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* Candidate for J.D., Washington and Lee University School of Law, May 2018. I give sincere thanks to Professor David Eggert and the Washington and Lee Law Review editorial board for their assistance in the development of this Note. Special recognition is also due my uncle, Michael Stanley, both for his input in helping me identify the topic covered in this Note and in the inspiration he has given me to pursue a legal career. Finally, I express my singular gratitude to my wife, who has undergone this law-school journey with me with astounding grace, poise and esteem.

I. Introduction

In Mary Shelley's masterpiece of Gothic horror, *Frankenstein*, the monster stumbles across the diary of his maker, the titular Dr. Frankenstein.[1] With Shelley's profound vocabulary, the monster proclaims his sadness upon reading what his creator has written about him:

> Everything is related . . . which bears reference to my accursed origin; the whole detail of that series of disgusting circumstances which produced it is set in view; the minutest description of my odious and loathsome person is given, in language which painted your own horrors and rendered mine indelible. I sickened as I read. "Hateful day when I received life!" I exclaimed in agony. "Accursed creator! Why did you form a monster so hideous that even *you* turned from me in disgust? God, in pity, made man beautiful and alluring, after his own image; but my form is a filthy type of yours, more horrid even from the very resemblance."[2]

When faced with this account of his creation, Frankenstein's monster came to fully understand his nature: he was the regrettable result of the aspirations of his maker. In piecing together remnants of corpses to create life on his own terms, Dr. Frankenstein created a monster; this monster was unfit to live among the rest of humanity, and infused the world around it with

1. MARY SHELLEY, FRANKENSTEIN 185–86 (Watermill Press 1980) (1831).
2. *Id.*

horror rather than beauty.[3] Of the many unfortunate lessons in Shelley's novel, this is among the most profound: humanity is rife with hubris, but the hubristic are bound to fail when they rewrite the rules.[4]

A. The Complete Bar Order: A Legal Frankenstein's Monster

In much the same way that Victor Frankenstein pulled pieces from burial grounds and charnel houses to assemble his creation, the courts have, in recent years, pulled precepts from various legal arenas—bankruptcy, securities law, and equity—to create a legal Frankenstein's monster, in the form of the "Complete Bar Order."[5] At its most basic level, a bar order (of any kind) is an order of writ that forbids a party from suing.[6] Where traditionally courts have limited a bar order to crossclaims and counterclaims between parties before the court in securities fraud litigation, this new legal creature rewrites long-accepted rules of due process and open access to the courts by effectively and permanently barring any and all claims by parties not even before the court.[7]

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3. *Id.*

4. *See* David Lemberg, *The Hubris of Dr. Frankenstein and Reproductive Cloning*, ALBANY MED. C. (July 7, 2011), http://www.amc.edu/BioethicsBlog/post.cfm/the-hubris-of-dr-frankenstein-and-reproductive-cloning (last visited Apr. 5, 2017) ("Prometheus and Frankenstein shared the classical tragic flaw of hubris.") (on file with the Washington and Lee Law Review).

5. I use this term (Complete Bar Order) throughout the Note to describe a bar order that works to bar any and all claims against a moving party, including the claims of a non-party to the case. The term "Complete Bar Order" has also been used to describe bar orders of a more limited scope. *See In re* Rite Aid Corp. Sec. Litig. 146 F. Supp. 2d 706, 719 (E.D. Penn. 2001) (designating a bar order that barred all claims, even those other than indemnification or contribution, by non-settling defendants against the moving party).

6. *See* Robert S. Saunders & Stephen D. Dargitz, *Post No Bills: The 11th Circuit Extends the 2nd Circuit's* Gerber *Standard & Approves Barring Advancement Claims in Securities Settlements*, 7 Sec. Litig. Rep. 10, 10 (Jan. 2010) ("A bar order prohibits [parties] from suing settling defendants for contribution or related claims.").

7. *See* Final Bar Order at 8–9, SEC v. Stanford Int'l Bank, Ltd., No. 3:09-cv-0298-n (N.D. Tex. Aug. 30, 2016) ("This Court hereby permanently bars, restrains, and enjoins the Receiver, the Plaintiffs, the Claimants, the Interested Parties, *and all other Persons or entities anywhere in the world*, . . . from . . . instituting, reinstituting, intervening in, initiating, commencing, maintaining, continuing, filing . . . or otherwise prosecuting [the

One example of this new form of bar order—the Complete Bar Order—occurred in August of 2016, when the Northern District of Texas approved a settlement between the global accounting firm BDO USA, LLP (BDO) and various parties suing it for its alleged involvement as an aider and abettor in the Stanford Financial Ponzi scheme.[8] The repercussions of this Complete Bar Order are significant, not just in the context of the Stanford litigations, but also for securities fraud jurisprudence generally.[9]

B. The Stanford Story

In February 2009, federal agents stormed the Houston offices of Stanford Financial Group (Stanford) and froze all its assets.[10] The Northern District Court promptly declared jurisdiction and possession of all Stanford assets and appointed an equity receiver to liquidate the Stanford companies.[11] The receiver would be tasked with managing the estate, and would be responsible for making claim disbursements to the defrauded investors in the Stanford scheme, all under the supervision of the district court.[12]

Stanford's Ponzi scheme was a complex, multi-decade criminal enterprise comprising 130 different companies under the Stanford brand, which at one point serviced 30,000 customers with billions of dollars of invested assets.[13] Most of the Stanford enterprise was

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settling party]." (emphasis added)).

8. *See* SEC v. Stanford Int'l Bank, Ltd., Nos. 3:09-CV-0298-N, 3:12-CV-01447-N, 2015 WL 10818588, at *1 (N.D. Tex. 2015) (approving Complete Bar Order).

9. *See infra* notes 10–26 and accompanying text (describing the impact of the BDO Bar Order on investors in the Stanford fraud).

10. *See* Anna Driver, *U.S. Agents Enter Stanford Financial Houston Office*, REUTERS (Feb. 17, 2009, 12:59 PM), http://www.reuters.com/article/us-stanford-marshals-idUSN1736672620090217 (last visited Apr. 5, 2017) (detailing the raid of Stanford offices) (on file with the Washington and Lee Law Review).

11. *See* Plaintiff's First Amended Complaint at 29, Official Stanford Inv'rs Comm. v. BDO USA, LLP, No. 3:12-CV-01447-N, 2014 WL 10748581 (N.D. Tex. May 13, 2014) (highlighting the facts surrounding the appointment of the Stanford receiver).

12. *See* Amended Order Appointing Receiver at 1–12, SEC V. Stanford Int'l Bank, Ltd., No. 3:09–CV–0298–N (Mar. 12, 2009) (appointing and instructing receiver in Stanford matter).

13. *See* Plaintiff's First Amended Complaint, *supra* note 11 at 8 (giving the history of the Stanford financial enterprise).

legitimate, but one Antiguan bank—Stanford International Bank Limited (SIBL)—acted as the epicenter of a fraud.[14] SIBL offered one proprietary product, a certificate of deposit, and Stanford would use investment principal into that deposit program to further a Ponzi scheme that provided revenue for all its companies worldwide.[15]

The Stanford receiver, from the outset, instituted a strategy that heavily focused on litigation in order to collect funds to distribute to the defrauded investors: it would pursue claims against third parties, who, allegedly, contributed to the Stanford fraud.[16] In 2014, the Stanford receiver, an "Investor's Committee," and a class of defrauded investors all filed separate actions against BDO as an aider and abettor.[17] The allegations against BDO were substantial.[18] Various members of the class action considered opting out of the class to pursue their own litigation against BDO.[19] In an effort to prevent these opt-outs, and to extinguish all pending claims against it, BDO entered into a settlement with the receiver, the Investor's Committee, and the class which hinged on the execution of a Complete Bar Order.[20] The settlement proposal

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14. *See id*. at 9, 12–15 (describing the Stanford International Bank and its Certificate of Deposit program).

15. *Id*.

16. *See* Lauren Kryger, *Majority of Funds Recovered in Stanford Ponzi Scheme Spent by Receiver*, CTR. FOR PUB. INTEGRITY (October 10, 2013, 6:00 AM), https://www.publicintegrity.org/2013/10/10/13515/majority-funds-recovered-stanford-ponzi-scheme-spent-receiver (last updated May 19, 2014, 12:19 PM) (last visited Apr. 5, 2018) ("[The Stanford Receiver] has sued thousands of people . . . .") (on file with the Washington and Lee Law Review).

17. *See* SEC v. Stanford Int'l Bank, Ltd., Nos. 3:09–CV–0298–N, 3:12–CV–01447–N, 2015 WL 10818588, at *1 (N.D. Tex. 2015) ("This motion arises from a compromise reached between parties in three cases . . . the 'SEC Action' . . . the 'Committee Litigation[,]' and . . . the 'Investor Litigation' . . . .").

18. *See* Plaintiff's First Amended Complaint, *supra* note 11 at 30–42 (levying various allegations of aiding and abetting including BDO's involvement in a "task force" designed to set up Antigua as a haven and its failure to properly audit in the face of suspicion, among other things).

19. *See* Patrick Danner, *Stanford Investors Unhappy with BDO's $40 Million Settlement*, MY SAN ANTONIO, www.mysanantonio.com/business/local/article/Stanford-investors-unhappy-with-BDO-s-40-6526796.php (last updated Sept. 24, 2015 10:59 AM) (last visited Apr. 5, 2018) (detailing overall dissatisfaction with class action settlement) (on file with the Washington and Lee Law Review).

20. *See Stanford Int'l Bank*, 2015 WL 10818588 at *1 (approving settlement between BDO, Stanford receiver, Stanford Investor's Committee, and class).

effectively discouraged the potential class action opt-outs from executing their opt-out right, and the judge approved the Order.[21]

Later, another group of claims surfaced against a different alleged aider and abettor in the Stanford fraud, Willis Towers Watson, PLC (Willis), and several of its affiliated companies.[22] As was the case with BDO, the allegations against Willis were substantial, and were hurled on three fronts: by the receiver, the Investor's Committee, and a class of defrauded investors.[23] This time, however, there was a fourth plaintiff group; various investors affirmatively elected to opt out of the class in an effort to pursue their own litigation.[24] In September 2016, Willis, the receiver, the Committee, and the class entered a settlement; again, the settlement was contingent on the issuance of a Complete Bar Order.[25] Such an Order would, effectively, bar any recovery for investors who exercised their own rights by opting out of the

21. *See id*. (approving Complete Bar Order as part of settlement).

22. Proposed Final Bar Order at 2, SEC v. Stanford Int'l Bank, No. 3:09-CV-0298-N (N.D. Tex. Sept. 7, 2016); *see also* Motion to Approve Proposed Settlement With the Willis Defendants at 3, SEC v. Stanford Int'l Bank, Ltd, No. 3:09-CV-0298-N, Janvey v. Willis of Colorado, Inc., No. 3:13-CV-03980-N (N.D. Tex. Sept. 7, 2016) (proposing settlement with Willis for its alleged role as a third-party aider and abettor in the Stanford fraud).

23. *See* Motion to Approve Proposed Settlement With the Willis Defendants, *supra* note 22 at 2 (settling claims for "the Receiver, the Committee, and the Investor Plaintiffs").

24. *See Stanford Ponzi Opt-Outs Sue Insurance Broker*, STANFORD INT'L VICTIMS GROUP (Sept. 13, 2016), https://sivg.wordpress.com/2016/09/13/stanford-ponzi-opt-outs-sue-insurance-broker/ (last visited Apr. 5, 2018) ("People with $135 million in claims . . . sued Willis Ltd. . . . .") (on file with the Washington and Lee Law Review).

25. *See* Motion to Approve Proposed Settlement With the Willis Defendants, *supra* note 22, at 2 ("Plaintiffs further request . . . that the Court enter the Scheduling Order, approve the Notices, and enter the Bar Order . . . .").

class.[26] The court approved the settlement and granted the Complete Bar Order.[27]

Courts in securities fraud litigation have signed Complete Bar Orders in other jurisdictions as well.[28] In 2009, the Sixth Circuit affirmed the issuance of a Complete Bar Order as part of a settlement between the IPOF Fund equity receiver and Ferris, Baker Watts Inc. that not only barred claims between non-parties, but also barred the claims of the plaintiffs who had actually initiated the lawsuit.[29] The Ninth Circuit took similar action in an earlier securities fraud case by permanently staying all pending state-court actions—and all potential actions—in order to allow the federally-appointed receiver to take full control of the management of the estate.[30]

In all of these instances, the supervising judge issued a Complete Bar Order to further the interests of an equity receiver at the expense of the litigation interests of other parties.[31] At the heart of this equity action lies the overarching deference afforded

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26. *See* Proposed Final Bar Order, *supra* note 22, at 8 ("The Court hereby bars, restrains and enjoins the Receiver, the Plaintiffs, the Claimants, the Interested Parties, and all other Persons or entities . . . from . . . instituting, reinstituting, intervening in initiating, commencing, maintaining, continuing, filing, encouraging, soliciting, supporting, participating in, collaborating in, or otherwise prosecuting . . . Willis . . . ."). It should be noted that the language in the proposed Final Bar Order closely matches the language of the previous Complete Bar Orders in Stanford matters, as approved, against both BDO and Chadbourne & Park, LLP. *See* SEC v. Stanford Int'l Bank, Ltd., Nos. 3:09-CV-0298-N, 3:12-CV-01447-N, 2015 WL 10818588, at *1 (N.D. Tex. 2015) (approving Complete Bar Order); Final Bar Order at 8–9, SEC v. Stanford Int'l Bank, Ltd., No. 3:09-cv-0298-n (N.D. Tex. Aug. 30, 2016) (same).

27. Final Bar Order, SEC v. Stanford Int'l Bank, No. 3:09-CV-0298-N (N.D. Tex. Oct. 19, 2016).

28. *See infra* notes 29–30 and accompanying text (detailing the issuance of a Complete Bar Order in the Sixth Circuit and a permanent stay in an earlier case in the Ninth Circuit).

29. *See generally* Gordon v. Dadante, 336 F. App'x 540 (6th Cir. 2009) (affirming a bar order in a securities fraud case involving an equity receiver).

30. *See* SEC v. Wencke, 622 F.2d 1363, 1369 (9th Cir. 1980) (stating that the court has "inherent equitable authority" to issue "ancillary relief" measures, including injunctions to stay proceedings by non-parties, and affirming such an injunction).

31. *See* SEC v. Stanford Int'l Bank, Ltd., 424 F. App'x 338, 341 (5th Cir. 2011) (per curiam) (affirming indefinite stay on pending or potential litigations from other parties arising from the same set of facts, on grounds that "the needs of the Receiver outweigh the substantial injury being suffered by the Appellants").

to equity receiverships and the courts supervising them.[32] At first glance, however, the court's perceived ability to preclude claims before they even come to light raises serious constitutional questions.[33] The issue that cuts to the core of this facial imbalance is constitutional: namely, does the Complete Bar Order comprise an unconstitutional deprivation of due process and the right to sue?[34]

C. Focus of Discussion Toward a Proposed Solution

In addressing the constitutionality of the Complete Bar Order, this Note first addresses (in Part II) the history of the use of bar orders generally in receivership proceedings, as well as its contemporary usage in securities fraud litigation.[35] Part III then examines the legal and scholarly justifications for the Complete Bar Order.[36] Parts IV and V respond to these justifications in light of the fundamental right to sue under the Due Process clause.[37] Part VI then argues that these insufficiencies are further magnified in the context of class actions and class action opt-outs.[38]

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32. *See* SEC v. Hardy, 803 F.2d 1034, 1037 (9th Cir. 1986) ("We review for abuse of discretion a district court's decisions involving its supervision of an equitable receivership.").

33. U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases [and Controversies], in Law and Equity, arising under this Constitution . . . ."); Marbury v. Madison, 5 U.S. 137, 177 (1803) ("Those who apply the rule to *particular cases*, must of necessity expound and interpret that rule." (emphasis added)).

34. *See* Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633, 1633 (2004) (arguing the right to a remedy is a fundamental right, and that a "strict scrutiny calculus" must be used to justify any denial of it).

35. *See infra* notes 42–65 and accompanying text (examining the history of the bar order as an equitable remedy).

36. *See infra* notes 66–82 and accompanying text (examining the legal justifications used to validate the Complete Bar Order, particularly in the context of securities fraud litigation).

37. *See infra* notes 117–144 and accompanying text (discussing the constitutional inadequacies of due process present in the Complete Bar Order in a securities fraud setting).

38. *See infra* notes 145–156 and accompanying text (discussing the particularly problematic constitutional issues that arise when a court issues a Complete Bar Order where there are class action opt-outs).

By following this analytical roadmap, this Note concludes that the Complete Bar Order, in the context of securities fraud litigation, is an unconstitutional deprivation of the right to sue that violates the Due Process clauses of the Fifth and Fourteenth Amendments.[39] In the alternative, this Note proposes that the supervising court should assess receivership actions with a lesser degree of deference when such actions threaten an individual's right to sue.[40] Furthermore, and perhaps more importantly, a Complete Bar Order should be presumed suspect, meriting strict scrutiny at the appellate level.[41]

II. The History of the Bar Order in Class Action Settlements

The Complete Bar Order has emerged as a contemporary result of the blending of equity receivership powers with a substantial uptick in securities fraud litigation.[42] To understand this evolution, it is important to briefly address the legal ingredients of both equity receivership powers and securities fraud litigation in turn.

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39. *See* U.S. CONST. amend. V ("No person . . . shall be deprived of life, liberty, or property, without due process of law . . . ."); U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."); *see also infra* notes 117–144 and accompanying text (concluding that the Complete Bar Order, in a securities fraud context, is facially unconstitutional).

40. In particular, this Note will propose that the receiver, as an officer and appointee of the court, be viewed as an agent of the state, thereby necessitating strict scrutiny of its actions when such are alleged to violate a fundamental right. *See* Thomas, *supra* note 34 (arguing that a "strict scrutiny calculus" must be used to justify any denial of the right to a remedy).

41. *Contra* SEC v. Hardy, 803 F.2d 1034, 1037 (9th Cir. 1986) ("We review for abuse of discretion a district court's decisions involving its supervision of an equitable receivership."); *but see* Hutchins v. District of Columbia, 188 F.3d 531, 563 (D.C. Cir. 1999) ("[S]trict scrutiny applies to burdens on fundamental rights . . . .").

42. *See* Kathy Bazoian Phelps, *April 2016 Ponzi Scheme Roundup*, LEXISNEXIS LEGAL NEWSROOM (May 3, 2016, 12:44 PM), https://www.lexisnexis.com/legalnewsroom/bankruptcy/b/bankruptcy-law-blog/archive/2016/05/03/april-2016-ponzi-scheme-roundup.aspx (last visited Apr. 5, 2018) (providing a "Ponzi Scheme Update" of many presently litigated Ponzi-type cases, including many currently in receivership) (on file with the Washington and Lee Law Review).

A. Securities Fraud Litigation

The Private Securities Litigation Reform Act (PSLRA) provides for bar orders in certain circumstances to facilitate settlement between one of several codefendants and the plaintiff.[43] This provision (which this Note will hereinafter refer to as the "Bar Order Provision") allows the court to "bar" pending or potential crossclaims between defendants and reflects the congressional intent to encourage settlement in securities fraud litigation, which often takes the form of complex, multi-party class actions.[44]

Class action lawsuits are among the best ways to influence corporate behavior because fraud claims by individual investors do very little to materially affect a corporation's balance sheet.[45] The class action lawsuit, however, is an expensive endeavor, and the courts—as well as taxpayers—have a compelling interest in expediting such actions by means of facilitating settlement.[46] When one of several defendants wants to settle with the plaintiff, the looming threat of crossclaims from other defendants may discourage settlement, for fear that the settling defendant will have to "pay up" twice.[47] The Bar Order Provision of the PSLRA

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43. *See* 15 U.S.C. § 78u-4(f)(7)(A) (2012) ("[T]he court shall enter a bar order constituting the final discharge of all obligations to the plaintiff of the settling covered person arising out of the action. The order shall bar all future claims for contribution arising out of the action . . . ."); *see also infra* note 49 and accompanying text (highlighting the certain circumstances and types of damages under which the PSLRA operates).

44. *See In re* Ins. Broker Antitrust Litig., 297 F.R.D. 136, 144 (D.N.J. 2013) ("[S]ettlement of litigation is especially favored by courts in the class action setting.").

45. *See* Adam J. Sulkowski & Kent Greenfield, *A Bridle, a Prod, and a Big Stick: An Evaluation of Class Actions, Shareholder Proposals, and the Ultra Vires Doctrine as Methods for Controlling Corporate Behavior*, 79 ST. JOHN'S L. REV. 929, 932 (2005) ("[I]f equitable remedies are sought by plaintiffs and awarded by a court or consented to in a settlement agreement, a class action can be a bridle with which to lead a corporation in a certain direction."); Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 ("The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government.").

46. *See In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 784 (3rd Cir. 1995) ("The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation. . . . The parties may also gain significantly from avoiding the costs and risks of a lengthy and complex trial.").

47. *See* Sheppard Mullin, *Ninth Circuit Limits Scope of Settlement Bar*

permits the court to permanently stay the impeding crossclaims so that the settling defendant and the plaintiff may settle their dispute without interference from non-settling defendants.[48]

Courts have interpreted the Bar Order Provision of the PSLRA broadly, expanding the facial language of the statute (which limits bar orders to claims of "contribution") to include crossclaims of subrogation and indemnification.[49] Additionally, courts have used these same principles in non-SEC suits, including FDIC proceedings.[50] While the application of the Bar Order Provision has expanded somewhat from its literal language, the courts have still refused to interpret the PSLRA to permit bar orders against non-parties to a case.[51] Therefore, for the Complete Bar Order to work in class action securities fraud demands legal justification beyond the statutory language of the PSLRA.[52] Some courts have found these justifications in the inherent powers of equity receiverships.[53]

Orders in Securities Class Action Settlement, CORP. & SEC. L. BLOG (Nov. 7, 2008), http://www.corporatesecuritieslawblog.com/2008/11/ninth-circuit-limits-scope-of-settlement-bar-orders-in-securities-class-action-settlement/ (last visited Apr. 5, 2018) ("Settlement bar orders encourage partial settlements in cases with multiple defendants by protecting the settling defendants from contribution and other similar claims while ensuring that non-settling defendants do not incur more than their proportionate share of liability.") (on file with the Washington and Lee Law Review).

48. *See In re* HealthSouth Corp. Sec. Litig., 572 F.3d 854 (11th Cir. 2009) (affirming the district court's approval of a settlement agreement stipulating the extinguishment of all claims by the non-settling defendants against the settling defendants).

49. *See id*. (affirming a Complete Bar Order by non-settling defendants against settling defendants, including contract-based indemnification claims).

50. *See* FDIC v. Geldermann, Inc., 975 F.2d 695, 698–99 (10th Cir. 1992) ("Contribution bar orders are frequently upheld when they are sought by a settling defendant against a nonsettling defendant in the same case.").

51. *See In re* Heritage Bond Litig., 546 F.3d 667, 676 (9th Cir. 2008) ("[A] bar order issued in a partial settlement of a securities fraud class action case cannot bar independent claims.").

52. *See id*.

53. *See supra* notes 25–46 and accompanying text (explaining the doctrine of deference to equity receivership decisions, and how an increased amount of securities fraud cases now involve entities put into receivership so that these rules of deference apply).

B. Equity Receivership Powers

The bar order exists as a statutory remedy in securities fraud litigation under the PSLRA, but the bar order also exists in far broader terms as an equitable remedy (with no statutory limitations) in equity receivership proceedings.[54] An equity receivership—acting like a trustee managing an estate in bankruptcy—benefits from high levels of deference to its discretionary powers as it performs its court-appointed task of settling an estate's affairs.[55] This deference takes the form of an "abuse of discretion" standard of review by the court that appoints and supervises it (the district court).[56] When the supervising district court approves the receiver's settlement, the appellate court considers the terms of that settlement—even when such terms include a bar order—with an equally high degree of deference.[57] Such settlements frequently bar any future "related litigation" and even bar present litigation of independent claims in state courts, all in order to facilitate the receiver's management of the estate.[58] "Related litigation" includes litigation that may be filed by non-settling plaintiffs or potential plaintiffs with independent, damage-based claims.[59] This permanent blanket stay

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54. *See* 11 U.S.C. § 105(a) (2012) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."); *In re* UAL Corp., 386 B.R. 701, 709 (N.D. Ill. 2008) ("[In a receivership proceeding], a bankruptcy court may stay a particular nonbankruptcy action . . . ." (citing 28 U.S.C. § 959(a) (2012); Jaytee-Penndel Co. v. Bloor, 547 F.2d 13, 16 (2d Cir. 1976))).

55. *See* SEC v. Kaleta, 530 F. App'x 360 (5th Cir. 2013) ("'[T]he district court has broad powers and wide discretion to determine the appropriate relief in an equity receivership.'" (quoting SEC v. Sec. Fin. Serv., Inc., 674 F.2d 368, 372–73 (5th Cir. 1982))).

56. *Id.*

57. *See* Sterling v. Stewart, 158 F.3d 1199, 1202 (11th Cir. 1998) ("'Determining the fairness of the settlement is left to the sound discretion of the trial court and we will not overturn the court's decision absent a clear showing of abuse of that discretion.'" (quoting Bennett v. Behring Corp., 737 F.2d, 982, 986 (11th Cir. 1984))).

58. *See* Newby v. Enron Corp., 302 F.3d 295, 300 (5th Cir. 2002) (upholding a district court order enjoining a law firm from filing "any new Enron-related actions" without first obtaining permission from the district court); *see also* SEC v. Wencke, 622 F.2d 1363, 1369 (9th Cir. 1980) (barring state court proceedings in a securities fraud case).

59. *See Wencke*, 622 F.2d at 1369 (stating that the court has "inherent

of all claims, both pending and potential, originating from "both sides of the 'v'"—the Complete Bar Order—is common practice in bankruptcy proceedings by virtue of the discretionary powers of the receiver and the deferential standard of review granted it.[60]

Since the economic collapse of 2008, a wave of Ponzi schemes[61] has produced a substantial uptick of equity receiverships and class-action securities lawsuits.[62] Where the PSLRA alone would limit bar orders in these cases to claims for indemnification, subrogation, and contribution by non-settling defendants, the existence of an equity receiver invokes the deference that courts generally afford a trustee in managing an estate.[63] In other words, courts have affirmed the powers of a receivership in a securities fraud, class action setting to issue a Complete Bar Order when there otherwise could not have been one.[64] While courts have

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equitable authority" to issue "ancillary relief" measures, including injunctions to stay proceedings by non-parties, and affirming such an injunction).

60. *See generally Newby*, 302 F.3d at 300; *Sterling*, 158 F.3d at 1202; *In re* Greektown Holdings, LLC, 2012 WL 4484933 (E.D. Mich. 2012), *affirmed in part and vacated in part*, 728 F.3d 567 (6th Cir. 2013); *In re* Dow Corning Corp., 280 F.3d 648 (6th Cir. 2002); *In re* UAL Corp., 398 B.R. 243 (N.D. Ill. 2008); *see also* Kathy Bazoian Phelps, *Handling Claims in Ponzi Scheme Bankruptcy and Receivership Cases*, 42 GOLDEN GATE U. L. REV. 567 (2012); 11 U.S.C. § 543 (2012) (dealing with the turnover of property to a trustee in bankruptcy proceedings); *infra* notes 83–85 (discussing the acceptance of Complete Bar Orders in bankruptcy).

61. *See* Mark A. McDermott, *Ponzi Schemes and the Law of Fraudulent and Preferential Transfers*, 72 AM. BANKR. L.J. 157, 158 (1998) (defining "Ponzi scheme" as "a fraudulent investment program in which the returns paid to investors are comprised of nothing more than the principal investments made by other investors").

62. The list of Ponzi-scheme type cases in recent years is staggering. A non-exhaustive list of such frauds that were managed by an equity receiver includes Bernard L. Madoff Investment Securities ($18 billion), Stanford Financial Group ($8 billion), Aequitas Capital Management ($350 million), J Peak Resort ($200 million), Creative Capital ($70 million), Atlantic Bullion & Coin ($60 million), Vesta Strategies ($25 million), and Credit Nation ($5 million). *See* Phelps, *supra* note 42 (providing brief updates on litigations pending in forty-nine Ponzi schemes worldwide).

63. *See* 28 U.S.C. § 959 (2012); (dealing with receivers and trustees, both as officers of the court, jointly); Imperial Assur. Co. v. Livingston, 49 F.2d 745, 749 (8th Cir. 1931) ("[T]he receiver and the trustee are officers of the court for the purposes of handling such property in accordance with the directions of the court within the act; and that their relation to the property is purely and solely in such official capacities.").

64. *See generally* Gordon v. Dadante, 336 F. App'x 540 (6th Cir. 2009)

specifically addressed the constitutionality of the PSLRA bar order, the constitutional question of whether a court may permissibly issue a Complete Bar Order under this "equity receivership" justification remains unanswered.[65]

III. The Legal Landscape and Justifications for the Complete Bar Order

A. Deference to an Equity Receiver

Generally, case law and scholarship tend to endorse or at least recognize a highly deferential standard of review to equity receivership actions, which themselves are subject to broad discretionary powers.[66]

The limitations on an equity receiver's power are, at best, ambiguous and ill-defined.[67] Little case law addresses the outer limits to this discretionary power; any limitations are statutory in form and broad in nature.[68] Courts have read statutory provisions

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(affirming a bar order in a securities fraud case involving an equity receiver); Final Bar Order, SEC v. Stanford Int'l Bank, Ltd., No. 3:09-cv-0298-n (N.D. Tex. Aug. 30, 2016) (same); SEC v. Wencke, 622 F.2d 1363, 1369 (9th Cir. 1980) (stating that the court has "inherent equitable authority" to issue "ancillary relief" measures, including injunctions to stay proceedings by non-parties, and affirming such an injunction).

65. There is no case law affirmatively setting forward what a receiver is or is not allowed to do. Instead, there are grants of broad discretion at a statutory level and permissive stances on various issues as they are brought before the courts. *Compare* Wis. Inv. Bd. v. Ruttenberg, 300 F. Supp. 2d 1210, 1220 (N.D. Ala. 2004) (holding that the bar could constitutionally extinguish claims which could be reasonably asserted by co-defendants), *with* Jared A. Wilkerson, *In Whose Shoes?: Third-Party Standing and "Binding" Arbitration Clauses in Securities Fraud Receiverships*, 8 J.L. ECON. & POL'Y 45, 51 (2011) ("The three main statutes that govern equity receiverships are simple and broad, leaving enormous discretion to common law precedent in equity." (citing FED. R. CIV. P. 66; 28 U.S.C. § 654 (2006); 28 U.S.C. § 959 (2006))).

66. *See* SEC v. Hardy, 803 F.2d 1034, 1038 (9th Cir. 1986) (discussing the discretion of the receiver and the deference afforded it by the courts).

67. *See* David A. Gradwall & Karin Corbett, *Equity Receiverships for Ponzi Schemes*, 34 SETON HALL LEGIS. J. 181, 204–08 (2010) (arguing that the limitations on equity receiverships include the ability to sue only based on damages to the entity in receivership, the frequent lack of third parties' wherewithal to compensate, the use of *in pari delicto* defenses, the need for justiciable standing, and the inability to represent investors directly).

68. *See* Wilkerson, *supra* note 65, at 51 ("The three main statutes that

to grant receivers "enormous" room for discretion, subject only to the court's directions at the time of its appointment.[69] In this way, the court directions to appointment of an equity receiver are analogous to the trust instrument from which a given trustee's powers originate.[70] The relationship between the court and the receiver also parallels the relationship between the legislature and a government agency, where the legislature in drafting the statutes creating the agency provides an "intelligible principle" for that agency to follow.[71] The courts review virtually every action by the agency in accordance with that "intelligible principle" only for abuse of discretion.[72] Like a trustee working in accordance with its organic instrument, or a government agency working in accordance with its organic act, the equity receiver, working in accordance with court instructions, operates with wide discretion.[73]

Courts continue to afford this discretion—and its accompanying "abuse of discretion" standard of review—to receivership actions despite the dubious success rates of receivers in securities fraud cases.[74] In a securities fraud case, the receiver

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govern equity receiverships are simple and broad, leaving enormous discretion to common law precedent in equity." (citing FED. R. CIV. P. 66; 28 U.S.C. § 654 (2006); 28 U.S.C. § 959 (2006))).

69. *Id*. at 51; *see also* Newby v. Enron Corp., 302 F.3d 295, 300 (5th Cir. 2002) (granting discretionary powers to the district court to issue permanent injunctions); Sterling v. Stewart, 158 F.3d 1199, 1201–02 (11th Cir. 1998) (same); Imperial Assur. Co. v. Livingston, 49 F.2d 745, 749 (8th Cir. 1931) (defining the receiver in a bankruptcy proceeding as an "officer[] of the court for the purposes of handling the property in accordance with the directions of the court . . .").

70. *See* Eisenrich v. Minneapolis Retail Meat Cutters and Food Handlers Pension Fund, 282 F. Supp. 2d 1077, 1081 (D. Minn. 2003) ("When, as here, a trust instrument gives a trustee the discretion to interpret its terms, the court reviews those interpretations under the deferential abuse of discretion standard.").

71. *See* Mistretta v. United States, 488 U.S. 361, 372 (1989) ("So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'" (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928))).

72. *Id.*

73. *See supra* notes 55, 63 (listing cases and statutes comparing the receiver to a trustee and enabling it with discretionary powers).

74. One example of the great discrepancy that can be found depending on the competency of the receiver in a given case arises when comparing the two largest Ponzi-schemes in world history. The receiver in the Madoff scheme has

is essentially responsible for determining rates, amounts, and frequency of disbursements to investors (creditors).[75] Poor decisions by the receiver can lead to poor results for the individual claimants.[76] Similar to class action attorneys, receivers also take substantial fees from any recovery; this in turn reduces the recovery of defrauded investors.[77] Under the abuse of discretion standard of review, the actual effectiveness of receivership action—and its trickle-down effects to investors—is not subject to review by the court.[78] In consequence, the receiver actions are dictated more by the court instructions governing it than they are by actual needs of the defrauded investors.[79]

The standard of review for receivership actions—particularly those actions affirmed by the supervising court—does not intensify at the appellate level; appellate courts review a supervising court's deference to a receiver's decision for abuse of discretion only.[80] The

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succeeded in distributing approximately $11.1 billion (61% of the total principal invested) to defrauded investors. The receiver in Stanford, however, has only returned $55 million (>1% of the total principal invested). *Compare* Kryger, *supra* note 16 (detailing the fee patterns and recovery techniques of the Stanford equity receivership), *with* Charles Lane, *Some Madoff Investors to Get All Their Money Back*, NPR, (Oct. 21, 2015 5:12 AM), http://www.npr.org/2015/10/21/450464745/some-madoff-investors-to-get-all-their -money-back (last visited Apr. 5, 2018) (detailing the returns expected of Madoff investors) (on file with the Washington and Lee Law Review).

75. *Compare* Kryger, *supra* note 16 (highlighting the minimal returns to Stanford investors), *with* Lane, *supra* note 74 (detailing the substantial expected returns to Madoff investors).

76. *See* Kryger, *supra* note 16.

77. *See* Kryger, *supra* note 16 (stating that $55 million return to investors was out of a total recovery of $235 million, the remainder going toward expenses and fees to the receiver of up to $400 an hour); *supra* note 74 (detailing the effect of receivership actions on defrauded investors by contrasting the effectiveness of the Madoff recovery plan with that of the Stanford recovery plan).

78. *See* Sterling v. Stewart, 158 F.3d 1199, 1201 (11th Cir. 1998) ("Determining the fairness of the settlement [in an equity receivership] is left to the sound discretion of the trial court and we will not overturn the court's decision absent a clear showing of abuse of that discretion.").

79. *See* Canney v. City of Chelsea, 925 F. Supp. 58, 65 (D. Mass. 1996) ("[C]ourts have the power to appoint a receiver, who is then subject to the court's control.").

80. *See* Gordon v. Dadante, 336 F. App'x 540, 545 (6th Cir. 2009) ("This Court reviews a district court's decision to approve a settlement agreement in the context of an equity receivership for abuse of discretion." (citing Liberte Capital Grp., LLC v. Capwill, 462 F.3d 543, 551 (6th Cir. 2006))).

Ninth Circuit has made this very clear in a fair summation of the appellate court's treatment of equity receivership actions:

> We reemphasize these basic principles. A district judge supervising an equity receivership faces a myriad of complicated problems in dealing with the various parties and issues involved in administering the receivership. Reasonable administrative procedures, crafted to deal with the complex circumstances of each case, will be upheld. A district judge simply cannot effectively and successfully supervise a receivership and protect the interests of its beneficiaries absent broad discretionary power. We would be remiss were we to interfere with a district court's supervision of an equity receivership absent a clear abuse of discretion.[81]

Together, the two legal realities of substantial discretionary powers of the receiver and highly deferential standards of review by the courts work to insulate a Complete Bar Order from meaningful review.[82] However, what is right in bankruptcy is not necessarily right in an Article III class action setting, particularly in the complex world of securities fraud litigation.

B. The Important Distinction Between Bankruptcy and Class Action Securities Litigation

The Complete Bar Order is widely accepted in the narrow contexts of bankruptcy because it acts to protect the debtor's estate.[83] The only limitation on the bankruptcy court's ability to approve a settlement agreement that contains a Complete Bar Order relates to the bankruptcy court's subject matter jurisdiction over the barred claims.[84] That jurisdiction exists so long as there is a nexus between the barred claims and the actual bankruptcy case.[85] Because a Complete Bar Order requires such a nexus in the

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81. SEC v. Hardy, 803 F.2d 1034, 1038 (9th Cir. 1986).

82. *See* SEC v. Kaleta, 530 F. App'x 360, 362 (5th Cir. 2013) (affirming a Complete Bar Order on grounds of broad powers and wide discretion granted a district court supervising an equity receivership).

83. *See In re* Land Res., LLC, 505 B.R. 571, 578 (M.D. Fla. 2014) (stating that barred claims impact the handling and administering of the bankruptcy estate).

84. *See id*. ("First the bankruptcy court must determine whether it has subject matter over the barred claims.").

85. *See* Matter of Mumford, Inc., 97 F.3d 449, 453 (11th Cir. 1996) ("In order

securities fraud realm—the Complete Bar Order does not prevent a disgruntled employee from suing BDO on an unrelated matter, for example[86]—courts have justified its use.[87]

Bankruptcy, however, operates differently than class action litigation.[88] Bankruptcy courts are not Article III courts, and are thereby not subject to the constitutional limitation to actions in cases and controversies.[89] Bankruptcy is a vehicle that has been socially-accepted as a means of debt forgiveness, and the jurisdiction of bankruptcy courts is limited to actions against the debtor only.[90] Securities fraud class actions, however, can and do

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for the bankruptcy court to exercise subject matter jurisdiction over a dispute, however, some nexus between the civil proceeding and the [bankruptcy] case must exist.").

86. *See, e.g.*, Philip Gonzales, *Asian American Woman Accuses Accounting Firm of Racial Discrimination*, SE TEX. RECORD (Sept. 22 2016, 12:59 PM), setexasrecord.com/stories/511012151-asian-american-woman-accuses-accounting-firm-of-racial-discrimination (last visited Apr. 5, 2018) (reporting on employment discrimination lawsuit against BDO) (on file with the Washington and Lee Law Review).

87. *See* Notice of Settlement and Bar Order at 2, SEC v. Stanford Int'l Bank, Ltd., No. 3:09-CV-0298-N, Official Stanford Inv'rs Comm. v. BDO USA, LLP, No. 3:12-CV-01447-N, Wilkinson v. BDO USA, LLP, No. 3:11-CV-01115-N (N.D. Tex. May 23, 2015) (stating that a Complete Bar Order applies to all claims "arising from or relating to [the] Settled Claim against [BDO]").

88. *See* ADMIN. OFFICE OF U.S. COURTS: BANKR. JUDGES DIV., BANKRUPTCY BASICS 5–6 (3rd ed. 2011) (discussing the Congressional origin of bankruptcy, how it is governed by its own code and rules of procedure, and its courts' primary function as administrative bodies).

89. *Compare* U.S. CONST. art I, § 8, cl. 4 ("[The Congress shall have power to] establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."), *with* U.S. CONST. art. III, § 2, cl. 1 ("The judicial power of the United States shall extend to all Cases, in law and equity, . . . and . . . Controversies . . . .").

90. *See* ADMIN. OFFICE OF U.S. COURTS: BANKR. JUDGES DIV., *supra* note 86, at 6 ("A fundamental goal of the federal bankruptcy laws enacted by Congress is to give debtors a financial 'fresh start' from burdensome debts."); Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) ("[Bankruptcy] gives to the honest but unfortunate debtor . . . a new opportunity in life and clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."); *see also* Matter of Munford, Inc., 97 F.3d 449, 453 (11th Cir. 1996) (requiring a nexus between the claim and the actual financial integrity of the debtor's estate).

function against third parties, including aiders and abettors.[91] The bankruptcy court cannot bar such actions.[92]

Because class action securities litigation is a completely different arena than that of bankruptcy, the Complete Bar Order must be viewed with greater scrutiny, particularly in actions against third party aiders and abettors. As currently applied, the legal justifications for the Complete Bar Order are insufficient because they do not consider the substantial constitutional rights at risk.[93]

IV. The Constitutional Right to Sue (or, the Constitutional Right to a Remedy)

A. Generally

The Complete Bar Order effectively blocks potential plaintiffs from open access to the courts by denying them the right to sue the settling party who has allegedly harmed them.[94] The issue arises, however, in that there is a constitutional right to sue—also known as the "right to open access to the courts" or the "right to a remedy"—and the bar order, in any context, constitutes a deprivation of this right.[95] All bar orders, and particularly the

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91. *See, e.g.*, Plaintiff's First Amended Complaint at 29, Official Stanford Inv'rs Comm. v. BDO USA, LLP, No. 3:12-CV-01447-N, 2014 WL 10748581 (N.D. Tex. May 13, 2014) (recognizing the BDO case as an example of creditors filing suit against a third-party aider and abettor).

92. *See Munford*, 97 F.3d at 453 (stating that the bankruptcy court can only bar claims against the debtor, even if such claims are tenuous, on grounds that the claims could have bearing on the management, reorganization, or liquidation of the estate).

93. *See infra* notes 117–144 and accompanying text (discussing the constitutional inadequacies of the Complete Bar Order in securities fraud cases).

94. *See* Final Bar Order, SEC v. Stanford Int'l Bank, Ltd., No. 3:09-cv-0298-n (N.D. Tex. Aug. 30, 2016) ("This Court hereby permanently bars, restrains, and enjoins the Receiver, the Plaintiffs, the Claimants, the Interested Parties, *and all other Persons or entities anywhere in the world*, . . . from . . . instituting, reinstituting, intervening in, initiating, commencing, maintaining, continuing, filing . . . or otherwise prosecuting [the settling party]." (emphasis added)).

95. *See* Bounds v. Smith, 430 U.S. 817, 828 (1977) (speaking of "the fundamental constitutional right of access to the courts"); Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1309–12 (2003) (discussing the constitutional right to a remedy); Thomas, *supra* note 34, at 1633

Complete Bar Order, must, therefore, follow due process to avoid unconstitutionality.[96]

Currently, forty of the fifty states in the United States have codified the right to sue, usually in the Bill of Rights of their own constitutions.[97] The Supreme Court also found the right to be seek remedy before a court of law to be an essential element of "natural justice" that is fundamental to the American jurisprudential system. [98] Likewise, legal scholarship views the right to sue as an integral aspect of liberty protected by the Due Process and Equal Protection clauses of the United States Constitution.[99]

Regardless of the context wherein it arises, any bar order inherently constitutes a deprivation of the right to sue by preventing a given plaintiff, or plaintiffs, from pursuing compensation for their injuries under both law and equity.[100] The Constitution requires, then, that the bar order follow proper due process.[101]

The degree of deference to state action that inhibits, impairs, or intrudes on an individual liberty interest varies depending on

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(arguing the right to a remedy is a fundamental right).

96. *See* U.S. CONST. amend. V ("No person . . . shall be deprived of life, liberty, or property, without due process of law . . . ."); U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

97. *See, e.g.*, DEL. CONST. art. I, § 9 (establishing a right of remedy or access to the courts); CONN. CONST. art. I, § 10 (same); *see* Phillips, *supra* note 95, at 1309 ("The remedy clause, . . . appears in the constitutions of forty states.").

98. *See* Windsor v. McVeigh, 93 U.S. 274, 280 (1876) (speaking to the right to be heard as a principle that "lies at the foundation of all well-ordered systems of jurisprudence . . . founded in the first principles of natural justice").

99. *See* Phillips, *supra* note 95, at 1319–20 (introducing the historical significance of the right to a remedy); John H. Bauman, *Remedies Provisions in State Constitutions and the Proper Role of the State Courts*, 26 WAKE FOREST L. REV. 237, 244 (1991) (discussing the interpretations of state constitutional treatment of the right to a remedy).

100. *See* Final Bar Order, SEC v. Stanford Int'l Bank, Ltd., No. 3:09-cv-0298-n (N.D. Tex. filed Aug. 30, 2016) ("This Court hereby permanently bars, restrains, and enjoins the Receiver, the Plaintiffs, the Claimants, the Interested Parties, *and all other Persons or entities anywhere in the world*, . . . from . . . instituting, reinstituting, intervening in, initiating, commencing, maintaining, continuing, filing . . . or otherwise prosecuting [the settling party]." (emphasis added)).

101. *See supra* note 96 and accompanying text (discussing Due Process clauses).

the nature of that liberty interest;[102] some liberty interests, according to perhaps the most seminal footnote in American jurisprudence, are more important than others.[103] The question, then, arises as to the nature of the right to sue: is the right of such a fundamental nature so as to merit strict scrutiny by the courts reviewing any state action alleged to have intruded upon it? Consequently, is the right to sue so fundamental that the Complete Bar Order, which denies that right to so many injured parties, must pass strict scrutiny review instead of currently-applied abuse of discretion review?

B. The Fundamental Nature of the Right to a Remedy

The former Chief Justice of the Texas Supreme Court, Thomas R. Phillips, has extensively analyzed the right to sue, which he, in his writing designates as the right to a remedy.[104] His analysis proves helpful in determining the standard of review for upholding or denying a Complete Bar Order.[105]

First, the right to a remedy is fundamental.[106] In assessing whether a right is fundamental, the court often works to determine whether the right has "long been recognized as one of the vital

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102. *See* ERWIN CHEMERINKSY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 565 (5th ed. 2015) ("[T]he Supreme Court [has] articulated the idea that different constitutional claims would be subjected to varying levels of review.").

103. *See* United States v. Carolene Products, Co., 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to within a specific prohibition of the Constitution . . . ."); *see also* J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275, 281 (1989) ("When constitutional scholars refer to the 'problem of the footnote,' they are referring to a specific footnote, *the* Footnote, footnote four of *United States v. Carolene Products* . . . ."); Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 714 (1985) ("*Carolene* proposed to make the ideals of the victorious activist Democracy serve as a primary foundation for constitutional rights in the United States.").

104. *See* Phillips, *supra* note 95, at 1309 (analyzing the right to a remedy).

105. *Id*.

106. *See id.* at 1309–23 (discussing the historical origins and significance of the right to a remedy); ERWIN W. CHEMERINKSY, CONSTITUTIONAL LAW 933 (4th ed.) ("The Supreme Court has held that some liberties are so important that they are deemed to be 'fundamental rights' and that generally the government cannot infringe them unless strict scrutiny is met; that is, the government's action must be necessary to achieve a compelling purpose.").

personal rights essential to the orderly pursuit of happiness by free men."[107] Looking to case law and history, Justice Phillips described the right to a remedy as "the most important" liberty "[o]f all the rights guaranteed by state constitutions but absent from the federal Bill of Rights."[108]

Second, the right to a remedy is deeply rooted in notions of justice.[109] This analysis is primarily historical in function.[110] Justice Phillips observes the evolution of the right to a remedy from its inception to its most modern applications.[111] The right to a remedy finds its origins in the Magna Carta.[112] Sir Edward Coke wrote of a free and speedy right to a remedy for injuries.[113] Sir William Blackstone later described the right to a remedy as the means whereby all other rights are protected.[114] Subsequently, when the several states of the newfound American nation were drafting their respective constitutions, the framers made sure to include this right in their understanding of protected rights at the state level.[115] The Supreme Court has continued to afford this right

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107. Loving v. Virginia, 388 U.S. 1, 12 (1967).

108. Phillips, *supra* note 95, at 1309.

109. *See* Brill v. Hedges, 783 F. Supp. 333, 336 (S.D. Ohio 1991) ("To determine whether a right not enumerated in the Constitution is 'fundamental,' and therefore deserving of special scrutiny by the judiciary, the Court must ask whether the right is 'deeply rooted in this Nation's history and tradition.'" (citing Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977))).

110. *See* Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) ("The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke." (quoting Poe v. Ullman, 367 U.S. 497, 542–43 (1961) (Harlan, J., dissenting))).

111. *See* Phillips, *supra* note 95, at 1309–23 (discussing the historical origins and significance of the right to a remedy).

112. *See* MAGNA CARTA, chs. 39–40 (1215) ("N[o] free man shall be seized or imprisoned or stripped of his rights or possessions, . . . except by the legal judgment of his equals or by the law of the land. To no one will we sell, to no one will we deny, or delay right or justice.").

113. *See* Phillips, *supra* note 95, at 1320–21 ("[E]very subject. . . for injury done to him . . . by any other subject, . . . may take his remedy by the course of the law, and have justice . . . for the injury . . . freely . . . and speedily. . . ." (quoting EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 55 (1641, photo. reprint 1986))).

114. *See id.* at 1321–22 (explaining Blackstone's understanding of the right to a remedy as the means whereby "absolute rights to life, liberty and property" were protected (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *124)).

115. *See* DEL. CONST. art. I, § 9 (establishing a right of remedy or access to the

the sort of treatment generally granted a fundamental right, the protection of which merits strict scrutiny in judicial review.[116]

The issue that arises, then, is this: if the right to sue is so fundamental to merit strict scrutiny by the courts, why is it only afforded abuse of discretion review when denied by a Complete Bar Order in a receivership setting?

V. The Complete Bar Order Does Not Satisfy Due Process

Despite historical justifications and existing PSLRA jurisprudence,[117] the Complete Bar Order, in today's legal landscape, satisfies neither substantive nor procedural due process when used in securities fraud cases.[118]

The PSLRA has passed constitutional muster, because courts consider the rights to indemnification or contribution precluded by its Bar Order Provision to be seizeable "property" rights.[119] The Bar Order Provision of the PSLRA, however, does not justify the Complete Bar Order because the right to an independent claim (i.e. the right to sue) is not a property right; it is a protected liberty

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courts); CONN. CONST. art. I, § 10 (same); GA. CONST. art. I, § 1, par. 12 (same); ME. CONST. art. I, § 19 (same); MD. CONST. DECL. OF RIGHTS, art. 19 (same); MASS. CONST. pt. I, art. 11 (same); PA. CONST. art. I, § 11 (same); R.I. CONST. art. I, § 5; S.C. CONST. art. I, § 9 (same); VT. CONST. ch. I, art. 4 (same); VA. CONST. art. III, § 17 (same); *see also* Phillips, *supra* note 95, at 1323 ("As Gordon Wood notes, [colonists] recognized that laws protecting their basic freedoms must be of 'a nature more sacred than those which established a turnpike road." (quoting Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911, 920 (1993))).

116. *See* Bounds v. Smith, 430 U.S. 817, 828 (1977) (speaking of "the fundamental constitutional right of access to the courts"); Windsor v. McVeigh, 93 U.S. 274, 280 (1876) (speaking of the right to a remedy as a foundational element of American jurisprudence); Thomas, *supra* note 34, at 1643 ("State action that abridges a fundamental right, including the right to a remedy, is subjected to strict scrutiny analysis that balances the interests of the state against the fundamental interest.").

117. *See supra* notes 66–93 and accompanying text (describing current justifications for the Complete Bar Order in securities fraud cases).

118. *See infra* notes 125–144 (explaining why the Complete Bar Order violates both procedural and substantive due process).

119. *See* Wis. Inv. Bd. v. Ruttenberg, 300 F. Supp. 2d 1210, 1220 (N.D. Ala. 2004) (holding that the bar could permissibly extinguish claims which could be reasonably asserted by co-defendants, and this did not violate the co-defendants substantive due process rights).

interest under the Due Process clause.[120] Constitutionally-protected liberty interests merit more protection under the Due Process clause than other rights, such as a contract or property right to indemnification.[121]

A. Procedural Due Process Considerations

At the heart of the Due Process clause is the right to be heard prior to deprivation by the state of one's life, liberty, or property.[122] Conversely, at the heart of the right to sue lies the right to be heard after harm has already occurred.[123] The right to be heard is a fundamental concept that informs both the right to sue and the right to due process; as such, it is the driving focus of all procedural due process analyses.[124] Was a procedure in place to give the aggrieved party the right to be heard?

The Complete Bar Order differs from PSLRA bar orders because it bars action from non-parties, whereas the PSLRA only approves bar orders against non-settling defendants for contribution or indemnification.[125] This distinguishing feature tips the Complete Bar Order over the edge, ignoring minimum levels of procedural due process; essentially, it operates as a court order

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120. *See In re* Heritage Bond Litig., 546 F.3d 667, 676 (9th Cir. 2008) ("[In a PSLRA case], a bar order issued in a partial settlement of a securities fraud class action case cannot bar independent claims.").

121. *See* CHEMERINSKY, *supra* note 102, at 565 ("[T]he Supreme Court [has] articulated the idea that different constitutional claims would be subjected to varying levels of review.").

122. *See* Armstrong v. Manzo, 380 U.S. 545, 552 (1965) ("A fundamental requirement of due process is 'the opportunity to be heard.'" (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914))).

123. *See* Windsor v. McVeigh, 93 U.S. 274, 280 (1876) (speaking of the right to be heard as a central facet of justice).

124. *See Armstrong*, 380 U.S. at 550 (stating that the Due Process clause, at its most basic, guarantees that any deprivation of life, liberty, or property "by adjudication" be preceded by notice and an opportunity for hearing).

125. *Compare* Final Bar Order, SEC v. Stanford Int'l Bank, Ltd., No. 3:09-cv-0298-n (N.D. Tex. filed Aug. 30, 2016) (barring "the Receiver, the Plaintiffs, the Claimants, the Interested Parties, *and all other Persons or entities anywhere in the world*" from pursuing future litigation against settling defendant (emphasis added)), *with In re* Heritage Bond Litig., 546 F.3d 667, 676 (9th Cir. 2008) ("[In a PSLRA case], a bar order issued in a partial settlement of a securities fraud class action case cannot bar independent claims.").

against parties who have never been given the right to be heard before any court.[126]

To follow proper procedure under the Due Process clause, the aggrieved party must receive notice.[127] In PSLRA litigation, the Bar Order Provision itself would probably constitute proper notice to any co-defendant filing a crossclaim in a securities fraud action; where parties reach a settlement contingent on obtaining a Complete Bar Order, however, there is no notice to the parties which the court is barring—settlements in receivership actions, generally, occur behind closed doors before they are publicly put before the court for approval.[128]

This lack of notice is already enough to declare the Complete Bar Order as an unconstitutional intrusion upon the right to a remedy, but the analysis need not stop there.[129] A greater problem persists in that there is no right to be heard at all. While the parties may be able to file intervenor motions, objections to the settlement, or *amicus curiae* briefs,[130] these cannot suffice as opportunities to be heard before the denial of an actual claim.[131]

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126. *Id.*

127. *See Armstrong*, 380 U.S. at 550 (stating that the Due Process clause, at its most basic, guarantees that any deprivation of life, liberty, or property "by adjudication" be preceded by notice and an opportunity for hearing).

128. *See generally* Symposium, *Behind Closed Doors: Confidential Settlements and Sealed Court Records*, 76 JUDICATURE 303 (1993) (discussing the generally private and confidential nature of settlement agreements, including the general practice to keep settlement terms and discovery confidential after agreement is reached).

129. *See Armstrong*, 380 U.S. at 550 (stating that Due Process requires both opportunity for hearing and notice).

130. *See* FED. R. APP. P. 26 (discussing Brief of an Amicus Curiae); FED. R. CIV. P. 24 (Intervernor Motions).

131. In fact, such motions and briefs are seen more often as procedural encumbrances, and are only admitted on permission of the court. As a practical matter, the court would probably not grant such permission: because the Complete Bar Order arises in the context of settlement, it is unlikely that either of the two parties to the settlement will acquiesce to an intervenor or *amicus curiae* who is attempting to halt it. The Complete Bar Order is a settlement device, which generally results in a stipulated order. From there, the court's deference to the receiver takes hold, and any objections are prejudicially handicapped. *See* FED. R. CIV. P. 24(b)(1) ("On timely motion, the court *may* permit anyone to intervene who . . . ." (emphasis added)); *see also* Strasser v. Doorley, 432 F.2d 567, 569 n.2 (1st Cir. 1970) ("As an attorney of our acquaintance once told the court, when asked for his response to the argument of the amicus, 'That fellow isn't any more a friend of the court than I am.'"); *In re* MetLife

B. Substantive Due Process Considerations

Even when proper procedure has been followed, an intrusion on life, liberty, or property can be so substantively contradictory to notions of justice that it offends the Due Process Clause of the Constitution.[132] For an intrusion to constitute a violation of this substantive due process, however, it must first be state action.[133]

The Complete Bar Order is state action.[134] The supervising court is a vehicle of the state, a basic unit in the third branch of the United States government.[135] Indeed, actions of the judiciary are no different than legislative or executive actions in that they are able (though certainly not permitted) to violate the constitutionally-protected rights of the people, which is best illustrated through the doctrine forbidding prior restraints.[136] A prior restraint includes any court order that prevents speech prior to the speech having ever occurred; it is a court-ordered denial of a

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Demutualization Litig., 689 F. Supp. 2d 297, 330 (E.D.N.Y. 2010) ("There is 'a presumption of fairness, reasonableness, and adequacy as to the settlement where a class settlement is reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'" (quoting McReynolds v. Richards-Cantave, 588 F.3d 790, 803 (2d Cir. 2009))); Susan Kenny, *Interveners and Amici Curiae in the High Court*, AUSTLII.EDU (1997), http://www.austlii.edu.au/au/journals/FedJSchol/ 1997/1.html (last visited Apr. 5, 2018) (showing the courts' increasing willingness to allow special interest interveners or those with fundamental legal interests to intervene) (on file with the Washington and Lee Law Review). *See generally* Michael J. Harris, *Amicus Curiae: Friend or Foe? The Limits of Friendship in American Jurisprudence*, 5 SUFFOLK J. TRIAL & APP. ADVOC'Y 1 (discussing the strengths and weaknesses of amici curiae generally)

132. *See* CHEMERINKSY, *supra* note 102, at 525–65 (discussing the incorporation doctrine, and its analysis of a given liberty's "fundamental" nature, and the doctrines of State Action and Entanglement).

133. *See id.* at 532–65 (generally discussing the State Action doctrine in Fourteenth Amendment jurisprudence).

134. *See infra* notes 135–144 and accompanying text (discussing the Complete Bar Order as a state action under substantive due process analysis).

135. *See* U.S. CONST. art. III ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); *see also* Flast v. Cohen, 392 U.S. 83, 111 (1968) ("The judiciary is an indispensable part of the operation of our federal system.").

136. *See In re* Goode, 821 F.3d 553, 559 (5th Cir. 2016) ("Prior restraints—defined as 'predetermined judicial prohibition[s] restraining specific expression' . . . receive a 'presumption against their constitutionality.'" (quoting United States v. Brown, 218 F.3d 415, 424–25 (5th Cir. 2000))).

fundamental right before an individual is able to exercise that right.[137] Is not the Complete Bar Order a prior restraint on the right to sue?[138]

Because an equity receiver is an officer of the court operating under the direction and supervision of the court, then any equity receiver's actions, when affirmed by the supervising court, should be viewed as state actions.[139] To invoke an analogy used earlier in this Note, the delegation of equity powers to the receiver by the supervising court is not unlike the delegation of legislative powers granted executive agencies by Congress.[140]

Indeed, the analogy of the executive agency is perhaps more appropriate than the more popular analogy of the trustee when it comes to examining receivership actions in a securities fraud setting. While a trustee's actions are reviewed only for abuse of discretion regardless of the alleged injury, the actions of a government agency are subject to strict scrutiny when they are alleged to have denied a fundamental right in violation of substantive due process.[141]

Where a Complete Bar Order has been issued, the state, through court order, has effectively denied the fundamental right to sue to all non-settling parties, whether they are parties to the present suit or not.[142] It follows that "heightened, substantive due

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137. *See* Alexander v. United States, 509 U.S. 544, 550 (1993) ("The term prior restraint is used 'to describe . . . judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.'" (quoting M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 4.03, 4–14 (1984))).

138. *See* Wright v. City of St. Petersburg, 833 F.3d 1291, 1298 (11th Cir. 2016) ("A prior restraint on expression exists when the government can deny access to a forum for expression before the expression occurs.").

139. *See* Imperial Assur. Co. v. Livingston, 49 F.2d 745, 749 (8th Cir. 1931) (defining the receiver in a bankruptcy proceeding as an "officer[] of the court for the purposes of handling the property in accordance with the directions of the court").

140. *See infra* notes 69–73 and accompanying text (analogizing the equity receiver to an executive agency to which legislative power is delegated).

141. *See* Reno v. Flores, 507 U.S. 292, 316 (1993) (stating that INS regulations leading to arrest had to pass a "heightened, substantive due process scrutiny," which necessitated a "sufficiently compelling governmental interest").

142. *See* Final Bar Order, SEC v. Stanford Int'l Bank, Ltd., No. 3:09-cv-0298-n (N.D. Tex. filed Aug. 30, 2016) ("This Court hereby permanently bars, restrains, and enjoins the Receiver, the Plaintiffs, the Claimants, the Interested Parties, *and all other Persons or entities anywhere in the world*, . . . from . . . instituting,

process scrutiny" should guide review of any Complete Bar Order when it occurs in a securities fraud setting.[143] The governmental interest in expediting class action settlements does not outweigh the importance of access to the courts.[144]

VI. The Complete Bar Order as a Constructive Intrusion and Regulation of Constitutional Rights

The aforementioned constitutional issues surrounding the Complete Bar Order multiply in the context of the class action opt-out. When an individual uses statutorily-prescribed mechanisms to best utilize his or her right to sue by opting out of a class action, the Complete Bar Order acts not only as a denial of rights, but as a constructive punishment.[145]

Class actions are already constitutionally problematic, thereby necessitating an opt-out mechanism.[146] In a class action, usually, the member plaintiff does not choose to litigate.[147] The

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reinstituting, intervening in, initiating, commencing, maintaining, continuing, filing . . . or otherwise prosecuting [the settling party]." (emphasis added)); *see also supra* notes 62–73 (demonstrating that the right to a remedy is a fundamental right deeply rooted in American notions of justice).

143. *Reno*, 507 U.S. at 316.

144. *Contra* SEC v. Stanford Int'l Bank, Ltd., 424 F. App'x 338, 341 (5th Cir. 2011) (per curiam) (affirming indefinite stay on litigations pending or potential from other parties with individual claims arising from the same set of facts on grounds that "the needs of the Receiver outweigh the substantial injury being suffered by the Appellants").

145. *See infra* notes 146–156 and accompanying text (detailing how the Complete Bar Order works, effectively, as a punishment for those who conscientiously opt-out of a class action).

146. *See* Douglas G. Smith, *The Intersection of Constitutional Law and Civil Procedure: Review of Wholesale Justice—Constitutional Democracy and the Problem of the Class Action Lawsuit*, 104 NW. U.L. REV. COLLOQUY 319, 319 (2010) ("[T]he class action procedure as applied today is profoundly troubling from a constitutional perspective." (reviewing MARTIN REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT (2009)); Jay Tidmarsh & David Betson, *Optimal Class Size, Opt-Out Rights and "Indivisible" Remedies*, 79 GEO. WASH. L. REV. 542, 543 ("The right to opt-out has a constitutional basis of uncertain breadth, but, at a minimum, seems to require an opt-out right for some class members in many class actions that seek monetary relief.").

147. *See* Smith, *supra* note 146, at 319–20 (restating Redish's assertion that class actions "infringe the due process right to individual autonomy by sweeping large numbers of individuals into litigation . . . without explicit consent").

member plaintiff does not participate in the litigation process to anywhere near the same extent he or she would in an individual lawsuit.[148] The individual member does not get to pick his or her attorney.[149] Perhaps most problematic of all, the actual remedy in a class-action lawsuit rarely matches the injury suffered.[150] Despite these constitutionally problematic shortcomings, class actions live on because of the significant public policy reasons justifying them.[151]

For class actions to survive constitutional scrutiny—and in order for class actions to continue as effective and efficient influencers of corporate behavior—the opt-out mechanism exists to protect the constitutional rights of potential class members, particularly their right to sue.[152] Because of the opt-out mechanism, an individual can decide to pursue litigation with an attorney of his or her own choosing.[153] The plaintiff can negotiate a fee arrangement, and actively participate in its own litigation.[154] And, in accordance with the ultimate aim of the constitutional

148. *See id.*

149. *See id.*

150. *See* Tidmarsh & Betson, *supra* note 108, at 544–46 (introducing concepts of optimal class sizes).

151. *See supra* notes 45–46 and accompanying text (highlighting the utility of class actions as one of the few effective ways to influence corporate behavior, provide litigation efficiency, and avoid over-crowded dockets).

152. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) (holding "that due process requires at a minimum that an absent plaintiff be provided with opportunity to remove himself from the class" by means of the opt-out mechanism); FED. R. CIV. P. 23(b)(3), (c)(2)(B) (discussing the certification procedure for class actions and the availability of the option to affirmatively request exclusion from the class, which the court would subsequently permit).

153. This directly resolves the Constitutional issues described *supra* notes 146–150. It is also interesting to note that Redish believes the opt-out mechanism is, itself, constitutionally insufficient; that is, however, the mechanism currently on the books in order to validate the class action procedure generally. *See* Smith, *supra* note 146, at 320 ("Redish argues that allowing due process rights to be waived simply by inaction, as under the current version of the rule, does not sufficiently protect such constitutional rights."). *Contra Phillips Petroleum*, 472 U.S. at 812 (striking down petitioner's contention that "opt-in" mechanisms are necessary to satisfy due process).

154. *See Phillips Petroleum*, 472 U.S. at 811–12 (discussing the need for an opt-out mechanism).

right to a remedy—or the right to sue—the plaintiff is far more able to obtain a recovery that actually matches the injury.[155]

The Complete Bar Order acts as a punishment against certain plaintiffs for exercising their constitutional rights in civil litigation as class opt-outs.[156] The Complete Bar Order, therefore, constitutes a constructive intrusion or constructive regulation of these rights.

VII. The Solution

The Complete Bar Order, when used in a securities fraud setting, is unconstitutional state action that deprives all claimants (plaintiffs and codefendants, actual and potential) of a fundamental right absent substantive and procedural due process.[157] It is not a mere limitation of that right; it is, instead, an outright deletion of it.[158]

What follows, then, is a need for a solution. As referenced at the outset of this Note, the proposed solution primarily focuses on 1) limiting the discretionary powers of an equity receiver and 2) transforming the standard of review for receivership actions from the more deferential "abuse of discretion" to the more exacting "strict scrutiny" whenever receivership action is alleged to have violated a constitutional right.[159]

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155. *Id.*

156. *See* Hansberry v. Lee, 311 U.S. 32, 42 (1940) ("[T]here has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it.").

157. *See supra* note 142 and accompanying text (arguing that the Complete Bar Order, when used in a securities fraud context, violates due process).

158. *See* Eichenholtz v. Brennan, 52 F.3d 478, 482 n.2 (3d Cir. 1995) (affirming Complete Bar Order "based upon, relating to, or arising out of the Settled Claims, the Action or the settlement of this Action," stating they were "permanently barred, enjoined and restrained permanently from commencing, prosecuting, or asserting any such claim."); Final Bar Order, SEC v. Stanford Int'l Bank, Ltd., No. 3:09-cv-0298-n (N.D. Tex. filed Aug. 30, 2016) (affirming Complete Bar Order "anywhere in the world . . . from . . . instituting, reinstituting, intervening in, initiating, commencing, maintaining, continuing, filing . . . or otherwise prosecuting [the settling party].").

159. *See supra* notes 40–41 and accompanying text (proposing heightened scrutiny of receivership actions); *supra* note 93 and accompanying text (proposing that the powers afforded an equity receiver dangerously disregard constitutional

Before modifying the existing standards of review on receivership action, however, courts must refocus on statutory limitations, thereby giving the PSLRA more persuasive power over the equitable decision-making of courts supervising receiverships.[160] The PSLRA is specific to securities fraud class action litigation, and, consequentially, its Bar Order Provision should govern all bar orders issued by a court supervising such litigation, whether or not a receiver is involved.[161] In that context, therefore, a bar order should only apply to non-settling co-defendants and their claims of contribution, indemnification and subrogation.[162] This effectively limits bar orders to co-defendants, and does not extend to non-parties to a case.[163] It also works to satisfy the Federal Rule of Civil Procedure which mandates that "[e]very action shall be prosecuted in the name of the real party in interest."[164] All other forms of the bar order, and, more particularly, the Complete Bar Order, would be automatically invalidated as improper equitable remedies in a securities fraud litigation.[165]

A return to traditional PSLRA jurisprudence aside, the solution, most importantly, requires an adjustment to the way we view equity receivership powers and the standard of review they deserve by reviewing courts. How then, should the discretionary powers of the equity receivership be limited?

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rights that may be at risk).

160. *See infra* note 163 (discussing the superiority of law over equity).

161. *See* Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(a)(1) (2012) ("The provisions of this subsection shall apply in each private action arising under this chapter that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure.").

162. *See* Wis. Inv. Bd. v. Ruttenberg, 300 F. Supp. 2d 1210, 1220 (N.D. Ala. 2004) (holding that the bar could permissibly extinguish claims which could be reasonably asserted by co-defendants, and this did not violate the co-defendants substantive due process rights); *In re* Heritage Bond Litig., 546 F.3d at 676 ("[In a PSLRA case], a bar order issued in a partial settlement of a securities fraud class action case cannot bar independent claims.").

163. *See* FDIC v. Geldermann, Inc., 975 F.2d 695, 698–99 (10th Cir. 1992) (determining in a PSLRA case that non-parties could not fall under the bar order).

164. FED. R. CIV. P. 17(a)(1).

165. *See generally In re* HealthSouth Corp. Sec. Litig., 572 F.3d 854 (11th Cir. 2009) (citing *TBG, Inc. v. Bendis*, 36 F.3d 916, 928 (10th Cir.1994) to affirm, under the PSLRA, that independent damage claims cannot be barred).

The equity receiver, as an officer of the court (and, by extension, a state actor), must be limited by the Constitution in its administration of an estate in securities fraud litigation.[166] The governmental interest in permitting the discretionary powers of an equity receiver to include the ability to bar all claims, present or potential, against a certain party does not outweigh the interest of injured parties in preserving their constitutionally-protected right to a remedy and open access to the courts.[167]

Any limitation on equity receivership powers is illusory if the courts are not able to void receivership actions in accordance with these limitations.[168] Accordingly, the court supervising an equity receivership (the district court) should more actively apply a constitutional litmus test to all receivership actions to determine whether the actions are actually an abuse of discretion, because this constitutes a "serious procedural irregularity."[169] If, indeed, a constitutional issue presents itself (i.e., complainants allege a violation of their right to sue), the state interest in deferring to

166. *See* U.S. CONST. art. IV, cl. 2 ("This Constitution . . . , shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

167. The interests in granting such rights exist in equity. Considering the general supremacy of law over equity and the explicit supremacy of the Constitution over any and all other considerations (in law *or* equity), both the Constitution and the PSLRA preempt equity receivership action that cuts against both their express and implied protections. *See id.* (containing The Supremacy Clause of the United States Constitution); 15 U.S.C. § 78u-4(a)(1) (2012) ("The provisions of this subsection shall apply in *each* private action arising under this chapter that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure." (emphasis added). *See generally* Temple v. Cleve Her Many Horses, 163 F. Supp. 3d 602 (D.S.D. 2016) (stating the general rule that resort to equity is only permissible where there is no satisfactory result at law); Cayne v. Wash. Tr. Bank, 125 F. Supp. 3d 1128 (D. Idaho 2015) (same); Trs. of Univ. of Penn. v. St. Jude Children's Research Hosp., 982 F. Supp. 2d 518 (E.D. Pa. 2013) (same); Finnegan v. Suntrust Mortg., 140 F. Supp. 3d 819 (D. Minn. 2013) (same); Ga. Dep't of Cmty. Health v. U.S. Dep't of Health and Human Servs., 79 F. Supp. 3d 269 (D.D.C. 2015) (same).

168. *See* Dickinson v. Zurko, 527 U.S. 150, 152–61 (1999) ("The upshot in terms of judicial review is some practical difference in outcome depending upon which standard is used.").

169. *See* Buttram v. Cent. States, Se. and Sw. Areas Health and Welfare Fund, 76 F.3d 896, 900 (8th Cir. 1996) (applying a "less deferential" version of abuse of discretion than the traditional, and more deferential version of that standard of review, where plaintiff could prove "serious procedural irregularity" and "serious breach of . . . trustee's fiduciary duty").

receivership discretion should yield to the more compelling state interest in protecting fundamental rights; after all, an "obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit."[170]

In turn, appellate courts should apply a more scrutinizing standard of review to all decisions made by a trial court supervising an equity receivership where, on appeal, an infringement of the constitutional right to sue has been pleaded.[171] Analogizing the equity receiver to an administrative agency, rather than to a trustee, works to make this proposed heightened standard ("strict scrutiny")[172] not only acceptable, but timely.[173] The analogy of a receiver to a trustee falls short because the trustee's power arises from a trust instrument, while an equity receiver's power originates from court instruction.[174] As a result,

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170. Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992).

171. Because the matter is whether a constitutional right has been violated by the Complete Bar Order, one could reasonably find the question to be solely a matter of law and not one of discretion, particularly because the receiver, as proposed, would not have the discretion to violate the Constitution. The settlement agreement in question being a private agreement between aggrieved parties, the court's decision to issue a Complete Bar Order in conjunction with that agreement would constitute a legal conclusion as to the agreement's constitutionality—thereby meriting *de novo* review. *See* Highmark Inc. v. All Care Health Mgmt. Sys., Inc., 134 S. Ct. 1744, 1748 (2014) ("Traditionally, decisions on 'questions of law' are 'reviewable de novo,' decisions on 'questions of fact' are 'reviewable for clear error,' and decisions on 'matters of discretion' are 'reviewable for abuse of discretion.'" (citing Pierce v. Underwood, 487 U.S. 552, 558 (1988))). This Note, however, proposes a middle ground. *See supra* notes 133–144 and accompanying text (analogizing the receivership action to agency action by which a substantive due process violation has been alleged, and proposing strict scrutiny to such actions).

172. *See Strict Scrutiny*, CORNELL U. L. SCH.—LEGAL INFO. INST. (WEX DICTIONARY), https://www.law.cornell.edu/wex/strict_scrutiny (last updated June 2016) (last visited Apr. 5, 2018) ("To pass strict scrutiny, the legislature must have passed the law to further a 'compelling governmental interest,' and must have narrowly tailored the law to achieve that interest.") (on file with the Washington and Lee Law Review).

173. *Compare supra* notes 71–72 and accompanying text (analogizing equity receiverships to administrative agencies, where equity receiverships are dictated by the court instructions and administrative agencies are dictated by the statutes creating them), *with supra* note 63 and accompanying text (analogizing and comparing receivers and trustees).

174. *See supra* note 69–70 and accompanying text (describing the analogy between the court instruction given to receivers and the trust instrument directed to trustees).

the receiver's actions constitute state action—and are capable of violating the Due Process clauses of the Constitution—while a trustee's actions do not.[175]

When an administrative agency, on the other hand, is alleged to have violated substantive due process, that agency's actions are subject to strict scrutiny by the reviewing court.[176] In this regard, the agency is more analogous to the equity receiver, and a similar standard of review should be applied to such receivership action.[177]

VIII. Conclusion

While toiling to bring to life his new creation, Victor Frankenstein found himself learning from his mistakes and improving on past attempts. He said:

> The materials at present within my command hardly appeared adequate to so arduous an undertaking, but I doubted not that I should ultimately succeed. I prepared myself for a multitude of reverses; my operations might be incessantly baffled, and at last my work be imperfect, yet when I considered the improvement which every day takes place in science and mechanics, I was encouraged to hope my present attempts would at least lay the foundations of future success.[178]

Much like "science and mechanics,"[179] the law has a profound ability to correct itself.[180] While the bar order has evolved in

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175. *See supra* notes 139–140 and accompanying text (calling an equity receiver a state actor because of its relationship to the court).

176. *See* Sw. Cmty. Action Council, Inc. v. Cmty. Servs. Admin., 462 F. Supp 289, 296 (S.D. W. Va. 1978) ("A regulation that significantly interferes with the exercise of a fundamental right requires rigorous scrutiny and must be supported by a compelling interest and be closely tailored to effectuate only those interests." (citing Mem'l Hosp. v. Maricopa Cty., 415 U.S. 250, 262–63 (1975))); United States v. Masciandaro, 648 F. Supp. 2d 779, 789 (E.D. Va. 2009) ("[S]trict scrutiny requires that a statute or regulation 'be narrowly tailored to serve a compelling governmental interest in order to survive' a constitutional challenge.").

177. *Id.*

178. SHELLEY, *supra* note 1, at 63.

179. *Id.*

180. *See* Lawrence M. Friedman, Book Review, 74 YALE L.J. 593, 596 (1965) ("[P]rocesses exist for correcting and modifying bad statute law in the light of experience . . . ." (reviewing FREDERICK G. KEMPIN, JR., LEGAL HISTORY: LAW AND SOCIAL CHANGE (1963))).

securities fraud class action lawsuits to include the ability to permanently enjoin all parties—even non-parties—from exercising their respective rights to remedy, the proposed solutions can work to bring the bar order back down to its acceptable levels and limits.[181] In this regard, the Constitution and PSLRA work to provide "the foundations of future success."[182]

With these three mechanisms in place—a return to traditional PSLRA jurisprudence in securities fraud litigation; a constitutional limitation on the equity receiver as a state actor; and strict scrutiny review at the district and appellate levels—the Complete Bar Order would disappear from the list of acceptable remedies in securities fraud litigation and settlement negotiations. The rights of plaintiffs to open access to the courts, whereby they might be able to seek an appropriate remedy for their injuries, would survive the challenges of a mercurial and undefined system of equity. These proposals would lead to a significant victory for the Constitution and the individual rights that it was designed to protect.

181. *See supra* notes 159–177 and accompanying text (providing solutions to the problems posed by current jurisprudence on the Complete Bar Order).

182. SHELLEY, *supra* note 1, at 63.