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Rena Steinzor

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Symposium

Too Big to Jail: Overcoming the Roadblocks to Regulatory Enforcement

INTRODUCTION: CONNECTING THE DOTS BETWEEN TWO PARALLEL WORLDS

RENA STEINZOR[*]

I. THE DEREGULATORY BRIDGE ACROSS FINANCE AND THE ENVIRONMENT

I am privileged to introduce the written product of an unusual Symposium co-sponsored by the *Maryland Law Review* and the Center for Progressive Reform.[1] As far as we know, the event is the first effort by the academy to make explicit the cross-cutting issues that undermine effective regulation and enforcement regarding the financial services sector and polluting industries. We were able to assemble an eclectic group of leading scholars in both arenas, and especially appreciate the participation of Brooksley Born, former Chairwoman of the Commodity Futures Trading Commission, who served as a modern day Cassandra during the lead-up to the financial meltdown of 2008. Had self-styled titans of finance like Alan Greenspan, Lawrence Summers, and Robert Rubin given more credence to her warnings of the dire collapse that lay just around the corner, the world would be a better place today.[2] Threshold plaudits are also due to Professor Mi-

* Professor, University of Maryland Francis King Carey School of Law.

1. Founded in 2002, the Center for Progressive Reform is a network of sixty scholars across the nation dedicated to protecting health, safety, and the environment through analysis and commentary. It has a small professional staff funded by foundations. Contributing authors Thomas McGarity and Victor Flatt are members of the organization and I am its president. For more information about CPR's mission, goals, and activities, see http://www.progressivereform.org.

2. The story of Born's efforts was the focus of the 2009 PBS documentary "The Warning." *Frontline: The Warning* (PBS television broadcast Oct. 20, 2009), *available at* http://www.pbs.org/wgbh/pages/frontline/warning/.

chael Greenberger, who served as Chairwoman Born's senior adviser during those troubled times and now teaches law at the University of Maryland Carey School of Law, and to Anne Havemann, *Maryland Law Review* Editor in Chief, and Brendan Hogan, Executive Articles and Symposium Editor, without whose tireless work the Symposium would not have been possible.

On the surface, the Environmental Protection Agency ("EPA") and the Securities and Exchange Commission ("SEC") have little in common. The first is the defiant poster child for regulation-run-amok, while the second is the powerful, if often sleepy, watchdog of Wall Street. Turn the telescope around, though, and the similarities between the root causes of the two agencies' institutional failures are startling. A powerful brew of political hostility[3] and funding shortfalls[4] hobble them despite the fact that the need for vigorous oversight in both arenas has never been more urgent. Indeed, if we believe the findings of the world's pre-eminent scientists and economists, our obstinate neglect of climate change solutions in the face of global economic insecurity will cost us more in the long run than we seem to be able to imagine.[5]

So what exactly is wrong with the lead actors in the regulatory state assigned to supervise reckless deals and harmful pollution? The SEC's failure to anticipate, much less mitigate, the economic collapse of 2008 was most unfortunate, although it was just one among several agencies blinded by the complexity of the mechanisms used to engineer the "bubble" that burst so disastrously. The agency's weakness in the aftermath of the crisis is as inexplicable as it is unforgiveable. It failed to take enforcement action against Lehman Brothers, a firm at the epicenter of the financial meltdown; entered a sweetheart deal with Countrywide Financial chief executive Angelo Mozilo, who spearheaded the accumulation of junk mortgages that were at the heart of the crisis; and destroyed records of enforcement actions it had closed, including cases involving Goldman Sachs, Wells Fargo,

3. For a discussion of "bureaucracy bashing" by hostile politicians, see RENA STEINZOR & SIDNEY SHAPIRO, THE PEOPLE'S AGENTS: SPECIAL INTERESTS, GOVERNMENT, AND THREATS TO HEALTH, SAFETY, AND THE ENVIRONMENT 126–29 (2010).

4. *Id.* at 54–72.

5. Fiona Harvey, *Climate Change Is Already Damaging Global Economy, Report Finds*, GUARDIAN (Sept. 25, 2012), http://www.guardian.co.uk/environment/2012/sep/26/climate-change-damaging-global-economy.

Bank of America, Deutsche Bank, Lehman Brothers, and the SAC Capital hedge fund.[6]

Far from using the crisis to rediscover its core mission, the SEC has swayed under the relentless political pressure of financiers who have embraced the adage "the best defense is a good offense" with unprecedented and unrelenting determination. In fact, as I write these words, the *New York Times* editorial page has excoriated newly appointed SEC Chairwoman Mary Jo White for her decision to defer the supervision of international derivatives trading to the weaker laws of the nations where the transactions occur.[7] Coupled with the government's massive bailout of mismanaged firms, the agency's dismal record sends the signal that a second, third, or fourth crisis might cost the losers on Wall Street money but will make other players rich.

Meanwhile, in the wake of the latest round of across-the-board budget cuts known as the "sequester," the head of EPA's Criminal Investigation Division has acknowledged the existence of "significant geographic regions we can no longer cover."[8] Subject to a double pincer attack on its authority and resources, EPA's every move is controlled by skittish political operatives within the White House, who repeatedly delay and weaken regulations the agency's authorizing statutes command it to write.[9] As I write these words, Senate Republicans are doing their best to block confirmation of Gina McCarthy, a long-time career bureaucrat who has worked for elected officials from both parties and is President Obama's nominee for EPA Administrator.[10]

6. Katherine Reynolds Lewis, *Mary Schapiro's SEC: Its 6 Biggest Blunders—So Far*, FIN. TIMES (Sept. 12, 2011), *available at* http://www.thefiscaltimes.com/Articles/2011/09/12/Mary-Schapiros-SEC-Its-6-Biggest-Blunders-So-Far.aspx#page2.

7. Editorial, *A Disappointing Debut*, N.Y. TIMES, May 5, 2013, at A26, http://www.nytimes.com/2013/05/06/opinion/a-disappointing-debut-at-the-sec.html?partner=rssnyt&emc=rss&_r=0.

8. John McArdle, *EPA: "There are Significant Geographic Regions We Can No Longer Cover"—Agency's Top Cop*, CLIMATEWIRE, May 6, 2013, http://www.eenews.net/public/Greenwire/2013/05/06/1?page_type=print.

9. *See, e.g.*, RENA STEINZOR, JAMES GOODWIN & MICHAEL PATOKA, CTR. FOR PROGRESSIVE REFORM, BEHIND CLOSED DOORS AT THE WHITE HOUSE: HOW POLITICS TRUMPS PROTECTION OF PUBLIC HEALTH, WORKER SAFETY, AND THE ENVIRONMENT (2011), *available at* http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf.

10. *See* John M. Broder, *Senate Panel Advances Nominee for E.P.A.* N.Y. TIMES, May 16, 2013, http://www.nytimes.com/2013/05/17/us/politics/senate-panel-advances-nominee-for-epa.html?_r=0 (describing Republican opposition); Sherwood Boehlert, Op-Ed, *GOP Must End Gina McCarthy Obstruction*, POLITICO, May 16, 2013, http://www.politico.com/story/2013/05/epa-gop-gina-mccarthy-obstruction-91461.html (describing McCarthy's record of reaching across the aisle).

Because the content of their missions is so different, the root causes of the agencies' dysfunction may appear to have little in common. The SEC's struggle to master the convoluted assessment of financial risks posed by new investment vehicles and EPA's faltering efforts to reduce toxic emissions differ fundamentally in execution and result. Big money is made in SEC's bailiwick. Big money can only be lost if regulated industries fail to thwart EPA's momentum. The SEC is viewed as a necessary evil—few would advocate a totally free marketplace—while EPA's opponents seem determined to stop it in its tracks. Few venture onto the unstable bridge that links the two and is just beginning to emerge as a central project of trade associations founded to keep government off their members' backs.

Powerful institutions like the Chamber of Commerce recognized the potential for cross-fertilization of people and ideas between the two arenas some time ago, well before their counterparts in the public interest community glimpsed those connections.[11] The fading core of the nation's industrial base—the heavy-duty manufacturing sector—has long experience with the potent strategy of exploiting economic downturns to convince the public that jobs and a clean environment cannot co-exist. Having constructed an updated version of the deregulatory bandwagon with the help of the traditional conservative coalition that now dominates the Republican Party, foresighted manufacturers were only too happy to welcome investment bankers on board. Weakening the statutory requirements commonly known as "Dodd-Frank" has become as important a priority for the Chambers' deregulatory staff as undermining EPA's "job killing" initiatives.[12]

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11. *See, e.g.*, Thomas J. Donohue, *Regulations Devastate Economic Growth*, U.S. CHAMBER OF COM. (Oct. 14, 2010), http:// www.uschamber.com/press/opeds/regulations-devastate-economic-growth (condemning the "regulatory hurricane" that threatens the U.S. economy); JAMES GATTUSO ET AL., HERITAGE FOUND., RED TAPE RISING: OBAMA'S TORRENT OF NEW REGULATION (2010), http:// www.heritage.org/research/reports/2010/10/red-tape-rising-obamas-torrent-of-new-regulation (contending that burden of regulation has grown at alarming rate); STEPHEN F. HAYWARD, AM. ENTER. INST. FOR PUB. POL'Y RES., THE EPA'S POWER GRAB (2009), http:// www.aei.org/article/101456 (on file with the Harvard Law School Library) (condemning EPA's proposals to regulate greenhouse gas emissions).

12. *Compare* CTR. FOR CAPITAL MARKETS' COMPETITIVENESS, FAR AGENDA 2013 (2013), http://www.centerforcapitalmarkets.com/wp-content/uploads/2010/04/CCMC_FAR_Agenda-2013.pdf (proposing regulatory and statutory fixes to Dodd-Frank), *with* U.S. CHAMBER OF COMMERCE, IMPACTS OF REGULATIONS ON EMPLOYMENT, EXAMINING EPA'S OFT-REPEATED CLAIMS THAT REGULATIONS CREATE JOBS (2013), http://www.uschamber.com/sites/default/files/reports/020360_ETRA_Briefing_NERA_Study_final.pdf (reviewing EPA's methodology for measuring the impact of a regulation and concluding that the agency's methods are "flawed" and replete with "striking omissions and inconsistencies").

II. DEREGULATION AS THE PROXIMATE CAUSE OF THE GLOBAL RECESSION

Our Symposium begins with Brooksley Born's analysis of how the 2008 meltdown came about and the reasons why the revival of stringent regulation and enforcement are necessary to prevent another crash. Born bases her analysis on her first-hand observations as a high profile attorney for financial industry clients,[13] her service as Chairwoman of the Commodity Futures Trading Commission in the late 1990s, and, especially, her participation as one of ten Commissioners appointed by the President and congressional leadership to serve on the Financial Crisis Inquiry Commission ("FCIC").[14]

She explains how Alan Greenspan, Chairman of the Federal Reserve for two decades, as well as a "laissez-faire economist" and "Ayn Rand disciple,"[15] fostered the belief that financial markets could self-regulate. Eventually, this mantra was embraced by the entire financial sector, which spent the astounding sum of $2.7 billion on federal lobbying efforts at the same time that financial services employees made more than $1 billion in federal election campaign contributions. This flood of cash produced deregulatory "gaps" that nurtured what Born describes as a "lightly regulated shadow banking system."[16] In just a few short years, this alternative system was trading so-called "over-the-counter derivatives" at a level that rivaled "the traditional banking system in size and importance."[17]

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13. *Brooksley E. Born*, ARNOLD & PORTER LLP, http://www.arnoldporter.com/professionals.cfm?action=view&id=557.

14. The FCIC was created by the Fraud Enforcement and Recovery Act of 2009, which was signed into law by President Obama on May 20, 2009. Pub. L. No. 111-21 (2009). Born was appointed by then House Speaker Nancy Pelosi (D-CA). Press Release, Democrats, Reid, Pelosi Announce Appointments to the Financial Crisis Inquiry Commission (July 15, 2009), *available at* http://democrats.senate.gov/2009/07/15/reid-pelosi-announce-appointments-to-the-financial-crisis-inquiry-commission/ (last visited May 21, 2013). The FCIC's final report was issued on January 27, 2011; the Commission split six to four along partisan lines in voting its approval of the report. *Get the Report*, U.S. FIN. CRISIS INQUIRY COMM'N, http://fcic.law.stanford.edu/report (last visited May 21, 2013). Astoundingly, the report became a bestseller on lists maintained by both *The New York Times* and *The Washington Post*. *Best Sellers: Paperback Nonfiction*, N.Y. TIMES (Feb. 20, 2011); Christopher Schoppa, *Best Sellers*, WASH. POST, Feb. 6, 2011. Jeff Madrick, writing in *The New York Review of Books*, hailed it as "the most comprehensive indictment of the American financial failure that has yet been made." Jeff Madick, *The Wall Street Leviathan*, N.Y. REV. BOOKS, Apr. 28, 2011, http://www.nybooks.com/articles/archives/2011/apr/28/wall-street-leviathan/.

15. Brooksley Born, *Keynote Address*, 72 MD. L. REV. 1163, 1164 (2013).

16. *Id.* at 1165.

17. *Id.*

Born and the FCIC majority lament the grave reluctance of oversight agencies to "police" grossly problematic practices.[18] Her first and most important example is the Federal Reserve Board ("FRB"), which had the authority to police mortgage terms and was "well aware of widespread abuses in mortgage lending practices," but did nothing.[19] In this vacuum, fraudulent mortgage lenders pushed unqualified borrowers to sign balloon loans that they could never repay, and then resold the loans to investors known as "mortgage securitizers."[20] The bad paper was then sold and resold, divided into tranches, recharacterized and hedged, until its core weakness—mortgagee insolvency—became invisible.[21] Born points out that current Federal Reserve Chairman Ben Bernanke admitted to the FCIC that the FRB's neglect of the mortgage market during the housing boom was a "severe failure."[22]

Born similarly condemns the SEC for failing to ensure that mortgage securitizers gave adequate disclosures to the investors that bought their junk paper.[23] Instead, she says that the agency relied on "shelf registration" provisions and exemptions from registration that allowed multiple public offerings without adequate investor disclosure.[24] She explains that the FCIC attributed the extraordinarily rapid growth of the OTC derivatives market to its deregulation by the Commodity Futures Modernization Act of 2000. By June 2008, the "explosive growth" of the OTC derivatives market had reached an astounding $650 trillion, "more than ten times the gross domestic product of all the countries in the world."[25] This deregulation and its utterly foreseeable consequences were "key turning point[s] in the march toward the financial crisis."[26]

The SEC also committed grave errors with respect to the country's largest investment banks, which grew with "little or no supervision except for their securities operations."[27] The five largest banks were so bloated with bad debt that they ultimately "disappeared" during the financial crisis, either going bankrupt (Lehman Brothers), be-

18. *Id.* at 1164.

19. *Id.* at 1165–66.

20. *Id.* at 1165.

21. For a full description of this dynamic, see MICHAEL LEWIS, THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE (2010).

22. Born, *supra* note 15, at 1166.

23. *Id.* at 1165.

24. *Id.* at 1167.

25. *Id.*

26. *Id.*

27. *Id.* at 1168.

ing acquired under emergency circumstances (that is, a buyers' market) by large bank holding companies (Bear Stearns and Merrill Lynch), or converting themselves to bank holding companies and submitting to the supervision of the FRB (Goldman Sachs and Morgan Stanley).[28]

As tempting as it is to believe that these incidents of catastrophic regulatory neglect will be prevented by the new authorities regulators received when their authorizing statutes were reformed by the passage of Dodd-Frank, Born is not especially sanguine about such progress. In addition to the cash that still floods the political system, inspiring multiple efforts to repeal portions of Dodd-Frank, Born worries that Congress will find oblique methods, such as cutting agency budgets, to undermine the work of federal regulators.[29] With so much money at stake, such cuts seem as far removed from legitimate deficit concerns as they are closely related to deregulatory ambitions. And, of course, funding cuts will only make it more difficult for federal regulators to overcome their deeply entrenched "muscle memory" of keeping a low profile rather than mounting tough and ambitious enforcement of new and old rules.

III. THE COSTS AND BENEFITS OF RE-REGULATING THE FINANCIAL SECTOR

Our next author, Wallace Turbeville,[30] explains the implications of cost-benefit analysis for future financial services regulation. This methodology is among the most powerful elements of the cross-cutting deregulatory campaign mounted by business groups—cross-cutting because the playbook for its application was developed in the context of health, safety, and environmental regulation, especially with respect to EPA's activities.[31]

In a report entitled *The Importance of Cost-Benefit Analysis in Financial Regulation*, Paul Rose and Christopher Walker, professors at the Ohio State University Moritz College of Law and fellows of the Cham-

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28. *Id.* at 1169.

29. *Id.* at 1170–72.

30. Turbeville is a lawyer and financial services expert who has worked in the financial services industry since 1978. He practiced law for seven years and then joined Goldman Sachs as an investment banker specializing in infrastructure finance and public/private partnerships. He is now a Senior Fellow at Demos, a nonprofit advocating reform in the financial services industry. For more information about its programs and views, see http://www.demos.org/about-demos.

31. *See, e.g.*, NAT'L CTR FOR ENVTL. ECON., EPA, GUIDELINES FOR PREPARING ECONOMIC ANALYSES (2010), *available at* http://yosemite.epa.gov/ee/epa/eerm.nsf/vwAN/EE-0568-50.pdf/$file/EE-0568-50.pdf.

ber of Commerce Center for Capital Markets' Competitiveness, refer with enthusiasm to the leadership of Harvard Law School Professor Cass Sunstein, an early architect of cost-benefit analysis in the environmental field.[32] Eager to translate theory into practice, Sunstein headed the Office of Management and Budget's Office of Information and Regulatory Affairs ("OIRA") during President Barack Obama's first term.[33] He is now back teaching at Harvard.

Sunstein's strong commitment to cost-benefit analysis is best expressed in his 2005 book, *Laws of Fear: Beyond the Precautionary Principle*, where he writes that environmental laws are the product of powerful and irrational social forces caused by the average citizen's overreoverreaction to risk.[34] Because non-experts succumb to irrational panic in response to improbable risk, "the public's demand for government intervention can be greatly affected by probability neglect, so that regulators may end up engaging in extensive regulation precisely because intense emotional reactions are making people relatively insensitive to the (low) probability that dangers will ever come to fruition."[35] Sunstein sees these reactions as so extreme that he recommends preventing the public from influencing government decisions that involve such risks: "[T]here is [a risk that] high levels of public participation in technical domains [will] simply heighten public fear, with unfortunate consequences for policy."[36] His tool for achieving this troubling goal is cost-benefit analysis.

Sunstein, of course, did not bring cost-benefit analysis to the fore of White House regulatory review. Rather, its genesis was in response to the landmark legislation passed in the wake of Watergate and the Vietnam War, a period that saw the creation of EPA, the Consumer Product Safety Commission, the National Highway Traffic Safety Administration, and the Occupational Safety and Health Administration.[37] Gradually, over four decades, the application of this flawed

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32. PAUL ROSE & CHRISTOPHER J. WALKER, CTR. FOR CAPITAL MARKETS' COMPETITIVENESS, THE IMPORTANCE OF COST-BENEFIT ANALYSIS IN FINANCIAL REGULATION (2013).

33. For a description of his tenure there, see Dan Froomkin, C*ass Sunstein: The Obama Administration's Ambivalent Regulator*, HUFFINGTON POST (June 13, 2011, 10:51 AM), http://www.huffingtonpost.com/2011/06/13/cass-sunstein-obama-ambivalent-regulator-czar_n_874530.html.

34. CASS SUNSTEIN, LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE (2005).

35. *Id.* at 69.

36. Cass R. Sunstein, *The Laws of Fear*, 115 HARV. L. REV. 1119, 1161 (2002) (reviewing PAUL SLOVIC, THE PERCEPTION OF RISK (2000)).

37. For a history of regulatory review, see Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, 1 MICH. J. ENVTL. & ADMIN. L. 209 (2012).

methodology has become increasingly elaborate and formal.[38] Despite its entrenchment as a hurdle to surmount before a proposed or final rule is published in the *Federal Register*, the methodology has come under heavy fire as a tool for killing protective regulation.[39]

Critics of cost-benefit analysis in the health and safety arena deplore its tendency to overstate costs and understate benefits. They argue that all the number crunching produces estimates that appear precise but are in truth the product of inaccurate, opaque, and even morally objectionable assumptions. They argue that cost-benefit analysis pushes the regulatory system in only one direction: toward weakening protections in order to lower industry compliance costs.

In an effort to justify the migration of such analyses to the financial services arena, the Rose and Walker report explains that financial regulatory agencies are independent, and therefore labor under the misimpression that they are immune from the methodology that applies to Executive Branch agencies. They urge sweeping reform:

> For more than three decades—under both Democratic and Republican administrations—cost-benefit analysis has been a fundamental tool of effective regulation. . . . Through the use of cost-benefit analysis in financial services regulation, regulators can determine if their proposals will actually work to solve the problem they are seeking to address. . . . The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) only elevates the importance of cost-benefit analysis in financial regulation. By requiring nearly 400 rulemakings spread across more than 20 regulatory agencies, implementing Dodd-Frank is an unprecedented challenge for both regulators and regulated entities. . . . Although financial market regulators have not entirely avoided the influence of cost benefit analysis, for largely historical reasons they have adopted the method both more slowly and more haphazardly than many other agencies.[40]

Turbeville's article strides right to the fundamental article of faith for those advocating the stringent application of cost-benefit analysis to financial rules to prevent re-regulation—the "Efficient Market Hypothesis."[41] Espoused by Alan Greenspan, among others,

38. *Id.* at 238–68.

39. *See, e.g.*, FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004); Richard W. Parker, *Grading the Government*, 70 U. CHI. L. REV. 1345 (2003).

40. ROSE & WALKER, *supra* note 32, at v, 5–6.

41. Wallace Turbeville, *A New Perspective on the Costs and Benefits of Financial Regulation: Inefficiency of Capital Intermediation in a Deregulated System*, 72 MD. L. REV. 1173, 1183 (2013).

this theory posits that if the market for financial services is allowed to operate unimpeded, efficiency—and cost-savings for customers—are optimized. A similar theory—that the only justification for regulation is when the "free" market "fails" has also been advanced by far-right conservatives in the environmental arena.[42]

Turbeville argues that if the flawed notion that unregulated financial markets are the epitome of efficiency is incorporated into the system for evaluating new rules, cost-benefit analyses will result in one-dimensional comparisons between the costs incurred by regulated industries and the far more attenuated benefits of preventing outright fraud.[43] Instead, he says that the correct yardstick for measuring the benefits of such rules is the extent to which they prevent excessive draining of capital from the economy to pay bankers for facilitating deals. Known as "intermediation," which Turbeville describes as "the plumbing that connects capital sources to capital uses," these sums can be quite large and—more to the point—larger than they need to be.[44]

In agreement with the market analysis offered by Born, Turbeville observes that the abandonment of the Glass-Steagall Act gave rise to a small number of very large "multifunctional 'universal' banks" that wield tremendous market power, allowing them to withdraw excessive value from the intermediation process.[45] He notes that the financial sector's share of aggregate Gross Domestic Product has been in the range of 8.3% in recent years, an increase from historic levels of 4.1%.[46] The difference between the two figures is the result of unwarranted and excessive profits that impose great costs—or, in cost-benefit analysis language—forestall great benefits from the society as a whole.

Turbeville's analysis suggests that to remain useful to policymakers, cost-benefit analysis of financial service sector rules must consider a significantly broader definition of regulatory beneficiaries than the banking industry would recognize. Or, in other words, such analyses must find a way of measuring not just the increased compliance costs imposed on the financial sector, but the liberated intermediation costs—or benefits to the productive capacity of the society as a whole—that would result from a regulatory proposal.

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42. *See, e.g.*, TERRY L. ANDERSON & DONALD R. LEAL, FREE MARKET ENVIRONMENTALISM (2001).

43. Turbeville, *supra* note 41, at 1177.

44. *Id.*

45. *Id.* at 1178.

46. *Id.* at 1179.

It is easy to anticipate the central technocratic objections of bankers to this proposal—namely, the difficulty of quantifying the difference between justifiable and unjustified intermediation costs. But Turbeville reports that a variety of economists have developed models designed to measure such costs over sufficiently lengthy periods that factors influencing their steady escalation can be teased out, measured, and (hopefully) eliminated.[47] For example, Professor Thomas Philippon has adapted a neoclassical growth model to measure such costs in the United States over an 140-year period, producing a Financial Intermediation Cost Index that estimates the unit price of such services over time.[48] It shows that the index has been trending upward, especially since the 1970s, a result Philippon finds anomalous given the efficiencies that should have occurred as a result of advances in information technology. Philippon concludes that increases are primarily due to excessive trading. Turbeville argues that the two best proofs of Philippon's theory are the manic derivatives trading and hedging that preceded the 2008 crisis and so-called "high-frequency trading," which is triggered automatically based on algorithms built into the computer systems used by large investment houses.[49] The latter practice caused the "flash crash" on May 6, 2010, during which the Dow Jones Average plunged 1000 points in a matter of minutes.[50]

IV. RESTORING ENVIRONMENTAL ENFORCEMENT

Turning to an examination of how deregulatory pressures have undercut environmental protection, we have three authors who together account for decades of experience in academia and in practice: Thomas McGarity, the Joe R. and Teresa Lozano Long Endowed Chair in Administrative Law at the University of Texas;[51] David Uhlmann, Jeffrey F. Liss Professor from Practice at the University of Michigan;[52] and Victor Flatt, Tom and Elizabeth Taft Distinguished

47. *Id.* at 1186–94.

48. Thomas Philippon, *Has the U.S. Finance Industry Become Less Efficient? On the Theory and Management of Financial Intermediation* (May 2012) (unpublished manuscript), *available at* http://pages.stern.nyu.edu/~tphilipp/papers/Finance_Efficiency.pdf.

49. Turbeville, *supra* note 41, at Parts IV, V.

50. *Id.* at 1190.

51. Professor McGarity has taught at the school since 1980, and is among the leading scholars in the country regarding regulatory design in theory and as applied. He has written dozens of articles and several books, most recently *Freedom to Harm: The Lasting Legacy of the Laissez Faire Revival* (2013). He is a founder and past president of the Center for Progressive Reform, *supra* note 1.

52. Professor Uhlmann is also the Director of the Environmental Law and Policy Program at the school. He joined the Michigan faculty following a seventeen-year stint at the

Professor of Environmental Law at the University of North Carolina Chapel Hill.[53] Professors McGarity and Uhlmann explore the protracted difficulties regulators encounter in civil and criminal enforcement, while Professor Flatt closes the Symposium with thoughts about how the abstract interests at stake in such cases can lead to public apathy, to the detriment of the political will needed to sustain them.

Professor McGarity's topic is the lengthy, star-crossed effort to bring U.S. power plants into compliance with the Clean Air Act's "new source" standards. Undermined by a series of political reversals at the top of the EPA leadership, enforcement actions begun during the second term of the Clinton administration were suppressed during the two-term presidency of George W. Bush.[54] But the resilience of EPA's career staff maintained their vitality and, demonstrating the power of single-minded prosecutorial commitment, brought them to fruition close to two decades after they began.

To understand why an enforcement sweep against power plants for upgrading their equipment would trigger such massive and sustained resistance, it is helpful to know at the threshold that coal-fired plants were "grandfathered" into the Clean Air Act, meaning that they did not have to retrofit to clean up their emissions.[55] Such plants also operated far longer than anyone expected; some are now in their sixth decade of use, roughly twice as long as the predictions of their useful lives were when Congress originally considered their status under the Act.[56] Siting a new plant is quite difficult, leaving utilities in a situation where constant repairs and upgrades were essential.

The EPA's efforts to define when pollution control retrofits were required by changes that in effect rendered an existing unit a "new source" for regulatory purposes were embattled from the start because the installation of new technology could cost millions.[57] With respect to power plants, Professor McGarity reports, this process be-

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U.S. Department of Justice, with the last seven spent as chief of the Environmental Crimes Section.

53. Professor Flatt is also the Director of the Center for Law, Environment, Adaptation, and Resources at the school. He previously taught at the University of Houston Law School and holds an appointment as a Distinguished Scholar in Carbon Markets and Trading at Houston's Bauer College of Business.

54. Thomas O. McGarity, *When Strong Enforcement Works Better than Weak Regulation: The EPA/DOJ New Source Review Enforcement Initiative*, 72 MD. L. REV. 1204 (2013).

55. NAT'L ACAD. OF PUB. ADMIN., BREATH OF FRESH AIR 11–12 (2003).

56. McGarity, *supra* note 54, at 1219–20; NAT'L ACAD. OF PUB. ADMIN., *supra* note 56, at 117.

57. McGarity, *supra* note 54, at 1209.

came "far and away the most controversial standard" in the Clean Air Act because electric utilities play a crucial role in maintaining the high American standard of living while simultaneously relying on coal as their chief fuel, despite the fact that coal heavily pollutes the air.[58] If EPA allowed utility owners and operators to patch and fix their plants without interfering, so that essentially new units were never required to install state of the art pollution control devices, health-based standards for clean air would become unachievable.

Professor McGarity traces the evolution of an exceptionally complicated set of regulatory guidance documents governing the determination that so-called "routine maintenance" had crossed the line into the territory of constructing a new source.[59] With federal regulators hot on the trail of such violations, some utilities were able to strike "sweetheart settlement deals" with state environmental agencies before the Department of Justice could file a complaint.[60] Nevertheless, EPA enforcement staff worked overtime to hustle as many cases as possible to court before the advent of the second Bush presidency. Their anxiety was justified on the last day of 2002 when a separate part of EPA, acting at the request of the White House, issued a "Safe Harbor" proposal that substantially undermined some of the pending enforcement cases.[61] For the remaining years of the Bush administration, enforcement staff struggled to develop and file cases even as the regulatory staff wrote new guidance to undermine those efforts.[62] Federal efforts were bolstered by aggressive state enforcement and private citizen suits. With the election of Barack Obama, enforcement lost its ambivalence, and in 2009, EPA and the Justice Department announced a new "national initiative, targeting electric utilities whose coal-fired power plants violate the law." Many of those cases are ongoing.

The cases ended up delivering huge benefits to public health and the environment. The EPA ultimately took enforcement actions against about forty-five percent, or 467, of the coal-fired electricity generating "units" in service.[63] (A power plant can have more than one generating unit and the largest have several.) The companies agreed to spend $12.8 billion on pollution controls and pay about $80

58. *Id.*
59. *Id.* at 1208–19.
60. *Id.* at 1241.
61. *Id.* at 1252.
62. *Id.* at 1256.
63. *Id.* at 1289.

million in fines.[64] The EPA estimates that when the settlements are fully implemented, they will reduce sulfur dioxide emissions by more than 1.8 million tons and nitrogen oxide emissions by 596,000 tons, both on an annual basis, saving thousands of lives and avoiding tens of thousands of cases of respiratory disease.[65]

Beyond these impressive benefits, the power plant new source enforcement project should teach us the lesson that any time a regulatory agency is plagued by controversy—as EPA has been through most of its history and as SEC and other financial sector regulatory bodies are rapidly becoming—regulated industries respond with entrenched resistance to standard enforcement not just in court, but before Congress and at the White House. In an article tracking the expensive battle over bank card debit fees published in 2012, Professor McGarity calls this kind of epic battle "administrative law as 'blood sport.'"[66] The story he tells about the new-source enforcement project might be called "blood sport enforcement."

Despite the tortuous process imposed on EPA enforcement by bitter industry resistance and blatant political interference, Professor McGarity identifies the benefits of such cases that extend far beyond the relief won by the government with respect to any particular power plant.[67] Chief among them is the "general deterrence" achieved within the industry as a whole as companies that are not involved in specific prosecutions take preventive measures to remain out of trouble.[68] And, of course, once they have taken expensive steps to improve their compliance, enforcement must continue to maintain a level playing field competitively.

Professor McGarity explains that a major advantage for regulators who choose enforcement over rulemaking is the absence of White House interference in such cases.[69] In fact, he reveals, internal White House rules actually prohibit political staffers from contacting agencies about pending enforcement actions unless they receive preclearance from the White House counsel's office.[70] Given the growing challenges of blood sport policymaking, this advantage can only increase in importance.

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64. *Id.*

65. *Id.*

66. Thomas O. McGarity, *Administrative Law as Blood Sport, Policy Erosion in a Highly Partisan Age,* 61 DUKE L.J. 1671, 1671 (2012).

67. McGarity, *supra* note 54, at Part VI.

68. *Id.* at 1276–77.

69. *Id.* at 1280.

70. *Id.*

Professor David Uhlmann shifts readers to the parallel world of criminal enforcement, broadening the scope from EPA to encompass health and safety violations that cause extreme catastrophes, such as the massive explosion that killed thirty miners at Massey Energy's Upper Big Branch mine in Montcoal, West Virginia on April 9, 2010.[71] A series of egregious regulatory violations that the company and the Mine Safety and Health Administration had left to fester caused the tragedy.[72] The situation was sufficiently disturbing that federal prosecutors began the arduous task of prosecuting the head of security at the mine, who destroyed evidence and made false statements to investigators, as well as the mine superintendent for his role in perpetuating rampant and dangerous safety violations.[73]

However, Professor Uhlmann explains, the most effective way to deter corporate crime is to prosecute the individuals responsible for the conduct that violated the law *and* the corporation where they worked.[74] With clearly established and powerful criminal penalties available to punish companies that fail to ensure compliance, Professor Uhlmann finds no excuse to ignore such prosecutions. For reasons he finds difficult to fathom, the corporation responsible for the Upper Big Branch disaster—Massey Energy ("Massey")—escaped prosecution, apparently through the simple ploy of selling itself to a second company, Alpha Natural Resources ("Alpha").[75] That company, which had successor liability for all of Massey's misdeeds, ultimately signed an agreement to pay civil penalties and take remedial action; the Department of Justice ("DOJ") deceptively described the agreement as "the largest-ever resolution in a criminal investigation of a mine disaster."[76]

This type of resolution, known as a "deferred" or "non-prosecution" agreement, is increasingly common. Professor Uhlmann reports that before 2002, DOJ rarely made such deals, completing only eleven over the previous decade, or roughly one annually.[77] But during the presidency of George W. Bush and continuing into the Obama administration, the choice of this weak enforcement tool accelerated, with 129 such deals reached during the Bush years

71. David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1295 (2013).

72. *Id.* at 1295–96.

73. *Id.* at 1298.

74. *Id.* at 1299.

75. *Id.* at 1300–01.

76. *Id.* at 1300.

77. *Id.* at 1308 n.81.

and 125 more during President Obama's first term.[78] Professor Uhlmann traces the popularity of this unsatisfactory alternative to DOJ's angst over the prosecution of Arthur Andersen, Enron's accounting firm.[79] When the Supreme Court of the United States overturned the company's conviction in 2005 based on faulty jury instructions, critics attacked the prosecutors for administering a "corporate death penalty" that put the firm out of business for no good reason, wiping out 28,000 jobs.[80]

The problem with this reaction, Professor Uhlmann writes, is that it effectively eliminates the deterrence to corporate criminality that could be achieved by routine criminal charges.[81] He finds unconvincing the dual justifications offered for the deferred and non-prosecution alternative: first, that such deals resolve cases more quickly and efficiently, allowing companies to commit their scarce resources to remediating the results of their misconduct, and, second, that they avoid the "collateral damage" imposed on such a grand scale by the Andersen fiasco.[82] Rather, he argues, these agreements represent a lazy way out for the DOJ, allowing prosecutors to obtain the same monetary penalties, factual admissions, corporate cooperation, and structural reforms without doing the heavy lifting required to prepare a criminal case for court.[83]

By far the most enthusiastic adoption of deferred or non-prosecution agreements has occurred in the mainstream Criminal Division of the DOJ, as opposed to its specialized Environment and Natural Resources and Antitrust Divisions.[84] The two specialized divisions have distinguished themselves with considerably more aggressive prosecutions of corporate crimes than the Criminal Division. Statistics compiled by the Government Accountability Office ("GAO"), indicate that between 2004 and 2009, the Criminal Division brought thirty-eight criminal prosecutions against corporations, but entered forty-four deferred and non-prosecution agreements.[85] According to analyses performed by University of Virginia Professor Brandon Garrett, large, publicly held, domestic corporations benefit from deferred and non-prosecution more often than small or foreign corporations.[86]

78. *Id.* at 1324.
79. *Id.* at 1312.
80. *Id.* at 1311.
81. *Id.* at 1338.
82. *Id.* at 1321–22.
83. *Id.* at 1325–26.
84. *Id.* at 1318.
85. *Id.*
86. *Id.* at 1328.

The types of cases most often covered by such agreements are fraud and Foreign Corrupt Practices Act violations.[87]

Professor Uhlmann's bottom line is hard to dispute. As the federal government shrinks in size, driven by deficit reduction and lower tax revenues, the deterrence provided by aggressive, high-profile enforcement has never been more important. Allowing a company with as shameful a track record as Massey to escape unscathed sends the message that is amazingly backed up by these statistics: the bigger a company and the more egregious its behavior, the better chance it has of avoiding punishment.

Professor Victor Flatt closes our Symposium with reflections on why contemporary environmental problems may seem abstract to members of the public.[88] He compares the attention environmental issues garnered in the 1970s to the changing attitudes that developed in the 1980s and remain today. At least when it comes to the environment, he argues, harms have come to seem less immediate and threatening, and therefore are seen as less of a threat to the social order. In such circumstances, the public zeal, which is manifested in part through calls for better enforcement of laws, has waned.

He focuses throughout on climate change, arguing that contemporary affluence may have masked its threat. Among other hypotheses, he suggests that the world's people may be dividing into self-perceived "winners" and "losers" with respect to climate, with more affluent nations such as our own able to avoid its most devastating effects.[89] Professor Flatt is certainly right that progress on climate change has stalled, and he is not the first to suspect that these threats seem attenuated to developed countries, including and especially our own. Yet it is hard to imagine that the failures in enforcement and regulation identified by his co-authors can be connected to such apathy, even if it is a real factor in fluctuating perceptions of the risks of climate change.

V. CONTINUING THE CROSS-WALK

We hope that the cross-walk we have begun between the increasingly related worlds of financial and health and safety enforcement will continue, in the academy and in the real world. With both areas flagging for many of the same reasons, to the strong disadvantage of

87. *Id.* at 1327 n.189.
88. Victor B. Flatt, *Too Big to Jail or Too Abstract (Or Rich?) to Care*, 72 MD. L. REV. 1345 (2013).
89. *Id.* at 1371.

the public interest, we hope that increasing such self-conscious parallelism will at the very least help advocates of more aggressive prosecution overcome the barriers erected by the special interests that profit from breaking the law. The alternative is the dangerous sense that some entities have, indeed, become too big for government to jail, with their competitors and customers at their mercy to a degree that is frightening to contemplate.