

## Book Review

Thomas O. McGarity, *Freedom to Harm: The Lasting Legacy of the Laissez-Faire Revival*, New Haven: Yale University Press, 2013, pp. 408, \$45.00.

Reviewed by Joel A. Mintz

In recent months, media outlets have carried certain news items that—to many observers—undoubtedly seemed entirely unrelated to one another. For example, since the summer of 2013, news stories have described the awarding of inflated ratings to risky, sub-prime mortgage-backed securities by prominent ratings agencies, drastic cutbacks in food safety inspections at poultry processing plants, a major spill of toxic chemicals into public drinking water supplies, unfair denials of basic banking services to low-income Americans, train derailments leading to fires, explosions, and oil spills, and the closure of almost the entire federal government for an extended period. However, those who have read Professor Thomas McGarity’s outstanding book, *Freedom to Harm: The Lasting Legacy of the Laissez-Faire Revival*, will be quick to observe that, rather than being unconnected, each of these developments reflects a dramatic deterioration in—or a complete absence of—government regulation of businesses. These failures—and numerous others—stem from an aggressive, 30-year effort by conservative academics, wealthy right-wing funders, conservative think-tanks and anti-government public interest groups, to undermine or eliminate governmental institutions and laws designed to curb recklessly irresponsible business practices.

Professor McGarity’s thesis is that American society has long been engaged in an evolving bargain between the powerful economic actors who drive our economy and their neighbors, workers and customers. As this bargain is continually renegotiated, consistent with fluctuations in economic and political conditions, three societal ideals—freedom, responsibility, and accountability—are constantly rebalanced. Beginning in the early 20th century, McGarity posits, and particularly after the period of the New Deal, it was generally agreed that business entities must be free to operate on their own terms, without unwarranted governmental interference. At the same time, however, business enterprises were understood to have a moral and legal obligation to adhere to standards and norms created by common law courts and government agencies that protect the health, safety, physical security

**Joel A. Mintz** is Professor of Law at Nova Southeastern University Law Center, an Elected Member of the American Law Institute and a Member-Scholar of the Center for Progressive Reform.

and economic well-being of the citizens affected by business activity. When corporations violate the pertinent rules of responsibility under the terms of this tacit social bargain, they must be held to account. Government must enforce those protective rules vigorously—and injured citizens must be compensated through the mechanism of the civil justice system for harm they suffer at the hands of irresponsible companies.

Since the early 1970s, however, McGarity contends that the owners and managers of many of the corporate entities that dominate the American economy have engaged in four, carefully crafted, persistent, and generally successful political assaults on the protective government infrastructure erected during previous periods of widely seen business abuses. In contrast with conservative responses to earlier periods of reform, McGarity states, the goal of these more recent, industry-sponsored offensives has been to create a radical change in existing institutions—changes engineered with the ultimate aim of returning the United States to a political economy similar to the one that prevailed during the “Gilded Age” of the late 19th century. From McGarity’s perspective, these attacks—which continue apace—have done vast and lasting damage to the ability of government agencies and private citizens to protect ordinary Americans against business malpractice.

In the first chapter of his book, McGarity succinctly describes the *laissez-faire* ideology that dominated post-Civil War 19th century America. These tenets (which he terms “*laissez-faire* minimalism”) emphasized nearly absolute economic liberty, and an extremely limited role for state institutions. The latter were only to serve as a protector of private property, an enforcer of private contracts, and the guarantor of industrial peace and economic growth. Government was to be a sponsor of public works projects, a preventer of inflation, and a forceful disrupter of striking trade unionists and picketing boycotters.

Professor McGarity concedes that *laissez-faire* minimalism yielded rapid economic growth in the 1880s and 90s. Nonetheless, he notes, the remarkable economic expansion of that period came at a dreadful social cost. It brought with it a plethora of job-related deaths and accidents, wholesale environmental destruction, devastating train derailments, massive consumer fraud, and blatant corruption of the political system.

McGarity crisply describes three critical periods of American history—the Progressive Era of the early 20th century, the New Deal Period of the 1930s, and what he refers to as “the Public Interest Era” of the late 1960s and early 1970s—when confluences of human tragedies revealed the stark consequences of unconstrained economic freedom. As the author reveals in detail, during these times of crisis and in response to public outcry, Congress enacted bold legislation to curb industrial abuses. It established administrative agencies with the power to adopt and enforce stringent protective requirements and (at the outset) those new agencies wrote strict rules and held private companies accountable.

Over time, however, as industrial abuses and the sense of crisis faded, regulated firms challenged agency rules in court, demanded variances and exemptions, and engaged in widespread regulatory non-compliance. By these tactics, business leaders managed, for extended periods of time, to gradually extricate themselves from many needed regulatory restraints. This industrial “freedom to harm” lasted until a new set of private sector abuses and perceived social crises renewed public demands for comprehensive change that led, in turn, to a new round of legal reforms.

After discussing the government institutions that emerged from these periods of social reform, McGarity recounts the intellectual, financial, and political evolution of the powerful *laissez-faire* revival movement that has, for the past four decades, steadily undermined the safeguards that those institutions provide. As McGarity reveals, the *laissez faire* movement’s “idea infrastructure” includes right-wing “think tanks,” professional journals, and generous grants and “scholarships” to conservative intellectual and political sympathizers—all with the goal of developing and disseminating *nouveau laissez-faire* ideas.

McGarity also describes the development of a well-coordinated network of lobbying organizations, pro-business activist groups, and news media instruments that form a disciplined “conservative echo chamber.” This network aims to embed *laissez-faire* minimalist preferences in the political agenda, attack the messages of progressive policy advocates, gain “grass roots” public support for conservative approaches, and turn pro-business policy prescriptions into law.

McGarity presents an incisive analysis of *laissez-faire* adherents’ remarkable political accomplishments since the mid-1970s, focusing on three powerful, carefully coordinated assaults by the business community and its allies on the government policies and agencies that emerged from the Progressive, New Deal and Public Interest Eras. Each of these anti-regulatory offensives, he argues, along with a “fourth assault” discussed later in the book, was intended to return the American political economy to the “*laissez-faire*” benchmark of the late 19th century. McGarity also vividly depicts the several “interregnum periods” that separated these right-wing political onslaughts.

McGarity’s analysis focuses specifically on federal industrial regulation with respect to environmental protection, drug and medical device safety, food safety, transportation safety, financial protection, and consumer protection. After examining the pre-*laissez faire* revival situation, he meticulously details the key features of the hard-nosed revivalist attacks on these important features of federal law and on their implementers—and the frequently devastating consequences of those successive, well-calibrated assaults on the well-being of millions of citizens. McGarity also writes of the business community’s determined—although somewhat less successful—attempts to discredit the American civil justice system and tilt state tort law in ways that systematically limit opportunities previously available for corrective justice and fair compensation. The author supports his conclusions with statistical evidence

and well documented, disturbing anecdotes regarding individual tragedies. His account is as taut and gripping as it is profoundly unsettling.

The concluding section of *Freedom to Harm*, “Renegotiating the Social Bargain,” presents a set of general observations respecting the institutional impacts of the laissez-faire revivalist assaults on the nation’s protective governmental infrastructure, and the disappointing “patch and repair” responses to extraordinary business abuses that have occurred during the Obama presidency. It also includes Professor McGarity’s prescriptions for striking a new social bargain that will undo the vast damage done to our regulatory and civil justice systems by the laissez-faire revival.

In McGarity’s view, the overall goal of any fundamental renegotiation of the social bargain must be to alter the underlying incentives of private sector actors, and thus motivate them to take more precautions that will benefit their workers, consumers, neighbors, and the environment. Some of his suggestions for accomplishing that simply involve reversing the changes wrought by the laissez-faire revival over the past 30 years. Others, however, represent a fresh approach to effective regulation in a globalized economy. They call for the empowerment of individuals to hold both government officials and private sector leaders to account.

McGarity suggests that progressive activists make an effort to restore public trust in the efficacy of government by debunking the notion that government officials are inherently less competent and more corruptible than their private sector counterparts, and by countering the false claim that government is incapable of delivering needed public protections. He recommends that supporters of regulatory and common law protections engage the business community’s idea infrastructure by weaving a coherent narrative—based upon the values of economic and physical security, corporate responsibility and accountability—and by stressing the immense social and economic costs that irresponsible products and activities impose on all citizens.

McGarity further advocates increasing agency resources, appointing agency leaders who are truly independent of regulated industries, eliminating burdensome analytical and procedural hurdles to regulatory effectiveness, and replacing some poorly functioning existing agencies with entirely new ones. Among other measures, he recommends that all agencies be required to revisit voluntary programs and replace failed voluntary programs with enforceable rules.

To accomplish these (and other) needed reforms, McGarity argues for a significant “rebuilding” of the institutions designed to hold business entities accountable. “Rebuilding” requires effective enforcement of regulatory standards through enhanced resources for investigating, prosecuting and punishing violators, setting penalties at a higher level than the amount of money saved through violator noncompliance, and tougher settlements with non-complying firms. He pushes for systematic collection of assessed fines, stronger criminal enforcement, and empowering state attorneys general to

enforce federal regulatory requirements. He also favors improving corporate accountability through the civil justice system by reinvigorating nuisance law, making the common law more protective, reviving class action lawsuits, depoliticizing the judiciary at the state level, and revising or repealing state “tort reform” statutes that created road blocks to full and fair compensation of parties harmed by corporate irresponsibility.

Beyond this, McGarity argues for the establishment of an expanded “progressive idea infrastructure” that will highlight the cause-and-effect relationship between the reduced governmental protections of recent years and ongoing social and economic problems. Moreover, he urges construction of a more extensive and better funded “progressive influence infrastructure” to counteract the current, outsized influence of laissez-faire-based organizations on regulatory law and policy. One goal of this effort, he suggests, should be restoration of the FCC “fairness doctrine” and the restoration of what he calls genuine balance in media news coverage. It should be supplemented by the development of a “progressive netroots community” that will provide a web-faceted voice for a progressive policy agenda.

Professor McGarity’s book represents a most important contribution to our collective understanding of the American regulatory state. Not since Marvin Bernstein’s influential 1955 analysis of agency capture, *Regulating Business by Independent Commission*,<sup>1</sup> has any scholar published a work on U.S. administrative regulation that is as broad in scope, perceptive, thoroughly researched, and clearly expressed as this one. *Freedom to Harm* is a masterful analysis of recent trends in business regulation and civil justice in the United States, combining scholarly depth and precision with accessible, entertaining prose. Moreover, its prescriptions for reform are at once thoughtful, farsighted and sound.

Beyond doubt, McGarity’s work will be controversial. One criticism to be anticipated is that *Freedom to Harm* is too polemical a volume to be considered first-rate scholarship. In this view, the job of a scholar is to be a neutral observer of the workings of governing institutions and political trends, and reluctant to take sides in disputed questions of policy. This critique seems entirely misplaced.

Throughout the development of Western civilization, many influential thinkers—from Plato and Aristotle through Thomas Hobbes, James Madison, John Stuart Mill, and Henry David Thoreau—embraced positions that some of their contemporaries regarded as misguided, disputatious and controversial. To the extent that Thomas McGarity’s work is condemned as unduly polemical, he will thus be in excellent company. As Oliver Wendell Holmes, Jr. sensibly noted, “[i]t is required of a man that he should share the passion and action of his time, at the peril of being judged not to have lived.”<sup>2</sup> Surely, this is no less true of scholarly observers of the American political economy.

1. MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* (1955).

2. Oliver Wendell Holmes, Jr., Address at John Sedgwick Post No. 4, Grand Army of the Republic, Keene, NH: In *Our Youth Our Hearts Were Touched With Fire* (May 30, 1884).

Other criticisms are sure to come from the political right. *Freedom to Harm* seems likely to be attacked as a work that is “extreme,” “radical,” “socialist” or even “communist”—all epithets that are as mean-spirited, unfair and clichéd as they are utterly false. One can even imagine that latter-day laissez faire proponents will concoct misleading catch phrases—such as “laissez faire progressives”—to describe Professor McGarity and other opponents of their ideas, and thus muddy the waters of public discourse to their advantage.

Sadly, strident attempts at vilification and distortion have become a regular feature of right-wing political rhetoric since the early 1970s. To the extent that McGarity’s book grows in importance—as seems most likely with a work of such wide reach and quality—it appears inevitable that McGarity’s ideas will be unjustly maligned by his laissez-faire revivalist opponents. One hopes that fair-minded, serious people will ignore such smears, smokescreens, and sophistry, read his book with an objective eye, and draw their own conclusions.

While *Freedom to Harm* is an exceptionally perceptive and persuasive book, McGarity’s strategy for restoring corporate responsibility and accountability seems incomplete. In my own view, the problems he describes with our civil justice system and regulatory infrastructure are now so deeply rooted and pervasive that even more effort to reverse them is called for. Thus, opponents of the laissez-faire revival may do well to expend more of their scarce time and resources on ending legal obstacles to lobbying and public advertising by regulatory agencies. Another logical anti-laissez faire priority should be curbing the power of state legislatures to “gerrymander” Congressional and state legislative districts along partisan lines. More vigorous efforts are also needed—at both state and federal levels—to support the too often-obstructed confirmation of qualified nominees for judicial and administrative positions, and to oppose the appointment of biased and/or unqualified individuals for those important posts. Finally, from my own perspective, anti-laissez-faireists should focus more on overturning, by constitutional amendment, the U.S. Supreme Court’s 2010 decision in *Citizens United v. Federal Election Commission*, a grossly ill-considered legal precedent which threw open the floodgates to unlimited political spending by corporate interests.

As Thomas McGarity wisely recognized, notwithstanding some recent gains, progressive idea and influence infrastructures are still no match for those of the business community. Given the current political climate, many of his thoughtful ideas—as well as the suggestions I have made above—are unlikely to be achieved in the short term. A great deal of institution-building remains to be achieved before the American social bargain can once again be renegotiated. The opponents of laissez-faire minimalism face what will doubtless be—to borrow a phrase used by President John F. Kennedy in a different context—a “long twilight struggle.” The path to progressive reform will be replete with obstacles, defeats and frustrations.

Nonetheless, McGarity’s compass is true and the roadmap to reform that he presents in *Freedom to Harm* is accurate. His extraordinary volume is essential

reading for anyone who cares about American governance and society and favors balanced and reasonable limitations on business-caused harms.