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by ANDY CARR*

Introduction

Credit rating agencies (CRAs) are essential components of the global financial systems. The major CRAs—Fitch, Moody's, and Standard & Poor's—primarily serve the financial systems in two key ways. CRAs first serve as "gatekeepers," inasmuch as their ratings determine whether a finacial instrument is "investment grade" under federal and state laws. Second, CRAs act as information-facilitators for the complicated instruments being bought and sold within the system. In part because of their systemic significance, CRAs faced especially harsh scrutiny in the aftermath of the financial crisis and Great Recession, accused not only of lavishing inflated ratings on the riskiest assets, but also recklessly promoting the securitization of increasingly complex, nearly impenetrable financial instruments. Initial public scrutiny was followed by waves of litigation which resurfaced long-dormant questions about the CRAs' exposure to liability and decades-old defenses of their rating "opinions." Accordingly, this Note reexamines the nexus between the CRAs' profound importance as financial institutions and their defenses against claims for liability in fueling the last recession, focusing especially on their decades-old claims of First Amendment protections–a resurgent issue in recent litigation.

This Note synthesizes a review of both recent trends in federal case law involving CRA defendants as well as the secondary literature in the years following the Dodd-Frank Wall Street Reform and Consumer Protection Act. The primary contributions are twofold. First, the updated overview of

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CRAs' successes and failures in state and federal courts suggests that, while the CRAs successfully defended many suits in recent years, the financial crisis and legislative responses thereto have built extensive records of the CRAs' key roles in exacerbating systemic risks and their acknowledgment of falsity of their peak-bubble ratings. As case records and the developing research literature suggest, the terrain has shifted toward less-CRA-favorable judicial approaches and standards of review. Second, recent legislative developments (e.g., Dodd-Frank's section 933) and a series of federal court cases (especially *Abu Dhabi v. Morgan Stanley* and *Genesee County v. Thornburg*) highlight the weaknesses of CRA's defenses—and especially their maximalist claims for First Amendment-grounded protection of their ratings.

While litigation challenging the CRAs has garnered increasing prominence in recent years, various other legal challenges to financial sector actors since the Great Recession have heightened pressure on these institutions. Among others, novel theories of financial sector actor liability helped win notable victories against investment banks in their transaction financing or deal-advising capacities, as well as related rulings against private equity firms, e.g., aiding and abetting liability for fraudulent actions knowingly committed by and in concert with investment banks in mergers and acquisitions. Remarkably, many of these cases have come from Delaware, both from the Chancery Court and from the state's Supreme Court, suggesting Delaware's "race to the bottom" corporate regulatory approaches and historically manager-friendly dispositions are less-certain now than in the recent past.

As key state and federal courts have scrutinized financial sector actors more closely, with diverging case outcomes set to establish or sharpen an emerging circuit split, the legislative branch has begun moving in the opposite direction. A White House-backed deregulatory bill, for example, passed a threshold vote to enter Senate debate in early March 2018. If passed in its current form, the bill would roll back regulatory requirements, including the Dodd-Frank Act's stress-testing requirements for large lending institutions, with the defendants from the aforementioned cases prominently among them. The rejection of Dodd-Frank's "too big to fail" provisions may heighten the likelihood of myriad legal challenges facing plaintiffs in similar cases. This uncertain regulatory environment comes amid recently renewed media attention upon the latest financial sector misconduct controversies, emerging in the wake of the 1MDB corruption scandals in Malaysia, where Goldman Sachs's role has come under Singaporean investigators' scrutiny, and following the latest stress-test failure of German banking giant Deutsche Bank. Nevertheless, the CRAs have fended off most legal challenges, even in the aftermath of the financial crisis and under Dodd-Frank—for the moment.

The increased doctrinal uncertainty puts CRA regulations–and their speech—in prime position for reconsideration by the United States Supreme Court in coming years. Should one or more appeals from lower court cases concerning CRA liability reach the United States Supreme Court, it would be the first time since the 1980s and would invite reconsideration of unresolved free speech issues from *Greenmoss Builders* and *Lowe*. Considering the highly inconsistent state and federal case law over the last decade, the CRAs should view those earlier Supreme Court cases not as protective guardrails for their own benefit, but rather as relics, unlikely to provide significant utility or security in the modern financial regulatory milieu.

The subsequent sections of this Note explicate signal recent cases and current doctrinal uncertainties, while considering both foundational free speech doctrines and the systemic shockwaves of the financial crisis and Great Recession. Both subjects are vital context for post-recession cases, necessary to distinguish the scope of concerns from the earlier landmark cases of the 1980s. Part II reviews theoretical foundations for key free speech doctrines more broadly, with particular emphasis on the roles of speech in self-governance and the "search for truth," and an overview of commercial speech principles. It concludes by situating the present analysis within the larger First Amendment research literature, explaining the narrow—but substantively impactful—contribution to broader theoretical debates. Part III turns to the financial services sector, the events leading up to the financial crisis, and the crucial roles played by the CRAs in domestic and global finance over time. Part IV explores the recent case law on financial actor liability broadly, including three key cases involving CRA defendants, these cases' outcomes, and their assessments of speech claims, where applicable. Part V summarizes recent proposed legislative and administrative changes to the post-recession regulatory scheme, with comparisons to alternative approaches globally, along with a discussion of the likely effects of recent membership changes on the Supreme Court on CRA regulation and First Amendment jurisprudence. Finally, Part VI concludes with a brief synthesis of the historical and up-to-date case law developments, discussing implications for CRAs' historical free speech claims, with suggestions for further research in these areas.

I. Theoretical Foundations of Free Speech: Imperatives for Protecting Expression

A. Self-Governance and Finding Truth

The theoretical justifications for vigorously protecting freedom of speech are manifold, yet have remained remarkably consistent throughout constitutional history. Among others, three notions have proven especially consistently influential: the importance of open and free expression for democratic self-governance; the value of the "marketplace of ideas" in allowing a search for truth; and free speech's importance in protecting individual autonomy, i.e., the individual's intrinsic right to find their own truth and values unencumbered by the state's actions.[1] Taken together, these rationales underlie a range of views regarding constitutional interpretations, from the bench and from academia, as well as in society at large. As ordering principles, each theoretical view finds currency across the spectrum of First Amendment protections; they encompass both Justice Hugo Black's "maximalist" First Amendment approach[2] and the views of commentators pushing for greater openness to government regulation of certain forms of expression.[3]

1. *See, e.g.*, Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (referring more broadly to speech protections for "individual self-fulfillment" or "individual self-realization").

2. Justice Hugo Black's "absolute" regard for the First Amendment rarely garnered a majority on the United States Supreme Court, but nonetheless has become a universal touchstone for free speech scholars and activists, *see generally* R.H. Coase, Advertising and Free Speech, 6 J. LEGAL STUD. 1, 23 (1977) (discussing Justice Black's concurrence in *New York Times v. Sullivan*, including his statement that the "unconditional right to say what one pleases about public affairs is . . . the minimum guarantee of the First Amendment"); Anthony Lewis, *Justice Black and the First Amendment*, 38 ALA. L. REV. 289, 290–91 (1987) (discussing, *inter alia*, Justice Black's lead opinion from Bridges v. California, where Black's majority reversed the convictions of the *Los Angeles Times* and Teamsters Union leader Harry Bridges for contempt of court after making public statements which might prejudice an ongoing court case involving the Union); *accord* Bridges v. California, 314 U.S. 252 (1941); New York Times v. Sullivan, 376 U.S. 254, 297, 299 (1964) (Black & Goldberg, JJ. concurring).

3. *See, e.g.*, C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 3 (1976) (arguing that commercial speech should not be protected by the First Amendment at all, "a complete denial" being "consistent with" and "required by" free speech doctrines as it fails to further the interests and purposes of the underlying protections); Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1170 (1996) (arguing—in the context of regulating public conduct of urban panhandlers and "chronic" homelessness in public spaces—that First Amendment scholars "self-consciously gives priority to the communicative aspects of street behavior" as grounds for heightened protections, while "other features, including . . . effects on the liberties of other street users" go ignored); Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark*, 1994 SUP. CT. REV. 1, 2 (1994) (arguing that U.S. Supreme Court opinions impliedly—and properly—distinguish types of speech

As in the far-ranging academic debates, state and federal courts' approaches to First Amendment jurisprudence and the various doctrines established in published opinions long have proven less coherent than theories might suggest.[4] Nonetheless, some highly generalized consensus suggests that, up to the farthest edges of conventional notions of protected speech and only in narrow circumstances may the government regulate speech without "abridging" it in contravention of the First Amendment, despite somewhat imprecise conceptual bounds. While writing on one categorical, if doctrinally abandoned exception, the "fighting words" doctrine, Justice Frank Murphy articulated a broader understanding of the outer bounds of free speech in *Chaplinsky v. New Hampshire*. In Justice Murphy's broad reading of First Amendment protections, to which the Supreme Court unanimously acceded, only in "certain well-defined and narrowly limited classes of speech [which] are no essential part of any exposition of ideas, and [which] are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[5] Among the typologies of free speech forms, very few have been characterized as having "no essential part" of these critical democratic functions—e.g., knowing lies or statements which endanger listeners, legitimate incitements of violence, and so on.[6]

content depending on context, distinguishing publicly acrimonious speech from, inter alia, sexually harassing speech arising in work environments); Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1279 (2007) (discussing the elastic nature of "strict scrutiny" review as applied to midcentury United States Supreme Court cases); Daniel Halberstern, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 773 (1999) (noting the unclear juxtaposition of professional service providers, e.g., physicians or attorneys, possessing First Amendment rights under law against the permitted instances of licensure and other regulatory requirements on those professions, as in Planned Parenthood v. Casey–upholding a state law requirement that doctors provide information to women seeking abortions, including alternatives); Harry Kalven, Jr., *Broadcasting, Public Policy and the First Amendment*, 10 J.L. & ECON. 15 (1967) (reviewing less-protected commercial speech, especially in broadcast radio and television media, drawn from myriad, political-ideologically diverse critiques); *accord* Planned Parenthood v. Casey, 505 U.S. 833, 884 (1992).

4. *See* Redish, *supra* note 1, at 591.

5. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942); *see generally* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 192–93 (1983).

6. Anthea J. Jeffery, *Free Speech and Press: An Absolute Right*, 8 HUM. RTS. Q. 197, 201 (1986) (noting a range of exceptions to free speech protections, including speech which incites violence, undermines national security interests, violates the privacy interests of other individuals, or results in prejudices impugning free trials, among others); *accord* Schenck v. United States, 249 U.S. 47 (1919) (including Justice Holmes' exception for panic-inducing speech, such as erroneously shouting "fire" in a theater); Brandenburg v. Ohio, 395 U.S. 444 (1969) (holding that speech which incites "imminent lawless violence" is not protected if the speech aims to incite and is likely to produce it); Virginia v. Black, 538 U.S. 343 (2003) (holding there is no protection for "true threats," distinguishing between a protected KKK rally burning a cross and the unprotected burning of a cross on a private individual's yard to intimidate them); Holder v. Humanitarian Law

Free speech typologies further subdivide expression depending on its content, where content-neutral and noninvasive regulations generally are permitted. Such "core" or "political speech" has been called "the central meaning of the First Amendment,"[7] and thus afforded the most expansive protections from government interference. Protecting political expression is essential to a democratic system of governance, necessitating protections from within the mainstream ideologies of American politics to the furthest reaches of its fringes.[8] Traditionally, then, speech directed to self-governance—to a citizen "[having] the information and ideas necessary for [democratic] decisionmaking"—has been argued to be deserving of absolute protection[9], or at least given expansive room to allow "more speech" to cure free expression's consequences.[10]

Another related justification for vibrant First Amendment protections concerns Justice Oliver Wendell Holmes's famous "marketplace of ideas" metaphor, which contends that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[11] Although this second theoretical basis has generated extraordinary controversy and criticism,[12] Justice Holmes's metaphor remains a common touchstone for

Project, 561 U.S. 1 (2010) (holding, as applied to the plaintiffs, that their "support" and "training," or other forms of "assistance" to State Department-designated terrorist organizations, was not protected speech, and that provisions of a federal statute prohibiting such assistance were *not* unconstitutionally vague).

7. *Sullivan*, 376 U.S. at 273.

8. *See, e.g., Black*, 538 U.S. at 367 (2003) (holding unconstitutional a Virginia statute banning all cross burnings, including protected ideology-driven burnings by the KKK, thus risking government suppression of unpopular ideas); *accord* Snyder v. Phelps, 562 U.S. 443 (2011) (holding protests of a military service member's funeral on public land is protected by the First Amendment's bar on content and viewpoint-based restrictions of messages); *cf.* Redish, *supra* note 1, at 596 (critiquing "democratic process" arguments as fundamentally limited, since this function of free speech does not empirically result in "[facilitation of] the political process" or "foster [only the values associated with expressive] conduct of the political process").

9. Lee C. Bollinger, *Free Speech and Intellectual Values*, 92 YALE L.J. 438, 447 (1983).

10. *See, e.g.*, Alexander Tsesis, *Balancing Free Speech*, 96 B.U. L. REV. 1, 2 (2016) (noting the limitations of the "more-speech" approach in recent Supreme Court jurisprudence as both "clearly inaccurate," given numerous topical exceptions to free speech, and "question-begging"); *cf.* Citizens United v. FEC, 558 U.S. 310, 361 (2010) ("When Congress finds that a problem exists, we must give that finding due deference . . . remedies [for improper political campaign conduct] enacted by law, however, must comply with the First Amendment; and it is our law and our tradition that more speech, not less, is the governing rule").

11. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

12. *See, e.g.*, Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L. J. 1 (landmark article challenging the veracity of the underlying "marketplace" reasoning, especially its reliance upon a rationality assumption and its susceptibility to entrenching extant power structures, rather than fostering debate); Thomas W. Joo, *The Worst Test of Truth: The Marketplace of Ideas as Faulty Metaphor*, 89 TUL. L. REV. 383 (2014) (challenging the metaphor on grounds that the "free market" assumptions underlying it are not only faulty, but diametrically

free speech advocates of all political stripes—and tracks well with the Supreme Court's abovementioned rulings over the nearly 100 years since *Abrams*.

B. Commercial Speech Offers Informational Value

While less robustly protected than "core" speech, the comparatively lower-value commercial speech has been protected from state intrusions as well. The Supreme Court has defined commercial speech in myriad ways: as speech which "propose[s] a commercial transaction,"[13] speech which "disseminat[es] information as to who is producing and selling what product, for what reason, and at what price,"[14] or communication which is "related solely to the economic interests of the speaker and its audience."[15] In *Central Hudson*, the Supreme Court provided a seminal justification for ensuring protections of commercial speech:

> Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of informationFalse Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all.[16]

Since *Central Hudson*, restrictions on commercial speech have been subjected to careful evaluation. Whereas false or "misleading" advertising and other forms of commercial speech "related to unlawful activity" may be banned altogether[17], "the government's power is more circumscribed" vis-à-vis restrictions upon all other modes of commercial speech.[18] Otherwise, regulations of commercial speech generally "must assert a substantial interest" and "the [chosen] regulatory technique must be in proportion to that

opposed to economic reality–that markets notably are especially *bad* at discerning "truth"); Bill Shaw, *Corporate Speech in the Marketplace of Ideas*, 7 J. CORP. L. 265 (1981–82) (arguing that the extension of free speech protections to corporations in the political arena is anathema to "marketplace" justifications); Tamara R. Piety, *Market Failure in the Marketplace of Ideas: Commercial Speech and the Problem that Won't Go Away*, 41 LOY. L.A. L. REV. 181 (2007).

13. Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 385 (1973).

14. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).

15. Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980).

16. *Id.* at 561–62.

17. *Id.* at 563–64.

18. *Id.* at 564.

interest," that is, "designed carefully to achieve the State's goal" through the least invasive means practicable.[19]

Commercial speech protections—however broad—are not boundless. The Court has refused to dissolve the boundary separating commercial expression from "core" expression, even where advertising "links a product to a current public debate," no matter how salient the controversy in question.[20] In fine, commercial speech regulations are defined by a certain tension: any such regulations still must be circumscribed carefully, yet they generally receive less-searching, less-assertive analysis by reviewing courts when challenged.

C. Conceptual Problems with Commercial Speech Doctrine

The foregoing context helps frame the issues in the subsequent sections, but the key issues herein must be distinguished from other, larger debates in First Amendment jurisprudence and scholarship. The general outlines of commercial speech doctrine have faced sharp criticism from various scholars, particularly works focusing on the intersections of "free speech and economic power."[21] While these critiques variously provided theoretical and empirical arguments that, as in the marketplaces of the modern economy, the conflation of money and speech in the "marketplace of ideas" provides a double meaning to the common maxim "money talks"—in both types of "marketplaces," money "talks" and money amplifies the voices of some over others correspondingly.[22]

First Amendment scholar Martin Redish provides a concise, overarching series of refutations of the foregoing criticisms, but sharpens his focus in commercial speech contexts in calling out others' "considerations of normative political ideology"—meaning, per Redish, many criticisms of money-as-speech and of commercial speech protections generally are partisan-ideological by nature, often from the political left, "contravene[ing] the principle of 'epistemological humility' on questions of normative value."[23] His central, relevant thesis—that "restricting the use of money in the expressive marketplace silences" and that "no basis in free speech theory exists to justify the disparate treatment of corporate or commercial speech

19. *Cent. Hudson Gas & Electric Corp.*, 447 U.S. at 561.

20. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 68 (1983) (quoting Cent. Hudson, 447 U.S. at 563, n. 5).

21. *See, e.g.*, MARTIN H. REDISH, MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY (2001), for an overview of these criticisms and a forceful argument rejecting them on various constitutional and democratic theory based grounds.

22. *Id.* at 1–3.

23. *Id.* at 3.

on the basis of its profit motive"[24]—may provide a reasonable justification for minimal commercial speech regulation as the presumption under the First Amendment, but it is immaterial to the present analysis. In the context of U.S. credit rating agencies, as discussed in the following section, the "product" is the "speech"—i.e., the ratings and other assessments by the agencies, in the issuer-pays model, are both the "products" (what securities issuers are paying the agencies for) and the "speech" for which the agencies claim First Amendment protections when challenged in litigation. Thus, the present focus concerns a much narrower—and much less theoretically consonant—debate than the ones highlighted by Redish and others, although it is a debate with profound, real-world economic and financial consequences of grave concern.

D. Speech Claims and the CRAs Muddle Ratings' "Opinions" Under the First Amendment

While the foregoing definitions and analytical frameworks for considering commercial speech are workable (if not fully clear), the Supreme Court has injected significant doctrinal ambiguity in one notable industry: credit rating agencies. Given the systemic importance of the credit rating agencies (CRAs), this is a curiously unique carve-out from the traditionally comprehensive approaches toward First Amendment jurisprudence worth exploring in detail. Generally, the CRAs are private firms which issue assessments (credit ratings) for a vast range of institutions, financial instruments, and corporations, including complex analyses of those entities' underlying creditworthiness as a whole.[25] The largest American CRAs—Moody's, Standard & Poor's, and Fitch—control 91% of the securities ratings market in the country[26] and play a vital role in the modern global financial system.[27] Although exact alphanumeric ratings differ slightly across all three firms, a "AAA" rating uniformly ranks highest, meaning the rated entity or financial instrument is both "investment grade" and perceived to be a low-risk investment; ratings at or below "BBB," however, are

24. REDISH, *supra* note 21.

25. In the CRA context, "creditworthiness" evaluations consider the referent entity's "ability to repay obligations or its likelihood of not defaulting" on repayments. *See* Nasdaq, *Credit Rating* (2011), www.nasdaq.com/investing/glossary/c/credit-rating.

26. Dori K. Bailey, *The New York Times and Credit Rating Agencies: Indistinguishable Under First Amendment Jurisprudence*, 93 DENV. U. L. REV. 275, 335 (2016).

27. John Patrick Hunt, *Credit Rating Agencies and the "Worldwide Credit Crisis": The Limits of Reputation, the Insufficiency of Reform, and a Proposal for Improvement*, 2009 COLUM. B.L. REV. 109 (2009).

considered below- or non-investment grade,[28] while "C" or "D" ratings ("speculative grade" investments) "either signal a higher level of credit risk or that a default has already occurred."[29]

Facially, ratings issued by CRAs appear akin to well-settled objects of commercial speech regulation.[30] Following two formative cases in 1985—*Lowe*[31] and *Greenmoss Builders*[32]—the Court accordingly appeared to endorse the credit ratings/advertising comparison. Whether the Court still views CRAs as subject to the same commercial speech standards, however, is unclear. Indeed, the Securities and Exchange Commission (SEC), through its own administrative rulings,[33] appears to blur the line between commercial and core, highly protected forms of speech, to which the courts have acquiesced. At a minimum, nearly all federal courts have been reluctant to impose liability for damages incurred by investors' reliance on CRAs' "opinions,"[34] a description which protects CRAs from the professional malpractice liabilities imposed upon other "expert" industries.[35] Ultimately, "The Supreme Court has yet to address the issue of whether speech by a [CRA] regarding the credit rating of an issue or issue of securities is fully protected speech or commercial speech"[36]—securities being financial instruments of extraordinary salience in the fraught public discourse unleashed by the 2008 financial crisis and ensuing Great Recession.

28. QuadCapital Advisors, LLC, *Rating Agency Credit Scale* (2017), http://www.quadcapital.com/resources/credit-rating-scales.

29. Fitch Ratings, Inc., *Ratings Definitions* (2017), https://www.fitchratings.com/site/definitions.

30. *See, e.g.*, Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc. 425 U.S. 748 (1976) (pharmaceutical advertising); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983) (contraceptives advertising); *Cent. Hundson Gas & Electric Corp*. 447 U.S. at 561–64 (electric utility advertising).

31. Lowe v. SEC, 472 U.S. 181 (1985).

32. Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).

33. *See, e.g.*, SEC Written Consents Rule, 17 C.F.R. § 230.436(g)(1) (2014) ("providing the [CRAs] with an exemption from liability under Section 11 of the Securities Act of 1933 for false or misleading statements in a registration statement"). *See also* 15 U.S.C. § 77a *et seq.* for the basic S.E.C. framework for registration requirements for securities issuances under the Securities and Exchange Act of 1933 (hereinafter "the Act").

34. *But see* Abu Dhabi Com. Bank v. Morgan Stanley & Co. Inc., 888 F. Supp. 2d 431 (S.D.N.Y. 2012) discussed *infra* at Part IV(A)(2).

35. *See generally* Marilyn Blumberg Cane, Adam Shamir, & Tomas Jodar, *Below Investment Grade and Above the Law: A Past, Present and Future Look at the Accountability of Credit Rating Agencies*, 17 FORDHAM J. CORP. & FIN. L. 1063 (2012); Bailey, *supra* note 26 at 277–78, 287–94 (highlighting financial advisors, auditors, and security analysts, among other professions exposed to liability).

36. Bailey, *supra* note 26, at 291.

E. The Supreme Court Distinguishes Opinions from Statements of Facts – An Extant Framework for CRA Ratings in Litigation

Nearly four decades after *Lowe* and *Greenmoss Builders*, a more-recent case has diminished their resonance and usefulness for post-crisis assessments of CRAs' actions and potential liability: *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund* ("*Omnicare*").[37] In that case, a group of pension funds sued Omnicare, a pharmacy company specializing in nursing home resident services, after the federal government disclosed investigations of the company's involvement in alleged kickback schemes under the antifraud provisions of the 1933 Securities and Exchange Act's Section 11.[38] In Omnicare's registration statements—required to issue securities under the Act, as well as the basis for the pension funds' claims against the company—two statements averred that the company's contracting arrangements were in accordance with state and federal law.[39] Both statements began with "We believe," a framing viewed both by Omnicare and by the reviewing, unanimous U.S. Supreme Court majority as reflections of opinion—not misstatements of "fact," as required by the Act to trigger liability.[40]

In writing the majority opinion, however, Justice Kagan elaborated on the distinctions between "opinion" statements and "statements of fact," a distinction which is not obviously binary. The baseline definition for "a statement of *fact*" is a statement which "expresses certainty about a thing, whereas a statement of opinion . . . does not."[41] Hence, statements which begin "I believe" or "we think" appear to fall under the latter category–pure opinions which cannot trigger liability under securities laws and regulations. There are exceptions of crucial importance; careful couching of disclosures' phrasing is no panacea and even "opinions" may be treated as factual statements in at least three situations. First, an erstwhile opinion statement may *not* protect the speaker from liability when they *know* their stated belief (e.g., "I believe our securities offer the best returns in this market segment") is erroneous (e.g., the speaker *knows* their securities' returns are not the best).[42] Second, opinions which necessarily "contain embedded statements

37. Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 135 S. Ct. 1318 (2015).

38. *Id.* at 1318–24.

39. *Id.* at 1323.

40. *Id.*

41. *Id.* at 1325 (emphasis added).

42. *Id.* at 1326–27.

of fact" within them may provide a cause of action under securities laws and regulations.[43] In these scenarios, a statement may no longer be an "opinion" if the speaker follows "I believe" with "because," then one or multiple factual assertions justifying the speaker's belief.[44] Third, and finally, evidence demonstrating a speaker's stated opinion was not sincerely held—i.e., the speaker was dishonest, irrespective of having expressed pure opinion or an opinion with embedded factual assertions—clearly implicates the possibility of liability under state or federal antifraud laws.[45]

Of course, the CRAs are exempt from the Act's Section 11 requirements, meaning the Omnicare framework may not be applied directly to the CRAs without impinging upon the SEC's regulatory directives.[46] Nonetheless, if the Supreme Court opts to harmonize 1980s-era precedents and the more-recent *Omnicare*, as it should, then the CRAs should be wary about judicial review of their crisis-era conduct, whether under the SEC Act or under general federal and state antifraud laws. For the CRAs, either approach is cause for concern after a decade of post-crisis analysis and particularly damning insider admissions.[47]

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43. *Omnicare, Inc.,* 135 S. Ct.at 1327.

44. *Id.* (referencing Va. Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1109 (1991) (Scalia, J., concurring in part and concurring in judgment)).

45. *Id.*

46. *See* 17 C.F.R. § 230.436(g)(1); *see also* 15 U.S.C. § 77a.

47. The U.S. Congress-commissioned Financial Crisis Inquiry Commission's Final Report catalogues voluminous examples. Among other warning signs which implicate the CRAs are the shifting lending standards for mortgage borrowers leading into the crisis; the longstanding, prototypical borrower putting 20% of a home's value into a down payment became less common as lenders accepted ever-lower payment amounts and offered mortgages covering ever-higher percentages of borrowers' mortgages. FINANCIAL CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES 109–10 (Jan. 2011) (hereinafter "FCIC REP."). In the run-up to the crisis, some lenders required no upfront collateral whatsoever, instead providing multiple mortgages to the same buyer to cover the entire cost of the home. *Id.* at 110. Those borrowers then had no equity in their own homes, a major problem once prices began to drop in lockstep with a deteriorating national economy—those zero-equity borrowers would have more difficulty paying their mortgage obligations (as incomes leveled or declined, work hours decreased, and layoffs spread early in the crisis) and, therefore, face risks of defaulting on *two* mortgages simultaneously. *Id.* The tendency for these defaults to be geographically proximate—even within the same neighborhoods, or on the very same streets—amplified these risks by ensuring these types of borrowers could not sell their homes in oversaturated, declining markets. *Id.* At the same time, underwriting and borrower–documentation standards loosened, especially for the riskiest subprime borrowers with poor credit and high relative default risks; lenders, in egregious cases, merely confirmed employment information provided by applicants, but no longer required proof of income. *Id.* The twofold pattern of increasing mortgage debts without equity/collateral and decreasing underwriting/documentation standards became widespread throughout U.S. housing markets–and well-known to insiders. *Id.* at 111. Citigroup's Richard Bowen testified after the crash that bankers were aware of these trends: "A decision was made that 'We're going to have to

Essentially, this Note advocates for the abovementioned harmonizing strategy in a manner consistent with fundamental constitutional principles above all—i.e., affirming existing First Amendment doctrines and properly classifying CRAs' ratings opinions within them, rather than as a wholly unique outlier. As long as the written consents rule holds,[48] then reviewing courts–and the U.S. Supreme Court in particular—ought not to confer overly expansive First Amendment-based protections for the CRAs' bubble-era misconduct, nor should the Court retain expansive guards against liability in case of future systemic financial crises. At most, CRAs' opinions, which necessarily rely upon embedded factual claims and which are the "product" for which securities issuers pay fees to the agencies, match the existing rubrics of commercial speech doctrine best. Ratings, ultimately, are "speech" and a "commercial transaction" rolled into one, not representations of ideological or political "core" speech.[49] For specific contexts, like the widespread, still-ongoing post-crisis litigation involving the CRAs,[50] an *Omnicare*-style approach with case-by-case assessments of CRAs' knowledge should provide the focal legal issues upon review. More broadly, policy-focused resolutions to this doctrinal morass should include exploring new SEC rule-making to strike the written consents carve-out for the CRAs as well as other means of harmonizing regulatory doctrines across industries (e.g., securities issuers, CRAs, mortgage lenders, and others involved in the housing and financial services sectors).

hold our nose . . . if we want to stay in business." *Id.* Former banking regulator William Black called "low-documentation" or "no-documentation" loans "an 'open invitation to fraud,'" colloquially known as "liar's loans." *Id.* at 110–11. CRA insiders' testimonials provide little help. A Moody's director testified: "We had to be looking for a problem [e.g., in the underlying risks of the mortgages they securitized and rated]. And we weren't looking." *Id.* at 147. CRAs, among other finance institutions, received growing numbers of warnings from regulators and watchdog groups around the world in the years immediately preceding the crash as well, with the Bank of International Settlements cautioning insiders about widespread defects in financial models (understating default risks and correlation risks systematically) as well as potentially disastrous consequences–all nearly a year before Bear Stearns collapsed. *Id.* at 148.

48. *See* 17 C.F.R. § 230.436(g)(1); *see also* 15 U.S.C. § 77a.

49. *See supra* notes 13-20 and corresponding discussion.

50. *See, e.g.*, Emily Glazer, *Wells Fargo Reaches $2.09 Billion Settlement Over Mortgage-Backed Securities*, WALL ST. J. (Aug. 1, 2018), https://www.wsj.com/articles/wells-fargo-agrees-to-2-09-billion-settlement-for-crisis-era-mortgage-loans-1533147302.

II. The Global Financial Crisis and CRAs: Intermediaries, Gatekeepers, Accelerants

A. The Rapid Rise of the American Housing Sector and Mortgage Securitization Before the Crisis

For at least the last three decades, the American housing sector has been a key locus of financial sector innovations, including the rise of securitized mortgages and related, increasingly complex financial investment instruments. Securitized mortgages developed rapidly after the savings and loan (S&L) crisis of the 1980s, ostensibly as instruments for mitigating and transferring or distributing the very financial risks which drove the earlier S&L crisis itself. Between the Great Depression and the early 1980s, S&Ls provided substantial sources of mortgage financing around the country, typically in the form of "traditional fixed-rate, 30-year mortgages."[51] The S&Ls combined three essential functions—origination, service, and holding[52] of mortgage loans in their portfolios—but they also "were largely prohibited from offering adjustable-rate mortgages [ARMs] or hedging their interest-rate risk through the use of derivatives."[53] As such, when the economy faltered in the late 1970s, a chain of policy choices and market shifts proved disastrous. In response to rising inflation, "short-term interest rates rose rapidly [during the late 1970s], and the yield curve inverted, with short-term rates exceeding longer-term rates."[54] With S&Ls holding nearly

51. Franklin Allen, James R. Barth, & Glenn Yago, *Financial Innovations and the Stability of the Housing Market*, 230 NAT'L INST. ECON. REV. 16, 28 (2014).

52. In the archetypal model, a "mortgage loan . . . is a loan secured by the collateral of some specified real estate property [e.g., a residential home], which obliges the borrower [homebuyer] to make a predetermined series of repayments" to the lender which provides the financing. Frank J. Fabozzi & David Yuen, *Agency Mortgage-Backed Securities* 333, *in* THE HANDBOOK OF FINANCIAL INSTRUMENTS (Frank J. Fabozzi ed. 2002). In exchange, the "mortgage gives the [lender the] right . . . to 'foreclose' on the loan and seize the property" if the borrower defaults on the prearranged repayments. *Id.* Thus, in the stylized and simplified approach, when a potential homebuyer decides to purchase a home, for instance, they apply for a mortgage loan with an originator, who, for a transaction fee, "performs a credit valuation for the applicant" and assesses their ability to repay the loan amount, given their income relative to the loan amount, as well as the value of the referent home vis-à-vis comparable properties in the area. *Id.* Once the mortgage is approved, the originator sends the approval to a financial institution (prototypically a bank or credit union), which acts as the lender–i.e., processes and pays out the loan amount, while "holding" the mortgage on their books. *Id.* at 333–34. S&Ls, however, combined each of these functions, overexposing those institutions to default risks of homebuyers in the (inevitable) case of a housing sector downturn or recession, as occurred in the 1980s. *Id.*

53. Allen, Barth & Yago, *supra* note 51, at 28.

54. *Id.*

half of all US mortgages in their portfolios—with fixed, 30-year terms—the sharp, sudden interest rate hikes meant thousands of these institutions became functionally insolvent, with an industry-wide shortfall of approximately $150 billion ($417 billion in 2011 dollars).[55] Lacking ARMs, S&Ls' mortgages became unmarketable, since new mortgage-backed investment assets and government-issued bonds instantly became the safer, preferred options among most investors.

Consequently, a more-distributed, decentralized system of financial institutions—with novel financing tools offered to would-be homebuyers—emerged after the mid-1980s.[56] Fixed-rate, 30-year mortgages remained a benchmark, but ARMs, subprime loans, and "hybrid" loans quickly expanded as a proportion of all mortgage financing approaches nationally. The variable nature of these loans, both in terms of their interest rates and the associated financial risks (e.g., the mortgagees' default risks), provided "[mortgages] which featured low introductory interest rates for two or three years but a higher rate thereafter. This financial innovation was fine [but only] *as long as home prices continued to rise*."[57] Therein lies the key structural defect that proved so disastrous for homeowners, lenders, and the overall economy over the decades which followed.

B. Historical Overview of America's CRAs Through 2007: The Gatekeepers Become Innovators

Throughout the rise of structured finance and securitization since the early 1990s, CRAs became deeply linked to increasingly diverse, enormously complex financial instruments.[58] These instruments notably included various forms of mortgage-backed securities (MBSs),[59]

55. Allen, Barth & Yago, *supra* note 51, at 28.

56. *Id.*

57. *Id.* (emphasis added).

58. Hunt, *supra* note 27, at 117–18.

59. MBS emerged in the 1980s amid rapid changes in the banking, housing, and financial services sectors. MBS "are financial assets, which, if publicly issued, are traded in an open market," innovatively allowing investors to disaggregate mortgages—both residential and commercial—whereas before mortgage securitization, investors could only deal with entire mortgages at once; *see* David J. Hartzell, Andrea Lepcio, Julia D. Fernald, & Susan Jordan, *Commercial Mortgage-Backed Securities: An Investor's Primer*, 6 HOUS. FIN. REV. 169, 170–71 (1987). From their inception, MBS are distinct from other, earlier forms of securities in that they are backed "by a pool" of assets, i.e., physical properties upon which the securities' values are based. While there are many types of MBS, the two main types for present purposes are "agency-backed MBS," i.e., MBS backed by the U.S. Department of the Treasury's guarantees, such as those created and sold by Fannie Mae and Freddie Mac, and "non-agency" MBS, which are issued by other financial institutions engaged in the housing sector. Frank J. Fabozzi & David Yuen, *Agency Mortgage-Backed Securities in* THE HANDBOOK OF FINANCIAL INSTRUMENTS 331, 333 (Frank J. Fabozzi ed.

collateralized mortgage obligations (CMOs),[60] collateralized debt obligations (CDOs)[61] and a range of credit default swaps (CDSs)[62] and complex derivatives,[63] among others. CDSs developed as a means for

2002). Sometimes, MBS backed by a pool of commercial properties, i.e., income-generating buildings from offices and hotels to industrial sites, are called "commercial MBS," or "CMBS." Joseph F. DeMichele, William J. Adams, & Duane C. Hewlett, *Commercial Mortgage-Backed Securities in* THE HANDBOOK OF FINANCIAL INSTRUMENTS 399 (Frank J. Fabozzi ed. 2002).

60. The genesis of CMOs was aimed at mitigating investment risks inherent in MBS by dividing securities' payouts from the underlying mortgage pool across a classified or hierarchical structure of investor levels called "tranches." Each CMO tranche is organized according to the risk profiles of the underlying assets (e.g., according to the risk of default or nonpayment for the mortgages contained in the pool). Fabozzi & Yuen, *supra* note 59, at 356. In fine, the effects of CMOs—the effects of collateralizing or pooling mortgages of varied risk profiles—were distributional, rather than risk-eliminating: they shifted risks across broader ranges of investors, only. *Id.* Thus, CMOs had systemic effects on financial and housing markets in the U.S. and globally: "The CMO's major financial innovation is that the securities created more closely satisfy the asset/liability needs of institutional investors and thus broaden the appeal of mortgage-backed products to . . . investors." *Id.* (emphasis added).

61. CDOs similarly emerged after the S&L crisis of the 1980s, a novel financial innovation which added one step beyond the pooling of CMOs (*see supra* note 46). CDOs added diversification to the securitization process, combining pools of assets across multiple industries, rather than just mortgages. Laurie S. Goodman & Frank J. Fabozzi, *Collateralized Debt Obligations*, *in* THE HANDBOOK OF FINANCIAL INSTRUMENTS 483–84 (Frank J. Fabozzi ed. 2002). CMOs include, *inter alia*, "corporate bonds, bank loans, sovereign bonds, and [MBS/CMBS]," among other types of underlying assets. *Id.* at 484. Although CDOs aimed to contain various forms of risks through diversification–securities which derive their value from a range of industries, such that a downturn in one sector (e.g., residential housing) could be offset by maintained strength in another (e.g., the sovereign bond market for emerging economies), thus preventing widespread losses—but as is a truism in the field of finance, risk can never be fully eliminated. Indeed, nearly a decade before the financial crash, commentators noted the pivotal role of credit rating agencies in evaluating the underlying risks to prevent widespread defaults or contagion: "The biggest risk [for CMOs and other pooled securities] . . . is a sudden decline in the value of the collateral pool. Thus, the [CRAs] focus on the price volatility and liquidity of the [underlying] assets" in their analyses and ratings assignments." *Id.* at 494. *See generally* DeMichele, Adams, & Hewlett, *supra* note 59, at 417–19.

62. Swaps, including credit default swaps, refer to agreements between two parties to "swap" risks across their respective portfolios–i.e., they contractually agree to a predetermined "exchange of a schedule of cash flows over a specified" duration, which can run from as little as a few months to as long as a decade. Bruce M. Collins & Frank J. Fabozzi, *Equity Derivatives*, *in* THE HANDBOOK OF FINANCIAL INSTRUMENTS 723, 752 (Frank J. Fabozzi ed. 2002). Swaps are useful tools for mitigating risks when an investor or a company is overexposed to a particular industry or commodity. For example, an airline company likely is exposed to risks associated with fuel costs, since oil prices are volatile and oil is an essential commodity in the airline sector. Thus, an airline may wish to "swap" their exposure to the energy sector with another company operating in another line of business without exposure to the same sector. In other contexts, swaps are advantageous when a firm or investor wishes to hedge their foreign exchange risks (e.g., using currency swaps to offset possible losses from fluctuating currency values in global markets) or to gain access to foreign currency if they wish to expand business in a new market abroad. *Id.* at 753.

63. Derivatives, most generally, are "contracts that essentially derive their value from the behavior of cash market instruments such as stocks, stock indexes, bonds, currencies, and commodities that underlie the [derivative] contracts." Collins & Fabozzi, *supra* note 62, at 723. Derivatives thus refer to a class of financial instruments, all ostensibly aimed at benefits like offsetting

companies and investors to offset the default risks of their portfolios by "swapping" those risks with other companies and investors, analogous to insurance contracts.[64] As with those contracts, the holder of a CDS "pay[s] premiums over time" on the swap, such that, if the entity underlying the swap "does not default . . . the premiums" are lost; however, if the default event occurs, "the credit default swap allows [the owner] to exchange [it] for the principal amount of the bonds, or alternatively, depending on the details of the contract, for a payment equal to the principal amount . . . minus their current value at the time of default."[65] As such, two companies may hold swaps—e.g., one company with widespread exposure to the automotive sector and another company with widespread exposures in an industry which performs conversely with automotive sector performance—and thus offset their respective risk exposures. Importantly, though, CDSs have two main differences vis-à-vis insurance contracts: First, the owner of a CDS need not hold the bonds underlying the swap, unlike with insurance contracts, where one "typically [must] have a direct economic exposure to obtain insurance" and, second, CDSs are tradable in markets, unlike most insurance contracts.[66]

The market for CDSs ballooned most prolifically over just two decades: "The first CDSs were traded by JP Morgan in 1995" and, by 2001, their total market value was just under $919 billion; by 2007, at the market's pre-crash zenith, this value had ballooned to over $62 *trillion*.[67] The CRAs' ratings reach far beyond securities, including sovereign debt ratings—assessments of creditworthiness for foreign countries' investment bonds[68]—and traditional, less-risky corporate bonds.[69] Nonetheless, it is these classes of

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investment risks via diversification and hedging, easing transaction costs and information flows, and other functions akin to securities. *Id.* at 723–24. Derivatives include instruments such as futures and forwards (predetermined, binding agreements to transact over defined commodities or investments in the future at pre-specified prices), options (like futures and forwards, but *elective*–i.e., the parties to such a contract are not bound to execute the agreement), and various forms of swaps. *Id.* at 725, 741, 752–53. For present purposes, this Note uses the term "structured finance" to refer to all the foregoing financial instruments which proliferated in the wake of the S&L crisis of the 1980s, from traditional securities to the most complex derivatives, for parsimony. Exceptions to this catch-all term are noted expressly otherwise.

64. René M. Stulz, *Credit Default Swaps and the Credit Crisis*, 24 J. ECON. PERSP. 73, 74 (2010).

65. *Id.*

66. *Id.*

67. Robert A. Jarrow, *The Economics of Credit Default Swaps*, 3 ANN. REV. OF FIN. ECON. 235, 236 (2011).

68. Glen Biglaiser & Joseph L. Staats, *Finding the "Democratic Advantage" in Sovereign Bond Ratings: The Importance of Strong Courts, Property Rights Protection, and the Rule of Law*, 66 INT'L ORG. 515 (2012).

69. *See* Aysun Alp, *Structural Shifts in Credit Rating Standards*, 68 J. FINANCE 2435 (2013).

financial instruments which garnered particularly widespread attention in the wake of the crisis.[70]

The manifold roles of CRAs, both in the spread of the American housing bubble of the 2000s and in the extremity of the ensuing financial crisis, are well-documented. Looking just to CRAs' assessments of MBSs and related instruments is illustrative. In the run-up to the crisis, a constellation of actors in the financial services sector relied upon faulty assumptions about market fundamentals—traditional commercial banks (providing mortgage loans to homebuyers); investment banks and hedge funds ("securitizing" these loans, i.e., packaging them into new investment instruments which could be bought and sold on the market); and the CRAs (assessing the risk profiles for all these investment instruments).[71] Disastrously, and in addition to the implicit assumption of perpetual home value growth mentioned above, these financial institutions assumed the risks of homeowners defaulting on their mortgages were *un*correlated, meaning there was only marginal risk of "contagion."[72] To make matters worse, the increased complexity of securitization spread the contagion across diverse segments of the global economy: collateralized debt obligations (CDOs) combined numerous mortgages of mixed risk profiles, including the riskiest subprime mortgages most likely to default, while the entirely unregulated

70. *See generally* Stulz, *supra* note 64.

71. *See* MICHEL CROUHY, DAN GALAI & ROBERT MARK, THE ESSENTIALS OF FINANCIAL RISK MANAGEMENT 82–84, 88 (2nd ed. 2014).

72. For illustration, this means that a single default–one homeowner in a neighborhood becoming unable to pay their monthly mortgage, thus losing their home (and invested equity) to the holder of the debt, often a bank or other institutional investor–would have no discernible effect on neighboring homeowners. Several factors ensured that mortgage defaults were *highly* correlated instead: ARMs were common financing/repayment structures for the riskiest (i.e., "subprime") mortgages, and after a period of zero or near-zero interest rates, the ARMs would adjust upward, often dramatically. In a neighborhood constructed quickly and speculatively, with many lower-income, lower-credit, typically first-time homebuyers, the ARM interest rates spiked almost simultaneously, leading to widespread defaults. Even among those who could afford to maintain their mortgage payments, once defaults and foreclosures began destroying home values in an area, attempts to sell remaining homes accelerated the crisis. *See, e.g.*, John Hull & Alan White, *The Risk of Tranches Created from Mortgages*, 66 FIN. ANALYSTS J. 54 (2010); Bruce I. Jacobs, *Tumbling Tower of Babel: Subprime Securitization and the Credit Crisis*, 65 FIN. ANALYSTS J. 17 (2009); Atif Mian & Amir Sufi, *The Consequences of Mortgage Credit Expansion: Evidence from the U.S. Mortgage Default Crisis*, 124 Q.J. ECON. 1449 (2009) (arguing from ZIP code-level analysis that the highest-risk "subprime" locales experienced the greatest expansion in credit access in the years immediately preceding the financial crisis, such that income growth and mortgage credit growth actually were *negatively* correlated from 2002 to 2005); Atif Mian, Amir Sufi & Francesco Trebbi, *The Political Economy of the U.S. Mortgage Default Crisis*, 100 AM. ECON. REV. 1967 (2010) (demonstrating that U.S. congressional representatives' voting on peak-crisis legislation correlates highly with the localized effects of the default crisis in their districts over the short term).

CDS market exploded.[73] Coupled with private behaviors in the bubble years before 2007, such as escalating individual and household debts, the use of properties as a form of "leverage" for everyday homeowners, the prevalence of these exotic instruments in retirement accounts, and so on, the contagion sprawled quickly, far beyond Wall Street icons and into every corner of the U.S. and many global economies.[74]

As these financial sector innovations developed, the major U.S. CRAs expanded their traditional gatekeeping and information-transmission roles in lockstep, leading to sharp criticism in numerous post-mortem analyses of the bubble and crash. The CRAs not only provided advice to producers of these instruments under the guise of *ex ante* risk-mitigation, but they also routinely lavished "AAA" (extremely safe) ratings on many of the resulting instruments, including those containing the riskiest debts.[75] Systematically questionable assessments of products at least partially designed and then speciously rated by the CRAs drew sharp condemnation from lawmakers in the aftermath of the crisis: "[M]ajor firms and investors blindly relied on [CRAs] as their arbiters of risk. What else could one expect on a highway where there were neither speed limits nor neatly painted lines?"[76] Indeed, once the U.S. housing market slowed and prices in overheated, speculation-driven markets plateaued, before plummeting, the economy swerved over the hidden "lines"–and over a cliff.

73. CROUHY ET AL., *supra* note 71; *see also* John M. Griffin, Jordan Nickerson & Dragon Y. Tang, *Rating Shopping or Catering? An Examination of the Response to Competitive Pressure for CDO Credit Ratings*, 26 REV. FIN. STUD. 2270 (2013).

74. *See* Atif Mian & Amir Sufi, *The Great Recession: Lessons from Microeconomic Data*, 100 AM. ECON. REV. 51 (2010).

75. FCIC REP., *supra* note 47.

76. *Id.* at xvii.

C. Systemic Crisis Claims Victims: AIG, Lehman, and Bear Stearns

In addition to erasing vast sums of household wealth and equity,[77] the financial crisis claimed among its victims three of Wall Street's largest institutions: Bear Stearns, AIG, and Lehman Brothers.[78]

In the early twenty-first century, Bear Stearns had a sterling reputation among America's "most-admired" securities industry leaders,[79] and as of late 2007, following its peak, employed approximately 15,500 workers across dozens of global offices,[80] and was one of the largest securities firms in the world. Bear Stearns held over $400 billion in capital and total assets in the years before the crisis, but the firm's capital structure was radically imbalanced: in addition to its cash and assets, Bear Stearns held over $13 trillion in derivatives contracts as of 2007; a net equity valuation of just over $11 billion against total assets of $396 billion; and balance sheets flooded with highly illiquid, often "junk" assets in the deteriorating subprime mortgage market.[81] The firm's troubles came to light nearly a year before its ultimate collapse, when several of its managed hedge funds had to be bailed out by the company after the underlying assets' values began to dive.[82] After failed attempts to salvage or liquidate suddenly worthless assets, with other financial sector actors paying pennies on the dollar—or outright refusing to take on Bear Stearns's toxic assets at all–the firm's outlook turned into a panic and, over little more than a single week in early March 2008, the stock value crashed dramatically.[83] The first major institutional casualty of

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77. Losses "from fraud on mortgage loans made between 2005 and 2007" alone amounted to at least $112 billion; even stagnant markets experiencing zero or negative population growth—such as Cleveland, Ohio—experienced wild surges in home values despite doubling foreclosure rates from the mid-1900s through the early 2000s. The ultimate financial and economic effects proved disastrous: 3.6 million jobs were lost in 2008 alone, with 4.7 million more through the end of 2009; unemployment rates jumped from 8.8% to 13.7% from December 2007 to December 2008, while "the underemployment rate stood at 17%" by November 2010. An estimated $17 trillion—nearly $3 trillion more than the *entire* U.S. GDP in 2008—in U.S. household net wealth was lost between 2007 and 2009. *Id*. at xxii, 9–10, 390–91.

78. Allana M. Grinshteyn, *Horseshoes and Hand Grenades: The Dodd-Frank Act's (Almost) Attack on Credit Rating Agencies*, 39 HOFSTRA L. REV. 937, 937–38 (2010).

79. *America's Most Admired Companies 2007 – Fortune*, CNN MONEY (2007), http://money.cnn.com/magazines/fortune/mostadmired/2007/industries/industry_52.html.

80. Tim McLaughlin, *Bear Stearns to Cut 650 Jobs Globally*, REUTERS (Nov. 28, 2007), https://www.reuters.com/article/us-bearstearns-jobs/bear-stearns-to-cut-650-jobs-globally-idUSN2861070720071128.

81. Roddy Boyd, *The Last Days of Bear Stearns*, FORTUNE (Mar. 31, 2008), archive.fortune.com/2008/03/28/magazines/fortune/boyd_bear.fortune/index.htm.

82. Bryan Burrough, *Bringing Down Bear Stearns*, VANITY FAIR (Aug. 2008), https://www.vanityfair.com/news/2008/08/bear_stearns200808.

83. Boyd, *supra* note 81.

the subprime mortgage meltdown and credit crisis received an urgently needed infusion of $30 billion from its eventual bargain-buyer, JPMorgan Chase, which was "backstopped" and underwritten by the U.S. government[84]—effectively marking the first of the bailouts, though providing only a faint vision of the massive rescue efforts to come.

The first alarm bells went off amid the collapse and failure of Bear Stearns, but they quickly rang out in other areas of the U.S. economy as well. Before the crisis, AIG was "the then largest insurance company in the United States . . . [with] 2007 earnings of $6.20 billion" and a stock price in February 2008 of $50.15 a share.[85] AIG held roughly $1 trillion in assets, nearly $96 billion in shareholders' equity, yet it almost entirely collapsed—requiring $182.5 billion in government aid through 2009, while its stock traded below $1.00 per share in the year after the bailouts.[86] Lehman Brothers—even more extraordinarily—became the largest bankruptcy filing in the world history, with $592 billion in assets as of September 2008;[87] given Lehman's central position in the financial systems of dozens of countries, more than 80 international insolvency cases unfolded concurrently worldwide.[88] In further groundbreaking moves, Lehman's failure was notably striking not only for its rapid pace, but also for the dynamics leading to the landmark bankruptcy: while the "government had committed about $30 billion to supporting JPMorgan Chase's . . . takeover of Bearn Stearns" and nearly $200 billion in the effective public takeovers of Fannie Mae and Freddie Mac, potential eleventh-hour buyers for Lehman's enormous assets "had little time to inspect" their "toxic assets," and so could not agree to a purchase deal which sufficiently allayed their concerns.[89]

Against the backdrop of these massive losses was a longstanding pattern of massive risk-taking among the nation's largest banks. After 30 years of progressive deregulation of financial markets and institutions, the largest among them "borrowed [money] to the hilt, leaving them vulnerable to financial distress or ruin if the value of their investments declined even

84. Boyd, *supra* note 81. *See generally* Vincent Reinhart, *A Year of Living Dangerously: The Management of the Financial Crisis in 2008*, 25 J. ECON. PERSP. 71 (2011).

85. William K. Sjostrom, Jr., *The AIG Bailout*, 66 WASH. & LEE L. REV. 3, 943 (2009).

86. *Id*.

87. Emily Lee, *Investor Protection in Lehman Brothers' Insolvency Litigation* [Research Comment], 7 J. COMP. L. 284 (2012).

88. Stephen J. Lubben & Sarah Pei Woo, *Reconceptualizing Lehman*, 49 TEX. INT'L L.J. 297, 298–99 (2014).

89. Eric Dash, *5 Days of Pressure, Fear and Ultimately, Failure*, N.Y. TIMES, Sept. 15, 2008, http://www.nytimes.com/2008/09/16/business/16reconstruct.html?action=click&contentCollection=Business%20Day&module=RelatedCoverage&region=EndOfArticle&pgtype=article.

modestly."[90] These institutions borrowed heavily against "extraordinarily thin capital" to such an extent that several had "leverage ratios . . . as high as 40 to 1" just before the crash—"meaning for every $40 in assets, there was only $1 in capital to cover losses," and a mere "3% drop in asset values could" make such over-leveraged firms insolvent overnight.[91] In year following the collapse of Bear Stearns, financial institutions collectively—including commercial banks, insurers, government-sponsored enterprises, brokers and dealers, and hedge funds—lost in excess of $1 trillion by March 2009, an estimate which likely understated the true extent of all losses.[92]

Even while Fannie, Freddie, and AIG were saved by direct federal injections of massive public funding, and the "shotgun marriage[s]" of Bear Stearns with JPMorgan and Bank of America with Merrill Lynch prevented the total dissolution of these trillion-dollar institutions[93], Lehman was forced to file for bankruptcy on September 15, leaving 25,000 employees to clear out their Manhattan offices and stock markets plunging around the globe. Lehman's dramatic collapse prompted then-Federal Reserve Chairman Alan Greenspan to remark, "It's a once-in-a-century type of financial crisis," warning that other institutions were likely to tumble.[94] In the following weeks, Congress considered—and the House of Representatives initially rejected—a $700 billion bank bailout plan, fueling the dramatic stock market selloff on September 29, 2008: the Dow plummeted 778 points, "the biggest single-day point loss ever" at the time, while S&P dropped by 8.8%, and Nasdaq by 9.1%, cumulatively erasing $1.2 trillion in total market value.[95]

90. FCIC REP., *supra* note 47, at xix.

91. Further, "much of their borrowing was short-term, in the overnight market—meaning the borrowing had to be renewed each and every day." This pattern of borrowing exacerbated systemic risks, with the Commission noting that the borrowing habits of these institutions "was the equivalent of a small business with $50,000 in equity borrowing $1.6 million, with $296,750 of that due" to lenders daily–a pattern repeated across all major investment banks, including Bear Stearns, Goldman Sachs, Lehman Brothers, Merrill Lynch, and Morgan Stanley, only one of which survived intact, without being purchased, merged, or entering bankruptcy in toto. Fannie Mae and Freddie Mac, in extremis, increased their leverage ratios as high as 75 to 1 by 2007, outpacing investment banks' and private households' extensive accumulation of debts in the run-up to 2008. *Id.* at xix–xx.

92. Zhiguo He, In Gu Khang, & Arvind Krishnamurthy, *Balance Sheet Adjustments during the 2008 Crisis*, 55 IMF ECON. REV. 118, 123 (2010).

93. Edmund L. Andrews, *Fed Loosens Standards on Emergency Loans*, N.Y. TIMES, Sept. 15, 2008, at A19, http://www.nytimes.com/2008/09/15/business/15fed.html?action=click&contentCollection=Business%20Day&module=RelatedCoverage&region=EndOfArticle&pgtype=article.

94. Adam Shell, Matt Krantz, Sue Kirchhoff, John Waggoner & Kathy Chu, *Lehman Bros. Files for Bankruptcy Protection*, ABC NEWS, http://abcnews.go.com/Business/story?id=5805288&page=1.

95. Alexandra Twin, *Stocks Crushed*, CNN MONEY, Sept. 28, 2008, http://money.cnn.com/2008/09/29/markets/markets_newyork/ (noting not only the macro figures from the stock markets, but also the collapse of consumer spending throughout the spreading financial crisis, including the

The unspooling of America's largest financial institutions further crippled lending, leading to a deep "credit freeze" that made even routine lending for unremarkable business expenses nearly impossible in the last quarter of 2008.[96] This confluence of loosened regulatory standards, increased individual risk-taking by financial institutions, and systemic risks amplified by "flawed models of valuation and risk assessment," among other factors,[97] produced extensive academic and policy debate,[98] though consensus on both causes and cures remains elusive nearly a decade later.[99] The following

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soon-defunct Wachovia Bank [shares down 81% in a single day of trading] and technology giant Apple, off almost 18%, among other tech-sector firms like Intel, IBM, and HP, illustrating the endogeneity issues between business financing availability, consumer confidence/spending, and overall economic health; even then "safe" commodities like oil experienced their "single-biggest" daily price drops in history).

96. The "credit freeze" resulted from banks' reluctance to lend money during the height of the financial crisis, including a refusal to extend new lines of credit or instituting "more onerous terms" for offerings; in practice, since "[most] businesses don't keep much cash on hand" as a matter of course, payroll and customer credit lines felt an immediate balance sheet crunch, sending "the economy into a tailspin" as feared by economists as events unfolded, Tami Luhby, *Credit Freeze and Your Paycheck*, CNN MONEY, Sept. 28, 2008, http://money.cnn.com/2008/09/28/news/economy/main_street_impact/index.htm?postversion=2008092811.

97. *See, e.g.*, Yiting Li, Guillaume Rocheteau & Pierre-Olivier Weill, *Liquidity and the Threat of Fraudulent Assets*, 120 J. POL. ECON. 815 (2012) (discussing the prevalence and effects of fraudulent practices in over-the-counter markets).

98. *See, e.g.*, Jacobs, *supra* note 72; Mian et al., *supra* note 72; Ing-Haw Cheng, Sahil Raina & Wei Xiong, *Wall Street and the Housing Bubble*, 104 AM. ECON. REV. 2797 (2014); Lloyd Dixon, Noreen Clancy & Krishna B. Kumar, RAND CORP., *Hedge Funds and the Financial Crisis of 2007-2008*, in HEDGE FUNDS AND SYSTEMIC RISK 39 (2012); James Grant, *After the Crash: Helping the U.S. Economy Right Itself*, 87 FOREIGN AFF. 141 (2008); Alan Greenspan, *Never Saw It Coming: Why the Financial Crisis Took Economists by Surprise*, 92 FOREIGN AFF. 88 (2013); Sue Konzelmann, Frank Wilkinson, Marc Fovargue-Davies & Duncan Sankey, *Governance, Regulation and Financial Market Instability: The Implications for Policy*, 34 CAMBRIDGE J. ECON. 929, 944–45 (2010); Frederic S. Mishkin, *Over the Cliff: From the Subprime to the Global Financial Crisis*, 25 J. ECON. PERSP. 49 (2011); Alan D. Morrison, *Systemic Risks and the 'Too-Big-To-Fail' Problem*, 27 OXFORD REV. ECON. POL'Y 498 (2011); Fabian T. Pfeffer, Sheldon Danziger & Robert F. Schoeni, *Wealth Disparities Before and After the Great Recession*, 650 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 98 (2013); Moritz Schularick & Alan M. Taylor, *Credit Booms Gone Bust: Monetary Policy, Leverage Cycles, and Financial Crises*, 1870–2008, 102 AM. ECON. REV. 1029 (2012); Chelsea Wald, *Crazy Money*, 322 SCIENCE 1624 (2008).

99. *See, e.g.*, Robert J. Shiller, *Speculative Asset Prices*, 104 AM. ECON. REV. 1486 (2014); Richard Roll, *The Possible Misdiagnosis of a Crisis*, 67 FIN. ANALYSTS J. 12 (2011); Maha Atal, *Banker: "TARP Helped Avert a Global Calamity*, FORTUNE, July 23, 2009, http://archive.fortune.com/2009/07/23/news/companies/tarp_banks_new_york_mellon.fortune/index.htm; Eugene Fama, Robert C. Merton, & Myron Scholes, *Bursting Bubbles: Finance, Crisis and the Efficient Market Hypothesis*, in THE PROFIT DOCTRINE (Robert Chernomas & Ian Hudson, eds., 2017) (classically neoliberal view, arguing that ineffective and over-involved governmental regulation, not systemic market problems, are the root of the crisis); John B. Taylor, *The Role of Policy in the Great Recession and the Weak Recovery*, 104 AM. ECON. REV. 61 (2014); Alana Semuels, *The Places That May Never Recover From The Recession*, ATLANTIC, Jan. 2, 2018, https://www.theatlantic.com/business/archive/2017/12/suburban-poverty-and-recession/549350/ (cataloguing U.S.

sections explore the regulatory challenges and shortcomings of the pre-crash era, focusing especially on the early 2000s and how a series of legal changes primed the American financial system for repeated crises. The final section of Part III reviews recent deregulatory legislative proposals considering this historical overview of crisis triggers.

D. Pre-Crash Regulatory Shortcomings Come to a Head

The federal government's response to the financial crisis and Great Recession followed earlier attempts at reform which, in the phrasing of one understated reflection, "proved insufficient."[100] Most notably among these earlier reforms was the 2002 Sarbanes-Oxley Act (SOX), passed following the accounting scandals of Enron and Worldcom, among others.[101] The SOX required publicly traded corporations to certify the accuracy of quarterly statements filed with the SEC, ensuring that they do "not contain any untrue statements or omit any material facts," while imposing procedural and auditing requirements more generally.[102] The SOX also required disclosure of "the number and names of persons serving" public corporations' audit committees, aiming to "make sure that the board . . . includes some members who are experts in understanding financial reports."[103] While these essential reforms improved transparency and put public companies on notice in the wake of the accounting scandals at the turn of the millennium, the narrow focus of the law—excluding most private corporations—and the emphasis on curbing "inattention and incompetence as much as deliberate malfeasance,"[104] ignored the foregoing, broader systemic risks. Above all, while the SOX imposed disclosure requirements and heightened expectations of public corporations' leaders, the simultaneous risk of structured financial products and waning attention to risk management standards during the pre-crisis housing boom proved disastrous. In other words, the SOX mandated more open, higher-quality "inputs" for mandated disclosures, aiming to enhance the required analyses conducted for effective regulatory oversight, but largely ignored the crucial "outputs" of those analyses, e.g., the assessments of CRAs and other financial institutions

real estate markets where prices have stabilized below pre-recession peaks and further recovery remains unlikely, including California's Inland Empire and speculative suburban developments throughout the Sunbelt broadly, as well as stagnant markets in Michigan, Ohio, and across the Rustbelt states).

100. CROUHY, ET AL., *supra* note 71, at 150–52.

101. *Id.*

102. *Id.* at 152.

103. *Id.* at 153.

104. *Id.* at 152.

which used the same disclosures to produce their own evaluations and strategies.

Around the same time the SOX was passed and implemented, however, regulatory action by the executive branch continued the deregulatory policies of previous conservative administrations. For example, the Office of the Comptroller of the Currency (OCC), a banking regulatory body, issued new rules in 2003 which expanded federal preemption of state laws concerning regulation of national banks' real estate lending practices.[105] The effect of the new deregulatory rules was to displace various states' more-stringent lending restrictions (prompted by Georgia's Fair Lending Act) with less-onerous federal standards in place at the time.[106] Like the broader finance sector deregulatory policies over the preceding few decades, these and other executive actions "also contributed to the financial crisis that began in 2007" because

Deregulation of financial markets enabled financial institutions to spawn new types of mortgages that fueled the housing bubble, manufacture enormous volumes of securities that became toxic when the bubble collapsed, magnify and concentrate risk through the use of customized derivatives, and lever up with short-term debt. Policies that were favored by the financial sector because they increased profits in the short run ended up making the financial system more fragile and imposing widespread losses on society.[107]

Financial sector innovation between 2002 and 2008 constituted one of the pitfalls facing risk managers across all areas of the economy. The rise of structured finance and increasingly complex financial instruments accelerated during this era; while access to capital and homeownership opportunities expanded, however, early warnings signaled the potential for

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105. Preemption Determination and Order, OFFICE OF THE COMPTROLLER OF THE CURRENCY (Aug. 5, 2003), 68 F.R. 46264.

106. *Id. Accord* 12 U.S.C. § 371.

107. James Kwak, *Cultural Capture and the Financial Crisis*, *in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 72–73 (Daniel Carpenter & David A. Moss eds. 2014). Kwak is careful to note that condemnatory assessments of OCC deregulation and other policy failures preceding the crisis (e.g., the Federal Reserve's punting on issues of consumer protection) are too tempting with the benefits of hindsight, yet the policies implemented were well within standard realm of most U.S. policy debates. That is to say, there is an expansive range of regulatory approaches, from a totally deregulated free-for-all to a preemption-less labyrinth of 50 state legal standards to which all financial institutions would need to adjust their state-by-state policies and practices for conformity. Assuming federal control over fair lending practice standards comfortably exists between those far extremes. *Id.* at 73–75. Kwak, among others, has referred to the interrelationships between financial regulators and the private financial sector as one of "cultural capture," where social, educational, professional, and other linkages between the parties can lead to suboptimal policy choices, as in the years leading to the financial crisis. *Id.* at 78–79.

systemic risks.[108] Some sector-specific warnings—e.g., the ballooning commercial real estate market "bubble" and its fueling by speculators' access to financing—also went unheeded.[109] In the short-term, whether owing to "irrational exuberance" among buyers and loan originators or to "risk aversion" among homeowners even once prices began to slide,[110] the cycle roared well into the start of 2006. By mid-2006, however, the American housing sector corrected course and began declining—by 2.6% from the second quarter of 2006 over the second quarter of 2005 alone.[111] As early as October 2006, economists began predicting the "slowdown" would turn negative, rather than merely slowing.[112] Despite concerns about the housing market's inextricable links to the overall American economy,[113] even increasingly dire projections were understated and frequently contradicted by competing, bullish analyses, both in the media and in academic publications.[114] After years of record growth, the American housing market, having peaked in early 2006,[115] would fall precipitously thereafter, leaving one-quarter of all U.S. mortgages underwater and erasing hundreds of billions in housing-invested retirement savings across the socioeconomic spectrum.[116]

108. *See supra* discussion at Parts II(B) and (C); *accord* Raghuram G. Rajan, *Has Financial Development Made the World Riskier?* (National Bureau of Economic Research, Working Paper No. 11728, 2005).

109. Catherine L. Pollina, Note, *Bursting the Speculation Buying Bubble: Modifications to the Capital Gains Provision and the 1031 Exchange Rule*, 3 HASTINGS BUS. L.J. 271, 273–77 (2007).

110. Christopher Mayer, *Housing Bubbles: A Survey*, 3 ANN. REV. ECON. 559, 561 (2011).

111. Ray Barrell, Dawn Holland & Olga Pomerantz, *The Housing Market and Risk of Recession in North America*, 198 NAT'L INST. ECON. REV. 16, 17 (2006).

112. *Id.*

113. As of 2006, "nearly six million payroll jobs in the US . . . [were] associated with the residential housing sector," across myriad industries. *Id.*

114. *See, e.g.*, James Smith, *The Global Economic Environment for Turnarounds in 2006–2007*, 9 J. PRIV. EQUITY 23 (2006); *accord* Dawn Holland & Olga Pomerantz, *Inflation Dynamics in North America*, 199 NAT'L INST. ECON. REV. 15 (2007) (predicting slower–but still-positive–growth for the U.S. into 2008, owing to a "weak housing sector"); James F. Smith, *There Is No Housing Bubble in the USA: Housing Activity Will Remain at High Levels in 2005 and Beyond*, 40 BUS. ECON. 29, 29–30 (2005) (suggesting "many years" of continued growth, as "more and more households who had been renting can afford to be homeowners; or, as one observer recently put it, 'Any one [*sic*] with a brain and a decent credit rating has already bought a house'").

115. Barrell et al., *supra* note 111, at 18.

116. *See* Mayer, *supra* note 110, at 560.

E. Mechanics and Timeline of the Fall 2008 Crash and Aftermath

With the benefit of hindsight, these years of gradually accumulating systemic risks come into focus and the calamitous consequences seemingly inevitable: This pressure valve released suddenly and most dramatically during the second half of 2008. Increasing numbers of defaults across the financial industry, and especially the defaults deriving from subprime mortgages, began dragging the credit markets into a freeze while drying up already limited liquidity in capital markets. What at first seemed like a normal cyclical turn toward recession escalated rapidly, signaling a fast-approaching, historic crisis.

Following the failure of Bear Stearns in March 2008,[117] the stakes of the looming crisis and evident recession raised further with ever-larger institutions approaching insolvency, most notably the collapse of Lehman Brothers.[118] The financial giant was already reported to be on "the brink of collapse" by early September 2008, unable to fulfill its financial obligations to counterparties across the financial system.[119] On September 14, 2008, Lehman's talks with prospective buyers—namely, Bank of America—fell through.[120] Meanwhile, another troubled industry giant, AIG, began experiencing systematic difficulties with trying to sell off their toxic assets, such as subprime MBS and other securitized products affected by defaults and downward ratings migrations.[121] The first major government responses came directly from the executive (i.e., the Federal Reserve), which gave $200 billion first to Fannie and Freddie,[122] then "engineered JP Morgan's

117. *See supra* notes 79-84 and accompanying text.

118. *See supra* discussion at Part II(B).

119. *The Crisis: A Timeline*, CNN MONEY, http://money.cnn.com/galleries/2008/news/0809/gallery.week_that_broke_wall_street/index.html (last updated Sept. 14, 2009) [hereinafter *The Crisis: A Timeline*]. http://money.cnn.com/galleries/2008/news/0809/gallery.week_that_broke_wall_street/index.html.

120. *Id.*

121. *See* Sjostrom, *supra* note 85; *accord* Roger D. Congleton, *On the Political Economy of the Financial Crisis and Bailout of 2008–2009*, 140 PUB. CHOICE 287, 292 (2009) (discussing the attractiveness of "bundling" subprime mortgages, i.e., "pooling" them together to offset default risks and improve the lifetime cash-flows of subprime-mortgaged loans, a key incentive which drove riskier lending practices across the U.S. housing industry).

122. Mark Calabria, David Reiss, Lawrence White, Mark Willis & Michael Levine, *The Future of Fannie and Freddie*, 10 N.Y.U. J.L. & BUS. 339 (2014); Dwight M. Jaffee, *Reining in Fannie Mae and Freddie Mac*, 29 REG. 22 (2006); Dwight M. Jaffee, *Reforming Fannie and Freddie*, 31 REG. 52 (2008–09); Carol J. Perry, *Rethinking Fannie and Freddie's New Insolvency Regime*, 109 COLUM. L. REV. 1752 (2009); Steven Davidoff Solomon & David Zaring, *After the Deal: Fannie, Freddie, and the Financial Crisis Aftermath*, 95 B.U. L. REV. 371 (2015); *see generally* FCIC REP., *supra* note 47, at Chap. 17.

purchase of Bear Stearns," another failing investment bank whose troubles lingered since March 2008, including a "$29 billion guarantee" to secure the transaction against liquidity concerns and the uncertain scope of remaining toxic assets on the firms' balance sheets.[123] The Federal Reserve and a consortium of 10 private banks also created "a $70 billion pool of funds to aid troubled financial firms," paired with "loosened . . . lending restrictions" from the Federal Reserve itself.[124] These efforts to mitigate crisis, however, proved insufficient.

The following day, September 15, 2008, stock markets began the first of several historic slides—a 500-point loss for the Dow Jones, among the steepest point losses in decades.[125] AIG simultaneously faced a sudden credit rating downgrade from Fitch, heightening fears that the insurance giant's bankruptcy was imminent, a worry which had already begun to spread throughout both Wall Street and Washington.[126] In light of Lehman's announced bankruptcy, systemic credit and liquidity freezes, and AIG's instantly expected collapse and skyrocketing market volatility, the federal government announced, on September 16, "that it would stage a staggering $85 billion bailout . . . and take an 80% stake in [AIG]."[127] This early, first major attempt at intervention failed to prevent another stock freefall on September 17, with the Dow sliding a further 450 points and investment banking giant Goldman Sachs reporting significant losses well below earlier forecasts, leading their share prices to drop "below $100 per share for the first time" in several years.[128] The ensuing weeks featured extreme market vacillations: the Dow saw an over-400-point increase on September 18, followed by a then-record-breaking drop of 777 points on September 29, after the House of Representatives rejected the first iteration of a much bolder Wall Street bailout plan.[129]

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123. *The Crisis: A Timeline*, *supra* note 119.

124. *Id.*

125. *Id.*

126. *Id.*

127. William K. Sjostrom, Jr., *Afterword to the AIG Bailout*, 72 WASH. & LEE L. REV. 795 (2015). For historical overview and empirical analysis of governmental interventions in market crises—e.g., bailouts, such as those granted to AIG and other financial institutions at the peak of the 2008 crisis, and how they compare to similar crisis responses globally—*see generally* Friederike Niepmann & Tim Schmidt-Eisenlohr, *Bank Bailouts, International Linkages, and Cooperation*, 5 AM. ECON. J.: ECON. POL'Y 270 (2013); Guillermo Rosas, *Bagehot or Bailout? An Analysis of Government Responses to Banking Crises*, 50 AM. J. POL. SCI. 175 (2006).

128. *The Crisis: A Timeline*, *supra* note 119.

129. Cindy Perman, *Dow Falls 777 as Market Reels from House Vote*, CNBC (Sept. 29, 2008), https://www.cnbc.com/id/26945972. Despite rejecting the first bailout package, however, the federal government managed to secure several other financed responses to the building crisis. Multilateral agreements across major economies quickly emerged, including committed funding of $180

Concurrent volatility roiled all major international markets as America's credit freeze and default losses spread globally.[130] Into October 2008, political responsiveness to the scope and severity of the crisis improved—especially in the United States, where credit markets remained frozen and whole industries outside the formal financial sector began sliding toward failure. Among these troubled industries were U.S. automotive companies, including GM and Ford.[131] Talks of a second "economic stimulus package" emerged from Congress in early October, with a focus on helping "struggling state and local governments" experiencing extreme pressures and waves of residential foreclosures; on October 13, details for the new $700 billion plan emerged, which would ultimately pass as one among several direct federal injections of money into the spiraling economy.[132] By later in mid-October, just a month after Lehman's shocking collapse, the macroeconomic effects of the crisis came into focus: retail sales figures "suffered their biggest drop in three years" over the preceding month, while employment rates and home values plummeted.[133] Then-President of the San Francisco Federal Reserve, Janet Yellen, remarked "that the economy 'appears to be in a recession,'" the first (prescient) announcement from a federal government official at the onset of the global Great

billion to bail out troubled global institutions. Nonetheless, initial opposition to the Wall Street bailout largely stemmed from demurring House Democrat leadership and a bloc of House Republicans; Representative Nancy Pelosi (D-CA) argued that the bailout plan failed to "insulate Main Street from Wall Street," promoting greater attention on ameliorating the mortgage foreclosure crisis over the short-run instead of securing major financial institutions. The 228-205 vote against the first bailout was a narrow but bipartisan decision: Nearly two-thirds of Republicans voted against the plan, compared to just one-third of Democrats. This approach, however, quickly collapsed–no cogent approach for containing the spiraling crisis emerged from those efforts, yet the crisis continued spiraling, with sliding stocks and the ultimate failure of another institution, Washington Mutual ("WaMu"), sparking increased panic. At that time, WaMu's failure was the largest bank failure in U.S. history. *See The Crisis: A Timeline*, *supra* note 119.

130. *See, e.g.*, Farshad Araghi, *Political Economy of the Financial Crisis: A World-Historical Perspective*, 43 ECON. & POL. WKLY. 30 (Nov. 8–14, 2008); Sharon Horgan, *The Impact of Globalisation and the Global Financial Crisis*, 17 INT'L TRADE & BUS. L. REV. 43 (2014); Badar Alam Iqbal & Farha Naz Ghauri, *Impact of Global Financial Crisis on FDI Inflows*, 10 J. WORLD INV. & TRADE 463 (2009); Anush Kapadia & Arjun Jayadev, *The Credit Crisis: Where It Came From, What Happened, and How It Might End*, 43 ECON. & POL. WKLY. 33 (Dec. 6–12, 2008); K.G. Viswanathan, *The Global Financial Crisis and Its Impact on India*, 9 J. INT'L BUS. & L. 41 (2010).

131. *The Crisis: A Timeline*, *supra* note 119.

132. The first—the Troubled Asset Relief Program ("TARP")—was a $200-billion bailout package for Fannie Mae and Freddie Mac, passed in late 2008; the second, formally called the American Recovery and Reinvestment Act ("ARRA"), provided a $787-billion direct "economic stimulus plan that provided tax relief to both small businesses and individuals, and expanded unemployment and welfare benefits" to blunt the sharpest effects of the crisis, Grinshteyn, *supra* note 78, at 938.

133. *The Crisis: A Timeline*, *supra* note 119.

Recession.[134] Altogether, the effects on domestic household wealth were grave, lingering well into the still-ongoing economic recovery.[135]

IV. Toward a Post-Recession Understanding of CRAS as Potential Facilitators of Systemic Risk

A. Framing Judicial Responses to the Crisis and to the CRAs: State and Federal Courts Diverge on CRA Liability

Given the unprecedented nature of the financial crisis and its expansive effects on housing markets and employment, casual observers might have expected forceful rebukes of financial sector actors' behavior during the preceding economic cycle. However, the administrative and legal-regulatory constraints upon major executive agencies, such as the Treasury Department and the Federal Reserve, left insiders and legal academics with lesser expectations.[136] In the signal state and federal court cases which unfolded after the crisis, litigation outcomes diverged sharply across the voluminous published opinions.[137] The following section reviews several such landmark cases and concludes that, despite inconsistencies, courts have demonstrated an overall greater willingness to extend liability to financial sector actors, including CRAs, all the while disregarding or challenging the salience of First Amendment-grounded defenses.

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134. *The Crisis: A Timeline*, *supra* note 119. *See also*, Grinshteyn, *supra* note 78, at 937–39 (noting the collapse of "three of the largest Wall Street investment banks [over] six months" in 2008, as well as a nearly-20% drop in average home prices across 20 "major [U.S.] cities by the end of November 2008" and over 2% increase in unemployment year-over-year).

135. Markus K. Brunnermeier, *Deciphering the Liquidity and Credit Crunch 2007–2008*, 23 J. ECON. PERSP. 77 (2009); Robert Madsen & Richard Katz, *Comparing Crises: Is the Current Economic Collapse Like Japan's in the 1990s?* 88 FOREIGN AFF. 159 (2009) (discussing total loss estimates, which could include as much as $15 trillion in lost U.S. household wealth, and contextualizing those losses as compared to the late 1980s/early 1990s collapse of Japanese economic growth); Lee E. Ohanian, *The Economic Crisis from a Neoclassical Perspective*, 24 J. ECON. PERSPECTIVES 45 (2010); *accord* CROUHY ET AL., *supra* note 71 *passim*.

136. Phillip Swagel, *The Financial Crisis: An Inside View*, BROOKINGS PAPERS ECON. ACTIVITY 1, 3 (Spring 2009) ("Given these [sorts of] constraints, some steps that are attractive in principle turn out to be impractical in reality . . . A lesson for academics is that any time they use the verb 'force' . . . the next sentence should set for the section of the U.S. legal code that allows that course of action."); *accord* Mishkin, *supra* note 98, at 52–53 (responding to critiques of the U.S. government's decision to allow Lehman Brothers to enter bankruptcy, noting that regulatory authorities were unclear of the scope of their authority to do so and were especially "extended" following their controversial decision to protect Bear Stearns through a "government safety net" earlier in 2008).

137. *See generally* Michael D. Greenberg & Geoffrey McGovern, *Patterns of Civil Litigation* 13–14, *in* RAND Corp., *An Early Assessment of the Civil Justice System After the Financial Crisis: Something Wicked This Way Comes?* 13–14 (RAND Corp., OP-353-ICJ, (2012), https://www.rand.org/pubs/occasional_papers/OP353.html.

B. Extending Liability to Financial Sector Actors Generally

One of the first controversial cases involving extension of liability following the financial crisis was *In re* Del Monte in 2011.[138] In *Del Monte*, the Delaware Chancery Court enjoined the titular food company from permitting a shareholder vote on a proposed merger with Blue Acquisition Group, a consortium of three private equity firms: Kohlberg, Kravis, Roberts & Co. (KKR), Centerview Partners, and Vestar Capital Partners.[139] The entire process of negotiating and effectuating the merger transaction was marred by problems. First, the Del Monte board failed in "allowing KKR to team up with Vestar, the higher bidder in a previous solicitation of interest."[140] The Chancery Court viewed this as a potential violation of the Del Monte board's fiduciary duties—i.e., they failed to pursue Vestar's original, better per-share deal to the detriment of their shareholders by cutting off their opportunities to explore and to allow a vote on a superior offer. Second—and more seriously—the Del Monte board erred in "authorizing Barclays Capital, the financial advisor to Del Monte [on the sell-side of the transaction], to [also] provide buy-side financing to KKR."[141] This latter choice ultimately gave Barclays a higher profit than it would have had otherwise, but also imposed a superfluous $3-million cost on Del Monte for obtaining "a last-minute fairness opinion" from another bank.[142]

The roles of Barclays on both sides of the deal proved a central, controversial focus in the case, leading the Chancery Court to enjoin the consummation of the deal for 20 days, including withholding the $120-million termination fee which "KKR otherwise would receive in the event of a topping bid," to allow the Del Monte board to evaluate alternatives and perform the due diligence search for the best possible transaction.[143] *Del Monte* also proved a dramatic turn for Delaware's approach toward judicial review of corporate misconduct. The Chancery Court refused to apply the traditional business judgment rule to the various defendants' actions, opting for the stricter "enhanced scrutiny" approach.[144] More profoundly, the shareholders' claims for Barclays' "aiding and abetting fiduciary breach" were allowed to proceed, meaning the investment bank could face liability

138. *In re* Del Monte Foods Co. S'holders Litig., 25 A.3d 813 (Del. Ch. 2011).

139. *Id.* at 817.

140. *Id.*

141. *Id.*

142. *Id.* at 818.

143. *Del Monte Foods Co. S'holders Litig.*, 25 A.3d at 844–45.

144. *Id.* at 830.

for knowing participation in a scheme which ignored shareholders' best interests. As the Chancery Court summarized:

> But for Barclays' manipulations, the Del Monte process would have played out differently. If the directors had known at the outset of Barclays' intentions and activities, the Board likely would have hired a different banker . . . Even if the directors decided to proceed with Barclays, the Board and its experienced counsel doubtless would have taken steps to protect the integrity of the process . . . [Had] Barclays disclosed its buy-side aspirations, the Board likely would have . . . 'nixed the idea.' The Board and its counsel likely also would have limited the role of Barclays lending group, chaperoned its discussions with bidders, or used another bank to provide confidential feedback to the potential sponsors about leverage parameters and market expectations.
>
> Although [these] activities and non-disclosures in early 2010 are troubling, what indisputably crossed the line was [Barclays'] surreptitious and unauthorized pairing of Vestar with KKR. In doing so, Barclays materially reduced the prospect of price competition [through outside bids] for Del Monte . . . Most egregiously, Barclays actively concealed [this] pairing from the Del Monte Board.[145]

While a single case does not signal a definitive reversal from Delaware's often pejoratively labeled "race to the bottom" in corporate manager-friendly rulings,[146] *Del Monte* nonetheless suggests a greater willingness to extend a court's equitable powers—and a concomitant openness to extending liability to new classes of defendants—in particularly "egregious" cases.[147] M&A financial advisors and financiers long have been criticized for participating in transactions despite their own "conflicts" on

145. *Del Monte Foods Co. S'holders Litig.*, 25 A.3d at 833–34.

146. John Armour, Bernard Black & Brian Cheffins, *Delaware's Balancing Act*, 87 IND. L.J. 1345, 1349 (2012).

147. *See generally* William W. Bratton & Michael L. Wachter, *Bankers and Chancellors*, 93 TEX. L. REV. 1 (2014); Joel Edan Friedlander, *Vindicating the Duty of Loyalty: Using Data Points of Successful Stockholder Litigation as a Tool for Reform*, 72 BUS. LAW. 623 (2017); John W. Noble, *Fixing Lawyers' Mistakes: The Court's Role in Administering Delaware's Corporate Statute*, 18 U. PA. J. BUS. L. 293 (2016); Jason Rigby, *Financial Advisor Aiding and Abetting of a Breach of a Fiduciary Duty Post Rural Metro: Clarifying "Knowing Participation*,*"* 41 DEL. J. CORP. L. 545 (2017).

both sides of a potential deal.[148] While recent Delaware cases provide "mixed messages" on these and other questions of third-party liability for misconduct in business activities,[149] analogizing investment bank or private equity firms' actions to CRAs and the inherent conflicts of their "issuer-pays" model of ratings.[150] As with Barclays in *Del Monte*, CRAs' *ex ante* advising of security issuers and the structuring of their financial products, combined with their subsequent ratings of those same instruments, similarly provides possible bases for extending liability in novel ways. The following sections elaborate a series of additional recent federal court cases focusing on the CRAs directly, suggesting a similarly mixed record of outcomes and an uncertain doctrinal evolution ripe for higher court review.

C. Key Federal Cases Following the Crash

1. Abu Dhabi v. Morgan Stanley

Another seminal case, *Abu Dhabi v. Morgan Stanley,*[151] is a companion to an earlier, pre-crisis case where CRAs' "actual knowledge of [a] corporation's fraud" had material "fact issues remaining," leading the court to deny in part the CRAs' motion to dismiss claims.[152] *Abu Dhabi* is integral to advancing this understanding of CRA liability, scienter requirements for fraud and related derivative claims, and the pleading requirements to survive a motion to dismiss for such cases. Plaintiffs—comprised of various structured investment vehicle (SIV) institutional investors—sued Morgan Stanley, S&P, Moody's and other financial industry defendants for numerous claims related to fraud and negligent misrepresentation in the sale of investments through the SIV.[153] The SIV, called "Cheyne," had received ratings of at least A- across all its tranches, and its medium-term notes were

148. Andrew Tuch, *Banker Loyalty in Mergers and Acquisitions*, 94 TEX. L. REV. 1080, 1081 (2016).

149. Tuch, *supra* note 148, at 1082.

150. *See supra* discussion at Part III(B), *passim*.

151. Abu Dhabi Com. Bank v. Morgan Stanley & Co. Inc., 888 F. Supp. 2d 431 (S.D.N.Y. 2012).

152. *In re* Nat'l Century Financial Enterprises, Inc. Litig., 580 F. Supp. 2d 630, 656 (S.D. Ohio 2008) (denying Moody's motion to dismiss claims by Lloyds Bank as to negligent misrepresentation and Ohio State "blue sky law" claims); *but see* Ohio State & Fire Pension Fund v. Standard & Poor's Financial Services LLC, 700 F.3d 829 (6th Cir. 2012) (distinguishing National Century and granting a motion to dismiss all three major CRAs on myriad grounds). *See generally* Bailey, *supra* note 26; John Crawford, *Hitting the Sweet Spot by Accident: How Recent Lower Court Cases Help Realign Incentives in the Credit Rating Industry*, 42 CONN. L. REV. CONTEMPLATIONS 13 (2009); Timothy M. Sullivan, Note, *Federal Preemption and the Ratings Agencies: Eliminating State Law Liability to Promote Quality Ratings*, 94 MINN. L. REV. 2136 (2010).

153. *Abu Dhabi Com. Bank*, 888 F. Supp. 2d at 439.

rated as highly as AAA, in the run-up to the financial crisis.[154] As the credit and financial crises unfolded, however, these strong ratings plunged; ultimately, Cheyne's assets had to be sold in July 2008, with a winning auction bid providing only "43.9% of notional value."[155] Although the District Court for the Southern District of New York dismissed most claims against the defendants at summary judgment, the defendants' motion to dismiss claims that they had aided and abetted fraud was denied.[156]

Remarkably, and distinctly unlike most cases of this nature, the District Court's reasons for denying the CRA-defendants' motion focused on the ratings issued by the CRAs.[157] The plaintiffs originally had argued the ratings in question were "attributable to Morgan Stanley," a framing they apparently viewed as necessary to satisfy the fraud claim elements.[158] The district court rejected this view on attributing blame, finding that Morgan Stanley could only be held liable, in any event, for aiding and abetting fraud under New York law–but the court further found the CRAs *could* be held liable for fraud themselves because the ratings themselves constituted the "fraudulent misrepresentation" upon which the plaintiffs relied.[159] Hence, the court reasoned, the ratings in question were attributable to the CRAs, not to the investment banks.[160]

Crucially, the fact-or-opinion nature of credit ratings was addressed squarely by the court as well. Under New York law, the court held, CRAs' ratings are "a *hybrid*" of *both* "pure statements of either fact or opinion."[161] Thus, such "ratings are actionable because they are understood to be statements of creditworthiness based on an analysis of underlying facts conducted by respected ratings organizations."[162] While fact issues remained—i.e., whether the CRAs "*knowingly* issue[d] a rating . . . unsupported by reasoned analysis or without a factual foundation," a

154. *Id.* at 441; *see also Settlement Cost for Moody's, S&P, Morgan Stanley is $225 million: WSJ*, REUTERS (Apr. 29, 2013), https://www.reuters.com/article/us-moodys-sp-settlement-wsj/settlement-cost-for-moodys-sp-morgan-stanley-is-225-million-wsj-idUSBRE93S11920130429 (discussing the highly-rated SIVs, noting "much of [their] underlying collateral was low-quality or subprime mortgage debt," and reporting the ultimate settlement between the parties involved).

155. *Abu Dhabi Com. Bank*, 888 F. Supp. 2d at 474.

156. *Id.* at 439.

157. *Id.* at 450–51.

158. *Id.* at 449.

159. *Id.* at 450–52.

160. *Abu Dhabi Com. Bank*, 888 F. Supp. 2d at 450–52.

161. *Id.* at 454 (emphasis added).

162. *Id.*

required element for the plaintiffs' fraud claims[163]—the court denied defendants' motion for summary judgment.[164] Ultimately, the parties settled for $225 million in April 2013.[165]

2. Anschutz Corp. v. Merrill Lynch and Co.

Among the seminal post-crisis cases regarding CRA liability are a pair of decisions cursorily dismissing claims, consistent with and epitomizing a more-permissive approach toward CRAs and their activities. In the first case, *Anschutz Corp. v. Merrill Lynch and Co.*, the District Court for the Northern District of California ruled that Securities and Exchange Commission (SEC) regulations precluded judicial review of CRA "opinions."[166] After removing the case to New York's Southern District, the Second Circuit affirmed the original findings and disposition of the Northern District of California on appeal.[167] The Second Circuit further held that broker-dealers—such as investment banks, private wealth management funds, and others who facilitate securities transactions for clients[168]—remain subject to a "suitability" standard, meaning their recommendations regarding securities transactions need only show a "reasonable basis" escape liability, rather than the more-rigorous standards found in fiduciary duty-based forms of liability.[169] Furthermore, the court ruled that broker-dealers do not have any "duty to monitor [a client] account or provide advice between transactions," affirming earlier cases' rulings on point.[170]

Across these cases, several district courts and the Second Circuit generally followed a restrained approach to judicial review of financial sector actors' liability in these contexts. The first few years after the crisis and ensuing recession thus suggested continued preclusion of CRA liability,

163. *Abu Dhabi Com. Bank*, 888 F. Supp. 2d at 455–56 (discussing as well the proof requirements post-summary judgment, e.g., that the CRAs knowingly issued misleading ratings which constituted a statement of "fact-based opinion that [the CRAs did] not believe to be true," and that this "disbelief" existed at the moment the ratings were issued).

164. *Id.* at 458.

165. *Settlement Cost for Moody's, S&P, Morgan Stanley is $225 million*, *supra* note 154.

166. 785 F. Supp. 2d 799 (N.D. Cal. 2011).

167. Anschutz Corp. v. Merrill Lynch & Co., 690 F.3d 98 (2d Cir. 2012).

168. Andrew Melnick, *What's in a Name: The Battle over a Uniform Fiduciary Standard for Investment Advisers and Broker-Dealers*, 87 ST. JOHN'S L. REV. 415, 421 (2013).

169. *Id.* at 422–24 (citing Financial Industry Regulatory Authority, Regulatory Notice 11-25: Know Your Customer and Suitability (May 2011), http://www.finra.org/sites/default/files/NoticeDocument/p123701.pdf; Financial Industry Regulatory Authority); FINRA Rule 2111, http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=9859 (last visited Sept. 1, 2018).

170. *Id.* at 425; *see also In re* Merrill Lynch Auction Rate Sec. Litig., 765 F. Supp. 2d 375 (S.D.N.Y. 2011); De Kwiatkowski v. Bear, Stearns & Co., 306 F.3d 1293 (2d Cir. 2002).

with consistent rulings issued even in ostensibly extreme cases. In *Ohio Police & Fire Pension Fund*, for example, the District Court for the Southern District Court of Ohio held Standard & Poor's could not be held liable under Ohio's Securities Act and that CRAs do not owe a duty to investors upon which a claim for negligent misrepresentation can be made.[171] Similarly, in *New Jersey Carpenters Vacation Fund*, the District Court for the Southern District of New York held CRAs are not subject to liability for their ratings, although underwriters and originators may be liable for material misstatements made in the process of obtaining ratings or when misleadingly using ratings in their own investment materials.[172] Finally, New York's Southern District also denied a motion for class certification by plaintiffs, whose claims against Moody's, alleging fraud and material misrepresentation, were based in analogous rationales.[173]

These post-crisis cases, like others which did not find liability for CRAs, often turn on SEC regulatory language, standing and class certification issues, and the materiality element of state fraud claims. On first impression, they suggest CRAs might be spared from liability for their involvements in the underlying mechanisms driving the financial and economic meltdown. However, unlike *Abu Dhabi* and the following case, *Genesee County*, the abovementioned courts neither reached nor ruled on matters concerning what a CRA's ratings *are*–i.e., whether they constitute speech and, if so, which particular level of protection their speech should receive under extant constitutional frameworks. Where courts have done so, and especially where state laws have been held to permit CRA liability more generally, the CRAs have fared far less favorably.

3. Genesee County v. Thornburg

The background and parties involved in *Genesee County* largely echo *Abu Dhabi,*[174] and the outcome was likewise similar, with several of the *Genesee* plaintiffs' claims against the CRAs surviving motions to dismiss.[175] In brief, the "[lawsuit] arose from significant losses on MBS-based investments; class-certified plaintiffs [various public employee retirement funds] alleged misrepresentations by defendants regarding investments

171. Ohio Police & Fire Pension Fund v. Standard & Poor's Financial Servs., LLC, 813 F. Supp. 2d 871 (S.D. Ohio 2011).

172. New Jersey Carpenters Vacation Fund v. Royal Bank of Scotland Group, PLC, 720 F. Supp. 2d 254 (S.D.N.Y. 2010).

173. *In re* Moody's Corp. Sec. Litig., 274 F.R.D. 480 (S.D.N.Y. 2011).

174. *See supra* discussion in Part IV(A)(2).

175. Genesee Cty. Emp. Ret. Sys. v. Thornburg Mortg. Sec. Tr. 2006-3, 825 F. Supp. 2d 1082 (D.N.M 2011).

which "misled the asserted class as to the true risk of these investments."[176] While reviewing the factual record, the District Court of New Mexico described the "misrepresentations" in detail, focusing on Wells Fargo's "systematic failure to follow its stated underwriting standards," minimum underwriting thresholds which were intended to be enforced regardless of borrowers' credit and borrowing capacities, disregard for falsified loan application contents and, across all defendants, a general "failure . . . to employ the stated underwriting standards."[177] In addition, Thornburg—the investment vehicle through which the Wells Fargo-underwritten loans were generated, securitized, and sold–had generated the underlying instruments in a manner that "misrepresented the truth . . . in violation of [Thornburg's own] underwriting standards, failing to include . . . sufficient documentation concerning the borrowers' financial circumstances," among other failures.[178] These actions produced systematically "inflated appraisals" by all named defendants, enough to suggest a plausible, comprehensive, knowing scheme perpetrated by the financial institutions involved.[179] Wells Fargo, in particular, "systematically threaten[ed] to not do business with real estate appraisers [who] failed to manipulate their appraisals above market value."[180]

Regarding the CRA-defendants, the court found the plaintiffs' pleadings regarding Moody's and Fitch were insufficient, but also ruled that claims against S&P could proceed.[181] In so finding, the court emphatically stated that "The First Amendment does *not* bar the Plaintiffs' claims against the [CRAs]"[182], distinguishing the earlier precedent set by *Greenmoss Builders*[183] and far more directly addressing the constitutional issue than in *Abu Dhabi*. The court in *Genesee County* explained that the ratings at hand were not "published [for] the public at large," but rather served as tailored, targeted pieces of information provided to a broad range of institutional investors in their initial offering documents, however "small" these investors

176. *Genesee Cty.*, 825 F. Supp. 2d at 1098–99.

177. *Id.* at 1104.

178. *Id.* at 1105.

179. *Id.* at 1105–06.

180. *Id.*

181. *Genesee Cty.*, 825 F. Supp. 2d at 1145.

182. *Id.* (emphasis added).

183. *Id.* at 1236 ("The credit ratings at issue . . . are not entitled to First Amendment protection"); s*ee* Dun & Bradstreet, Inc. v. Greenmoss Builders Inc., 472 U.S. 749, 761(1985) (asserting expression not addressing "a matter of public concern"–unlike the claim in *Greenmoss*–is not entitled to the same level of First Amendment protection as general public pronouncements, irrespective of the "type" of speech in question).

were in numbers.[184] Regardless, where ratings contain "speech" which is "wholly false and clearly damaging to the [victim]," under commercial speech doctrine the speech is accorded even-lower protections, if any.[185] Here, the court concluded "false opinions," like S&P's ratings for Thornburg's securities, were entitled no First Amendment protections whatsoever—stopping only just short of calling them "lies" outright, while suggesting as much.[186] Following Thornburg's bankruptcy and dissolution in mid-2009,[187] a series of settlements followed, ending the related litigation.[188]

V. CRAS and Post-2016 Financial Sector Regulation

A. The Incomplete Post-Crisis Reforms and a Return to Deregulation in the U.S.

Key state and federal courts have scrutinized financial sector actors more closely since the crisis and Great Recession,[189] with diverging case outcomes set to establish or sharpen an emerging circuit split; meanwhile, the U.S. Congress has begun moving in the opposite direction. For example, a White House-backed deregulatory bill passed a threshold vote to enter Senate debate in early March 2018.[190] If passed, the bill would roll back

184. *Genesee Cty.*, 825 F. Supp. 2d at 136–37.

185. *Id.* at 1237–38 (citing *Greenmoss Builders*, 472 U.S. at 762).

186. *Id.* at 1238; for discussions of unprotected "lies" under the First Amendment, *see generally* Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435 (2015); *cf.* Helen Norton, *Lies and the Constitution*, 2012 SUP. CT. REV. 161 (2012); Ilya Shapiro, Trevor Burris & Gabriel Latner, *Truthiness and the First Amendment*, 16 U. PA. J. CONST. L. HEIGHTENED SCRUTINY 51 (2013); Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897 (2010); Paul Horwitz, *The First Amendment's Epistemological Problem*, 87 WASH. L. REV. 445 (2012).

187. THORNBURG MORTGAGE ANNOUNCEMENT, TMST (2009), http://thornburgmortgage. com.

188. *See, e.g.*, Justin T. Hilley, *Thornburg Mortgage Settles with Investors, Awaits Court Approval*, HOUS. WIRE (June 1, 2012), https://www.housingwire.com/articles/thornburg-mortgage-settles-investors-awaits-court-approval; Patrick Fitzgerald, *Barclays to Pay $23 Million to Settle Thornburg Mortgage Lawsuit*, WALL ST. J. (Aug. 20, 2014), https://www.wsj.com/articles/barclays-to-pay-23-million-to-settle-thornburg-mortgage-lawsuit-1408559969.

189. *See supra* discussion in Part IV.

190. Renae Merle, *Senate Sponsor of Bank Deregulation Bill Offers Changes in Hopes of Attracting House Support*, WASH. POST (Mar. 8, 2018), https://www.washingtonpost.com/news/business/wp/2018/03/08/senate-sponsor-of-bank-deregulation-bill-offers-changes-in-hopes-of-attracting-house-support/?noredirect=on&utm_term=.6dc45c6f85d0; Jim Puzzanghera, *Lawmakers Revise Financial Deregulation Bill to Try to Blunt Criticisms and Assure House Passage*, L.A. TIMES (Mar. 8, 2018), http://www.latimes.com/business/la-fi-dodd-frank-regulations-20180308-story.html; Zachary Warmbrodt, *Senate Advances Bank Deregulation Bill as Democrats Break Ranks*, POLITICO (Mar. 6, 2018), https://www.politico.com/story/2018/03/06/elizabeth-warren-bank-deregulation-bank-bill-387979.

regulatory requirements, including the Dodd-Frank Act's stress-testing requirements for large lending institutions, key defendants from the following cases prominently among them. The rejection of Dodd-Frank's "too big to fail" provisions may heighten the likelihood of myriad legal challenges, not diminish them, since the reform-targeting provisions do not clearly touch upon the actions prompting findings of CRA liability.[191]

Under existing regulations, beginning with 12 C.F.R. § 46.1(b), national banks must perform stress tests at least annually in compliance with requirements under 12 C.F.R § 46.2 *et seq.*[192] Subsequent sections of the regulation include requirements which vary depending upon a covered bank's size.[193] A bank's board of directors, however, retains the same duties regardless of its covered institution's size.[194] The Dodd-Frank Annual Stress Test, or "DFAST" requirements, are set out under 12 C.F.R. § 46.5 and successive sub-sections. The minimum requirements thereunder are set by the Office of the Comptroller of the Currency (OCC); these requirements include the time horizons of financial data to be used in the institution's models and reports;[195] requirement that the institution's stress tests include three "conditions" sets, i.e., baseline, adverse, and severely adverse

191. Notably, Dodd-Frank presents a compromise, "middle ground" policy reform drawn in the aftermath of the financial crisis; among the options considered by the federal government and in popular media debates at the time, some advocated for a total "government-led reconstruction of the financial marketplace," breaking up larger banks so none could ever become "too big to fail" again while imposing much stricter financing and risk-mitigation practices, while others championed a return to minimal governmental intrusion after markets had stabilized, allowing the surviving corporations to sift through the rebuilding process unimpeded. Nolan McCarty, *Complexity, Capacity, and Capture*, *in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 99, 99–100 (Daniel Carpenter & David A. Moss eds. 2014).

192. 12 C.F.R. §§ 46.1–46.2 (2012, 2018).

193. 12 C.F.R. § 46.3(a) (2018) (requiring a bank's size be determined by the averaged value of its total assets over the four prior quarters).

194. *See* 12 C.F.R. § 46.6. (2015). Specifically, banks are subdivided according to the general value of assets they hold, e.g., banks with under $10-billion in assets, banks with between $10 and $50 billion in assets, and those with over $50-billion in assets. 12 C.F.R. § 46.3(b)(1), (2) (2018). The regulatory text further specifies that banks can move between these categories in either direction; when banks move from the $10 billion range to the $50-billion-plus range, they immediately trigger the stress test requirements for those institutions. 12 C.F.R. § 46.3(d)(2) (2018). In addition, subsidiaries or other banking institutions controlled by a holding company may elect to subject themselves to the requirements for the larger institution, i.e., if their holding company is a covered "$50 billion institution," they may opt for those requirements. 12 C.F.R. § 46.3(e)(1), (2) (2018). Note, however, that the OCC *may in its discretion* require non-covered institutions to comply with these regulations—including stress testing requirements, their timing, scope, reporting, etc.—at any time. 12 C.F.R. § 46.4(a) (2014).

195. For all stress tests by covered institutions after January 2016, calendar-year data running through the previous December 31 are to be used. 12 C.F.R. § 46.5(a) (2018).

economic scenarios;[196] inclusion of trading activities, e.g., to cover counterparty and trading risks, when requested by the OCC;[197] and the results of stress tests must be incorporated into the business decisions of the board and senior management as appropriate.[198]

Under 12 C.F.R. § 46.6, a covered institution's board must adhere to the foregoing requirements while also (a) ensuring adequate controls and review over the process, (b) guaranteeing sufficient documentation of procedures used, (c) reviewing and approving all procedures at least annually, and (d) reviewing stress test results at least annually.[199] While subject to widespread academic debate and critique,[200] especially regarding the increased complexity and difficulty of regulatory compliance for the largest U.S. banks,[201] amending or removing the DFAST regulatory requirements alone would not offer clear implications for the CRAs and their actions as non-covered institutions. Recent judicial responses to the CRAs' activities, however, provide a clearer picture of heightened post-recession liability risks, irrespective of recent legislative proposals.

B. Post-2018 and Expected Shifts Toward Conservatism on Federal Courts

> Time alone gives definition. Nevertheless . . . professional commentators with grave authority make analyses which the briefest interval often declares invalid.
>
> –Gore Vidal[202]

Speculation about future events, political and economic ones especially, invites trouble. This final section of the analysis thus avoids prediction-

196. That is, these scenarios should cover routine economic and financial conditions, "stressed" conditions, and extreme economic and financial downturns (deep recessions), corresponding to the three named scenarios; precise descriptions for each of these scenarios are provided by the OCC to covered institutions in mid-February of each year. 12 C.F.R. § 46.5(b) (2018).

197. As with the three "conditions" scenarios, the OCC provides information and requirements by March 1 of each year. 12 C.F.R. § 46.5(c) (2018).

198. These decisions include capital planning, capital adequacy, and general risk management approaches, among others. 12 C.F.R. § 46.5(d) (2018).

199. 12 C.F.R. § 46.6(c)(1), (2) (2015).

200. *See, e.g.*, Robin Greenwood, Samuel G. Hanson, Jeremy C. Stein, & Adi Sunderam, *Strengthening and Streamlining Bank Capital Regulation*, BROOKINGS PAPERS ON ECON. ACTIVITY 479 (Fall 2017).

201. Stephen Gandel, *Why the Bank Stress Tests Don't Really Matter*, FORTUNE (July 2, 2016), http://fortune.com/2016/07/02/fed-bank-stress-tests/.

202. Gore Vidal, *Novelists and Critics of the 1940s*, *in* UNITED STATES: ESSAYS 1952–1992 10, 10 (1993). While Vidal was speaking of commentaries from within literary academia, his cautions are universal.

making, instead offering an overview of recent secondary analyses and current affairs. In doing so, the aim is to provide a range of possible trajectories in the near-future, a limited set of informed hypotheses about likely federal court disposition of cases involving CRAs and their First Amendment claims, and a general framework for further studies.

Recent scholarship focused on CRAs have affirmed the complicated roles of CRAs in global financial systems–as information "intermediaries," as standard-setters for investment grade instruments under agency-promulgated regulations and state law analogues, among other functions.[203] A more nuanced finding from a series of studies shows, however, that CRAs' ratings "*did* . . . contain important information predicting future downgrades and defaults" not otherwise "reflected in the credit rating" of an MBS, as well as that the ratings "did not reflect all available (negative) information concerning" default risks, in the CRAs' own admissions and in private investor behaviors before the crash.[204] While these findings suggest criticisms of CRAs' roles in understating the riskiness of investments might be amplifying their systemic consequences unfairly–if private investors understood the limits of ratings and the riskiness of their investing choices from outside information, then the CRAs ought not shoulder disproportionate blame–reliance on ratings for *specific types* of instruments appears to have been widespread. In particular, AAA-rated MBS tranches, including many which ultimately downgraded, becoming toxic and functionally valueless, seemed to be relied upon in the market leading into the crisis. Where such MBSs were so highly rated, passive investors—those least likely to undertake the nuanced, individual analyses required to ascertain otherwise hidden "negative information"—flocked, despite underlying, systemic risks far in excess of what the "AAA" ratings suggested.[205]

These and related findings are troubling for a highly concentrated, relatively uncompetitive market: today, "approximately 96% of all ratings are provided by just three CRAs," the aforementioned Moody's, S&P, and Fitch, an even higher percentage of the total ratings market than before the

203. Allen Ferrell & John Morley, *New Special Study of the Securities Markets: Institutional Intermediaries* 38–39 (Yale Law & Economics Research Paper No. 580), https://ssrn.com/abstract=3005542.

204. *Id.* at 39–40. *Accord* Manuel Adelino, *How Much Do Investors Rely on Ratings? The Case of Mortgage Backed Securities* (June 22, 2009), unpublished dissertation, https://ssrn.com/abstract=1425216; Adam Ashcraft, Paul Goldsmith-Pinkham & James Vickery, *MBS Ratings and the Mortgage Credit Boom* (Fed. Reserve Bank N.Y., Staff Report No. 449), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr449.pdf.

205. Ferrell & Morley, *supra* note 203, at 40.

crisis.[206] Simultaneously, the same leading firms experienced dramatic growth over the last two decades which continues: Moody's profits tripled between 2002 and 2006 alone;[207] more-recently, S&P's revenues increased by 14% year-over-year, from Q4 2016 to Q4 2017,[208] and a further 7% increase for Q2 2018,[209] in keeping with previous years' growth; Fitch, a subsidiary of Hearst Corporation and the smallest of the three leading CRAs, "recorded record revenue and profit" which contributed to Hearst's seventh-consecutive year of overall growth during 2017.[210] Consolidation and an anti-competitive industry altogether remain unchanged. The implications of relatively lacking competition are expansive, with recent commentaries and analyses suggesting both opportunities for and improved ratings accuracy outcomes by enhancing the number and variety of firms in the ratings sector.[211]

The foregoing is a decidedly truncated review of recent work on post-crisis legal and economic policies. Others have called for, *inter alia*, a more-flexible legal framework which responds to the disparate behaviors of economic fundamentals during "normal" conditions as compared to during "deep recessions";[212] greater exploration of how corporate law, specifically, ought to adjust to financial and economic crises;[213] and further understanding of how legal and regulatory changes may "prompt the spread of 'investor-driven financial innovations,'" i.e., how markets respond to governmental

206. Ferrell & Morley, *supra* note 203, at 42.

207. *Id.*

208. *S&P Global Reports 4th Quarter and Full-Year 2017 Results*, PR NEWSWIRE (Feb. 6, 2018), https://www.prnewswire.com/news-releases/sp-global-reports-4th-quarter-and-full-year-2017-results-300594101.html.

209. *S&P Global Reports Second Quarter Results*, S&P GLOBAL INVESTOR RELATIONS (July 26, 2018), http://investor.spglobal.com/file/Index?KeyFile=394368238.

210. *Hearst President & CEO Steven R. Schwartz Letter to Employees on Hearst's 2017 Performance*, HEARST CORP. (Jan. 2, 2018), http://www.hearst.com/newsroom/hearst-president-ceo-steven-swartz-letter-to-employees-on-hearst-s-2017-performance; *accord* Sami Main, *Hearst Scored Record Profits for the 7th Consecutive Year, According to Memo From CEO*, ADWEEK (Jan. 2, 2018), https://www.adweek.com/tv-video/hearst-scored-record-profits-for-the-7th-consecutive-year-according-to-memo-from-ceo/.

211. Ferrell & Morley, *supra* note 203 at 42; *accord* Francesco Sangiorgi & Chester Spatt, *The Economics of Credit Rating Agencies*, 12 FOUNDS. & TRENDS FIN. 1 (2017), http://dx.doi.org/10.1561/0500000048.

212. *See* Yair Listokin, *Law and Macroeconomics: The Law and Economics of Recessions* (Yale Law School, Public Law Research Paper No. 576), http://ssrn.com/abstract=2828352.

213. *See* Yair Listokin & Inho Andrew Mun, *Rethinking Corporate Law During a Financial Crisis,* 8 HARV. BUS. L. REV. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3105175.

actions, and do so with potentially systemic consequences.[214] As these and many other works build upon lessons from the last decade, ambiguous global and domestic economic factors may presage upcoming challenges. In the U.S., exceptionally low unemployment after nearly a decade of sustained yet sluggish recovery is promising,[215] but incomes are largely flat[216] and housing markets appear to be slowing dramatically, especially in the largest, most competitive metropolitan markets, like Seattle, the Bay Area, and Austin, Texas.[217] While credit-based buying across all sectors remains far below the spiraling pre-crisis trends and recent home-starts by developers have slowed in lockstep with home buying habits–suggesting present trends are more a "cooling" of housing markets than a prelude to a disastrous "bust" as in 2007[218]—another recession, as always, will come eventually. Uncertainty in global markets from Brexit, unresolved trade disputes among leading global economic powers,[219] ongoing and mass-scale global corporate consolidations, high-profile corporate misconduct, and government corruption scandals[220]—all will have indeterminate effects on the severity and timing of the next downturn, as well as the U.S. government's responses.

214. *See* Kathryn Judge, *Investor-Driven Financial Innovation* (Columbia Law and Economics Working Paper No. 576), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3068991.

215. Natalie Kitroeff, *Unemployment Rate Hits 3.9%, a Rare Low, as Job Market Becomes More Competitive*, N.Y. TIMES (May 4, 2018), https://www.nytimes.com/2018/05/04/business/economy/jobs-report.html.

216. Tim Duy, *Companies Can't Hold the Line on U.S. Wages Much Longer*, BLOOMBERG (May 16, 2018), https://www.bloomberg.com/view/articles/2018-05-16/wages-are-poised-to-increase-at-a-faster-rate (reporting that, while unemployment dropped to 3.9 % in the April 2018 jobs report, wage growth was only 2.6 % over the previous year–and only 0.6 % when accounting for estimated inflation rates).

217. Prashant Gopal & Sho Chandra, *The U.S. Housing Market Looks Headed for Its Worst Slowdown in Years*, BLOOMBERG (July 26, 2018), https://www.bloomberg.com/news/articles/2018-07-26/american-housing-market-is-showing-signs-of-running-out-of-steam.

218. *Id.*

219. *See, e.g.*, Andrew Restuccia, *In Abrupt Shift, Trump Makes Nice with EU, Gets Tough on Russia*, POLITICO (July 25, 2018), https://www.politico.com/story/2018/07/25/trump-russia-european-union-juncker-742718.

220. *See, e.g.*, the ongoing "1MDB" scandal in Malaysia, involving various allegations of fraud, money laundering, and embezzlement of development project funds by Malaysia's state development giant, 1Malaysia Development Bhd., which has ensnared U.S. hedge fund giant Goldman Sachs in legal inquiries. Andrea Tan, *Singapore Police Examine Goldman's Role in 1MDB Deals*, BLOOMBERG (Nov. 2, 2017), https://www.bloomberg.com/news/articles/2017-11-03/singapore-police-are-said-to-examine-goldman-role-in-1mdb-deals; *Former Goldman Sachs Banker in 1MDB Plea Talks with U.S.: WSJ*, REUTERS (July 9, 2018), https://www.reuters.com/article/us-malaysia-scandal-goldman-sachs/former-goldman-sachs-banker-in-1mdb-plea-talks-with-u-s-wsj-idUSKBN1K007K. As of March 2018, an estimated $4.8 billion out of the total $6.5 billion Goldman Sachs helped 1MDB raise from 2012 through 2013 had been "diverted" from the company into various personal and shell company bank accounts, including a one-time, $681-million transfer to former Malaysian Prime Minister Najib Razak's personal account, as well as extensive purchases

Outside academic discourses and economic trend lines, ongoing political happenings in the U.S. and around the world may influence both regulatory approaches to the CRAs and federal courts' dispositions of CRA-related litigation outcomes as well. The appointment of Justice Neil Gorsuch and the pending appointment of Justice Anthony Kennedy's replacement on the U.S. Supreme Court, for instance, likely will cement a nascent period of conservative dominance over the Court in coming years.[221] Below the Supreme Court, too, the record-setting pace of federal appeals judge appointments in 2017[222] suggests overall tilt toward conservatism in the federal judicial system–and, thus, a more-favorable environment for review of potential challenges to deregulatory policies from the executive and legislative branches.

At the same time, jurisprudence on First Amendment matters—from CRAs' claims to heightened protections of their ratings opinions thereunder—further complicates any effort to forecast specific outcomes. Justice Kennedy and his fellow Republican Party appointees on the U.S. Supreme Court certainly held and ruled upon expansive views of First Amendment protections in recent decades.[223] In other areas, however, the ideological binary of the Court breaks down regularly–and most interestingly, when contemplating litigation against CRA-defendants. At least some liberal justices, for instance, have sided with conservative counterparts on particularity requirements for pleadings under antitrust

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of "luxury items such as a yacht, a Picasso painting, and [jewelry]." Jamie Smyth & Don Weinland, *Australia PM's Son Says Goldman Sidelined Him After 1MDB Warnings*, FIN. TIMES (Mar. 8, 2018), https://www.ft.com/content/cb0fbf5c-2284-11e8-9a70-08f715791301.

221. *See, e.g.*, Lawrence Hurley, *Trump's Supreme Court Appointee Gorsuch Plots Rightward Course*, REUTERS (Dec. 19, 2017), https://www.reuters.com/article/us-usa-court-gorsuch/trumps-supreme-court-appointee-gorsuch-plots-rightward-course-idUSKBN1EE0IJ.

222. Tessa Berenson, *President Trump Appointed Four Times as Many Federal Appeals Judges as Obama in His First Year*, TIME (Dec. 17, 2017), http://time.com/5066679/donald-trump-federal-judges-record/.; Deanna Paul, *Trump Promised to Remake the Courts. He's Installing Conservative Judges at a Record Pace*, CHI. TRIB. (July 20, 2018), http://www.chicagotribune.com/news/nationworld/ct-trump-judges-20180720-story.html#.17, 2017);

223. *See, e.g.*, Peel v. Attorney Registration and Disciplinary Comm'n of Ill. 496 U.S. 91 (1990) (holding unconstitutional a state's categorical ban on listing board certifications on attorney letterhead as potentially "misleading" and in violation of state Code of Professional Responsibility); Colo. Republican Fed. Campaign Comm. v. F.E.C., 518 U.S. 604 (1996) (holding independent campaign expenditures by political parties may not be limited under the Federal Election Campaign Act of 1971); Citizens United v. F.E.C., 558 U.S. 310 (2010) (holding corporate-funded independent political advertising may not be restricted without violating the First Amendment); McCutcheon v. F.E.C., 572 U.S. 185 (2014) (holding unconstitutional a two-year aggregate campaign contribution limitation under the 2002 Bipartisan Campaign Reform Act). *But see* Williams-Yulee v. Florida Bar, 135 S. Ct. 1656 (2015) (holding a rule which bars judicial candidates from personally soliciting contributions did not violate the First Amendment).

statutes[224] and on credit card companies' ability to alter account rates in response to cardholder defaults without notice.[225] Conversely, conservative Supreme Court members have joined unanimous opinions affirming an insurer's "reckless disregard" for the Fair Credit Reporting Act constitutes a "willful" violation under the statute.[226] Altogether, a partisan–ideological shift on—much less a single new appointment to—the Supreme Court is not definitive evidence of future case dispositions. No matter the complex political and economic trends discussed above, there remains room for policy and litigation to confront concerns vis-à-vis the CRAs and the ratings industry broadly.

C. Policy and Advocacy Options are Constrained – Not Futile

The possibility of grassroots movements demanding improved CRA oversight and accountability—perhaps in the mold of the "consumer empowerment programs" exercising public oversight of the U.S. insurance sector since the 1980s—offers another suggested avenue for curtailing "capture" of regulators and consequently imprudent regulatory decisions.[227] But activism and policy advocacy aiming to hold CRAs accountable for their failures before and during the crisis also should address decades-old First Amendment-based claims of CRAs highlighted in the foregoing. Without anticipating and heading off those constitutional claims, attempts to ensure accountability and less-risky financial sector practices face daunting odds.

By dint of their structural and information-gatekeeping importance in the financial system, as well as the compelling framework set forth in *Omnicare*[228] and other recent cases, CRAs' opinions merit comprehensive regulatory, policymaking, and judicial reevaluation. The most-recent cases concerning CRAs' opinions in the context of free speech entitlements, *Lowe* and *Greenmoss Builders*, are nearly four decades old and of dubious utility in modern markets; the last two decades of rapid financial innovation and the exemption of CRAs from *Omnicare*'s precise standards strongly favor a

224. Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) (Justices Souter and Breyer joining the 7–2 majority).

225. Chase Bank U.S.A. v. McCoy, 562 U.S. 195 (2011) (Justices Ginsberg, Breyer, Sotomayor, and Kagan joined the unanimous opinion, though the holding turned upon the timing of the change-in-terms transactions in the case preceded passage of regulations compelling such notice claimed by the plaintiff.).

226. Safeco Ins. Co. of America v. Burr, 551 U.S. 47 (2007).

227. Daniel Schwarcz, *Preventing Capture Through Consumer Empowerment Programs: Some Evidence from Insurance Regulation*, *in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 365, 365–396 (Daniel Carpenter & David A. Moss eds. 2014).

228. *See supra* note 47.

reinvigorated doctrinal approach. Under present frameworks, ratings are granted a patina of intrinsic legitimacy—i.e., in that ratings are statutorily required referents for securities regulatory benchmarks—yet the ostensibly rigorous development of ratings models and the underlying data which support them are claimed as protected "opinions," pure speech, by the three leading CRAs. When these CRAs' cases reach the Supreme Court, whether in the near-term or several years ahead, *Lowe* and *Greenmoss Builders* must be abandoned decisively.

This and all the foregoing is *not* to suggest CRAs should face unbounded liability for less-than-prescient conduct before the crisis and Great Recession, nor that CRAs and other financial sector institutions lack any First Amendment protections whatsoever. Rather, the Supreme Court is called upon to more clearly and concretely define the bounds of CRAs' opinions–precisely, to classify them properly as forms of commercial speech, still protected by intermediate scrutiny upon review in all cases not involving overt fraudulence or other forms of illegal misconduct. Especially in future cases, and specifically in the event of another crisis of a magnitude seen circa 2007-08, complex and high-stakes dispositions can and should disregard decades-old CRA claims and hold CRAs' ratings opinions to be *at most* subject to well-established commercial speech protections, or otherwise subject to an *Omnicare*-like review standard. These fine-tuned approaches would not only align federal regulation of CRAs with traditional constitutional understandings, but also would enhance the ratings industry's incentives to and capacities for safeguarding global markets from financial crisis. The stakes could hardly be higher.

Conclusion

The foregoing discussions highlight myriad unresolved issues–even now, nearly a decade since the financial crisis began to unravel–as well as the complexity in litigating financial sector liability from the intersections of corporate, administrative, and constitutional law. There are some early, coalescing lessons to draw, however, and those lessons should prod CRAs and other financial actors toward caution–especially where they rely upon tepid constitutional claims from the last century. For the major investment banks after the crisis, a "conflicted" role on both sides of a merger or buyout transaction now can trigger aiding and abetting liability in Delaware's courts, a dramatic extension of fiduciary duty doctrines. Where those same institutions knowingly perpetuated financial fraud–packaging and selling investment instruments with foreknowledge but nondisclosure of excess risks–their litigation prospects are more ambiguous.

For U.S.-based CRAs, the outlook remains perplexing and ripe for reconsideration by the U.S. Supreme Court. The Ninth and Second Circuits have offered at-best unclear guidance for CRA liability generally, while Ohio's Southern District in the Sixth Circuit went further in permitting claims against CRAs to enter discovery or trial phases. At the Sixth Circuit level, though, a separate case's dismissal was affirmed, further muddying any inferences drawn therefrom. Across all cases, however, longstanding claims of First Amendment protections for CRA ratings have been kept out of issued court opinions or rejected outright, such as where the courts apply state law rather than federal securities laws or view commercial speech doctrines under *Greenmoss Builders* exceptionally narrowly. With apparently inconsistent and unsettled views across the Circuit Courts, an evident conflict between state fraud laws and federal securities laws, and hundreds of millions in settlements since the financial crisis first unfolded, the question becomes not if but when definitive guidance will be forthcoming.

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