

Demise of the Laissez Faire Revival?

A BOOK REVIEW BY JOHN DONOVAN MAHER OF *FREEDOM TO HARM: THE LASTING LEGACY OF THE LAISSEZ FAIRE REVIVAL* BY THOMAS O. MCGARITY (YALE UNIVERSITY PRESS 2013).

INTRODUCTION

Thomas McGarity's *Freedom to Harm*¹ documents conservatives' assault on regulation from the end of the Carter administration through the beginning of President Barack Obama's presidency—a period McGarity dubs the “Laissez Faire Revival.” The attack has been largely successful. Barring “interregnums” from 1984 to the 1994 Gingrich House and in the late Clinton years, conservatives have left their mark on public safety, environmental protection, and civil justice.² McGarity's thesis is that citizens and economic actors are constantly renegotiating America's “social bargain.”³ In periods of prosperity, concerns about unfettered capitalism fade, allowing conservatives to erode regulatory protections.⁴ Economic, environmental, and public safety crises counterbalance this trend by revealing existing regulation's inadequacy, galvanizing the public to push for more protections.⁵ However, a concerted conservative offensive and a general lack of crises between the Reagan Revolution and the Great Recession have left the movement of the balance decidedly one-sided.⁶ Though *Freedom to Harm* examines many regulatory issues, the analysis here will focus primarily on the environmental protection and civil justice aspects of the book's discussion. This review presents three main arguments. First, partisan divisions within and between the presidency and Congress have led conservatives' success to be less complete than McGarity suggests. This deadlock increases the importance of federal judges, who determine how far regulatory authority extends under existing legislation. Second, McGarity's thesis also applies to deregulation. Specifically, perceptions of regulatory overreach can cause a political crisis that leads to deregulation. Third, whether a given event constitutes a “crisis” depends in large part on the public's subjective perceptions, which are shaped by the dominant political narrative.

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1. THOMAS O. MCGARITY, *FREEDOM TO HARM: THE LASTING LEGACY OF THE LAISSEZ FAIRE REVIVAL* (2013).

2. *See id.* at 65–66.

3. *Id.* at 9–10.

4. *Id.* at 10.

5. *See id.* at 11.

6. *Id.*

I. BACKGROUND

A. *The Conservative Ecosystem*

The protagonists in McGarity's account are a small group of conservative businessmen, think tanks, and politicians. Together they launched a counteroffensive designed to resist future regulation and actively turn back the clock on the achievements of the Progressive Era, the New Deal, and the "Public Interest Era" of 1965 to 1975.⁷ Businessmen's willingness to make long-term investments in conservatism's "idea infrastructure" was crucial to this campaign.⁸ In particular, John M. Olin's foundation spent over \$68 million to entrench law and economics as a conservative beachhead in the legal academy, while Professor Henry Manne trained federal judges in the new discipline.⁹ Alongside forays into the law, donors poured resources into conservative think tanks.¹⁰ Organizations such as the Heritage Foundation and the American Enterprise Institute provided intellectual substance to conservative critiques, and their media-oriented policy prescriptions helped make coverage more business friendly.¹¹ They also provided talent pipelines for Republican administrations and served as incubators for other groups.¹² The Federalist Society, for example, was initially housed in the American Enterprise Institute's offices.¹³ In sum, business built an ecosystem.

B. *Regulatory Relief*

Once ensconced in Republican administrations, conservative administrators frequently took their cues from business and attempted to grant "regulatory relief."¹⁴ Officials proved reluctant to impose new rules or stringently enforce existing ones, often with stark results. In 1981 alone, Environmental Protection Agency (EPA) referrals of cases for prosecution dropped 84 percent.¹⁵ Under President George W. Bush (Bush II), environmental criminal enforcement investigations dropped 50 percent, with civil actions exhibiting a similarly steep decline.¹⁶ Meanwhile, a growing number of procedural and analytical requirements hampered agencies' attempts to issue new regulations. By 2000, promulgating a major rule could require

7. *Id.* at 6. For an excellent account of business involvement in the conservative movement's political success, see KIM PHILLIPS-FEIN, *INVISIBLE HANDS: THE MAKING OF THE CONSERVATIVE MOVEMENT FROM THE NEW DEAL TO REAGAN* (2009).

8. See MCGARITY, *supra* note 1, at 5.

9. *Id.* at 48, 55.

10. *Id.* at 40.

11. *Id.* at 49, 55. This was further aided by Reagan's 1987 repeal of the Fairness Doctrine, requiring television and radio stations to give equal time to opposing views. *Id.* at 62, 64.

12. *Id.* at 48–50, 52, 103.

13. *Id.* at 48.

14. *Id.* at 149.

15. *Id.* at 113.

16. *Id.* at 114.

overcoming more than 120 such hurdles.¹⁷ What new rules were imposed emphasized voluntarism, compliance assistance, and market-based regulation.¹⁸ These proved an ineffective substitute for enforcement.¹⁹ For instance, the Bush II EPA instituted a “Performance Track” program, allowing “exemplary” companies to promise to improve their environmental record in exchange for reduced supervision.²⁰ Subsequent EPA analysis found that only two of thirty investigated facilities had met their obligations under the initiative.²¹ Nevertheless, the deregulatory agenda did have its limits. Political resistance could force moderation: a series of damaging conflicts deprived the Reagan administration of much of its deregulatory zeal by 1984.²² Furthermore, blatant overreach or abdication of regulatory responsibility could meet a frosty reception in the courts—as the milestone *Massachusetts v. EPA* illustrates.²³

C. *The Litigation Crisis*

Conservatives’ state-level attack on the civil justice system mirrored their federal deregulatory offensive. Its success has limited the ability of “private attorneys general” to use statutes as an alternative source of regulation.²⁴ To start, the crusade for tort reform has had an impressive legislative output. Between 1995 and 1999 alone, over thirty states passed some form of tort reform.²⁵ Complementing this effort, conservatives successfully launched themselves into judicial elections.²⁶ Between 2000 and 2003, candidates backed by the Chamber of Commerce won in twenty-three of twenty-four races.²⁷ Newly elected judges appear to have returned the favor. In Texas, large donors to judicial campaigns won nearly four-fifths of their subsequent cases before the court.²⁸ The most striking example occurred in West Virginia. Facing a \$50 million verdict, Massey Energy Company spent \$3.5 million to elect Brent Benjamin to the West Virginia Supreme Court.²⁹ When Massey appealed the verdict against it, Benjamin refused to recuse himself, and a three

17. *Id.* at 220.

18. *Id.* at 226. For example, in 2003 the EPA attempted to withdraw its 1997 finding on the dangers of mercury emissions and substitute a far more industry friendly cap-and-trade program. *Id.* at 109; *see also* *New Jersey v. EPA*, 517 F.3d 574, 582 (D.C. Cir. 2008) (striking down EPA’s attempt).

19. MCGARITY, *supra* note 1, at 225.

20. *Id.* at 113.

21. *Id.* at 113–14.

22. *Id.* at 73. McGarity goes so far as to classify the second Reagan administration as part of an interregnum between regulatory assaults. *Id.* at 65.

23. *Massachusetts v. EPA*, 549 U.S. 497, 504–09 (2007).

24. MCGARITY, *supra* note 1, at 213. The private attorney general concept describes “the equitable principle that allows the recovery of attorney’s fees to a party who brings a lawsuit that benefits a significant number of people, requires private enforcement, and is important to society as a whole.” BLACK’S LAW DICTIONARY 712 (9th ed. 2009).

25. MCGARITY, *supra* note 1, at 208.

26. *Id.* at 208–09.

27. *Id.* at 211.

28. *Id.* at 209.

29. *Id.* at 211–12.

to two court found for Massey.³⁰ Taken together, these developments bode ill for tort law's ability to curb corporate excess in the future.

D. *A New Social Bargain*

The final portion of *Freedom to Harm* suggests remedies for an ailing system.³¹ Chief among them is a call for a "progressive narrative" to counter a conservative narrative of personal responsibility, economic freedom, and a civil justice system run amok.³² The progressive account would emphasize "security, corporate responsibility, corporate accountability, and social costs" and make its case with concrete examples.³³ This account would be accompanied by an increase in agency resources, a de-emphasis on cost-benefit analysis, and a reduction in the procedural obstacles to rulemaking.³⁴ New rules would prioritize enforcement over assistance and stiffen penalties to better deter corporate actors from violating regulations.³⁵ McGarity also highlights the importance of reversing the constraints imposed on the civil justice system, depoliticizing the state courts, and building up a progressive "idea infrastructure" to counter conservative think tanks.³⁶

II. ANALYSIS

A. *Less Than Full Freedom to Harm*

Although the Laissez Faire Revival's impact on the federal judiciary has been significant, its overall record at the national level has been less successful than McGarity suggests. Much of the weakness stems from the structure of the federal government, which tends towards inertia. Executive agencies' lackluster enforcement records under conservative administrations follow the political cycle and are therefore inherently transient. Consequently, Ronald Reagan and Bush II's regulatory passivity gave way to more aggressive action under Presidents William Clinton and Obama.³⁷ Deregulation is further constrained by judicial oversight and the dynamics of the political arena. For instance, hostility toward the aggressive deregulatory agendas of Reagan's first EPA Administrator and Secretary of the Interior contributed to their resignations in 1983.³⁸ Both were replaced with more moderate officials able to stay within political bounds.³⁹

30. *Id.* at 212. The Supreme Court, however, held that Benjamin should have recused himself. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884 (2009).

31. MCGARITY, *supra* note 1, at 217, 232, 264.

32. *Id.* at 202, 265.

33. *Id.* at 291.

34. *Id.* at 269, 270, 273.

35. *Id.* at 275.

36. *Id.* at 279–80.

37. *Id.* at 7, 65, 80.

38. *Id.* at 103–04.

39. *Id.*

The Laissez Faire Revival has fared even worse in Congress. Political divisions between the presidency and Congress, and between the House and Senate, have constrained the conservative agenda. Democrats controlled the House throughout the Reagan and George H. W. Bush years, and proved unwilling to yield on the issue of deregulation. Similarly, though a Republican House passed business friendly amendments to the Clean Water Act in 1995, the threat of a veto from President Clinton doomed them in the Senate.⁴⁰ More recently, Democratic control of the White House and Senate has protected the Affordable Care Act from conservative efforts to repeal or undermine the bill.⁴¹ Furthermore, even in times of Republican control, the rhetoric of deregulation has not become reality. The Bush II administration actually oversaw a modest growth in regulation.⁴² Today, a gerrymandered House, a filibuster-prone Senate, and the GOP's struggles with the Electoral College suggest divided government may remain common for some time. Thus, political stalemate reinforces the simple truth that laws, once passed, tend to stay on the books.⁴³

This deadlock makes the fate of the federal judiciary even more important. In the likely absence of substantial new legislation, the courts will determine how far agencies' regulatory authority extends under existing law. Unfortunately, however, in contrast with his examination of state courts, McGarity spends little time on conservatives' remarkable success in appointing allies to the federal bench.⁴⁴ Reagan alone appointed nearly half of the nation's federal judges, with far reaching implications.⁴⁵ Conservatives have built upon this success through tenacious resistance to Democratic appointments. In Obama's first term, the gap between the first committee report to confirmation for federal district and circuit court nominees averaged, respectively, 105 and 140 days.⁴⁶ Under Bush II, the comparable figures were twenty-one and thirty-seven days.⁴⁷ Certainly, the partial abolition of the filibuster will affect these

40. *Id.* at 106.

41. See Robert Pear, *Repeal of Health Care Law Approved, Again, by House*, N.Y. TIMES, July 11, 2012, http://www.nytimes.com/2012/07/12/health/policy/house-votes-again-to-repeal-health-law.html?_r=0.

42. JERRY BRITO & MELINDA WARREN, GROWTH IN REGULATION SLOWS: AN ANALYSIS OF THE U.S. BUDGET FOR FISCAL YEARS 2007 AND 2008, at 4 (2008), *available at* <http://jerrybrito.com/pdf/Reg-budget-2007.pdf>.

43. See, e.g., Lane Kenworthy, *America's Social Democratic Future*, FOREIGN AFF., Jan.–Feb. 2014, at 86, 90, *available at* <http://www.foreignaffairs.com/articles/140345/lane-kenworthy/americas-social-democratic-future> (“New programs and expansions of existing ones will tend to persist, because programs that work well become popular and because the U.S. policymaking process makes it difficult for opponents of social programs to remove them.”).

44. MCGARITY, *supra* note 1, at 81, 228.

45. Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 220 (2008).

46. See BARRY J. MCMILLION, CONG. RESEARCH SERV., R42556, NOMINATIONS TO U.S. CIRCUIT AND DISTRICT COURTS BY PRESIDENT OBAMA DURING THE 111TH AND 112TH CONGRESSES 18–19 (2012), *available at* <http://www.fas.org/sgp/crs/misc/R42556.pdf>.

47. *Id.*

figures.⁴⁸ Yet, in the long-term, the reform benefits Republicans as much as Democrats, and does nothing to undo past efforts to alter the judiciary's composition. This matters a great deal for the future of American regulation. The courts' rightward drift influences their tolerance of regulation and deregulation. This trend, rather than lax agency enforcement or deregulatory efforts in Congress, may be the Laissez Faire Revival's greatest success.

B. Defining a Crisis

McGarity's core analytical framework—under-regulation, crisis, increased regulation—applies equally well in reverse. Specifically, public perceptions of over-regulation, justified or not, create a political crisis that gives rise to a successful deregulatory push. Consequently, even warranted regulatory action, if politically tone-deaf, can trigger a heated response. Though the hostility directed toward the Occupational Safety and Health Administration in the early 1970s is a prominent example, it is by no means the only one.⁴⁹ In 1978, the Federal Trade Commission (FTC) attempted to protect children's health by proposing a rule banning all television “advertising targeting children and most advertising for sugared foods aimed at audiences containing a ‘significant proportion’ of children.”⁵⁰ The reaction from the business community was predictably wrathful.⁵¹ But even the traditionally liberal-leaning *Washington Post* attacked the regulation in an editorial titled “The FTC as National Nanny.”⁵² The criticism persuaded the Democrat-held House and Senate to explicitly bar the rule for at least three years and subject all future FTC regulations to cost-benefit analyses.⁵³ This backlash parallels the one directed against Mayor Michael Bloomberg's recent attempt to fight obesity by banning large soda sizes in New York City.⁵⁴ In both instances, conservatives' unsurprising opposition found support among normally liberal groups. In Bloomberg's case, the *New York Times* and 60 percent of heavily Democratic New York City all opposed the ban.⁵⁵ Though separated by over three decades, the episodes' similarities underscore regulators' continuing lack of political

48. Jeremy W. Peters, *In Landmark Vote, Senate Limits Use of the Filibuster*, N.Y. TIMES, Nov. 21, 2013, <http://www.nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html>.

49. MCGARITY, *supra* note 1, at 86–87.

50. *Id.* at 185.

51. *Id.*

52. *Id.*

53. *Id.* at 186.

54. See Michael M. Grynbaum, *In N.A.A.C.P., Industry Gets Ally Against Soda Ban*, N.Y. TIMES, Jan. 24, 2013, <http://www.nytimes.com/2013/01/24/nyregion/fight-over-bloombergs-soda-ban-reaches-courtroom.html> [hereinafter *Soda Ban*]; Michael M. Grynbaum, *Judge Blocks New York City's Limits on Big Sugary Drinks*, N.Y. TIMES, Mar. 11, 2013, <http://www.nytimes.com/2013/03/12/nyregion/judge-invalidates-bloombergs-soda-ban.html> [hereinafter *Sugary Drinks*]; Editorial, *Mayor Bloomberg's Anti-Obesity Campaign*, N.Y. TIMES, Mar. 12, 2013, <http://www.nytimes.com/2013/03/13/opinion/mayor-bloombergs-anti-obesity-campaign.html> [hereinafter *Anti-Obesity*].

55. *Soda Ban*, *supra* note 54; *Sugary Drinks*, *supra* note 54; *Anti-Obesity*, *supra* note 54.

sophistication. This needs to change. Agencies and politicians must consider the likely public and political reaction to new regulations. Not doing so risks failing to implement new rules, and consuming scarce political capital in the process. Regulatory efforts that fall too far outside the current paradigm face a serious risk of backlash.

The conservative narrative's ability to dictate public reactions underscores crises' subjective nature. Briefly, the existence of a crisis rests less on an event's objective risk than on the public's subjective perception. Thus a minor FTC restriction on advertising inflamed the public and led to congressional action, whereas the global disaster of climate change remains largely unaddressed. What triggers public outcry, and hence regulation or deregulation, is the appearance of a crisis, not the reality. Certainly, the same event often gives rise to an objective and subjective crisis. And in such cases the public's call for regulatory action is usually answered. For instance, the Cuyahoga River fire of 1969 helped spur 1972's Clean Water Act,⁵⁶ and the 1989 Exxon-Valdez oil spill led to the Oil Pollution Act of 1990.⁵⁷ Still, in other cases, an objective crisis has not inflamed the public, and no regulation has appeared. The recent chemical spill in West Virginia that poisoned the Elk River threatened the drinking water of over 300,000 people.⁵⁸ This toll is far higher than the Cuyahoga River fire, which burned for only thirty minutes and caused just \$50,000 in damage.⁵⁹ Yet, perhaps because it lacks the visceral quality of burning water, the Elk River spill shows no sign of prompting an increase in federal regulation, and even state efforts to improve oversight appear to have stalled.⁶⁰ Similarly, the Deepwater Horizon spill of 2010 matched or exceeded the Exxon-Valdez's impact, but public anger quickly evaporated and never translated into a successful regulatory push.⁶¹ Perhaps because of the success of the conservative narrative *Freedom to Harm* describes, neither event reached crisis proportions. This highlights the importance of the progressive narrative McGarity advocates. Displacing the conservative narrative will change public attitudes, influencing how future crises are perceived and thereby increasing the odds an event will lead to effective regulation.

Public distaste for the Republican Party, coupled with its internal splits, indicates McGarity's call for a new progressive narrative may have come at an opportune moment. The contemporary GOP struggles to connect with the American public, having lost the popular vote in five of the past six presidential

56. Christopher Maag, *From the Ashes of '69, a River Reborn*, N.Y. TIMES, June 21, 2009, <http://www.nytimes.com/2009/06/21/us/21river.html>.

57. MCGARITY, *supra* note 1, at 104.

58. Jennifer Levitz et al., *West Virginia Begins to Lift Water Ban*, WALL ST. J. (Jan. 14, 2014), <http://online.wsj.com/news/articles/SB10001424052702303595404579318623579448490>.

59. See Maag, *supra* note 56; Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 FORDHAM ENVTL. L.J. 89, 96 (2002).

60. *W. Va. Chemical Spill Legislation Stalls*, AL JAZEERA AM. (Feb. 27, 2014), <http://america.aljazeera.com/articles/2014/2/27/w-va-chemical-spilllegislationstalledassessionwinddown.html>.

61. MCGARITY, *supra* note 1, at 114–15, 249–50.

elections. This opens up the political space for a progressive narrative to take root. Moreover, as factionalism engulfs the modern GOP, conservatives' ability to successfully resist regulation, much less repeal it, is compromised.⁶² Indeed, the endurance of the Affordable Care Act in the face of continued public skepticism attests to Republicans' inability to repeal even unpopular legislation.⁶³ In sum, the narrative framework upon which the Laissez Faire Revival depends is in jeopardy for the first time in decades.

CONCLUSION

McGarity's work provides an excellent overview of how and why regulation in America has been undermined over the past three decades. Its recommendations, if adopted, would do much to reverse the Laissez Faire Revival. While one might wish McGarity had spent more time discussing the federal judiciary, this oversight does not distract from his otherwise outstanding examination of conservatives' deregulatory push. McGarity's analytical framework also bears extension, particularly to the issue of perceived over-regulation catalyzing successful opposition. In turn, this underscores the importance of ideological narratives in determining what constitutes a crisis, and of acting on the opportunity to create a new progressive narrative in American political life. The Laissez Faire Revival has lasted over thirty years— it seems increasingly unlikely to endure for another three decades.

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62. See MJ Lee, *Government Shutdown: Wall Street Angry at Tea Party It Has No Influence Over*, POLITICO (Oct. 2, 2013), <http://www.politico.com/story/2013/10/government-shutdown-wall-street-tea-party-97734.html>; Jeremy W. Peters, *G.O.P. Leaders Draw Re-election Challenges from the Right*, N.Y. TIMES, Feb. 25, 2014, <http://www.nytimes.com/2014/02/25/us/politics/gop-leaders-draw-rare-re-election-challenge-from-the-ranks.html>.

63. *Health Tracking Poll: Exploring the Public's Views on the Affordable Care Act (ACA)*, KAISER FAM. FOUND., <http://kff.org/interactive/health-tracking-poll-exploring-the-publics-views-on-the-affordable-care-act-aca> (last visited Apr. 19, 2014). Public support for the Affordable Care Act has only reached 50 percent in one month since April 2010. *Id.*

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