

Journal of Business & Technology Law

Volume 5 | Issue 1

Article 5

The Best of Times, the Worst of Times: Securities Regulation Scholarship and Teaching in the Global Financial Crisis

Joan MacLeod Heminway

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/jbtl>

 Part of the [Securities Law Commons](#)

Recommended Citation

Joan M. Heminway, *The Best of Times, the Worst of Times: Securities Regulation Scholarship and Teaching in the Global Financial Crisis*, 5 J. Bus. & Tech. L. 59 (2010)

Available at: <http://digitalcommons.law.umaryland.edu/jbtl/vol5/iss1/5>

This Articles & Essays is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Journal of Business & Technology Law by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

The Best of Times, the Worst of Times: Securities Regulation Scholarship and Teaching in the Global Financial Crisis

It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to Heaven, we were all going direct the other way—in short, the period was so far like the present period, that some of its noisiest authorities insisted on its being received, for good or for evil, in the superlative degree of comparison only.¹

AS WE SIT HERE IN THE MIDST OF A GLOBAL FINANCIAL recession,² many of us seemingly are seeing—even experiencing—the worst of times, at least from a financial point of view. For many in the faculty sector, there are lower or nonexistent travel budgets, hiring freezes, no raises, and fewer dollars for adjuncts and visiting instructors.³ Our graduating students are having a tougher time finding employ-

© 2010 Joan MacLeod Heminway.

* Professor, The University of Tennessee College of Law; J.D., New York University School of Law, 1985; A.B., Brown University, 1982. This essay is an enhanced version of comments I delivered as the moderator of a roundtable at the University of Maryland School of Law program on “Corporate Governance and Securities Law Responses to the Financial Crisis” held on April 17, 2009. I owe a huge debt of gratitude to my excellent research assistant, Alicia Teubert, who assisted mightily in the identification and formatting of supporting citations for this essay. My work on this essay was funded by a summer research grant from The University of Tennessee College of Law.

1. CHARLES DICKENS, *A TALE OF TWO CITIES* 1 (A. B. de Mille ed., Allyn & Bacon 1922) (1859).

2. See Scott Neuman, *Stock Slide Persists; Global Financial Summit Set*, NAT’L PUB. RADIO, Oct. 22, 2008, <http://www.npr.org/templates/story/story.php?storyId=95974598> (quoting British Prime Minister Gordon Brown referring to the current situation as a “global financial recession”).

3. See, e.g., Maggie Reeb, *State Cuts \$4.9 Million from College Budget*, FLAT HAT, Oct. 17, 2008, at 1, available at http://flathatnews.com/files/pdf/flt_pg01_10-17-08.pdf; Karen Sloan, *Law Schools Dealing with Budget Cuts*, NAT’L L.J., Jan. 19, 2009, at 1, 12, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202427496279>; Elie Mystal, *Nationwide Pay Freeze Watch: Welcome Brooklyn Law School Faculty*, ABOVE THE LAW, Feb. 10, 2009, http://abovethelaw.com/2009/02/nationwide_pay_freeze_watch_we.php.

ment,⁴ or if they have found desirable, private-firm jobs, they are being told not to bother to come to work on their originally scheduled start dates at the firm.⁵ Many are not being compensated for these delayed start dates.⁶ Others, less fortunate yet, are even having their employment offers rescinded.⁷ Our friends and family members are losing—or have lost—their jobs and the compensation and benefits (including health insurance) that those jobs provide.⁸ The worst of times.

Yet (and not to gloat), like a Phoenix rising from the ashes, those of us who research, write about, and teach law—especially business law—now have more salience, more status in the wake of the current economic crisis. We have the opportunity to participate in debates about what went wrong and how to fix it,⁹ and we are in the scholarly trenches and in the classroom with others doing the same. We can help relate the facts, analyze the issues and problems, and forward solutions.¹⁰ It is

4. See, e.g., Fred Horlbeck, *New Lawyers Must Get Creative with Job Searches in South Carolina*, S.C. LAW WKLY., May 11, 2009, at 1.

5. See, e.g., Martha Neil, *Bloody Thursday: Six Major Law Firms Ax Attorneys*, A.B.A. J., Feb. 12, 2009, http://www.abajournal.com/news/bloody_thursday_4_major_law_firms_ax_attorneys_more_layoffs_at_others/.

6. See, e.g., Kashmir Hill, *News for Incoming Associates at Kirkland and Sidley Austin (and a New Start Date Round-up)*, ABOVE THE LAW, May 8, 2009, http://abovethelaw.com/2009/05/news_for_incoming_associates_a.php (listing firms that are delaying associates' start dates and noting which firms are providing stipends).

7. Ameet Sachdev, *Job Market Rough for New Law School Graduates*, CHI. TRIB., Mar. 9, 2009, <http://archives.chicagotribune.com/2009/mar/09/business/chi-biz-market-tough-law-school-graduates-march09> (“Law firms have rescinded job offers because of the recession.”).

8. See Edmund Andrews, *With Grim Job Loss Figures, No Sign That Worst Is Over*, N.Y. TIMES, Feb. 6, 2009, at B1 (noting that approximately 3.6 million jobs were lost between December 2007 and January 2008); Press Release, Dept. of Labor, *Extended Mass Layoffs in the First Quarter of 2009 (May 12, 2009)*, available at http://www.bls.gov/news.release/archives/mslo_05122009.pdf; Rex Nutting, *U.S. Unemployment Rate Jumps to 26-Year High of 9.7%*, MARKETWATCH.COM, Sept. 4, 2009, <http://www.marketwatch.com/story/unemployment-rate-jumps-to-26-year-high-of-97-2009-09-04>; see, e.g., Katie Linebaugh, *Slump Spreads to Health Care as Michigan Loses Car Jobs*, WALL ST. J., July 13, 2009, at A1 (indicating that a side-effect of the lost jobs in Michigan is an increase in number of people in the state who are uninsured or on Medicaid).

9. For example, a number of law schools are hosting conferences featuring scholarly and other commentary on the financial crisis and related issues. See, e.g., William Harms, *Diverse Group of Scholars Will Address Economic Crisis and Its 'Credit-Crunch'*, U. CHI. CHRON., Apr. 2, 2009, <http://chronicle.uchicago.edu/090402/economic.shtml> (providing information on the University of Chicago's "Conference on the Financial Crisis"); Erin St. John Kelly, *Exploring the Future of Financial Regulation*, Feb. 16, 2009, http://www.law.columbia.edu/media_inquiries/news_events/2009/february2009/acspanel (describing Columbia Law School's conference entitled "Financial Regulation, Corporate Governance and Securities Litigation: What Does the Future Hold?"); Marsha Stoutenburg, *Responding to the Current Economic Crisis*, BYU LAW NEWS & EVENTS, Apr. 9, 2009, <http://www.law2.byu.edu/news/item.php?num=386> (describing the Brigham Young University Law School's "Federalist Society Beehive Debate"); Seton Hall Law Review, *Securities Regulation and the Global Economic Crisis: What Does the Future Hold?*, <http://law.shu.edu/Students/academics/journals/law-review/symposium/index.cfm> (agenda for an upcoming symposium); Posting of Villanova Law Review to Legal Scholarship Network's Professional Announcements, <http://www.ssrn.com/update/lsl/lslann/ann09081.html> (June 17, 2009) (announcing a call for papers for Villanova Law Review's "Symposium on Regulatory Reform: Genesis, Progress, and Impact").

10. See generally STEVEN M. DAVIDOFF, *GODS AT WAR: SHOTGUN TAKEOVERS, GOVERNMENT BY DEAL, AND THE PRIVATE EQUITY IMPLSION* (2009). See, e.g., Lucian A. Bebchuk, *A Plan for Addressing the Financial Crisis*, ECONOMIST'S VOICE, Sept. 2008, Vol. 5, Iss. 5, Art. 6, at 1, available at <http://www.bepress.com/cgi/viewcontent.cgi?article=1416&context=ev> (critiquing the \$700 billion bailout and proposing an alternative plan); Steven M.

perhaps not “the best of times” for corporate and securities law professors, but it nevertheless is an exciting time to be engaging in business law scholarship and teaching.

Securities regulation is a particularly relevant area for inquiry and analysis, for obvious reasons.¹¹ Securities markets around the world have been both players in and victims of the global financial crisis.¹² Each securities market is regulated by distinct national and regional bodies of standards and principles.¹³ Each is regulated principally using or building upon national and international institutional structures and enforcement systems and vehicles.¹⁴ Is it time to recast those regulatory rules and institutions?¹⁵ Is it time for more supranational standards, rules, and

Davidoff & David T. Zaring, *Big Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463 (2009), available at <http://ssrn.com/abstract=1306342> (reviewing the “deals” struck by the government, the legal justification for them, and how they will affect legal scholarship); Kenneth Ayotte & David Skeel, Jr., *Bankruptcy or Bailouts?* 33–34 (Univ. of Penn. Inst. for Law & Econ., Research Paper No. 09-11, 2009), available at <http://ssrn.com/abstract=1362639> (suggesting that using bankruptcy as a solution to the economic problems of companies may be more effective than first thought); Robert C. Hockett, *A Fixer-Upper for Finance* 7 (Cornell Law Sch. Working Paper Series, Paper No. 53), available at http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1055&context=clsops_papers (suggesting short and long term fixes to prevent future housing bubbles).

11. According to Finance Professor Luigi Zingales, “[t]he backbone of U.S. security law was introduced in the 1930s to restore the public’s trust in securities market [sic] Seventy-five years later, we face a similar problem trying to restore trust in securities market [sic]” Luigi Zingales, *The Future of Securities Regulation* 2 (Chicago Booth Sch. of Bus., Working Paper No. 08-27, 2009), available at <http://ssrn.com/abstract=1319648>; see also Steven L. Schwarcz, *Systemic Risk*, 97 GEO. L.J. 193, 198 (2008) (arguing that regulation of systemic risk is necessary because if left to individuals to self regulate, the tragedy of the commons phenomenon will occur).

12. See, e.g., Schwarcz, *supra* note 11, at 249 (“[T]he Bank of England and other ‘central banks on both sides of the Atlantic’ have become ‘actively engaged’ in discussing . . . ‘the feasibility of mass purchases of mortgage-backed securities as a possible solution to the credit crisis.’” (citing Chris Giles & Krishna Guha, *Mortgage Crisis Talks Under Way*, FIN. TIMES (London), Mar. 22, 2008, at 1)). At the April 2, 2009 meeting of the G-20, the G-20 leaders stated, “[w]e face the greatest challenge to the world economy in modern times; a crisis which has deepened since we last met, which affects the lives of women, men, and children in every country, and which all countries must join together to resolve. A global crisis requires a global solution.” G-20 LEADERS STATEMENT, THE GLOBAL PLAN FOR RECOVERY AND REFORM ¶ 2 (Apr. 2, 2009), available at <http://www.g20.org/Documents/final-communicue.pdf>.

13. See, e.g., International Organization of Securities Commissions, Ordinary Members of IOSCO, http://www.iosco.org/lists/display_members.cfm (last visited Sept. 11, 2009) (listing various national securities commissions, regulatory bodies, and national exchanges).

14. See generally Luca Enriques & Matteo Gatti, *Is There a Uniform EU Securities Law After the Financial Services Action Plan?*, 14 STAN. J.L. BUS. & FIN. 43 (2008) (describing European Community and European nation state securities regulation); Jerry W. Markham & Daniel J. Harty, *For Whom the Bell Tolls: The Demise of Exchange Trading Floors and the Growth of ECNs*, 33 J. CORP. L. 865, 938 (2008) (“In the international arena, cooperation among regulators has evolved from bilateral agreements to multilateral agreements in the form of participation in international organizations.”); Ana Carvajal & Jennifer Elliott, *Strengths and Weaknesses in Securities Market Regulation: A Global Analysis* (Int’l Monetary Fund, Working Paper No. 07/259, 2007), available at <http://www.imf.org/external/pubs/ft/wp/2007/wp07259.pdf> (describing and assessing national securities market regulation). The International Organization of Securities Commissions provides helpful international coordination. See General Information on IOSCO: The International Organization of Securities Commissions, <http://www.iosco.org/about/> (last visited Sept. 11, 2009).

15. The G-20 leaders think so. In its April 2, 2009 Leaders Statement, the G-20 said:

structures in securities regulation?¹⁶ Are existing international bodies the right institutions through which changes should be suggested, vetted, and made?¹⁷ What do the processes regarding the construction of, and the efforts to obtain multilateral buy-in for, the International Financial Reporting Standards (“IFRS”) tell us (and not tell us) about ways to approach (and not approach) standardization in securities regulation across regional and national borders?¹⁸ Certainly, the current environment speaks to the need for regulatory coordination, domestically and internationally.¹⁹

More questions abound, especially as to the capacity of our system to propose and manage lasting, positive change. Are our regulators up to the task?²⁰ What can

Major failures in the financial sector and in financial regulation and supervision were fundamental causes of the crisis. Confidence will not be restored until we rebuild trust in our financial system. We will take action to build a stronger, more globally consistent, supervisory and regulatory framework for the future financial sector, which will support sustainable global growth and serve the needs of business and citizens.

G-20 LEADERS STATEMENT, *supra* note 12, at ¶ 13.

16. The Securities Law Subcommittee of the International Bar Association argues that “international securities regulation, interpretation and enforcement . . . should evolve by synchronising [sic] the existing national and regional regulations [through convergence or standardization, exemption, and recognition].” Securities Law Committee, *Final Report of the Securities Law Subcommittee of the Task Force on Extraterritorial Jurisdiction of the International Bar Association*, 2009 GLOBAL CAPITAL Mkts. & U.S. SEC. L. 265, 279, available at <http://ssrn.com/abstract=1109061>. Yet most believe that international cooperation on better securities regulation will not be easy. See, e.g., Donald C. Langevoort, *U.S. Securities Regulation and Global Competition*, 3 VA. L. & BUS. REV. 191, 204 (2008) (noting that the “diffused global market” in which “no nation is able to capture enough of the benefits from investments in quality regulation” is a “classic free rider problem”).

17. See Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 YALE J. INT’L L. 113, 150 (2009) (“IOSCO has been successful in coordinating mutual assistance in securities law enforcement among regulators in developed countries . . . [but, offshore financial centers] have incentives to renege, and it is doubtful that sustained compliance can be achieved through [transnational regulatory networks like IOSCO].”).

18. Arguably, it is too soon to tell. See generally Lawrence A. Cunningham, *The SEC’s Global Accounting Vision: A Realistic Appraisal of a Quixotic Quest*, 87 N.C. L. REV. 1 (2008) (describing and critiquing the Securities and Exchange Commission’s adoption of IFRS); Andreas M. Fleckner, *FASB and IASB: Dependence Despite Independence*, 3 VA. L. & BUS. REV. 275 (2008) (comparing and contrasting the Financial Accounting Standards Board and the International Accounting Standards Board). See also Langevoort, *supra* note 16, at 200–02 (describing briefly the then-current state of the Securities and Exchange Commission’s rulemaking regarding IFRS and characterizing the Securities and Exchange Commission’s decisions using the framework described in Fleckner’s article).

19. According to Professor Steven Schwarcz, with “finance and markets being global, systemic collapse in one country can affect markets and institutions in other countries.” Schwarcz, *supra* note 11, at 198. Even in 2004, the International Monetary Fund noted that “[c]onsideration could be given to establishing and maintaining regular contacts with the most relevant authorities and making a joint effort to understand each others’ systems, while working towards an international arrangement or an institutional mechanism for improving domestic and international regulatory coordination and exchange of information.” INT’L MONETARY FUND, FINANCIAL SECTOR REGULATION: ISSUES & GAPS 32 (2004), available at <http://imf.org/external/np/mfd/2004/eng/080404.pdf>. But cf. Verdier, *supra* note 17, at 130–31 (arguing that transnational regulatory networks, including IOSCO, have limitations not discussed in other academic discourse).

20. In an earlier article, I wrote:

The SEC’s rulemaking expertise generally is acknowledged to extend only to the boundaries of its mandate under the federal securities laws. The breadth and depth of this expertise reflects the knowledge and experience of the SEC commissioners and staff. Moreover, recognition of, and deference to,

they regulate, and what is beyond their capacity for regulation?²¹ These two broad questions raise a host of others. For example, one might ask whether our regulators are smart enough or skilled enough.²² Is effective regulation possible in a constantly evolving, innovative, entrepreneurial market?²³ Can our regulators effectively increase derivatives regulation?²⁴ What about the regulation of hedge funds?²⁵ Is it

the SEC's expertise is shaped by judicial jurisdiction and structural competence considerations. Courts and the President have noted the SEC's expertise in interpreting the statutes that it administers.

Joan MacLeod Heminway, *Rock, Paper, Scissors: Choosing the Right Vehicle for Federal Corporate Governance Initiatives*, 10 *FORDHAM J. CORP. & FIN. L.* 225, 286 (2005). That was then, and this is now. Most commentators now doubt the Securities and Exchange Commission's capacity to regulate in the current environment, for one reason or another. See, e.g., Jill E. Fisch, *Top Cop or Regulatory Flop? The SEC at 75*, 95 *V.A. L. REV.* 785, 811 (2009) ("Some commentators have attributed the SEC's regulatory failures to the unwillingness of SEC staff to be sufficiently vigilant in dealings with 'prominent Wall Street insiders.' Others blame demoralization of the staff of an agency that is more concerned with deregulation than with active oversight."); Eric Lichtblau, *F.B.I. Finds Financier Suspected of Fraud*, *N.Y. TIMES*, Feb. 20, 2009, at B1 ("The Stanford case, like the case of Bernard L. Madoff and his purported \$50 billion Ponzi scheme, has raised fresh questions about the ability of the S.E.C. to police and regulate the securities industry.").

21. See, e.g., Susan Schott Karr, *Keeping Pace, Working Smart: Is the SEC Overextended?*, *COMPLIANCE WK.*, Aug. 3, 2004, <https://www.complianceweek.com/article/1005/keeping-pace-working-smart-is-the-sec-over-extended> (assessing the Securities and Exchange Commission's capacity to fulfill its mandate); see also *infra* notes 22–29 and accompanying text.

22. Possibly not. See, e.g., Sara Hansard, *Lack of SEC Enforcement Called Culprit in Lax Oversight*, *INVESTMENT NEWS*, Mar. 8, 2009, at 10 ("Scandals in the financial markets over the past several years are the result of enforcement failures and a lack of regulators with industry-specific knowledge, not a need for increased regulation."); Cristina McEachern, *Markopolos: SEC a Group of Chickens Tasked with Catching Foxes*, *ADVANCED TRADING*, Feb. 6, 2009, <http://www.advancedtrading.com/regulations/showArticle.jhtml?articleID=213300370#undefined> (reporting on congressional testimony regarding—among other things—the substantive competence of the Securities and Exchange Commission).

23. See generally Olivier J. Blanchard, *The Crisis: Basic Mechanisms, and Appropriate Policies* 29 (Mass. Inst. of Tech. Dept. of Econ., Working Paper No. 09-01, 2009), available at <http://ssrn.com/abstract=1324280> ("Even if and when new regulation is introduced and tax laws are changed, we should be under no illusion that systemic risk will be fully under control. Regulation will be imperfect at best, and always lag behind financial innovation."); Steven L. Schwarcz, *Regulating Complexity in Financial Markets* 6 (Duke Law Sch. Pub. Law & Legal Theory Paper No. 217, 2009), available at <http://ssrn.com/abstract=1240863> ("Prescriptive regulation can begin to address existing market failures, but financial markets evolve so rapidly and often in such unexpected ways that prescriptive regulation can never address all potential failures."); Andrew W. Lo, *Regulatory Reform in the Wake of the Financial Crisis of 2007–2008*, at 4 (Mar. 10, 2009) (unpublished manuscript, <http://ssrn.com/abstract=1398207>) ("The complexity of financial markets is straining the capacity of regulators to keep up with its innovations, many of which were not contemplated when the existing regulatory bodies were first formed.").

24. They should. See Fisch, *supra* note 20, at 807–08 (noting that derivatives regulation is "perhaps the most critical accounting issue of the credit crisis" and that "[d]espite the enormous risks posed by derivatives[,] . . . the SEC yielded to industry and political claims that derivatives trading did not require regulatory oversight"). In 1997, the Securities and Exchange Commission did create a rule requiring the disclosure of "the risks associated with their derivatives positions," but this did not prevent the crisis. *Id.* at 809–10; see also Thomas Lee Hazen, *Filling a Regulatory Gap: It Is Time to Regulate Over-the-Counter Derivatives*, 13 *N.C. BANKING INST.* 123, 123 (2009) (equating credit default swap derivatives with gambling and suggesting the use of insurance regulation as a guide to regulating derivatives). President Obama's financial regulatory reform plan calls for the "[c]omprehensive regulation of all over-the-counter derivatives." U.S. DEPT. OF THE TREASURY, *FINANCIAL REGULATORY REFORM: A NEW FOUNDATION* 3, available at http://financialstability.gov/docs/regs/FinalReport_web.pdf [hereinafter *FINANCIAL REGULATORY REFORM*].

possible to regulate systemic risk?²⁶ Can our regulators successfully regulate leverage?²⁷ Is it time to further regulate credit rating agencies?²⁸ Can the Securities and

Securities and Exchange Commission expertise in regulating complex derivatives may be in doubt, however. See Troy A. Paredes, *On the Decision to Regulate Hedge Funds: The SEC's Regulatory Philosophy, Style, and Mission*, 2006 U. ILL. L. REV. 975, 999 (suggesting that the Securities and Exchange Commission may not be able to regulate complex derivatives).

25. The European Union has proposed the following:

[To regulate] managers of alternative investment funds such as hedge funds and private equity groups in order to limit the systemic risk such funds pose to the European Union's financial markets . . . [by requiring that] the managers of all hedge funds and other alternative capital pools worth more than EUR100 million (U.S. \$133 million) . . . have to report regularly on their main investments, performance, and risks.

Commission Proposes Directive to Regulate Hedge Funds, Private Equity, World Sec. L. Rep. (BNA) ¶ 1–2 (May 1, 2009). Senators Grassley and Levin have introduced the Hedge Fund Transparency Act of 2009. See S. 344, 111th Cong. (2009). This bill will “give the SEC the authority to regulate all pooled investment vehicles, including hedge funds, which manage at least \$50 million in assets as investment companies.” Roberta S. Karmel, *The Future of the Securities and Exchange Commission as a Market Regulator* 41 (Brooklyn Law Sch., Legal Studies Research Paper No. 152, 2009), available at <http://ssrn.com/abstract=1407576>. President Obama's plan for financial regulatory reform proposes “[t]he registration of advisers of hedge funds and other private pools of capital with the SEC.” FINANCIAL REGULATORY REFORM, *supra* note 24, at 3.

26. Before systemic risk can be regulated, we must agree on what it is. See, e.g., Schwarcz, *supra* note 11, at 196 (noting the confusion that exists regarding which risks are systemic). Systemic risk can be defined as: [T]he risk that (i) an economic shock such as market or institutional failure triggers (through a panic or otherwise) either (X) the failure of a chain of markets or institutions or (Y) a chain of significant losses to financial institutions, (ii) resulting in increases in the cost of capital or decreases in its availability, often evidenced by substantial financial-market price volatility.

Id. at 204. Professor Schwarcz continues:

Without regulation, the externalities caused by systemic risk would not be prevented or internalized because the motivation of market participants “is to protect themselves but not the system as a whole No firm . . . has an incentive to limit its risk taking in order to reduce the danger of contagion for other firms.”

Id. at 206 (citing PRESIDENT'S WORKING GROUP ON FIN. MKTS., HEDGE FUNDS, LEVERAGE, AND THE LESSONS OF LONG TERM CAPITAL MANAGEMENT 31 (1999)). Thus, Professor Schwarcz concludes, “regulation of systemic risk appears not only appropriate, but necessary.” *Id.* He identifies several possible approaches to regulating systemic risk in the following categories: (1) “Averting Panics;” (2) “Disclosure;” (3) “Financial-Exposure Limits;” (4) “Reducing Leverage;” (5) “Ensuring Liquidity;” (6) “Ad Hoc Approaches;” and (7) “Market Discipline.” *Id.* at 214–34. Another commentator identifies two significant challenges to controlling systemic risk. Blanchard, *supra* note 23, at 30. “The first is about monitoring [the regulatory system] itself, what information to collect, and how to use it to construct measures of systemic risk, both at the national and international level. . . . The second challenge is how to react when measures of systemic risk increase.” *Id.* Both securities and monetary system regulators would play a leading role in regulating systemic risk. President Obama's plan calls for the creation of a Financial Services Oversight Council (chaired by the Department of the Treasury and including the heads of the key federal financial regulators) as members to operate in this area. FINANCIAL REGULATORY REFORM, *supra* note 24, at 3.

27. In the last few years, before the onset of the current financial crisis, the Securities and Exchange Commission was in the business of deregulating leverage in the nation's key investment banks. See Stephen Labaton, *Agency's '04 Rule Let Banks Pile up New Debt, and Risk*, N.Y. TIMES, Oct. 3, 2008, at A1. As a result, “[l]everage of the financial system as a whole was almost surely too high before the crisis. Regulation can force lower leverage. This requires however increasing the perimeter of regulation beyond banks to many other financial institutions.” Blanchard, *supra* note 23, at 29.

28. The Securities and Exchange Commission's regulatory implementation of the Credit Rating Agency Reform Act does “not meet all of the political and market needs contemplated by the CRA Reform Act, as a number of ideas proposed by the SEC . . . were left hanging, and have been re-proposed.” Karmel, *supra* note 25, at 43–44; see also *Do the SEC's New Rating Agency Rules Have Any Bite?*, KNOWLEDGE@WHARTON, Dec. 10,

Exchange Commission (“SEC”) effectively and comprehensively enforce the prescriptions and proscriptions within its mandate?²⁹ Should the SEC be combined (in whole or in part) with the Commodities Futures Trading Commission (“CFTC”)?³⁰

It also will be important to determine the role that the investing public should play in casting and recasting regulation. SEC Commissioner Luis A. Aguilar recently noted his views on this issue.

*[A]s we seek to improve our regulatory process and adopt better rules, I think it is important to provide retail investors with an active voice in our policymaking. In a recent speech to members of the Investment Company Institute, I called for the establishment of an advisory committee consisting primarily of retail investors to provide advice and guidance to the SEC. I strongly believe direct retail investor input would be helpful toward restoring the confidence of retail investors in the SEC. It'll send a powerful message to investors that the SEC is their advocate.*³¹

2008, <http://knowledge.wharton.upenn.edu/article.cfm?articleid=2112>. President Obama's financial reform plan urges further Securities and Exchange Commission regulation of credit rating agencies. See Washington Wire, Obama's Financial Reform Plan: The Condensed Version (June 17, 2009, 24:14 EST), <http://blogs.wsj.com/washwire/2009/06/17/obamas-financial-reform-plan-the-condensed-version/>.

29. See generally Fisch, *supra* note 20, at 788 (“The failures in financial regulation cannot be passed off as the result of a ‘balkanized system.’ If the SEC has failed, it is not because of regulatory gaps, global competition, or the convergence of financial service providers, but a lack of functional effectiveness.”); Norman S. Poser, *Why the SEC Failed: Regulators Against Regulation* 29 (Brooklyn Law Sch., Legal Studies Paper No. 132, 2009), available at <http://ssrn.com/abstract=1348612> (“It appears that, far from monitoring the securities markets and securities industry in order to detect and terminate abusive and illegal practices, the SEC was prompted into action only after investigative financial reporters or state regulators had unearthed them.”). SEC enforcement efforts have been under increasing scrutiny since the onset of the financial crisis, and reforms are already being implemented. See Melissa Klein Aguilar, *Enforcement Under the New SEC Regime*, COMPLIANCE WK., Feb. 24, 2009, <http://www.complianceweek.com/article/5284/enforcement-under-the-new-sec-regime>.

30. See Lawrence A. Cunningham, *The New Federal Corporation Law?*, 77 GEO. WASH. L. REV. 685, 700–01 (2009) (noting and describing the Department of the Treasury's proposal in this regard, nicknamed the *Treasury Blueprint*); Karmel, *supra* note 25, at 44. (“In the view of the author, consolidation of the SEC and the CFTC would lead to better regulation of the markets”); Markham & Harty, *supra* note 14, at 938–39 (outlining steps toward a combination of the SEC and CFTC). President Obama's plan calls for harmonization of the regulatory structures between the two agencies, but stops short of proposing a full combination. FINANCIAL REGULATORY REFORM, *supra* note 24, at 4 (“The Securities and Exchange Commission (SEC) and Commodity Futures Trading Commission (CFTC) would maintain their current responsibilities and authorities as market regulators, though we propose to harmonize the statutory and regulatory frameworks for futures and securities.”).

31. Luis A. Aguilar, Comm'r, Sec. & Exch. Comm'n, Increasing Accountability and Transparency to Investors, Remarks at “The SEC Speaks in 2009” (Feb. 6, 2009) (transcript available at <http://www.sec.gov/news/speech/2009/spch020609laa.htm>). Commissioner Aguilar's point, raised again in a June 2009 presentation at the Compliance Week Annual Conference, is “that the regulatory discussion is not being properly oriented. There is a need to shift the dialogue from the discussion of how best to preserve financial institutions to what is best for investors.” Luis A. Aguilar, Comm'r, Sec. & Exch. Comm'n, Reversing Course—Putting Investors First in Regulatory Reform at “Compliance Week Annual Conference” (June 3, 2009) (transcript available at <http://www.sec.gov/news/speech/2009/spch060309laa.htm>) [hereinafter Reversing Course]. Of course, retail (as opposed to institutional) investors hold of record a small percentage of the securities traded in public markets. See generally Alicia Davis Evans, *A Requiem for the Retail Investor?*, 95 VA. L. REV. 1105, 1105 (2009) (“The American retail investor is dying. In 1950, retail investors owned over 90% of the stock of U.S. corporations. Today,

Possibilities for investor participation in regulation need to be explored. Both Wall Street and Main Street had roles in the creation of the financial crisis, and both are suffering its effects.³² Only with participation by both groups will any positive change hold the promise of being both pervasive and lasting.

A separate set of questions relate to the need for reforms in market regulation. Is new regulation necessary?³³ Do our existing substantive laws and regulation work as well as anything can?³⁴ Do we need more regulation, or can the market provide adequate checks?³⁵ Was the crisis created or fueled by a lack of adequate regulation³⁶

retail investors own less than 30% and represent a very small percentage of U.S. trading volume.” (footnotes omitted)). But the indirect participation of retail investors in public trading markets looms larger and has resulted in a crisis of confidence.

Investors around the country are feeling the pain of this economic crisis—in their retirement nest eggs, their college savings plans and in their brokerage accounts. Any credible effort at regulatory reform has to work for investors, so that they can feel confident in our markets. My objective is to ensure that prioritizing investors is the primary goal of any regulatory reform.

Reversing Course, *supra*. A component piece of Commissioner Aguilar’s vision is the increased regulation of broker-dealers who provide investment advisory services. *Id.*

32. See Eamonn K. Moran, *Wall Street Meets Main Street: Understanding the Financial Crisis*, 13 N.C. BANKING INST. 5 (2009); Ralph Z. Hallow & S.A. Miller, *Main Street Gets Share of Wall Street Blame*, WASH. TIMES, Oct. 5, 2008, at A1; Markos Kaminiis, *Don’t Blame Wall Street—At Least Not Completely*, SEEKINGALPHA, Sept. 29, 2008, <http://seekingalpha.com/article/97879-dont-blame-wall-street-at-least-not-completely>.

33. Yes. See Lawrence A. Cunningham & David Zaring, *The Three of Four Approaches to Financial Regulation: A Cautionary Analysis Against Exuberance in Crisis Response*, 78 GEO. WASH. L. REV. (forthcoming) (manuscript at 1, <http://ssrn.com/abstract=1399204>) (“First the financial markets collapsed, and second came massive government intervention designed to address the collapse. The third part of any financial crisis is reform.”); Schwarcz, *supra* note 11, at 248 (“A threshold question is whether regulatory measures are appropriate. The Article argues they are because, like a tragedy of the commons, market participants have insufficient incentives, absent regulation, to limit risk-taking in order to reduce the systemic danger to others.”). Professors Cunningham and Zaring, however, caution that “[i]n considering what reform should look like, we caution that the headlong rush to do something should not neglect the surprisingly good things about the old system or ignore the considerable reform that has already been achieved by the federal government’s massive and unorthodox response to crisis.” Cunningham & Zaring, *supra*, at 1; see also Fisch, *supra* note 20, at 787 (“Market crises invariably lead to regulatory reform. Indeed, the SEC owes its existence to the stock market crash of 1929 and the subsequent Great Depression.”). *But see* Lo, *supra* note 23, at 2 (“Financial markets do not need more regulation; they need smarter and more effective regulation.”).

34. No. “During the past decade, the SEC made important regulatory changes [deregulation] that weakened the regulatory system and turned out to be a disaster for investors, significantly contributing to the 2008 financial crisis.” Poser, *supra* note 29, at 10. Additionally, “[t]he growth of new financial products that do not easily fit within the regulatory framework and risk analysis applicable to traditional securities, commodities, and insurance policies expands these gaps [in the regulatory system].” Fisch, *supra* note 20, at 787.

35. Many argue it was the era of deregulation that precipitated the crisis. See Hershey H. Friedman & Linda W. Friedman, *The Global Financial Crisis of 2008: What Went Wrong?* 3 (Mar. 9, 2009) (unpublished manuscript, <http://ssrn.com/abstract=1356193>) (stating that Alan Greenspan’s call “‘for less burdensome derivatives regulation, . . . [because the] banks could police themselves’” was wrong). Most commentators in fact assume that more regulation is needed and offer suggestions. See Fisch, *supra* note 20, at 823 (“[A]lthough the precise form of regulatory reform is not critical, the reform efforts must emphasize transparency and enforcement.”); see also Lo, *supra* note 23, at 2 (“With sufficient transparency and knowledge, many of the problems posed by financial excess can be solved by market forces . . . , and such solutions are often more efficient and more effective than government intervention. Facilitating access to information and education should be one of the two primary objectives of regulation.”).

36. Some scholars argue that the problem was self-interest combined with a lack of regulation. See Moran, *supra* note 32, at 94 (“Our financial system was undermined not only by greed and other bad behavior, but by

or human nature?³⁷ What are the limits, in particular, of disclosure regulation as a vehicle for protecting investors and markets?³⁸ Do we need more substantive regulation?³⁹

For example, my own world of scholarship and teaching focuses significantly on securities fraud (including insider trading regulation) under Section 10(b)⁴⁰ of, and Rule 10b-5⁴¹ under, the Securities Exchange Act of 1934, as amended.⁴² Dislocations

an utter lack of checks and balances to curb such destructive forces.”); Friedman & Friedman, *supra* note 35, at 7 (“[The crisis] shows quite clearly what happens when everyone is solely concerned with self-interest. Closely tied to the concept of pursuit of self interest[sic] is the belief that free markets do not need regulation. Many economists and CEOs promoted the belief that capitalism could only work well with very little regulation.”).

37. Andrew Lo points out how human nature exacerbates the problem.

[H]uman behavior . . . is driven not by logic and rationality, but by emotion. For example, fear and greed are among the most powerful of human emotions, and the deep roots of most financial calamities can be traced to these twin forces—greed, which inflates asset bubbles to unsustainable levels, and the fear that ultimately causes the bubble to burst via panic selling.

Lo, *supra* note 23, at 2–3. He also notes that:

[T]here is mounting evidence from cognitive neuroscientists that financial gain affects the same “pleasure centers” of the brain that are activated by certain narcotics. This suggests that prolonged periods of economic growth and prosperity can induce a collective sense of euphoria and complacency among investors that is not unlike the drug-induced stupor of a cocaine addict.

Id. at 17 (footnote omitted).

38. Professor Steven Schwarcz believes that “[t]he complexity of structured transactions undermines the long-held disclosure paradigm.” Steven L. Schwarcz, *Rethinking the Disclosure Paradigm in a World of Complexity*, 2004 U. ILL. L. REV. 1, 36; see also Emiliios Avgouleas, *What Future for Disclosures as a Regulatory Technique? Lessons from the Global Financial Crisis and Beyond* 4 (Mar. 26, 2009) (unpublished manuscript, <http://ssrn.com/abstract=1369004>) (arguing that while disclosure is helpful, its efficacy as a regulatory tool is limited by the ability of people to understand what is disclosed).

39. Scholars wrestle with this issue in a variety of contexts. For example, in an earlier article, I note generally that “alternatives or supplements to disclosure regulation involve the substantive regulation of issuers or investors and enhancements in fraud protection, protection against deception and manipulation that does not rely solely on the accurate and complete public disclosure of available material information.” Joan MacLeod Heminway, *Female Investors and Securities Fraud: Is the Reasonable Investor a Woman?*, 15 WM. & MARY J. WOMEN & L. 291, 331 (2009); see also Susanna Kim Ripken, *The Dangers and Drawbacks of the Disclosure Antidote: Toward a More Substantive Approach to Securities Regulation*, 48 BAYLOR L. REV. 139, 194 (2006) (“Securities regulation that is substantive and that prohibits improper behavior can help revive investor trust.”). Professor Steven Schwarcz proposes that:

[G]overnment regulation should require management to be free of any material conflicts of interest in disclosure-impaired transactions. . . . The rationale for this rule is that, in the face of complexity, investors must rely not only on disclosure, but also on the business judgment of management in setting up complex transactions for the company’s benefit. To that end, the law similarly should focus on, in addition to disclosure, requiring management to be free of conflicts of interest that would affect management’s judgment in those transactions.

Schwarcz, *supra* note 38, at 35–37. In relation to the current financial crisis, Roberta Karmel offers that there are “areas where the SEC, or a combined SEC and CFTC, or some new regulator, should focus with respect to market regulation. These areas are broker-dealer capital adequacy, credit and other OTC derivatives trading, short sales, hedge funds and credit rating agencies (‘CRAs’).” Karmel, *supra* note 25, at 8. Most scholars, however, are not advocating comprehensive substantive changes. See Cunningham & Zaring, *supra* note 33, at 7 (“[O]ur conclusion [is that] incremental regulatory adjustments rather than sweeping regulatory revolution are both superior and more practicable.”).

40. Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (2006).

41. 17 C.F.R. § 240.10b-5 (2009).

42. See, e.g., Heminway, *supra* note 39, at 291 (suggesting that the behavior of women investors more accurately satisfies the concept of the “reasonable investor” applied under Rule 10b-5 than the behavior of male

in financial markets tend to both spawn and expose financial fraud and self-dealing.⁴³ The interconnectedness of national securities markets⁴⁴ in this environment raises comparative law issues.⁴⁵ Even though the U.S. model for securities regulation has been adopted in many countries around the world⁴⁶ (resulting in a convergence of overall regulatory concepts), there are important differences in the substance of that regulation and the supervisory bodies that interpret and enforce that regulation around the world.⁴⁷ Perhaps what we have learned is that genera-

investors); Joan MacLeod Heminway, *Hell Hath No Fury Like an Investor Scorned: Retribution, Deterrence, Restoration, and the Criminalization of Securities Fraud Under Rule 10b-5*, 2 J. BUS. & TECH. L. 3, 4 (2007) (arguing that enforcement of criminal securities fraud law is an ineffective deterrent and should instead focus on victims' rights and restorative justice); Joan MacLeod Heminway, *Martha Stewart Saved! Insider Violations of Rule 10b-5 for Misrepresented or Undisclosed Personal Facts*, 65 MD. L. REV. 380, 382, 432 (2006) (applying the elements of securities fraud to the facts of the *Stewart* case and arguing that it represents a change in the treatment of key corporate executives); Joan MacLeod Heminway, *Materiality Guidance in the Context of Insider Trading: A Call for Action*, 52 AM. U. L. REV. 1131, 1134 (2003) (arguing for greater clarity in insider trading regulation as a means to efficiently prosecute violators more effectively).

43. "Currently, [the FBI is] investigating more than 580 corporate fraud cases. And [the FBI has] more than 1,300 securities fraud cases, including the many Ponzi schemes so prevalent in the news today—from high-profile financiers such as Bernie Madoff to seemingly ordinary individuals from Arizona, Arkansas, Massachusetts, or even Minnesota." Robert S. Mueller, III, Dir., FBI, Address to the Economic Club of New York (June 2, 2009) (transcript available at <http://www.fbi.gov/pressrel/speeches/mueller060209.htm>). An earlier article notes that "U.S. Attorneys . . . are investigating whether Lehman was telling investors that its financial condition was sound at the same time its executives knew the balance sheet was crumbling." Noleen G. Walder, *White-Collar Defense Lawyers Predict a Rash of Criminal Prosecutions over Financial Crisis*, N.Y.L.J., Oct. 9, 2008, at 1, available at <http://www.law.com/jsp/article.jsp?id=1202425138326>. "In June, two former Bear Stearns hedge-fund managers were indicted in New York's Eastern District for allegedly misleading clients about the risk of certain investments." *Id.* Additionally "the FBI ha[s] launched a probe into Fannie Mae and Freddie Mac, AIG and Lehman." *Id.*

44. See, e.g., James D. Cox, *Coping in a Global Marketplace: Survival Strategies for a 75-Year-Old SEC*, 95 VA. L. REV. 941, 943 ("[B]y far the largest shift is the combination of the ubiquity of the Internet and the convention that trading and offerings are global so that markets are increasingly seamless.").

45. Many scholars write on these comparative issues. See, e.g., Jerry W. Markham, *Super-Regulator: A Comparative Analysis of Securities and Derivatives Regulation in the United States, Great Britain, and Japan*, 28 BROOK. J. INT'L L. 319, 319 (2003) ("The Financial Services Authority in the United Kingdom ("FSA-UK") and the Financial Services Agency in Japan ("FSA-Japan") are two agencies of recent vintage with a unified regulatory structure that should provide a basis of comparison with the competitive regulatory approaches of the U.S."); John C. Coffee Jr., *Law and the Market: The Impact of Enforcement*, 156 U. PA. L. REV. 229, 255–84 (2007) (discussing the different enforcement systems used by securities regulators in common and civil law countries).

46. See, e.g., Cox, *supra* note 44, at 943 ("[R]ival markets are converging toward the American reporting and operational practices."); Eric A. Posner, *International Law and the Disaggregated State*, 32 FLA. ST. U. L. REV. 797, 838 (2005) ("[T]he U.S. SEC has persuaded other countries to adopt U.S. securities policies, making it easier for the SEC to enforce American securities law and policy overseas."); Robert Prentice, *Sarbanes-Oxley: The Evidence Regarding the Impact of Sox 404*, 29 CARDOZO L. REV. 703, 757 (2007) ("European and Asian nations have all adopted many important aspects of U.S.-style securities regulation over the last fifteen years.").

47. See Eric Engle, *The EU Means Business: A Survey of Legal Challenges and Opportunities in the New Europe*, 4 DEPAUL BUS. & COM. L.J. 351, 358 (2006) ("The ends of EU securities law look similar to those seen in U.S. securities law, however, the means used to attain those ends are at times different."); Cheryl Nichols, *The Importance of Selective Federal Preemption in the U.S. Securities Regulatory Framework: A Lesson from Canada, Our Neighbor to the North*, 10 CHAP. L. REV. 391, 496 (2006) ("The U.S. and Canada are quite similar in their approaches to the framework for securities regulation; the primary difference is that the U.S. has a single federal regulatory authority, the Commission, to guide policy and to ensure consistency both domestically and

lized convergence is a necessary but insufficient component of effective market regulation in global markets.⁴⁸ These and other observations about securities regulation in the context of the current global financial crisis have helped push me further along in some comparative doctrinal work on insider trading that I started a few years ago.⁴⁹ Suffice it to say that, under existing national insider trading regulation schemes, one country's insider trader may be another country's savvy investor.⁵⁰

In this increasingly global environment, it is important that law scholars and teachers emphasize the need for international legal education⁵¹ and that they individually and collectively reach out to and interact with their counterparts in other parts of the world.⁵² It is also important that we interact with students in other

in the global securities marketplace.”). In March 2009, U.S. Treasury Secretary Tim Geithner advocated collaboration on a global framework for reform. See James Quinn, *G20 Summit: Timothy Geithner Calls for Global Regulation*, TELEGRAPH.CO.UK, Mar. 26, 2009, <http://www.telegraph.co.uk/finance/financetopics/g20-summit/5057267/G20-summit-Timothy-Geithner-calls-for-global-regulation.html>. These sentiments were echoed and extended on the eve of the Pittsburgh summit in September. Rebecca Christie, *Geithner Sees G-20 Consensus, Supports Dollar's Reserve Role*, BLOOMBERG.COM, Sept. 25, 2009, <http://www.bloomberg.com/apps/news?pid=20601087&sid=aOdHXNfRMHZE>; *G20 Focuses on Regulation; Geithner Sees Shared Commitment*, WALL STREET & TECH., Sept. 24, 2009, <http://www.wallstreetandtech.com/regulatory-compliance/showArticle.jhtml?articleID=220200191>.

48. See Eric J. Pan, *The New Internationalization of U.S. Securities Regulation: Improving the Prospects for a Trans-Atlantic Marketplace 2-3* (Cardozo Sch. of Law Jacob Burns Inst. for Adv. Legal Studies Research, Working Paper No. 217, 2008), available at <http://ssrn.com/abstract=1089491> (noting that a decrease in the United States' preeminence as a market has led the SEC to propose and adopt policies of “convergence, harmonization and mutual recognition”). But see Cox, *supra* note 44, at 943 (“[The] differences between U.S. and foreign regimes are slight so that true convergence between them is not necessary to assure investor protection.”).

49. See Joan MacLeod Heminway, *Common Roots, Divergent Evolution: Insider Trading Doctrine in the United States, Japan, and Germany* (Mar. 23, 2009) (unpublished manuscript, on file with author).

50. See *id.* at 21 (noting that neither “tippers” nor “misappropriators” are regulated under Japanese law (citing Franklin A. Gevurtz, *The Globalization of Insider Trading Prohibitions*, 15 TRANSNAT'L LAW. 63, 84-86 (2002))); see also Amir N. Licht, *The Mother of All Path Dependencies Toward a Cross-Cultural Theory of Corporate Governance Systems*, 26 DEL. J. CORP. L. 147, 160-61 (2001) (“[C]ulture is often invoked as a reason for differences between various national regimes of insider trading regulation. . . . [For example, in] Japan and Germany, insider trading has been tolerated for a long time as ‘part of the game’ of securities trading and has not even carried a stigma of being immoral.”).

51. See Claudio Grossman, *Building the World Community: Challenges to Legal Education and the WCL Experience*, 17 AM. U. INT'L L. REV. 815, 818 (2002) (“A profoundly different approach is needed . . . the aim . . . is to push the debate in that direction and explore ways to reconceptualize legal education in accordance with the global transformations currently taking place.”); Stephen C. Hicks, *Global Alternatives in Legal Education for a Global Legal Profession*, 3 PARALLAX: J. INT'L PERSPECTIVES 47 (2006), available at <http://ssrn.com/abstract=981421> (discussing the need for a more global law school experience to prepare students for a global profession); Carl C. Monk, *Working Together: Developing Cooperation in International Legal Education*, 20 PENN ST. INT'L L. REV. 23, 23-24 (2001) (discussing how and why the Association of American Law Schools put together an international conference on global education).

52. See Jon Mills, *The Role of Law Schools in the Development of Inter-American Relations and the Rule of Law, a Discussion by Law School Deans for the Americas*, 13 FLA. J. INT'L L. 114, 114-15 (2000). Mills has cited international exposure for faculty members as an important part of academia because:

When our faculty members go and teach somewhere else, they learn as well. They come back and teach differently than they had taught before, because they are compelled to think differently when they are teaching in another country. The benefit is not only to that faculty member but to his or her

countries and that we encourage our students to do the same.⁵³ To this end, I can be proud of my small-but-globally-active institution. At The University of Tennessee College of Law, we cosponsor (as part of law school consortia) two study abroad programs, one in England⁵⁴ and one in Brazil.⁵⁵ I have taught in the latter program for the past three years. Although most students in my classroom in Rio de Janeiro have been American law students, I have had the privilege of meeting and working with Brazilian faculty, lawyers, and students (some of whom have been full-time students in my course) each year. This past spring, I lectured and taught undergraduate and graduate students at three universities—two in Rio de Janeiro (Universidade do Estado de Rio de Janeiro and Ibmec) and one in São Paulo (Fundação Getulio Vargas—Direito GV). The students were hungry for an American perspective on the financial crisis and cross-border transactions (and the intersection of the two). The exchanges were lively and multidisciplinary. I learned a lot by talking to these Brazilian students.

Of course, my students here in the United States also are curious about many issues surrounding the financial crisis. They all want to know about Bernie Madoff and other purveyors of recently publicized investment Ponzi schemes.⁵⁶ How do these schemes work, and why was the SEC not able to prevent them from existing or expose them earlier?⁵⁷ The students also want to understand why financial insti-

students as well. Among the other benefits of these programs would be the expanded exchange of professors between Latin America and the United States.

Id.; see also European-American Consortium for Legal Education, Mission Statement, http://www.eacle.org/?page_id=27 (last visited June 15, 2009) (“The EACLE partners are convinced that the future of legal education will require greater integration between law faculties across borders, and more frequent exchanges of faculty and students.”).

53. See Louise Harmon & Eileen Kaufman, *Innocents Abroad: Reflections on Summer Abroad Law Programs*, 30 T. JEFFERSON L. REV. 69, 151–56 (2007) (suggesting, among other things, that local law students be incorporated into law school study abroad programs).

54. The University of Mississippi School of Law, Legal Centers & Programs: Cambridge, <http://www.law.olemiss.edu/programs/cambridge/> (last visited Sept. 10, 2009) (noting that the University of Mississippi School of Law’s study abroad program is sponsored with The University of Tennessee College of Law).

55. Georgia State University Summer Legal and Policy Study in Rio de Janeiro, <http://law.gsu.edu/rio/> (last visited Sept. 10, 2009) (indicating that the Georgia State University’s study abroad program is cosponsored by The University of Tennessee College of Law).

56. Cf. Samantha Gross, *Financial Crisis Spurs Student Interest in Economics*, USA TODAY, Nov. 24, 2008, http://www.usatoday.com/news/education/2008-11-24-economics-classes_N.htm. On my spring 2009 Securities Regulation exam, I used a portion of Bernie Madoff’s plea allocation as the fact pattern for a question. See DealBook Blog, *The Text of Madoff’s Plea Allocation* (Mar. 12, 2009), <http://dealbook.blogs.nytimes.com/2009/03/12/the-text-of-madoffs-plea-allocation/>, for a copy of the plea allocation.

57. The recently released Executive Summary of the report of the SEC Inspector General catalogs and characterizes the SEC’s many failures in the Madoff affair. U.S. SEC. & EXCH. COMM’N OFFICE OF INSPECTOR GENERAL, INVESTIGATION OF FAILURE OF THE SEC TO UNCOVER BERNARD MADOFF’S PONZI SCHEME: EXECUTIVE SUMMARY, (2009), available at <http://www.sec.gov/spotlight/secpostmadoffreforms/oig-509-exec-summary.pdf>; see also Diana B. Henriques, *At Madoff Hearing, Lawyers Lay into SEC*, N.Y. TIMES, Feb. 4, 2009, at B1 (stating that the SEC lacked a systematic way of dealing with whistle-blowers and the expertise to handle major fraud cases); Allan Chernoff, *Madoff Whistleblower Blasts SEC*, CNNMONEY, Feb. 4, 2009, http://money.cnn.com/2009/02/04/news/newsmakers/madoff_whistleblower/index.htm (noting that the Ponzi scheme was not discovered by the SEC as a result of internal rivalry and focus on other matters); Ken Prewitt & Tom Keene,

tutions regulated by (among others) the SEC do not have to disclose how they are using federal bailout funds on a current basis.⁵⁸ This question gets us into good discussions about both the efficacy of the current periodic disclosure system in the United States⁵⁹ and the concept of materiality,⁶⁰ both of which are foundational to securities regulation in the United States.⁶¹ And students are curious about the U.S. government's emerging role as an investor in private enterprise.⁶² How does *that* work, and what are the implications for securities regulation and corporate finance?⁶³ And finally, my students want to know whether the global financial crisis

Madoff Failure Shows Oversight 'Flawed,' Levitt Says, BLOOMBERG.COM, Dec. 17, 2008, <http://bloomberg.com/apps/news?pid=20670001&sid=ayaizPhDRBgY> (describing the Ponzi scheme as one in which money from new investors was used to pay off old investors). According to Norman Poser, this failure is part of a larger, more systemic problem.

The fundamental reason for the failures, however, is the anti-regulatory climate, supported by academically generated anti-regulatory theory, that has pervaded government, including the SEC, in the past two or three decades. The SEC's main focus has changed from protecting investors to protecting the companies and investment firms that the SEC was required to regulate.

Poser, *supra* note 29, at 38–39.

58. Cf. Lori Craig, *Debating the Bailout*, USC LAW NEWS & EVENTS, Feb. 27, 2009, <http://law.usc.edu/news/article.cfm?newsID=3241> (demonstrating student sponsorship of a debate over the value of a federal bank bailout). See generally Liz Moyer, *Where's All the TARP Money?*, FORBES, Feb. 5, 2009, http://www.forbes.com/2009/02/04/tarp-treasury-congress-business-beltway_0205_tarp.html (noting that, at the time, only 2 of the 317 TARP recipients "were required to say what they would do with . . . the money").

59. One scholar believes that "[o]ur system of disclosure has serious weaknesses Securities regulation is motivated by the assumption that more information is better than less, but evidence shows that too much disclosure can ultimately be counterproductive to the decision-making process of the individual investor." Ripken, *supra* note 39, at 146–47. See generally *supra* note 39 and accompanying text.

60. See generally *Basic, Inc. v. Levinson*, 485 U.S. 224, 231 (1988) (defining materiality in the context of a securities fraud claim under Rule 10b-5); *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (defining materiality in the context of proxy fraud under Rule 14a-9). In simplest terms, the SEC notes that "[m]ateriality concerns the significance of an item to users of a registrant's financial statements. A matter is 'material' if there is a substantial likelihood that a reasonable person would consider it important." SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45,150 (Aug. 19, 1999).

61. See Ripken, *supra* note 39, at 145 (describing the approach to securities regulation being based on "the long held belief in and preference for disclosure"); see also *United States v. Anderson*, 533 F.3d 623, 629 (8th Cir. 2008) (emphasizing that to constitute insider trading, the information used must be material).

62. Cf. Fred Dingley, *Securities Fraud and Bank Bailouts, Oh My!*, WM. & MARY WOLF L. LIBR. NEWS, <http://law.wm.edu/library/news/securitiesfraud.php> (last visited Sept. 11, 2009) (providing resources to students to enable them to research recent developments in the financial world). A useful summary piece on the government's investment activities in private companies is Davidoff & Zaring, *supra* note 10. Additional information detailing how the U.S. began acting as an investor in the current economic crisis can be found in Josh Zumbun, Liz Moyer, and Brian Wingfield's article, *The Ownership Society*, FORBES, Oct. 14, 2008, http://www.forbes.com/2008/10/14/tarp-paulson-banking-biz-beltway-cx_lm_bw_1014tarp3.html, which notes that "[u]nder the Capital Purchase Program, the Treasury will purchase senior preferred shares in banks. The shares will pay a 5% dividend, and will rank senior in a firm's capital structure to common stock. After five years, the dividend will reset to 9%, if the bank has not repurchased them."

63. See J.W. Verret, *The U.S. Government as Control Shareholder of the Financial and Automotive Sector: Implications and Analysis* 3 (George Mason Law & Econ. Research Paper No. 09-13, 2009), available at <http://ssrn.com/abstract=1348256> (noting that the government's control complicates (1) federal securities class action suits, (2) controlling shareholder fiduciary duties, and (3) insider trading laws). For example, the government's corporate investments have spawned interesting and unusual issues in resulting bankruptcy proceedings. See Todd J. Zywicki, Editorial, *Chrysler and the Rule of Law*, WALL ST. J., May 13, 2009, at A19 ("The Obama administration's behavior in the Chrysler bankruptcy is a profound challenge to the rule of law."); Mark J. Roe

is a sign that our existing system of securities regulation is irretrievably broken, and if so, in what respects and why.⁶⁴

Legal scholars are already playing out some of these themes in their own scholarship and teaching.⁶⁵ Some of these law scholars have worked in or with capital markets, in financial regulation (as lawyers or business professionals), or in the SEC, and most of them are translating that experience into pragmatic scholarship and teaching in securities regulation and corporate finance.⁶⁶ A number are looking at global implications or solutions.⁶⁷ A number are teaching courses that cover in-

& David A. Skeel, *Assessing the Chrysler Bankruptcy* (U. of Penn. Law School, Public Law Research Paper No. 09-17, U. of Penn. Inst. for Law & Econ. Research Paper No. 09-22, Harvard Law and Economics Discussion Paper No. 645, Harvard Public Law Working Paper No. 09-42, 2009), available at <http://ssrn.com/abstract=1426530>; Tiffany Kary & Christopher Scinta, *GM's Main Street Bondholders Would Lose, Lawyer Says*, BLOOMBERG.COM, May 28, 2009, <http://www.bloomberg.com/apps/news?pid=20601009&sid=AAXocPtiYXO> (noting the claim that federal intervention in the Chrysler reorganization treated bondholders illegally); Zach Lowe, *GM and Chrysler: The End of Bankruptcy as We Know It?*, AM. L. DAILY, July 7, 2009, <http://amlawdaily.typepad.com/amlawdaily/2009/07/gm-chrysler-precedent.html> (citing heavy government involvement as the reason that recent expedited bankruptcies have diverted from traditional bankruptcy law); *Supreme Court Asked to Block Chrysler Sale to Fiat*, FOX NEWS, June 7, 2009, <http://www.foxnews.com/politics/2009/06/07/supreme-court-asked-block-chrysler-sale-fiat/> (noting the constitutional challenge to the Treasury Department's use of TARP money to supply Chrysler bankruptcy financing). In addition, after the bailout, the government "overhauled" the boards of directors of AIG and GM. See Martha Graybow, *US Taxpayer to Get Say in GM Board Reshuffle*, REUTERS, June 5, 2009, <http://www.reuters.com/article/ousivMolt/idUUSTRE5545DB20090605>.

64. See generally U.S. GOV'T ACCOUNTABILITY OFFICE, FINANCIAL REGULATION: A FRAMEWORK FOR CRAFTING AND ASSESSING PROPOSALS TO MODERNIZE THE OUTDATED U.S. FINANCIAL REGULATORY SYSTEM (2009), available at <http://www.gao.gov/new.items/d09216.pdf> (describing the limitations and gaps in the current regulatory system and offering ways to evaluate the proposals to address these shortcomings). See also Kara Scannell, *The Madoff Fraud Case: SEC Moves to Fix Its Blind Spots*, WALL ST. J., Mar. 12, 2009, at C3 (describing regulatory changes in response to the Bernie Madoff affair); Brain Baxter, *Se-C Masters of the Universe Weigh in on Economy*, AM. L. DAILY, May 5, 2009, <http://amlawdaily.typepad.com/amlawdaily/2009/05/sc-on-the-economy.html> (quoting H. Rodgin Cohen saying that he is "far from convinced there was something inherently wrong with the system" and "[t]he system will look more like what preceded the current environment than many people seem to believe"); Nicole Gelinias, *To Fix U.S. Finance*, N.Y. POST, Oct. 16, 2008, http://www.nypost.com/seven/10162008/postopinion/opedcolumnists/to_fix_us_finance_133818.htm (critiquing the financial industry bailout as a fix for problems in the U.S. financial regulatory system).

65. See, e.g., sources cited *supra* notes 24-27, 30, 31, 34-39.

66. For example, Roberta S. Karmel, a former SEC Commissioner, is currently a member of the faculty at Brooklyn Law School. Brooklyn Law School, Faculty Roberta S. Karmel, <http://www.brooklaw.edu/faculty/profile/?page=77> (last visited Sept. 12, 2009). For an example of her scholarship, see Karmel, *supra* note 25. As another example, Donald C. Langevoort, a former Special Counsel in the SEC's Office of General Counsel, is now a member of the faculty at Georgetown University. Georgetown Law, Full Time Faculty Donald C. Langevoort, http://law.georgetown.edu/faculty/facinfo/tab_faculty.cfm?Status=faculty&id=279 (last visited Sept. 12, 2009). For an example of his scholarship, see Langevoort, *supra* note 16. Yet another example is Steven L. Schwarcz who formerly represented banks and financial institutions worldwide and is currently a member of the faculty at Duke University. Duke University, Faculty Steven L. Schwarcz, <http://www.law.duke.edu/fac/schwarcz> (last visited Sept. 12, 2009). For examples of his scholarship, see Schwarcz, *supra* notes 11, 23, & 38.

67. See, e.g., Emilius Avgouleas, *The Global Financial Crisis, Behavioural Finance and Financial Regulation: In Search of a New Orthodoxy*, 9 J. CORP. L. STUD. 23, 23-26 (2009) (describing the global implications of the financial crisis and arguing that the lack of a global regulatory system amplified the effect); Langevoort, *supra* note 16, at 192-93 (arguing that overregulation is a political reaction to the financial crisis that will damage U.S. global competition); Pan, *supra* note 48, at 2 (describing the SEC's embrace of European strategies for regulation); HOUMAN B. SHADAB, *Coming Together After the Crisis: The Global Convergence of Private Equity and Hedge Funds*, 29 Nw. J. INT'L L. & BUS. 603, 613 (2009) (arguing that convergence of private equity firms

ternational business transactions and comparative regulatory systems.⁶⁸ The importance of the continuation and expansion of these instructor-student interactions and related efforts at globalization to both our system of securities regulation and our world cannot be understated.

And so, it truly is the best of times and the worst of times. Each of us in the legal academy has an opportunity for excellence that emanates from the current financial crisis. Each law scholar and teacher has an opportunity to inform students and other law academics, as well as national and international policy makers, about aspects of the financial crisis that intersect with his or her knowledge and research.⁶⁹ Each of us has the opportunity to connect, in an engaged manner, law students and faculty in the United States and abroad to the law and legal systems impacting and impacted by the financial crisis.⁷⁰ Those teaching law in public law

and hedge funds will occur in emerging markets due to the investment around the globe in U.S. mortgage-related securities).

68. Emilius Avgouleas teaches "International Financial Services Regulation" and "Corporations in International Business Law." University of Manchester School of Law, Dr. Emilius Avgouleas, http://www.law.manchester.ac.uk/aboutus/staff/emilius_avgouleas/default.html (last visited June 18, 2009). Roberta S. Karmel teaches "Corporations," "Securities Regulation," "European Union Law," "International Securities Regulatory Law Seminar," and "Regulation of Financial Institutions And Markets Seminar" at Brooklyn Law School. Brooklyn Law School, Faculty Roberta S. Karmel, <http://www.brooklaw.edu/faculty/profile/?page=77> (last visited Sept. 12, 2009). Eric Pan teaches "Corporations," "International Finance," and "International Law." Benjamin N. Cardozo School of Law, Profile Eric J. Pan, <http://www.cardozo.yu.edu/MemberContentDisplay.aspx?ccmd=contentDisplay&ucmd=UserDisplay&userid=10534> (last visited Sept. 12, 2009). These are but a few examples.

69. Some consider it an obligation. *E.g.*, Clark Byse, *Walter Gellhorn: Administrative Law Scholar, Teacher, Reformer*, 96 COLUM. L. REV. 589, 594 (1996) ("[A] law teacher serves not only by devoted teaching and research but also by personal concern for the individual human beings who are his students. A law teacher's responsibility extends beyond the boundaries of legal academe to the broader community."). I am reminded at this juncture of the wonderful article that Professor Mae Kuykendall wrote about Earnest Folk a few years ago, in which she (among other things) eloquently articulated Folk's impactful role as a scholar-drafter:

Ernest Folk provides one small possibility, for the professor to find a real place in producing the small improvements some call the "genius of American law," and one successful writer of big theory calls "the extended order." The output would be a mixture of writings and participation. Achieving the mixture of insight, credibility, and emotional elegance is not easy, and being recognized by administrators and your peers is not easy. But it is an honorable calling. In the end you will be forgotten, but so will everyone else (almost, anyway).

Mae Kuykendall, *Reflections on a Corporate Law Draftsman: Ernest L. Folk's Lessons for Writing and Judging Corporate Law*, 35 RUTGERS L.J. 391, 480 (2004). This "mixture of writings and participation" can give more meaning to the role of the law professor and the education of law students. *Id.* at 391, 480.

70. Law is, and lawyers are part of, an increasingly outward-facing and public profession. Michael Jordan, *Law Teachers and the Educational Continuum*, 5 S. CAL. INTERDISC. L.J. 41, 48–51 (1996). The expansive role that lawyers play in establishing and implementing national and international policy should and does impact what we do as law professors. *Id.*; Donald J. Polden, *Educating Law Students for Leadership Roles and Responsibilities*, 39 U. TOL. L. REV. 353, 359 (2008) ("Law schools can and should be educating their students for the leadership roles they will be playing in an increasingly complicated global profession because our communities and societies need greater leadership manifested in business, government, public policy, and in the legal profession.").

It is . . . important to realize that law professors do more than teach students. . . . Thinking like a lawyer, given the changing demands made upon the legal profession, means more than the ability to analyze precedent and spot issues. It means addressing public concerns that may or may not be subject to resolution in the legal system. Thinking in this context is not necessarily a cognitive process

schools may bear a more concrete responsibility to take advantage of these opportunities.⁷¹ Regardless, efforts to capitalize on these opportunities are likely to influence the nature and extent of national and global regulatory reform and the activities and expertise of the next generation of lawyers, policy makers, and law teachers.

governed by certain logical rules, as much as it is the ability to facilitate informed public discussion of issues that illuminate competing values, interests and choices.

This vision of the public profession places it outside of the traditional definition of a profession which focused on mastery of specialized knowledge and providing limited services. Indeed, professionalism is normally associated with a reduction in the ability and desire to foster public debate and searching inquiry into issues of interests to the general public. The alternative expanded public view of the profession casts the lawyer in the role of public intellectual rather than professional. If this is what is meant when reference is now made to the public professional and if the reference necessarily implies certain ways of thinking, then we ought to ask whether this view of thinking and the profession is compatible with the setting in which future lawyers are being trained. Are law schools structured to produce public professional/intellectuals?

These questions go to the heart of what is, will or should be meant when law professors assert that they are training students to think like lawyers

Jordan, *supra*, at 48–51 (footnotes omitted); see also Polden, *supra*, at 359. Meeting the challenges posed by shifts in the roles that lawyers play in the world order will be a difficult, yet worthy, task for law schools and law faculty in the coming years. See Jordan, *supra*, at 74.

The kind of education necessary to solve problems in this context is precisely the opposite of what is supported by the ideology of the university law school. Instead of focusing on rule knowledge, the starting point is realizing that lawyers, in their public capacity, will face complex and fluid social situations. Their analysis of a social problem will not necessarily result in fixed answers or conclusions. Analysis in this context is more analogous to insights which must be tested and revised based upon changing perceptions of what the public desires and values or should desire and value. And, the information acquired and conclusions reached during this process are subject to challenge and are not always empirically verifiable.

Id.

71. See, e.g., Rex R. Perschbacher, *The Public Responsibilities of a Public Law School*, 31 U. Tol. L. Rev. 693, 695–97 (2000) (noting, among other things, an obligation on the part of public law schools to prepare students for democratic leadership, engage legal education with public needs, and be publicly accountable).