases interpreting § 109(b)(2) and its predecessors"). In fact, only the Seventh Circuit appears to have endorsed the use of the state classification test in this specific context, although the Sixth circuit has embraced it in the context of other terms in section 109. *In re* Cash Currency Exchange, Inc., 762 F.2d 542, 548 (7th Cir. 1985); Ky. Emps. Ret. Sys. v. Seven Cntys. Servs., Inc., 901 F.3d 718 (6th Cir. 2017) (discussing the state classification test for the definition of municipality). There are only a handful of district court cases as well. *See, e.g.*, *In re* Oil & Gas Ins. Co. 1992 WL 308033 (C.D. Ca., July 31, 1991).

87. *See, e.g.*, *First Am. Bank & Tr. Co.* v. George, 540 F.2d 343 (8th Cir. 1976) (citing cases from the 2nd, 4th, 5th, and 10th circuits).

88. *In re Prudence Co.*, 79 F.2d at 79.

89. *In re Republic Tr. & Sav. Co.*, 59 B.R. at 611; *see* Sovern, *supra* note 7, at 182

> Three kinds of state action have been urged upon the courts as warranting a holding that a given corporation is exempt from bankruptcy, and hence to be left to the state of incorporation for liquidation or reorganization. These are: (1) that the state of incorporation has provided for liquidation or reorganization of corporations of this type; (2) that the state of incorporation has declared that corporations of this type shall not be subject to the Bankruptcy Act; and (3) that the of incorporation has classified corporations of this type as banking or insurance corporations or building and loan associations. The first and second points are usually raised to bolster the third.

90. This classification can be explicit or implicit. The implicit state classification test is usually referred to as the substantial equivalent test. *See, e.g.*, *In re* Auto. Pros., Inc., 370 B.R. 161, 176 (Bankr. N.D. Ill. 2007) ("Under the state classification test, if the court concludes that [an entity] is not classified as [a bank] under state law, the court must then analyze whether [the entity] is the substantial equivalent of [a bank] under state law.") (citing *In re* Est. of Medcare HMO, 998 F.2d 436, 442 (7th Cir. 1993)); *see also* Patrick Collins, *HMO Eligibility for Bankruptcy: The Case for Federal Definitions of 109(b)(2) Entities*, 2 AM. BANKR. INST. L. REV. 425, 435 (1994) ("Entities are deemed to be substantial equivalents of entities excluded under section 109(b)(2) if the former share certain essential attributes or powers with the latter"). Under a substantial equivalent analysis, courts tend to consider four factors: "(1) whether the debtor has the essential attributes of [a bank]; (2) the degree of state regulation of the debtor; (3) the existence of a state statutory scheme for liquidation or rehabilitation, and (4) the public or quasi-public nature of the business.") *In re Auto. Pros., Inc.*, 370 B.R. at 176 (citing *In re Est. of Medcare HMO*, 998 F.2d at 445); *see also Matter of* Cash Currency Exchange, Inc., 762 F.2d 542, 548 (7th Cir. 1985)

> The starting point in this analysis is a comparison of the powers conferred upon or withheld from the entity with the powers conferred upon or withheld from

classification test is satisfied and many bankruptcy courts will defer (almost) entirely to the debtor's treatment under applicable nonbankruptcy law.[91] For example, the district court in *In re Republic Financial Corp.* found that the entity in question was not a bank because it

> was not chartered as a bank as required under Oklahoma law nor was it registered as a bank with the Oklahoma Banking Commission or authorized to engage in the banking business. RTS was chartered as a trust company, not as a bank. RTS was not authorized under Oklahoma law to engage in the banking business.[92]

In most cases, the state classification test looks at the debtor's treatment in the state of its incorporation.[93] Deference to state law has been thought appropriate because Congress' "apparent purpose [was] to leave the winding up of such companies to the state."[94] Courts have generally suggested that the primary reason to defer to states has been the public interest in protecting bank creditors, primarily depositors.[95] But in an article thoroughly reviewing the legislative history and case law surrounding the provisions excluding banks from bankruptcy, Professor Michael Sovern makes plain that

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> entities excluded under section 109(b)(2). The court also will examine the relevant statute to determine whether the entity, like those in the excluded class, is subject to extensive state regulation; is subject to express statutory procedures for liquidation or rehabilitation; and conducts business of a public or quasi-public nature.

(citing *First Am. Bank & Tr. Co.*, 540 F.2d at 349).

91. Sims v. Fidelity Assur. Ass'n, 129 F.2d 442 (4th Cir. 1942) ("The course of decisions, even in the Second Circuit, where perhaps the rule of state classification has been most strongly stated, indicates that the spirit rather than the letter of the local statutes should prevail.").

92. *In re* Republic Fin. Corp. 77 B.R. 282, 284 (N.D. Okla. 1987) ("Therefore, RFC and RTS should not be classified as banks under the Oklahoma Banking Code.").

93. Collins, *supra* note 90, at 432–33.

94. *In re Prudence Co.*, 79 F.2d at 79.

95. *In re Republic Fin. Corp.*, 77 B.R. at 284; *see also* Collins, *supra* note 90, at 440 (noting several justifications for the state classification test, including:

> the absence of statutory definitions for the entities listed in section 109(b)(2); legislative history indicating that entities are excluded under section 109(b)(2) because alternate provisions for their liquidation or rehabilitation exist under state law; an established judicial practice of looking to state law to fill gaps in the Code; and finally a codified federal policy of non-interference with state regulation of the business of insurance.

Collins, *supra* note 90, at 446 ("The overriding interest underlying state insolvency regulation of excluded entities is to protect consumers of these industries.").

Congress' rationale for deferring to state law is not particularly clear.[96] He offers several possible rationales to defer to state definitions,[97] including the existence of alternative liquidation regimes,[98] extensive state-based regulation,[99] and a Congressional desire to defer to existing state definitions.[100] Sovern also rejects some common rationales, such as the existence of state supervision and the need for local control, as being unlikely

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96. *See generally* Sovern, *supra* note 7. Another terrific article on this subject is Paul J. Green, *When a Bank Is Not a Bank*, 43 BROOK. L. REV. 899, 910 (1976) (noting that courts have identified a variety of alternative rationales, including: "(1) 'the public or quasi-public nature' of the banking business, which is tied to other interests beyond the lending function; (2) 'the desirability of unarrested operation' of banks; and (3) 'the inappropriateness of the bankruptcy machinery' for winding up the affairs of banks").

97. *See, e.g.*, Sovern, *supra* note 7, at 181

> It is possible, too, that Congress had no more definite reason than a reluctance to bring such crucial financial institutions within the purview of a statute aimed primarily at liquidation, but preferred to leave them under the aegis of the states and to courts of equity, where rehabilitation would at least be a possibility.

Sovern, *supra* note 7, at 187–91 (suggesting that the state classification test might be justified on grounds that it is a bright-line rule and that "[p]redictability alone may be sufficient to justify the state classification test"); Green, *supra* note 96, at 910; Peter P. Swire, *Bank Insolvency Law Now That It Matters Again*, 42 DUKE L. J. 471, 505 (1992) ("The existence of special bank insolvency rules was founded on the perceived problem of bank runs and depositors' need to have immediate access to transaction accounts.").

98. Sovern, *supra* note 7, at 175; Green, *supra* note 96, at 907–08 (quoting one of the authors of the original language excluding national banks from bankruptcy access as explaining, "[t]here is already in existence a satisfactory law for the control and liquidation of national banks. Since the Government is responsible for the bank notes issued by these banks in the event of their failure, there is good reason why it should have control of their liquidation").

99. Sovern, *supra* note 7, at 181, 204

> If we accept the common judicial rationale that Congress' purpose was to leave the insolvency administration of strictly regulated enterprises to the state which regulates them, the sound approach would be to resolve all close cases in favor of exclusion from bankruptcy if the corporation is strictly regulated, and against exclusion in the absence of strict regulation.

Green, *supra* note 96, at 906–07 (writing that there is substantial support in the legislative history that banks should be excluded from the "generic provisions of the Bankruptcy Act" because "Congress and the various state legislatures had enacted highly specialized regulatory devices which included liquidation procedures, [and] those tailored schemes should be allowed to operate . . . ").

100. Sovern, *supra* note 7, at 185-86 (arguing that Congress's failure to define a term does not evidence its intent "to accept the definition of whatever state happened to be the state of incorporation of a particular debtor"); Green, *supra* note 96, at 914 (noting that the Second Circuit has held "that the only operative intent behind the banking corporation exclusion was the avoidance of conflict between state or federal regulatory procedures and the Bankruptcy Act") (citing Israel-British Bank (London) Ltd. v. FDIC, 536 F.2d 509, 514 (2d Cir. 1976)).

to be determinative.[101]

National banks are chartered directly by the OCC and the OCC takes the position that SPNBs are "banks."[102] As the OCC explained, "[a] national bank charter is a federal form of corporate organization that authorizes a bank to conduct business on a nationwide basis and subjects the bank to uniform standards and rigorous federal oversight."[103] Thus, if a court looks to the OCC's classification they are likely to treat SPNBs as banks for bankruptcy purposes.

But will they? As just detailed, courts and commentators have offered a variety of rationales for deference to the views of the incorporating entity. Of the rationales Professor Sovern offers, the existence of an alternative

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101. Sovern, *supra* note 7, at 177, 185

> But since there is little evidence in the legislative history to support the proposition that close state regulation was the principal reason for Congress' action, and since Congress, instead of excepting from bankruptcy all corporations which the states may strictly regulate, excepted only a handful of such companies, the ultimate responsibility for distinguishing those companies from all others rests on the federal courts.

see also Green, *supra* note 96, at 915–16 (arguing that federalism concerns are the most likely rationale for the exclusion of banks from bankruptcy).

102. *See* OCC, EXPLORING SPECIAL PURPOSE NATIONAL BANK CHARTERS FOR FINTECH COMPANIES, (Dec. 2016), https://www.occ.gov/publications-and-resources/publications/banker-education/files/exploring-special-purpose-nat-bank-charters-fintech-companies.html [https://perma.cc/X4QW-KPVK]; *see also* Letter from John W. Ryan, President and CEO, Conference of State Bank Supervisors, to Thomas Curry, Comptroller of the Currency, Office of the Comptroller of the Currency (Nov. 14, 2016), https://www.csbs.org/sites/default/files/2017-11/CSBS%20Comment%20Letter%20on%20OCC%20Receiverships%20for%20Uninsured%20National%20Banks%20NPRM_0.pdf [https://perma.cc/AQ5K-5LUP] [hereinafter, CSBS Letter] (The Conference of State Bank supervisors has taken the view that SPNBs "would remain eligible to file for bankruptcy in a liquidation or reorganization proceeding" and sought guidance from regulators as to how its framework "would interact with conflicting bankruptcy law and the rights accorded debtors and creditors under such law"); Receiverships for Uninsured National Banks, 81 Fed. Reg. 92594 (proposed Sept. 13, 2016) (to be codified at 12 C.F.R. § 51), https://www.federalregister.gov/d/2016-30666/p-25 [https://perma.cc/H7QN-5GF4] (III. Public Comments on the Proposed Rule)

> The OCC believes it is best to be clear, through a regulation implementing those NBA provisions, about the framework that would apply in order to avoid clouding the ongoing discussion about the chartering of special purpose national banks engaged in fintech activities with uncertainty about how uninsured institutions are resolved . . . The OCC continues to consider what approach to assessments would be appropriate should it approve charters for special purpose national banks engaged in fintech activities.

103. *See* OCC, *Exploring SPNB Charters*, *supra* note 20, at 4 ("All national banks, including special purpose national banks, are organized under, and governed by, the National Bank Act.").

liquidation regime is the only one that counsels in favor of adopting the OCC's views.[104] By contrast, the lack of a well-formed regulatory structure and Congress's failure to express a desire to defer to the OCC's interpretation counsels against.[105] The answer seems, at best, uncertain.

In a somewhat analogous context involving a business trust a conflict between federal and Singaporean law, at least one court applied non-federal law to resolve the definitional dispute. In *In re EHT US1 Inc.*, the Bankruptcy Court for the District of Delaware applied Singaporean law in deciding that an offshore real estate investment trust was a "business trust" eligible for chapter 11.[106] In doing so it disagreed with "the weight of authority," which instead applies federal common law for the sake of uniformity.[107]

The state classification test is often described as the alpha and omega of courts' analysis.[108] Some courts use only this test and no other. Therefore, it remains possible that a court would defer to the OCC's view of SPNBs and find that SPNBs are ineligible for bankruptcy if it ended its inquiry there. However, courts often employ the independent classification test in conjunction with the state classification test. In the second stage, courts "must then consider whether the state classification is consistent with the

104.. Sovern, *supra* note 7, at 175; *see also* Green, *supra* note 96, at 907-08.

105. Sovern, *supra* note 7, at 181, 185-86, 204; *see also* Green, *supra* note 96, at 906-07; *cf.* Lev Menand & Morgan Ricks, *Federal Corporate Law and the Business of Banking*, 88 U. CHI. L. REV. *19 (forthcoming 2021), (from the November 2020 version on file with author) (discussing how the Supreme Court directed lower courts to use a "location-based approach" for determining the fiduciary duties for directors of federally chartered depository institutions by looking to the state laws in the place where "the federally chartered bank has its main office or maintains its principal place of business").

106. 21-10036 (Bankr. D. Del. June 1, 2021); *see also* Bill Rochelle, *Federal Common Law Doesn't Define a Business Trust Eligible for Chapter 11*, Rochelle's Daily Wire (June 8, 2021), https://www.abi.org/newsroom/daily-wire/federal-common-law-doesn%E2%80%99t-define-a-business-trust-eligible-for-chapter-11 [https://perma.cc/AD6L-QJKE] (applying Singaporean law in deciding a REIT's chapter 11 eligibility).

107. 21-10036 (Bankr. D. Del. June 1, 2021); *cf.* Atherton v. FDIC, 519 U.S. 213, 224 (1997) (discussing whether federal common law should control the fiduciary duties applicable to directors and officers of federally chartered banks because there is no law from the state of incorporation to look to).

108. Collins, *supra* note 90, at 434–35; *see also First Am. Bank & Tr. Co.*, 540 F.2d at 346 ("(The) authorities establish the rule that in determining whether a corporate debtor is a member of the excepted classes, the provisions of the state law must be given predominating influence.") (citing cases from the 2nd, 4th, 5th, and 10th circuits); *but cf*. Sims v. Fidelity Assur. Ass'n, 129 F.2d 442 (4th Cir. 1942) ("The course of decisions, even in the Second Circuit, where perhaps the rule of state classification has been most strongly stated, indicates that the spirit rather than the letter of the local statutes should prevail.").

108. *See, e.g.*, *In re Republic Tr. & Sav. Co.*, 59 B.R. at 611.

purposes of the Bankruptcy Code."[109] This inquiry is discussed in the next subsection.

B. The independent classification test

While some courts suggest that the state classification test is preeminent, many courts also regularly invoke the independent classification test.[110] Unhelpfully, while many courts label their inquiry as the independent classification test, they do not always mean the same thing. Some courts consider the independent classification test "merely another name for judicial interpretation and construction of the statute," an essential judicial role.[111] Many of these courts have been particularly critical of the state classification test and its suggestion that federal courts interpreting federal law should defer to state legislatures and state agencies to define when federal courts should hear a case.[112] But other courts use the independent

109. *In re Auto. Pros., Inc.*, 370 B.R. at 167 (citing *In re Est. of Medcare HMO*, 998 F.2d at 442).

110. Nearly every court to consider both the state classification and independent classification test have reached the same conclusion using both tests. But Professor Sovern argued (in 1957) if the entity was not empowered to receive deposits, it would not be held to be a bank regardless of how it was classified under state law. Sovern, *supra* note 7, at 206, n.123.

111. *See, e.g.*, *In re Republic Tr. & Sav. Co.*, 59 B.R. at 611 (stating "The 'state classification test' was somewhat illusory, for no State scheme could override Congress' own intention as to who should be eligible for bankruptcy relief; and the 'independent classification test' was merely another name for judicial interpretation and construction of the statute."); *In re* Northern Mariana Islands Retirement Fund, 2012 WL 8654317 (D.N.M.I. 2012) (arguing in favor or using the independent classification test alone because section 109 contains statutory terms and it is

> [t]he court's job . . . to interpret those terms. The "three tests" suggest that courts must interpret those terms using unique techniques. But no one has explained why the usual tools of statutory construction are inadequate or inapplicable. The [alternative relief] test is particularly suspect, because it is completely unmoored from the statutory text.

see also In re Family Health Services, Inc., 104 B.R. 268, 273 (Bankr. C.D. Ca 1989) (describing its ruling as "entirely consistent" with a 9th circuit case that described the state classification test as dispositive, despite applying the traditional rules of statutory construction to decide the issue); Sovern, *supra* note 7, at 185 (explaining that courts rarely examine the underlying basis for employing the state classification test).

112. *In re Colo. Indus. Bank*, 84 B.R. at 738 n.2; *cf.* Collins, *supra* note 90, at 443 ("It seems unlikely that Congress intended to delegate to the states to decide, even if limited to the banking and insurance industries, who shall have access to federal bankruptcy courts."); *In re Auto. Pros., Inc.*, 370 B.R. at 179–80 (quoting California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 281 (1987)) ("States cannot undermine Congressional intent by broadly classifying entities that are not [banks] as [banks]. Federal law preempts state law if it 'stands

classification test label to describe their focus on federal bankruptcy policy, warning that they are charged with ensuring "that the results of the state classification analysis do not defeat federal bankruptcy policy."[113] Whatever the reason, many courts use the independent classification test label to describe their inquiry and some have even argued this is the preeminent test.[114] In this section, this Article considers both types of independent classification inquiries.

The Supreme Court has repeatedly noted that the statutory language is the starting place for statutory interpretation.[115] As a result, we might expect that courts would embrace the independent classification test, which requires that "bankruptcy courts construe section 109(b)(2) itself based upon their own definition of the words of the Bankruptcy Code."[116] Only the independent classification test, therefore, puts "Congressional intent, as evinced by the language of the statute itself or by legislative history," on the center stage.[117]

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as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"); *In re Republic Tr. & Sav. Co.*, 59 B.R. at 611; Sovern, *supra* note 7, at 183–84 (suggesting that some courts have thought they were bound to defer to a state's classification because they believe that Congress has indicated that it wants them to do so) (quoting *In re* Union Guarantee & Mortgage Co., 75 F.2d 984 (2d Cir. 1935)).

113. *In re Auto. Pros., Inc.*, 370 B.R. at 180 (finding that entity is bankruptcy eligible, and that state interest doesn't require adjudication by state laws because "[t]o put Illinois' relative stake in perspective, less than 5% of API's outstanding service contracts are held by Illinois residents. Thus, applying the Bankruptcy Code in this case carries out Congress' intent to create a single uniform bankruptcy system that will apply to a debtor's activities in every state"). Some courts use the "alternative relief test" label to describe what they are doing when they consider bankruptcy policy. *See infra* text accompanying note 156.

114. *See* Sovern, *supra* note 7, at 186 n.61 (claiming "the weight of authority favored independent characterization over acceptance of a state classification" and citing cases); Sovern, *supra* note 7, at 206 n.123 ("[N]o banking decision has considered its independent characterization to be at variance with a state classification."); *see also* Collins, *supra* note 90, at 443 (describing the state classification test).

115. *See, e.g.*, Lamie v. United States Tr., 540 U.S. 526, 534-39 (2004) ("When the statute's language is plain, the sole function of the court[] . . . is to enforce it according to its terms.") (internal quotation omitted).

116. *Cent. Mortg. & Tr., Inc. v. State of Texas ex rel. Sexton and Wynne (In re Cent. Mortg. & Tr., Inc.),* 50 B.R. 1010 (S.D. Tex. 1985); *see also In re Republic Tr. & Sav. Co.*, 59 B.R. at 613 (construing § 109 exemption); *In re Republic Fin. Corp.*, 77 B.R. at 283 ("The second test for § 109 exemption is referred to as the "independent classification test" whereby the court, on its own, construes § 109."); Sovern, *supra* note 7, at 186 n.61.

117. Collins, *supra* note 90, at 440; Landgraf v. USI Film Prods., 511 U.S. 244 (1994); Lamie v. United States Tr., 540 U.S. 526, 534–39 (2004); King v. Burwell, 576 U.S. 473, 474 (2015)

> If the statutory language is plain, the Court must enforce it according to its terms. But oftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context [;] . . . the Court must read the words

Applying the independent classification test to SPNBs is likely to result in courts finding that such entities are not "banks" within the meaning of the Bankruptcy Code.[118] In 1933, the Tenth Circuit explained that "[c]alling an institution a bank does not make it a bank in legal contemplation if it is not given the powers of a bank."[119] A core banking power is the power to take deposits,[120] with Professor Sovern going so far as to write that "whatever the classification of the state of incorporation, it seems unlikely that a corporation will be held a bank if it lacks the power to receive deposits."[121] Almost universally, courts agree, including all of the circuit courts to consider the issue.[122] As the Second Circuit explained in *Prudence*: "Strictly speaking the term bank implies a place for the deposit of money, as that is the most obvious purpose of such an institution."[123] Similarly, the Eighth Circuit has written that "while there may be other attributes which a bank may possess, yet a necessary one is the receipt of deposits which it may use in its business."[124] More recent decisions have continued to require deposit-

in their context and with a view to their place in the overall statutory scheme.

(internal quotation and citation omitted).

118. This is almost certainly true for fintech lenders but is less clearly correct for fintech payment processors. *See infra* text accompanying note 132.

119. *Hayes*, 62 F.2d at 600; *see also In re Republic Fin. Corp.*, 77 B.R. at 284 ("[A]n entity cannot be a bank unless it is authorized to do banking business."); *In re* Southern Indus. Banking Corp. 59 B.R. 978 (E.D. Tenn. 1986) ("The Court considers that the word 'bank' as it appears in § 109(b)(2) without a qualifying adjective, refers to a commercial bank.").

120. 12 U.S.C. § 1813(l) defines "deposit" in a fairly circular fashion. Essentially it provides that deposits can only be held by banks or savings associations, even though the actions it describes as deposit-taking are conducted by a wide range of entities.

121. Sovern, *supra* note 7, at 206; *Id.* at 192 (citing several cases which found deposit-taking was a necessary but not sufficient condition to be a bank, and stating "A corporation cannot be a banking corporation within the meaning of section 4 of the Bankruptcy Act unless it has the power to receive deposits."); *see also* Wilmarth, *supra* note 13, at 3 ("Federal courts have repeatedly identified deposit-taking as an "essential" aspect of the "business of banking" authorized by the NBA and other federal statutes.").

122. *In re Prudence Co.*, 79 F.2d at 79–80; Clemons v. Liberty Savings & Real Estate Corp., 61 F.2d 448 (5th Cir. 1932); *In re* Cash Currency Exchange, Inc., 762 F.2d 542 (7th Cir. 1985)); *Hayes*, 62 F.2d at 598; Woolsey v. Security Trust Co., 74 F.2d 334, 337 (5th Cir. 1932); *Gamble*, 39 F.2d at 447.

123. *In re Prudence Co.*, 79 F.2d at 79 (quoting Oulton v. German Savings & Loan Soc., 84 U.S. 109, 118 (1872)); *see also In re* Cash Currency Exchange, 762 F.2d 542 (7th Cir. 1985) (holding that currency exchanges that did not accept deposits were *not* "banks" and were not exempted from the Bankruptcy Code, based on cases decided under the 1898 Bankruptcy Act); Sovern, *supra* note 7, at 191 (noting that a court using the independent classification test must come up with its own definition for bank).

124. *Gamble*, 39 F.2d at 450; *see also* Frank R. Kennedy, *The Commencement of a Case under the New Bankruptcy Code,* 36 WASH. & LEE L. REV. 977, 990 (1979) (noting that deposit-taking was "the crucial question" under the Bankruptcy Act, that deposit-taking was

taking as essential to the definition of a bank. For example, in *In re Republic Financial Corp.*,[125] the district court noted that "an entity cannot be a bank unless it is authorized to do banking business . . . [and t]he power to accept general deposits is an essential attribute of a bank."[126]

According to the OCC, SPNBs are, by definition, non-depository institutions.[127] In a policy statement, the OCC announced that it was accepting "applications for special purpose national bank charters from financial technology (fintech) companies that are engaged in the business of banking but do not take deposits."[128] The OCC's decision to issue bank charters to non-depository institutions should not, therefore, transform SPNBs into banks for purposes of section 109(b)(2).[129] Many eminent banking law scholars agree, writing that "[n]ondepository national banks would not be considered 'banks' under [the independent classification] test."[130] Other banking regulators, such as the Conference of State Bank Supervisors, also concur in this assessment, writing to that "the power to

necessary but not dispositive by itself, and suggesting that "[w]hether or not a debtor receives deposits is likely to continue to be significant in determining whether a debtor is one of the three varieties of excluded banks under the Bankruptcy Code").

125. *In re Republic Fin. Corp.*, 77 B.R. 282 (N.D. Okla. 1987).

126. *Id.* at 284.

127. While a consumer might consider a Venmo balance to be the functional equivalent of a bank deposit, it is not clear that courts will view these as equivalents. Given the language it uses in its policy statements about SPNBs, the OCC certainly does not seem to view them as equivalents.

128. *See* OCC, *Policy Statement*, *supra* note 19 (describing the OCC's decision and process to accept special purpose bank charter applications from fintech companies).

129. *Hayes*, 62 F.2d at 600

> Calling an institution a bank does not make it a bank in legal contemplation *if it is not given the powers of a bank.* And conversely, calling an institution a trust company does not prevent its being a bank within the meaning of the law, if it *possesses* and exercises all the powers of a bank. *The only way to create a bank is to give it the powers of a bank.*

(emphasis added).

130. Banking Law Scholars Brief, *supra* note 40, at 31; *see also* Sovern, *supra* note 7, at 192 ("While the power to receive deposits is undoubtedly an indispensable prerequisite to a finding of banking, it does not follow that any corporation with that power is a bank."); *cf.* Nikolei M. Kaplanov *Nerdy Money: Bitcoin, the Private Digital Currency, and the Case Against its Regulation*, 25 LOY. CONSUMER L. REV. 111, 132 (2012) (writing that "[t]he [U.S.] Code generally requires that the institution accept deposits in order to be classified as a bank, in addition to other permissible activities") (citing 12 U.S.C. § 24). *But see* Brief of Professor David Zaring as *Amici Curiae* in Support of Appellants Office of the Comptroller of the Currency and Joseph Otting, Lacewell v. OCC, at *7 (writing that there are many chartered institutions that do not take deposits (including trust banks and credit card banks chartered by the OCC) and claiming that there are "[a]lmost no cases have held that firms must take deposits if they want to obtain a bank charter.").

receive deposits bears an indispensable relation to . . . the banking business more generally."[131] At least as applied to fintech lenders, this seems to be clearly correct.

While the answer is less clear-cut when we consider SPNBs that offer "payment-related service[s]," the answer is probably the same nonetheless.[132] The OCC has indicated that it will "consider on a case-by-case basis the permissibility of a new activity that a company seeking a special purpose charter wishes to conduct."[133] And some firms that issue "debit cards or engag[e] in other means of facilitating payments electronically" hold customer funds in a manner that consumers may view as being functionally similar to deposit-taking activity of traditional banks.[134] Thus, a court could be persuaded that these entities, unlike fintech lenders, hold "deposits" and are, therefore, sufficiently similar to a bank to warrant exclusion from the bankruptcy system.

However, consumer expectations do not appear to be the lens through which courts view this question. There are at least three reasons to doubt that a court would conclude that a SPNB is a bank because it holds customer balances for sending electronic payments or in connection with a debit card. First, these customers balances are generally not FDIC-insured deposits. Second, without a SPNB charter, these entities are generally classified as money transmitters rather than banks under the relevant state law. Finally (and to reiterate), the OCC itself does not regard these balances as deposits.

Courts might also look beyond state law or the views of the UCC for interpretations for the word "bank" in section 109(b)(2) of the Bankruptcy Code. For example, courts may look for guidance from other federal statutes that define the word bank.[135] While "there is no single definition of a 'bank'" that is used at the federal level, courts might look to the Bank Holding Company Act (the BHCA) and the Federal Deposit Insurance Act (the

131. Brief of Conference of State Bank Supervisors as *Amici Curiae* in Support of Appellee and Affirmance, Lacewell v. OCC, at 36 ("[T]he power to receive deposits bears an indispensable relation to . . . the banking business more generally."); *see also* Brief of National Association of Consumer Credit Administrators and American Conference of Uniform Consumer Credit Code States as *Amici Curiae* in Support of Appellee and the New York State Dept. of Fin. Srvcs., Lacewell v. OCC, at 9–10 ("A bank charter is unnecessary unless the business seeks to engage in receiving deposits and, similarly, a bank has never been chartered that did not intend to engage in receiving deposits . . . federal law also requires national banks to be depository institutions.").

132. OCC, *Exploring SPNB Charters*, *supra* note 20, at *2.

133. OCC, *Exploring SPNB Charters*, *supra* note 20, at *4.

134. OCC, *Exploring SPNB Charters*, *supra* note 20, at *4.

135. *See* Sovern, *supra* note 7, at 193–94 ("Banking has been defined in many contexts outside of bankruptcy, and some of these definitions are occasionally referred to by bankruptcy courts.").

FDIA) for guidance.[136] Unfortunately, most extant definitions are unhelpfully circular. For example, the FDIA defines deposits-taking as an action that only a bank can take. Conversely, Glass-Steagall prohibits certain non-banks from taking deposits.[137] And neither the BHCA or FDIA serves similar purposes to the Bankruptcy Code and therefore neither is a particularly useful analogue. They also point in different directions. Under the BHCA, SPNBs are not "banks," but under the FDIA they may be.

Currently, the BHCA defines banks as "any institution organized under the laws of the United States . . . which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans."[138] As a result, SPNBs would all be excluded, regardless of whether they hold customer funds. At this time, fintech companies appear to either be exclusively lenders, which do not satisfy the first part of the definition, or payment firms, which do not satisfy the second part of the definition.[139] Originally, the BHCA—like the FDIA—defined banks as any entity with a bank charter.[140] Under the original definition, SPNBs would have qualified. But the definition has been substantially narrowed and now requires that the entity accept demand deposits.[141] In

136. Brynne Krause, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: How Increased Regulation Has Given Large Banks an Artificial Competitive Edge*, 83 U.M.K.C. L. REV. 1045, 1052 (discussing different definitions under state and federal law, including the BHCA, the FDIA, Dodd Frank); *cf*. Menand & Ricks, *supra* note 105, at 46–47 (discussing the BHCA, the FDIA, and the Federal Reserve Act in concluding that these laws all require national banks to be depository institutions).

137. 12 U.S.C. § 378(a).

138. 12 U.S.C. § 1841(c) (1982).

139. Payment processors may or may not satisfy the first half of the definition either, depending on how the customer funds are held. Venmo, for example, claims to hold customer funds in "one or more custodial accounts we maintain for the benefit of Venmo account holders at one or more FDIC member banks (currently Wells Fargo Bank, N.A. or The Bancorp Bank), and the funds in your Venmo balance will be eligible to be insured by the FDIC up to the standard maximum deposit insurance amount (currently $250,000).") *User Agreement*, VENMO, https://venmo.com/legal/us-user-agreement/ [https://perma.cc/X484-4BXT].

140. Omarova & Tahyar, *supra* note 23, at 115 ("As originally enacted, the BHCA defined the term based simply on the formal charter.").

141. Omarova & Tahyar, *supra* note 23, at 115

> In 1966, however, Congress introduced a functional definition of "bank" based on whether or not an institution accepted deposits that could be withdrawn on demand. In 1970, that functional definition was narrowed by adding the second requirement that a "bank" had to be engaged in the business of making commercial loans. This definition allowed proliferation of so-called "nonbank banks" that had access to federal deposit insurance but structured their activities to avoid being included in the definition of "bank."

amending the BHCA's definition of the term "bank," Congress did nothing to suggest that it intended to expand or restrict bankruptcy eligibility for banks.[142] This should not endear bankruptcy judges to the idea of adopting the BHCA's bank definition for bankruptcy purposes.

Additionally, the reason why the BHCA's definition of "bank" has morphed over time is because the underlying rationale for regulating bank holding companies has changed.[143] The purpose of the law shifted from preventing monopolies to systemic risk prevention.[144] Bankruptcy policy, by contrast, is neither about preventing excess concentration nor about avoiding systemic risk to the national economy. Instead, core bankruptcy policies include consolidating creditor collection efforts and ensuring the equitable treatment of similarly situated creditors, including the distribution of losses, and providing a fresh start for honest but unfortunate debtors.[145] Thus, bankruptcy policy and BHCA policy are not well-aligned and the definition for banks provided by the BHCA does not seem terribly appropriate to use.[146]

However, it is worth noting that if the BHCA definition were to be used, SPNBs would not be "banks."[147] This is similar to the treatment of credit

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142. Omarova & Tahyar, *supra* note 23, at 138–39.

143. For a terrific article on the BHCA's changing statutory language and Congress' changing regulatory rationales, *see generally* Omarova & Tahyar, *supra* note 23.

144. Omarova & Tahyar, *supra* note 23, at 117, 129, 190

> The explicit exemptions under CEBA were ultimately traceable to the same policy rationale that the exempted institutions did not pose risk of excessive concentration of commercial credit and, more generally, economic and political power. An additional rationale for the exemptions was the fact that some of these entities, such as thrifts and credit unions, were subject to parallel regulatory regimes.

145. Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 777 (1987) (describing differences of opinions among bankruptcy scholars about bankruptcy's core purposes); *see also* Clarke v. Rogers, 228 U.S. 534, 548 (1913) (calling "[e]quality between creditors . . . necessarily the ultimate aim of the Bankruptcy Law").

146. "FIRREA granted the FDIC and RTC the power to discriminate among claims on the failed institution, in contrast to the traditional rule that all claims in the same class must receive the same percentage recovery." Swire, *supra* note 97, at 487. Also bank depositors are favored in an FDIC wind-down relative to the position they would enjoy in a bankruptcy proceeding. *See* Daniel R. Fischel, Andrew M. Rosenfield & Robert S. Stillman, *The Regulation of Banks and Bank Holding Companies*, 73 VA. L. REV. 301, 318 (1987) ("The primary difference is that the thrust of bankruptcy laws is to ensure that creditors of the same class are treated equally, whereas federal deposit insurance ensures that certain classes of creditors are paid in full.").

147. Credit card banks, which have a special purpose national bank charter similar to the fintech charter, are also exempt from the BHCA's definition of bank. Omarova & Tahyar, *supra* note 23, at 171–72 ("Beginning with the 1966 Amendments, however, credit card banks were implicitly exempted from the definition of a bank, because they did not accept demand deposits. In 1987, CEBA explicitly excluded credit card banks from the BHCA's definition

card banks, which cannot accept demand deposits, and are exempt from the BHCA's definition of bank.[148] Credit card banks are exempted from the BHCA "primarily because these institutions offered very limited and highly specialized *consumer* financial services and did not pose the risk of monopolizing *commercial* credit markets."[149] Fintech lenders are generally very similar in these regards and should expect similar treatment.

By contrast, if bankruptcy courts were to adopt the FDIA's definition of bank, then SPNBs might be ineligible for bankruptcy protection. The FDIA defines bank as "any national bank and State bank, and any Federal branch and insured branch."[150] Because the OCC seeks to issue "special purpose *national bank*" charters, entities that have one would—on their face—be national banks within the meaning of the FDIA. But, as Lev Menand and Morgan Ricks explain, the FDIA presupposes that all national banks are depository institutions.[151] Thus, if Menand and Ricks are correct that being a national bank requires an entity be a depository institution, SPNBs would not be banks for purposes of section 109(b)(2), even if the FDIA's definition were used.[152]

Once again, however, FDIC policy and bankruptcy policy are not well-aligned and, therefore, the FDIA seems to be as bad an analogue as the BHCA. The FDIC's mission "is to maintain stability and public confidence in the nation's financial system" by protecting bank depositors in the event of bank failures.[153] In other words, the FDIC's goal is to preference bank

of a bank, subject to certain limitations.") (citing 12 U.S.C. § 1841(c)(2)(F)(1988)).

148. Omarova & Tahyar, *supra* note 23, at 171; *see also* REPORT TO THE CONGRESS ON THE PROFITABILITY OF CREDIT CARD OPERATIONS OF DEPOSITORY INSTITUTIONS, FED. RESERVE, https://www.federalreserve.gov/publications/2019-report-to-congress-profitability-credit-card-operations-depository-institutions.htm [https://perma.cc/M9HJ-RDTR] (July 2019) (defining credit card banks as "(1) [m]ore than 50 percent of their assets are loans to individuals (consumer lending), and (2) 90 percent or more of their consumer lending involves credit cards or related plans").

149. Omarova & Tahyar, *supra* note 23, at 172.

150. 12 U.S.C. § 1813(a)(1)(A). This language seems very similar to the original BHCA definition. "In its original form, the BHCA defined 'bank' by charter mean 'any national banking association or any State bank, bank, or trust company' and explicitly excluded only those that were organized by U.S. bank holding companies to offshore." Omarova & Tahyar, *supra* note 23, at 141.

151. Menand & Ricks, *supra* note 105, at *46–47 (from the November 2020 version on file with author) ("The Federal Deposit Insurance Act (FDIA) requires national banks to obtain deposit insurance, presupposing that they are in the deposit business.").

152. Menand & Ricks, *supra* note 105, at *46 ("Congress thus understood that "all" national banks were depository institutions.").

153. About, FEDERAL DEPOSIT INSURANCE CORP., https://www.fdic.gov/about/what-we-do/ [https://perma.cc/7VDN-UWW9].

depositors above other creditors.[154] This stands in contrast with the bankruptcy system's focus on the equitable treatment of creditors.[155] This policy focus also provides further support to Menand and Ricks' interpretation of the FDIA and suggests that SPNBs should not be considered banks for purposes of section 109(b)(2).

Having multiple tests to determine the meaning of the term "bank" in section 109(b)(2) creates the possibility of inconsistent results. An entity might be a bank if the OCC's treatment of SPNBs is determinative under the state classification test but would not be a bank under the independent classification test. In such a case, I would expect that the state classification test's results would give way to the court's own judgment because federal bankruptcy policy should not give way to aggressive maneuvering by a federal banking regulator. But this outcome is far from certain because of the state classification test's perceived preeminence. Alternatively, an entity might be a bank if the FDIA's "bank" definition is used, but not if the BHCA's definition is used. But neither statute seems like a particularly good analogue, and neither are likely to be relied upon.

C. The alternative relief test

Finally, a few courts also use the so-called "alternate relief test," in which the court examines "'congressional intent and factors of practicality and policy' to determine whether the Bankruptcy Code would be a satisfactory alternative to the state rehabilitation and liquidation law."[156] If the independent classification test is thought of as using traditional methods of statutory interpretation, and the state classification test as deference to a bank's regulators, the alternative relief test can be best thought of as court-considered policy arguments. However, courts do not consistently assign the same labels to the same inquiries, and some courts conduct a policy analysis

154. Fischel, *et al*., *supra* note 146, at 318 ("The primary difference is that the thrust of bankruptcy laws is to ensure that creditors of the same class are treated equally, whereas federal deposit insurance ensures that certain classes of creditors are paid in full.").

155. Fischel, *et al*., *supra* note 146, at 318.

156. Grohsgal, et al., *The Twilight Zone of HMO Insolvencies*, 13-MAY AM. BANKR. INST. J. 22 (May 1994) (citing *In re Estate of Medcare HMO*, 998 F.2d at 439); *see also In re Republic Trust & Sav. Co.,* 59 B.R. at 615 (describing this test as overlapping the other two and focusing on the timeline in this particular case where the bankruptcy was well progressed when Oklahoma asserting the right to control the liquidation as being important to the avoidance of delay and noting the important of bankruptcy avoidance powers). *Id.* at 614 ("[C]ourts should consider whether a bankruptcy proceeding is a satisfactory method, compared with available State and Federal non-bankruptcy methods, of reorganizing or liquidating a would-be debtor.").

under the guise of the independent classification test.[157] Additionally, this test is the least well-adopted because some courts believe that the statutory text is clear.[158]

Courts that use the alternative relief test are likely to determine the Bankruptcy Code is a satisfactory alternative to the OCC's liquidation scheme and state regimes. A full description of the differences between the OCC's liquidation scheme and the Bankruptcy Code is provided in Section IV and the Appendix. But it's worth noting here that the OCC (and state regulators) would not be the residual claimant in the insolvency of a non-depository institution.[159] They merely offer a mostly neutral forum for resolving the SPNB's financial distress, which is just like a bankruptcy court. But the Bankruptcy Code offers two additional advantages. First, its processes are far better established than the OCC's recently enacted and never-before-used procedures for winding down uninsured national banks like SPNBs. Second, the Code is much more detailed than the bare bones procedures the OCC has rolled out.

In addition, bankruptcy courts have been used to wind down investment banks, such as Drexel and Lehman, to good effect.[160] Speed is a common justification for administrative resolution, but bankruptcy courts can also act quite quickly.[161] And since SPNBs will not hold insured deposits (or a near

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157. *See, e.g.*, *In re Republic Trust & Sav. Co.*, 59 B.R. at 614 (noting the overlap between the alternate relief test and the other two tests.)

158. *See In re Colo. Indus. Bank*, 84 B.R. at 738 n.2

> Since this court's decision regarding its jurisdiction over the debtor is based upon a compelling application of the fundamental canons of judicial statutory construction, the court found it unnecessary to resort to the other two tests. Moreover, the court is convinced that the 'state classification test' is inappropriate for determining jurisdiction because its utilization would result in an abdication of a federal court's responsibility to interpret federal law. No state scheme can override Congress's own intention as to who should be eligible for bankruptcy relief and the mere fact that a debtor is an industrial bank as defined by state law is not dispositive of the issue of federal jurisdiction under the Bankruptcy Code.

cf. Magwood v. Patterson, 561 U.S. 320, 334 (2010) ("We cannot replace the actual text with speculation as to Congress' intent."); United States v. S.A., 129 F.3d 995, 998 (8th Cir. 1997) ("If the plain language of the statute is unambiguous, that language is conclusive absent clear legislative intent to the contrary.").

159. Richard M. Hynes & Steven D. Walt, *Why Banks are Not Allowed in Bankruptcy*, 67 WASH. & LEE L. REV. 985, 1012–25 (2010) (discussing why it is important that the FDIC is the residual claimant of most insolvent depository institutions); *see infra*, text accompanying notes 195–198 (discussing the residual claimant issue).

160. Kenneth Ayotte & David A. Skeel, Jr., *Bankruptcy or Bailouts?*, 35 J. CORP. L. 469, 477–83 (2010).

161. *See infra* text accompanying notes 179-196.

equivalent), the resolution of many SPNBs in bankruptcy should proceed at an acceptable, if slightly slower, pace.[162] To the extent that bank resolution under a federal banking regulator can proceed more quickly, it is because creditors' participatory rights are given short shrift as compared to a bankruptcy proceeding.[163] In bankruptcy proceedings, creditors have substantially greater rights to participate in the entity's resolution than under the OCC process. Without a need for immediate action because of harm to depositors or systemic risk—neither of which applies to fintech lenders[164]—bankruptcy is a more appropriate forum because creditor participation rights are generally better respected in bankruptcy than outside of it.[165] However, customers of SPNBs that do hold something akin to deposits will want rapid access to their funds. For customers of such entities, the OCC's bank resolution process may be a superior option but only if it treats the funds held by fintech payment processors as customer deposits entitled to priority distribution. And it may not.

It is true that if SPNBs were bankruptcy-eligible and still subject to the OCC's liquidation scheme there would be potentially inconsistent insolvency regimes. Concerns about potential inconsistency have given pause to some courts but not others. For example, in *In re Manufacturers' Nat'l Bank*, the court held that national banks could not be liquidated under the 1867 Bankruptcy Act because the National Bank Act (NBA) provided "a very complete and detailed scheme or plan for administering the affairs of an insolvent national bank" and that the NBA and the 1867 Bankruptcy Act were fundamentally incompatible with each other.[166] Since that case was decided in 1873, the bankruptcy scheme has grown more complete and detailed; it is the new OCC liquidation scheme that appears more

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162. Hynes & Walt, *supra* note 159, at 1007–12 (describing the need for speed).

163. *See infra* text accompanying note 236.

164. *See infra* text accompanying notes 223–231.

165. Ayotte & Skeel, *supra* note 160, at 483

> [B]ankruptcy laws provide numerous formal and informal mechanisms for creditors to exercise control over the liquidation process. These include formal rights given to creditors' committees, the opportunity of creditors to object to the terms and timing of asset sales, and indirect control over the debtor through covenants in DIP loan agreements.

166. *In re* Manufacturers' Nat'l Bank, 16 Fed. Cas. 665, 669 (N.D. Ill. 1873); *see also* Boyd v. Schneider, 131 F. 223, 227 (7th Cir. 1904)

> No one doubts the power of congress to provide the machinery for such administration, and no one doubts the intention of congress, in the enactment of the national banking act, that to the extent national banks were concerned, such machinery should be embodied in the powers conferred upon the comptroller.

rudimentary. And, more recently, courts have dismissed concerns about inconsistent insolvency regimes outside of the bankruptcy context, writing that "[c]ongress was certainly aware of the potential for inconsistent insolvency regimes, but obviously concluded that the interest in continuing state regulation into insolvency outweighed any interest in uniformity. We will not second guess that determination."[167] For these reasons, courts that use the alternative relief test are likely to determine the Bankruptcy Code is a satisfactory alternative to the OCC's liquidation scheme and state regimes for most, if not all, SPNBs.

* * *

In conclusion, Section II reviewed the judicially created tests for establishing the meaning of a "bank" under section 109(b)(2) of the Bankruptcy Code and has established that bankruptcy courts are likely to conclude that SPNBs are not "banks." As a result, SPNBs are likely to be deemed eligible to be a debtor under the Bankruptcy Code unless there is some overriding policy reason to deny them access. That question is taken up in the next Section.

III. THE POLICY RATIONALES FOR EXCLUDING BANKS FROM BANKRUPTCY

"Even though the word 'bankruptcy' derives from bank failure, modern banks never technically go bankrupt, no matter how hard it sometimes seems they try."[168]

In this Section, eight of the historic rationales for excluding commercial banks from bankruptcy are reviewed and then applied to SPNBs to consider whether SPNBs should also be excluded from bankruptcy. These rationales are: (i) banks' fragility and the possibility that unexpected and correlated bank closures could freeze the economy; (ii) the breadth of people who deposit their savings with banks and the harm banks closing without repaying depositors would have; (iii) the need for expert oversight of a bank's insolvency proceedings; (iv) the historic exclusion from bankruptcy because of available alternative liquidation procedures and the need to avoid conflicting regimes for the sake of efficiency; (v) banks' systemic importance to the functioning of the economy by, among other things, providing liquidity for consumers, businesses and governments, (vi)

167. *In re Estate of Medcare HMO*, 998 F.2d at 447; *In re Prudence*, 79 F.2d at 78 (allowing an involuntary bankruptcy petition under the Bankruptcy Act to continue even after "the superintendent of banks of the state of New York . . . took possession of the property and business of the Prudence Company, Inc. [the debtor]").

168. Swire, *supra* note 97, at 471.

appointing the residual claimant as receiver, (vii) preserving banks' ongoing operations and avoiding their liquidation; and (viii) avoiding the high costs of lost confidence.[169] To preview my conclusions, only the first three justifications potentially have bite in the context of distressed SPNBs, but none requires that bankruptcy give way to an administrative liquidation process.

The first potential justification for excluding banks from bankruptcy comes from Robert Bliss and George Kaufman, who explain that the resolution of financially distressed banks was historically treated differently than non-bank firms because banks were thought to be particularly fragile yet important to the efficient functioning of the national economy.[170] As a result, we need to treat banks with kid gloves and not subject them to the harsh bankruptcy process. Banks are perceived as being especially fragile for at least two reasons. First, banks have historically had a funding mismatch because they make long-term loans (assets) funded by short-term deposits (liabilities).[171] This asset-liability mismatch creates a risk that if depositors lose faith in a bank and simultaneously seek to withdraw their deposits, depositors create a "run" on the bank that renders it insolvent.[172] Second, problems with one bank can create a cascading effect on other banks because bank finances are often "closely interconnected through inter-bank deposits and loans."[173]

As noted above, there are two types of fintech companies that are

169. *See* H.R. REP. No. 95-595, at 318–19; Swire, *supra* note 97, at 478; Green, *supra* note 96, at 914; Sovern, *supra* note 7, at 220; Theodore Eisenberg, *Bankruptcy in the Administrative State*, 50 LAW & CONTEMP. PROBS. 3, 9–10 (1987); Skeel, *Law & Finance*, *supra* note 4, at 723 ("Because banks, insurance companies, and related financial intermediaries play an important role in the financial security of the citizenry, the government has a strong interest in assuring their soundness and in preventing the kinds of systemic failures that led to financial devastation in the Depression.").

170. "Banks are exempted from the general corporate bankruptcy code and subject to special provisions because they are frequently viewed as 'special' and different from other firms both in their importance to the aggregate economy and in their financial fragility and vulnerability." Bliss & Kaufman, *Economic Comparison*, *supra* note 12, at 3, n.3.

171. *See* KERN ALEXANDER, PRINCIPLES OF BANKING REGULATION 295 (CAMBRIDGE U. PRESS 2019) (reporting that '"maturity transformation"' is "a major concern for bank regulators because the practice of borrowing short and lending long can pose risks to society if banks fail to manage their risks effectively"); *see also* CHARLES W. CALOMIRIS & STEPHEN H. HABER, FRAGILE BY DESIGN: THE POLITICAL ORIGINS OF BANKING CRISES & SCARCE CREDIT 29 (PRINCETON U. PRESS 2014) ("[B]ankers face the risk that, even if their banks are not insolvent, worried depositors might show up en masse to withdraw their money, and there might not be enough cash in the till to satisfy all those withdrawal demands.").

172. Bliss & Kaufman, *Economic Comparison*, *supra* note 8, at 3 ("Banks have a large proportion of their liabilities in very short-term debt that can easily be withdrawn (run).").

173. Bliss & Kaufman, *Economic Comparison*, *supra* note 8, at 3.

eligible for SPNB charters: fintech lenders and payment processors. The former are unlikely to be depository institutions, but the latter firms do hold substantial customer balances that may be, practically speaking, withdrawable on demand.[174] Thus, fintech lenders may be able to eliminate the asset-liability mismatch that can bedevil depository institutions, but payment firms are likely to be more susceptible to coordinated consumer actions.[175] As a result, this rationale has greater bite in the latter case than in the former. However, it remains a potential issue even for non-depository fintech lenders.

The OCC intends to provide prudential oversight of SPNBs and should be able to force fintech lenders to avoid the asset-liability mismatch. Thus, in theory, runs should not happen in the same way with well-managed fintech lenders. In practice, however, there is evidence that non-banks are "often reliant on short-term financing similar to deposits."[176] Consider that Lehman Brothers, an investment bank that failed in the Great Recession, obtained substantial funding through short-term repos and the overnight commercial paper market, which proved to be a terrible decision once those markets froze up during the Great Recession.[177] Although Lehman Brothers could have obtained longer term funding to match its longer term liabilities, it chose not to do so and the SEC, its primary regulator, did not force it to do so. As a result, while this issue is potentially avoidable in the context of fintech lenders, it may nevertheless have some bite. However, if the OCC fails to address SPNB's funding mismatch, one might reasonably query whether we should leave the OCC in charge of addressing the fallout from its own regulatory failure. As for interconnectedness, I have not seen any evidence that fintech companies' finances are as interconnected as bank finances are

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174. *See e.g.*, *supra* notes 36, 134 (discussing customer funds held by Venmo in connection with their debit card offering).

175. *Cf.* Hilary J. Allen, *Payments Failure*, 62 BOSTON COLL. L. REV. 453, 462–63 (2021) (exploring the vulnerability of new fintech "[p]ayments systems . . . to mass technological failures . . . as reliance on electronic processing and communication has increased").

176. Swire, *supra* note 97, at 496 (noting "[o]ver time, the distinctions between banks and other corporations have eroded significantly, with non-banks today often reliant on short-term financing similar to deposits"); *see also* CSBS Letter, *supra* note 102 ("[I]n contrast, non-depository institutions have much less resilient liability structures heavily dependent on higher cost, volatile, short-term funding provided by sophisticated, institutional investors, who are likely to withdraw their funds at the earliest indication of potential problems."); Eamonn K. Moran, *Wall Street Meets Main Street: Understanding the Financial Crisis*, 13 N.C. BANKING INST. 5, 73–74 (2009); CHRISTOPHER K. ODINET, FORECLOSED: MORTGAGE SERVICING AND THE HIDDEN ARCHITECTURE OF HOMEOWNERSHIP IN AMERICA 125–31 (2019).

177. *See* Moran, *supra* note 176, at 73–78 (illustrating the Lehman Brothers' investment failure).

said to be.[178]

Related to this first justification, some suggest that banks' financial distress must be resolved more quickly than would be possible in a bankruptcy proceeding because of banks' perceived importance and fragility.[179] For example, Bliss & Kaufman write that "the [FDIA] recognized the need to resolve banks differently than other firms by providing for speedy administrative action outside the slower judicial system."[180] Hynes and Walt have also written about the importance of the speedy satisfaction of the claims of some bank creditors.[181] There are two aspects to this claim. First, speedy resolution of an entity's financial distress is required. Second, Chapter 11 offers insufficiently quick resolution. Both are contested.

Even when an entity has deposit liabilities, some have argued that an especially speedy liquidation of a bank's assets is not required.[182] For example, Fischel, Rosenfield, and Stillman argue that justifying an administrative bank resolution process because of the need for speedy depositor access to funds "is questionable today because [many] depositors have available liquidity substitutes such as money market funds and credit cards."[183] Others, though, disagree. For example, Kathleen Engel and Pat

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178. *See* Bruckner, *Promise and Perils*, *supra* note 45, at 32–33 & n.197 (describing how fintech lenders fund their loans); *see also* Odinet, *Consumer Bitcredit and Marketplace Lending*, *supra* note 45, at 789–93 (highlighting different fintech lending models, such as balance-sheet/direct-funding model and bank-partnership model). *But see* Allen, *supra* note 175, at 469 (arguing "[t]he retail payments ecosystem . . . qualifies as a complex adaptive system and is susceptible to cascade failure").

179. *See* Ayotte & Skeel, *supra* note 160, at 492–93 (writing that FDIC's mandate to take "prompt corrective action . . . has some attractive features (namely, speed) that are more appropriate to limiting systemic risk"); *see also* Bliss & Kaufman, *Economic Comparison*, *supra* note 8, at 3.

180. Bliss & Kaufman, *Economic Comparison*, *supra* note 8, at 5; *see also* Ayotte & Skeel, *supra* note 160, at 482 (citing Luigi Zingales, *Why Paulson is Wrong*, ECONOMIST'S VOICE, (Sept. 2008), http://gesd.free.fr/zingales.pdf [https://perma.cc/2B3U-ES4E] for the proposition that Chapter 11 is "too slow and costly"); Fischel, *et al*., *supra* note 146, at 318 (noting that even a short delay in depositor's access to their "funds has historically been thought to be intolerable").

181. *See* Hynes & Walt, *supra* note 159, at 1008–09.

182. *See* Hynes & Walt, *supra* note 159, at 1008 ("We are skeptical of the possible benefits of speed and conclude that speed does not justify giving the FDIC control over the resolution process.").

183. Fischel, *et al*., *supra* note 146, at 318

> Even if there is still some basis for the traditional view—perhaps because the alternatives are not perfect substitutes for bank deposits—it certainly does not justify providing de facto insurance to all depositors, no matter how large. A preferable system might be to insure small depositors while allowing the

McCoy note that there were multiple depositor runs during the 2008 financial crisis, and particularly highlighting IndyMac's downfall.[184]

Separately, Hynes and Walt argue that the need to give depositors timely access to their funds depends not on selling the failed bank's assets but ensuring that FDIC insurance makes funds promptly available to those depositors.[185] Once again, therefore, this rationale presents a mixed bag. Regardless of whether the speedy resolution of depository institutions is required, fintech lenders do not hold customer deposits and there is no particular need for haste on this account. By contrast, payment firms do hold funds for customers and customers likely expect to have ready access to those funds.[186] If these firms were to fail, customers would be cut off from that access. As such, the speedy resolution of payment firms with SPNB charters may be important and FDIC insurance is not likely to be relevant to creditors of fintech payment firms.[187]

But does Chapter 11 offer an insufficiently quick resolution? Again, this is contested. It is not at all apparent that regulators act promptly to resolve problems with banks or that regulators initiate administrative resolution of insolvent entities more promptly then creditors will initiate bankruptcy proceedings.[188] As Ayotte and Skeel write, "recent examples

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bankruptcy laws to operate for larger creditors.

184. Kathleen C. Engel & Patricia A. McCoy, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS 176-77 (OXFORD U. PRESS 2011) (noting IndyMac Bank was deemed "well capitalized" in January 2008 but after a run on the bank deprived the bank of $1.3 billion in deposits, IndyMac closed in July 2008); *see also* Allen, *supra* note 175, at 461 (discussing how a "run dynamic also was central to sparking the 2007–2008 financial crisis").

185. *See* Hynes & Walt, *supra* note 159, at 990 ("The identified benefits of speed depend on the timely reimbursement of insured depositors (a matter governed by the terms of FDIC insurance) and not on the sale of the failed bank's assets.").

186. Customer expectations may not be well-grounded in their legal rights, however. Paypal, for instance, notes that many of its users "will experience a time when their funds become unavailable, also known as a payment hold." *See Why are your funds unavailable or on hold? And what can you do about it?* PAYPAL (July 10, 2020), https://www.paypal.com/us/brc/article/funds-availability [https://perma.cc/4S66-HHJ2] (describing situations where Paypal will not release customer funds for 21 days).

187. *See* Ayotte & Skeel, *supra* note 160, at 492–93 (describing the prompt resolution of a bank's assets for the benefit of depositors as requiring that a "bank's unprotected investors (unsecured creditors and shareholders)" give up substantial rights and arguing that "while this is defensible with commercial banks, because the vast majority of their liabilities are deposits, it is far more problematic with other firms"); *see also* Fischel, *et al*., *supra* note 146, at 318 (explaining that the need for speed has historically been a justification when consumer deposits are involved).

188. Ayotte & Skeel, *supra* note 160, at 472 (2010); *see also* Bliss & Kaufman, *Economic Comparison*, *supra* note 8, at 25 ("[T]he objectives of prompt corrective action are not entirely

suggest that bank regulators often are unable or unwilling to identify distressed institutions and trigger a resolution procedure before the institution becomes deeply insolvent."[189] Instead of bank regulators, Ayotte and Skeel argue that the best situated party to identify troubled entities in need of intervention are the bank's managers and investors (i.e. creditors).[190]

It is not simply creditors may decide to more promptly initiate insolvency proceedings than bank regulators; bankruptcy cases may proceed as or more quickly than administrative bank liquidations. It is true that "a typical purchase and assumption of a failed bank [by the FDIC] is quicker" than a typical bankruptcy case because it typically happens over the weekend.[191] Nonetheless, a typical purchase and assumption proceeds only marginally faster than many section 363 sales[192] which have become an increasingly important, though criticized, part of bankruptcy practice.[193] And

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met," as evidenced by "the fact that almost all banks that have been closed by regulators since FDICIA were economically insolvent, usually imposing total losses on general unsecured creditors and some losses on uninsured depositors[.]").

189. Ayotte & Skeel, *supra* note 160, at 472 (2010)

> As a result, prompt resolution can only be guaranteed with the promise of taxpayer assistance behind it. The distress of financial firms thus poses an inescapable choice: regulators must either allow counterparties to take losses, and thus confront the possibility of systemic effects, or they must use taxpayer money to prevent the losses from being realized. Bankruptcy has proven to be an adequate mechanism for handling the former choice, and it is flexible enough to accommodate the latter.

See also Bliss & Kaufman, *Economic Comparison*, *supra* note 8, at 27; Skeel, *Law & Finance*, *supra* note 4, at 724 ("[I]n both bank and insurance law . . . only regulators can initiate an insolvency proceeding.").

190. Ayotte & Skeel, *supra* note 160, at 492 (the "prompt corrective action approach" . . . "is designed to assure early closure of troubled banks, and it relies on regulators to determine when and how to intervene, rather than the parties with the best information—the bank's managers and investors"); *see also* Skeel, *Law & Finance*, *supra* note 4, at 724 ("Managers are even better informed than regulators and are particularly well positioned to know when a troubled firm belongs in an insolvency proceeding.").

191. Hynes & Walt, *supra* note 159, at 989, 1004 ("Some purchase and assumption transactions can be quite similar to bankruptcies that utilize Section 363 to sell all or substantially all of the assets. Both processes can be used to quickly transfer the core assets or goodwill of the failed entity to an acquirer.").

192. Hynes & Walt, *supra* note 159, at 1050 ("Granted, the FDIC sometimes sells all or substantially all of the assets of the failed bank immediately upon seizing the failed bank. These resolutions are marginally quicker than the fastest bankruptcies resolved by use of Section 363."); *see also* Ayotte & Skeel, *supra* note 160, at 479 (discussing the speedy resolution of most of Drexel Burnham's most liquid assets).

193. *See* Bruckner, *Bankruptcy Sales*, *supra* note 16, at 1 ("Over the past thirty years, bankruptcy sales have become a vitally important aspect of bankruptcy practice."); *see also* *Final Report and Recommendations*, AM. BANKR. INST. COMMISSION TO STUDY THE REFORM OF CHAPTER 11 (2012-14), https://abiworld.app.box.com/s/vvircv5xv83aavl4dp4h [https://pe

Belk, the department store chain, recently set a record for completing its "prepackaged restructuring . . . in less than 21 hours."[194] Unfortunately, the speed of 363 sales often comes at the expense of the procedural protections for creditors baked into other parts of the Bankruptcy Code.

Similarly, Ayotte and Skeel point to the Lehman Brothers bankruptcy cases as evidence that Chapter 11 is neither too slow or costly to address bank failures.[195] In those cases, they argue, that "faced with extreme time pressure, buyers materialized, and Lehman quickly sold its viable subsidiaries, allowing them to remain in business under different ownership."[196] Ayotte and Skeel also note that the investment bank Drexel Burnham only took a week to liquidate "82% of its securities, leaving mostly low quality, hard to value junk bonds in its portfolio" and this took place during an era when bankruptcy cases were routinely criticized for taking far too long.[197] That said, the creditors of an investment bank like Lehman Brothers are probably very different from the creditors of a hypothetical SPNB payments firm that is similar to Venmo. In summary, bankruptcies can be a speedy process. Thus, even if we are concerned about the failure of SPNB payment firms, it is not clear that bankruptcy cannot address those failures in a timely fashion.

When time is not of the essence, bankruptcy can certainly be an appropriately prompt process for resolving a banks' financial distress. Since the OCC has not "appointed a receiver for an uninsured bank since shortly after the Congress established the FDIC in response to the banking panics of 1930-1933," the FDIC receivership process may be our best guide to what an OCC receivership would look like.[198] Hynes and Walt write that the

rma.cc/8WH3-J39D].

194. Soma Biswas, *Sycamore's Belk to Exit Bankruptcy Within One Day*, WALL ST. J. (Feb. 24, 2021, 4:33 PM ET), https://www.wsj.com/articles/sycamores-belk-to-exit-bankruptcy-within-one-day-11614202411?st=whnwrdcx65br2nw [https://perma.cc/9RXW-PXFN]. Obviously, in a prepackaged bankruptcy there is some time spent on the "prepackaging," but that time could also be spent in advance on a prepackaged bankruptcy for an SPNB.

195. Ayotte & Skeel, *supra* note 160, at 477–82 (discussing the speedy resolution of investment banks, Drexel Burnham and Lehman, in bankruptcy to argue that "bankruptcy is surprisingly well-designed to handle the failures of nonbank financial firms"); *see also* Hynes & Walt, *supra* note 159, at 989 (discussing the speedy resolution of the automobile bankruptcy cases after the Great Recession, which "generated headlines because the sales were completed in a matter of weeks").

196. Ayotte & Skeel, *supra* note 160, at 482.

197. Ayotte & Skeel, *supra* note 160, at 479–80 (noting Drexel Burnham was able to liquidate most of its securities within a week and it did so "at a time when delay was seen as a great shortcoming of Chapter 11").

198. It is hard to compare OCC receiverships, since we have not had one in approximately ninety years. *See* RECEIVERSHIPS FOR UNINSURED NATIONAL BANKS, OFF. OF THE COMPTROLLER OF THE CURRENCY, [Docket ID OCC-2016-0017] 12 C.F.R. Pt. 51 (Dec. 15,

FDIC's experience in resolving failed banks suggests that bankruptcy is often faster and that there is "no reason to believe that the FDIC would resolve a bank holding company much more quickly than would bankruptcy, unless the FDIC were willing to provide substantial assistance that shifts much of the risk of loss to the FDIC itself."[199] In FDIC receiverships, the FDIC takes more than two and a half times as long to dispose of assets (four years) than the average time the bankruptcy courts took "to dispose of the filings of large publicly traded corporations between 1995 and 2008."[200] Hynes and Walt note that "the FDIC often retains a sizable portion of the failed bank's assets, by choice or necessity, and liquidates them over time."[201] They report that "[t]he FDIC's own resolution manual proposes a four-year liquidation schedule, and the average time elapsed between the seizure of failed banks between 2002 and 2003 and the date of the last distribution to depositors was forty-seven months. In only one transaction was the final payment made in less than one year (ten months)."[202]

Although the OCC process could be faster than the FDIC process, there's little reason to believe that would be true. Thus, in these longer cases, bankruptcy courts may well be faster.[203] Therefore, while the first rationale may have some bite in the context of SPNBs, bankruptcy is probably a fine pathway to resolve distressed SPNBs. In other words, this difference—if there is one—may not favor the OCC receivership process.

The second justification for treating banks differently than non-banks is that most banks are depository institutions.[204] Deposits represent the

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2016), https://www.occ.treas.gov/news-issuances/news-releases/2016/nr-occ-2016-160a.pdf [https://perma.cc/FF4F-QRMZ]. ("The OCC has not appointed a receiver for an uninsured bank since shortly after the Congress established the FDIC in response to the banking panics of 1930-1933."). And we have not seen the OLA process used yet.

199. Hynes & Walt, *supra* note 159, at 1050.

200. Hynes & Walt, *supra* note 159, at 1050.

201. Hynes & Walt, *supra* note 159, at 1009.

202. Hynes & Walt, *supra* note 159, at 1012 ("Perhaps the greatest weakness with the speed of liquidation argument is that the FDIC does not, in fact, quickly liquidate the assets of the failed bank.").

203. *See* Ayotte & Skeel, *supra* note 160, at 480

> Drexel showed, nearly two decades before Lehman, that bankruptcy need not take too long to effectively resolve the financial distress of a financial institution. Drexel filed for bankruptcy in 1990, at a time when delay was seen as a great shortcoming of Chapter 11. To be sure, the case did take more than two years to complete. But even in an era of long cases, Drexel's most time sensitive assets were redeployed almost immediately, long before the eventual reorganization.

see also Hynes & Walt, *supra* note 159, at 1050.

204. Wilmarth, *supra* note 13, at 2 ("Since 1864, deposit-taking has been an essential part of the 'business of banking' conducted by national banks.").

collective savings of a substantial portion of residents of the United States.[205] If banks were to close precipitously without repaying their depositors, many people of "limited financial means and expertise" would lose their entire nest egg.[206] But fintech lenders are exclusively non-depository institutions and therefore this rationale has no bite at all in this context. While fintech payment processors do hold something akin to bank deposits, the volume of those customer funds is not that great. Whereas the largest banks hold balances in the trillions, the largest payment processors hold just tens of billions of dollars in customer funds.[207] Of course the people who have deposited those billions of dollars may very well need access to them promptly. But it is not clear that the OCC's administrative resolution process would advantage these consumers relative to bankruptcy.

The third justification—the need for expert oversight of a bank's insolvency proceedings—may also provide some degree of support for excluding SPNBs from bankruptcy. The need for expert regulation of financial institutions, particularly when entities are in financial trouble, counsels in favor of allowing an entity's primary regulator to wind down its operations, thus preventing information asymmetries.[208] As Professor David

205. Bliss & Kaufman, *Economic Comparison*, *supra* note 8, at 2 ("Bank deposits (debt) are held by a large proportion of the population, including those of limited financial means and expertise, and in a wide range of denominations, including very small amounts.").

206. Bliss & Kaufman, *Economic Comparison*, *supra* note 8, at 2.

207. *See The Biggest US Banks by Total Deposits*, MX (May 25, 2021), https://www.mx.com/moneysummit/biggest-us-banks-by-deposits/ [https://perma.cc/A5YH-87FS] (describing the biggest US banks' deposits). By contrast, Paypal, which owns Venmo, reports that it holds only about $35 billion dollars in customer money. *See* Paypal Holdings, Inc, Annual Report (Form 10-K) (Feb. 4, 2021) https://sec.report/Document/0001633917-21-000018/ [https://perma.cc/LQ2E-JN8V] (CONSOLIDATED BALANCE SHEETS, "Funds payable and amounts due to customers").

208. *See* David A. Skeel, *Bankruptcy for Banks*: *A Tribute (and Little Plea) to Jay Westbrook*, FAC. SCHOLARSHIP PENN L., 6 (2021); Skeel, *Law & Finance*, *supra* note 4, at 735

> [R]egulators are a sensible choice to initiate insolvency proceedings in heavily regulated industries such as banking and insurance because their involvement in the regulatory process gives them extensive information about a given bank or insurance company. Regulators ideally will know when a financial intermediary has encountered financial distress and can commence a receivership or other insolvency proceeding at that time. Regulators also are well positioned to consider the systemic effects of a bank failure rather than focusing solely on the troubled bank.

see also Sovern, *supra* note 7, at 220

> [E]xpertise in the handling of an insolvent bank's affairs is made possible by the statutory authorization of the Federal Deposit Insurance Corporation to accept appointment as receiver of any closed insured bank if the appointment is offered 'by the authority having supervision of such bank and is authorized or permitted

Skeel writes, "[r]egulators are thus likely to be well-informed about an institution that encounters financial distress from the moment the trouble begins. A bankruptcy judge, by contrast, would have little or no contact with the institution until the moment it filed for bankruptcy."[209] Presumably one advantage to having the OCC rather than a debtor or its creditors decide whether to initiate an insolvency proceeding for a SPNB is because the OCC will have a more clear-eyed appraisal of whether the entity is insolvent.[210]

However, Skeel also warns that "the advantages of regulator initiation often prove more theoretical than real" because regulators' parochial interest may encourage them to delay action to avoid the failure of a bank or insurance company on their watch.[211] By contrast, creditors have a financial incentive to monitor their investments in a distressed SPNB and to take steps to force it into bankruptcy when they believe it necessary. Thus, while bankruptcy judges will bring less experience to bear in resolving a SPNB's financial troubles, the ease in which creditors can initiate bankruptcy cases at least partially outweighs that downside.

The first three rationales are the only ones that potentially justify excluding SPNBs from bankruptcy, but they do not require that outcome. As just noted, there are good counterarguments to each. The remaining

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> by State law.'

Swire, *supra* note 97, at 503–04 (suggesting that the FDIC has "a plausible claim to expertise" in bank insolvency cases because it is a repeat player and setting forth at least one reason why FDIC receiverships might be preferable to resolution in bankruptcy).

209. Skeel, *Bankruptcy for Banks*, *supra* note 208; Eisenberg, *supra* note 169, at 10 ("If special expertise is needed to assist troubled financial institutions, the bankruptcy court, the traditional bankruptcy forum, may be at a relative disadvantage vis-a-vis federal or state regulatory authorities.").

210. "If regulators were fully informed and had appropriate incentives to initiate in a timely fashion, their monopoly over initiation would make perfect sense." Skeel, *Law & Finance*, *supra* note 4, at 724 (arguing that regulators have mixed results as insolvency regime initiators and that managers are better suited to decide whether to initiate an insolvency proceeding).

211. Skeel, *Law & Finance*, *supra* note 4, at 735

> Because regulators do not have a financial interest in any given bank or insurance company, they often have little to lose if they wait too long to initiate a receivership, and much to gain by delaying: bank or insurance company failure may reflect badly on the regulators, so a regulator may be better off if the failure occurs after they have departed.

Skeel, *Law & Finance*, *supra* note 4, at 741 ("[G]iven regulators' political disincentive to close banks promptly and related factors such as the relationships examiners develop with managers of the banks they monitor, one suspects that regulators may continue to initiate insolvency proceedings inefficiently late—particularly in times when the number of troubled banks begins to rise.").

traditional justifications for excluding banks from bankruptcy, which are discussed below, do not apply to SPNBs and cannot justify their exclusion from bankruptcy. Thus, bankruptcy may be an equally good (or possibly superior) forum for addressing the financial distress of SPNBs.

The fourth rationale is historic. To wit: banks have long been excluded from bankruptcy. Professor Swire dates "[t]he perceived need for a special bank insolvency regime . . . to 1837 and to 1857, when Presidents Van Buren and Buchanan, respectively, introduced bills in Congress that would have provided for a federal bankruptcy system confined to banks."[212] Justifications for special rules for banks include concerns about bank runs and the need for immediate access to deposits, but, as just explained, "it is not clear that they remain convincing rationales for special rules today," particularly for SPNBs.[213] And when it came time to enact the Bankruptcy Code in 1978, the legislative history states only that "banking institutions and insurance companies are excluded from liquidation under the bankruptcy laws because they are bodies for which alternate provision is made for their liquidation under various regulatory laws."[214] Another rationale for the exclusion was supplied by the Second Circuit, which has held "that the only operative intent behind the banking corporation exclusion was the avoidance of conflict between state or federal regulatory procedures and the Bankruptcy Act."[215]

As a result, it is not clear if the driving rationale for exclusion is a concern about federalism[216] or the efficient resolution of distressed entities.[217] To the extent that the concern is grounded in federalism and ensuring that states retain primary control over the liquidation of wholly domestic entities, that concern is misplaced in the context of SPNBs. SPNBs are creatures of federal and state law. In addition, they are unlikely to operate wholly within the jurisdiction of any one particular state. Their business models are not

212. Swire, *supra* note 97, at 478.

213. Swire, *supra* note 97, at 494.

214. H.R. REP. No. 95-595, at 318–19.

215. Green, *supra* note 96, at 914.

216. Green, *supra* note 96, at 908 ("[H]istory does tend to explain the exceptions in terms of the considerations of federalism.") (internal citations omitted).

217. Sovern, *supra* note 7, at 220 ("Unified and probably efficient insolvency administration is available for national banks by virtue of the fact that Congress has vested primary responsibility for their liquidation and rehabilitation in the Comptroller of the Currency and the Federal Deposit Insurance Corporation," making access to bankruptcy less important.); Laura S. McAlister, *The Inefficiencies of Exclusion: The Importance of Including Insurance Companies in the Bankruptcy Code*, 24 EMORY BANKR. DEV. J. 129, 141 (2008) (discussing the benefits of a single federal regime instead of state-based insolvency regimes for insurers and noting that "the out-of-state proceedings that are required to reclaim the insurer's assets result in the duplicated efforts of the regulators").

bounded by state borders and so it would be surprising if their customers and operations were strictly contained within a single state's geographic borders.[218] Additionally, one of the primary advantages of the fintech charter is to match a nationally operative entity with a single, national regulator.[219] Finally, the costs of obtaining and maintaining a SPNB charter are and will be considerable. As such, fintech companies who seek a SPNB charter are likely to be larger entities, and therefore are unlikely to operate solely within a single state. Thus, federalism concerns seemingly cannot justify excluding SPNBs from bankruptcy because multiple states and the federal government are likely to have an interest in the resolution of financially distressed SPNBs.

Nonetheless, if the concern is one about avoiding conflicts between competing insolvency regimes, such as the OCC's liquidation procedures and the Bankruptcy Code, it might be appropriate to exclude SPNBs from bankruptcy. This reading also seems supported by the legislative history to the Code itself, which expressed concern about there being alternatives available to liquidate "under various regulatory laws."[220] That said, the vast majority of regulatory regimes available to liquidate banks and insurance companies in 1978 were under various state regulatory laws and so, perhaps, the Code *is* primarily focused on federalism concerns, even if the issue was not expressly couched in those terms. In addition, concerns about inefficient conflicts between the NBA and bankruptcy law are not new. As far back as the 19th century, courts recognized the potential for conflict.[221] But, as noted earlier, not all courts have been worried about the potential for inconsistent insolvency regimes.[222] Whether it is an action being removed from state to federal court, conflicts between arbitrators and bankruptcy judges, or district courts withdrawing the reference from bankruptcy courts, there are many other instances where potential duplication of effort are tolerated, and this does not seem especially different.

The fifth justification—that banks create systemic risk for the economy—appears true for some banks but not (yet) for SPNBs.[223] Like

218. *See* Knight, *Federalism and Federalization on the Fintech Frontier*, *supra* note 30.

219. *See* Knight, *Federalism and Federalization on the Fintech Frontier*, *supra* note 30.

220. H.R. REP. No. 95-595, at 318–19.

221. *See supra* text accompanying note 166.

222. *See supra* text accompanying note 167.

223. Others have referred to this rationale by a different name, such as the "public or quasi-public nature" of banks, which has been described as "the theory that banks touch 'enough persons who must deal with them at some economic disadvantage to require public supervision and control.'" *See* Green, *supra* note 96, at 910. This seems to require that the government have "a strong interest in assuring their soundness and in preventing the kinds of systemic failures that led to financial devastation in the Depression." Skeel, *Law & Finance*,

bank lenders, fintech lenders are expected to loan money and demand its repayment.[224] Similarly, they are expected to securitize some of those loans.[225] And fintech payment firms maintain some of the financial plumbing of the U.S. payments system. Because banks' systemic importance is not strictly linked to their status as depository institutions, SPNBs could also be systemically important.

Undoubtedly, some banks are systemically important and "some are individually large relative to GDP."[226] But fintech companies are not nearly as large as traditional banks.[227] Ally Bank is the only fintech entity on the list of systemically important financial institutions (SIFI) in the United States[228] and none are on the Financial Stability Board's list of global SIFIs.[229] In his work, Professor Christopher K. Odinet has made the case

supra note 4, at 723.

224. *See* Bruckner, *Promise and Perils*, *supra* note 45, at 32–33 & n.197 (describing how fintech lenders fund their loans); *see also* Matthew A. Bruckner, *Regulating Fintech Lending*, 37 BANKING & FIN. SERVS. POL'Y REP. 1, 1 (2018); *see also* Odinet, *Consumer Bitcredit and Marketplace Lending*, *supra* note 45, at 789–93; *see* Vincent Di Lorenzo, *Fintech Lending: A Study of Expectations Versus Market Outcomes*, 38 REV. BANKING & FIN. L. 725, 737, 752–53 (discussing potential default risks on repayment and expressing consumers' concerns of unaffordable terms of repayment).

225. Christopher K. Odinet, *Securitizing Digital Debts*, 52 ARIZ. ST. L. J. 477, 496–523 (2020) (discussing the structure and process of fintech securitizations and the systemic risk arising from the accumulation of such securities combined with a lack of consistent regulation); Christopher K. Odinet, *The New Data of Student Debt*, 92 S. CAL. L. REV. 1617, 1636, 1643 (2019) (describing the securitization of loans by fintech lenders and the growth of overall fintech lending securitizations); *see also* Nick Clements, *Led by Student Loans, Marketplace Lending Securitization Volume Soars*, FORBES (Oct. 21, 2016, 5:25 PM), https://www.forbes.com/sites/nickclements/2016/10/21/led-by-student-loans-marketplace-lending-securitization-volume-soars/?sh=38b0febc3c23 [https://perma.cc/82Y2-8LHZ].

226. Bliss & Kaufman, *Economic Comparison*, *supra* note 8, at 2.

227. For example, as of November 4, 2020, fintech lender Lending Club's market capitalization was $0.42B and JPMorgan Chase's was $305.52B (or almost 900x larger). *LendingClub Market Cap 2008-2021 | LC*, MACROTRENDS (Sept. 20, 2020), https://www.macrotrends.net/stocks/charts/LC/lendingclub/market-cap [https://perma.cc/63CS-BD7P]. In the payments space, by contrast, fintech companies are growing more quickly in size and importance. For example, as of November 4, 2020, Visa's market capitalization was $378.24B, PayPal's was $220.3B, Square's was $68.85B and American Express's was $75.21B. *See Visa Market Cap 2007-2021 | V*, MACROTRENDS (Sept. 20, 2020), https://www.macrotrends.net/stocks/charts/V/visa/market-cap [https://perma.cc/6HVG-YK6Y]; *Publicly Listed Fintech Companies – a Tale of Two Sectors*, LENDACADEMNY (Sept. 20, 2020), https://www.lendacademy.com/publicly-listed-fintech-companies-a-tale-of-two-sectors/ [https://perma.cc/UNF6-KFZH] (showing trends since 2018 to exemplify growth).

228. Emily Liner, *Understanding SIFIs: What Makes an Institution Systemically Important?*, THIRD WAY (Nov. 6, 2015), http://thirdway.imgix.net/pdfs/understanding-sifis-what-makes-an-institution-systemically-important.pdf [https://perma.cc/T4Q4-2WTC] (listing systemically important entities, only one is a fintech, Ally).

229. FIN. STABILITY BD., 2019 LIST OF GLOBAL SYSTEMICALLY IMPORTANT BANKS (G-SIBS)

that fintech lenders *could* become systemically important in the future.[230] Although I'm not wholly convinced by Professor Odinet's arguments, it remains a possibility. Yet even he doesn't argue that fintech companies are systemically important right now. The consensus appears to be that fintech firms are not systemically important at this time.[231]

Sixth, Hynes and Walt argue that it is important to have the residual claimant in charge of a depository institution's winding down because the residual claimant will make value-maximizing decisions for the bank's assets.[232] The FDIC is usually a bank's residual claimant and it acts as the receiver for most insolvent depository institutions.[233] By contrast, the bankruptcy process, diffuses authority through its "numerous formal and informal mechanisms for creditors to exercise control over the liquidation process" and thus allows creditors to assert their parochial views as to how to maximize the value of the estate.[234] For this reason, Ayotte and Skeel suggest that creditors cannot be trusted to maximize the value of a failed depository institution as well as the FDIC.[235]

However, in the case of SPNBs, the OCC is not the residual claimant

(Nov. 22, 2019), https://www.fsb.org/wp-content/uploads/P221119-1.pdf. [https://perma.cc/6PU4-42WG].

230. *See* Christopher K. Odinet, *Securitizing Digital Debts*, *supra* note 225; *see also* Christopher K. Odinet, *The New Data of Student Debt*, *supra* note 225; *see also* Allen, *supra* note 175, at 463 ("A failure of the infrastructure supporting retail payments processing could certainly be systemic, however, and could be at least as debilitating as a financial crisis transmitted through credit channels.").

231. *See* FIN. STABILITY BD., FINANCIAL STABILITY IMPLICATIONS FROM FINTECH, 1 (June 27, 2017), http://www.fsb.org/wp-content/uploads/R270617.pdf [https://perma.cc/QG98-EUH3] ("the FSB concludes that there are currently no compelling financial stability risks from emerging FinTech innovations."); *see also* Lavinia Franco, Ana Laura Garcia, Vigor Husetovic, and Jessica Lassiter, *Does Fintech Contribute to Systemic Risk? Evidence from the US and Europe*, ADBI WORKING PAPERS (May 2020), https://www.adb.org/publications/does-fintech-contribute-systemic-risk-evidence-us-europe [https://perma.cc/MD66-KP2B] ("[O]ur results show that these fintech firms do not contribute greatly to systemic risk."). *But see* Saule T. Omarova, *New Tech v. New Deal: Fintech as a Systemic Phenomenon*, 36 YALE J. ON REG. 736, 742 (2019) (expressing concerns about fintech's ability to create systemic risk by "amplify[ing] the system's capacity to fuel financial speculation on an unprecedented scale . . . [by] exacerbate[ing] the financial system's dysfunctional tendency toward unsustainably self-referential growth"); *but see generally* Allen, DRIVERLESS FINANCE: FINTECH'S IMPACT ON FINANCIAL STABILITY, *supra* note 15.

232. *See* Hynes & Walt, *supra* note 159, at 990.

233. *See* Hynes & Walt, *supra* note 159, at 1015 (discussing evidence that suggests "the FDIC is truly the residual claimant in the overwhelming majority of bank insolvencies").

234. Ayotte & Skeel, *supra* note 165, at 483.

235. Ayotte & Skeel, *supra* note 160, at 483; *see also* Ayotte & Elias, *supra* note 16, at *21–37 (discussing certain instances where first lien creditors do not act to maximize the value of the bankruptcy estate and instead only maximize their own recoveries).

and therefore lacks the "skin-in-the-game" that Hynes and Walt use to justify FDIC receiverships for insured depository institutions. Instead, the OCC merely provides a neutral forum for adjudicating issues and offers itself as a neutral decision-maker.[236] But the OCC's role is an expansive one and it crowds out other interested parties, such as creditors, from participating.[237] In FDIC receiverships that may make sense because the FDIC can be expected to maximize the value of the estate. But with an insolvent SPNB, we lack a single decision-maker with the incentives to maximize the value of the bankrupt entity. Instead, we are forced to choose whether we will allow creditors—who are generally incentivized to maximize the estate's value—an active role in the process.[238] Since creditors have a greater incentive to maximize the aggregate value of the estate to increase their slice of the pie, it appears sensible to allow creditors greater participation rights upon the insolvency of a SPNB than we allow upon the insolvency of an insured depository institution. As a result, this appears to cut in favor of allowing SPNBs to reorganize in bankruptcy.

The seventh rationale—preserving banks ongoing operations and avoiding the liquidation of banks—is simply confusing as an argument for preferring the OCC receivership process to bankruptcy.[239] Bankruptcy does not require the liquidation of debtors, and the OCC process does not generally appear to contemplate preserving an entity as a going concern.[240] As a result, the ability to reorganize in a chapter 11 bankruptcy proceeding is at least as likely to preserve the going concern value of a SPNB as the OCC's receivership process.[241]

Finally, the eighth rationale—avoiding the high costs of lost confidence—is premised on the idea that "[t]he economic system regards unregulated liquidation of a financial institution with alarm."[242] This concern

236. *But see infra*, text accompanying note 250.

237. *See supra* notes 223–231 (discussing how creditor participation rights are greater in bankruptcy than in an OCC receivership).

238. First lien creditors are not always interested in maximizing the aggregate value of the bankruptcy estate. *See* Ayotte & Elias, *supra* note 16.

239. *See* Green, *supra* note 96, at 910 (describing "the desirability of unarrested operation" of banks as a rationale which courts have identified).

240. *See Business Combinations - Uninsured National Bank Combining With an Uninsured Depository Institution, Comptroller's Licensing Manual,* OFF. OF THE COMPTROLLER OF THE CURRENCY (2018), *13-15; *see also* 12 C.F.R. § 51.7 (2021) (appearing to provide the OCC with the necessary latitude to negotiate purchase and assumption agreements).

241. *See* Green, *supra* note 96, at 913–14 (arguing that the view of bankruptcy as inappropriate "for winding up the complex affairs of banks [appears based on the view] that the federal bankruptcy mechanism [requires] a complete winding up," which is incorrect).

242. Eisenberg, *supra* note 169 ("Visions of depression era 'runs on the banks' have not

should not apply to the bankruptcy process, which is neither "unregulated" nor always a "liquidation."[243] Chapter 11 bankruptcy allows a chance for reorganization, and whether an attempted reorganization will succeed or not, is usually revealed relatively quickly.[244]

* * *

In summary, few of the rationales that have traditionally justified excluding banks from bankruptcy are applicable to the case for excluding SPNBs from bankruptcy. The best arguments for excluding SPNBs are efficiency, expertise, the funding mismatch, and the "deposits" taken by fintech payment processors. First, concerns about the efficient use of judicial time and agency resources should make us worry about the potential for duplicative efforts by bankruptcy courts and the OCC. Efficiency is not, however, the paramount objective as evidenced by our tolerance for similar inefficiencies in many other contexts. Standing alone, therefore, efficiency appears insufficient to justify excluding SPNBs from bankruptcy proceedings because the OCC has also provided for their resolution.

Second, the OCC's relative expertise could also justify the exclusion of SPNBs from bankruptcy, but only if we think that the OCC will actively monitor SPNBs, quickly initiate insolvency proceedings when they are required, and maximize the value of the estate. There are reasons to doubt that this is true, but this rationale cannot be dismissed.

Third, SPNBs may have the same funding mismatch problems of depository institutions if they rely on short-term funding to make loans and because some hold customer funds.

Finally, customers may keep a credit balance with fintech payment processors and can temporarily lose access to that money to that money during the course of a bankruptcy case. It is not clear, however, that they would fare better under the OCC's new liquidation rules. And bankruptcy seems up to the task of resolving the financial distress of overextended SPNBs. Thus, none of the foregoing rationales appear to justify the exclusion of SPNBs from bankruptcy, and none of the other historic reasons

vanished. Fear of extreme reactions underlies reluctance to allow the straightforward liquidation of a bank or savings and loan association.").

243. Eisenberg, *supra* note 169.

244. Elizabeth Warren & Jay L. Westbrook, *The Success of Chapter 11: A Challenge to the Critics*, 107 MICH. L. REV. 603 (2009) (finding that most chapter 11 cases that fail do so (relatively) quickly). *But see* Rutger van Bergem, Todd J. Zywicki, & Jeff Jenkins, *Bankruptcy as Filtering Failure: Evidence of Filtering Failure in the U.S. Bankruptcy Process*, (unpublished manuscript on file with the author) (Feb. 6, 2021 draft) (claiming that bankruptcy law fails "to facilitate economic efficiency by enabling the reorganization of economically viable but financially distressed firms and facilitating the liquidation of economically failed firms").

for excluding banks from bankruptcy have purchase in the context of SPNBs. The appropriate solution appears to be better prudential regulation instead of denying entities access to the bankruptcy system.

IV. DOES IT MATTER IF BANKS ARE EXCLUDED FROM BANKRUPTCY?

By this point, I hope to have established that bankruptcy courts are unlikely to rubber stamp the OCC's decision to label certain non-depository entities as "banks" based either on the statutory language or for policy reasons. In this section, I explain why it matters. As Hynes and Walt write, "[v]ery different rules govern the bankruptcy and bank receivership processes. These rules appear in different titles of the United States Code and have important substantive differences."[245] If SPNBs are allowed to use bankruptcy, some parties-in-interest might prefer bankruptcy to the OCC's procedures for liquidating uninsured national banks. This section highlights six of the most salient differences, including (i) bankruptcy rules are more firmly established, (ii) judicial rather than administrative oversight in bankruptcy cases, (iii) greater creditor participation rights in bankruptcy, (iv) bankruptcy allows for some debtors to be reorganized instead of liquidated, and (v) bankruptcy's automatic stay and anti-discrimination provisions. Additional differences are summarized in the Appendix.

There are significant differences between the OCC's wind-down processes and the Bankruptcy Code that could cause creditors to favor the latter over the former. First and foremost, the bankruptcy process is well-established and is well understood by many professional advisors. By contrast, "[t]he OCC has not appointed a receiver for an uninsured bank since shortly after the Congress established the FDIC in response to the banking panics of 1930-1933."[246] Because the OCC's processes for uninsured national banks are so new and the NBA's procedures have lain fallow for so long, neither courts nor professional advisors have experience with the OCC process.

There is reason to doubt that the OCC process will be used extensively if bankruptcy is an available alternative, and this is especially true while the OCC's process remains unfamiliar to many bankruptcy professionals. Debtors have some discretion in where they file for bankruptcy cases. And some bankruptcy professionals serve as "case placers," arranging for

245. Hynes & Walt, *supra* note 159, at 987.
246. Receiverships for Uninsured National Banks, 81 F.R. 62835, 62839 (proposed Sept. 13, 2016) (codified at 12 C.F.R. 51).

bankruptcy cases to be heard in preferred jurisdictions.[247] These case placers may well prefer bankruptcy resolution to OCC resolution because bankruptcy offers greater certainty for several reasons, including bankruptcy's longer track record, its more firmly established rules, and its expert umpires.[248] Professional advisors may also prefer bankruptcy for more parochial reasons, including that their fees can be paid directly from the bankruptcy estate but cannot be paid out of the receivership's assets.[249]

Second, the OCC's administrative proceeding is different than the Bankruptcy Code's judicial proceedings in a variety of other ways that creditors are unlikely to prefer, including the absence of a neutral and wholly disinterested decision-maker.[250] Bankruptcy cases are supervised by two neutral parties (e.g., the court and the U.S. Trustee) and a variety of interested parties (e.g., various official and ad hoc committees, and individual parties-in-interest to the case) but the OCC process lacks a completely neutral party.[251] The OCC process lacks a completely neutral supervisory party

247. Lynn M. LoPucki, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS 17 (2008) (discussing bankruptcy's case placers—those "lawyers, corporate executives, banks, and investment bankers who chose the courts for their cases"—and how those they have been able to corrupt some bankruptcy judges); Kenneth Ayotte and David A. Skeel, Jr., *An Efficiency-Based Explanation for Current Corporate Reorganization Practice*, 73 U. CHI. L. REV. 425, 428 (2006) [hereinafter, Ayotte & Skeel, *Efficiency*] (contesting LoPucki's claims that case placers choose Delaware's bankruptcy courts because Delaware bankruptcy judges will approve their fees and arguing that "the debtors that choose Delaware appear to be drawn by the Delaware court's experience in handling large Chapter 11 cases, and that companies that have substantial secured credit are more likely to file in Delaware"); Lynn M. LoPucki & Joseph W. Doherty, *Delaware Bankruptcy: Failure in the Ascendancy*, 73 U. CHI. L. REV. 1387, 1390 (2006) (responding to Ayotte and Skeel and arguing that Delaware's bankruptcy reorganization methods have been a "catastrophic failure").

248. *See* Ayotte & Skeel, *Efficiency*, *supra* note 247, at 428 (arguing that case placers choose Delaware's bankruptcy courts because of "the Delaware court's experience in handling large Chapter 11 cases"); *see also* G. Marcus Cole & Todd J. Zywicki, *Anna Nicole Smith Goes Shopping: The New Forum-Shopping Problem in Bankruptcy*, 2010 UTAH L. REV. 511 (discussing problems with forum shopping in bankruptcy when bankruptcy resolution offers different substantive rights than other bodies of law); Swire, *supra* note 97, at 503–05 (describing the FDIC, not the OCC, as the expert in bank insolvency because the FDIC has served as the receiver in "*every* modern bank insolvency" but cautioning that giving bank regulators too much discretion "creates uncertainty for third parties").

249. Lynn M. LoPucki, *supra* note 247, at 17 (discussing how bankruptcy judges compete for cases by, among other thing, signaling their "willingness to approve higher fees for bankruptcy lawyers who brought cases to the court"); *cf.* Matthew A. Bruckner, *Crowdsourcing (Bankruptcy) Fee Control*, 46 SETON HALL L. REV. 361 (2016) (reviewing the literature on professional fees in bankruptcy cases, discussing concerns that those fees may exceed reasonable amounts, and offering crowdsourcing as a solution to control them).

250. Bliss & Kaufman, *Economic Comparison*, *supra* note 8, at 4.

251. *See, e.g.*, Bruckner, *supra* note 7, at 735 (discussing judicial oversight over bankrupt

because the OCC is the chartering entity for SPNBs but also supervises their winddown and dissolution.[252]

Third, creditors and other parties-in-interest have fewer avenues to participate in or to seek judicial review of the OCC's administrative proceeding as compared with the Bankruptcy Code's judicial process.[253] The OCC alone may appoint a receiver.[254] By contrast, a debtor or its creditors can initiate the bankruptcy process.[255] Creditors' right to seek judicial review of a receiver's appointment by the OCC is more limited than the right of parties-in-interest to a bankruptcy case to seek the transfer of a bankruptcy case to a different venue or withdraw the case from the bankruptcy courts altogether.[256]

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entities).

252. This statement is not intended to cast aspersions on federal receivers but merely to note there is an apparent conflict of interest between a receiver's role in fair-handedly administering the estate and avoiding a perception that the OCC failed in some way to properly oversee the entity. In addition, the receiver may feel pressure to recover assets on behalf of the federal government to the extent it provided any financial relief to the failed institution.

253. 11 U.S.C. § 1109(b) ("A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter."); Hynes & Walt, *supra* note 159, at 987 (discussing important differences between FDIC receiverships and bankruptcy in terms of "the concentration of control over the disposition of the failed firm's assets."); Bliss & Kaufman, *Economic Comparison*, *supra* note 8, at 26

> Bankruptcy law, for all its complexity, is designed to ensure that all creditors have representation and the process is supervised by a neutral party (the court) to protect all creditors' interests. Bank insolvency law is explicitly designed to primarily protect the interests of a senior creditor by giving that creditor control, limiting oversight, and mandating least cost (to the senior creditor) resolution.

cf. Bliss & Kaufman, *Comparison*, *supra* note 15, at 48–49 (discussing differences between the bankruptcy and FDIA processes). Bliss & Kaufman are critical of giving the FDIC control over bank resolution because "No neutral party is interposed in the process to protect the interests of the other creditors." Bliss & Kaufman, *Economic Comparison*, *supra* note 8, at 26. But that concern is diminished in an OCC receivership because the OCC does not have a financial interest in the outcome of the receivership, unlike the FDIC. In this regard, OCC receiverships are more similar to bankruptcy than to FDIC receiverships.

254. *See* 12 C.F.R. § 51.2(b) ("The Comptroller may appoint a receiver for an uninsured bank based on any of the grounds specified in 12 U.S.C. 191(a).").

255. 11 U.S.C. §§ 301, 303.

256. *Compare* 12 C.F.R. § 51.2(b) ("The Comptroller may appoint a receiver for an uninsured bank based on any of the grounds specified in 12 U.S.C. 191(a).") *and* 12 C.F.R. § 51.2(c) ("If the Comptroller appoints a receiver for an uninsured bank, the bank may seek judicial review of the appointment as provided in 12 U.S.C. 191(b).") *and* Boyd v. Schneider, 124 F. 239, 242 (N.D. Ill. 1903) (The comptroller "alone can determine the need of and appoint a receiver.") *and* Bennet v. Spear, 520 U.S. 154, 162 (1997) (explaining that to have

As Hynes and Walt note, whether a bankruptcy is resolved consensually or crammed down over the objections of some dissenting creditors, "the debtor must win approval of at least some creditors, and the other creditors can ask the judge to reject the plan because it fails to comply with tests of horizontal and vertical equity or it is not in the best interests of the creditors."[257] Even where cram down is possible, dominant creditors often make concessions to other creditors to obtain a consensual reorganization.[258] And parties-in-interest, including the debtor, creditors, acting individually or through a committee, and equity holders, acting individually or through a committee, "may raise and may appear and be heard on *any* issue" in a chapter 11 case.[259]

Fourth, there are also many specific differences in the rules applicable in bankruptcy and an OCC receivership such that creditors may prefer bankruptcy.[260] Although most bankruptcy petitions are voluntarily filed by the debtor[261] (and not the creditors), bankruptcy filings are often precipitated by actions taken by creditors.[262] If, for example, creditors favor reorganizing the entity over liquidating it or think that keeping a debtor's more experienced management running the business would help maximize their

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standing to sue plaintiffs must demonstrate that they have suffered an "'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision") *with* FED. R. BANKR. P. 1014(a) (providing for the transfer of a case to "any other district if the court determines that the transfer is in the interest of justice or for the convenience of the parties") *and* FED. R. BANKR. P. 5011.

257. Hynes & Walt, *supra* note 159, at 987.

258. Hynes & Walt, *supra* note 159, at 995–96 (arguing that plan confirmation process favors deal-making over bankruptcy hardball).

259. 11 U.S.C. § 1109(b) (*emphasis added*).

260. *See* Skeel, *Law & Finance*, *supra* note 4, at 772–73 (discussing the "daunting" downsides of reorganizing banks, but many of the author's concerns do not seem to apply to SPNBs).

261. 11 U.S.C. § 301.

262. *See, e.g.*, Chrysler LLC v. Plastech Engineered Products, Inc. (*In re* Plastech Engineered Products, Inc.), 382 B.R. 90, 103 (Bankr. E.D. Mich. 2008) (describing how the debtor's chapter 11 filing was precipitated when Chrysler obtained

> an ex parte temporary restraining order and order of possession that required the Debtor to immediately deliver possession of all of the tooling that it utilized in the production of Chrysler's parts, allow Chrysler immediate access to the Debtor's facilities to inspect, load, remove and transport the tooling, and to provide all reasonable and necessary assistance to Chrysler to take possession of the tooling.)

While creditors, like Chrysler in the *Plastech* case, can often push a debtor into bankruptcy, involuntary bankruptcy petitions are rarely filed by creditors. *See* Richard M. Hynes & Steven D. Walt, *Revitalizing Involuntary Bankruptcy*, 105 IOWA L. REV. 1127 (2020) ("Involuntary petitions filed by creditors now account for less than 0.05 percent of all petitions.")

returns, they will favor bankruptcy. In such cases, they will favor bankruptcy because the Bankruptcy Code allows debtors to attempt to reorganize and leaves incumbent management in control.[263] By contrast, the OCC's process aims for an expeditious liquidation and displaces the debtor's existing managers.[264]

Another difference between the two resolution processes is that only bankruptcy offers a broad injunction against most actions that will negatively affect the debtor (the so-called automatic stay), which applies immediately and automatically upon the filing of a bankruptcy petition.[265] By contrast, the NBA and accompanying regulations appears to lack a comparable provision.[266] The OCC's recently finalized rules do provide that "the receiver for an uninsured bank may exercise other rights, privileges, and powers authorized for receivers of national banks under the NBA and the common law of receiverships as applied by the courts to receiverships of national banks conducted under the NBA."[267] But when providing examples of a receiver's common law powers, an injunction is not among the listed powers.[268] Moreover, the OCC has specifically disclaimed any right to "stay,

263. *See* Matthew Bruckner, *The Virtue in Bankruptcy*, 45 LOY. U. CHI. L.J. 233, 275 (2013) ("Chapter 11 is biased toward the rehabilitation of financially distressed companies and their reorganization into viable, going concerns."); *see also* Bliss & Kaufman, *Economic Comparison*, *supra* note 17, at 4.

264. *See supra* note 263.

265. 11 U.S.C. § 362.

266. *Compare* 12 U.S.C. § 1821(d)(12)(A) (providing for a stay of between 45 and 90 days when an conservator or receiver is appointed for an insured depository institution and only upon the request of the conservator or receiver) *with* 12 C.F.R. § 51.7(c) (lacking express language providing for an injunction against creditor collection activity or government action and providing only that "[t]he receiver for an uninsured bank may exercise other rights, privileges, and powers authorized for receivers of national banks under the NBA and the common law of receiverships as applied by the courts to receiverships of national banks conducted under the NBA."). *Cf.* Banking Law Scholars Brief, *supra* note 40, at 31–32 ("The NBA[] . . . lacks an automatic stay . . . ").

267. 12 C.F.R. § 51.7(c).

268. RECEIVERSHIPS FOR UNINSURED NATIONAL BANKS, OFFICE OF THE COMPTROLLER OF THE CURRENCY, https://www.govinfo.gov/content/pkg/FR-2016-12-20/pdf/2016-30666.pdf [https://perma.cc/CD52-3HTF] (providing the following examples:

> (1) the authority to repudiate certain contracts, including: (a) purely executory contracts, upon determining that the contracts would be unduly burdensome or unprofitable for the receivership estate, (b) contracts that involve fraud or misrepresentation, and (c) in limited cases, non-executory contracts that are contrary to public policy; (2) the authority to recover fraudulent transfers; and (3) the authority to enforce collection of notes from debtors and collateral, regardless of the existence of side arrangements that would otherwise defeat the collectability of such notes.)

delay or hinder a secured party's remedies with respect to collateral security" in certain circumstances, such as the when a creditor asserts a right to setoff.[269]

Certain creditors may prefer bankruptcy to the OCC process because of the automatic stay's availability. While the automatic stay is often thought to benefit the debtor at the expense of its creditors, it also benefits creditors in many circumstances. For example, unsecured creditors might be protected by the stay preventing a secured creditor from seizing an important piece of the debtor's collateral, which could allow the debtor's business to remain operational.

Most importantly, the debtor or its creditors might seek to use the automatic stay or the Code's anti-discrimination provisions to prevent the OCC from terminating a SPNB's charter. Section 541(a) of the Bankruptcy Code provides that filing a bankruptcy petition creates an estate that contains "all legal or equitable interests of the debtor in property as of the commencement of the case."[270] Although it is not free from doubt, a SPNB arguably has a property interest in its OCC charter, thus making the charter property of the estate.[271] For example, a debtor's accreditation or licensure

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269. Office of the Comptroller of the Currency, Interpretive Letter #733, Interpretations and Actions (July 1996), https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/1996/int733.pdf [https://perma.cc/KSK3-3JZE] (citing Bell v. Hanover National Bank, 57 F. 821, 822 (C.C.S.D.N.Y. 1893) and Scott v. Armstrong, 146 U.S. 499, 510 (1892)). *Contrast* 12 U.S.C. § 203(b)(2)

> The conservator may request that any judicial action or proceeding to which the conservator or the bank is or may become a party be stayed for a period of up to 45 days after the appointment of the conservator. Upon petition, the court shall grant such stay as to all parties.

Cf. Bliss & Kaufman, *Comparison*, *supra* note 15, at 48 (discussing differences between the bankruptcy stay and the power to stay actions under the FDIA); Bliss & Kaufman, *Economic Comparison*, *supra* note 8, at 12–14; Hynes & Walt, *supra* note 159, at 988–99 (discussing stays of litigation in both FDIC receiverships and bankruptcy proceedings).

270. 11 U.S.C. § 541(a).

271. COLLIER ON BANKRUPTCY ¶ 541.06[3] (Richard Levin & Henry J. Sommer eds., 16th ed.) ("Under sections 541(a)(1) and 541(c)(1), licenses become property of the estate notwithstanding restrictions on transfer, such as the approval of state officials or execution of papers by the debtor."). *But cf.* Pension Benefit Guar. Corp. v. Braniff Airways, Inc. (*In re* Braniff Airways, Inc.), 700 F.2d 935, 942 (5th Cir. 1983) (describing a debtor airline's airport landing slots as "restrictions on the use of property -- airplanes; not property in themselves."); D.H. Overmyer Telecasting Co. v. Lake Erie Communications, Inc. (*In re* D.H. Overmyer Telecasting Co.), 35 B.R. 400, 401 (Bankr. N.D. Ohio 1983) (calling an FCC broadcasting license "a property right only in a limited sense"). In both of these cases, however, the debtor sought to transfer its rights to the landing slots and broadcasting license to a third party. The result may well be different if the debtor merely passively sought to retain the use of the slots or to continue broadcasting. *Cf.* City of Chicago v. Fulton, 141 S.Ct. 585 (2020) (discussing

status as an educational institution is *not* property of the estate, but only because it has expressly been carved out of definition.[272] A bank charter, which authorizes an entity to operate as a bank, appears similar to state licensure, which also provides the legal authority to operate in a state.

Even if a SPNB's charter is property of the estate, the OCC retains the authority to terminate the charter, but the Bankruptcy Code circumscribes the OCC's authority in several ways. First, the automatic stay would limit the OCC's authority to rescind the license, thus exercising control over property of the estate, unless it was enforcing its police or regulatory power.[273] So long as the OCC is acting out of a concern with public safety and welfare and not in its pecuniary interest, the regulatory power exception to the automatic stay is applicable.[274] And the OCC may well be able to argue successfully that closing a poorly-performing SPNB is in the public interest. But the issue is not free from doubt.

Second, the OCC cannot terminate a SPNB's charter *because* of its bankruptcy filing due to the limitation set forth in section 525(a). Section 525 provides that:

> a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against . . . a person that is or has been a debtor under [the Bankruptcy Code] . . . , has been insolvent before the commencement of the case under this title, . . .

Whether or not a SPNB charter is included in the protections of section 525(a) is not free from doubt either, but Collier's suggests that "this

a creditor's passive retention of automobiles seized pre-petition).

272. 11 U.S.C. § 541(b)(3); Bruckner, *Bankrupting Higher Education*, *supra* note 7, at 715 ("Nevertheless, at least two courts have allowed the ED to terminate a college's Title IV eligibility because it filed for bankruptcy relief, section 525(a) notwithstanding.").

273. 11 U.S.C. § 362(a)(3) (providing for a stay of "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate"); 11 U.S.C. § 362(b)(4) (providing an exception for "the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's or organization's police and regulatory power").

274. COLLIER ON BANKRUPTCY *supra* note 272, at ¶ 362.05[5][a] at 10-11

> To determine whether an action is excepted from the automatic stay as a police or regulatory power action or simply a collection action, the courts have developed two tests to judge the government's action:—the pecuniary purpose test (is the governmental unit pursuing a matter of public safety and welfare rather than a governmental pecuniary interest?); and—the public policy test (is the government action designed to effectuate public policy rather than to adjudicate private rights?

provision be interpreted broadly."[275] Collier's describes the "[t]he common qualities of the property interests protected under section 525(a), . . . [as] property interests [that] are unobtainable from the private sector and essential to a debtor's fresh start."[276] The SPNB charter fits squarely within this definition. This restriction is a limited one, however. It would prevent the OCC from terminating a SPNB charter because of the bankruptcy filing, but not for other reasons, such as the entity's financial mismanagement.

In summary, there are many salient differences between the OCC's administrative liquidation process for banks and the bankruptcy system.[277] Debtors, creditors, and other parties-in-interest might prefer to take advantage of the Bankruptcy Code instead of allowing a SPNB to be liquidated. And they are likely able to do so for the reasons set forth in Sections II and III.

CONCLUSION

Bankruptcy protection appears to be an option if a special purpose national bank runs into financial distress and its creditors or management prefer bankruptcy to the OCC liquidation process.[278] As highlighted

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275. COLLIER ON BANKRUPTCY *supra* note 272 at ¶ 525.02[5] (citing H.R. Rep. No. 595, 95th Cong., 1st Sess. 367 (1977), reprinted in App. Pt. 4(d)(i) infra; S. Rep. No. 989, 95th Cong., 2d Sess. 81 (1978), reprinted in App. Pt. 4(e)(i) infra.).

276. COLLIER ON BANKRUPTCY *supra* note 272 at ¶ 525.02[5]. *Cf.* Matthew Adam Bruckner, *Higher Ed "Do Not Resuscitate" Orders*, 106 KY. L.J. 223, 260 n.249 (2017) (discussing 525(a)'s applicability to healthcare entities and noting "courts have not allowed HHS or CMS to terminate a healthcare provider's Medicare eligibility because of its bankruptcy filing").

277. Additional differences are contained in the Appendix.

278. Arguably, the appointment of a receiver should deprive the debtor's management of the right to file a chapter 11 petition. *See, e.g.*, *In re* Gen-Air Plumbing & Remodeling, Inc., 208 B.R. 426 (Bankr. N.D. Ill. 1997) ("Moreover, Illinois law provides that when a receiver is appointed, the functions of the corporation's managers and officers are suspended and the receiver stands in their place."). *See Prairie States Petroleum Co. v. Universal Oil Sales Corp.*, 88 Ill. App. 3d 753, 759 (1st Dist. 1980) (citation omitted); *see also* 19 C.J.S. *Corporations* § 779 (1990)

> [I]nsofar as the appointment of a receiver vests the right to control the corporate property, it is obvious that the directors and officers of the corporation are, by the appointment, deprived of authority over or control thereof, and this result follows where the order appointing the receiver expressly restrains the corporation and its officers from exercising any of the privileges and franchises of the corporation until the further order of the court.

(footnotes omitted). Courts in other jurisdictions in cases not involving Illinois corporate law have held, however, that the appointment of a receiver does not deprive the corporate directors of the power to file a bankruptcy petition. *See, e.g.,* In re Prudence Co., 79 F.2d 77, 79 (2d immediately above, there are many reasons why they might prefer bankruptcy courts to exercise jurisdiction. As such, policymakers should take heed of this important issue.

The OCC appears committed to providing innovative, though questionable, bank charters, regardless of whether the OCC is headed by a Democratic or a Republican Comptroller. Even if no entity ever obtains a SPNB charter under the OCC's current scheme, we can expect this idea to re-emerge later. This Article is intended to highlight the importance of addressing a SPNB's bankruptcy eligibility.

Cir. 1935), *cert. denied*, 296 U.S. 646 (1935).

APPENDIX

Summary of differences between the OCC process and the Bankruptcy Code

Body of law / Key characteristic	BANKRUPTCY CODE	OCC RESOLUTION
Entities covered	☐ Every type, except banks, thrifts, insurance companies, and businesses that violate federal law.	☐ Non-depository banks
Objectives	☐ Maximize value of debtor's assets for benefit of creditors, including preserving the debtor as a going concern (when appropriate). ☐ Treat similarly situated creditors similarly (i.e., equality is equity).	☐ Efficiently resolve failing or failed uninsured national banks.
Initiator	☐ Voluntarily initiated, usually by the debtor's management. ☐ Can be involuntarily initiated by the debtor's creditors, but this is very rare.	☐ OCC initiates o Debtor's management and creditors have no role
Oversight	Oversight offered by bankruptcy court,	Primarily administrative and, therefore, more

	the DOJ (via the Office of the United States Trustee, and by creditors. Parties have legal representation. Appellate judicial review of most bankruptcy court decisions is available.	political in nature with a particular worry about conflicts of interest between a receiver's role in fair-handedly administering the estate and the federal government's financial interest in getting repaid for any financial relief to the failed institution. Some judicial review, but Comptroller has substantial discretion to act without review by the courts.
Management, Creditor and Shareholder Rights	Debtor remains "in possession" (DIP) Creditors and shareholders retain substantial control over various important decisions in the case (depending on the solvency of the bankrupt entity)	Management displaced by the receiver. Creditors and equity have no managerial rights.
Automatic Stay?	Yes	No
Allows reorganization?	Yes	No
May borrow new money?	Yes	No
Priority of distributions to unsecured creditors and equity interests	Distributional priorities are forth in 11 U.S.C. § 507.	Distributional priorities are forth in 12 CFR § 51.5.

	Notably these priorities include administrative expenses of case, such as certain employee wage/severance/etc. claims. ($12,850) Certain deposits of money by individuals ($2,850) Certain government tax claims	These are: (1) administrative expenses of the receiver; (2) unsecured creditors, including secured creditors to the extent their claims exceed their valid and enforceable security interests; (3) creditors of the uninsured bank, if any, whose claims are subordinated to general creditor claims; and (4) shareholders of the uninsured bank. 12 CFR § 51.5
Representation of the parties	“Disinterested” persons that are approved by the Bankruptcy Court may represent parties-in-interest.	Parties to the case may hire who they like. The receiver does not approve the representation of parties-in-interest and the estate does not pay their fees.
Notice	Publication notice o Notice is also provided directly to all known claimholders and interest holders listed on the debtor’s	Publication notice. o Unclear about whether notice is provided directly to known claimholders.

	schedules.	
Claims process	Bar date set by the court. □ Late filed claims are generally inadmissible. □ Claims are prima facie valid. □ Form is generally standardized and is relatively straight-forward to fill out.	No bar date; instead, the notice of the receivership includes instructions for creditors and other claimants about the claim submission process. □ Late filed claims may be adjudicated valid by a court of law (but not by the receiver). □ Claims are not prima facie valid. o OCC determines the claim's validity, but the basis for doing so is not immediately clear. o Debtor's books and records are relevant (but not clearly dispositive)
Debt settlement	□ Requires court approval	□ Requires court approval
Sale of assets	□ A debtor-in-possession may operate in the ordinary course of business without court approval. □ Must get	□ Receiver requires court approval to sell the real or personal property of an uninsured bank.

	court approval to operate outside of the ordinary course of business	
Professional fees incurred on behalf of the estate.	Court must approve compensation scheme in advance and retains full discretion to refuse to approve the fees of the estate's professional representatives. Any fees awarded during the course of a bankruptcy case are awarded on a strictly interim basis and are subject to be returned until a final fee application is approved.	"The Comptroller may reduce the fees of the receiver for an uninsured bank if, in the Comptroller's discretion, the Comptroller finds the performance of the receiver to be deficient, or the fees of the receiver to be excessive, unreasonable, or beyond the scope of the work assigned to the receiver."[279]

279. 12 C.F.R. § 51.7(2)