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Introduction

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Our goal when organizing this symposium was something different from the typical academic conference. We wanted to extend a conversation beyond academia to explore the process of how laws are made, how their implementation affects industry, and how these laws might realistically be improved. In other words, we were interested in examining both the sausage-making of financial regulation and how that sausage is placed in a bun and served to the general public: that is, not only how financial regulation is hashed out on the floors of Congress, but also how it is implemented at the agency level. We focused on agencies and their regulations because in the financial world, that is the nucleus of action.

Accordingly we convened a group of not just scholars, but also of regulators. Our first keynote speaker, President Dennis Lockhart of the Federal Reserve Bank of Atlanta kicked off the conference with a provocative talk suggesting that there might be shortcomings in the current regulatory scheme and that prudential regulation of the shadow banking industry might be appropriate.[1] SEC Commissioner Luis Aguilar provided the second keynote speech in which he reflected on his experiences as a new commissioner during the early months of the financial crisis, projected a future of the SEC using data and technology to regulate more effectively, and proposed that the SEC work closely with its international counterparts in order to more adequately protect investors.[2] Because so much bank regulation in the United States happens at the state level, we felt it imperative that the state regulatory voices be a part of this conversation. We included Kevin Hagler of the Georgia Department of Banking and Finance

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[1] President Lockhart's remarks are available in full at https://www.frbatlanta.org/news/speeches/2015/150320-lockhart.aspx.

[2] Commissioner Aguilar's remarks are available in full at http://www.sec.gov/news/speech/preparing-for-regulatory-challenges-of-21st-century.html.

and John P. Henrie, FDIC Deputy Regional Director, Atlanta, of the Federal Deposit Insurance Corporation to round out the discussion. Given that Georgia has been called the epicenter of bank closures in the 2008 crisis, these state regulators provided significant insights into banking reform.

Thus, what unfolded was a frank and lively discussion of the past and future of financial regulation from the perspective of both the regulator and the scholar. The following papers reflect and expand on that conversation. Reader, you are in for a treat.

We begin with Professor Steven Schwarcz's "Keynote Reflections," which proposes a new public governance duty for the managers of systematically important firms. Schwarcz first observes the rational preference of investors in such firms to encourage risky behavior when the general public will bear the costs of any excessive corporate risk-taking. He sketches the contours of what the new public governance duty might look like and addresses the practical question of the mechanics of imposing liability.

Two contributions on the political economy of financial regulation have the twin merits of describing problems and proposing solutions. Professor Urska Velikonja's "Politics in Securities Enforcement," examines the enforcement side of the equation. Velikonja first describes the sources of political pressure on SEC enforcement: unlike many of its sister agencies, the SEC must supplicate annually for its funding from Congress. Velikonja uses original research to describe the data distortions this political pressure creates and cites other studies that indicate that political influence matters. Her solution to counteracting political pressure on the SEC is elegant and easy to implement.

The second, Professor Arthur E. Wilmarth, Jr.'s "The Financial Industry's Plan for Resolving Failed Megabanks Will Ensure Future Bailouts for Wall Street," looks at the political economy from the rulemaking perspective. Wilmarth pulls back the veil from agency rulemaking to reveal how legislative intent—in this case, Title II of Dodd-Frank—can be subverted by industry. Wilmarth vividly describes how Title II's original purpose of ensuring that failed systematically important financial institutions be liquidated was supplanted by the industrypreferred "single point of entry" plan—and how that plan shifts the costs of any future bailouts onto the general public. He prescribes two innovative remedies to address these concerns.

The next set of articles deals with that question so central to the question of preventing future financial crises: risk management. In "Bank Regulation and Securitization: How the Law Improved Transmission Lines Between Real Estate and Banking Crises," Professor Erik Gerding places the recent financial crisis in historical context, arguing that bank crises often go hand-in-hand with real estate crises, and that deregulation that removed barriers between banking and securities activities both increased the risk of contagion and magnified its effect. He makes the convincing case that banks' use of securitization—a tool that would seem to reduce banks' risk exposure—instead amplified the extent of the crisis. Professor Kristin N. Johnson's short essay "Cyber Risks: Emerging Risk Management Concerns for Financial Institutions," which will be expanded in a subsequent article in Issue 2 of Volume 50 of the *Georgia Law Review*, highlights the increasingly prominent threat that cyber risks pose to financial institutions. In "Regulating Angels," Professor Heidi Schooner trains her lens on community banks. After describing these titular "angels," she critically assesses the complaints these banks have against the imposition of Dodd-Frank's regulatory requirements on them. She notes that while both the legislation itself and regulatory agencies have properly loosened requirements in light of the particular needs of community banks, in some cases the risks inherent in community banking justify prudential regulation. Finally, Professor Daniel Schwarcz considers the risks posed by "shadow insurance," where life insurers use "captive" affiliates to reinsure their own policies, which he describes as a form of regulatory arbitrage that might increase risks to policyholders, the insurance industry, and the financial system as a whole. Schwarcz suggests that state regulators may be focused on the wrong issues and advocates for more accurate representations of shadow insurance risks on the balance sheets of insurers.

The final set of papers focus on the theory and structure of financial regulatory agencies. Professor Robert Ahdieh uses "From Fedspeak to Forward Guidance: Regulatory Dimensions of Central

Bank Communications" to explore the intriguing question of whether talk, and talk alone, can be considered agency action. He traces the evolution of central bank communication from Greenspan-era enigma to post-crisis forward guidance, arguing that, with limited tools at its disposal, the Fed "embraced communication . . . as a monetary policy [tool]." Professor Robert F. Weber, in "Post-Crisis Reforms of the Supervisory System and High Reliability Theory," provocatively draws on the theory and literature of high reliability organizations (HROs) to inform his analysis of the regulation of financial institutions. The HRO literature focuses on topics exotic to the typical legal reader—wildfire fighting, nuclear power plants, emergency rooms, and air traffic control centers—and its focus is to study organizations that maintain reliable performance even under dynamic operating conditions. HROs stress resilience, containment, and sensitivity to operations in order to maintain their reliability. Weber argues that financial regulation has prioritized resilience (capital adequacy requirements) and containment (living wills and orderly liquidation authority), but it has largely overlooked the question of future crisis avoidance. He argues that recent operational breakdowns, such as J.P. Morgan's London Whale and other failures in banks' internal controls, indicate the importance of risk management in preventing future crises.

And, last but certainly not least, Professor Joshua T. White contributes a doubly unique perspective in "The Evolving Role of Economic Analysis in SEC Rulemaking," that of economist and of regulator. Drawing on his time as a financial economist at the SEC, he reveals the SEC's rethinking of its economic analysis after the D.C. Circuit's critical decision in *Business Roundtable v. SEC*.[3] The agency issued a memorandum outlining new principles to guide its analysis and required that every analysis include a stated need for rulemaking, a well-defined economic baseline, identification of reasonable alternative regulatory approaches, and a full analysis of the economic consequences of the proposed rulemaking compared to reasonable alternatives and the status quo. White's case study focuses on the risk retention rulemaking

[3] Business Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011).

mandated by Dodd-Frank to show the evolution of the SEC's economic analysis following these agency-level changes.

The vital conversation that began at the symposium and is further elucidated in these excellent articles demonstrates that the laws of finance remain in flux and are developing through the combined work of academics, regulators, and policymakers, many of whom were conference participants. The papers draw on similar themes and reveal the interconnectedness of several seemingly disparate fields of finance. In the real world, securities, insurance, banking, and real estate law are connected. As the conference demonstrated, so is the scholarship on these topics.