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ARTICLE

REGULATING IN THE LIGHT: HARNESSING POLITICAL ENTREPRENEURS' ENERGY WITH POST-CRISIS SUNLIGHT HEARINGS

JENNIFER TAUB*

INTRODUCTION

Financial market reform has progressed at a glacial pace. More than six years after the 2008 crisis began, many of the conditions that caused the near collapse of the global financial system—and that were used to justify the extraordinary multi-trillion dollar U.S. government rescue[1]—persist.[2] The top banks are larger than they were before the crisis began;[3] are still permitted to borrow excessively relative to the assets they hold;[4] appear

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* Professor of Law, Vermont Law School. I would like to thank Professor Wulf Kaal for organizing and including me in the "Beyond Crisis-Driven Regulation – Initiatives for Sustainable Financial Regulation" conference and the editors of the University of St. Thomas Law Journal, particularly both Deborah Walker, for ensuring the event ran smoothly, and Adam Wickens and his colleagues for their patience and careful editing.

1. Bill McGuire, *Fed Loaned Banks Trillions in Bailout, Bloomberg Reports*, ABCNEWS .COM (Nov. 28, 2011), http://abcnews.go.com/blogs/business/2011/11/fed-gave-banks-trillions-in-bailout-bloomberg-reports/; David Goldman, *Follow the Money Bailout Tracker*, CNNMONEY .COM, http://money.cnn.com/news/storysupplement/economy/bailouttracker/ (figures current as of November 16, 2009).

2. Jennifer Taub, *Reforming the Banks for Good*, DISSENT, Summer 2014, *available at* http:/ /www.dissentmagazine.org/article/reforming-the-banks-for-good.

3. Stephen Gandel, *By Every Measure, the Big Banks are Bigger*, FORTUNE (Sept. 13, 2013), http://fortune.com/2013/09/13/by-every-measure-the-big-banks-are-bigger/.

4. Leverage (the use of debt to purchase assets, which includes loans to customers and securities, for example) is still quite high. Banks are permitted to borrow at levels considered excessive pre-crisis (up to $97 for every $100 in assets they own). Experts decried the 33 to 1 (assets to equity) leverage ratios (meaning just percent equity capital). In April 2014, U.S. banking regulators voted to limit borrowing at the top eight banks, those with more than $500 billion in assets. Under the rules, these bank holding companies will be restricted from borrowing more than $95 for every $100 in assets they own, and their depository institution subsidiaries would be limited to $94. Yet these limits will not go into legal effect until at least January 1, 2018, and are still far above safe levels. For example, Admati and Hellwig recommend a 20 to 30 percent leverage ratio. ANAT ADMATI & MARTIN HELLWIG, THE BANKERS' NEW CLOTHES 182 (2012); Anat Admati & Martin Hellwig, *The Parade of the Bankers' New Clothes Continues: 23 Flawed Claims Debunked* (Rock Ctr. for Corp. Governance at Stanford Univ., Working Paper No. 143,

exceptionally opaque to regulators, experts, counterparties, and even to their own executives;[5] and remain vulnerable to sudden, massive runs, due to overdependence on the short-term wholesale funding markets.[6]

The Dodd-Frank Wall Street Reform and Consumer Protection Act[7] (Dodd-Frank) was signed into law in July 2010 to eradicate these problems. The stated purposes of Dodd-Frank are: to "promote the financial stability of the United States by improving accountability and transparency," to "end 'too big to fail,'" to "protect American taxpayers by ending bailouts," and "to protect consumers from abusive financial services practices."[8] Unfortunately, the promise of achieving these important goals remains unfulfilled due to repeated efforts by dominant industry groups to delay, dilute, and

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2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2292229; Mayra Rodríguez Valladares, *Why the Bank Leverage Ratio is Important,* N.Y. TIMES DEALBOOK (Feb. 28, 2014), http://dealbook.nytimes.com/2014/02/28/why-the-bank-leverage-ratio-is-important/?_r=0; Yalman Onaran, *U.S. Banks' Leverage Should Be Halved to Cut Risks, Bair Says,* BLOOMBERG (Sept. 26, 2012), http://www.bloomberg.com/news/2012-09-26/u-s-banks-leverage-should-be-halved-to-cut-risks-bair-says.html.

5. Frank Partnoy & Jesse Eisinger, *What's Inside America's Banks?*, THE ATLANTIC (Jan. 2, 2013), http://www.theatlantic.com/magazine/archive/2013/01/whats-inside-americas-banks/309196/; Peter Eavis, *Regulators Size up Wall Street, With Worry,* N.Y. TIMES DEALBOOK (Mar. 12, 2014), http://dealbook.nytimes.com/2014/03/12/questions-are-asked-of-rot-in-banking-culture/ (William Dudley, President of the Federal Reserve Bank of New York, said in 2013, "There is evidence of deep-seated cultural and ethical failures at many large financial institutions;" and in a 2014 interview he said, "Either the firm is not too complex, you can manage it, you do know what's going on. Or, if you don't know, that's sort of raising the question whether the firm is too complex to manage.").

6. The collapses of both Bear Stearns and Lehman Brothers were precipitated by what Gary Gorton dubbed a "run on repo"—when the institutions that had extended short-term and overnight credit to the investment banks withdrew their financing. The continued reliance on this short-term, wholesale funding creates what Fed Governor Dan Tarullo and others call "fire sale" risk. *See, e.g.,* Daniel K. Tarullo, Member of the Bd. of Governors of the Fed. Reserve Sys., speech at the Americans for Financial Reform and Economic Policy Institute Conference, Shadow Banking and Systemic Risk Regulation (Nov. 22, 2013); Liz Capo McCormick, *New York Fed Says Repo Fire Sale Risks Not Being Addressed*, BLOOMBERG (Feb. 13, 2014), http://www.bloomberg.com/news/2014-02-13/new-york-fed-says-repo-fire-sales-risks-are-not-being-addressed.html; Jennifer Taub, *Time to Reduce Repo Run Risk*, N.Y. TIMES DEALBOOK (Apr. 4, 2014), http://dealbook.nytimes.com/2014/04/04/time-to-reduce-repo-run-risk/; Ryan Tracy, *Fed Officials Suggest Limiting Banks' Repo Exposure: Rosengren and Dudley Say Large Markets for Repurchase Agreements Could Cause Instability Again*, WALL ST. J. (Aug. 13, 2014), http://online.wsj.com/articles/fed-official-suggests-limiting-banks-repo-exposure-1407936002. According to a report on "Contagion," reliance on short-term, wholesale funding means a bank is "more likely to suffer distress" and "the best predictor of a bank's contribution to systemic risk." COMM. ON CAPITAL MKTS. REGULATION, WHAT TO DO ABOUT CONTAGION? 34–35 (Sept. 3, 2014), *available at* http://capmktsreg.org/app/uploads/2014/09/2014-09-03-WDAC.pdf.

7. Dodd-Frank Act, Pub. L. 111-203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. § 5365 (2012)).

8. The preamble to Dodd-Frank states its purposes: "To promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail,' to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes." *Id.*

rollback reform.[9] Most notably, the scourge of "too big to fail"[10] and the prospect of additional "taxpayer funded bailouts" have not gone away.[11]

In the summer of 2014, we were alerted that eleven of the largest banks[12] have failed to provide the Federal Reserve (Fed) and the Federal Deposit Insurance Corporation (FDIC) with credible "living wills"—plans that detail how, if their institutions were on the verge of failure, they could be restructured or sold ("resolved").[13] Dodd-Frank requires that these living wills detail how the institutions can be "rapidly and orderly resolved in the event of material financial distress or failure."[14] In a joint press release, the Fed and FDIC wrote that common problems with the banks' plans were that they "fail to make, or even to identify, the kinds of changes in firm structure

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9. Liaquat Ahmed, *Timothy Geithner on Populism, Paul Ryan, and His Legacy*, NEW REPUBLIC (Jan. 24, 2013), http://www.newrepublic.com/blog/112152/timothy-geithners-exit-interview ("It is true that there is an ongoing political effort to legislate a weakening Dodd-Frank or block appointees. But that effort does not have much political force now."); Joe Mont, *Dodd-Frank Act Still a Work in Progress*, COMPLIANCE WEEK, Apr. 2014, *available at* http://www.complianceweek.com/news/news-bulletin/four-years-on-plenty-of-dodd-frank-rulemaking-still-awaits ("[E]fforts to kill the Act are now next to impossible . . .[t]here is still plenty of room, however, to stall individual rules and amend existing ones. . . ."); Jennifer Taub, *Delays, Dilutions, and Delusions: Implementing the Dodd-Frank Act*, *in* RESTORING SHARED PROSPERITY: A POLICY AGENDA FROM LEADING KEYNESIAN ECONOMISTS (Thomas I. Palley & Gustav A. Horn eds., 2013); Jared Bennett, *Four years after passage, House keeps trying to kill Dodd-Frank*, CTR. FOR PUBLIC INTEGRITY (July 21, 2014), http://www.publicintegrity.org/2014/07/21/15124/four-years-after-passage-house-keeps-trying-kill-dodd-frank.

10. Several studies indicate that size matters; it confers upon the largest institutions a "too big to fail" advantage, permitting them to borrow to fund their enterprises at lower cost than their smaller competitors due to the perception that should they fail, a government-backed rescue would be provided. And in late March of 2014, the Federal Reserve Bank of New York published a paper that found that the five largest banks have a cost advantage relative to their smaller peers "consistent with the hypothesis that investors believe the largest banks are 'too big to fail.'" João A.C. Santos, Evidence from the Bond Market on Banks' "Too Big to Fail" Subsidy (Mar. 2, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2403441. This "too big to fail" advantage meant that these banks borrow by issuing their own bonds at lower interest rates than their smaller competitors.

11. Indeed, in a candid conversation with Harvard undergraduates, observed by a reporter, former Treasury Secretary Timothy Geithner responded "Yeah, of course it does," when asked whether too big to fail still exists. He elaborated that attempting to eradicate it was "like Moby-Dick for economists or regulators. It's not just quixotic, it's misguided." Andrew Ross Sorkin, *What Timothy Geithner Really Thinks*, N.Y. TIMES, May 8, 2014, http://www.nytimes.com/2014/05/11/magazine/what-timothy-geithner-really-thinks.html.

12. These eleven institutions are Bank of America, Bank of New York Mellon, Barclays, Citigroup, Credit Suisse, Deutsche Bank, Goldman Sachs, JPMorgan Chase, Morgan Stanley, State Street Corp., and UBS.

13. Sabrina R. Pellerin and John R. Walter, *Orderly Liquidation Authority as an Alternative to Bankruptcy,* 98 ECON. QUARTERLY 1, 1–31 (2012), *available at* http://www.richmondfed.org/publications/research/economic_quarterly/2012/q1/pdf/walter.pdf.

14. Dodd-Frank Act § 165(d); Joint Press Release, Bd. of Governors of the Fed. Reserve Sys., Agencies Provide Feedback on Second Round Resolution Plans of 'First-Wave' Filers" (Aug. 5, 2014), *available at* http://www.federalreserve.gov/newsevents/press/bcreg/20140805a.htm; Peter Eavis, *Federal Reserve and F.D.I.C. Fault Big Banks' 'Living Wills'*, N.Y. TIMES DEALBOOK (Aug. 5, 2014), http://dealbook.nytimes.com/2014/08/05/federal-reserve-and-f-d-i-c-fault-big-banks-living-wills/.

and practices that would be necessary to enhance the prospects for orderly resolution."[15] According to Vice Chairman of the FDIC, Thomas Hoenig, "Each plan being discussed . . . is deficient and fails to convincingly demonstrate how, in failure, any one of these firms could overcome obstacles to entering bankruptcy without precipitating a financial crisis."[16]

Credible resolution plans are legally required, and are necessary to avoid contagion and help facilitate either a smooth bankruptcy or as a last resort, an orderly resolution process overseen by the FDIC. The use of a credible resolution plan in either scenario is intended to help allow a single firm to fail without bringing down other large firms or the broader economy.[17] The living wills that have been submitted each year have not yet been deemed credible. Neither the Fed nor the FDIC has deployed the full powers they possess under Dodd-Frank to mandate those banks to sell certain assets or operations.[18]

Unfortunately, even if credible plans are produced, if a "too big to fail" firm were to be placed in the "orderly resolution" process (in lieu of a bankruptcy filing), it would once again be the taxpayers[19] who fund the process at the outset.[20] This is because though the House of Representatives' version of the legislation had required the banks to pay into an orderly resolution fund, due to intense lobbying, the law ultimately enacted has no such fund. Instead, Dodd-Frank requires the U.S. Treasury to advance to the FDIC the money needed to resolve a falling giant.[21] And if proceeds of the sale or liquidation of the failed firm are insufficient to pay back the obliga-

15. Joint Press Release, *supra* note 14.

16. Danielle Douglas, *U.S. Regulators Reject Resolution Plans of 11 Big Banks*, WASH. POST, Aug. 5, 2014, http://www.washingtonpost.com/business/economy/us-regulators-reject-bankruptcy-plans-of-11-big-banks/2014/08/05/aec219b2-1ce3-11e4-ab7b-696c295ddfd1_story .html.

17. Ron J. Feldman, *Forcing Financial Institution Change Through Credible Recovery/Resolution Plans: An Alternative to Plan-Now/Implement-Later Living Wills*, (Fed. Reserve Bank of Minneapolis Econ. Policy Paper 10–2, 2010), *available at* http://ssrn.com/abstract=1608023 ("Observers hope the wills capture the advance planning needed for orderly resolution without bailouts. This is wishful thinking unless recovery and resolution planning (1) leads to changes to financial institutions and supervision in the here and now; (2) is driven by supervisors, not firms; and (3) has transparent outcomes.").

18. Dodd-Frank Act § 165(d)(5)(B); Chris Matthews, *Yellen Testimony Shows Too-Big-to-Fail is Still a Very Big Problem*, FORTUNE (July 15, 2014), *available at* http://fortune.com/tag/elizabeth-warren/ (Senator Elizabeth Warren informed Fed Chairwoman Janet Yellen that "There are very effective tools that you have at your disposal if these plans aren't credible. Including forcing these financial institutions . . . to liquidate some of their assets.").

19. Instead of banks funding the process, as was initially part of the House version of the legislation, the line of credit provision was added.

20. Jennifer Taub, *It's Not a Bailout, It's a Funeral,* BASELINE SCENARIO (June 17, 2010), http://baselinescenario.com/2010/06/17/it%E2%80%99s-not-a-bailout-it%E2%80%99s-a-funeral/.

21. Dodd-Frank Act §§ 210(n)(5)–(6); FDIC and Dept. of Treasury, 12 C.F.R. § 380 (2012) ("In order for the FDIC to fulfill its obligations as receiver of a covered financial company, it may be necessary for the FDIC to borrow funds from the Treasury."); David A. Skeel, Jr., *Single Point of Entry and the Bankruptcy Alternative* 2 (Univ. of Penn., Inst. for Law & Econ. Research, Paper No. 14–10, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2408544

tions owed to Treasury, the surviving banks can be required to pay an assessment. But, by law, this repayment by the peer banks could occur five or more years later.[22] If history is a guide, particularly given the current absence of credible resolution plans, the messy collapse of one giant would damage the other comparably-sized firms, and they would be in no position to come up with the money to make up for the shortfalls anytime soon. Moreover, scholars and economists have raised serious questions as to whether the so-called "orderly resolution" regime can actually work well with any of the colossal enterprises that operate across the globe.[23]

Meanwhile, efforts continue unabated to undermine the Consumer Financial Protection Bureau, the agency that has been quite successful in meeting its deadlines[24] and issuing rules to curb the predatory and abusive lending practices that contributed to the crisis.[25] Additionally, certain critical rules related to derivatives have been designed with large exemptions.[26] These are invitations for industry to avoid compliance by maintaining and growing some of the most dangerous practices outside our country, with risk of loss still on U.S. corporate parents, and thus the U.S. taxpayers.[27]

We wonder how this came to be, whether the current state should cause concern, and if so, what can be done to pick up the pace of reform and block efforts to weaken the most effective provisions currently in the law. Some answers to these questions can be found by examining and reconciling two seemingly rival academic articles. These works are Roberta Romano's *Regulating in the Dark*[28] and John C. Coffee, Jr.'s *The Political Economy of Dodd-Frank: Why Financial Reform Tends to be Frustrated*

("FDIC would have access to large amounts of liquidity from the US Treasury as needed for the holding company or subsidiaries.").

22. Dodd-Frank Act §§ 210(o)(1)(B)–(C) (indicating that assessments are to be charged to eligible financial institutions within 60 months "if such assessments are necessary to pay in full" the obligations of the FDIC to Treasury. However, the FDIC "may, with the approval of the [Treasury] Secretary, extend the time period . . . if the [FDIC] determines that an extension is necessary to avoid a serious adverse effect on the financial system of the United States.").

23. *See generally* Stephen J. Lubben, Resolution, *Orderly and Otherwise: B of A in OLA*, 81 Cin. L. Rev. (2013).

24. Elizabeth Warren, Speech before Better Markets and George Washington Law School's Center for Law, Economics, and Finance (Sept. 12, 2013) (transcript available at http://www.warren.senate.gov/files/documents/Better%20Markets%20Speech.pdf).

25. *Enhanced Consumer Financial Protection After the Financial Crisis: Hearing Before the S. Comm. on Banking, Housing, & Urban Affairs,* 112th Cong. (2011) (written testimony of Adam J. Levitin, Professor of Law at Geo. Univ. Law Ctr.); Arthur E. Wilmarth, Jr., *Turning a Blind Eye: Why Washington Keeps Giving in to Wall Street*, 81 U. Cin. L. Rev. 1318, 1325 (2013).

26. Kara Stein, Commissioner, Sec. and Exch. Comm'n, Cross-Border Security-Based Swap Rules and Guidance (June 25, 2014) (transcript available at http://www.sec.gov/News/PublicStmt/Detail/PublicStmt/1370542555426#.VAk53UuGpcM) ("Congress enacted derivatives reforms to protect us from risks like the collapse of AIG. And it gave the Commission and the CFTC a lot of tools to get that done. Today, the Commission is pretending we don't have some of these tools so that we can justify adopting this particular rule in this particular form.").

27. *Id.*

28. Roberta Romano, *Regulating in the Dark* (Yale Law & Econ. Research Paper No. 442, 2012), *available at* http://ssrn.com/abstract=1974148.

and Systemic Risk Perpetuated.[29] Both works focus on patterns in post-crisis foundational legislation, coming to seemingly different conclusions. However, upon closer examination, there is common ground to be found and built upon.

This article will first explain the circumstances that draw these competing works together. As part of this discussion, it will set out the distinct claims each scholar makes about the nature and shortcomings of post-crisis legislation, highlighting the areas of disagreement. This will focus upon Romano's recommendation that all post-crisis legislation and regulation automatically expire within five to six years, unless deliberately reenacted after a sunset hearing.

Next, the article reaches a synthesis, identifying the authors' areas of agreement and pointing to an alternative recommendation—post-crisis sunlight hearings. Instead of an automatic sunset, sunlight hearings would allow something different. The foundational post-crisis legislation would stay in place, but there would be an obligation to revisit it but with sufficient temporal distance. These sunlight hearings would allow for technical adjustments, corrections for unintended impacts, and a public assessment of the status of financial reform.

Instead of just independent experts as suggested by Romano,[30] or only top agency officials, sunlight hearings would bring to the table the same political entrepreneurs who had in the immediate aftermath of the crisis rallied allies to demand action. These individuals and groups would have the historical knowledge of the legislation and related implementation, and with the public interest in mind could identify gaps between what reform promised and what it delivered. Similarly, industry representatives would have their space to ask for relief. Their claims, like those offered by their public interest counterparts, can be judged by the press and public in the light of day, and not acceded to in backroom deals. This would help prevent the pattern of incremental erosion of reforms that have of late followed financial crises from the Savings & Loan debacle to the 2008 meltdown.

I. Rival Works in Dialogue

Romano's *Regulating in the Dark* and Coffee's *The Political Economy of Dodd-Frank* are logically paired given that the texts exist in dialogue, each citing the other. Each scholar spends some time critiquing the arguments the other makes regarding post-crisis reform legislation. Others joined in on this conversation when it spilled off the pages and into the blogosphere. This controversy ensued when Coffee and Romano were panelists at an academic conference where Coffee presented his not-yet-pub-

29. John C. Coffee, Jr., *The Political Economy of Dodd-Frank: Why Financial Reform Tends to be Frustrated and Systemic Risk Perpetuated,* 97 Cornell L. R. 1019 (2012).

30. Romano suggests "independent experts." Romano, *supra* note 28, at 20.

lished paper.[31] Though he had provided Romano with a copy prior to the event, his more updated version that was circulated at the conference was accused by some of including ad-hominem attacks on her and other corporate law scholars.[32]

Specifically, Coffee referred to Romano and two other academics as "the 'Tea Party Caucus' of corporate and securities law professors" and "conservative critics of securities regulation."[33] Some commentators viewed Coffee's comments as acceptable discourse, remembering that the targets of his "name-calling" had previously engaged in similar practices, albeit directed at regulatory efforts and legislation, not people.[34] In the final published version of Coffee's article, a footnote offers an explanation for his use of the "Tea Party" descriptor: "While there is irony in this term, it is also intended to be accurate; the three occupy a polar position at one end of the continuum in terms of their unbroken skepticism and rejection of governmental regulation. At the same time, all three are original and creative legal scholars."[35]

Sweeping aside that dust-up, with admiration and respect for the analysis and intentions of both professors, this essay explores how to synthesize the insightful observations and cogent arguments that each piece presents. This synthesis creates feasible, desirable, and sensible policy suggestions that can fulfill past promises and create a safer and more equitable financial system.

31. Cornell Law School hosted the "Financial Regulatory Reform in the Wake of Dodd-Frank" Conference in New York City, Oct. 28, 2011, *see* http://www.lawschool.cornell.edu/academics/clarke_business_law_institute/Conferences.cfm. Additional information available at http://www.lawschool.cornell.edu/spotlights/The-Dodd-Frank-Act-and-Regulatory-Reform.cfm.

32. Stephen Bainbridge, *WTF is Jack Coffee's Problem,* ProfessorBainbridge.com (Dec. 20, 2011), http://www.professorbainbridge.com/professorbainbridgecom/2011/12/wtf-is-jack-coffees-problem.html; Larry Ribstein, *Notes from the Tea Party Caucus of Corporate Academia,* Truth on the Market (Dec. 20, 2011), http://truthonthemarket.com/2011/12/20/notes-from-the-tea-party-caucus-of-corporate-academia/; Stephen Bainbridge, *Civility in Context,* Professor Bainbridge.com (Dec. 21, 2011), http://www.professorbainbridge.com/professorbainbridgecom/2011/12/civility-in-context.html ("Bodie also complains that we've all 'Called a major piece of federal legislation *quack corporate governance.*' BFD. There's a huge difference between uncivil towards a person and being uncivil about a piece of legislation.").

33. *See* Romano, *supra* note 28, at 42.

34. Matt Bodie, *Name-Calling in Corporate Law Academia,* PrawfsBlawg (Dec. 21, 2011), http://prawfsblawg.blogs.com/prawfsblawg/2011/12/name-calling-in-corporate-law-academia.html; Brian Leiter, *Coffee v. Bainbridge, Ribstein, & Romano,* Brian Leiter's Law School Reports (Dec. 22, 2011), http://leiterlawschool.typepad.com/leiter/2011/12/coffee-v-bainbridge-ribstein-romano.html; Brian Leiter, *Coffee v. Romano Redux,* Brian Leiter's Law School Reports (Dec. 23, 2011), *available at* http://leiterlawschool.typepad.com/leiter/2011/12/coffee-v-romano-redux.html (Romano objected to the labels as "designed to delegitimize an argument by attacking the credibility of the speaker rather than the merits of the argument.").

35. Coffee, *supra* note 29, at 1024 n.20.

A. *Regulating in the Dark*

In *Regulating in the Dark,* Professor Romano makes three central claims. First, she contends that "foundational financial legislation" is usually enacted during or in the wake of a crisis prior to policy makers having sufficient understanding as to its causes.[36] Second, she argues that finance operates in a dynamic environment and thus legislation may have unintended consequences as it is often poorly suited to address changes in technology and economic circumstances.[37] Third, due to what she deems status quo stickiness, she believes it can be difficult to revise legislation even when the consensus is that change or corrections are desirable.[38]

According to Romano, the reason that post-crisis legislation is quickly enacted is that crises are "focusing events" that make the public supportive of a government response. This mood encourages "policy entrepreneurs" to offer their pre-existing policy positions as solutions.[39] Referring to the work of political scientist John Kingdon, she argues that a sense of urgency to act stems from "media clamor for action" to which "risk averse" legislators respond hastily.[40] As a result, she argues that "without an understanding of the causes of a crisis, regulatory fixes, except by fortuity, are bound to be off the mark."[41] As part of this rushed process, she writes that post-crisis legislation thus "contains recycled proposals fashioned to resolve quite unrelated problems, imagined or real, which policy entrepreneurs advance as ready-made solutions to immediate concerns, to a Congress in need of off-the-shelf proposals that can be enacted quickly."[42]

She also notes that rules enacted to implement a law can also be rushed. Using Dodd-Frank as an example, Romano points to the delegation by Congress to the agencies of approximately 400 rulemakings and 67 studies.[43] While in theory it might seem ideal to hand over to those with greater expertise the mechanics of implementation, in practice she observes the out-

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36. Romano, *supra* note 28, at 1.

37. *Id.* at 1. She further writes that "[r]egulations that are appropriate when initiated can rapidly become inappropriate as a financial system's business, legal and technological conditions change." *Id.* at 11.

38. *Id.* at 3.

39. *Id.* at 4.

40. *Id. See generally* JOHN KINGDON, AGENDA ALTERNATIVE AND PUBLIC POLICY (2d ed. 2011).

41. Romano, *supra* note 28, at 5.

42. *Id.*

43. DAVIS POLK & WALDWELL, SUMMARY OF THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT, ENACTED INTO LAW ON JULY 21, 2010 (2010), www.davispolk.com/sites/default/files/files/Publication/7084f9fe-6580-413b-b870-b7c025ed2ecf/Preview/PublicationAttachment/1d4495c7-0be0-4e9a-ba77-f786fb90464a/070910_Financial_Reform_Summary.pdf (conservatively estimating 243 rulemakings, and 67 studies). This was later updated in a subsequent progress report to approximately 398 rulemakings. *See* DAVIS POLK & WALDWELL, DODD-FRANK PROGRESS REPORT (2013), *available at* http://www.davispolk.com/sites/default/files/Nov2013_Dodd.Frank_.Progress.Report_0.pdf.

comes in some cases[44] could be as troubling. She contends, "delegation enables legislators to 'do something' in a crisis, by passing 'something' and thereby mollifying media and popular concerns, while at the same time shifting responsibility to an agency for potential policy failures given the paucity or poor quality of information available concerning a crisis's causes when the legislation is being crafted."[45] In the event the rules are effective, though, "legislators could, of course, still take credit."[46]

Because she seems to concede to the inevitability of this hurried action, Romano offers several remedies for the problems associated with hastily-enacted legislation and rushed rulemaking. She suggests that all post-crisis legislation (1) would be embedded with a mandate that it be reviewed and reconsidered at a future date[47] by a review panel of "independent experts" appointed by Congress and the President[48] and (2) would endow regulators with powers to grant exemptions and waivers. As a critical part of the required review process, she envisions that all post-crisis legislation and regulation would contain automatic sunset provisions.[49] Such sunset provisions would cause the statute (or regulation) to expire automatically on a specific future date, as early as five or six years later.[50] The only way to avoid such expiration would be for the law to be reenacted in full or revised.[51] It is this threat of sunset, in her view, that would pressure those involved to take the review process seriously.[52] She observes:

> [B]y the time of a statute's sunset review, several years after enactment, there should be a better understanding of the causes of the crisis that the legislation sought to address, along with knowledge of the enacted legislation's consequences, information indispensable for getting regulation right, but unavailable when a crisis necessitates a response.[53]

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44. Romano does seem to commend the delegation to more expert regulators in some areas, such as reducing systemic risks, including the creation of the Financial Stability Oversight Council and delegation and directives regarding leverage and capital ratios. *See*, *e.g.*, Romano, *supra* note 28, at 9. However, she later questions whether central bankers are actually "better positioned to get things right." *Id.* at 10. For example, she refers to the "favorable . . . risk rates for residential mortgages" under the Basel Accord. *Id.* at 13. As noted by others as well, this encouraged regulatory arbitrage and helped enable the securitization of high risk residential mortgages.

45. *Id.* at 7.

46. *Id.*

47. *Id.* at 14.

48. Romano, *supra* note 28, at 20–21.

49. *Id.* at 22.

50. *Id.* at 14. In previous work, Romano advocated for automatic sunset provisions. *See* Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1600–01 (2005).

51. *See* Romano, *supra* note 28, at 20. It would be the task of the sunset review panel to recommend action to Congress and on a specific timetable. She suggests these actions would be either to repeal, reenact, or revise the law. Inaction, though, would result in the law's automatic sunset. *Id.*

52. *Id.* at 21. Based upon a discussion with Romano during the University of St. Thomas Law Review conference in April 2014.

53. Romano, *supra* note 28, at 15.

Let's take each argument and then the proposed remedies in turn. Is foundational post-crisis legislation typically enacted before Congress has an opportunity to understand the causes? And, if so, what are the implications? We can consider the enactment of Dodd-Frank in July 2010, three years after the subprime mortgage crisis began and about two years after the financial meltdown and bank bailouts began. It is true that the law was passed and signed about six months before the Financial Crisis Inquiry Commission (FCIC) Report was published.[54] The FCIC was a ten-member panel of private citizens appointed by Congress to examine the causes of the financial and economic crisis. And Dodd-Frank was passed about nine months before the Senate Permanent Subcommittee Report was released.[55] Both reports came to similar conclusions about the root and precipitating causes of the crisis. However, hearings had been held long before the publications, including one by the FCIC beginning in January of 2010, in which banking executives, regulators, industry participants, consumer advocates, and other witnesses testified.[56]

Yet even if the particular nuances of the 2008 crisis were not fully exposed, this is of no great matter.[57] The basic causes of these and other major financial crises were clear. It is widely accepted that banking crises share common elements. This time was not different.[58] Financial crises re-

54. Financial Crisis Inquiry Commission (FCIC) published a 545-page book entitled *The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States,* which was in three parts. The first contained the lengthy majority report endorsed by the six Democratic appointees. There were also two much shorter dissents. On many issues related to the causes of the crisis nine of the ten panelists agreed. All ten commissioners agreed that the proximate cause of the 2008 crisis was collapse of the U.S. housing bubble. Nine agreed that risk management failures at banks and other financial firms led to excess borrowing, particularly through short-term funding.

55. Staff of S. Permanent Subcomm. on Investigations, Comm. On Homeland Sec. & Governmental Affairs, 112th Cong., Wall Street and the Financial Crisis: Anatomy of a Financial Collapse (Comm. Print 2011), *available at* http://www.hsgac.senate.gov//imo/media/doc/Financial_Crisis/FinancialCrisisReport.pdf?attempt=2. In April 2011, the Senate subcommittee issued a 639-page report called *Wall Street and the Financial Crisis: Anatomy of a Financial Collapse.* This report concluded "the [2008] crisis was not a natural disaster, but the result of high risk, complex financial products; undisclosed conflicts of interest; and the failure of regulators, the credit rating agencies, and the market itself to rein in the excesses of Wall Street." *Id.* at 1.

56. *See* Jennifer Taub, Other People's Houses: How Decades of Bailouts, Captive Regulators, and Toxic Bankers Made Home Mortgages a Thrilling Business 269 (2014).

57. To this day there is still some disagreement as to the connection between the stock market crash in October 1929 and the Great Depression. Even the causes of the sudden drop in the stock market are still debated. Would the enactment of the first federal securities laws in 1933 and 1934 and the passage of the Glass-Steagall Act be considered hasty in retrospect? Many scholars, though not all, contend that the New Deal reforms provided more than fifty years of relative financial stability without a major crisis. Yet Roosevelt, who took office in March of 1933, quickly ushered in these reforms within his first 100 days in office, when the full Pecora Commission report had not been released.

58. *See* Admati & Hellwig, *supra* note 4; Erik F. Gerding, Law, Bubbles, and Financial Regulation (2013); Hyman P. Minsky, Stabilizing an Unstable Economy (1986); Carmen M. Reinhart & Kenneth S. Rogoff, This Time is Different: Eight Centuries of

sult from the collapse of debt-fueled asset bubbles. Banks that hold inflated assets collapse when depositors or other lenders to the banks pull their cash out. Even good assets cannot be sold at full price by banks scrambling to come up with money. This spreads. Government rescues ensue when leaders determine that the contagion associated with the failure of one banking institution will cause widespread damage to the public.[59] I would agree that it has taken time to see how incremental legal acts and omissions over several decades enabled the crisis.[60] However, the essential crisis ingredients, including excessive leverage and over-dependence on short-term wholesale funding, were well-known and obvious.

In the recent crisis, the toxic assets included a wide variety of residential mortgage-linked securities. After a seven-year housing boom, when the prices of houses nationwide stopped rising and retreated around mid-2006, mortgage defaults followed. Banks that had borrowed excessively to purchase these toxic assets, as well as the financial firms that insured against these instruments, collapsed. This happened rather suddenly in the cases of Bear Stearns and later the run on Lehman Brothers, where it was a run by these investment banks' short-term wholesale lenders that caused their quick falls. This was no mystery by 2010 when Dodd-Frank was passed. Much of this was openly discussed by witnesses as well as by financial economists, legal experts, journalists, and others well before Dodd-Frank was enacted.[61] Indeed, by July 21, 2010, there were already more

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FINANCIAL FOLLY xxv (2009) ("No matter how different the latest financial frenzy or crisis always appears, there are usually remarkable similarities with past experiences from other countries and from history."); MARTIN H. WOLFSON, FINANCIAL CRISES: UNDERSTANDING THE POSTWAR U.S. EXPERIENCE (2d ed. 1994) (surveying historical theories of financial crises to determine that all involved the accumulation of debt); John Geanakoplos, *The Leverage Cycle* 2 (Cowles Found. for Research in Econ., Discussion Paper No. 1715R, 2009), *available at* http://cowles.econ.yale.edu/P/cd/d17a/d1715.pdf ("In the absence of intervention, leverage becomes too high in boom times and too low in bad times. As a result, in boom times asset prices are too high, and in crisis times they are too low. This is the leverage cycle.").

59. This support can come in the form of the central bank, acting as a lender of last resort offering liquidity (ideally at a "penalty" rate), and creating other programs to purchase toxic assets. Other interventions, including direct capital infusion government can also be used to prop up insolvent firms, as was done with the TARP. Still other support, such as during the New Deal era can come from the ground up, through mortgage relief programs such as those offered through the Home Owners Loan Corporation.

60. *See* TAUB, *supra* note 56, at 222–46.

61. *The Financial Crisis and the Role of Federal Regulators Before the H. Comm. On Oversight and Gov't Reform,* 110th Cong. 11 (2008) (statement of Alan Greenspan, Former Chairman of the Fed. Reserve Bd.); CONG. OVERSIGHT PANEL, 111TH CONG., SPEC. REP. ON REGULATORY REFORM: MODERNIZING THE AMERICAN FINANCIAL REGULATORY SYSTEM: RECOMMENDATIONS FOR IMPROVING OVERSIGHT, PROTECTING CONSUMERS, AND ENSURING STABILITY (2009); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-739, FINANCIAL MARKETS REGULATION: FINANCIAL CRISIS HIGHLIGHTS NEED TO IMPROVE OVERSIGHT OF LEVERAGE AT FINANCIAL INSTITUTIONS AND ACROSS SYSTEM (2009); FIN. CRISIS INQUIRY COMM'N, COMMISSION HEARING OFFICIAL TRANSCRIPT 18–115 (2010), *available at* http://fcic-static.law.stanford.edu/cdn_media/fcic-testimony/2010-0407-Transcript.pdf; FRENCH ET AL., THE SQUAM LAKE REPORT: FIXING THE FINANCIAL SYSTEM (2010); ROBERT POZEN, TOO BIG TO SAVE? HOW TO FIX THE U.S. FINANCIAL SYSTEM

than 100 books published about the subprime mortgage crisis and the 2008 financial crisis.[62] Moreover, well before the housing bubble burst in 2006, experts were sounding the alarm about the pending collapse of the housing bubble.[63]

Failure to expose all of the intricate details of the meltdown did not inhibit Congress, the Fed, or the Treasury to collectively take unprecedented action to prop up financial firms and other enterprises, most dramatically beginning in early 2008 and continuing well into 2009–2010. To justify that multi-trillion dollar intervention, a list of causes was offered. Central to all of those discussions were that certain banks and nonbank financial firms had become "too big to fail."[64] They had grown so big and fragile due to their excessive reliance on debt to fund their balance sheets. And due to their interconnections (including lending to each other as well as owning similar assets), the failure of one spread to another.[65]

(2010); GILLIAN TETT, FOOL'S GOLD: HOW THE BOLD DREAM OF A SMALL TRIBE AT J.P. MORGAN WAS CORRUPTED BY WALL STREET GREED AND UNLEASHED A CATASTROPHE (2009); PAUL MCCULLEY, THE SHADOW BANKING SYSTEM AND HYMAN MINSKY'S ECONOMIC JOURNEY (2009), *available at* http://www.cfapubs.org/doi/pdf/10.2470/rf.v2009.n5.15; Gary B. Gorton & Andrew Metrick, *Securitized Banking and the Run on Repo* (Yale ICF, Working Paper No. 09-14, 2013); Richard Bookstaber, *Blowing up the Lab on Wall Street*, TIME, Aug. 6, 2007, http://content.time.com/time/business/article/0,8599,1653556,00.html; John Gapper, *The Fatal Banker's Fall*, FIN. TIMES, Oct. 1, 2008, http://www.ft.com/intl/cms/s/0/ccc6d456-8fd7-11dd-9890-0000779fd18c.html#axzz3IcSidR4v; Manuel Roig-Franzia, *Brooksley Born, The Cassandra of the Derivatives Crisis*, WASH. POST, May 26, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/05/25/AR2009052502108.html.

62. Gary Karz, *Books Related to the Housing Crash and Financial Crisis*, INVESTOR HOME, http://investorhome.com/crisisbooks.htm (last visited Nov. 9, 2014).

63. MIKE MAYO, EXILE ON WALL STREET: ONE ANALYST'S FIGHT TO SAVE THE BIG BANKS FROM THEMSELVES (2012); DEAN BAKER, CTR. FOR ECON. AND POLICY RESEARCH, THE RUN-UP IN HOME PRICES: IS IT REAL OR IS IT ANOTHER BUBBLE? 2–5 (2002), *available at* http://www.cepr.net/documents/publications/housing_2002_08.pdf; James K. Galbraith, *Who are These Economists Anyway*, THOUGHT & ACTION, Fall 2009, at 85; Jonathan R. Laing, *The Bubble's New Home,* BARRON'S, June 20, 2005, at 24, *available at* http://online.barrons.com/articles/SB111905372884363176?tesla=y; David Leonhardt, *Be Warned: Mr. Bubble's Worried Again,* N.Y. TIMES, Aug. 21, 2005, at 3.1, *available at* http://www.nytimes.com/2005/08/21/business/yourmoney/21real.html?pagewanted=all&_r=0.

64. *See* TAUB, *supra* note 56, at 87–90. As further evidence that this time was not different is the fact that the expression "too big to fail" was used before in quite similar circumstances: in 1984 in connection with the bailout of Continental Illinois, as well as the soon-to-fail-and-to-be-bailed holding company of the largest S&L, American Savings and Loan. *Id.*

65. *See* Tom Raum & Jeannine Aversa, *Bush Asking for $700 Billion Bailout,* ASSOCIATED PRESS, Oct. 21, 2008, *available at* http://www.huffingtonpost.com/2008/09/20/bush-asking-for-700-billi_n_127926.html (Treasury Secretary Paulson stated: "I am convinced that this bold approach will cost American families far less than the alternative—a continuing series of financial institution failures and frozen credit markets unable to fund economic expansion . . . . The financial security of all Americans . . . depends on our ability to restore our financial institutions to a sound footing."); *see also Bush: Bailout Plan Necessary to Deal with Crisis,* CNN.COM, Sept. 25, 2008, http://www.cnn.com/2008/POLITICS/09/24/bush.bailout/index.html?_s=PM (Advo-cating for the TARP program, President George W. Bush said: "I'm a strong believer in free enterprise, so my natural instinct is to oppose government intervention, [however] these are not normal circumstances. The market is not functioning properly. There has been a widespread loss of confidence . . . . Without immediate action by Congress, America can slip into a major panic.").

One clear example of such justification was offered by then-Chairman of the Fed, Ben Bernanke, in the summer of 2009. These causes were entwined with solutions. He told the audience at a televised forum:

> The problem we have is that in a financial crisis if you let the big firms collapse in a disorderly way, they'll bring down the whole system. When Lehman Brothers failed, the financial markets went into anaphylactic shock basically, and it was that shock to the financial system that led the global recession that began last fall, which is probably the worst one since World War II. So it wasn't to help the big firms that we intervened. It was to stabilize the financial system and protect the entire global economy.[66]

Bernanke continued in language more familiar to the crowd: "It's a terrible problem. It's a problem called a too-big-to-fail problem. These companies have turned out to be too big to allow to collapse because, again, if they collapse the - when the elephant falls down, all the grass gets crushed as well."[67]

He then transitioned from the problem of "too big to fail" to describe the solution—regulatory reform. The two essential components he described, targeting both prevention and intervention, were ultimately at the heart of Dodd-Frank. The prevention component was to subject the largest so-called "too big to fail" institutions to oversight by the Fed, and to "put extra tough requirements on their capital and their activities, what they can do, the risks they can take,"[68] which would later be referred to in Dodd-Frank as "enhanced prudential standards."[69] The second component went to intervention. He heralded the orderly resolution process described above as an alternative to either a potentially chaotic bankruptcy or a government bailout.[70] Thus it was not a rush, but rather more than a year before these form elements became the law. Moreover, as later described in this essay, the so-called "tough" requirements have yet to arrive.

Even so, I do agree with Professor Romano's observation that post-crisis legislation is often misaligned. Furthermore, beginning with the S&L Crisis response legislation (FIRREA), or even the accounting-scandal response legislation (SOX), I see reform being repeatedly too timid to correct the underlying problems, thus we face more severe relapses in the future.[71]

Romano is correct that some pre-existing items on reformers' wish lists were added to Dodd-Frank. However, this should not be considered a

66. Transcript of *PBS NewsHour: At Forum, Bernanke Defends Fed's Aggressive Moves* (PBS television broadcast July 26, 2009), *available at* http://www.pbs.org/newshour/bb/business-july-dec09-bernanke_07-27/.

67. *Id.*

68. *Id.*

69. Dodd-Frank Act § 165.

70. *See generally* David Skeel, The New Financial Deal: Understanding the Dodd-Frank Act and Its (Unintended) Consequences (2011).

71. *See* Taub, *supra* note 56, at 1–6.

problem, but a benefit of the Democratic process, something Coffee notes.[72] It is also worth praising the reintroduction of possibly refined concepts that have not before been enacted.[73] Romano is correct that crises are "focusing" moments;[74] therefore, I believe that those prepared with helpful reform concepts and drafted language should strike while the iron is hot. A policy idea should not be rejected simply because proponents have not been successful or there was not yet political will to act. Also, in light of Romano's observation that rushed legislation can be problematic, one would hope to welcome that which has been debated and rethought over time.

That said, reformers are right to be concerned about Romano's point. Meaningful change can be stymied if a post-crisis bill is jammed with solutions to different problems such that the bigger, necessary responses to the current problem get crowded out. While problems or issues not directly related to the crisis might get addressed, this could give the false appearance of solving the pressing problems that led to the crisis. This could be the case if trade-offs are made during the legislative process to reject stronger reform measures and provide weaker substitutes, something that appears to have happened in many instances with Dodd-Frank. Additionally, as detail piles up, reformers' limited attention can be divided and hyperfocused on technical details, losing sight of the game-changing reforms that should lie at the heart of a post-crisis bill.

Let's examine Romano's second central claim—that finance operates in a dynamic environment and thus post-crisis legislation may have unintended consequences as it is often poorly suited to address changes in technology and economic circumstances.[75] This argument appears to avoid the fact that a post-crisis status quo can often be a post-government bailout status quo. To postpone acting creates moral hazard and undermines the public's faith in the rule of law and in the markets. Also, assuming Romano is right—that legislation and regulation can have unintended consequences[76]—one can also argue that so can failure to act, deregulation and desupervision, or uneven regulation. Her argument collapses on itself to some degree, because it ignores the point that there is no blank slate pre-crisis. Thus, the pre-crisis status quo must be the product of a prior legal structure, which could be bad "bubble laws" and "quack" policies (borrowing her descriptors). From a reformer's perspective, this might also be reframed as any post-crisis reforms not going far enough to restore the regulatory framework to what it had been before many years of erosion.

72. *See* Coffee, *supra* note 29, at 1022, 1026.

73. As Coffee states, "The alternative view, here presented, agrees that crisis is a precipitant, allowing legislative inertia to be overcome. After a crisis, Congress tends to adopt proposals long-favored by the relevant administrative agency but frustrated by powerful lobbies." *Id.* at 1036.

74. *See* Romano, *supra* note 28, at 4.

75. *Id.* at 1.

76. *Id.* at 1, 13.

It seems accurate that law cannot anticipate technological or economic changes. However, this is not unique to the financial sector. As for the final claim regarding status quo stickiness, this does not seem strongly supported by recent historical evidence. If anything, between 1980 and 2008, we saw the incremental erosion of the structural reforms enacted during the New Deal.[77] Moreover, as Coffee notes, some of the most contentious or burdensome parts of SOX were reduced through subsequent administrative and legislative acts,[78] arguably at a slow pace.[79]

We can now examine Professor Romano's remedies. Even assuming that each of her central claims is true, the mandatory sunset suggestion is troublesome for several reasons. To begin, I believe if it were implemented, the quality of post-crisis legislation would decline, not improve. If legislators knew ex ante that the laws they craft would sunset unless reenacted, they may take less care. In the event that the entire bill was reenacted so as to avoid the sunset, then we would still have the rushed legislation, but possibly of even worse quality. If the entire law were to expire, then some of those "prepackaged" changes that were at last ushered in with the energy of reformers would suddenly vanish. The chances of seeing nuanced changes that would serve the public interest seem unlikely given the tremendous benefit the financial services sector could receive by just letting the entire act expire and then getting incremental legal changes passed where they wish to further their business goals.

Either way, the possibility that a law might expire in whole or in part would create such uncertainty in the markets that it would seem unworkable.[80] There is the added problem, which Coffee notes (as discussed below), that reformers would be required to win their battles a second time.[81] Given that the energy of political entrepreneurs will have faded by the five-year-post-enactment automatic sunset, there is a chance that the whole law would evaporate or, if revised, be substantially weakened.

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77. *See* TAUB, *supra* note 56, at 222–46; *see generally* CONG. OVERSIGHT PANEL, *supra* note 61.

78. Coffee, *supra* note 29, at 1027.

79. Romano, *supra* note 28, at 18 (noting it took eight years to reverse some provisions of SOX).

80. She attempts to address this concern as follows, however, observations about the slow implementation of the Dodd-Frank Act show that business planning is not yet complete nor are the rules.

> First, there may be a prudential concern that a sunset law would impose costs on firms and individuals by decreasing regulatory certainty, given an expiration date. I do not find this to be a plausible explanation. In the financial regulation context, the multi-year interval before a sunset is often long enough for the completion of business planning surrounding the regulated financial investments and instruments, especially given how rapidly the financial environment changes.

Id. at 23.

81. Coffee, *supra* note 29, at 1033 ("The 'reform' side would have to win twice, with the latter battle coming after the crisis subsides.").

Supplementing the sunset provisions, Romano also advocates for allowing regulators flexibility in the implementation of crisis-response legislation.[82] Such leeway would include the right to grant exemptions and waivers. Certainly, delegating the implementation of rules to regulators would allow for some flexibility, "at first glance" as she notes.[83] Yet, in practice, she noted that delegation creates business uncertainty, "a minefield for business planning."[84] This claim undermines her earlier arguments that the prospect of sudden sunset would not increase business uncertainty. As for flexibility, regulators often already have the power to grant exemptions and waivers. Of course, the problem with exemptions and waivers is that they become a means to avoid adapting to changing technology or economic circumstances in a way that benefits the public, and instead become a way to grant special or powerful parts of the financial sector to gain advantages and undermine the law over time so that it can eventually be repealed. This is the reason that while flexibility is desirable, there needs to be greater public awareness and input.

B. *The Political Economy of Dodd-Frank*

In his article *The Political Economy of Dodd-Frank: Why Financial Reform Tends to be Frustrated and Systemic Risk Perpetuated*, Professor Coffee poses the question, "Why is it that Congress seems to only pass securities and financial reform legislation after a crash or similar crisis?"[85] To answer that question he makes three main claims. First, drawing upon political science theory and building upon the work of Mancur Olson,[86] Coffee explains that during normal times, latent "citizen-based" groups (that are large and diffuse) are dominated by smaller and better-organized special interest groups.[87] Coffee observes that "[e]asily distracted by other important issues, investors' and shareholders' attention span is short. In contrast, the financial services industry is well organized, focuses on the issues that most affect it, and has an obvious incentive to maintain a powerful lobbying presence that will give the industry disproportionate influence."[88]

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82. Romano, *supra* note 28, at 3, 31.

83. *Id.* at 6.

84. *Id.* at 9.

85. Coffee, *supra* note 29, at 1021. He also contends that historically, in the U.S and across the globe, it has become clear that "only after a catastrophic market collapse can legislators and regulators overcome the resistance of the financial community and adopt comprehensive 'reform' legislation." *Id.* at 1020. He also dates this tendency back to at least the time of the South Sea Bubble approximately 300 years ago. *Id.*

86. *See* MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (2d ed. 1971).

87. Coffee, *supra* note 29, at 1021.

88. *Id.*

Second, building on later theorists including Elinor Ostrom,[89] Coffee suggests that a cycle exists such that major crises interrupt this domination allowing "political entrepreneurs" to organize the latent groups to shape reform.[90] These individuals and groups are successful at "exploiting the popular discontent."[91] Responding to the crisis, "These entrepreneurs assume the transaction costs of organizing otherwise latent interest groups in order to secure election, or re-election, by assisting the public to overcome entrenched business interests."[92] However, after the crisis, the hegemony of the financial services industry is restored.[93] He explains that this return to dominance by the more powerful and focused special interest groups occurs due to the fact that public attention wanes, and because the issues involved are particularly complicated. Third, Coffee argues that both reform and deregulatory legislation contain flaws. However, he contends that the flaws of reform legislation are often removed at the end of the cycle.[94]

Coffee echoes Romano in acknowledging that legislative responses can be rushed. He observed that after the accounting scandals of the late 1990s and early 2000s, culminating in the collapse of Worldcom and Enron, "Congress enacted, possibly in some haste, the Sarbanes-Oxley Act (SOX)."[95] Like Romano,[96] he notes that this, as well as the passage of Dodd-Frank, was a reaction to popular demand or public outrage.[97]

Coffee asserts that his "[a]rticle is not a response to Professor Romano's sunset proposal."[98] Instead, he sets out to respond "to the worldview these scholars favor and an attempt to focus attention on the critical implementation stage at which reform legislation is regularly frustrated."[99] Nevertheless, Coffee does briefly address Romano's automatic sunset suggestion. He contends that the proposal "ignores Mancur Olson's critical insight: in the long term, smaller, better-motivated interest groups will likely dominate over the majority."[100] Thus, a consequence of a mandatory sunset would be "to protect the hegemony of well-financed and better-organized interest groups from majoritarian attack."[101] This is be-

89. *See* Elinor Ostrom, Public Entrepreneurship: A Case Study in Ground Water Basin Management (Sept. 29, 1964) (unpublished Ph.D. dissertation, University of California, Los Angeles) *available at* http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/3581/eostr001.pdf.

90. Coffee, *supra* note 29, at 1021–22.

91. *Id.* at 1022.

92. *Id.*

93. *Id.* at 1023.

94. *See id.*

95. *Id.* at 1020.

96. Romano, *supra* note 28, at 4 (discussion of "shifts in the national mood," "media clamor for action," and "popular demand").

97. Coffee, *supra* note 29, at 1021 ("Both of these episodes revealed abundant evidence of financial chicanery and fraud that outraged and repulsed the public").

98. *Id.* at 1025.

99. *Id.*

100. *Id.* at 1023.

101. *Id.*

cause "[f]inancial industry lobbyists could then easily organize to prevent the reenactment of the original legislation once it reached its moment of sunset."[102] This would put pressure on the reformers who would "have to win twice, including after the crisis subsides."[103] Among the most significant objections, Coffee observes that "to the extent that the recurring battle over financial regulation is between those who want more regulation and those who want less, a sunset remedy is inherently one-sided because it applies only to legislation that imposes new regulation and not to legislation that repeals existing regulation."[104]

Let's now address Coffee's claims. Romano questions whether the latent groups truly come into being after a crisis.[105] She argues that "these groups are full-time political players, and do not just spontaneously emerge as a counterweight to business interests solely in a crisis, as Coffee would have it."[106] In this respect, as applied to Dodd-Frank legislation and implementation, they both seem correct. After the financial crisis, a combination of new groups appeared; some emerged, and others that already existed became more organized and specialized in coalition around the particulars of the recent problems. For example, groups like Americans for Financial Reform (AFR) were new, but with a membership comprised of hundreds of existing groups. Not a lobbying organization, AFR was "created in the wake of the 2008 crisis" and is a "nonprofit coalition of more than 200 civil rights, consumer, labor, business, investor, faith-based, and civic and community groups."[107] AFR's effectiveness as a political entrepreneur was noticed, including by Senator Elizabeth Warren who said, "Dodd-Frank would have been a much weaker law if AFR had not been there."[108]

Additionally, some groups were created afresh by individuals who had never or rarely before been involved in legislative issues, financial or otherwise. This includes groups like Occupy the SEC, created in late 2011 as an offshoot of the Occupy movement launched in New York City.[109] Members of Occupy the SEC worked together to research, write, and submit an impressive 325-page comment letter to the federal regulators regarding imple-

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102. *Id.*

103. Coffee, *supra* note 29, at 1033.

104. *Id.*

105. Romano, *supra* note 28, at 17.

106. *Id.*

107. *See About AFR*, Americans for Financial Reform, http://ourfinancialsecurity.org/about/ (last visited Nov. 12, 2014).

108. As quoted on the AFR website, Warren additionally observed: "The AFR coalition played a critical role in pushing for a strong and independent Consumer Financial Protection Bureau and, after the law was passed, in defending the Bureau against attack and helping it get started on the right path." *Id.*

109. Simon Johnson, *An Occupy Wall Street Offshoot Has its Day,* N.Y. Times Economix Blog (Jan. 16, 2014, 12:01 AM), http://economix.blogs.nytimes.com/2014/01/16/occupy-the-s-e-c-has-its-day/?_r=0.

mentation of Section 619 of the Dodd-Frank Act, also known as "the Volcker Rule."[110]

Other new activists include individual academics[111] who began to take a more vocal role in policy than they had in the past, including actions like testifying and participating in meetings with legislators and regulators.[112] Another fledgling group is Better Markets, a nonprofit organization created in 2010 by a private fund manager who was drawn to Washington for policy discussions and to offer testimony regarding the causes of the crisis.[113] Better Markets is led by Dennis Kelleher and staffed by others who also held top policy roles on Congressional staffs. As Kelleher describes, "For a long time, there had been no organization dedicated solely to going to toe-to-toe with the financial industry, on any issue, no matter how complex or obscure . . . . That's what we do."[114]

The creation and continued existence of these groups show that Coffee mildly, but not substantially, overstates a point about how the dominant groups reassert their hegemony. He writes, "In short, those seeking to reduce systemic risk have few natural political allies; it is a cause that unites largely the technocrats."[115] Today, both Better Markets and AFR continue to work on systemic risk issues. While still outnumbered and outspent by industry, they have access and growing influence.[116]

110. Nathaniel Popper, *Regulators Weigh Massive Public Input on the 'Volcker Rule,'* L.A. Times, Feb. 15, 2012, http://articles.latimes.com/2012/feb/15/business/la-fi-volcker-rule-20120215.

111. As a volunteer myself for an AFR committee, I can concur that many others like me were not repeat players, but became engaged after witnessing.

112. *See, e.g.*, *Staff Directory*, Better Markets, https://www.bettermarkets.com/about/staff-directory#.VDVWtEuGpcM (last visited Nov. 12, 2014).

113. Dinner conversation in September 2013 with Mike Masters; *Testimony Before the Fin. Crisis Inquiry Comm.* (statement of Michael W. Masters, Managing Member/Portfolio Manager, Masters Capital Management, LLC) (2010), http://fcic-static.law.stanford.edu/cdn_media/fcic-testimony/2010-0630-Masters.pdf.; *Testimony Before the Commodities Futures Trading Comm.* (statement of Michael W. Masters, Managing Member/Portfolio Manager, Masters Capital Management, LLC) (2009), http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/hearing080509_masters.pdf.; *Testimony Before the S. Comm. on Homeland Sec. and Gov't Affairs* (statement of Michael W. Masters, Managing Member/Portfolio Manager, Masters Capital Management, LLC) (2008), http://www.hsgac.senate.gov//imo/media/doc/052008Masters.pdf?attempt=2.

114. Annie Lowrey, *Facing Down the Bankers,* N.Y. Times, May 30, 2012, http://www.nytimes.com/2012/05/31/business/kelleher-leads-a-nonprofit-better-markets-in-fight-for-stricter-banking-rules.html?pagewanted=all ("Think of Better Markets as Occupy Wall Street's suit-wearing cousin.").

115. Coffee, *supra* note 29, at 1032.

116. *See* Kim Krawiec, *Don't 'Screw Joe' the Plummer: The Sausage-Making of Financial Reform,* 55 Ariz. L. Rev. 53 (2013); Nathaniel Popper, *Banks Step Up Spending on Lobbying to Fight Proposed Stiffer Regulations*, L.A. Times, Feb. 16, 2010, http://articles.latimes.com/2010/feb/16/business/la-fi-bank-lobbying16-2010feb16; Gary Rivlin, *How Wall Street Defanged Dodd-Frank,* The Nation (Apr. 30, 2013), http://www.thenation.com/article/174113/how-wall-street-defanged-dodd-frank#.

II. Synthesis and Solution: Post-Crisis Sunlight Hearings

Both authors agree that post-crisis legislation is not perfect. In Coffee's words, he takes as a "common starting point" that "legislation is often flawed" and that Dodd-Frank had "curious, overbroad, and inconsistent elements."[117] In Romano's words, it is often "misguided"[118] and "prone to error."[119] Both recognize that it is public pressure (whether outrage or clamor) that motivates legislators to act.[120] In addition, both recognize that regulating in the dark is undesirable and that having time to adjust flaws after the fact would be beneficial.[121] Both recognize that policy entrepreneurs or political entrepreneurs play a critical role in shaping post-crisis legislation[122] and that in time concerns about the crisis fade as attention turns to other pressing issues.[123] In light of these points of agreement, an obvious solution seems in order.

Instead of a mandated sunset of post-crisis legislation with related sunset hearings, Congress should hold sunlight hearings. These sunlight hearings would take place, perhaps, every five to six years after a major financial crisis. If done right, we might not have another. The purpose of the hearings would be to do an assessment of the legislative and regulatory response to discern whether it is properly aligned to the problems that remain. Some of those may be crisis causes and others might be unintended consequences of new business developments or of the laws and rules that have been put into effect. The hearings could also examine gaps in implementation.

Another purpose of sunlight hearings would be to harness reformers' zeal that Coffee celebrates,[124] but with sufficient temporal distance to provide a "clear-eyed assessment"[125] that Romano promotes. These hearings would be transparent and would help prevent (though perhaps not eliminate) backroom deals. Who is at the table will matter. The legislation should ensure a balanced representation of political entrepreneurs with in-

117. Coffee, *supra* note 29, at 1030. He also notes, "Rather than idealize this legislation . . . [he] acknowledges that some of the Act's reforms were flawed or even inconsistent. But legislation in the real world is always imperfect—this is the consequence of the logrolling and compromise needed to assemble a majority in a divided political environment." *Id.* at 1029.

118. Romano, *supra* note 28, at 1.

119. *Id.* at 2.

120. *See supra* notes 96–97.

121. Romano, *supra* note 28, at 18; Coffee, *supra* note 29, at 1026.

122. Romano, *supra* note 28, at 4; Coffee, *supra* note 29, at 1021–22.

123. Romano notes that at the time of a post-crisis sunset hearing, five or so years later, "constituent concerns in a crisis that motivated the statute in the first place have drifted to new matters." Romano, *supra* note 28, at 19. To remedy this problem, she suggests that "evaluative criteria for the sunset review, and not simply an expiration date, need to be specified in the statute responding to the crisis." *Id.*

124. Coffee, *supra* note 29, at 1022.

125. Romano, *supra* note 28, at 16.

dustry members and experts.[126] It is important to note that the hearings would examine the unintended consequences, not just of regulation, but of deregulation and regulatory failure. Sunlight can be more than a disinfectant;[127] it can generate the heat, or the political will, necessary to finish the necessary work.

As a thought experiment, imagine if we held those sunlight hearings today, four years after Dodd-Frank and more than six years after the $29 billion government bailout of Bear Stearns in March 2008. The task would be to shine a light on whether we think the reform legislation aligns with the problems it set out to remedy and with its own purposes. We would look not just to the stated purposes in Dodd-Frank, but also to the surrounding public statements made by government officials to justify the bailouts and to support the legislation.

A mandated post-crisis sunlight hearing would differ from the various ongoing congressional hearings. These include regular appearances by the Treasury Secretary (acting in his capacity as Chairman of the FSOC), or other topically-related hearings organized by the Senate Banking Committee,[128] or the House Financial Services Committee. The sunlight hearings would be conducted at regular intervals to deal with some of the concerns that both professors raised in their articles. First, the hearings would adjust for what both agreed was a hallmark of post-crisis legislation—that it was possibly rushed and contained flaws. Instead of throwing the baby out with the bath water, such a hearing would allow us to take a look at progress. Most centrally, we would examine whether the legislation has fulfilled its stated purposes thus far.

The hearing would need to cover several days and be scheduled six months in advance so as to attract enough attention and participation from the latent groups and allow political entrepreneurs to become active again. Importantly, equal representation of political entrepreneurs would be mandated, and former legislators and regulators would also have seats at the table. Discussion would also cover any and all exemptions and delays. And there would be a focus on efforts to rollback reform, so that reforms are placed in context. This would compare to, for example, a recent Congressional hearing the announcement of which focused on how consumers have fewer choices, without acknowledging that some of the choices of the past

126. Additionally, Ross Levine and James Barth's guardians of finance could be welcome additions. *See generally* JAMES R. BARTH, GERARD CAPRIO JR., & ROSS LEVINE, THE GUARDIANS OF FINANCE (2012).

127. *See generally* LOUIS BRANDEIS, OTHER PEOPLE'S MONEY 89 (Melvin I. Urofsky ed., 1995).

128. *See, e.g.*, *Wall Street Reform: Assessing and Enhancing the Financial Regulatory System*, United States Senate Committee on Banking & Finance (Sept. 9, 2014), http://www.banking.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=b15fc832-df18-47d7-8c7d-1367e5770086.

involved predatory loans whose terms made it difficult for lenders to repay and helped foster a systemic crisis.[129]

These hearings would offer an opportunity for academics and activists to share their empirical findings and for a report to be issued. Such a report could reiterate or adjust key findings as to the cause of the crisis and include a checklist of unfinished business. Such a report could include online access to exhibits and witness transcripts.

Because these hearings would be held regularly, every five or six years post crisis, there would be the added benefit of keeping the crisis fresh in the minds of the public and the next fresh young crop of economists who might not have learned about it.[130] It would also help in acting as a counterforce against the efforts of well-organized industry groups to erode reform piece-by-piece or gain particular advantages over competitors.[131] Additionally, mini hearings should be scheduled where political entrepreneurs can also be present before acts of deregulation. This would help reduce the one-sidedness that might result if attention is only drawn to reforms that restrict bank activities as opposed to reforms that liberalize them.

Were these hearings held today, we might surprisingly learn how much progress still needs to be made to achieve the fundamental goals of financial reform. This thought experiment of imagining holding sunlight hearings in the future could also be used to apply them retroactively. As noted in previous work, I see the most recent crisis not as a stand-alone event, but as a continuation of the S&L debacle of the 1980s.[132] If one looked back at FIRREA, the reform legislation passed in 1989, one can see that it did not fully address all of the issues that lead to the widespread thrift failures.[133] One wonders how different the situation would be today had a hearing been held every five years to make sure that the law lived up to its promises of "never again" and that we were adapting regulation to meet innovation and change. That would have meant hearings in 1994, 1999, and 2004.

Imagine if instead of being silenced, Brooksley Born could have participated in such a post-S&L crisis sunlight hearing in 1999, along with Professor Lynn Stout who was warning about the dangers of over-the-

129. Jennifer Taub, *Now What?: Applying the Economic Dynamic Approach to Financial Regulation*, Concurring Opinions Blog (Apr. 5, 2014), http://www.concurringopinions.com/archives/2014/04/now-what-applying-the-economic-dynamic-approach-to-financial-reform.html (Referencing U.S. House of Representatives Committee on Financial Services has scheduled a hearing entitled, *Who's In Your Wallet: Examining How Washington Red Tape Impairs Economic Freedom*. Also discussing DAVID DRIESEN, THE ECONOMIC DYNAMICS OF LAW (2013)).

130. *See* WOLFSON, *supra* note 58, at 3 ("Nearly an entire generation of economists was trained without ever studying the origins and causes of financial crises.").

131. It would help combat the forgetfulness and exuberance and fight against the trend of how, as economist Hyman Minsky theorized, financial stability leads to instability.

132. *See generally* TAUB, *supra* note 56.

133. *Id.*

counter derivatives.[134] Perhaps seeing the 1993 bankruptcy of Orange County as a potential source of larger future financial crises could have been broached at a 1994 hearing. History might be different if in 2004, instead of being ignored, economists like Dean Baker would have appeared at such a post-S&L crisis hearing to talk about the growing housing bubble. Imagine if in 2004, the hearing focused on avoiding another crisis and considered and avoided some of the changes to the bankruptcy code that would be made via BAPCPA in 2005, which encouraged the extension of short-term wholesale lending against CDOs and other risky assets. What would have happened if consumer advocates were not just brushed aside by the Fed Consumer Advisory Council after suggesting, as one did in 2004, that her concerns that predatory lending was leading to a systemic crisis, but instead testified before a committee where the public could watch? Can we try to envision what a more contextualized discussion of the SEC's net capital rule decision—allowing the largest broker-dealers to use alternative methods for computing capital—would have yielded?

Conclusion

At the July 21, 2010, signing ceremony for the Dodd-Frank Wall Street Reform and Consumer Protection Act, President Barack Obama highlighted the statute's goals. After detailing the important consumer protections contained in the law, including the creation of the Consumer Financial Protection Bureau, the President moved on to say:

> [R]eform will also rein in the abuse and excess that nearly brought down our financial system. It will finally bring transparency to the kinds of complex and risky transactions that helped trigger the financial crisis . . . And finally, because of this law, the American people will never again be asked to foot the bill for Wall Street's mistakes. There will be no more tax-funded bailouts—period. If a large financial institution should ever fail, this reform gives us the ability to wind it down without endangering the broader economy. And there will be new rules to make clear that no firm is somehow protected because it is "too big to fail."[135]

The President also recognized the need for dynamic regulation[136] when he offered this admonition: "For these new rules to be effective, regulators will have to be vigilant. We may need to make adjustments along the way as our

134. *See generally* Lynn A. Stout, *Why the Law Hates Speculators: Regulation and Private Ordering in the Market for OTC Derivatives*, 48 DUKE L. J. 701 (1999).

135. President Barack Obama, Signing of Dodd-Frank Wall Street Reform and Consumer Protection Act (July 21, 2010), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-signing-dodd-frank-wall-street-reform-and-consumer-protection-act.

136. *See generally* Wulf Kaal, *Dynamic Regulation of the Financial Services Industry,* WAKE FOREST L. REV. (2014); DRIESEN, *supra* note 129.

financial system adapts to these new changes and changes around the globe."[137]

A year earlier, in 2009, Fed Chairman Bernanke justified the bailouts that began under President George W. Bush and proposed a new regulatory framework that would prevent this from happening again. He said, "These companies have turned out to be too big to allow to collapse because, again, if they collapse the - when the elephant falls down, all the grass gets crushed as well."[138] Today, in the fall of 2014, more than six years after those bailouts began, the elephants are larger than ever, the grass is still crushed,[139] and the regulatory framework is incomplete. The top banks are larger than they were before the crisis and are more concentrated. Their permitted leverage is at levels considered by experts to be too dangerous before the crisis, and even rules to require the top banks to fund themselves with more equity and less debt are insufficient and have not yet gone into effect. The contagion that causes the failure of one firm to result in the failure of many was transmitted through the short-term wholesale funding system, upon which the system still too greatly depends. The perverse incentives that provide tremendous reward in the short-term for individuals who gamble with taxpayer-backed insured deposits are profound, with individual penalties and consequences practically non-existent.

While these conditions—size, leverage, and over-reliance on short-term funding—persist, there are optimists who point to other key tools in Dodd-Frank that arguably mitigate these problems. One such tool is the mandate of orderly resolution plans—or living wills. Yet to date, the top eleven firms have repeatedly failed to submit credible living wills. These are to be used in either a bankruptcy proceeding or in an orderly resolution by the FDIC of a failing firm. This was the mechanism designed to create an alternative to either the chaotic Lehman Brothers bankruptcy process or a government bailout. Critics of this resolution authority question it for a variety of reasons. Some are skeptical as to whether it can work with firms sprawling across the globe. Others wonder whether the FDIC has the ability to manage a multi-faceted financial firm, as opposed to just a large deposi-

137. Obama, *supra* note 135.

138. PBS, *supra* note 66.

139. Between 2006 and 2013, about five million homes were lost to foreclosure with millions more still in process. In 2013, nearly nine million homes remained underwater—approximately one-fifth of all mortgaged properties. *9.3 Million U.S. Residential Properties Deeply Underwater in December 2013, Down From 10.7 Million in September 2013*, REALTYTRAC (Jan. 7, 2014), http://www.realtytrac.com/content/news-and-opinion/us-home-equity-and-underwater-report-december-2013-7959. Between 2009 and 2011, the net worth of the top 7% of Americans (about 8 million households) grew by 28%, while the net worth of the bottom 93% (about 111 million households) declined by approximately 4%. Richard Fry & Paul Taylor, *A Rise in Wealth for the Wealthy; Declines for the Lower 93%*, PEW RES. CENTER (Apr. 23, 3013), http://www.pewsocialtrends.org/2013/04/23/a-rise-in-wealth-for-the-wealthydeclines-for-the-lower-93/.

tory institution.[140] Even with a credible plan, a resolution, as enacted, will be funded by the taxpayers until such date that the surviving banks are assessed and pay us back. Yet today, especially when there are not even credible plans submitted, when the top six banks are thirty-seven percent larger than they were before the crisis, when they are still subject to firesale risk and wholesale runs, it would be unwise to let Dodd-Frank sunset. There are still plenty of measures in the statute of value that need support, not erasure (such as the CFPB and the OFR). Moreover, it is time to shine a light on the gaps between the promise of the past and today's reality. Brandeis said that sunlight is the best disinfectant.[141] But sunlight also brings heat, and so do political entrepreneurs. We need to build mechanisms like regular post-crisis sunlight hearings to harness that energy to secure financial stability and to end the boom and bust cycles at last.

140. In 2014, Bank of England's deputy governor for financial stability "admitted [that] he had no confidence a 'global giant' could fail safely and described TBTF as 'perhaps the most important regulatory priority.'" *Banks Will Carry On 'Too Big to Fail'*, THE TELEGRAPH (Mar. 17, 2014), http://www.telegraph.co.uk/finance/financialcrisis/10704227/Banks-will-carry-on-being-too-big-to-fail.html.

141. BRANDEIS, *supra* note 127, at 89.