FINDING A BETTER DISINFECTANT: SHORTCOMINGS OF MODERN PUBLIC-DISCLOSURE REGULATIONS AS A TOOL FOR DIRECTING CORPORATE BEHAVIOR AND PROTECTING CONSUMERS

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Abstract

Mandated public disclosure of various sorts of information—about companies, about products, about particular transactions—has become an incredibly widespread and popular regulatory tool. Louis Brandeis's aphorism that "sunlight is the best of disinfectants" is all well and good, but this Note argues that mandated disclosure is an ineffective regulatory tool that often fails to achieve regulators' goals, and often invites unintended consequences, sometimes causing the very conduct it is meant to prevent or mitigate. First, this Note examines the changing regulatory paradigm in the United States through the long twentieth century, from the founding of the first federal financial regulatory agencies in the 1860s through the jarring tumult and innovation of the New Deal era and the postwar consensus-based principles of managerial capitalism that emerged from the conditions of the Great Depression and World War II, before coming to focus on the light-handed ideological turn of the "Reagan revolution," which is responsible to a large degree for the current vogue of mandated disclosure rules. The Note then considers some reasons why mandated disclosure regulations are often deficient in achieving the goals of lawmakers and society at large. Several specific examples are examined. Finally, the Note proposes that—in the absence of wholesale legislative reform—the United States might adopt a more supervisory regulatory stance vis-à-vis large corporations. This arrangement would involve close supervision of certain corporate actors by regulatory agencies and confidential disclosures from the regulated companies to the regulatory agencies. Borrowing from the field of international tax policing, such a supervisory arrangement could take on a multi-state dimension, perhaps through the use of harmonizing agreements or formal treaties.

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I. Introduction

Legal scholars, regulators, and practitioners often quote the aphorism that "sunlight is the best disinfectant," as a catch-all way to say that more mandated disclosure is better than less, and that such disclosure is the most effective regulatory tool. But these people do not get the aphorism exactly right. Louis Brandeis actually wrote, "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[1] This suggests that the "sunlight" of mandated public disclosure is not enough to improve corporate behavior, keep consumers safe, protect the soundness of financial markets, or achieve many of the goals set by regulators. What is needed is that added "electric light"—the throwing on of a particular switch—which comes from the active intervention of regulators. This Note will argue that over the course of the twentieth century, regulation of corporate activity, particularly in the United States, moved from an interventionist model, which prohibits certain actions by corporate actors and looking out for a multitude of stakeholders,[2] toward a much more light-handed regulatory model, based primarily on mandated public disclosure.[3] That ideological shift was partly brought about by the *types* of people running American corporations and directing American policy.[4] This

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[1] LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (Augustus M. Kelly 1971) (1914).

[2] ROBERT TEITELMAN, BLOODSPORT: WHEN RUTHLESS DEALMAKERS, SHREWD IDEOLOGUES, AND BRAWLING LAWYERS TOPPLED THE CORPORATE ESTABLISHMENT 18 (2016) (discussing a consensus from the New Deal through the immediate post-War period that "corporations were run for stakeholders—workers, shareholders, customers, communities—which effectively put managers, overseen by the government, in control").

[3] *See* Michael Moran, *The Rise of the Regulatory State*, *in* THE OXFORD HANDBOOK OF BUSINESS AND GOVERNMENT 383, 390 (2010) ("Although [ideological shifts toward softer regulation] date mostly from the 'Reagan revolution,' some of their origins lie in the 1970s: the landmark deregulation of airlines, and of financial services, for instance, was well under way by the time that decade ended."). *See also* Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 652 (2011) ("Mandated disclosure is now a standard—one might almost say favored—weapon in the arsenals of legislatures, courts, administrative agencies, and commentators.").

[4] *See* Daniel Markovits, *How McKenzie Destroyed the Middle Class*, THE ATLANTIC (Feb. 3, 2020, 6:30 AM), https://www.theatlantic.com/ideas/archive/2020/02/how-mckinsey-destroyed-middle-class/605878/ (concluding that over the past few decades, corporate leaders have come to embrace profit

Note highlights a number of times when mandated public disclosure regimes did not achieve their intended effect, or, indeed achieved the opposite of the desired effect.[5] The optimal path toward improving corporate social responsibility might be wholesale legislative reform to revert U.S. regulatory agencies back toward a more interventionist paradigm, but such a program would be complex, difficult, and practically impossible. In light of these considerations, one solution to improve corporate behavior and protect consumers could be coordinated cooperation among regulators at an international level, working directly with regulated entities through more extensive *private* disclosures. Some scholars have shown how such a framework has been effective in helping to curb tax avoidance by multinational corporations.[6] Such a framework also would borrow from the supervisory model used to regulate banks and other large financial institutions.[7]

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maximization as the epitome of all business activity, instead of merely "a salutary side effect of running their businesses well"); *see also* MICHAEL MACCOBY, THE GAMESMAN: THE NEW CORPORATE LEADERS 76–85 (1976) (offering typologies such as the "jungle fighter" and the "empire builder" to characterize contemporary business executives). On the influence of such voices in government, see Kate Andrias, *Separation of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419, 422 (2015) (discussing the range of strategies employed by large corporations and wealthy individuals in order to influence the regulatory political process and achieve sought-for policy outcomes).

[5] As in, *e.g.*, the precipitous rate at which executive compensation has climbed *since* the Securities and Exchange Commission implemented a fulsome regime of mandated disclosures on executive compensation. Lawrence Mishel & Julia Wolfe, *CEO Compensation Has Grown 940% Since 1978*, ECON. POL'Y INST. (Aug. 14, 2019) (showing, in Figure A, that the rate at which executive compensation at large American corporations has grown has only accelerated since the early 1990s, when the SEC's comprehensive disclosure regulations were introduced).

[6] Ruth Mason, *The Transformation of International Tax*, 114 AM. J. INT'L L. 353, 370 (2020) (showing how the G20 / OECD Base Erosion and Profit Shifting Project has led to a conceptual shift in the way countries work together to tax multinational corporations, as well as a broader acceptance of the "full taxation" principle, *i.e.*, the idea that all of a corporation's income should be taxed).

[7] *See* Alfred Dennis Mathewson, *From Confidential Supervision to Market Discipline: The Role of Disclosure in the Regulation of Commercial Banks*, 11 J. CORP. L. 139, 140–41 (1986) (discussing the "paternalistic approach" traditionally taken by bank regulatory agencies in actively monitoring and overseeing—confidentially—the operations of depository institutions).

Private disclosures from firms to regulators working in concert could foster productive dialogue between regulators and industry, and could overcome some of the problems that currently hamper the effectiveness of public disclosure, such as information overload for consumers.[8] Until the political will can be mustered for a reevaluation of our regulatory means and ends, and the corresponding legislative reform, international cooperation between regulators could be a useful tactic for harmonizing various areas of regulation, and creating a regulatory "race to the top" instead of a "race to the bottom."

Part II of this Note begins by sketching a historical overview of regulation of commercial activity in the United States at the federal level. This historical introduction shows how the country moved from a period of comfort and familiarity with command-and-control regulation that substantively limited and directed corporate activity in several sectors of the economy, through a period of broad consensus in the immediate postwar era. This latter era is synonymous with an arrangement now sometimes called "managerial capitalism," in which corporate executives managed their companies with a stewardship ethos and government control was ascendant. Finally, the country moved to deregulation in the 1970s and 1980s, heralded by the rise of a light-handed regulatory regime based primarily on mandated disclosure. Part III then examines the reasons for the failures of this regulatory regime, first in the abstract, definitional and conceptual sense, and then with concrete examples. Part IV offers substantive policy recommendations for supplementing and moving past the disclosure-based regime in the absence of wholesale legislative reform. These reforms include using agencies' existing authority to more directly supervise large firms and a push toward international harmonization of corporate regulation, borrowing from the world of international tax. Concerns about legitimating these reforms in the absence of sweeping congressional action will be addressed. Part V then provides a brief summation and conclusion.

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[8] Luca Enriques & Sergio Gilotta, *Disclosure and Financial Market Regulation* 5 (European Corp. Governance Inst., Working Paper No. 252/2014, 2014) (emphasizing that "the incapacity of the individual investor to 'handle' large amounts of information" hampers the effectiveness of mandated disclosure rules as a regulatory tool).

II. The Changing Regulatory Paradigm in the Twentieth Century

To some critics, both academic and popular, the "administrative state" is a phenomenon born of the Great Depression,[9] still casting its long shadow over us today, which ought to be dismantled.[10] But in fact, the United States had a strong bureaucracy at the federal level long before the New Deal era of the 1930s, and a panoply of areas in American life were regulated at the federal level.[11] We will be concerned here primarily with the regulation of financial institutions and the commercial activities of large corporations. In order to understand how the United States ended up with its current regulatory paradigm, and how regulatory strategies have shifted over the twentieth century,

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[9] *See* Mariano-Florentino Cuéllar, Margaret Levi & Barry R. Weingast, *Twentieth-Century America as a Developing Country: Conflict, Institutions, and the Evolution of Public Law*, 57 HARV. J. ON LEGIS. 25, 29 (2020) (suggesting that the 1930s were a "pivotal moment" for public law and administration in the United States, but that many "institutional changes" important for the modern administrative state "matured only in the succeeding years of World War II and the Cold War").

[10] Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994) ("The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.") (footnotes omitted); Alasdair Roberts, *Should We Defend the Administrative State?*, 80 PUB. ADMIN. REV. 391, 391 (2020) (discussing the positive reaction from attendees at the 2017 Conservative Political Action Conference to the statement by then-White House strategist Stephen K. Bannon that a top priority of the Trump Administration was the "deconstruction of the administrative state"); Jonathan Turley, Opinion, *The Rise of the Fourth Branch*, WASH. POST, May 26, 2013, at B1, B5 (arguing that federal bureaucrats have come to dominate the policymaking process in the United States, at the expense of Congress, and concluding that we "cannot long protect liberty if our leaders continue to act like mere bystanders to the work of government").

[11] DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940 1 n.2 (2014) (countering the argument that "Americans lacked a state in the nineteenth century or had only a 'weak' one," and emphasizing that in the nineteenth century, Americans used national bureaucracies "not simply to deliver the mail, collect customs, distribute public land, and administer veterans' pensions, but also to pursue seemingly unrelated policies, such as regulating sexuality"); *see generally* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996) (discussing the areas of American life that were subject to national regulation in the nineteenth century).

it is important to examine the genesis of federal regulation of commercial activity, especially since one scholar has argued that the patterns and methods of American regulation have not changed since the Great Depression.[12]

A. Setting the Scene: American Regulation of Business Activity Before the Great Depression

During the Civil War, as the use of paper money and the demand for credit grew, "the first of today's large business regulators," the Office of the Comptroller of the Currency (OCC), "was born."[13] The National Bank Act, which created the OCC in 1864,[14] had the effect of grafting a federal system of bank regulation onto the confused warren of state bank regulatory regimes, with different mechanisms in each state for issuing bank charters, different capital requirements, and different powers of inspection.[15] This arrangement hamstrung the OCC to a significant degree, because the organizers of a new bank often could obtain a state charter, even if the OCC had declined to issue a federal charter.[16] In the roughly half-century between the creation of the OCC and the founding of the Federal Reserve in 1914, "a dual banking system developed because one set of rules was easier than the other," and by 1907, "state banks outnumbered national banks by nearly two to one, and resources of state banks were about the same as those of national banks."[17]

The federal-state dichotomy in bank chartering regimes made effective regulation of financial institutions in the late nineteenth and

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[12] Lawson, *supra* note 10, at 1232 ("The post-New Deal conception of the national government has not changed one iota, nor even been a serious subject of discussion, since the Revolution of 1937.").

[13] Rory Van Loo, *Regulatory Monitors: Policing Firms in the Compliance Era*, 119 COLUM. L. REV. 369, 384–85 (2019).

[14] National Bank Act of 1864, ch. 106, § 1, 13 Stat. 99 (codified as amended at various sections of 12 U.S.C.).

[15] ROSS M. ROBERTSON, THE COMPTROLLER AND BANK SUPERVISION: A HISTORICAL APPRAISAL 21–25 (1968).

[16] Eugene N. White, *Lessons from the History of Bank Examination and Supervision in the United States, 1863–2008*, *in* FINANCIAL MARKET REGULATION IN THE WAKE OF FINANCIAL CRISES: THE HISTORICAL EXPERIENCE 15, 19 (Alfredo Gigliobianco & Gianni Toniolo eds., 2009) (discussing the boost to "free entry" in the banking arena given by states' comparatively lax chartering requirements).

[17] ROBERTSON, *supra* note 15, at 66.

early twentieth centuries difficult, and bank failures remained common during this period.[18] The OCC is nonetheless an important touchstone in the history of the country's regulation of business activity because of the statutory authority the OCC possessed (and possesses) and the way it influenced the development of other independent regulatory agencies.[19] The OCC conducted surprise examinations of each national bank at least twice annually; the agency could write rules; and its examiners "had the authority to enter any room, open any drawer, and look at any document."[20] In extreme instances, the OCC could revoke a national bank's charter if the bank was found to be out of compliance with federal banking laws—a power little used, but always hanging like a Sword of Damocles over the heads of national banks' officers and directors.[21]

But the OCC could not regulate the conduct of the many state banks or the "trusts" that were growing precipitously through consolidation at the close of the nineteenth century.[22] Although Congress passed the Sherman Antitrust Act in 1890,[23] courts quickly indicated

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[18] *See id.* at 67–68 ("Data on new-bank formation between 1891 and 1900 suggests at first inspection that Comptrollers Lacey and Eckels may have been more strict in their approval policy [than their predecessors in the 1870s and 1880s had been]. Yet the decade of the 1890s was one of times; there were perhaps 1,000 bank failures during those 10 years, and investors were probably deterred by the accumulated bank investment of the 1880s.").

[19] *See* Van Loo, *supra* note 13, at 387–88 (discussing how the OCC's "early visitorial authority" would set an example for other monitoring-focused agencies such as the FAA and the FCC).

[20] *Id.* at 385–86 (discussing the powers vested in the OCC by the National Bank Act of 1864).

[21] *Id.* at 385 ("Its chief sanction was revoking a bank's national charter, a seldom-used option given the OCC's need to *prevent* bank closings.").

[22] ROBERTSON, *supra* note 15, at 66 ("And whereas state banks and trust companies frequently had wide latitude in purchasing the stocks of banks and other corporations, national banks were barred from such activity."); *and see* Naomi R. Lamoreaux, *Industrial Organization and Market Behavior: The Great Merger Movement in American Industry*, 40 J. ECON. HIST. 169, 169 (1980) ("Between 1898 and 1902 an immense wave of merger activity swept the United States economy. Unlike anything before or since, the movement affected most sectors of manufacturing as, in industry after industry, firms united to form horizontal consolidations which controlled major shares of the markets in which they operated.").

[23] Sherman Antitrust Act of 1890, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1–7 (2019)).

that consolidations would be not be held to be violative of the act.[24] This wave of consolidation led to a "shift from competitive to oligopolistic forms of organization" in American industry,[25] which in turn provoked the ire of multiple strata of the country's population.[26]

In his 1902 State of the Union address, Theodore Roosevelt emphasized the need for Congress to pass new legislation that would allow the federal government to positively regulate the conduct of the newly ascendant large corporations, and to curb the evils attendant on "the progress of our gigantic industrial development"[27]:

> A fundamental base of civilization is the inviolability of property; but this is in nowise consistent with the right of society to regulate the exercise of the artificial powers which it confers upon the owners of property, under the name of corporate franchisees, in such a way as to prevent the misuse of these powers. Corporations, and especially combinations of corporations, should be managed under public regulation. Experience has shown that under our system of government the necessary supervision cannot be obtained by State action. It must therefore be achieved by national action …. We are not hostile to [corporations]; we are

[24] Lamoreaux, *supra* note 22, at 170 ("Court decisions indicated that consolidations would not be held in violation of the Sherman Antitrust Act.").
[25] *Id.* at 171.
[26] Moran, *supra* note 3, at 386 ("[Populism] arose out of the stresses and problems imposed on small business rural America by the momentous changes of the second half of the [nineteenth] century, and was a reaction against the figures and institutions that seemed to be behind, and to benefit from, those changes: the new plutocracy represented in the public mind by the 'Robber Barons'; the giant corporations that seemed to be able to control, rather than be controlled by, markets; the new centers of finance, and their perceived ability to control the terms on which small entrepreneurs could get credit."). Though the populism of the 1890s had its genesis in rural parts of the country, the coeval Progressive Movement "was a kind of 'twin' of Populism … which had enduring roots in the professional classes being created in the newly urbanizing America." *Id.* at 387.
[27] Theodore Roosevelt, President of the U.S., Second Annual Message to Congress (Dec. 2, 1902), *in* THEODORE ROOSEVELT AND REFORM POLITICS 3, 4 (Richard H. Collin ed., 1972).

> merely determined that they shall be so handled as to subserve the public good.[28]

Roosevelt expressed these ideas even more forcefully in a speech to business leaders at the Union League Club of Philadelphia in 1905:

> Unquestionably the great development of industrialism means that there must be an increase in the supervision exercised by the Government over business enterprises.
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> …
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> Neither this people nor any other free people will permanently tolerate the use of the vast power conferred by vast wealth, and especially by wealth in its corporate form, without lodging somewhere in the Government the still higher power of seeing that this power, in addition to being used in the interest of the individual or individuals possessing it, is also used for and not against the interests of the people as a whole.[29]

Roosevelt suggested that the federal government had to step in and regulate the conduct of large businesses (railroads in particular) so that "the conscientious man" would not be "put at a disadvantage by his less scrupulous fellows" in "the sharp competition of the business world."[30] The federal government must direct and guide business conduct so as "to require from … less scrupulous [large corporations] as well, that heed to the public welfare which [more scrupulous businesses] would willingly give."[31]

The furor over the increasing power of large combinations of corporations, railroads in particular, led Congress to pass the Hepburn Act in 1906,[32] which greatly expanded the jurisdiction of the Interstate Commerce Commission by allowing it to set mandated maximum

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28 *Id.* at 4–5.

29 Theodore Roosevelt, President of the U.S., Speech to the Union League Club of Philadelphia (Jan. 30, 1905), *in* THEODORE ROOSEVELT AND REFORM POLITICS, *supra* note 27, at 7, 7–8.

30 *Id.* at 9.

31 *Id.*

32 Hepburn Act of 1906, Pub. L. No. 59–337, 34 Stat. 584 (repealed by the ICC Termination Act, Pub. L. No. 104–88, 109 Stat. 803 (1995)).

railroad and shipping rates, review rates alleged to be unreasonable, and gave its decisions the force of law in most cases.[33]

Taking over after the comparatively conservative Taft Administration, President Wilson in his first inaugural address lamented the state of the country as he found it, and itemized a list of "things that ought to be altered," among which some of the "chief items" were:

> A tariff which cuts us off from our proper part in the commerce of the world, violates the just principles of taxation, and makes the Government a facile instrument in the hand of private interests; a banking and currency system based upon the necessity of the Government to sell its bonds fifty years ago and perfectly adapted to concentrating cash and restricting credits; [and] an industrial system which, take it on all its sides, financial as well as administrative, holds capital in leading strings, restricts the liberties and limits the opportunities of labor, and exploits without renewing or conserving the natural resources of the country.[34]

Wilson's attitude echoed that of many Americans of this era, who felt that the growing trusts and corporate amalgamations were "mysterious mutations, the consequences of some evil tampering with the natural order of things" that were "not merely economic freaks but also sinister new political forces" that "had to be opposed in the name of American democracy."[35] This view was given eloquent and vigorous expression by Louis D. Brandeis, who from 1912 to 1916 served as President Wilson's chief economic adviser.[36] Brandeis "embodied the popular revolt against the sudden domination of the nation's economic life by big business," and "exemplified the anti-bigness ethic without which there would have been no Sherman Act, no antitrust

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[33] Bruce Wyman, *Rise of the Interstate Commerce Commission*, 24 YALE L.J. 529, 535–37 (1915) (discussing the augmentation of the ICC's jurisdiction and regulatory powers under the Hepburn Act).

[34] Woodrow Wilson, President of the U.S., First Inaugural Address (Mar. 4, 1913) (transcript available at the Yale Law School Avalon Project, https://avalon.law.yale.edu/20th_century/wilson1.asp).

[35] THOMAS K. MCCRAW, PROPHETS OF REGULATION 78 (1984).

[36] *See id.* at 82 ("Brandeis served from 1912 until 1916 as Woodrow Wilson's chief economic advisor.").

movement, and no Federal Trade Commission."[37] While advising Wilson's presidential campaign, Brandeis developed a program on the regulation of competition, and suggested a "constructive policy" under which the federal government would undertake to positively regulate the conduct of American businesses in all branches of industry:

> The issue is not (as it is usually stated by the advocates of monopoly), Shall we have unrestricted competition or regulated monopoly? It is, Shall we have regulated competition or regulated monopoly?
>
> Regulation is essential to the preservation and development of competition, just as it is necessary to the preservation and best development of liberty. We have long curbed physically the strong, to protect those physically weaker. More recently we have extended such prohibitions to business. We have restricted theoretical freedom of contract by factory laws. The liberty of the merchant and manufacturer to lie in trade, expressed in the fine phrase of *caveat emptor*, is yielding to the better conceptions of business ethics, before pure food laws and postal-fraud prosecutions. Similarly the right to competition must be limited in order to preserve it.
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> ….
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> It is asserted that to persist in the disintegration of existing unlawful trusts is to pursue a policy of destruction. No statement could be more misleading. Progress demands that we remove the obstacles in the path of progress; and private monopoly is the most serious obstacle.[38]

In an article that appeared in *Harper's Weekly* in January 1914, Brandeis declared stridently, "We must break the Money Trust or the Money Trust will break us."[39] For a brief moment, it seemed that the federal government might actually set about "break[ing] the Money Trust" when President Wilson signed the Federal Trade Com-

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[37] *Id.*

[38] Louis D. Brandeis, *Shall We Abandon the Policy of Competition?*, 18 CASE & COMMENT 491, 494–95 (1912).

[39] BRANDEIS, *supra* note 1, at 201.

mission Act into law in September 1914.[40] Brandeis was considered a leading architect of the Federal Trade Commission (FTC),[41] but even with his guidance, the FTC was "troubled in infancy," not least of all by the exigencies imposed by the First World War, and "never found a coherent mission for itself."[42] The country's increasing prosperity and international preeminence, and the Wilson Administration's focus on foreign affairs in the years immediately after World War I, also pushed domestic concerns about business regulation to the side.[43] Through the prosperity of the 1920s, "the nation's preoccupation with the underside of business practice disappeared from view, to remain out of sight until the next emergence of general economic adversity."[44]

B. The Broad Consensus from the New Deal to the Postwar Era

As discussed above, many commentators, both critics and defenders of the modern American regulatory paradigm, locate its genesis in the Great Depression and the New Deal policies of President Franklin Roosevelt.[45] Certainly, "The Great Crash of 1929, and the ensuing Great Depression, reignited [the Progressive Era's] tradition of suspicion of business, and especially of big business identified

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[40] *See* Federal Trade Commission Act, Pub. L. No. 63–203, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41–58 (1938)) (endowing the FTC with the authority to investigate antitrust violations).
[41] MCCRAW, *supra* note 35, at 82 ("The most influential critic of trusts during his generation, Brandeis … was regarded as one of the architects of the FTC.").
[42] *Id.* at 81.
[43] *See* Cuéllar et al., *supra* note 9, at 31–32 (discussing the "delicate juncture" at which the United States found itself after World War I and the divisions among political leaders regarding the nation's proper role in the world and the ideal relationship between business, labor, and government).
[44] MCCRAW, *supra* note 35, at 143.
[45] Lawson, *supra* note 10, at 1232 ("The post-New Deal conception of the national government has not changed one iota, nor even been a serious subject of discussion, since the Revolution of 1937."); Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 52 (2017) ("FDR's election and enactment of the broad regulatory statutes of the New Deal thus was not a sudden move to administrative government, but it did represent a significant intensification.").

with the 'money trusts' of Wall Street."[46] The New Deal "is a powerful symbol for a new relationship between government, business, and society, and a key development in the American regulatory state," but the meaning of the New Deal, and the meaning of the relationships it established between business, labor, consumers, and the national government, continue to be contested.[47] Since one of this Note's main contentions is that Professor Lawson's suggestion that the American regulatory paradigm has not changed "one iota" since the "Revolution of 1937"[48] is incorrect, and that the current regulatory paradigm does an inadequate job of achieving its goals, it will be prudent to sketch out the contours of the regulatory institutions created by the New Deal.

1. Interventionism, Regulation for Stakeholders, and the Institutions and Norms Created by the New Deal

In his first inaugural address, President Franklin Roosevelt empathized with those who were experiencing hardship and economic dislocation because of the Depression, declaring, "This Nation asks for action, and action now."[49] Roosevelt emphasized his philosophy that the federal government should be actively involved in regulating and directing the current of financial and commercial activity; the "money changers," he said, "have fled from their high seats in the temple of our civilization. We may now restore that temple to the ancient truths. The measure of the restoration lies in the extent to which we apply social values more noble than mere monetary profit."[50]

Roosevelt set about in order pressing Congress to pass—and signing into law all the legislation that Congress invariably did pass—a whole raft of new measures that intervened directly in many sectors

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[46] Moran, *supra* note 3, at 387.
[47] *Id.* (advancing this thesis and discussing the "distinctively American way of ordering the relations between government and business" that came out of the New Deal era).
[48] Lawson, *supra* note 10, at 1232.
[49] Franklin Delano Roosevelt, President of the United States, First Inaugural Address (Mar. 4, 1933) (transcript available at the Yale Law School Avalon Project, https://avalon.law.yale.edu/20th_century/froos1.asp).
[50] *Id.*

of the nation's economy.[51] Some of these enactments were initially cheered by big business interests, such as the modification of the Volstead Act in order to allow the manufacture and sale of beer and "light wine."[52] Big businesses also cheered the passage of some early measures, such as the National Industrial Recovery Act,[53] because it suspended some antitrust laws and created "industry-wide councils" that were staffed by "both public and private representatives" to draft "codes of fair competition" following plans for "industrial self-government" endorsed by the U.S. Chamber of Commerce.[54]

Big business's support for the Roosevelt Administration's recovery plans "soon began to sour, largely in response to growing protections for labor, expanding governmental economic regulation, and higher taxes."[55] Congress passed the "sweeping" Agriculture Adjustment Act,[56] which restricted the planting and sale of certain crops, gave subsidies to farmers, offered relief for farm mortgages by allowing for government-backed refinancing, and bolstered the value of bank loans to agriculture by stabilizing the currency.[57] The Emergency Conserva-

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[51] ROBERT F. BURK, THE CORPORATE STATE AND THE BROKER STATE: THE DU PONTS AND AMERICANS NATIONAL POLITICS, 1925–1940, at 110–12 (discussing the raft of legislation passed and new policies devised during the Roosevelt Administration's first months in office).

[52] *Id.* at 110, 107 (commenting on the passage of the modification to the Volstead Act, and discussing Prohibition repeal in general, which was "the immediate policy focus of the [du Pont family]" in the early 1930s).

[53] National Industrial Recovery Act of 1933, Pub. L. No. 73–67, 48 Stat. 195 (1933) (*invalidated by* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)).

[54] BURK, *supra* note 51, at 112 (discussing the mechanics of the National Recovery Administration created by the National industrial Recovery Act and the support this agency garnered from the du Pont family and other industryalists); *and see* Metzger, *supra* note 45, at 52–53 (discussing in similar terms the early and tentative support given to New Deal legislation by big business interests).

[55] Metzger, *supra* note 45, at 53.

[56] Agricultural Adjustment Act of 1933, Pub. L. No. 73–10, 48 Stat. 31 (1933), *invalidated by* United States v. Butler, 297 U.S. 1 (1936).

[57] BURK, *supra* note 51, at 110–11 (discussing the provisions of the Agricultural Adjustment Act); *see also* Franklin D. Roosevelt, President of the U.S., Statement on Signing the Farm Relief Bill (May 12, 1933) (transcript available at the University of California Santa Barbara American Presidency Project, https://www.presidency.ucsb.edu/node/208139) (discussing the mortgage-refinancing provisions of the Agricultural Adjustment Act).

tion Work Act[58] created the agency that would eventually become the Civilian Conservation Corps, designed to help reduce unemployment by putting people to work on publicly funded conservation and reclamation projects.[59] The Federal Emergency Relief Act provided grants of federal money to the states to provide people with direct unemployment payments.[60] Congress also passed legislation to consolidate railroad management under a "national coordinator of transportation," and to regulate railroad holding companies at the federal level.[61]

In 1935, the Public Utility Holding Company Act (PUHCA)[62] required public utilities to register with the Securities and Exchange Commission (SEC), and gave the SEC the authority to force the companies to divest themselves of their holdings "until they became a single integrated system serving a limited geographic area."[63] PUHCA's registration requirements required public utilities to disclose to the SEC all of the details of the financial structure of the holding company, the holding company's balance sheets and other financial information, and the provisions of any contracts for materials or services made by the holding company.[64] Holding companies registered with the SEC also had to provide "explanations of any bonus and profit sharing arrangements."[65] Although these requirements are disclosure-

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[58] Emergency Conservation Work Act of 1933, Pub. L. No. 73–5, 48 Stat. 22 (1933), *repealed by* Labor-Federal Security Appropriations Act of 1943, Pub. L. No. 77–647, 56 Stat. 562, 569 (1942) (providing for the liquidation of the Civilian Conservation Corps).

[59] *See* BURK, *supra* note 51, at 111 (discussing the establishment of the Civilian Conservation Corps).

[60] *Id.* ("Roosevelt asked … for legislative approval to provide additional grants of federal moneys to the states for direct unemployment relief via the Federal Emergency Relief Act.").

[61] *Id.*

[62] Public Utility Holding Company Act of 1935, Pub. L. No. 74–333, 49 Stat. 803 (1935), *repealed by* Energy Policy Act of 2005, Pub. L. No. 109–58, 119 Stat. 594 (2005).

[63] ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY, DOE/EIA-0563, PUBLIC UTILITY HOLDING COMPANY ACT OF 1935: 1935–1992, at 9 (1993) [hereinafter PUHCA 1993 REPORT]; *see also* MCCRAW, *supra* note 35, at 151 (discussing the "rigorous investigation of public utilities" undertaken by the FTC during the 1920s, which helped provide the impetus for passing the Public Utility Holding Company Act).

[64] PUHCA 1993 REPORT, *supra* note 63, at 9 (listing the SEC requirements regarding financial structure).

[65] *Id.* (explaining that "[t]hese provisions entailed a meticulous accounting of the holding companies' total business operation").

based, and bear a resemblance to some of the disclosure requirements to be discussed *infra*, they were coupled with strong "command and control" provisions that: public utility holding companies could not issue securities without approval from the SEC, and could not sell them through their officers or employees; holding companies could not acquire securities of other utilities without prior approval from the SEC; operating companies were forbidden from making "loans" to their central holding company; and holding companies were allowed to provide only engineering and managerial services to their operating companies, and any such services had to be performed at cost.[66] These provisions forced the conduct of holding companies registered under the act into a straight and narrow channel and prohibited the worst abuses that had made regulation of public utilities necessary in the first place. The act also "provided that needless complexities in corporate structure be eliminated and that the voting power be fairly distributed among the security holders," and holding companies regulated under the act were "confined solely to conducting business which was necessary and appropriate for the operation of a single integrated utility."[67]

Labor law is another area in which the legislative and institutional exertions of the New Deal brought about long-lasting changes in economic relations between the business owners, workers, and the government.[68] Section 7(a) of the National Industrial Recovery Act provided that "employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers … in self-organization or in other concerted activities for the purpose of collective bargaining."[69] But because this guarantee was not backed up by

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[66] *Id.* at 9–10 (summarizing the operative provisions of PUHCA).
[67] *Id.* at 11 ("While in theory the holding company structure was retained, virtually all of the existing holding companies were eventually forced into radical reorganization.").
[68] *See* Cuéllar et al., *supra* note 9, at 45 ("[T]he [National Labor Relations Act] dramatically lowered the stakes for firms. It narrowed considerably the legitimate range of bargaining between labor and business, focusing on wages and conditions. The legislation removed labor's threat to business management and firm capital, such as demands for representation on corporate boards or for a role in management. Moreover, by making non-violence a criterion for recognition by the [National Labor Relations Board], the NLRA also prevented unauthorized strikes, helping unions control their more radical and extreme elements who favored goals beyond wages and benefits.").
[69] National Industrial Recovery Act of 1933 § 7(a), Pub. L. No. 73–67, 48 Stat. 195, 198 (1933) (stating the conditions that must be contained in "[e]very code

any enforcement powers, it initially "proved to be little more than a basis for union sloganeering."[70] It was not until the passage of the National Labor Relations Act (NLRA)[71] that labor unions and employees' right to bargain collectively was affirmatively recognized by the federal government; the act defined a number of anti-union practices as "unfair labor practices" and made them illegal, and it provided "an enforcement mechanism to make the private sector take these codes seriously."[72] The National Labor Relations Board (NLRB), as constituted under the NLRA, was modeled along the lines of a "full blown, full fledged judicial agency like the Federal Trade Commission."[73] The NLRB was given subpoena power to compel testimony and the production of records at its hearings; after a hearing on a complaint, the board could issue a cease and desist order, as well as such other "affirmative action" as the board deemed necessary; and the board's findings of fact were to be treated as "conclusive" in any further judicial review as long as they were "supported by evidence."[74] Additionally, under the NLRA, the board could bring an enforcement action "either in the judicial circuit in which the unfair labor practice occurred *or* in any circuit in which the violator 'resides or transacts business'"; this allowed the NLRB to go "forum shopping" for the

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of fair competition, agreement, and license approved, prescribed, or issued under" the statute).

[70] Joseph L. Rauh Jr., *Lawyers and the Legislation of the Early New Deal*, 96 HARV. L. REV. 947, 952 (1983) (reviewing PETER H. IRONS, THE NEW DEAL LAWYERS (1982)) (stating that although one legislator "wanted a law with strong enforcement powers to revive a depressed and debilitated labor movement[,]" § 7(a) of NIRA did not accomplish that result).

[71] National Labor Relations Act of 1935, Pub. L. No. 74–198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–69) ("Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption").

[72] Cuéllar et al., *supra* note 9, at 45 (stating that the NLRA "legitimized unions, allowing labor organization to form, grow, and advance workers' interests"); *see also* PETER H. IRONS, THE NEW DEAL LAWYERS 228–30 (1982) (listing the "unfair labor practices" made illegal by the NLRA and detailing the act's enforcement mechanism).

[73] IRONS, *supra* note 72, at 228 (stating that "on receiving a charge that 'any person' had committed an unfair labor practice … the Board was authorized to issue a complaint and to set a time and place for a hearing on the charges").

[74] *Id.* (stating that the subpoena power of the Board made it "[u]nlike its predecessors").

most sympathetic judges in cases against large employers with business operations in multiple judicial circuits.[75]

Above and beyond all of these particular legislative enactments and the particular branches of the national economy that were affected by New Deal policy, "[t]he New Deal also established a highly distinctive *mode* of regulation that has ever since deeply shaped the relations between business, the state, and the wider political system."[76] The passage of the Administrative Procedure Act[77] "greatly strengthened legalistic proceduralism" and created a unique regulatory culture in which lawyers were preeminent and "adversarial argument between opposing parties" emerged as the main "means of determining outcomes."[78]

2. "Traditional" American Corporate Leadership and Social Responsibility

The wholesale changes in business–government relations occasioned by the Great Depression, New Deal programs, and the post–World War II wave of prosperity, brought about a "transformation" of large corporations in the United States, and heralded an age of what has come to be called "managerial capitalism," which persisted well into the 1960s.[79] It was clear to contemporary observers that "the type of capitalism existing in America [in 1959] is substantially

[75] *Id.* at 229 (discussing "the Board's litigation flexibility").
[76] Moran, *supra* note 3, at 388 ("The most important feature of this mode is the dominance of the law and of legal argument.").
[77] Administrative Procedure Act of 1946, Pub. L. No. 79–404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 500–96).
[78] Moran, *supra* note 3, at 388 ("Lawyers emerged as the key features on negotiating the relationship between the new regulatory state and American business.").
[79] BRIAN CHEFFINS, THE PUBLIC COMPANY TRANSFORMED 1–3 (Oxford U. Press, 2019) (discussing the conditions that gave corporate executives a great deal of discretion and control in running their enterprises in the years immediately following the Second World War, and also the "external forces" which tended to temper the exercise of this discretion). Economists and historians generally use the term "managerialism" to refer to "any theory of the corporation that presents the corporation as a hierarchical entity run by managers with loyalties running chiefly to the corporation rather than shareholders." Harwell Wells, *Corporation Law Is Dead: Heroic Managerialism, Legal Change, and the Puzzle of Corporation Law at the Height of the American Century*, 15 U. PA. J. BUS. L. 305, 310 (2013).

different from that existing in America in the year 1900."[80] Intellectuals and academics in the postwar period debated whether American businesses were changing the way they operated because of a change in public sentiment and the mores of executives, or because of structural changes to the institution of private property and the separation of corporate ownership and control.[81] Questions about who the public corporation was meant to serve, and how, were "submerged … in the warm glow of consensus" during the 1950s and '60s, so that from our perspective, the answers are not always easy to untangle.[82]

It seems uncontroversial to say, however, that as corporations grew and the national economy grew with them, and as more people came to take part in the newly regulated securities markets in the wake of the New Deal reforms, "founder-owners" of many large corporations "surrendered control to a broader diversified shareholder base." Thus, in the immediate postwar period, "[t]he primary movers within corporations shifted from 'owners,' the shareholders, to managers, those most deeply involved in operations."[83] "As a result, managers developed a degree of independence from shareholders; they felt that the company was theirs, and they acted autonomously" to balance their own interests, and the interests of several other constituencies, with the

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[80] Robert V. Eagley, *American Capitalism: A Transformation?*, 33 BUS. HIST. REV. 549, 549 (1959) (that "examining the whole of the American economy as an institutional structure" is the second of these two changes in the "literature concerning the nature of … American capitalism"); *see generally* RUSSELL W. DAVENPORT, U.S.A.: THE PERMANENT REVOLUTION (1951) (expressing the view that the transformation in American capitalism between 1900 and 1950 had been brought about largely by a change in public sentiment about large business interests, and a concomitant change in the mores of business leaders).

[81] *See* Eagley, *supra* note 80, at 565–66 (providing, on the one hand, the view that American corporations had transformed themselves fundamentally between 1900 and 1950 because of changing mores and morality, and, on the other hand, propounding the view that the increasing "sense of social responsibility" displayed by American corporations in the immediate postwar period was due to the greater separation of corporate ownership and control, leading managers to try to balance a panoply of interests, rather than focusing on shareholder value exclusively).

[82] TEITELMAN, *supra* note 2, at 18 ("[T]he '50s and '60s [were] decades of enormous growth and prosperity.").

[83] *Id.* ("This is the message that has sifted down through the decades. Over the years it gradually dovetailed with other, often contentious ideas … nearly all of them beginning with the snake in the garden: the separation of ownership and control.").

interests of the shareholders.[84] In spite of the risk that corporate managers might act in a "manner that was contrary to the interests of stockholders and others closely affiliated with companies," "[m]anagerial wrongdoing was in fact rare during the middle decades of the twentieth century, with executives refraining for the most part from taking a freewheeling approach with the discretion available to them."[85] Managerial discretion was hemmed in partially because in most industries in the immediate postwar era, "organized labor was a powerful force," so that "collective bargaining functioned as a significant constraint for management," and, furthermore, "governmental action, or the threat thereof, impinged upon executive discretion in various significant ways."[86] Most salient for our discussion, the postwar age of managerial capitalism was also an era of "regulated capitalism."[87]

It probably does not discount the importance of regulatory and structural changes too much to say that the particular postwar consensus in American capitalism, under which corporations were "run for stakeholders—workers, shareholders, customers, communities,"[88] was brought about in part by a change in public opinion about large businesses and concomitant changes in the mores of business leaders.[89] Public intellectuals and business leaders who wrote on the subject during the immediate postwar era were adamant in suggesting that the whole American free market system could be justified only if it produced positive results for a whole range of stakeholders, and that private ownership and control of large corporations could only be supported if "conducive to the general welfare by advancing progress, promoting a high standard of living, contributing to economic justice, etc."[90] Some observers suggested that such statements, which we might

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[84] *Id.* (going so far as to suggest that some managers acted "plutocratically" and "entrenched themselves").
[85] CHEFFINS, *supra* note 79, at 3.
[86] *Id.*
[87] DAVID M. KOTZ, THE RISE AND FALL OF NEOLIBERAL CAPITALISM 6 (2015) ("We regard the period of regulated capitalism as starting roughly in the late 1940s and continuing until the late 1970s, while neoliberal capitalism runs from the early 1980s to the present.").
[88] TEITELMAN, *supra* note 2, at 18.
[89] *See* KOTZ, *supra* note 87, at 45 (suggesting that, by the 1950s and '60s, government regulation of economic activity was widely accepted, and "the very term 'capitalism' had largely disappeared from public discourse, replaced by 'mixed economy.'").
[90] HOWARD R. BOWEN, SOCIAL RESPONSIBILITIES OF THE BUSINESSMAN 5 (University of Iowa Press ed. 2013) (1953).

see as the first nascent expressions of what we now call "corporate social responsibility," were an embrace of Max Weber's Protestant ethic.[91] However, it seems there were numerous pragmatic and prudential reasons for American business leaders in the years immediately following World War II to embrace Keynesian economic ideas, governmental regulation of wide swaths of commercial activity, and collective bargaining by strong labor unions.[92] Managers and executives of America's largest corporations embraced Keynesian economic policies and substantial state regulation of important industries because they feared that, with the end of the war, inflation, economic instability, and possible depression might return without government intervention.[93] Furthermore, in several key industrial sectors, the federal government maintained a system of "managed competition," in which regulators significantly directed businesses' conduct and influenced pricing; the "[b]arriers to entry that resulted reinforced market power that 'first movers' were already enjoying due to their own efforts to bolster their production, distribution, marketing, and managerial capabilities."[94]

Whatever the exact causes that gave rise to the consensus-based model of corporate activity that prevailed in the United States in the postwar period may be, it seems uncontroversial to conclude that in the middle of the twentieth century, publicly traded corporations in the United States were run "for stakeholders—workers, shareholders, customers, communities," with managers "overseen by the government[] in control."[95] Executives tended to view profits "as a salutary side

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[91] *See* BOWEN, *supra* note 90, at 31–43 (discussing Protestant conceptions of the social responsibilities of the business leader); Eagley, *supra* note 80, at 551 (discussing Weber's view that the business leader was "imbued with the Protestant ethic, attempting to reform the world according to God's plan" and suggesting that such a moral commitment on the part of American business leaders might be a partial cause of the "transformation" of American capitalism between 1900 and 1950).

[92] *See* KOTZ, *supra* note 87, at 50–62 (discussing the reasons why the majority of large American corporations—and the trade groups representing business executives—came to support signal features of "regulated capitalism" in the years after World War II, such a Keynesian macroeconomic policy and strong trade unions).

[93] KOTZ, *supra* note 87, at 59 ("There was widespread fear, including among big companies, that once the war conditions ended, the depression would return. Most of big business decided a big federal government could stabilize the economy and prevent are turn of depression.").

[94] CHEFFINS, *supra* note 79, at 42.

[95] TEITELMAN, *supra* note 2, at 18.

effect of running their business well" rather than a single-minded goal to be pursued in preference to all others.[96] Directors and executives "viewed themselves as stewards or trustees charged with guiding a vital social and economic institution in the interests of a wide range of beneficiaries."[97] Government participation and extensive regulation of economic activity played important roles in creating these comparatively benign conditions: "Defense spending effectively sponsored many industries, which operated less in an environment of fierce competition than as part of 'administered economy,'" and "[o]ther industries, including railroads, airlines, finance, and energy production, were so heavily regulated that competition there, too, was muted at best."[98] Indeed, at the height of the managerial era, contemporary social historian Frederick Lewis Allen concluded that "the big and successful corporation" was "severely circumscribed by government."[99] Regulators of this era "pursued policies that were designed to foster orderly growth along familiar, predictable lines," and these regulatory schemes acted as an effective check on managerial discretion, so that "[e]xecutives in the regulated industries tended to become increasingly averse to risk, which would have discouraged freewheeling managerial gambles that could end up as scandals if things went awry."[100] Furthermore, regulatory agencies were watchful and not shy to act, so that "concerns that additional unwelcome state intervention could be forthcoming provided executives with incentives to stay on the straight and narrow."[101]

Given these conditions, it is no surprise that business leaders, economists, and lawmakers all seemed to agree in the postwar period that there had been "real progress" since the depths of the Great Depression, at least in the sense that postwar American capitalism did not closely resemble American capitalism at the turn of the twentieth century. It was also well settled that the "economic benefits of capital-

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[96] Markovits, *supra* note 4 (discussing the ways in which neoliberal economic ideas and firms' increasing reliance on outside management consultants have changed corporate values in favor of short-term profits and the idea of shareholder primacy).

[97] Lynn A. Stout, *On the Rise of Shareholder Primacy, Signs of Its Fall, and the Return of Managerialism (in the Closet)*, 36 SEATTLE U. L. REV. 1169, 1171 (2013).

[98] Wells, *supra* note 79, at 318.

[99] CHEFFINS, *supra* note 79, at 93 (quoting FREDERICK LEWIS ALLEN, THE BIG CHANGE: AMERICA TRANSFORMS ITSELF 1900–1950, at 239 (1952)).

[100] *Id.* (citation omitted).

[101] *Id.*

ism" were and ought to be "widely shared among most, if not all, of the population," so that the "old free-market economic theories" were "relegated to the proverbial dustbin of history."[102]

C. The Light-Handed Ideological Turn of the 1970s and the "Reagan Revolution"

Perhaps inevitably, a change was on the horizon, and ideas that many American universities in the 1960s considered "relevant only in courses in the history of economic thought" began to reassert themselves.[103] This resurgence began in academia, most prominently in the economics department of the University of Chicago. At first, "[t]he sudden emergence and rapid spread of new versions of free-market economic theory were startling and inexplicable to many leading economists," but "[b]y the end of the 1970s, the new free-market theories, increasingly advocated by younger academic economists, were pushing the established Keynesian orthodoxy aside."[104] Legal scholars picked up on the work of the economists, and their theories found broad acceptance among lawmakers and business leaders, leading in the latter part of the 1970s to a swift and precipitous "shift in theory, law, and practice" that "dismantled the consensus-based management practices of the mid-twentieth century, replacing them with a much narrower focus on short-term fluctuations in share price and out-sized bonuses for the executives who engineer share price increases."[105] This shift

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[102] KOTZ, *supra* note 87, at 45 (examining the emergence of in capitalism in the 1930s and 1940s and how that lead to neoliberal capitalism).
[103] *Id.* For a fuller discussion of the academic and historical context surrounding the resurgence of classical economic ideas in the 1970s, and the attendant changes in corporation law and the theory of corporate governance, see CHEFFINS, *supra* note 79, at 101–54 (discussing, in a chapter entitled, "The 1970s: Managerial Capitalism Sustained … But 'Something Happened,'" how a series of prominent managerial failures and corporate scandals, as well as the general erosion of the public's trust in governmental institutions, contributed to an atmosphere that, by the late 1970s, put managerial capitalism "decidedly on the back foot").
[104] KOTZ, *supra* note 87, at 45. The University of Chicago's economics department, under free-market champion Milton Friedman, "did not join in the Keynesian revolution but stuck with the earlier dominant economic ideas. The term 'Chicago School' economics came to mean free-market economic ideas and theories." *Id.* at 45 n.1.
[105] William K. Black & June Carbone, *Economic Ideology and the Rise of the Firm as a Criminal Enterprise*, 49 AKRON L. REV. 371, 372 (2016).

happened quickly—in the space of half a decade—in large part because big businesses supported the new neoliberal ideas, forming a "new alliance with small business," which "created an overwhelmingly powerful force that was able to rapidly install the neoliberal form of capitalism."[106]

Large corporations perhaps were so quick to embrace such neoliberal ideas and to push for a lighter regulatory stance from the U.S. government because by the 1970s, their managers, executives, and directors, "were no longer the cautious organization men shaped by the Depression and World War II."[107] Executives increasingly began managing large conglomerates, "pieced together from businesses with little obvious connection," and the "[m]anagers of these transitory assemblages did not resemble the corporate statesmen of the previous decades, and their specialty was fluid financial acumen" rather than any particular conception of stewardship.[108] These executives "felt less constrained by bureaucratic regularities," (and presumably by the ethos of stewardship which such regularities bred) and "were more eager to shake things up" both "inside corporations and without."[109] Contemporary observers noticed the change in the tenor of corporate leadership as well. In the mid-1970s, it was discovered that several large public companies made improper bribes to foreign governments in return for entry to new markets and other preferential treatment. A legal scholar commenting on responses to these scandals observed that part of the "dysfunction" revealed by the scandals was "a recurring management style—over-zealous, action-oriented, and characterized by a remarkably low level of risk aversion."[110] Anthropologist Michael Maccoby published a study of roughly 250 executives from twelve large American corporations in the mid-1970s and concluded that eleven of the executives fit a typology he called "the

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[106] KOTZ, *supra* note 87, at 46.
[107] Black & Carbone, *supra* note 105, at 389.
[108] Wells, *supra* note 79, at 353.
[109] Black & Carbone, *supra* note 105, at 389.
[110] John C. Coffee, Jr., *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 63 VA. L. REV. 1099, 1103 (1977). For a fuller recapitulation of the allegations of corporate misconduct and improper payments that came to light in the mid-1970s, see *id.* at 1102 n.3, 1104 n.10 (cataloging some of the instances of misconduct by large American corporations that came to light in the mid-1970s, ranging from improper payments to foreign governments to violations of the Bank Secrecy Act and "garden variety antitrust and tax law violations").

jungle fighter." Such people are "entrepreneur[s]" and "empire builder[s]," who are generally distrustful of others, "wily," and ambitious.[111] The most common typology Maccoby identified among American corporate leaders of the 1970s was a type he called "the gamesman."[112] Such a person is defined by "flexibility, individuality, and risk-taking"; gamesmen often "rebel against bureaucratic hierarchy" and are "compulsively driven to succeed."[113] Notably, Maccoby concluded, "[i]n the organizational world of the 1950's, the gamesman was too independent and irreverent to reach the top of the largest corporations," but by the mid-1970s, the characteristic traits of the gamesman fit the needs of modern American businesses rather well.[114]

This change in the tenor of American corporate leadership was met by an auspicious combination of economic conditions and shifting public opinion about the role of government institutions.[115] The economy faltered at the start of the decade, and conditions were not improved by the oil crisis of 1973–74 or the attendant rampant inflation. Unemployment rose and measures taken to hem in inflation did very little to ameliorate the unemployment situation.[116] The general mood was one of sour cynicism, and as faith in government institutions faltered so did Americans' faith in the largest corporations and

[111] MACCOBY, *supra* note 4, at 15, 76, 80.
[112] *Id.* at 98–99.
[113] *Id.* at 100.
[114] *Id.* at 99.
[115] *See* CHEFFINS, *supra* note 79, at 109–10 (discussing the economic challenges facing American corporations from the beginning of the 1970s onward, and the swell of criticism of corporate managers that began to build in the middle of the decade); JUDITH STEIN, PIVOTAL DECADE: HOW THE UNITED STATES TRADED FACTORIES FOR FINANCE IN THE SEVENTIES 176–80 (2010) (discussing the fractured response by Congress and the Carter Administration to the recession of 1974–75, which culminated in the passage of a business-friendly tax reform bill); Wells, *supra* note 79, at 352 ("Waning faith in corporate management—in managers generally—is so clear across the 1960s as almost not to require elaboration. A broad disaffection with giant institutions was one of the hallmarks of protests that had become widespread by mid-decade, not only shown by lack of faith in corporations but also in a reaction against the other giant institutions valorized in the 1950s.").
[116] *See* KOTZ, *supra* note 87, at 63–66 (summarizing the harsh economic conditions that prevailed in the United States throughout most of the 1970s, and concluding that "[c]ontractionary policy slowed inflation but at the cost of very high unemployment").

the abilities of their managers.[117] Perhaps somewhat paradoxically, these views might have given a boost to economists and legal scholars who hoped to refashion corporate law with a narrower focus on shareholder profits and to undo some of the "burdensome" regulations that they believed were imperiling the continued health of American corporations.[118] Economists and legal scholars were quick to embrace neoliberal conceptions of the corporation that tied measures of its performance to its stock price (in contrast to the consensus-based managerial approach that dominated the 1950s) in large part because "[p]rofit maximization is a precise standard," whereas "[e]valuating how well corporate managers balance interests or serve the corporation's long term interests, on the other hand, is a more difficult undertaking that may be impossible to quantify."[119] To scholars, then, "shareholder primacy provided an elegant and seemingly scientific explanation of corporations that fit nicely into the law and economics methodology" that was beginning to dominate legal academia by the late 1970s and early 1980s.[120] The paradoxical consequence of this intellectual shift is that the clear-cut metrics of the neoliberal view of the corporation dovetailed nicely with calls from progressive reformers such as Ralph Nader for greater corporate accountability and transparency.[121] There was thus a sort of "perfect storm" that made people

117 CHEFFINS, *supra* note 79, at 105 ("Polling data confirmed the public's disillusionment with large corporations in the 1970s. The proportion of Americans with 'a great deal of confidence' in major companies fell from 55 percent in 1966 to 30 percent in 1973 and to 16 percent in September 1974, rallied somewhat and then fell back to 18 percent in early 1979. Those who believed that business tried to strike a fair balance between profits and the public interest declined from 70 percent in 1968 to 32 percent in 1972, 19 percent in 1974, and 15 percent in 1976 and 1977 before rallying modestly to 19 percent in 1979. Similarly, as of 1978, 56 percent of the American public adjudged 'big businessmen' to be 'generally immoral and unethical.'") (citations omitted).

118 *See id.* (discussing the work of Michael Jensen and William Meckling, management professors who "identified burdensome regulation rather than falling stock prices or antipathy toward business as the potentially fatal threat to the public company" and who achieved notoriety among corporate law scholars by being the first to describe the modern firm as "a nexus for contracting relationships").

119 Black & Carbone, *supra* note 105, at 392.

120 Stout, *supra* note 97, at 1174.

121 *See* CHEFFINS, *supra* note 79, at 110 (discussing the work of Ralph Nader, Mark Green, and Joel Seligman, "three of the most vocal and prominent 'advocates for reform'" during the 1970s, and their book TAMING THE GIANT

and institutions ready to accept neoliberal ideas and regulatory reform: "The rise of economists and economics helped legitimate the deregulation movement, which produced liberalizing reforms in industries like telecommunications, airlines, and financial services." This led to experiments with "soft" regulation, such as market-style permitting and licensing mechanisms and self-regulatory bodies for particular industries.[122]

It was also in the late 1970s that the Efficient Market Hypothesis (EMH) began to receive trenchant support from economists and legal academics.[123] Briefly stated, the EMH postulates that public securities markets "impound available information into stock prices fast enough that arbitrage opportunities cannot be exploited systematically," and a stock's price rationally reflects the company's value.[124] This theory's wide acceptance among economists and legal scholars with neoliberal or deregulatory bents perhaps points toward one reason why mandated disclosure has become a "favored" regulatory tool.[125] If markets are efficient because they quickly "price in" all publicly available information, then they will be made even more efficient—or at

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CORPORATION (1976), which called for reduced managerial discretion, greater transparency of internal decision-making processes, and strengthened accountability for executives and directors generally).

[122] Moran, *supra* note 3, at 389.

[123] *See* Donald C. Langevoort, *Theories, Assumptions, and Securities Regulation: Market Efficiency Revisited*, 140 U. PA. L. REV. 851, 852–53 (1992) (discussing the statistical tests done in the 1960s and '70s by finance theorist Eugene Fama that underpinned the Efficient Market Hypothesis, and collecting various academic articles voicing strong support for the Efficient Market Hypothesis). In 1978, economist Michael C. Jensen declared that "there is no other proposition in economics which has more solid empirical evidence supporting it than the Efficient Market Hypothesis." *Id.* (quoting Michael C. Jensen, *Some Anomalous Evidence Regarding Market Efficiency*, 6 J. FIN. ECON. 95, 95 (1978)).

[124] *Id.* at 851 (discussing and defining the central tenets of the EMH). For a fuller discussion of the EMH and the various ways it has influenced legal thought and doctrine, see Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549 (1984) (examining how the EMH influenced new developments in business law, securities regulation, how the theory came to be accepted in judicial decisions, and how it influenced the day-to-day practice of law).

[125] Ben-Shahar & Schneider, *supra* note 3, at 652 (describing mandated disclosure as a "standard" if not "favored" regulatory tool).

least not hindered—by the mandated public disclosure of even more information.[126]

The SEC accepted the EMH and used it as the intellectual basis for a planned simplification and "integration" of the mandatory disclosure requirements under the Securities Act of 1933 and the Securities Exchange Act of 1934 that it undertook beginning in 1982.[127] The SEC at this time was "heavily influenced by the Carter administration's deregulation philosophy,"[128] and this attitude would only grow more pronounced during Ronald Regan's presidency.[129] Reagan began his presidency promising to "get government off people's backs."[130] His Administration shunned what Michael Moran has termed "command and control" regulation in favor of more "soft" regulation that was oriented toward free-market mechanisms—including mandated public disclosure.[131] This is a regulatory paradigm that, to a large degree, we are still living with today.[132]

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[126] *See, e.g.*, Daniel R. Fischel, *Use of Modern Finance Theory in Securities Fraud Cases Involving Actively Traded Securities*, 38 BUS. LAW. 1, 3–5 (1982) (arguing that although the aim of regulation is to "ensure that all relevant information is equally available to everyone entering the investment markets," informed investors are "no better off with more disclosure nor worse off with less disclosure" when markets are already efficient).

[127] Langevoort, *supra* note 123, at 873–76 (discussing the SEC's implementation of a three-tiered, so-called "integrated" disclosure system, that required less fulsome disclosure from established and frequently traded companies, and which was based, at least rhetorically, on the EMH). The dubiousness of the assumptions underlying the EMH, and the role this weakness has in the systemic failure of disclosure-based regulatory efforts, will be discussed further *infra* Part III.

[128] *Id.* at 875.

[129] *See* CHEFFINS, *supra* note 79, at 177, 181 (discussing the generally "hands-off" and deregulatory approach taken by the SEC during the Reagan Administration).

[130] *Id.* at 175.

[131] *See id.* at 197 ("Admiration for entrepreneurial proclivities was growing as the 1980s began. Ronald Reagan was attuned to this change of sentiment and his administration correspondingly advocated policies designed to foster economic growth through the reduction of governmental interference with business.") (internal footnote omitted).

[132] *See* Moran, *supra* note 3, at 390 ("Every president since Reagan has at some period of office announced a temporary standstill on the making of regulations, usually expressed in the language of relieving the 'burden' of regulation on business …. Every president since the start of the 1980s has

III. The Failure of the Disclosure-Based Regulatory Regime

Although disclosure-based regulations remain popular with lawmakers, trenchant criticisms of mandated disclosure are not difficult to find in the academic literature.[133] This Note will draw on these critiques to explicate systemic reasons why disclosure-based regulations fail to achieve their goals, before moving on to specific examples of disclosure-based regulations that have fallen well short of regulators' intentions.

A. Systemic Reasons for the Failure of Disclose-Based Regulations

Professors Omri Ben-Shahar and Carl E. Schneider have made what is probably the most seminal and comprehensive study of the reasons why mandated disclosure rules are so often deficient as regulatory tools.[134] This section largely recapitulates their findings. First, mandated disclosure often fails because the person to whom information is disclosed may not be able to understand, interpret, and act on the information.[135] Mandatory disclosure regimes meant to improve

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talked the language of the 'burden' of regulation on business, of deregulation, and of 'soft' regulatory initiatives.").

133 *See*, *e.g.*, Ben-Shahar & Schneider, *supra* note 3 (providing both theoretical reasoning and empirical evidence to suggest the failure of mandated disclosure); Florencia Marotta-Wurgler, *Even* More than You Wanted to Know *About the Failures of Disclosure*, 11 JERUSALEM REV. LEGAL STUD. 63 (2015) (offering new evidence that supports Ben-Shahar and Schneider's theory); Frederick Schauer, *The Mixed Blessings of Financial Transparency*, 31 YALE J. ON REG. 809 (2014) (arguing that the costs of pursuing transparency in the financial systems exceeds its benefits).

134 *See generally* Ben-Shahar & Schneider, *supra* note 3 (discussing why mandated disclosure is in most cases an inefficient and ineffective regulatory tool). Ben-Shahar and Schneider's article provides a useful and detailed analysis of types of mandated disclosure not covered in this Note, such as informed consent in the practice of medicine and the common law of mandated disclosure in the law of contract. *See id.* at 655–57, 657–58.

135 *See* Caroline Bradley, *Transparency is the New Opacity: Constructing Financial Regulation after the Crisis*, 1 AM. U. BUS. L. REV. 7, 27 (2011) ("Consumer advocates recognize that consumers' ability to make good financial choices may be hampered by information overload, and consumers are far more likely to feel they need to make personal financial choices than

corporate behavior (such as fulsome executive compensation disclosure requirements or supply-chain transparency requirements) often fail because corporations, unlike people, do not possess morality or a sense of shame or embarrassment.[136] Finally, and most importantly for the purposes of this Note, there are definitional reasons why disclosure-based regulations fail in their aims: by their nature, such regulations do not reach the substance of the conduct to be regulated and leave too much to the discretion of the regulated entity.[137] These stumbling blocks to effective regulation will be considered in turn.

1. Consumer-Side Infirmities of Mandated Disclosure Regulations: The Problem of Information Overload

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that they need to wrestle with the details of financial regulation. Information overload tends to impede real communication about standards.") (internal footnote omitted); Noga Blickstein Shchory, *Information Asymmetries in E-Commerce: The Challenge of Credence Qualities*, 20 J. HIGH TECH. L. 1, 4 (2020) ("With the growth of information, scholars in the fields of sociology, organization theory, psychology, business management, and others have recognized the information overload effect that magnifies the difficulty of processing information and thence arriving at a decision. Terms such as information overload, data smog, information glut, infobesity, and intoxication have proliferated both in scholarly and popular writing.") (internal footnote omitted).

[136] *See* Lawrence E. Mitchell & Theresa A. Gabaldon, *If I Only Had a Heart: Or, How Can We Identify Corporate Morality*, 76 TUL. L. REV. 1645, 1664 (concluding that the only way for interests of beneficiaries who are not shareholders to be factored into corporate decision making is "by way of required compliance with laws having to do with pollution control, civil rights, and the like," and "these laws may operate at a level permitting a great deal of conduct to go unregulated"). The authors also conclude that corporate morality is an impossibility, because full moral development cannot take place inside external constraints, and the corporate structure is by definition highly constraining: "There are the constraints of internal competition, constraints of pleasing the boss, and, perhaps most importantly in contemporary times, the constraint of stock price maximization," so that, in the final analysis, "while corporate actors, of course, have all sorts of moral experiences, they do not generally have the moral experience of the decisions they make in the corporate context." *Id.* at 1665.

[137] *See* Ben-Shahar & Schneider, *supra* note 3, at 681 ("Mandated disclosure may constrain unfettered rapacity and counteracts caveat emptor, but the intervention is soft and leaves everything substantive alone: prices, quality, entry.").

In theory, mandated disclosure in the context of consumer transactions (buying and selling goods and services or financial products, for example) should "force[] sellers to compete on the information disclosed," and provide "a superior alternative to measures that might distort markets or reduce choice."[138] But in practice, "[n]obody reads fine print—even when it matters."[139] In the first instance, the party to whom a mandated disclosure is made (Ben-Shahar and Schneider call this person "the disclosee") may not acquire the disclosed information at all, because "they do not know that it exists, where it is, or how to find it," and potential disclosees "often doubt that they need [the disclosed information] or that it would justify its acquisition costs."[140] Companies may go to significant lengths to make the disclosed information difficult to obtain, such as using "browserwrap" end user license agreements, which require a customer to click a hyperlink to read the contractual language on the seller's website, or by concealing the terms of a contract until after the sale, in so-called "pay now, terms later" agreements.[141]

Even if a disclosee goes to the trouble of finding and obtaining the disclosed information, disclosure documents are often quite lengthy and "[such] documents are infamously a farrago of tortured language, serpentine sentences, tiny print, and irrelevancies." A disclosee may not wish to read through the disclosed information, or may not be able to understand or usefully interpret it.[142] This is where the twin, perennial problems of illiteracy and innumeracy come into focus: disclosures often use language "similar in complexity to that [found] in corporate annual reports, legal contracts, and the professional medical literature."[143] According to one analysis, only three or four percent of the American population can understand the language in which legal

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[138] Marotta-Wurgler, *supra* note 133.
[139] *Id.*
[140] Ben-Shahar & Schneider, *supra* note 3, at 709.
[141] Marotta-Wurgler, *supra* note 133, at 66–67 (summarizing the findings of a study on disclosure accessibility and categorizing end use license agreements into three main types: "clickwraps," which require a user to click on an "I Agree" button before continuing; "browserwraps," which require a user to follow a hyperlink to find the contractual language somewhere on the seller's website; and "pay now, terms later" agreements, which are only made available to the user after the product in question is purchased).
[142] Ben-Shahar & Schneider, *supra* note 3, at 710.
[143] *Id.* at 712 (quoting Peter Breese *et al.*, Letter, *The Health Insurance Portability and Accountability Act and the Informed Consent Process*, 141 ANNALS INTERNAL MED. 897, 897 (2004)).

contracts are drafted.[144] "Rates of innumeracy are worse than rates of illiteracy," which makes it unsurprising that people are often unable to correctly apply numerical information (for example, information about the risk of a particular medical procedure or the interest rate of a particular financial product) when presented with this information in disclosures.[145] Attempts to present the complex information required in mandated disclosures in a simple manner, so as to overcome the hurdles of functional illiteracy and innumeracy, have shown only "modest" success.[146] For example, an experimental study seeking to determine whether simplified disclosure forms would improve mutual fund investors' investment choices found that, when presented with a simplified "Summary Prospectus," there was no improvement in the subjects' investment choices, although those who were presented with the simplified disclosure forms "spent less time on their investment decision."[147] Furthermore, attempting to use simpler language in mandated disclosures means that complex concepts "must be spelled out," so that the disclosure forms are made much longer, which "returns us to the overload problem" and makes disclosure forms repellant and "cognitively overwhelming."[148] In sum, "in areas where mandated disclosure is likeliest to be used, full and accurate understanding [of the disclosed information] is vanishingly rare."[149]

Disclosees' failure to retain and recall the disclosed information when it is needed is a further stumbling block on the consumer

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[144] *Id.* ("[O]nly 3% to 4% of the population can understand the language in which contracts are drafted.") (citing Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233, 234 (2002)).

[145] *Id.* (recapitulating studies finding that many people—even those of above-average literacy—fare poorly on tests of simple computational skills).

[146] *Id.* at 713 ("The standard response to illiteracy and innumeracy is to demand simpler forms. But for decades experts have labored intelligently and earnestly to present complex information accessibly, and it is now clear that only modest progress is possible.").

[147] John Beshears, James J. Choi, David Laibson & Brigitte C. Madrian, *How Does Simplified Disclosure Affect Individuals' Mutual Fund Choices?* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 14,859, 2009). The study also found that subjects' investment choices "[did] not respond sensibly to loads and redemption fees, whether or not they receive[d] the Summary Prospectus." *Id.*

[148] Ben-Shahar & Schneider, *supra* note 3, at 713.

[149] *Id.* at 716–17.

side to the efficacy of mandated disclosure regulations.[150] People are generally better at retaining information if they can place it into some kind of narrative frame. The legal shibboleths contained in most mandated disclosures are difficult to fit into any kind of recognizable story. That is, disclosures in a mutual fund prospectus, for example, probably seem to most retail investors to be ancillary to the investment transaction, rather than an integral part of it.[151]

A further, more foundational and far-reaching problem of whether people—or markets composed of people—actually make rational decisions based on all the information available to them, or whether people and markets are buffeted by all sorts of irrationalities, even in the face of the best and most fulsome disclosures, will be discussed *infra*.

2. *Corporate-Side Infirmities of Mandated Disclosure Regimes: The Lack of Corporate Morality*

We turn now to problems on the side of the disclosers—which, in the context of this Note, are mostly large, publicly traded corporations in the financial services sector—which hamper the effectiveness of mandated public disclosure as a regulatory tool. Most basically and essentially, "[m]andated disclosure attempts to solve social problems by requiring the revelation of information." But this, especially in the corporate context, is at best a "partial remedy."[152] As was mentioned briefly above, it is very difficult to locate in the corporation any kind of "soul" or moral compass.[153]

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[150] *See id.* at 719–20 (discussing the problem of remembering information disclosed).
[151] *See id.* at 719 (discussing the difficulties most people show in remembering facts that are not part of a recognizable narrative frame, drawing on studies about juries: jurors are quite proficient at remembering the facts of a case, which they assemble into a coherent story, but they are much worse at remembering the judge's instructions to them about points of law, which they cannot fit as easily into a story that makes sense).
[152] *Id.* at 720.
[153] *See* Mitchell & Gabaldon, *supra* note 136, at 1662 ("We generally feel, however, that there is more point in looking for evidence of intelligent life on Mars than there is in trying in this venue to prove anything about the existence of a separate corporate morality. Certainly, those who believe that there is such a thing as a soul, and that morality has redemptive connotations, are not going to be impressed.") (footnote omitted).

Absent such a corporate morality or an ability on the part of the corporation to feel shame, the effectiveness of most mandated disclosures, particularly under the heading of "Corporate Social Responsibility," must be doubted on a very fundamental level. Mandatory disclosure regulations, after all, are a type of "regulatory shaming."[154] Insofar as some actions by companies subject to mandated disclosure regulations might "invite criticism, disapproval, press attention, political attention, and perhaps even policy changes," mandated disclosure "makes the disapproved activities more difficult to perform than would be the case were the gaze of public and press attention less focused."[155]

Or such is the hope. Rules requiring the fulsome disclosure of executive compensation, for example, or of the ratio between a CEO's compensation and the compensation of a median employee at a particular firm, are presumably meant to rein in compensation for top executives by inciting public ire and filling companies with some embarrassment.[156] This particular regulation—whether it is thought of as merely a disclosure mandate or a kind of "shaming" regulation—has not had the desired effect: CEO compensation has continued to rise precipitously in absolute terms, and the ratio of CEO-to-median worker compensation has also risen .[157] The most hopeful outcome of these regulations would be that "government regulators may pay special attention to [the activities of a corporation shamed by man-

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[154] *See* Sharon Yadin, *Regulatory Shaming*, 49 ENVTL. L. 407, 425 n.149 (2019) (highlighting the "SEC's policy requiring disclosure of public companies' pay ratios of CEOs to median employees" as a type of "regulatory shaming"). Professor Yadin is careful to distinguish "regulatory shaming" from transparency activity generally, and from some other types of disclosure, such as contract boilerplate. *See id.* at 427–28

[155] Schauer, *supra* note 133, at 814 (describing the pros and cons of financial transparency).

[156] *See* Yadin, *supra* note 154, at 424 ("While maintaining a low wage ratio is not a formal legal norm, by publishing these figures the SEC seeks to give shareholders a tool for influencing the board of directors to design compensation policies that are more socially responsible. Publicizing high wage gaps can also draw the attention of activist investors and other stakeholders, resulting in embarrassment to the company and its shareholders.").

[157] Mishel & Wolfe, *supra* note 5 (recapitulating the results of an empirical study showing that CEO compensation rose 940.3 percent between 1978 and 2018, and that the ratio of CEO compensation to median worker compensation has risen just as precipitously, even after the SEC's rules on pay ratio disclosures went into effect: the ratio of CEO-to-median-worker pay rose to 221-to-1 in 2018, from 206-to-1 in 2017).

dated disclosures] and concentrate enforcement resources on it." However, the disclosure rules themselves—either by their own force, or by the "shame" they are meant to engender—do not actually stop any bad conduct or enforcing.[158]

All of this should come as no great surprise. After all, "[g]ood behavior can be costly," and "our shareholders, our capital markets, do not like short-term costs."[159] Market data since the 1970s shows that shareholders "punish managers for incurring short-term expenses, even if they are expected to pay off in the long term," which means that "corporate managers who behave well might very well expect to wind up collecting unemployment."[160] The disappearance of the stewardship ethos of managerial capitalism and the switch to the narrow conception of shareholder primacy mean that it is highly unlikely that even the best-intentioned managers will take steps to actually stem untoward conduct as long as the untoward conduct remains profitable.[161]

3. *Definitional Infirmities of Mandated Disclosure Regimes*

We come now to the most fundamental—and often most elusive—reasons for the deficiency of disclosure-based regulations in achieving their stated aims. As discussed above, one of the most profound reasons disclosure-based regulations fail to achieve their

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[158] *See* Yadin, *supra* note 154, at 424 (featuring the quoted language and discussing the outcomes of "shaming" regulations for the corporations subject to them).

[159] Mitchell & Gabaldon, *supra* note 136, at 1667 (stating that good behavior can be costly in the short term and that both shareholders and capital markets have proven to dislike these costs).

[160] *Id.* (describing the effect of short-term costs on managers).

[161] There are surely numerous examples of this dynamic playing out in practice, but one particularly memorable and tragic example is the case of Ford's decision not to move the gas tank on its Pinto cars in the 1970s, even once it knew the design was unsafe. *See* Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 384, 388 (Cal. Ct. App. 1981) ("[Ford] decided to defer correction of the shortcomings [of the Pinto's gas tank] by engaging in a cost-benefit analysis balancing human lives and limbs against corporate profits …. [T]he conduct of Ford's management was reprehensible in the extreme. It exhibited a conscious and callous disregard of public safety in order to maximize corporate profits."); *see also* Mithcell & Gabaldon, *supra* note 136, at 1665 (discussing then-Ford CEO Lee Iacocca's "'safety doesn't sell' attitude" and the decisions surrounding the Pinto's gas tank design).

goals is definitional: disclosure-based regulations leave too much to the free play of the market to sort out.[162] Mandated disclosure "may constrain unfettered rapacity and counteracts caveat emptor, but the intervention is soft and leaves everything substantive alone: prices, quality, entry," and, one might add, any other kind of conduct that one might like to prevent or mitigate by disclosures.[163]

Because of the ideological appeal of mandated disclosure regulations—their attractiveness from the side of personal autonomy and free-market principles, "two fundamental American ideologies,"[164]—such regulation "is a Lorelei, luring lawmakers onto the rocks of regulatory failure."[165] Mandated disclosure appears to lawmakers to be both "cheap" and "easy," and comprehensive schemes mandating disclosures in myriad areas have been readily embraced by both parties.[166] The untroubled bipartisan popularity of mandated disclosure regulations may be the best indication of these regulations' ultimate inefficacy. In passing a mandated disclosure regulation, a politician can tell their constituents they have acted, but the actual terrain of the economic playing field is left quite intact.[167]

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[162] *See* Ben-Shahar & Schneider, *supra* note 3, at 681 ("The more-information-is-better mantra seems to serve both the free-market and autonomy principles.").

[163] *Id.* (describing how mandated disclosure resonates with free-market principles).

[164] *Id.* (describing how personal autonomy and free-market principles have an effect on lawmakers); *see also* Moran, *supra* note 3, at 389–90 (discussing the "paradigm shift" among regulatory agencies since the late 1970s toward free-market principles, "soft" regulation, and self-regulatory schemes for many industries, and describing this mélange of thought and institutions as "the aspect of the American regulatory state which has looked with benign gaze on business in recent decades").

[165] Ben-Shahar & Schneider, *supra* note 3, at 681.

[166] *Id.* at 681–682 (discussing the "ease" with which lawmakers of both parties have supported mandated disclosure regulations, and citing as examples the Truth in Lending Act of 1968, which passed 92-0 in the Senate, and the Patient Self-Determination Act of 1990, which "passed unopposed in the Senate").

[167] *See id.* at 684 ("In short, when lawmakers are besieged, mandated disclosure looks like rescue. Its critics are few. Lawmakers can be seen to have acted. The fisc is unmolested. The people most visibly burdened—the disclosers—rarely dare resist vigorously and prefer disclosure to yet harsher regulation. Easy alternatives are few. Disclosure's political utility does much to explain its incessant use and its irrepressible expansion.") (footnotes omitted).

There is a further fundamental problem with mandated disclosure rules that stymies their effectiveness as regulatory tools. This has to do with recent trenchant criticisms of the EMH.[168] Namely, at the larger end of the scale, capital markets rationally assess stock prices and price in all available public information about a particular stock or arrest. At the smaller end of the scale, it is not at all clear that people make important decisions rationally, using all the information that is available to them.[169]

To begin with consumers, a great deal of research in social psychology and behavioral economics has shown that people "distort information and ignore and misuse it in making decisions."[170] Mandated disclosure—making more information available to people—"does not solve this problem."[171] Consumers are at best "imperfectly rational," and they rely on "heuristics or cognitive rules-of-thumb, which result in predictable, systemic biases and misperceptions" about the goods and services they choose.[172] These flawed heuristics mean

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[168] *See* Langevoort, *supra* note 123, at 854 ("This ferment has led to a counterreaction to the efficient market hypothesis within the economics profession. A group of eminent theorists believes that "noise"—pricing influences not associated with rational expectations about asset values—plays a far greater role than previously thought in stock market behavior. They are developing alternative models of price behavior that assume prices do make significant departures from asset values.").

[169] For an accessible critique of the EMH by a lauded scholar in the field, see Robert J. Shiller, *Speculative Asset Prices*, 104 AM. ECON. REV. 1486, 1489, 1497 (2014) (discussing alternatives to the EMH and suggesting that statistical models and analysis of historical market data show that stock prices are driven much more by irrational "animal spirits" than by investors' rational conclusions about a stock's fundamentals). For a discussion of the many ways that consumers fail to achieve rationality in making decisions about products and services, even in the face of fulsome disclosure, see Oren Bar-Gill & Franco Ferrari, *Informing Consumers About Themselves*, 3 ERASMUS L. REV. 93, 96 (2010) (discussing the fact that most consumers are not perfectly rational, a problem which is compounded by the fact that consumers generally have imperfect information about their own preferences as well as the products they are considering).

[170] Ben-Shahar & Schneider, *supra* note 3, at 720.

[171] *Id.* (suggesting that providing decisionmakers with more information may be a "necessary" condition for making better decisions, but is not a "sufficient" one).

[172] OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS 9 (2012) (discussing the differences

that, on the one hand, when consumers lack information, they may not realize they are poorly informed.[173] On the other hand, when they receive information about a particular product by way of mandated disclosure, they may draw false inferences about the meaning or import of the disclosed information, or the motives behind the disclosure itself.[174]

Laying aside for a moment the problem that, in the abstract, consumers might misapprehend the motivation behind mandated disclosures and therefore misconstrue their meaning and import, there is the additional problem. In any particular decision-making instance, consumers might be unable to make welfare-maximizing choices because of the complexity of the disclosed information they must parse and the complexity of the products among which they must choose.[175] People have difficulty integrating large amounts of information into a decision, and in general, "people can process and use only a limited

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between perfectly and imperfectly rational consumers through a "rational-choice decision-making" lens).

[173] *Id.* at 9 n.4 ("Moreover, while the perfectly rational consumer realizes that she is imperfectly informed, the imperfectly rational consumer might be blissfully unaware of the extent of his ignorance.").

[174] Oren Bar-Gill, David Schkade, & Cass R. Sunstein, *Drawing False Inferences from Mandated Disclosures*, 3 BEHAV. PUB. POL'Y 209, 222 (2019) (discussing the results of an empirical study of 1675 people that found that when consumers believe a particular mandated disclosure was based on a right-to-know motive, they often made a false inference about the risk associated with the product about which the disclosure was made, "whereas rational Bayesian decision-makers would not update their estimate"). The authors concluded that "[i]t is reasonable to speculate that consumers do not accept a pure [right-to-know] motive; rather, they think that the government is motivated by a [right-to-know motive] when there is good reason to know; namely, when there is evidence that the product is harmful." *Id.*

[175] Ben-Shahar & Schneider, *supra* note 3, at 720–21 ("We have already said that providing complex information in large quantities makes it hard for disclosees to acquire and understand disclosures. The problem worsens when they try to use such information.") (footnote omitted); Lauren E. Willis, *Against Financial-Literacy Education*, 94 IOWA L. REV. 197, 219–22 (2008) (discussing the quantitative literacy, data analysis, and predictive skills demanded of consumers in the modern financial-services marketplace and concluding that "[b]etter disclosures could help at the margins," but "unless financial products themselves are simplified and standardized, they will inevitably require complex detailed disclosures" that will be beyond the reach of most consumers).

number of variables."[176] Most salient for our discussion of the usefulness of mandated disclosure, empirical studies have shown that as people are provided with more information about a complex decision they have been asked to make, their confidence in their decision increases, but the accuracy or correctness of the decision does not, and the reliability of their choices decreases.[177] Difficulties with complexity compound the problems of innumeracy and illiteracy discussed more fully *supra*. In many instances when consumers have to make a decision about particular goods and services based on disclosed information, they are unable to correctly apprehend their preferences or make decisions that are truly welfare-enhancing.[178] Consumers' ability to correctly divine their preferences and choose the product that is best for them based on an analysis of disclosed information is at its lowest ebb when the product has costs and benefits that are complex, multidimensional, and fluid. This is often the case in the financial-services context, in which mandated disclosures are frequently employed.[179] Disclosers

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[176] Judith H. Hibbard, Paul Slovic & Jacquelyn J. Jewett, *Informing Consumer Decisions in Health Care: Implications from Decision-Making Research*, 75 MILBANK Q. 395, 395 (1997) (explaining that patients "use much less information than they are given," as evidenced by consumers who found highly-detailed reports about their health plans "cumbersome, complex, and detailed.").

[177] *Id.* at 397–98 (discussing the results of a study in which participants "were asked to make predictions about the winners of horse races based on information from 5, 10, 20, and, later, 40 variables," which found that "predictive ability was as good with 5 variables as with 10, 20, or 40.").

[178] *See* BAR-GILL, *supra* note 172, at 10–14 (discussing the ways in which consumers' misperceptions about the per-use benefits and per-use costs of a products, as well as consumers' own misunderstandings of their use-patterns for a particular product, lead to biased choices and sub-optimal outcomes). Bar-Gill emphasizes that the "implicit assumption" behind most mandated-disclosure regulations has been that disclosures should focus on the discrete attributes of a particular product, rather than on information about how product-use patterns might affect the costs and benefits of the product to the consumer. *Id.* at 13 ("[A]t the policy level, disclosure regulation has focused largely on product-attribute information. The implicit assumption seems to have been that use patterns, being a function of consumer preferences, are known to customers."). But because "product use is also a function of product attributes and external forces about which consumers might be perfectly informed[,] … perfect knowledge of one's preferences cannot simply be assumed." *Id.* at 14.

[179] Willis, *supra* note 175, at 219–23 (using a sample mandated disclosure providing information about three different mortgages to illustrate the

also control the context, tone, and form of mandated disclosures, so they can—and frequently do—make disclosures in a way that heightens disclosees' natural biases rather than allaying them.[180]

A similar fog of irrationality and imperfect heuristics affects professional investors as well, and the literature bringing the principles of behavioral economics to bear on the public securities markets is fairly voluminous.[181] To be sure, economists and professional investors often "want to think of asset prices as being determined by the interaction of rational agents—that is, as being determined as an

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immense difficulties consumers face when choosing among various financial-services products, even—and, perhaps, particularly—in the face of fulsome information about the products available to them). Willis concludes, "There never was a halcyon day when consumers had more financial knowledge and skills, but there was a time when knowing rules of thumb was sufficient to make many financial decisions. For example, a rule of thumb to spend no more than 28% of monthly income on mortgage payments was not too difficult to apply (once the consumer overcame the hurdle of calculating the 28% limit) when mortgages had monthly payments that were either level or did not change very much. To apply such a rule today is significantly more complicated, when consumers face mortgages with variable and uncertain future monthly payments." *Id.* at 224–25.

[180] Ben-Shahar & Schneider, *supra* note 3, at 700–01 (discussing the various ways in which disclosers often "beautify disclosure language," "overdisclose in order to exacerbate the overload of disclosees," and generally "obey the letter of a [disclosure] mandate but flout its spirit").

[181] *See, e.g.*, Donald C. Langevoort, *Taming the Animal Spirits of the Stock Markets: A Behavioral Approach to Securities Regulation*, 97 NW. U. L. REV. 135 (2002) (criticizing the EMH in the wake of the Enron scandal); Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, 146 U. PA. L. REV. 101 (1997) (using the theory of behavioral economics to examine why corporations often seem to behave in ways that are less than rational); Langevoort, *supra* note 123 (suggesting that a great many factors keep securities markets from actually valuing securities correctly and rationally in many instances); Stephen F. LeRoy, *Efficient Capital Markets and Martingales*, 27 J. ECON. LIT. 1583 (1989) (reviewing the history of the EMH and other competing models, and then concluding that, at least empirically, many securities market participants act if they believed the market is *not* efficient); Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1, 9 (2002) (suggesting that institutional investors' response to the Enron scandal "raises serious questions concerning the extent to which the market can be relied on to ferret out facts and to make efficient judgments about appropriate governance devices").

economic equilibrium," and that "the amount of information which is publicly available, and which for this reason cannot be used to construct profitable trading rules, is large."[182] But "[b]ecause the value of information depends on the extent of its dispersion, investors' decisions about what information to acquire depend on whether they think capital markets are efficient; to the extent that markets are informationally efficient, acquisition of information is a waste of time."[183] But this is not how professional analysts and institutional investors act.[184] Investors go to great lengths to make apparently advantageous use of information and to find arbitrage opportunities. Indeed, "the volume of trading on the financial markets seems well in excess of what the efficient market hypothesis would predict."[185] Anecdotally, also, "market fads and fashions" continue to persist,[186] and in the face of such fads, even expert investors can have significant difficulty in making accurate predictions about the performance of particular investments.[187]

Examining market responses to a host of recent crises and burst bubbles is beyond the scope of this Note. But the response of large institutional investors to the unfolding Enron scandal in the summer and autumn of 2001 may prove instructive: Enron's 2000 annual report showed plainly enough the precarious extent of the company's liabilities and the fact that its revenue depended almost entirely on derivatives trading. But "[e]ven more striking is the fact that Enron's ninety dollar share price in 2000 could be justified only by some very unrealistic assumptions," such as a twenty-five percent return on

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[182] LeRoy, *supra* note 181, at 1584.
[183] *Id.*
[184] *See* Jason Zweig, *Stock Analysts Tell All!*, WALL ST. J. (Apr. 25, 2013, 11:11 AM), https://www.wsj.com/articles/BL-TOTALB-1051 (summarizing research finding that wall street analysts rely significantly on various sources of nonpublic information, including discussions with company managers, when making earnings forecasts and recommendations about investments for clients).
[185] Langevoort, *supra* note 123, at 863 (explaining an alternative to the EMH as the basis for the observed investor behavior).
[186] *Id.* (discussing the factors that contribute to the difficulty of making accurate investment predictions).
[187] *See* Colin F. Camerer, *Comment on Noll and Krier, "Some Implications of Cognitive Psychology for Risk Regulation,"* 19 J. LEGAL STUD. 791, 794 (1990) ("Predictions of simple statistical models about student academic success, recidivism of criminals, mental illness, financial performance, and the like are invariably better than predictions of experts.").

equity forever, and annual revenue increases at more than twice the historical rate for U.S. public companies.[188] "To be sure," Professor Ribstein adds in his analysis of the market's reaction to Enron's failings, the company's stock price "dropped from eighty dollars to forty dollars in the first eight months of 2001 in the face of rising earnings, indicating that Enron's problems may have been seeping into its price." But "Enron's trading for thirty to forty dollars per share when it was probably worthless suggests that the market had spotted only a small piece of its problems," even though these problems were reasonably plain to see in the company's annual reports and other disclosures.[189] This kind of reaction by expert market participants—which can be observed in other periods of market stress as well—raises profound questions about the efficacy of mandated disclosures in protecting investors or actually making markets more efficient.[190]

B. Examples of Mandated Disclosure Regulations Falling Short of Regulators' Goals

We have now given fairly detailed consideration—at least in the abstract—to the reasons why mandated-disclosure regulations fail,

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[188] Ribstein, *supra* note 181, at 8 (illustrating the unrealistic business activities that purported to explain Enron's profits).

[189] *Id.* (explaining the invisible market forces that contributed to the price of shares of Enron falling prior to improprieties coming into the public light).The market's reaction to Enron's downfall, and particularly institutional investors' apparent decision to ignore troubling information in Enron's mandated disclosures until it was almost too late, puts one in mind of John Maynard Keynes's skeptical view of the stock market. Keynes "hypothesized that investors were playing a game akin to the newspaper beauty contests of the time, where readers voted for the most attractive contestant and the winners of the pool came from those who voted for the entrant who received the most votes. Under those circumstances the strategy was not to vote for the one the voter considered most attractive (fundamental analysis), but simply to try to guess for whom the other voters would vote." Langevoort, *supra* note 123, at 866.

[190] *See, e.g.*, Donald C. Langevoort, Essay, *Chasing the Greased Pig Down Wall Street: A Gatekeeper's Guide to the Psychology, Culture, and Ethics of Financial Risk Taking*, 96 CORNELL L. REV. 1209, 1209–12 (2011) (offering possible explanations for why, in the lead-up to the 2008 financial crisis, sophisticated institutional investors bought and sold subprime mortgage derivatives that were known to carry high risk and be of poor quality; these explanations include "compensation-based incentives to deliberately ignore the long-term risk" and "biases in risk perception").

or at least fall far short of regulators' and lawmakers' goals. Nonetheless, it would be well to consider a few examples in particular. Failures and shortcomings are apparent both in regulations designed to inform consumers via mandated disclosure and in regulations that use mandated disclosure as a tool to try to influence corporate behavior.[191] Professors Ben-Shahar and Schneider have also compellingly discussed the failures of mandated disclosures in areas that go beyond the scope of this Note, such as boilerplate, informed-consent forms provided to patients, and the *Miranda* warning given to arrestees.[192]

1. Disclosure Regulations Meant Primarily to Inform Consumers in the Consumer Credit Markets

Laws aimed and informing and protecting consumers at least partially through mandated disclosure certainly have a long history in the United States.[193] Many of the laws, which have come to form the basis of our modern consumer-protection framework, were originally passed during the years of progressive energy following President Lyndon Johnson's "Great Society" reform agenda.[194] There was a prodigious wave of new regulation in the late 1960s and early 1970s,

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[191] *See supra* Sections III.A.1 and III.A.2 (differentiating between disclosure regimes meant primarily inform consumers and those meant primarily to influence corporate behavior, and highlighting the failures of each).

[192] *See* Ben-Shahar & Schneider, *supra* note 3, at 655–58, 662 (highlighting these areas as paradigmatic examples of contexts in which mandated disclosure is employed, and in which it often fails to achieve the desired result).

[193] *See, e.g.*, Pure Food and Drug Act of 1906 § 8, Pub. L. No. 59–384, 34 Stat. 768, 771 (requiring true disclosure of the ingredients of any foodstuff and making illegal any false or misleading labeling of ingredients), *repealed by* Federal Food, Drug, and Cosmetic Act of 1938, Pub. L. No. 75–717, 52 Stat. 1040 (codified as amended at 21 U.S.C. §§ 301–99*i*) (creating the Food and Drug Administration and providing for a much more comprehensive system of labeling and branding for foodstuffs and medications).

[194] *See* Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1283 (1983) ("Thus, advocates of 'the public interest,' rendered suspicious of authority and skeptical of materialism by the events of the 1960s, joined the chorus of academic discontent in discerning an underlying pattern of institutional neglect beneath the sporadic crises and catastrophes that made the newspaper headlines. There was a pervasive sense of grievance in the air and a receptivity to change—and that was sufficient to launch a new wave of regulatory activity in Congress.").

affecting a wide variety of industries and transactions,[195] but it is notable that these new laws were not ideologically radical: they relied heavily on mandated disclosures and kept the accepted mechanisms of the free market largely in place.[196]

A preeminent example of a regulation in this spirit is the Truth in Lending Act.[197] Indeed, this legislation has served as a "template" for "virtually all subsequent legislation in the consumer credit area."[198] The act mandates the disclosure to the borrower of the "annual percentage rate" for any "extension of consumer credit."[199] This figure, commonly called the "APR," was meant to "provide a single 'yardstick' that would facilitate comparisons between different credit offerings and generally familiarize consumers with the cost of credit."[200] Congress specified that the purpose of the Truth in Lending Act was to "assure a meaningful disclosure of credit terms so that the customer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit bill and credit card practices."[201] But unfortunately, "the [Truth in Lending Act's] percentage rate disclosure scheme did not achieve the goals for which it was

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[195] William Lilley III & James C. Miller III, *The New "Social Regulation,"* 47 PUB. INT. 49, 49 (1977) ("The last few years have witnessed a quiet explosion in the scope and pervasiveness of federal regulation …. Over the period 1970 through 1975, the number of pages published annually in the *Federal Register* more than tripled, while the number of pages in the *Code of Federal Regulations* grew by 33 per cent.").

[196] Rabin, *supra* note 194, at 1294 ("A third aspect of the Public Interest era that warrants attention is the relatively limited ideological thrust of the reform measures that characterize the period. This assertion may seem at odds with the antigrowth theme evident throughout the era. Consider, however, that no substantial wealth redistribution impulse fueled the Public Interest reform efforts, and no discernible challenge was mounted against the autonomy of a market-based economy. Instead, the key legislation of the period suggested a return to the policing model of Progressivism.").

[197] Truth in Lending Act of 1968, Pub. L. No. 90–321, 82 Stat. 146 (codified as amended at 15 U.S.C. §§ 1601–1667f (2018)).

[198] Edward L. Rubin, *Legislative Methodology: Some Lessons from the Truth-in-Lending Act*, 80 GEO. L.J. 233, 234 (1991).

[199] 15 U.S.C. § 1606(a) (2018).

[200] Rubin, *supra* note 198, at 233 (quoting *Truth in Lending Bill, 1961: Hearings on S. 1740 Before the Subcomm. on Production and Stabilization of the S. Comm. on Banking and Currency*, 87th Cong. 2–3 (1961) (statement of Sen. Paul Douglas)).

[201] 15 U.S.C. § 1601(a) (2018).

intended."[202] In fact, the disclosures mandated by the act "achieve[d] a number of results—one can hardly call them goals—that were quite unintended, and were of rather dubious social utility or moral legitimacy."[203] In a 1999 study, "only 10% of surveyed consumers who had applied for or obtained home loans in the previous five years understood the concept [of APR] well enough to answer accurately whether the APR is higher[], lower, or the same as the note- or loan-contract interest rate—fewer than would have guessed the correct answer by chance."[204]

In the mortgage and home-buying context, other laws on the federal and state levels complement and supplement the Truth in Lending Act. Most of these measures rely on the same disclosure-based framework pioneered by the 1968 act. The Real Estate Settlement Procedures Act of 1974[205] requires the timely disclosure to a homebuyer of "[a] description and explanation of the nature and purpose of the costs incident to a real estate settlement";[206] "[a] list and explanation of lending practices, including those prohibited by the Truth in Lending Act";[207] and "[a] list and explanation of questions a consumer obtaining a federally related mortgage loan should ask regarding the loan."[208] The questions for the borrower required to be in this disclosure include "whether the consumer will have the ability to repay the loan, whether the consumer sufficiently shopped for the loan, whether the loan terms include prepayment penalties or balloon payments, and whether the loan will benefit the borrower."[209] The Home Ownership

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[202] Rubin, *supra* note 198, at 233.

[203] *Id.*

[204] Willis, *supra* note 175, at 219. The correct answer is "higher." *Id.* at 219 n.91.

[205] Real Estate Settlement Procedures Act of 1974, Pub. L. No. 93–533, 88 Stat. 1724 (codified as amended at 12 U.S.C. §§ 2601–17 (2018)).

[206] 12 U.S.C. § 2604(b)(1) (2018) ("A description and explanation of the nature and purpose of the costs incident to a real estate settlement.").

[207] 12 U.S.C. § 2604(b)(3) (2018) ("A list and explanation of lending practices, including those prohibited by the Truth in Lending Act.").

[208] 12 U.S.C. § 2604(b)(4) (2018) ("A list and explanation of questions a consumer obtaining a federally related mortgage loan should ask regarding the loan.").

[209] *Id.* ("[I]ncluding whether the consumer will have the ability to repay the loan, whether the consumer sufficiently shopped for the loan, whether the loan terms include prepayment penalties or balloon payments, and whether the loan will benefit the borrower.").

and Equity Protection Act of 1994[210] supplemented these requirements by providing for additional mandated disclosures related to reverse mortgages and certain high-cost and risky mortgages.[211] This whole legislative framework is now administered by the Consumer Financial Protection Bureau (CFPB) and implemented through Regulation Z, which provides for uniform mandated disclosures in mortgages, reverse mortgages, home equity lines of credit, installment loans, credit cards, and other consumer credit transactions.[212] These federally mandated disclosures have also been augmented by similar disclosure laws in several states.[213]

Despite this fulsome framework of mandated disclosure requirements, and the lofty and laudable goals of these laws—to protect consumers and "avoid the uninformed use of credit,"[214]—consumers still do not know how to use APR and other disclosures to compare effectively the ever-more-complex credit instruments available to them.[215] Since the early 1970s, just after the passage of the Truth in

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[210] Home Ownership and Equity Protection Act of 1994, Pub. L. No. 103–325, 108 Stat. 2160, 2190 (codified as amended at scattered sections of 15 U.S.C. (2018)).

[211] *See* 15 U.S.C. § 1602(bb) (2018) (defining "high-cost mortgage" for the purposes of the act); 15 U.S.C. § 1602(cc) (2018) (defining "reverse mortgage transaction" for the purposes of the act); *and* 15 U.S.C. § 1639 (2018) (specifying the additional disclosures required in the case of high-cost mortgages and reverse mortgages).

[212] Truth in Lending (Regulation Z), 12 C.F.R. pt. 1026 (2019) (mandating disclosures in mortgages, reverse mortgages, home equity lines of credit, installment loans, credit cards, and other consumer credit transactions).

[213] *See, e.g.*, CAL. CIV. CODE § 1748.13 (West 2020) (providing for mandated disclosures from credit card issuers to be made to credit card borrowers in each billing cycle); CAL. CIV. CODE § 1921 (West 2020) (requiring lenders to disclose information about the risks of adjustable-rate mortgages to prospective borrowers); 205 ILL. COMP. STAT. ANN. 670 / 16 (West 2020) (specifying various mandated disclosures to be made by the lender to the prospective borrower in any consumer installment loan transaction); MICH. COMP. LAWS ANN. § 445.1637 (West 2016) (requiring mortgage lenders to disclose to borrowers the possible risks of taking on a mortgage, as well as the availability of credit counseling), *repealed by* 2016 Mich. Pub. Acts No. 44.

[214] 15 U.S.C. § 1601(a) (2018) ("It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and void the uninformed use of credit.").

[215] *See* Willis, *supra* note 175, at 219–22 (discussing the complexity of many mandated disclosures required under the Truth in Lending Act and related

Lending Act, "the mortgage foreclosure rate has increased fivefold," and "[f]rom 2001 to 2005 an average of one in every sixty households with a mortgage fell into foreclosure a year."[216] A failure on the part of the federal government to do more substantively to rein in the growing subprime mortgage market or to resist the increasingly complex securitization of those subprime mortgages has been blamed for causing or exacerbating the 2008 Financial Crisis.[217] Although Regulation Z applies extensive mandated disclosure requirements to credit card transactions and other kinds of open-ended consumer credit,[218] consumer debt in the United States has continued to grow,[219] and the dubious activity of payday lenders has continued apace.[220]

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legislation, and summarizing studies that have found that consumers do not know how to use APR and other benchmarks to effectively compare credit options).

216 JACOB S. HACKER, THE GREAT RISK SHIFT 13 (Oxford Univ. Press, Inc., 2006) (footnote omitted).

217 Michael Hirsch, *Hirsch: Greenspan's to Blame for Wall Street Woes*, NEWSWEEK (Sept. 16, 2008, 8:00 PM), https://www.newsweek.com/hirsh-greenspans-blame-wall-street-woes-89383 [https://perma.cc/7EAX-76L8] (arguing that the Federal Reserve should have more aggressively exercised its authority under the Home Ownership and Equity Protection Act of 1994 to substantively regulate mortgage loans).

218 *See* 12 C.F.R. § 1026.5 (2020) (specifying general disclosure requirements for credit card accounts and other open-ended consumer credit transactions); 12 C.F.R. § 1026.17 (2020) (specifying general disclosure requirements for "closed-end" credit transactions, such as what are commonly called "payday loans").

219 Dan Burns, *U.S. Household Debt in Four Charts*, REUTERS (Nov. 13, 2019, 4:10 PM), https://www.reuters.com/article/us-usa-fed-debt-charts-graphic/u-s-household-debt-in-four-charts-idUSKBN1XN2OH [https://perma.cc/7K2D-HCFB] (showing data from the Federal Reserve Bank of New York indicating that total U.S. household debt has reached roughly $14 trillion, surpassing levels seen during the 2008 financial crisis).

220 Jeannette N. Bennett, *Fast Cash and Payday Loans*, FED. RESERVE BANK OF ST. LOUIS: PAGE ONE ECONOMICS (Apr. 10, 2019), https://research.stlouisfed.org/publications/page1-econ/2019/04/10/fast-cash-and-payday-loans [https://perma.cc/2EP3-RM8F] (suggesting that the use of payday loans is "widespread," particularly unbanked and underbanked people in the United States).

2. *Disclosure Regulations Meant Primarily to Affect Corporate Behavior*

We turn now to mandated disclosure regulations that, rather than seeking primarily to inform consumers, seek to affect corporate behavior through information dispersion and publicity—what has sometimes been called "regulatory shaming."[221] Often, the distinction between disclosure regulations meant to inform consumers and those meant to influence corporate behavior cannot be rigorously maintained, since "both strategies aim to softly influence consumers' (or other addressees') choices as an alternative to the paternalism of command and control …."[222]

A signal example—both of this kind of regulation and the sorts of failures to which this kind of regulation is susceptible—is the SEC's mandated disclosures of executive compensation under Regulation S-K.[223] The SEC first adopted regulations mandating the tabular disclosure of various sorts of compensation for public-company executives and directors in 1992,[224] replacing earlier regulations that mandated less fulsome disclosures of compensation in narrative form.[225] The 1992 rules were promulgated during "a public policy debate on

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[221] Yadin, *supra* note 154, at 427–30 (discussing the difference between what Yadin calls "disclosure regulation," which consists of the kind of consumer-informing regulations discussed *supra* in Section III.B.1, and "regulatory shaming," which consists of mandates directed primarily at corporations rather than consumers, and which "aims to convey a message that carries not only factual information, but also a negative judgment").

[222] *Id.* at 429.

[223] Executive Compensation, 17 C.F.R. § 229.402 (2020) (mandating the detailed disclosure, in tabular form, of annual compensation for a public company's CEO and certain other specified executive officers). The regulation also mandates similar tabular disclosure of the annual compensation for all of a public company's directors. 17 C.F.R. § 229.402(k) (2020).

[224] Executive Compensation Disclosure, 57 Fed. Reg. 48,126, 48,129 (Oct. 21, 1992) (codified as amended at 17 C.F.R. pts. 228, 229, 240, and 249) ("[T]he Summary Compensation Table is intended to provide an easily understood overview of executive compensation.").

[225] Executive Compensation and Related Party Disclosure, 71 Fed. Reg. 6542, 6543 (proposed Feb. 8, 2006) (codified as amended at 17 C.F.R. pts. 228, 229, 239, 240, 245, 249 and 274) ("Most recently, in 1992, the Commission adopted amendments to the disclosure rules that eschewed a mostly narrative disclosure approach adopted in 1983 in favor of formatted tables that captured all compensation.").

executive compensation,"[226] at a time when politicians from both parties, as well as regulators, were being pressured to find ways to rein in excessive executive compensation.[227] In fact, the SEC's rules on the disclosure of executive compensation failed to achieve their goals, and, unintentionally, may have achieved the opposite of the desired results.[228] In truth, executive compensation has grown even more quickly in the wake of the SEC's mandated disclosure rules, and the trend appears to be unabated.[229] The mandated disclosure in uniform tabular form of executive and director compensation was meant to make compensation data more "[comparable] from year to year and from company to company."[230] It may well be that the mandated disclosures did make the data more easily comparable. But the very

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[226] Nikos Vafeas & Zaharoulla Afxentiou, *The Association Between the SEC's 1992 Compensation Disclosure Rule and Executive Compensation Policy Changes*, 17 J. ACCT. & PUB. POL'Y 27, 27 (1998).

[227] Andrew R. Brownstein & Morris J. Panner, *Who Should Set CEO Pay? The Press? Congress? Shareholders?*, HARV. BUS. REV., May–June 1992, at 28 ("[P]oliticians on both sides of the aisle have taken shots at executive compensation. Arkansas Governor Bill Clinton has proposed changing the tax code to curb high salaries; Vice President Dan Quayle has criticized excessive salaries as a drag on American competitiveness. Congress is considering legislation that would limit the deductibility of 'excessive executive salaries.' Meanwhile, both the Securities and Exchange Commission and the Financial Accounting Standards Board are under pressure to preempt such ill-advised legislative initiatives with actions of their own."). The debate about executive compensation arose in the midst of the 1992 election, and was bolstered but studies showing sharply increasing wealth inequality in the United States. *Id.* ("The compensation debate has been bolstered by recent studies showing that, over the past decade, the wealthiest Americans have made the greatest gains, while the poorest citizens and the middle class have lost ground. Most people believe the rich have gotten richer and the poor poorer and that CEOs are now lining their pockets at the expense of everyone else.").

[228] *See* Ben-Shahar & Schneider, *supra* note 3, at 651 ("[M]andated disclosure has unintended and undesirable consequences, like driving out better regulation and hurting the people it purports to help.").

[229] Lawrence Mishel & Julia Wolfe, *CEO Compensation has Grown 940% Since 1978*, ECON. POL'Y INST. (Aug. 14, 2019), https://www.epi.org/publication/ceo-compensation-2018/ [https://perma.cc/ND2G-PB65] (showing, in Figure A, that the rate at which executive compensation at large American corporations has grown has only accelerated since the early 1990s, when the SEC's comprehensive disclosure regulations were introduced).

[230] Executive Compensation and Related Party Disclosure, 71 Fed. Reg. at 6543.

availability and comparability of compensation data engendered a "Lake Wobegon Effect," in which executive pay is driven to ever greater heights because every firm wanted to be able to boast of above-average compensation.[231]

As another, more recent, example of the failure of disclosure regulation—and a context in which the goals of informing consumers and directing corporate behavior bleed together—take the SECs new standard of conduct for broker-dealers with respect to retail investors. This rule is called "Regulation Best Interest."[232] The SEC first proposed the rule on May 9, 2018, to establish a standard of conduct for all broker-dealers registered with the SEC by requiring them, when making an investment recommendation to a retail customer, to "act in the best interest of the retail customer at the time the recommendation is made."[233] It may not seem that Regulation Best Interest is really a disclosure regulation at all, as it purports to establish a heightened standard of conduct for broker-dealers akin to (although different from) the fiduciary standard that applies to Registered Investment Advisers (RIAs) under the Investment Advisers Act of 1940.[234] Nonetheless, Regulation Best Interest includes an important disclosure-based component, which requires that broker-dealers disclose to a retail customer "[a]ll material facts relating to the scope and terms of the [broker-dealer's] relationship with the retail customer,"[235] as well as "[a]ll materials facts relating to conflicts of interest that are associated with [a particular investment recommendation]."[236] This

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[231] *See generally* Rachel M. Hayes & Scott Schaefer, *CEO Pay and the Lake Wobegon Effect*, 94 J. FIN. ECON. 280, 280 (2009) (describing the "Lake Wobegon Effect" in the context of executive compensation and developing a formal model to explain it).

[232] Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33,318 (Jul. 12, 2019) (to be codified at 17 C.F.R. pt. 240) [hereinafter BI Final Rule].

[233] Regulation Best Interest, 83 Fed. Reg. 21,574, 21,575 (proposed May 9, 2018) (to be codified at 17 C.F.R. pt. 240) [hereinafter BI Proposed Rule].

[234] BI Final Rule, 84 Fed. Reg. at 33,320 (describing the "General Obligation" that attaches to broker-dealers under Regulation Best Interest as a requirement that a broker-dealer, when making an investment recommendation to a retail customer, must "act in the retail customer's best interest and cannot place its own interests ahead of the customer's interests"). This "General Obligation," unlike the fiduciary standard applicable to RIAs, does not impose an ongoing duty to monitor retail customers' accounts. *Id.* at 33,334.

[235] Regulation Best Interest, 17 C.F.R. § 240.15*l*-1(a)(2)(i)(A) (2020).

[236] 17 C.F.R. § 240.15*l*-1(a)(2)(i)(B).

"Disclosure Obligation" is one of the four component obligations that broker-dealers must fulfill in order to satisfy the rule's "General Obligation."[237]

Another component obligation imposed by Regulation Best Interest, which goes hand in hand with the disclosure obligation, is the "Conflict of Interest Obligation."[238] Under this obligation, broker-dealers are required to establish and enforce written policies and procedures that are "reasonably designed" to "identify and at a minimum disclose [in compliance with the Disclosure Obligation], or eliminate, all conflicts of interest associated with [the recommendation of particular securities or investment strategies to retail customers]."[239] This language, substantially unchanged from the text of the proposed rule,[240] provoked trenchant and voluminous commentary from lawmakers, state attorneys general, and academics. Senator Elizabeth Warren submitted a comment letter on the proposed rule in which she suggested that "the SEC should explicitly ban the most obvious forms of conflicted advice, like sales contests and quotas that encourage brokers and agents to make bad recommendations," instead of merely requiring broker-dealers to disclose such conflicts of interest to retail customers.[241] The SEC, Warren said, "shouldn't rely on disclosure alone to protect customers," because "[a] number of studies have shown that disclosure fails to reduce the harm by conflicted advice, and brokers have every incentive to make the disclosures as ineffective

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[237] BI Final Rule, 84 Fed. Reg. at 33,320 ("The General Obligation is satisfied only if the broker- dealer complies with four specified component obligations. The obligations are: (1) Providing certain prescribed disclosure before or at the time of the recommendation, about the recommendation and the relationship between the retail customer and the broker-dealer ('Disclosure Obligation'); (2) exercising reasonable diligence, care, and skill in making the recommenddation ('Care Obligation'); (3) establishing, maintaining, and enforcing policies and procedures reasonably designed to address conflicts of interest ('Conflict of Interest Obligation'), and (4) establishing, maintaining, and enforcing policies and procedures reasonably designed to achieve compliance with Regulation Best Interest ('Compliance Obligation').").

[238] *Id.*

[239] 17 C.F.R. § 240.15*l*-1(a)(2)(iii).

[240] BI Proposed Rule, 83 Fed. Reg. at 21,682 (providing a version of the Conflict of Interest Obligation that is substantially identical to the version of the obligation that was adopted in the final rule).

[241] Sen. Elizabeth Warren, Comment Letter on Proposed Regulation Best Interest (Aug. 7, 2018), https://www.sec.gov/comments/s7-07-18/s70718-4185606-172653.pdf [https://perma.cc/Z33Y-VURW].

as possible."[242] The Attorneys General of New York, California, Connecticut, Delaware, Hawaii, Maine, Maryland, Massachusetts, Minnesota, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and the District of Columbia jointly submitted a comment letter on the proposed rule, in which they argued that the rule should prohibit certain kinds of conflict advice outright, instead of relying on disclosure and "the good faith of broker-dealers to fashion effective policies and procedures."[243] The Attorneys General suggested that the SEC should implement a uniform fiduciary standard for RIAs and broker-dealers, noting that an SEC staff study favored a fiduciary standard and that there were some conflicts of interest that disclosure alone could not cure.[244]

The final version of Regulation Best Interest—still heavily focused on mandated disclosure—was promulgated on July 12, 2019, and became effective on September 10, 2019.[245] There has not been sufficient time, therefore, to judge the rule's effectiveness at protecting retail investors, and the academic literature on the rule remains scant. It seems likely, however, that the disclosure mandates in Regulation Best Interest will fail to achieve their goals for all the reasons this Note has discussed: retail investors may fail to read the mandated disclosures about conflicts of interest; if they read them, they may fail to understand them; and, in any case, the disclosure mandates do not prevent broker-dealers from offering conflicted advice. Some harm to investors is still likely to occur.[246]

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[242] *Id.*

[243] Barbara Underwood *et al.*, Comment Letter on Proposed Regulation Best Interest (Aug. 7, 2018), https://www.sec.gov/comments/s7-07-18/s70718-4185784-172673.pdf [https://perma.cc/A2VW-QRVR].

[244] *Id.* (citing U.S. SEC. & EXCH. COMM'N, STUDY ON INVESTMENT ADVISERS AND BROKER-DEALERS 117 (2011) ("[T]he Commission could consider whether rulemaking would be appropriate to prohibit certain conflicts, or where it might be appropriate to impose specific disclosure and consent requirements (*e.g.*, in writing and in a specific format, and at a specific time) in order to better assure that retail customers were fully informed and can understand any material conflicts.")).

[245] BI Final Rule, 84 Fed. Reg. at 33,318.

[246] *See* discussion *supra* Sections III.A.1, III.A.3 (explicating some of the reasons for the failure of disclosure-based regulations to achieve their stated goals). For a recent discussion suggesting that Regulation Best Interest will prove inadequate at protecting retail investors, see Sara Hanley, Joe Wojciechowski & Bradley Stark, *Investors Cornered: Regulation Best Interest—It's Not a Fiduciary Duty, but the Industry Hopes Investors Think It Is*, 27

IV. Policy Suggestions: Borrowing from Financial Regulation and International Tax Policing

Having now examined at length the history of economic regulation in the United States through various changing paradigms, the rise of the current disclosure-based regulatory regime, and having looked at some of the reasons for the failure of disclosure-based regulations, both in the abstract and in particular, we come now at last the meat of the matter: What is to be done? It bears repeating that the best course would be wholesale legislative reform to clarify and expand the authority of U.S. regulatory agencies at the federal level and return the country to a regulatory paradigm that champions banning harmful corporate conduct.[247] At the time of writing, the United States has seen a change in administrations and is continuing to struggle with the coronavirus pandemic. Congress has been unable to make meaningful progress on many important issues, and the political will for any broader economic and regulatory reform is almost certainly lacking.[248] Nonetheless, even within the existing legislative framework, regulatory agencies could use their existing authority to more closely supervise large firms, borrowing from the supervisory

PIABA B.J. 237, 254–55 (2020) ("Broker-dealers are not required to improve the recommendations they make to clients as a result of Regulation Best Interest. Instead, they are required to disclose material facts related to conflicts of interest associated with the recommendation that might incline a broker-dealer to make the recommendation. The warning to the broker-dealer's client about the conflict will only be as good as the disclosure, and will only be effective if the client reads and understands the disclosure prior to taking the recommenddation of the broker-dealer. An unlikely scenario indeed.").

[247] *See* discussion *supra* Part I (discussing the advisability of wholesale legislative reform).

[248] *See* Kristina Peterson & Andrew Duehren, *House Speaker Pelosi Says Coronavirus Stimulus Talks with White House at Impasse*, WALL ST. J. (Oct. 11, 2020, 12:23 PM), https://www.wsj.com/articles/house-speaker-pelosi-says-coronavirus-aid-talks-remain-at-impasse-11602428344?mod=politics_lead_pos2 (discussing the failure of Republicans and Democrats to reach a compromise on any legislation to provide recovery and stimulus funds to address the economic and public health damage wrought by the pandemic, despite intense pressure to pass some kind of recovery measure); *see generally* Emily Cochrane & Catie Edmondson, *Tariff Threats Aside, the Senate Is Where Action Goes to Die*, N.Y. TIMES (June 6, 2019) https://www.nytimes.com/2019/06/06/us/politics/tariffs-trade.html ("Seemingly by design, Senator Mitch McConnell of Kentucky, the majority leader and self-proclaimed 'grim reaper' of Washington, has turned his chamber into a legislative graveyard.").

model already used to ensure the safety and stability of the country's largest financial institutions, and could prohibit conduct most deleterious to consumers and other stakeholders. The United States could also enter agreements with the European Union (or other progressively regulated jurisdictions, such as the United Kingdom, New Zealand, and Canada) to help harmonize international corporate regulation in a manner that would borrow from efforts already underway in the realm of international tax policing.

A. Expanding the Supervisory Model from Financial Services to Other Industries

As touched on, *supra*, in the discussion of the history of bank regulation in the United States,[249] federal regulatory agencies charged with overseeing the country's largest financial institutions have from the beginning had broad, wide-ranging supervisory and monitoring authority.[250] The Federal Reserve also has broad authority to "examine at its discretion the accounts, books, and affairs of each Federal reserve bank and of each member bank and to require such statements and reports as it may deem necessary"; to "suspend or remove any officer or director of any Federal reserve bank"; and to "require the writing off of doubtful or worthless assets upon the books and balance sheets of Federal reserve banks."[251] The SEC has similar supervisory and monitoring authority over securities brokers and dealers.[252] This model of visitation and close supervision by federal examiners could be expanded from the financial-services sector to other sectors of the economy.

Professor Rory Van Loo has made valuable contributions to the literature in this area, and the analysis here is indebted to his

[249] *See* text accompanying notes 13–21 (discussing the founding of the OCC and the office's supervisory powers over federally chartered banks).
[250] *See* Van Loo, *supra* note 13, at 386 ("Examiners [with the OCC] had the authority to enter any room, open any drawer, and look at any document.").
[251] Federal Reserve Act of 1913, Pub. L. No. 63–43, § 11(a), (f), & (g), 38 Stat. 251, 261–62 (codified at 12 U.S.C. § 248(a)(1), (f), & (g) (2018)).
[252] Securities Exchange Act of 1934, Pub. L. No. 73–291, § 17(a), 48 Stat. 881, 897 (codified as amended at 15 U.S.C. § 78m(h)(4) (2018)) (providing that the "accounts, correspondence, memoranda, papers, books, and other records" of broker-dealers registered with the SEC "shall be subject at any time or from time to time to such reasonable periodic, special, or other examinations by examiners or other representatives of the Commission as the Commission may deem necessary or appropriate in the public interest or for the protection of investors").

work.[253] The regulators just discussed have exercised traditional visitation and supervisory authority over the largest actors in the country's financial sector. Other agencies, notably the FTC and the CFPB, have authority to exercise such supervisory authority over firms in other sectors, which could be used to help protect consumers and improve corporate behavior in lieu of or adjunct to mandated public disclosure requirements.[254] Since its founding in 1914, the FTC has had the authority to "gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce," and to "require, by general or special orders, corporations engaged in commerce … to file with [the FTC] in such form as the commission may prescribe annual or special … reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, [and] management" of these corporations.[255] Despite this broad grant of authority, the FTC has throughout its history "generally not engaged in monitoring except in narrow contexts where explicitly required by statute."[256] The outer limits of the FTC's authority and power to directly supervise and investigate the conduct of large firms across many sectors of the economy are therefore "in many regards unsettled."[257] Nonetheless, the grant of authority is there in the enabling

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[253] *See, e.g.*, Rory Van Loo, *Helping Buyers Beware: The Need for Supervision of Big Retail*, 163 U. PA. L. REV. 1311 (2015) [hereinafter Van Loo, *Helping Buyers Beware*] (arguing that the FTC could use its existing authority to supervise large retail firms in a manner similar to the way in which financial-services firms are supervised by the CFPB); Van Loo, *supra* note 13 (examining the history of regulatory monitors in the United States and suggesting that such monitors have an important role to play in today's regulatory landscape); Rory Van Loo, *The Missing Regulatory State: Monitoring Businesses in an Age of Surveillance*, 72 VAND. L. REV. 1563 (2019) [hereinafter Van Loo, *The Missing Regulatory State*] (examining the privacy concerns raised by the monitoring of large firms by government agencies and developing a normative framework for such monitoring).

[254] CONGRESSIONAL RESEARCH SERVICE, WHO REGULATES WHOM? AN OVERVIEW OF THE U.S. FINANCIAL REGULATORY FRAMEWORK (2020) (explaining the structure of agencies and their individual roles in regulating the financial sector).

[255] Federal Trade Commission Act of 1914, Pub. L. No. 63–203, § 6(a)–(b), 38 Stat. 717, 721 (codified as amended at various sections of 15 U.S.C. (2018)).

[256] Van Loo, *The Missing Regulatory State*, *supra* note 253, at 1617.

[257] *Id.*

statute, waiting to be used.[258] There is strong basis, Professor Van Loo has argued, "for concluding that the FTC already has the mandate, without new legislation, to build a substantial monitoring program. Used as a complement to other tools, such as ex post litigation and consumer complaints, monitoring could contribute to a more robust oversight architecture for the most surprisingly unregulated entities," such as social-media platforms and large, consumer-facing companies.[259]

The FTC, of course, also has the authority to prohibit "unfair or deceptive acts or practices in or affecting commerce."[260] Like its authority to monitor and investigate corporations in interstate commerce, the FTC "has since its early years exercised its unfairness powers with restraint," and "[c]onsequently, there is a lack of clarity about the doctrine."[261] Congress has clarified that the FTC may not prohibit particular conduct in or affecting commerce on the grounds that it is "unfair" unless that conduct "is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[262] This is a limitation, to be sure, but the FTC has said that a practice will satisfy the "substantial harm" test if it "does a small harm to a large number of people, or if it raises a significant risk of concrete harm."[263] This is the case with many consumer-facing practices that have the potential to harm consumers by wasting money or time—or both—and which are not to be remedied by disclosures alone, such as hidden fees or search algorithms that promote expensive products over less-expensive ones online search results.[264] The discussion of consumers' inherent biases and flawed heuristics, *supra*, strongly suggests that consumers cannot reasonably avoid such

[258] *See id.* at 1619 ("[T]he FTC's enabling statute and direct case history, along with courts' treatment of other regulators and crime agencies, indicate that the commissioners can construct a vigorous [monitoring and supervision] program if they so choose.").
[259] *Id.* at 1622.
[260] 15 U.S.C. § 45(a)(2) (2018).
[261] Van Loo, *Helping Buyers Beware*, *supra* note 253, at 1370.
[262] 15 U.S.C. § 45(n) (2018).
[263] Fed. Trade Comm'n, FTC Policy Statement on Unfairness n.12 (Dec. 17, 1980), https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness [https://perma.cc/HX5Q-WY4Z].
[264] *See* Van Loo, *Helping Buyers Beware*, *supra* note 253, at 1335–39 (describing some supracompetitive pricing practices employed by mass retailers and e-commerce platforms that have the potential to harm consumers).

harms and pitfalls.[265] In most of the contexts in which mandated disclosure provides an imperfect remedy to consumer harm, market failures are at work. Consumers have imperfect information or are unable to properly discern their preferences. Consequently, it is difficult to imagine that banning these various practices would be "outweighed by countervailing benefits to consumers …."[266] Thus it seems that the FTC, beyond establishing a more robust monitoring and supervision program to ensure better compliance with existing law, could use its unfairness authority in a more aggressive manner to affirmatively prohibit a host of practices currently engaged in by large firms that have the potential to harm consumers, particularly in contexts where mandated disclosure does not provide an effective remedy.[267]

Mandated disclosure is frequently employed as a regulatory tool in the realm of consumer financial transactions, but often fails to achieve the goals of protecting and informing consumers because of the complexity of the products and the high stakes of the decisions involved.[268] The CFPB can play an important role in supplementing and augmenting mandated disclosure through more substantive regulation. Created by the Dodd-Frank Act in the wake of the 2008 Financial Crisis,[269] the CFPB has broad power to conduct examinations of companies that provide mortgages, student loans, payday loans, and other consumer financial products.[270] The CFPB is also directed by the statute to require periodic reports from consumer financial services companies for the purposes of "(A) assessing compliance with the requirements of Federal consumer financial law; (B) obtaining information about the activities and compliance systems or procedures of

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[265] *See supra* text accompanying notes 139–49, 170–80 (discussing consumers' difficulties in finding, interpreting, and using information provided to them in mandated disclosures and consumers' irrationality, biases, and roadblocks to discerning their own preferences and making optimal, welfare-enhancing decisions).
[266] 5 U.S.C. § 45(n) (2018).
[267] *See* Van Loo, *Helping Buyers Beware*, *supra* note 253, at 1372 (reaching the same conclusion).
[268] *See supra* Section III.A.3, III.B.1 (discussing the reasons for the failure of mandated disclosures to adequately protect and inform consumers and examining a few particular failures in the consumer finance context).
[269] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 § 1011, Pub. L. No. 111–203, 124 Stat. 1376, 1964 (codified at 12 U.S.C. § 5491 (2018)) (establishing the CFPB).
[270] 12 U.S.C. § 5514(a) (2018) (outlining the broad scope of the CFPB's regulatory authority over several classes of individuals and institutions).

[covered financial services providers]; and (C) detecting and assessing risks to consumers and to markets for consumer financial products and services."[271] Additionally, the CFPB has broad rulemaking authority,[272] and, in language that tracks the FTC's enabling statute very closely, the Bureau is empowered to prohibit "unfair, deceptive, or abusive act[s] or practice[s] …."[273] The CFPB has in the past exercised its unfairness authority to prohibit conduct that exploited consumers' biases and limited information.[274] Thus, just as the FTC's current statutory authority could allow it to play a more robust role in substantively regulating wide consumer-facing sectors of the economy, the CFPB's current statutory authority would allow the Bureau to take on a fuller role in substantively regulating and prohibiting unfair and deceptive conduct that preys on consumers' biases and imperfect information, in a manner that would supplement and augment mandated public disclosure as a regulatory tool.[275]

B. Harmonizing Regulations Globally: Lessons from the World of Tax

With the surging tide of globalization and the enormous scale of innovation in recent decades, "[f]inancial markets have been liberalized, trade has increased, … communications networks have expanded," and large, multinational corporations have become more common and more important, both to consumers and to regulators.[276] It is now estimated that there are "well over 60,000 transnational corporations."[277] As multinational corporations have become larger and

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[271] 12 U.S.C. § 5514(b)(1) (2018).

[272] 12 U.S.C. § 5512(a) (2018) ("The Bureau is authorized to exercise its authorities under Federal consumer financial law to administer, enforce, and otherwise implement the provisions of Federal consumer financial law.").

[273] 12 U.S.C. § 5531(a) (2018).

[274] *See* Van Loo, *Helping Buyers Beware*, *supra* note 253, at 1373 (discussing instances when the CFPB, during the Obama Administration, exercised its unfairness authority to prohibit conduct that "exploit[ed] consumer limitations").

[275] *See id.* (suggesting that the CFPB's authority under the Dodd-Frank Act could be viewed as a model for interpreting the scope of the authority of other regulators, such as the FTC).

[276] Pamela Camerra-Rowe & Michelle Egan, *International Regulators and Network Governance*, *in* THE OXFORD HANDBOOK OF BUSINESS AND GOVERNMENT 404, 405 (David Coen, Wyn Grant & Graham Wilson eds., 2010).

[277] *Id.*

more numerous, they have begun to abandon their "formerly centralized, hierarchical structures" and have "turned into polycentric organizations" that truly resemble "transnational networks" or "global webs."[278] This structural change has created formidable regulatory difficulties: because they operate globally and are not confined to any particular jurisdiction, large transnational corporations "[have] at least partly escaped from the regulatory grip of national governments and [have] assumed a position of authority not only over people and markets but to an increasing extent even over governments."[279] Despite the difficulties and obstacles, the very size and prevalence of transnational corporations with which many consumers do business mean that any serious regulatory plan aimed at robustly protecting consumers and imposing socially-minded norms on corporate behavior—a plan such as this Note has been contemplating—must at least attempt to take on some international dimension.[280]

Because of the peculiarities of the traditional nation state and the absence of international governmental institutions, there are significant obstacles to creating international rules and standards: nations must work together and find consensus in order to create rules in the first place, and then, "even if states agree on rules, it is difficult for nation states to supervise economic activities and enforce decisions in the international system because those rules fall outside the realm of their individual sovereign power."[281] Nonetheless, there is some reason for hope. Academic commentators have proposed frameworks for harmonizing corporate governance standards and securities laws on the international plane in order to improve corporate conduct, better protect and inform investors, and make company data more easily comparable.[282] Additionally, recent experiences in the realm of interna-

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[278] FLORIAN WETTSTEIN, MULTINATIONAL CORPORATIONS AND GLOBAL JUSTICE 11 (2009).

[279] *Id.* at 13.

[280] *See* Camerra-Rowe & Egan, *supra* note 276, at 405 ("As with any market, the global economy needs rules in order to operate successfully. Without transnational rules, the risks of engaging in investment, production, and exchange can be very high.") (citations omitted).

[281] *Id.* at 406.

[282] *See, e.g.*, Larry Cata Backer, *From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations*, 39 GEO. J. INT'L L. 591, 591 (2008) (arguing for a "mandatory system of transparency and disclosure at the international level" that could "provide an efficient means of creating incentives for 'moral' behavior without the need to incorporate any one version of appropriate manifestations of social response-

tional tax collection suggest that nation states can cooperate effectively to achieve desirable outcomes, like maximizing revenue and preventing corporate tax avoidance.[283]

For most of the last century, "international tax has consisted of a collection of isolated national tax regimes, connected on a piecemeal basis by bilateral tax treaties that follow[ed] a model drafted by a small set of [Organization for Economic Cooperation and Development (OECD)] member countries."[284] The strongest norm underlying this system was that "companies should not pay tax twice." Usually corporate income was taxed in the jurisdiction in which the company located its headquarters, even if it carried on significant operations, sold products, and generated negative external costs in other jurisdictions.[285] In the wake of the 2008 Financial Crisis, the OECD partnered with all of the G20 nations to embark upon the Base Erosion and Profit Shifting Project (BEPS). The tax authorities from all twenty member nations came together to develop harmonized standards and practices to increase transparency in corporate taxation, clamp down on corporate tax avoidance, and secure the full taxation of all corporate income in every jurisdiction in which a particular company operates.[286]

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bility on corporate entities"); Campbell Heggen, *Continuous Disclosure and the Harmonisation of International Securities Disclosure Regimes*, 1 CORP. GOVERNANCE L. REV. 426 (2005) (examining securities disclosure standards in Australia, New Zealand, the United States, Canada, the United Kingdom, Hong Kong, and the European Union and analyzing trends toward harmonization, but nonetheless concluding that a uniform securities law would either fail to take account of national differences or be too burdensome for many economies); Amir N. Licht, *International Diversity in Securities Regulation: Roadblocks on the Way to Convergence*, 20 CARDOZO L. REV. 227 (1998) (examining the work of the International Accounting Standards Committee and the International Organization of Securities Commissions).

283 Mason, *supra* note 6, at 353–54 (discussing the positive results brought about in this realm by the Base Erosion and Profit Sharing Project spearheaded by the Organization for Economic Cooperation and Development and the G20 nations).

284 *Id.* at 354.

285 *Id.*; *see also* Lee A. Sheppard, *Twilight of the International Consensus: How Multinationals Squandered Their Tax Privileges*, 44 WASH. U. J.L. & POL'Y 61, 62–63 (2014) (describing the contours of this traditional consensus on single corporate taxation and its economic consequences).

286 Mason, *supra* note 6, at 368–70 (discussing the components of the BEPS project and the project's commitment to the principle of full taxation). Currently, the framework created by BEPS is being implemented by more than 135 countries, including a majority of developing countries. OECD, *What is*

A full explication of the complex technicalities of the BEPS and international tax apportionment is beyond the scope of this Note, but prior to the introduction of the BEPS, "companies reported to a state only profits and activities that took place *in that state*," so "[t]ax administrators lacked a complete picture of a multinational's global activities, which limited their ability to identify, let alone combat, income shifting and stateless-income planning."[287] Under the BEPS framework, multinational corporations with at least €750 million in annual consolidated revenue "must now submit country-by-country reports, which provide governments a global and per-country overview of profits, sales, employees, income, and where companies declare income and pay taxes."[288]

One could imagine a similar cooperative framework being brought to bear on other policy areas aside from international tax administration. Regulatory monitors in the United States could cooperate with their counterparts in other large, developed, heavily regulated economics such as the European Union, the United Kingdom, Canada, and Australia to ensure that multinational corporations are complying with all applicable regulations and not engaging—within any jurisdiction—in unfair or deceptive practices or conduct in restraint of competition. Under the current statute, the FTC is already empowered to provide investigative assistance to foreign regulators and law enforcement agencies "if the [foreign agency requesting assistance] states that it is investigating, or engaging in enforcement proceedings against, possible violations of laws prohibiting fraudulent or deceptive commercial practices, or other practices substantially similar to practices prohibited by any provision of the laws administered by the Commission."[289] Additionally, the FTC, with the approval of the Secretary of State, "may negotiate and conclude an international agreement, in the name of either the United States or the Commission, for the purpose of obtaining such assistance, materials, or information."[290] Thus, even without making any changes to the current statutory scheme, a future Administration more amenable to robust regulation and closer alignment with European standards could use the FTC to cooperate

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BEPS?, http://www.oecd.org/tax/beps/about/ [https://perma.cc/X5EV-CELY] (providing information about BEPS and the project's "Inclusive Framework").

[287] Mason, *supra* note 6, at 370–71.

[288] *Id.* at 371.

[289] 15 U.S.C. § 46(j)(1) (2018).

[290] 15 U.S.C. § 46(j)(4) (2018).

with foreign regulators and law enforcement agencies. This new coalition could ferret out and mitigate corporate conduct that has the potential to harm consumers and that cannot be adequately remedied by mandated disclosure alone, such as the provision of consumers' personal data to third parties without permission or the use of proprietary algorithms to show consumers more expensive products. One could also imagine that a more progressive future Administration could work with its counterparts abroad to develop a framework for cooperation similar in spirit to the BEPS. This new framework would apply to broad swaths of economic activity and create a set of substantive standards binding multinational corporations doing business in the United States and the European Union. Such a framework could be expressed in an executive agreement, entered into by the President and other heads of state, which would not require ratification by the Senate pursuant to the Treaty Clause of the United States Constitution.[291] The Supreme Court has upheld the constitutionality of such executive agreements when they concern areas within the cognizance of the President's Article II powers, such as trade and foreign affairs.[292] A simple majority of both houses of Congress could also ratify any agreement after the President has entered, giving it the weight and democratic buy-in of a "congressional-executive agreement."[293] The United States would then find itself in a position—without having gone through the difficulty of substantial legislative action—to step up its efforts to substantively regulate corporate conduct and protect con-

[291] David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 STAN. L. REV. 1963, 1964 (2003) ("A 'sole executive agreement' is an agreement concluded by the President on the basis of his Article II powers, without explicit authorization or approval by any legislative body."). The Treaty Clause of the United States Constitution provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur." U.S. CONST. art. II, § 2.

[292] United States v. Pink, 315 U.S. 203, 229 (1942) ("The powers of the President in the conduct of foreign relations included the power, without consent of the Senate, to determine the public policy of the United States with respect to [a foreign government] …. That authority is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition. Objections to the underlying policy as well as objections to recognition are to be addressed to the political department and not to the courts.").

[293] *See* Sloss, *supra* note 291, at 1964 (discussing various types of international agreements).

sumers. The results of examinations and investigations of large multinational firms could be shared with foreign regulators, and steps could be taken to hold these firms to the higher standards of conduct which already prevail in the other jurisdictions, such as the European Union.

C. Candor, Legitimacy, and Avoiding a "Blueprint for Fraud"

Of course, turning toward such "new mechanisms of governmentality," particularly with regard to frameworks for international cooperation, raises "new dilemmas in terms of accountability, transparency, participation, equality, and legitimacy."[294] Such concerns should not be minimized. But, as was discussed *supra*, to a significant extent, U.S. regulators such as the FTC and the CFPB could take a more proactive and robust approach to monitoring and examining large corporate actors, and could prohibit a wider range of conduct as unfair or deceptive, while staying completely within the lines of current statutory authority.[295] Insofar as regulators act within the bounds of policymaking authority explicitly delegated to them by Congress, their decisions should be "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[296] The fact that an agency may from time to time change or expand its definition of some operative term in an area where the agency has regulatory authority—such as an expansion by the FTC of the sorts of practices that may be labeled unfair or deceptive—does not deprive the agency's interprettation of the relevant statute particularly in cases where "Congress has never indicated any disapproval of a flexible reading of the statute [at issue]."[297] In short, an agency may change its mind about what course of action is wise, and a future Administration may have different regulatory priorities than the current one, and agencies should be able to fulfill these priorities within the limits of the policymaking power Congress has delegated to them.[298] If an agency's course of regulation

[294] Camerra-Rowe & Egan, *supra* note 276, at 411.
[295] *See supra* text accompanying notes 253–75 (delineating the current statutory authority of the FTC and CFPB and discussing ways in which those agencies could wield that authority more fully and effectively).
[296] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 844 (1984).
[297] *Id.* at 864.
[298] *Id.* at 865 ("In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely

in a particular instance proves to be unpopular or unworkable, Congress may always craft a new law, changing the scope of the discretion it leaves in the agency's hands. Robust regulatory activity by executive agencies should not in itself raise grave legitimacy concerns, either, because the President remains accountable to the people.[299]

Furthermore, there are ways in which a regulatory framework based on robust monitoring, confidential supervision and examination, and rulemaking outside of the context of enforcement actions fits in neatly with recent trends in regulatory scholarship and evolving ideas about the relationship between business and government. Such monitoring "fits well with the modern emphasis on collaborative governance—that is, working with firms to solve problems rather than adopting a punitive approach at the first signs of wrongdoing."[300] Such an approach might also receive support from the firms that would be subject to the contemplated monitoring because submitting to such action could potential stave off a tout-court return to command-and-control regulations and the stakeholder-forward ethos of managerial capitalism.[301] Robust monitoring and supervision would also avoid costly—and often highly public—litigation and enforcement actions: "By identifying issues early on before they have become systemic, the FTC [and other similar regulatory monitors] would be better situated to steer firms away from problematic practices before major liabilities materialize."[302]

In the context of large banks and other depository institutions, regulation has long relied on confidential monitoring, supervision, and examination both to ensure candid responses to regulators' queries and

upon the incumbent administration's views of wise policy to inform its judgments.").

299 *See id.* at 865–66 ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.").

300 Van Loo, *The Missing Regulatory State*, *supra* note 253, at 1621.

301 *See* KOTZ, *supra* note 87, at 205–09 (suggesting that, in the wake of the 2008 financial crisis and amid increasing popular and political dissatisfaction with the current arrangement of neoliberalism, the United States could in the coming years see a transition to a kind of "social democratic capitalism" that would resemble the managerial capitalism of the immediate postwar period in important ways).

302 Van Loo, *The Missing Regulatory State*, *supra* note 253, at 1621.

because it was thought that confidentiality would promote the safety and soundness of the banking system by shielding the public from adverse information about a particular institution.[303] The law recognizes evidentiary privileges of confidentiality in other areas, as well, such as in communications between a lawyer and her client, between spouses, or between members of the clergy and parishioners.[304] All of these privileges are "based on the fundamental premise that certain things that are useful to have said are less likely to be said in the glare of Justice Brandeis's sunlight. The range of sins that would be admitted in the confessional booth is, we suppose, greater than the range that would be admitted in a crowd of friends, relatives, casual acquaint-tances, and perfect strangers."[305] All of this is to say that corporate actors might be more candid with regulators if disclosures were made confidentially, in the context of ongoing supervision, than if the same disclosures were to be made publicly. Furthermore, many mandated public disclosures, such as the quarterly and annual reports required of publicly traded companies by the SEC, can be prepared for well in advance, and might be padded out by "window dressing."[306] Monitoring and supervision, which goes on continuously and which can be supplemented by periodic examinations, leaves comparatively little opportunity for such varnishing of the truth.[307] Finally, detailed mandated public disclosures—particularly in the financial services context—might simply serve as a "blueprint for fraud," by showing sophisticated executives and corporate lawyers who know how to parse such disclosures the ways in which certain realities might be

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303 *See* Mathewson, *supra* note 7, at 140–41 (discussing the reasons for confidential supervision of large banks and calling such an approach the "cornerstone" of the traditional, "paternalistic," approach to bank regulation).

304 Schauer, *supra* note 133, at 817 (listing these and other evidentiary privileges based on the confidentiality of certain communications).

305 *Id.* at 817–18.

306 The SEC apparently considered this phenomenon enough of a problem in 2010 to propose a rule aimed at addressing such "window-dressing," which occurs when a company engages in short-term borrowing in order to mask its true financial condition; the proposed rule would have relied, however, on more mandated public disclosure. Short-Term Borrowings Disclosure, 75 Fed. Reg. 59,866 (proposed Sept. 28, 2010) (to be codified at 17 C.F.R. pts. 229 & 249).

307 *See* Van Loo, *supra* note 13, at 385–86 (discussing the often terrified reaction of bank officials to surprise examinations conducted by the OCC).

artfully hidden.[308] This remains a possible threat to the effectiveness of disclosure-based regulations as long as regulatory capture remains a concern and the "revolving door" between regulatory agencies and the private sector continues to shuffle expert attorneys back and forth between the two camps.[309] Regulation based to a greater degree on confidential supervision, examinations, and substantive rulemaking does not solve this problem entirely, but it could at least mitigate by slowing the rate at which attorneys in the private sector could guess what regulators consider material. All of these factors together suggest that regulators in the United States could adopt a more robust regulatory posture under current statutory authority, and concerns about legitimacy or political buy-in would not prove to be insurmountable roadblocks.

V. Conclusion

One certainly cannot fault Louis Brandeis for saying that "sunlight is the best of disinfectants," and one can hardly fault the generations of lawmakers and regulators who followed in his wake, blowing the battle trumpet of transparency. The intuition that more information is better, and that more information will lead to better outcomes for all involved, is understandable and natural. This Note does not mean to take issue with the concept of mandated disclosure *in general*: certainly, our securities markets would be a terrible Wild West were it not for the comprehensive system of mandated disclosures introduced by the Securities Act of 1933 and the Securities Exchange of 1934. The problem is much more that mandated public disclosure, as a regulatory tool, became a sort of siren song for academic commentators and lawmakers; disclosure-based rules came to dominate the regulatory landscape to the point of "driving out better regulation."[310] The

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[308] *Cf.* George A. Blackstone, *A Roadmap for Disclosure vs. A Blueprint for Fraud*, 26 UCLA L. REV. 74, 74 (1978) (engaging with the SEC's view that providing more concrete guidance about what sorts of material facts must be included in mandated public disclosures would be tantamount to providing regulated companies with a "blueprint for fraud," but ultimately disagreeing with this position).

[309] *See* Mason, *supra* note 6, at 385 n.17 (discussing the "revolving door between government and [private-sector tax] practice" that allows "former government officials to cash in on their knowledge of government's interprettations and enforcement practices").

[310] Ben-Shahar & Schneider, *supra* note 3, at 651 (introducing the reasons why mandatory disclosure has failed).

deregulatory spirit of the 1970s, and attendant beliefs in shareholder primacy and the efficiency of free markets, drove U.S. regulators away from more effective regulatory tools that had been employed in the past. A return to the stakeholder-focused managerial capitalism of the immediate postwar period is unlikely, and the political will for wholesale legislative reform to remake the American regulatory toolbox also seems to be lacking. Nonetheless, a more progressive future Administration could use existing statutory authority to step up direct supervision and substantive regulation of corporate conduct in a way that would protect consumers and minimize socially undesirable actions by large firms in a way that mandated disclosure alone cannot do.