OTHER PEOPLE'S VOLATILITY: A CALL FOR RULES THAT MORE EQUITABLY STABILIZE THE STOCK MARKET

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I. INTRODUCTION: WHOSE MARKET IS IT, ANYWAY?

Between September 2008 and February 2009, the Dow Jones Industrial Average ("DJIA") slowly and steadily lost over 30%, eradicating trillions of dollars of wealth.[2] The nation's stock exchanges did not close, slow, or cease during this painstaking decline.[3] The thirty-five or so bills proposed by Congress in the intervening legislative session variously

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[2] *See* Chronology of Dow Jones Industrial Average, http://www.islandnet.com/~kpolsson/dow jones/dow1954.htm (last visited April 8, 2014) (highlighting bleak periods in the Dow's recent history).

[3] *See* Colin Clark, *Updating the Market-Wide Circuit Breaker*, http://exchanges.nyx.com/colin-clark/updating-market-wide-circuit-breaker (last visited April 9, 2014) ("You may not even know this market-wide circuit breaker exists. It has only been triggered one day (October 27, 1997) in 23 years.").

offered to reform the exchanges, securities industry regulatory agencies, market players, trading practices, and individual investments.[4] The law pressed by the White House to passage in 2010 left the day-to-day operation of market centers out of the mix.[5]

The losses were replaced – at least on paper – in March 2013, when the DJIA regained its pre-Crisis, October 2007 zenith of 14,000.[6] That same month, securities regulators finalized rules that ostensibly provided protection against swift market downturns.[7] In the interim, during those harrowing half-dozen years, investors witnessed debate over the proper level of regulation of banks, brokerages, brokers and investments, as well as the degree of severity of sanctions meted out to Crisis villains. But stock exchange volatility remained largely unhindered, as it does today.

And so, like the highways that go without repair while automobiles are increasingly regulated, so too have the nation's securities exchanges[8] avoided meaningful reform.

To be sure, a blithe response to tremulous stock exchanges can be said to be traditional. Throughout the nation's history, the scholars stopping to decry wonton capitalism have often spared its chief conduit substantive critique. The seminal *Other People's Money* by Louis Brandeis noted blandly in 1914 that the New York Stock Exchange ("NYSE") housed

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[4] *See, e.g.*, Financial Regulation Reform Act of 2008, S. 3691, 110th Cong. (2008) (requiring reporting and recordkeeping of credit-default swaps); Financial Market Investigation, Oversight, and Reform Act of 2008, S. 3652, 110th Cong. (2008) (establishing a Commission, Joint Select Committee, and a Special Inspector General); Derivatives and Hedge Fund Regulatory Improvement Act of 2008, S. 3739, 110th Cong. (2008) ("To address the regulation of derivatives and unregistered hedge funds . . . ."); H.R. 2868, 110th Cong. (2007) ("To eliminate the exemption from State regulation for certain securities designated by national securities exchanges.").

[5] *See* DEP'T OF TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION (2009). The White House's detailed description of planned changes for American investors and homeowners did not include modifications to stock exchange operations. *Id.*; *see also* the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. § 5301 (2010) [hereinafter *Dodd-Frank*].

[6] *See Dow Jones Historical Average – Historical Charts*, YAHOO FIN., http://finance.yahoo.com/echarts?s=%5EDJI+Interactive (last visited Feb. 24, 2014).

[7] Regulatory Systems Compliance and Integrity, SEC Release No. 34-69077 (March 8, 2013), *available at* www.sec.gov/rules/proposed/2013/34-69077.pdf.

[8] 15 U.S.C. § 78c(a)(1) (2006) ("(1) The term 'exchange' means any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange."); 17 C.F.R. § 242.300(a)(1) (2013) ("(a) Alternative trading system means any organization, association, person, group of persons, or system: (1) That constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange . . . ."); Jerry W. Markham & Daniel J. Harty, *For Whom the Bell Tolls: the Demise of Exchange Trading Floors and the Growth of ECNS*, 33 J. CORP. L. 865, 866 (2008) (Notes that this expansion by the SEC paved the way for numerous non-conventional/non-traditional securities marketplaces, initially resulting in a proliferation of "Electronic Communication Networks", or "ECNs," and asserting that "[t]he amazing growth of the ECNs and their displacement of the traditional exchanges have raised regulatory concerns.").

"[o]nly a part" of market securities.[9] Likewise, the remedial legislation adopted after the Great Depression sought merely to establish a chain of review that firmly established the Securities and Exchange Commission ("SEC") atop a pyramid that relied heavily on self-regulation at its base.[10] More recently, pundits were equally nonplussed, opining that economic historians had concluded that the stock market swoon of 1929 itself was more an effect of the deepening Depression than its cause.[11]

A. For Which Customers?

Part of the indifference, no doubt, traces to the market's fluid and inscrutable clientele. "Direct participation" in the stock market is, at best, a misleading term; an individual investor – not rising to the level of a stock exchange member – relies on his order being grouped with others at his accountholder's firm or simply being satisfied by the brokerage itself from an internal account.[12] In recent times, there has sprung the notion of "indirect" participation to connote both the increasing involvement of pooled investments (e.g., retirement plans and pensions) and a citizenry more sensitive to market fluctuations. Concurrently, a 1998 study concluded that nearly half of all American households had become indirectly involved with the market.[13]

Not surprisingly, the data concerning a typical trading day at the major stock exchanges never quite clarifies how much buying and selling was ultimately institutional (as opposed to retail, or individual). Mutual funds buy scores of individual stocks and thus their numbers are hopelessly intermingled; separately, we know that pension plans and retirement funds are weighty but not majority players.[14] The most precise evidence speaks to the practices of market professionals, which reflect the complexity and risk inherent in a "routine" day in the life of a stock exchange.

From this evidence, we know that short selling, "program trading,"

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[9] LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 7 (1914).

[10] *See* the Securities Exchange Act of 1934, 15 U.S.C. § 78(d) (2012) [hereinafter *Exchange Act*] (establishing the Securities and Exchange Commission).

[11] *See, e.g.*, Paul Alexander Gusmorino III, *Main Causes of the Great Depression*, GUSMORINO WORLD (May 13, 1996), http://www.gusmorino.com/pag3/greatdepression/index.html.

[12] *See* DOUG HENWOOD, WALL STREET: HOW IT WORKS AND FOR WHOM? 17–19 (1997) (describing the route of an order from customer to stock exchange floor).

[13] Harrison Hong et al., *Social Interaction and Stock-Market Participation*, 59 J. FIN. 137, 137 (2004), *available at* http://www.princeton.edu/~hhong/jfsocial.pdf (noting that in 1998 48.9% of American households owned stock either directly or indirectly, a figure representing a 17% increase in a decade).

[14] *See* Greg Smith, *How Wall Street Is Still Rigging the Game*, TIME, Nov. 5, 2012, at 18 ("The secret that Wall Street doesn't want anyone to know is that hedge funds comprise less than 5% of assets in the stock market. The real big players in the market are individual households and the pension funds, mutual funds, university endowments, charities and foundations that are entrusted with your savings, donations, retirement funds and 401(k)s – trillions and trillions of dollars that are invested with Wall Street banks."); *see generally* Greg Smith, WHY I LEFT GOLDMAN SACHS: A WALL STREET STORY (2012).

and proprietary trading (by firms for firms) are common practices of market professionals. "Short interest" reports disclose the monthly amount of shares that have been sold as part of a strategy of sell now, buy shares to cover the sale later.[15] Program trading, a computerized practice employed by large brokerage firms for decades, connotes a wide range of trading strategies centering on an investment of at least $1 million in a basket of at least 15 stocks.[16] Astonishingly, the calculation of program trading reveals a number phrased in percent of daily trading volume that has, at times, nearly reached 50% of all exchange volume.[17] Combining short sales, program trading, and an indeterminable volume of firms trading for themselves, the stock market is a game in which the individual investor (even when represented by institutions) is, at best, a minority player.

B. Storied But Forgotten

Nonetheless, despite any precision in identifying exactly which clientele are being foremost served, the "stock market" is the most visible and time-honored of our economic indicators.[18] Further, the notion of a continuous and fair trading center for stocks and bonds still attends all perceptions of developed economies.[19] While traditionally the stock exchange either assisted with capital formation or provided a reprieve from

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[15] *See Short Interest*, NASDAQ.COM, http://www.nasdaq.com/quotes/short-interest.aspx (last visited Feb. 24, 2014); s*ee also* Brigitte Yuille, *Short Selling: Introduction*, INVESTOPEDIA.COM, http://www.investopedia.com/university/shortselling (last visited Feb. 24, 2014) (explaining that a short sale is a legal but speculative practice of selling a stock not yet owned or borrowed, and that the practitioner profits from the spread between the sale price and the price of the subsequent "covering" transaction).

[16] *See* Press Release, NYSE, Program Trading Averaged 26.4 Percent of NYSE Volume during July 8-12 (July 18, 2013), http://www.nyse.com/press/1374142974235.html; *Program Trading*, INVESTOPEDIA.COM, http://www.investopedia.com/terms/p/programtrading.asp (last visited Feb. 24, 2014).

[17] *See* Press Release, NYSE, Program Trading Averaged 48.6 Percent of NYSE Volume during June 22-26 (July 7, 2009), http://www.nyse.com/press/1246962735805.html (reporting that in June of 2009, Program Trading accounted for over 48% of all volume on the NYSE in one business week).

[18] For purposes of this Article, the "stock market" connotes the major stock exchanges in the United States. The New York Stock Exchange ("NYSE") and the NASDAQ stock exchange ("NASDAQ") house listings which comprise all 30 companies constituting the famed Dow Jones Industrial Average. *See Companies in the Dow Jones Industrial Average*, CNN MONEY, http://money.cnn.com/data/dow30/ (last visited Feb. 24, 2014); *see generally* David Escobar, *Stock Exchanges and History of Stock Exchanges*, EZINE @RTICLES (July 5, 2010), http://ezinearticles.com/?Stock-Exchanges-and-History-of-Stock-Exchanges&id=4608793 (describing the fabled "Customer Afternoon Letter" first circulated by Charles Dow). *But see* SEC, Joint Industry Plans, Exchange Act Release No. 34-67091, 103 S.E.C. Docket 2760, 2012 WL 1963373 (May 31, 2012) (stating that there are currently at least 10 other American stock exchanges routinely recognized by the press, regulators, and other interested parties like the National Stock Exchange and the Chicago Stock Exchange).

[19] Economists often link a successful stock to a reputational economy. The stock exchanges charge a commission to each member based upon revenues (calculated by shares executed) that is required by rule to be meticulously and timely tallied each month. *See* NYSE Information Memo No. 96-12, Form 600TC/Floor Brokerage and Commissions Reporting (Apr. 4, 1996), http://www.nyse.com/nysenotices/nyse/information-memos/detail?memo_id=96-12 (Explains that monthly form 600TC required of all members must record floor brokerage revenue including "income received from non-member broker-dealers as well as public institutional and retail customers.").

fraud,[20] in modern times the goals seem expedient at best, and, at worst, dangerously cloistered.[21] Sometime in the past 100 years, the American "stock exchange" appears to have become a behemoth, susceptible to only self-supervision, and bounded by crude mechanistic inhibitors. This largely unnoticed reality[22] may prove catastrophic the next time the nation's biggest banks suddenly disclose billions of dollars in losses.[23]

Over the past 25 years, as various American stock exchanges have become inextricably linked[24] they have (reluctantly) safeguarded against intolerable volatility by instituting so-called "circuit breakers,"inorganic operational halts tantamount to shutting off the lights and praying for the weekend.[25] Regrettably, what has emerged is a cottage industry in a skyscraper world. To wit, as regulators and regulated entities alike have come to be far more concerned with ensuring that a stock exchange index ascend without interruption than with preventing its cataclysmic fall, oversight measures have been left to the exchanges themselves. These exchange-implemented measures have at various times proven to be mythical, belated, superficial, and, worst of all, self-serving.

Accordingly, this article examines the reasons for, and efficaciousness of, stock exchange regulation of volatile trading. Part II introduces some of the most storied tales dotting the Anglo-Saxon/American timeline regarding the birth of stock exchanges and their near collapse, including three American market disasters of recent times. Part III examines the legal responses to these epic downturns, both those proposed by the exchanges and explored by the SEC. Part IV advances two proposals: (1) re-implementing some traditional market safeguards, and (2) adopting more meaningful brakes on rapidly escalating indices and high-speed trading. Part V concludes by reminding of the dangers of the

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[20] See *infra* notes 43–48 and accompanying text.

[21] See *infra* notes 43–48 and accompanying text.

[22] *See, e.g.*, Nathaniel Popper, *The Big Board, in One Big Gulp*, N.Y. TIMES, Jan. 20, 2013, at BU1 ("[S]tock exchanges are probably a bit like plumbing. Most of us don't think much about them – until something goes wrong.").

[23] *See* John Cassidy, *Subprime Suspect: The Rise and Fall of Wall Street's First Black C.E.O.*, NEW YORKER, Mar. 31, 2008, at 78 (detailing Merrill Lynch's billions of dollars in losses due to a concentration in collateralized debt obligations).

[24] *See* Regulation NMS, 17 C.F.R. § 242.600 (2013). In 1995, the Securities and Exchange Commission adopted Regulation NMS to require, among other things, that all domestic exchanges display the lowest price for an offered security. *Id.*; Regulation NMS, Exchange Act Release No. 34-51808, 85 S.E.C. Docket 1642, 2005 WL 1364545 (June 9, 2005). In similar vein, effective October 1, 2012, all national securities exchanges were required by the SEC "to submit a national market system ("NMS") plan to create, implement, and maintain a consolidated order tracking system, or consolidated audit trail . . . [and to report] order event information for orders . . . across all markets, from the time of order inception through routing, cancellation, modification, or execution." Consolidated Audit Trail, Exchange Act Release No. 34-67457, 104 S.E.C. Docket 748, 2012 WL 2927797, 1 (July 18, 2012).

[25] *See* CHARLES GASPARINO, KING OF THE CLUB/RICHARD GRASSO AND THE SURVIVAL OF THE NEW YORK STOCK EXCHANGE 58–61 (2007) (explaining the decision by Exchange management to "slow down the [trade order entry] process" in response to the market crash of 1987). Such decision was implemented as NYSE Rule 80B. *See infra* note 93 and accompanying text.

continued sugar-coating of stock market swings – at least insofar as "retail investors" are concerned.[26]

Overall, as the nation forges through its second greatest economic downturn,[27] this article urges greater action to forestall yet another wave of long-term investors being victimized by marketplaces seemingly concerned foremost with keeping the center functional for professional traders for another day – in essence, trading for the sake of trading professionals, with unprecedented volatility being a problem for other people.

II. BACKGROUND: 'IRRATIONAL EXUBERANCE,' BOTH ORGANIZED AND UNORGANIZED

In December 1996, then Federal Reserve Chairman Alan Greenspan interrupted a jovial period of market expansion to publicly comment that stock prices seemed to reflect an "irrational exuberance" among investors.[28] But frankly, quixotic stock pricing has been with us for centuries, and has consistently been succumbed to by expert and layman alike. Of greater import, speculative trading frenzy and the resulting internecine volatility predates organized stock exchanges, proving that the fault lied in ourselves before the stars even took shape.

Concomitantly, while casting blame on cyclical zeniths of greed may be convenient, such aspersions on human nature educate us minimally on the reasons why citizens have tolerated clumsy, merciless stock exchanges for so long. An indelible characteristic is clear: governments are usually inextricably linked to stock exchanges, either in their inspiration or continuance.

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[26] For purposes of this article, the "retail investor" is an individual with an order valued at less than $50,000.

[27] Joan Indiana Rigdon, *Government Handouts: Federal Bailout Money Comes With Strings*, WASHINGTON LAWYER 24 (July/August 2009) ("As the nation plods through the worst recession since the Great Depression . . . ."). Of course, in terms of raw numbers (e.g., market capitalization lost), the current downturn may be the greatest collapse of all time. *Cf.* DAVID WESSEL, IN FED WE TRUST 265 (2009) ("More than eighteen months after the Great Panic [of 2008] began, more than a year after Bear Stearns was rescued, more than six months after Lehman collapsed and AIG became a ward of the state, more than a hundred days into the Obama presidency, it was still not entirely clear that [Federal Reserve Chairman] Ben Bernanke and his allies . . . had succeeded at preventing what Bernanke called Depression 2.0.").

[28] J. Scott Colesanti, *"Circuit Breakers" and the Mission of Stock Market Stability*, 15 NEXUS: CHAP. J.L. & POL'Y 43, 53 (2010) (quoting Alan Greenspan, Chairman, Fed. Reserve Bd., The Challenge of Central Banking in a Democratic Society, Remarks at the Annual Dinner and Francis Boyer Lecture of The American Enterprise Institute for Public Policy Research (Dec. 5, 1996), http://www.federalreserve.gov/boarddocs/speeches/19961205.htm) ("But how do we know when irrational exuberance has unduly escalated asset values, which then become subject to unexpected and prolonged contractions as they have in Japan over the past decade? . . . We as central bankers need not be concerned if a collapsing financial asset bubble does not threaten to impair the real economy, its production, jobs, and price stability.").

A. The Origins of Stock Exchanges

The concept of a centralized marketplace for the trading of financial instruments is actually younger than the ideas for indoor plumbing or a suspension bridge. The notion of a marketplace for "bonds" traces to Italy in the Twelfth Century, when local rulers paid 5% interest on "loans" from their citizens.[29] Indeed, historians often have found the roots of exchanges in informal marketplaces trading government-issued debt,[30] and the word "stock" itself emanates from the wooden object once used to record interest payments (and thus partially forgive loans) from the local government.[31]

The first stock exchange or "bourse"[32] hales from Amsterdam circa 1610,[33] centuries after the bonds issued by Italian municipal officials.[34] The Amsterdam exchange was said to have been primarily formulated to facilitate trading in the stocks and bonds of the Dutch East India Company,[35] also credited with originating the notion of an Initial Public Offering.[36] The enduring Dutch stamp on our modern version of the securities marketplace remains a "meeting-place" for bankers, dealers, and others.[37]

Years later, wholly apart from the marketplace for stock, Europe fell prey to Holland's "Tulip Bulb Craze" of the 1630s, proving that the emergence of the formal bourse would neither meet nor curtail the need for lazy profit. In that craze, speculators attempted to create a centralized market for converting a faddish craze for tulip bulbs into healthy profit. The storied testament to avarice was said to have been at once so frantic and egalitarian as to ensnare "[n]obles, citizens, farmers, mechanics, seamen, footmen, maid-servants, even chimney sweeps and old clotheswomen . . . ."[38]

The first noteworthy "crash" of the British stock market occurred in 1696, and is attributed to fears over currency devaluations, ultimately dooming 100 British and Scottish public companies.[39] In what would prove to be a recurring pattern for the ages, brokers were blamed for acting solely

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29 Kenneth Silber, *The Earliest Securities Markets: Stocks and Bonds Have Origins Stretching Back Across the Centuries*, THINK ADVISOR (Feb. 1, 2009), http://www.thinkadvisor.com/2009/02/01/the-earliest-securities-markets.

30 B. MARK SMITH, A HISTORY OF THE GLOBAL STOCK MARKET 19–20 (2003) (The British Crown's issuance of annuities in 1693 and 1694 "to raise money for seemingly never-ending military expenditures . . . .").

31 *Id.* at 20.

32 *Id.* at 14–15. The term "bourse"—still common today in European exchange names—means "purse" but is more likely attributable to the family Van der Bourse, leading Dutch financiers in the Sixteenth Century. *Id*. at 15 (citing Seventeenth Century author Samuel Ricard).

33 *Id.* at 18–21.

34 *Id.* at 12–15.

35 Escobar, *supra* note 18.

36 *Id.*

37 SMITH, *supra* note 30, at 15 (citing Seventeenth Century author Samuel Ricard).

38 BURTON G. MALKIEL, A RANDOM WALK DOWN WALL STREET 36 (6th ed. 1996).

39 SMITH, *supra* note 30, at 22 (noting that the number 100 represented approximately two-thirds of all companies listed on the London Stock Exchange at that time).

in self-interest, leading to legislation in 1697 designed to "refrain the number and ill-practices of brokers and stock-jobbers."[40]

Subsequently, the storied British South Sea Bubble of 1720, as a noted economist highlighted, centered on stock foisted upon the public but nonetheless owned in part by "Half of the House of Lords and more than Half of the House of Commons . . . ."[41] The resulting crash manifested itself in waves throughout various European nations. Again, the British response was remedial legislation, this time aimed at investment vehicles and speculative trading practices.[42]

Across the pond in America, the Great Depression can surely be seen as an equal opportunity chasm, effecting bankers and their depositors alike. The problem lay not with the lure of the stock exchange, but rather with the spirit of invulnerability that defied economic stratification, regardless of market access. As the period's chief chronicler explained, there existed across the sociological divide a perverted American spirit, and a people "displaying an inordinate desire to get rich quickly with a minimum of physical effort."[43] Not surprisingly, the populist President initiated legislative reforms aimed at making markets more egalitarian, with a resolute government watchdog overseeing the federalization of what had traditionally been covered by State law.[44] The ribald tales of Franklin Delano Roosevelt's ("FDR") ensuing paternalism towards American investors[45] are well-known; less understood, however, are the reasons that domestic stock exchanges even originated in the first place.

B. The American Model

Because greed and panic-selling pre-dated, and have in many instances existed outside of, stock exchange trading,[46] the lineage of the exchanges must be more practically defined. Each of the American stock exchanges initially organized for at least one of the following two reasons: (1) the desire to minimize opportunities for fraud, and (2) the need to bring

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[40] *Id.* at 22–23.

[41] MALKIEL, *supra* note 38, at 40–41.

[42] *Id.* at 45. Specifically, the Sir John Bernard's Act of 1734 banned, among other things, trading in options and futures, and short-selling. *Id. But see* REPORT OF THE SUB-COMMITTEE OF THE STOCK-EXCHANGE, RELATIVE TO THE LATE FRAUD 6–8 (1814), https://ia600506.us.archive.org/2/items/reportofsubcommi13stoc/reportofsubcommi13stoc.pdf (detailing a separate and later British Crown inquiry into a later London Stock Exchange fraud which concluded that losses could largely be attributed to an unforeseen forgery by a sole counterparty).

[43] JOHN KENNETH GALBRAITH, THE GREAT CRASH: 1929 3–4 (7th ed. 1997) (also noting that the perversion afflicted not only the Astors and the Rockefellers—who clung to the resilience of "Blue Chip stocks"—but also the market newcomer of the 1920s, who found himself (like the real estate speculator) able to buy a sizeable amount of stock with 10% down).

[44] *See* CHARLES R. GEISST, WALL STREET: A HISTORY 233–243 (1997).

[45] *See* GALBRAITH, *supra* note 43, at 12–22, 36–37 (describing the alluring margin market of the 1920s); GEISST, *supra* note 44, at 235 (describing the appointment of the first S.E.C. Chairman—a former manipulative "market operator"—as placing a "fox to guard the henhouse").

[46] *See supra* pp. 7–8.

small companies to market. For example, the NYSE, the largest and oldest of America's financial battlefields,[47] was itself formed to wrest authority from manipulative New York "street" brokers of the late Eighteenth Century who had succumbed to the charms of an over-extended (and eventually imprisoned) nobleman.[48] Likewise, the Philadelphia Stock Exchange—the rival to the NYSE for the moniker of first American stock exchange[49]—is recalled as the entity enabling a market that responded to both the same New York nobleman's fraud and a local health epidemic.[50]

A second reason for stock exchanges in America would appear to be the need to serve local markets.[51] Because the largest stock exchanges have high costs and listing requirements,[52] or simply because a fledgling company need not reach a national audience, local market centers have sprung up and survived. These smaller marketplaces have grown in importance as SEC rules have mandated that all exchanges provide the same pricing information (and thus, trading opportunities) to their customers.[53] Yet since 2008, the number of domestic initial public offerings (IPOs) has halved[54] while average trading volume on the stock exchanges has increased dramatically, indicating that the goal of bringing companies to market has, at best, been subjugated to other activities at the exchanges.

Regardless of their primary purpose, today's American stock

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47 *See, e.g.*, Popper, *supra* note 22, at BU1 (calling the NYSE "the largest stock exchange in the nation and the world").

48 GEISST, *supra* note 44, at 11–12. Geisst detailed the need for an exclusionary club to avoid the unfair practices that had been exploited by the notorious "merchant speculator" William Duer:

> Recognizing the need to clean up their operations, the dealers and auctioneers entered the Buttonwood Agreement in May 1792. Meeting under a buttonwood tree, today the location of 68 Wall Street, the traders agreed to establish a formal exchange for the buying and selling of shares and loans. The new market would be more structured, conducted without the manipulative auctions. This market would be continual throughout the prescribed trading period, and a commission structure would be established. All of those signing the agreement would charge each other a standard commission for dealing. Those not signing but still intending to trade would be charged a higher commission.

Id. at 13.

49 *See The Philadelphia Stock Exchange*, WALL STREET & TECH., http://www.wallstreetandtech.com/photos/tradingfloors/phlx ("The Philadelphia Stock Exchange, created in 1790, was the first U.S. stock exchange.").

50 DOMENIC VITIELLO WITH GEORGE E. THOMAS, THE PHILADELPHIA STOCK EXCHANGE AND THE CITY IT MADE 40–42 (2010).

51 *See* Steve Greechie, Answer to "Why Was the American Stock Exchange Started?", ANSWERBAG (Jan. 21, 2010), http://www.answerbag.com/q_view/1902469 (explaining that the American Stock Exchange formed to trade shares "too small to be listed on the NYSE").

52 *See* NYSE LISTED COMPANY MANUAL § 102.01 (2013), http://nysemanual.nyse.com/lcm/Help/mapContent.asp?sec=lcm-sections&title=sx-ruling-nyse-policymanual_102.01&id=chp_1_2_2_1 (detailing requirement of $40 million market value of publicly held shares and $10 million in pre-tax earnings for the 3 years prior to listing application).

53 *See* CONSOLIDATED AUDIT TRAIL, *supra* note 24 (discussing the "National Market System" and pricing).

54 *See IPO Pricings*, RENAISSANCE CAPITAL IPO CENTER, www.renaissancecapital.com/IPOHome/Press/IPOPricings.aspx (last visited Feb. 24, 2014) (disclosing an average of approximately 200 IPOs per year between 2004 and 2007 and 100 per year for the period of 2008 through 2012).

exchange serves as a focal point for the nation's ever-increasing need of economic reassurance.[55] Euphemisms such as "corrections," "recessions," and "bubble bursts" have not only taken root in economic vernacular, but make a bit more palatable the seemingly inevitable cycle of outrageous fortune and collective despair. Without fanfare, economists describe the characteristics of market setbacks, in words that are hauntingly familiar:

> The ingredients of financial panics are boringly repetitive. Past panics fade from memory. Financial institutions figure out ways to circumvent the regulations established to prevent those past panics from happening again. Rising asset prices enable easier credit and vice versa. Market euphoria grips increasing numbers. Risks are underestimated. Quick, large fortunes are made and flaunted. Everyone seeks to ride the economic boom times to great wealth. All the conditions are in place for something significant to go wrong.[56]

Additionally, the faith in the stock market as a bastion of desirable volatility persists. The Twentieth Century's "efficient market hypothesis" posited that stock market prices were "the best available estimates of the real value of shares since the market has taken account of all available information on an individual stock."[57] And tremendous market calamities are met with some degree of well-publicized reform, rather than radical shifts in the delivery of investment profits and losses.

Despite its age, omnipresence, and unique importance, the American stock market defies macroeconomic action intended to stymie this intolerable volatility.[58] Perhaps because its prompts and controls thus remain mystical, its effective (albeit rare) regulation is widely touted. President Lyndon Baines Johnson openly lauded the work of the market's chief regulator in sustaining a period of national economic growth.[59] Our current President, curiously, extols the market's heights while nonetheless

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[55] Roger Altman, *Why the Economy Could...POP!*, TIME, Aug. 12, 2013 (citing a rosy prediction on economic growth from the Federal Reserve Board and a contemporaneous Bull Market as indicia of the dramatic increase in jobs and incomes to come).

[56] RICHARD D. WOLFF, CAPITALISM HITS THE FAN: THE GLOBAL ECONOMIC MELTDOWN AND WHAT TO DO ABOUT IT 64 (2010).

[57] JENNIFER BOTHAMLEY, DICTIONARY OF THEORIES 168 (1993).

[58] *See* Ray C. Fair, *Fed Policy and the Effects of a Stock Market Crash on the Economy: Is the Fed Tightening too Little too Late?*, BUS. ECON., Apr. 2000, at 7, http://fairmodel.econ.yale.edu/rayfair/pdf/1999c.pdf ("[T]he Fed does not have the power to prevent a recession from taking place [when] there is a crash.").

[59] JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET 347 (3d ed. 2003) (relating President Johnson's crediting of the Securities and Exchange Commission's "leadership and wisdom" for an increase in total market value of New York Stock Exchange stocks from $23 billion in 1933 to $465 billion in 1964).

warning that the accompanying data presents some cause for concern.[60]

All of which may simply support the most basic of aphorisms. Greed predates exchanges. Investors desire some degree of volatility. And exchanges shall experience devastating lows. As successful traders instruct their squires, "[t]he market is never wrong in what it does; it just is."[61] The surprise comes from a review of the responses to the most arresting of market setbacks throughout history reveal a similarly detached (if not confused) regard for cause and blame.

C. Largest Recent Mishaps

Indeed, nowhere was this testament to detached reform truer than in the aftermath of the Great Depression. Eschewing the closing of the storied NYSE,[62] the committee of members governing the exchange decided—literally within smoky, closed-door meetings—to continue trading in the darkest hours of October 1929.[63] What resulted from the Great Crash was the codification of government surveillance of the exchanges. No longer the sole masters of their domains, American exchanges would be forced to answer to the newly-created SEC[64] and to seek approval therefrom for all substantive rule changes.[65]

The reactions to all subsequent American crashes, while often legislative, have never again been so dramatic. The omnipresent, diverse desire for higher returns coupled with the complex means thereto would seem to cry for intervention from Congress or the Executive Branch. Yet, quite the opposite has occurred. The market adjustments of the past twenty-five years evidence the growing gap between the regulators and the regulated. While even the most cynical of popular authors has described the recent stock market as "transparent [and] heavily policed,"[66] cash is still king. The competing exchanges, heavily dependent upon commission revenue and the sale of market data (as opposed to exploring globalization of access to trades or quotes), at times experiment with varied limits to volatility and adopt the means of correcting prices and indices themselves

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[60] *See* Michael D. Shear & Jonathan Weisman, *For the Administration, Another try to put the Economy on Center Stage*, N.Y. TIMES, July 23, 2013, at A11.

[61] MARK DOUGLAS, THE DISCIPLINED TRADER: DEVELOPING WINNING ATTITUDES 37 (1990).

[62] *See* GALBRAITH, *supra* note 43, at 118 ("The next day a further formula was hit upon. The Exchange would stay open.").

[63] *Id.* at 117–18.

[64] *See* STEVE FRASER, EVERY MAN A SPECULATOR: A HISTORY OF WALL STREET IN AMERICAN LIFE 460 (2005) ("More fundamentally, it ended the Stock Exchange's long reign of self-regulation, placing all stock markets, at least in theory, under direct government supervision.").

[65] Securities Exchange Act, 15 U.S.C. § 78s (2006) (a.k.a. "Self Regulatory Organizations," or "SROs"). For example, the Act requires that all substantive rule changes be submitted by the exchanges for approval. *Id.*

[66] MICHAEL LEWIS, THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE 61 (2010).

while keeping the exchange open.[67]

More importantly, the data underlying the burst bubbles of 1987, 2000, and 2008 all belie the idyllic assertion that market volatility has been tamed. Focus upon three of these embarrassing periods demonstrates that the monster of momentary market myopia is stronger than ever.

1. The Intra-Week Crash of 1987

While many exchanges have adopted a purely cyberspace model,[68] the NYSE remains at the vanguard of floor-based trading. Boasting approximately 2,300 listings (cumulatively valued at over $20 trillion),[69] the most famed marketplace has nonetheless proven itself repeatedly susceptible to disaster. Between the morning of October 19, 1987, and the closing bell of October 20, 1987, the DJIA fell 25%. The fall was truly heard around the world, as nineteen of twenty-three major markets concurrently fell 20% or more.[70]

Shunning the drastic remedy of closing the exchanges (akin to FDR's "bank holiday" of March 1933 and prior executive-initiated market halts),[71] regulators responded by constraining trading.[72] The SEC issued an autopsy report on the 1987 Crash, containing mixed messages at best. Specialists—the well-heeled entities that both match buyers with sellers and operate as either to keep markets afloat—were said to have "in the aggregate, performed satisfactorily."[73] Yet the SEC Report also admitted that "a disturbing number of NYSE specialists on October 19th either were net sellers or did not take substantial positions."[74] Eschewing soft targets

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[67] Brian Korn & Bryan Y.M. Tham, *Why We Could Easily Have Another Flash Crash*, FORBES (Aug. 9, 2013, 7:58 AM), http://www.forbes.com/sites/deborahljacobs/2013/08/09/why-we-could-easily-have-another-flash-crash/ (describing unnamed stock exchanges that, at the time of the Flash Crash, relied on "clearly erroneous" rules that only broke trades 60% or more away from the reference price).

[68] *See* DAVID L. RATNER &THOMAS LEE HAZEN, SECURITIES REGULATION: CASES AND MATERIALS 2–3 (5th ed. 1996).

[69] Popper, *supra* note 22, at BU1 (auguring the purchase of the famed exchange by a private entrepreneur at a price exceeding $8 billion).

[70] DIDIER SORNETTE, WHY STOCK MARKETS CRASH 5–6 (2003) (remarking that American markets were not the first or last to decline in October 1987, thus confounding attempts at identifying a sole cause).

[71] William L. Silber, *Birth of the Federal Reserve: Crisis in the Womb* 24–26 (NYU Stern Dep't of Fin. Working Paper Series, Working Paper No. FIN-03-27, Oct. 2003), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1299468 (arguing that the suspension of trading at the NYSE for four months following the outbreak of World War I enabled President Wilson to both launch the Federal Reserve and forestall an outflow of gold).

[72] CHARLES GASPARINO, KING OF THE CLUB: RICHARD GRASSO AND THE SURVIVAL OF THE NEW YORK STOCK EXCHANGE 58–61 (2007) (Gives the example of closing the direct order system between the NYSE trading floor and its approximately 240 member firms, and details the Chairman's private and public efforts to keep the NYSE open for business despite pressure from its constituents and onlookers, and noting "[a]ll orders would have to be done the old fashioned way: from trading desk to floor broker to specialist.").

[73] DIV. OF MKT. REGULATION, SEC, FED. SEC. L. REPORT NO.1271, THE OCTOBER 1987 MARKET BREAK, at xvii (extra ed. Feb. 9, 1988) [hereinafter *SEC Report*].

[74] *Id.*

such as a sudden dearth of foreign investors or the role of derivatives, the report took aim at exchange operational structures and their ability to handle the unprecedented selling volume. Those structures were said to have simply become overloaded in October 1987, as the average daily NYSE trading volume of 175 million shares more than tripled, and automated trading programs competed with retail order flow.[75] Order imbalances—the extent to which sellers outnumbered buyers—were attributed primarily to institutional customers, which both clarified the mechanics of ordinary order-routing on an exchange and dispelled the notion that the layman's panic precipitated the Crash.[76] Two years later, the long-term remedy crystallized in the form of crudely-fashioned "circuit breakers" that limited trading halts to the most rare of market declines.[77]

To be sure, the SEC Report explained the October 1987 disaster and updated the public on the workings of the exchanges. But the technicalities attending larger concepts, like order flow and capacity, ensured that remedies would need to be implemented by those exchanges themselves. Faced with an unprecedented decline, a broad array of investors, and the more immediate concern of accommodating dramatically increased volume, the NYSE simply codified the practice it had quietly implemented during its 1987 crisis (i.e., delaying orders and imploring the membership to stop sending computerized, program trades).[78] In effect, a market that strove for so long to impress upon the public its speed and transparency would—in rare times of chaos—stop work and leave stock prices clouded.

Years later, the "dot coms" followed a rush to market of fledgling technology companies and advances in access that allowed ordinary households to trade stocks. But, in hindsight, the flurry was seen more as folly than progress, and its consequences more humbling than debilitating.[79] Much more instructive is the government's reaction (or lack thereof) to the foundering market that precipitated the present financial crisis.

2. The Five-Month Swoon of 2008-2009

The tale, and attendant numbers, of the nation's most recent economic nadir become no less harrowing through repetition. In sum, the market listed stocks of giants that had simply wagered too much on exotic vehicles dependent upon an over-inflated real estate market. In turn, proprietary positions at financial firms became so linked to "collateralized debt obligations" and similar products as to defy reason. The subsequent

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[75] *Id.* at 2-2.
[76] *Id.* at xiii.
[77] *See infra* notes 93-94 and accompanying text.
[78] *See* GASPARINO, *supra* note 72, at 59–61.
[79] Gary A. Munneke, *Maybe Mom and Dad Were Right: Musings on the Economic Downturn*, 81 N.Y. ST. B.J. 10, 12 (2009) ("[I]n the early '90s we lost a little spare cash on a tech penny stock that didn't pan out.").

enormous rescue launched by the federal government itself spawned critics fearing both the size of the bailouts and their economic and social utility.[80]

American markets fell substantially between the fall of 2008 and winter of 2009, recovering in part by 2011 either because of or despite government stimulus.[81] The details of the monthly exodus of market capitalization are listed below, via two major indices:[82]

MONTHLY OPENING	DJIA	S&P 500
9/1/08	11,545	1,287
10/1/08	10,847	1,164
11/3/08	9,326	968
12/1/08	8,826	888
1/2/09	8,772	902
2/2/09	8,000	823

In sum, the DJIA fell approximately 31%, and the S&P Index gradually fell approximately 37%. Neither decline triggered a circuit breaker because no sizeable decline occurred within a single trading day. Yet the indirect investor with interests in pension funds and college savings plans, which adjust holdings at a glacial rate, watched helplessly as fund value ebbed away. But tales of bureaucratic "mis-decision," evaporated savings, and involuntarily-extended working careers were quickly replaced in the spring of 2010 by a new breed of market disaster that posed the risk of fatal declines to prices in minutes.

3. The Flash Crash of 2010

On May 6, 2010, the DJIA inexplicably fell almost 1,000 points in less than half an hour, with losses spanning several markets.[83] The index thus "experienced its second largest point swing in its 114-year history,"[84]

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[80] *See generally* J. Scott Colesanti, *Laws, Sausages, and Bailouts: Testing the Populist View of the Causes of the Economic Crisis*, 4 BROOK. J. CORP. FIN. & COM. L. 175, 182–219 (2010).

[81] *See, e.g.*, Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 115(a), 122 Stat. 3765 (2008) (authorizing, via the Troubled Asset Relief Program, over $700 billion in "bailout" monies to troubled companies).

[82] *Dow Jones Industrial Average Historical Prices*, YAHOO FIN., http://finance.yahoo.com/q/hp?s=%5EDJI&a=08&b=1&c=2008&d=01&e=2&f=2009&g=m (last visited Feb. 24, 2014); *S&P 500 Historical Prices*, YAHOO FIN., http://finance.yahoo.com/q/hp?s=%5EGSPC&a=08&b=1&c=2008&d=01&e=2&f=2009&g=m (last visited Feb. 24, 2014).

[83] HAL S. SCOTT & ANNA GELPERN, INTERNATIONAL FINANCE: TRANSACTIONS, POLICY, AND REGULATION 904 (19th ed. 2012).

[84] *Id.* at 905.

temporarily extinguishing approximately $1 trillion in market value.[85] The intra-day debacle briefly reduced some stock prices to a penny.[86] Volumes of trades were later canceled, and prices rebounded,[87] but the Armageddon-like quality of the disaster did not escape either humorists[88] or the popular press.[89]

The twenty-minute plunge was attributed by popular sources to a combination of systemic glitches and human "panic-selling."[90] The ensuing SEC study added that a sole seller of $4.1 billion of a particular type of futures contract prompted copycat, high-frequency trading.[91] The dollars were replaced and the regulators pacified, and the industry took not to expand its study of volatility expanded to acknowledge the risks for disaster inherent in software trading programs. Again, the responsibility for implementing measures to relieve new market angst was eschewed by the government and entrusted to the exchanges themselves. Study of those protections reveals a protocol surprisingly simplistic.

III. EXISTING RULES

Paradoxically, as the stock market's breadth and speed trend

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[85] Stevenson Jacobs, *Traders Put Faith in "Circuit Breakers" After Dive*, SEATTLE TIMES (May 19, 2010, 2:43 PM), http://seattletimes.com/html/businesstechnology/2011905964_apusmarketplungesec.html.

[86] *Id.*

[87] *Id.*

[88] *See, e.g.*, STEPHEN COLBERT, AMERICA AGAIN: RE-BECOMING THE GREATNESS WE NEVER WEREN'T 84 (2012) ("Computers do most of the actual [stock exchange] trading. And thank goodness they do. Because computers allow us to make tens of thousands of trades per second—precious seconds we otherwise would have wasted wondering if we'd really meant to push 'enter' instead of 'delete.'").

[89] *See* Jacobs, *supra* note 85. The term "flash crash" was repeated—and its attendant fear reinforced—on August 1, 2012 when a "technical glitch" misquoted scores of stocks at a firm called Knight Capital, causing losses exceeding $440 million. *See* Korn & Tham, *supra* note 67.

[90] *See* Sal Arnuk et al., *Comment: "Algo bots" Could Cause Another Flash Crash*, FIN. TIMES (May 5, 2011, 9:39 AM), http://www.ft.com/intl/cms/s/0/6d9fc8c8-70a5-11e0-9b1d-00144feabdc0.html ("[H]igh frequency traders . . . tripped over each other to see who could sell the fastest."); Peter Cohan, *The 2010 Flash Crash: What Caused It and How to Prevent the Next One*, DAILY FIN. (Aug. 18, 2010, 8:20 PM), http://www.dailyfinance.com/2010/08/18/the-2010-flash-crash-what-caused-it-and-how-to-prevent-the-next/ (attributing the unprecedented single-day market decline to market fragmentation). *But see* SCOTT & GELPERN, *supra* note 83, at 904 ("No evidence so far has suggested that this market event was caused by hacking, terrorist activity, or 'fat finger' errors."); Peter J. Henning, *The Flash Crash and Possible Enforcement Actions*, DEALBOOK (May 24, 2010, 11:22 AM), http://dealbook.nytimes.com/2010/05/24/the-flash-crash-and-possible-enforcement-actions/ ("The Securities and Exchange Commission and the Commodity Futures Trading Commission are still trying to figure out what caused the flash crash on May 6.").

[91] REPORT OF THE STAFFS OF THE CFTC AND SEC TO THE JOINT ADVISORY COMM. ON EMERGING REGULATORY ISSUES, FINDINGS REGARDING THE MARKET EVENTS OF MAY 6, 2010 2–3 (Sept. 30, 2010) (describing the SEC and Commodity Futures Trading Commission ("CFTC") Study and findings regarding the market events of May 6, 2010). As late as August 2013, the specter of future "flash crashes" remained relevant. *See* Nathaniel Popper, *Pricing Problems Suspends Nasdaq Trading for Three Hours*, DEALBOOK (Aug. 22, 2013, 12:52 PM), http://dealbook.nytimes.com/2013/08/22/nasdaq-market-halts-trading/?_php=true&_type=blogs&_r=0 ("The United States stock market showed again on Thursday that it remained vulnerable to technological breakdowns even as regulators and market operators work to keep up with trading that is increasingly electronic and driven by speed.").

towards incomprehension,[92] the mechanisms safeguarding investments remain arcane. Indeed, twenty-five years after the October 1987 decline that extinguished 25% of the market, the chief tool to combat hazardous volatility across a market is still the circuit breaker, an electronic brake only slightly more refined than the proverbial shoe stuck in the factory machinery.

A. Market-Wide Circuit Breakers

Implemented in the largest domestic stock exchanges in 1989, circuit breakers amount to forcibly slowing systems perennially and loudly touted as being quick and efficient. For better or worse, for decades these checks became the chief industry response to a market that occasionally fell too far too fast. Emblematic is NYSE Rule 80B, which from its inception in 1989 until 2012 read as follows:

> Rule 80B. Trading Halts Due to Extraordinary Market Volatility
>
> (a) Trading in stocks shall halt on the Exchange and shall not reopen for the time periods described in this paragraph (a) if the Dow Jones Industrial Average reaches Level 1 below its closing value on the previous trading day:
>
> > (i) before 2:00 p.m. Eastern time, for one hour;
> >
> > (ii) at or after 2:00 p.m. but before 2:30 p.m. Eastern time, for 30 minutes.
>
> If the Dow Jones Industrial Average reaches Level 1 below its closing value on the previous trading day at or after 2:30 p.m. Eastern time, trading shall continue on the Exchange until the close, unless the Dow Jones Industrial Average reaches Level 2 below its closing value on the previous trading day, at which time trading shall be halted for the remainder of the day.
>
> (b) Trading in stocks shall halt on the Exchange and shall not reopen for the time periods described in this paragraph (b) if the Dow Jones Industrial Average reaches Level 2 below its closing value on the previous trading day:
>
> > (i) before 1:00 p.m. Eastern time, for two hours;

[92] Luis A. Aguilar, Commissioner, SEC, Speech at Compliance Week 2010: Market Upheaval and Investor Harm Should not be the New Normal (May 24, 2010), http://www.sec.gov/news/speech/2010/spch052410laa-1.htm (Denounced the Flash Crash of May 2010 as a "breakdown" serving as one of the "further stark reminders of the dangers of weak oversight of our tightly interconnected financial markets.").

> (ii) at or after 1:00 p.m. but before 2:00 p.m. Eastern time, for one hour;
>
> (iii) at or after 2:00 p.m. Eastern time, for the remainder of the day.
>
> (c) If the Dow Jones Industrial Average reaches Level 3 below its closing value on the previous trading day, trading in stocks shall halt on the Exchange and shall not reopen for the remainder of the day.[93]

Thus, the cure for "extraordinary volatility" is a cooling off period, the length of which is limited to three options. The pivotal notions are the trigger points (a.k.a. "Levels"), which were originally set to finite measures and adjusted (belatedly) to a percentage scale nine years after inception (i.e., 1998). The original miscue in calibration relegated the device to almost complete disuse: the only triggering of the Market-Wide Circuit Breaker between 1989 and 1998 was in 1997, when trading was halted twice in response to plummeting markets in the Far East.[94] The dated trigger points, their infrequent adjustment, and the short, one-day nature of the reference points were blamed for the tool's infrequent implementation. This suggests that, at best, the breaker's value lies much more in a psychological barrier to continued institutional selling than to a halt to widespread market panic. In a word, Market-Wide Circuit Breakers serve as minefields that savvy professionals and their computerized trading programs seem adept at negotiating.[95]

In more recent times, the Market-Wide Circuit Breaker "Levels" are, at least theoretically, more likely to be triggered. The superficially broader S&P 500 Index is utilized as a reference point, and the trigger levels have been lowered. Since April 2013[96] the more finely tuned NYSE rule now reads in relevant part as follows:

> (i) For purposes of this Rule, a Market Decline means a decline in price of the S&P 500® Index between 9:30 a.m. and 4:00 p.m. on a trading day as compared to the closing price of the S&P 500® Index for the immediately preceding trading day. The Level 1, Level 2, and Level 3 Market Declines that will be applicable for the trading day will be

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[93] *NYSE Circuit Breakers (Rule 80B)*, PLI'S IN BRIEF (Oct. 22, 2008), http://inbrief.pli.edu/2008/10/nyse-circuit-breakers-rule-80b.html.

[94] *See generally SEC Approves "Limit Up-Limit Down" Plan and Tighter Circuit Breakers,* DAVIS POLK & WARDWELL (June 6, 2012), http://www.davispolk.com/download.php?file=sites/default/files/files/Publication/f79a3977-9354-4922-98f1-014d57ea0f40/Preview/PublicationAttachment/1668d75e-bc8b-4e9b-a8b4-02df28eae3d6/060612_SRO_Proposal.html.

[95] *See infra* note 165 and accompanying text.

[96] Press Release, NYSE, NYSE Announces Second-Quarter 2013 Circuit-Breaker Levels (Mar. 28, 2013), http://www.nyse.com/press/1364465929027.html.

> publicly disseminated before 9:30 a.m.
>
> (ii) A "Level 1 Market Decline" means a Market Decline of 7%.
>
> (iii) A "Level 2 Market Decline" means a Market Decline of 13%.
>
> (iv) A "Level 3 Market Decline" means a Market Decline of 20%.[97]

The updated Market-Wide Circuit Breaker provides that thresholds—now lowered to 7%, 13%, and 20%, respectively—would be recalculated daily (as opposed to quarterly). In a tacit bow to market speed, the halt triggered by a Level 1 or Level 2 decline has been shortened to 15 minutes, while a Level 3 breaker would halt the market for the remainder of the trading day.[98] The NASDAQ counterpart provision ensures that the cyber-market will honor a market shutdown pursuant to NYSE Rule 80B.[99]

B. Other People's Concerns

Commenters have long noted that the automated practice of curtailing exchange trading "short cuts" individual investors.[100] Noteworthy is the public feedback that the SEC received in the form of Comment Letters submitted in response to the expanded Market-Wide Circuit Breaker levels when proposed in 2011.[101] While neither objectively voluminous nor decidedly one-sided, these Comments did evidence the public's mistrust of the faith that the Commission places on circuit breakers in general.

One individual investor wrote, "if a stock comes off a halt, and brokers of the retail owners do not allow trading in the first several minutes, those traders who have near-instant access to the market get to set the price. . . . [O]ften to the detriment of the stockholders."[102] The same commenter provided a practical solution when she added, "all trading pauses should specify a time to resume. [S]uch information could be sent as a news item

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[97] NYSE Rule 80B(a) (2013), http://nyserules.nyse.com/NYSETools/PlatformViewer.asp?searched=1&selectednode=chp_1_3_4_20&CiRestriction=80B&manual=%2Fnyse%2Frules%2Fnyse-rules%2F.

[98] *See id.* at 80B(b)(i)–(ii).

[99] *See* Financial Industry Regulatory Authority (FINRA) Rule 6121 (2013), http://finra.complinet.com/en/display/display.html?rbid=2403&record_id=14651&element_id=7182&highlight=6121#r14651 (Provides for a trading halt "if other major securities markets initiate market-wide trading halts . . . .").

[100] *See* Chedley A. Aouriri et al., Exchanges – Circuit Breakers, Curbs, and Other Trading Restrictions, INVESTMENTFAQ (Oct. 6, 2008), http://invest-faq.com/articles/exch-circuit-brkr.html ("The circuit breakers cut off the automated program trading initiated by the big brokerage houses . . . . This automated connection allows them to short-cut the individual investors who must go thr[ough] the brokers and specialists on the stock exchange.").

[101] *See Comments on FINRA Rulemaking*, SEC, http://www.sec.gov/comments/sr-finra-2011-054/finra2011054.shtml. (last visited Feb. 24, 2014).

[102] Suzanne H. Shatto, Comment to *Comments on FINRA Rulemaking*, SEC (Oct. 20, 2011), http://www.sec.gov/comments/sr-finra-2011-054/finra2011054-1.htm.

on common newswires."[103]

Meanwhile, a government official publicly disclosed his "strong reservations"[104] that the Market-Wide Circuit Breakers—even in their modified states—had yet to reach after-hours trading.[105] Concurrently, the CEO of a derivatives marketplace expressed concern that the proposed Market-Wide Circuit Breakers (when operating in conjunction with other proposed breakers)[106] "would serve to exacerbate rather than remediate conditions of extraordinary volatility."[107] Separately, the managing director of a firm dedicated to providing "mathematical market intelligence on trading behaviors"[108] submitted commentary in opposition to the breakers that was far more pointed, if not more colorful:

> By stamping out natural cleansing mechanisms, forests were subjected to monumental and unnatural risk, producing catastrophic fires and sweeping beetle infestations.
>
> In similar fashion, trading markets cannot heal themselves. And public companies derive no benefit from a synthetic environment that forces value money out and remands price-setting authority to transient intraday intermediaries.[109]

One Wall Street firm optimistically opined that the new Market-Wide Circuit Breaker would have been triggered on 13 occasions since 1962 (as opposed to the one time it was actually triggered in 1997).[110] Lastly, one commenter from academia took issue with the obsolete size of the first level of Market-Wide Circuit Breaker (i.e., 7%) and the lack of any trading halt in the presence of numerous questionable trades and/or "serious discrepancies in the data submitted by the major trading platforms."[111] Conversely, the voice of Wall Street's largest securities firms supported the Market-Wide Circuit Breakers and described the SEC proposal as "yet another important

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[103] *Id.* It bears noting that, for different disclosures, the SEC has blessed use of various methods of achieving "public disclosure." 17 C.F.R. § 243.101(e) (2013); *see* Regulation FD ("Full Disclosure"), *id.* at §§ 240.100-101(e) (acknowledging methods "reasonably designed to provide broad, non-exclusionary distribution of the information to the public" as a cure for inadvertent disclosure of "material nonpublic information"). *Id.* at § 101(e).

[104] Bart Chilton, Comment to *Comments on FINRA Rulemaking*, SEC (Oct. 25, 2011), http://www.sec.gov/comments/sr-finra-2011-054/finra2011054-4.pdf.

[105] "After-Hours Trading" connotes limited sessions of decreased trading volume. These sessions are offered in different forms by various exchanges as the global market glacially moves toward the day when all markets are open 24 hours a day.

[106] *See infra* notes 110–114 and accompanying text.

[107] Craig S. Donohue, Comment to *Comments on FINRA Rulemaking*, SEC (Jan. 25, 2012), http://www.sec.gov/comments/sr-bats-2011-038/bats2011038-6.pdf.

[108] Timothy Quast, Comment to *Comments on FINRA Rulemaking*, SEC (Jan. 20, 2012), http://www.sec.gov/comments/sr-bats-2011-038/bats2011038-5.pdf.

[109] *Id.*

[110] *SEC Approves "Limit Up-Limit Down" Plan and Tighter Circuit Breakers*, *supra* note 94.

[111] James J. Angel, Comment to *Comments on FINRA Rulemaking*, SEC (Oct. 25, 2011), http://www.sec.gov/comments/sr-bats-2011-038/bats2011038-2.pdf.

step toward addressing extraordinary market volatility."[112]

As Mark Twain penned, "[h]istory shows that the Moral Sense enables us to perceive morality and how to avoid it . . . ."[113] Likewise, Market-Wide Circuit Breakers serve to remind us of the borders to unacceptable volatility, and how best to stop short of them.[114] As has been aptly noted, the breakers failed to "kick in" during a week in October 2008 in which the DJIA lost over 1,000 points, or on any of the alarmingly volatile trading days that commenced our present era of market malaise.[115] Indeed, Market-Wide Circuit Breakers are alarmingly mislabeled; the mechanism is specific to each exchange and not directly linked to other exchanges.[116] The breakers—wholly fragmented and subjected to varying warning levels—are still irrelevant to Bull Markets, as they only trigger upon the reference point's descent. A gradual, devastating descent remains either beyond concern or control, for, even with the lowered thresholds,[117] the Market-Wide Circuit Breakers would not have been triggered once during the Swoon of 2008-2009.[118]

C. The Limit Up-Limit Down Breaker

In June 2010, in response to the largely inexplicable stock exchange disaster of the prior month (i.e., the Flash Crash), the SEC and the Financial Industry Regulatory Authority ("FINRA"), the nation's largest private regulator, implemented on a pilot basis five-minute trading halts in securities that fluctuated wildly within a five-minute window.[119] The halts were to be triggered by a 10% rise or fall of an individual stock's price.[120]

In June 2011, the universe of subject stocks in this pilot program was expanded from those comprising the S&P 500 Index to all domestic listings.[121] Of perhaps greater consequence, the SEC found that the pilot halts were too often erroneously triggered by trading errors – an observation that can only be considered ironic in light of the fact that "fat fingers" were

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[112] Ann L. Vlcek, Comment to *Comments on FINRA Rulemaking*, SEC (Feb. 7, 2012), http://www.sec.gov/comments/sr-bats-2011-038/bats2011038-7.pdf (The SIFMA letter supported halts as enabling unspecified "market participants" to "appropriately adjust their buying and selling interest").

[113] WILLIAM E. PHIPPS, MARK TWAIN'S RELIGION 281 (2003).

[114] Jacobs, *supra* note 85.

[115] *See id. But see* SCOTT & GELPERN, *supra* note 83 at 904 (noting that related "collars" on program trading were triggered in 2007 "in connection with the subprime crisis").

[116] Jacobs, *supra* note 85.

[117] Press Release, NYSE, NYSE Announces Second Quarter 2013 Circuit-Breaker Levels, (Mar. 28, 2013), http://www.nyse.com/press/1364465929027.html (noting the latest NYSE Market-Wide Circuit Breakers are set to triggers of 1,450 point, 2,900 point and 4,350 point drops in the DJIA; and that on April 8, 2013, the Breakers became tied to the S&P index).

[118] *See* Korn & Tham, *supra* note 67 (noting the lowered 7% threshold would have resulted in a Market-Wide Circuit Breaker being triggered during the Flash Crash of May 2010).

[119] *See generally* Self-Regulatory Organizations, SEC Release No. 34-67090, 103 S.E.C. Docket 2574, 2012 WL 1963372 (May 31, 2012).

[120] *Id.* at *3, *6.

[121] *Id.* at *4.

publicly blamed for the seminal Flash Crash a year before.[122] In May 2012, the SEC adopted as final the "Limit Up-Limit Down" breaker ("LULD") to address market volatility. The measure, triggered by large, sudden price moves, prevents trades in individual securities. Contemporaneously, the Commission approved modifications to the Market-Wide Circuit Breakers of 1989.[123]

Consequentially, effective February 4, 2013, the modified LULD protocol required the following:

- A new "limit up-limit down" trading halt would prevent trades in individual securities from occurring outside of a specified price band. The mechanism would first be applied to DJIA stocks and later to all S&P 500 stocks.

- The mechanism would be triggered by trades outside of a "price band" set at a percentage level above and below the average price of the stock over the immediately preceding five-minute trading period. These price bands would be 5%, 10%, 20% as set by the stock's closing price the day before.

- These price bands would double during the opening and closing periods of the trading day (i.e., less strictly gauging volatility during periods normally characterized by heavy trading volume).

- If the stock's price did not naturally move back within the price bands within 15 seconds, there would be a five-minute trading pause.[124]

The new measures[125] were made subject to a one-year pilot period (through February 2014), during which time the breakers would be expanded to fill the entire trading day and the SEC would receive comments.[126] Curiously, it was observed that the LULD plan had been

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[122] Eric Rosenbaum, *Latest Flash Crash a Fat Five-Fingered Slap to Investors*, THE STREET (Oct. 1, 2010), http://www.thestreet.com/story/10876622/1/.

[123] *See* Quast, *supra* note 108.

[124] *See* Investor Bulletin, SEC, New Measures to Address Market Volatility (Apr. 9, 2013), http://www.sec.gov/investor/alerts/circuitbreakersbulletin.htm.

[125] *See* NYSE Rule 612 (2013), http://nyserules.nyse.com/NYSETools/PlatformViewer.asp?searched=1&selectednode=chp%5F1%5F9%5F1%5F14&CiRestriction=612&manual=%2Fnyse%2Frules%2Fnyse%2Drules%2F; FINRA Rule 6121.01, http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=7182 (codifying the LULD Breakers at the respective Stock Exchanges); *see also* FINRA Rule 11892 (2013), http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=8854.

[126] *See* Annette L. Nazareth, *"Limit Up-Limit Down" Plan and Circuit Breakers Approved*, HARVARD L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (June 13, 2013, 9:15 AM), http://blogs.law.harvard.edu/corpgov/2012/06/13/limit-up-limit-down-plan-and-circuit-breakers-approved/.

modified to "prevent an erroneous trade from triggering a trade pause."[127] Recall that an erroneous trade was the majority theory as to the culprit for the original Flash Crash of May 2010.[128]

D. Other People's Fears

As commenters to the SEC rule proposal pointed out, the "price bands" are difficult to calculate and inordinately challenging to apply.[129] Further, the SEC refused to heed the suggestion that the presence of numerous stocks subject to the limits should prompt a market-wide shutdown.[130]

To be sure, a plethora of evidence exists of dangerously uninformed repair; observers still cannot agree on the cause of the Flash Crash.[131] Not surprisingly, few can pinpoint the goal of the cure. The final LULD breaker makes no mention of recurrence, nor exhibits any concern for spikes in volume. Likewise, while the information gathered and displayed is detailed, it fails to convey the effect that any halt has on a stock's price.[132] As a result, the LULD breaker—a daily occurrence on the major exchanges—results foremost in an accumulation of data so stock-specific (and, yet, obtuse) as to belie any meaningful conveyance of cause for market alarm or portfolio adjustment; to the untrained eye, a random sampling of stock prices simply re-set. It is doubtful that such routine data affects decision-making by those effecting long-term investment strategies.[133] Of course, the breakers, five-minutes in duration, may temporarily slow a stock's intra-day descent due to panic selling by nervous professionals, but are of no use to

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[127] *SEC Approves "Limit Up-Limit Down" Plan and Tighter Circuit Breakers*, *supra* note 94.

[128] *See* Cohan, *supra* note 90.

[129] *See* SELF-REGULATORY ORGANIZATIONS, *supra* note 119, at n.24 (citing CME Group Letters I and II and Commissioner Chilton Letter).

[130] *Id.* at 7 & n.22.

[131] *See* Jacobs, *supra* note 85 (Identifies panic selling as "one of several possible causes of the May 6 plunge" and describing the need to give "investors a break during extreme market dips" to avoid "a chain reaction of human and computerized selling").

[132] *See generally Trading Halts Code*, NASDAQ, http://www.nasdaqtrader.com/Trader.aspx?id=TradeHaltCodes (last visited Feb. 24, 2014); *Trading Halt Search*, NASDAQ, http://www.nasdaqtrader.com/Trader.aspx?id=TradingHaltSearch (last visited Feb. 24, 2014). Between August 2, 2013, and August 12, 2013, an average of approximately 7 single-stock halts per day appeared on the nasdaqtrader.com site. *Id.* (input each date in the "Halt Start Date" then search). A sample website display resulting from the LULD halt appears below:

Halt Date	Halt Time	Issue Symbol	Issue Name	Market	Reason Code	Pause Threshold Price	Resumption Date	Resumption Quote Time	Resumption Trade Time
8/12/13	10:37:14	CNYD	CHINA YIDA HOLDING, CO	NASDAQ	T7	7.7870	8/12/13	10:37:14	10:42:14

Id.

[133] Practitioners have been quick to criticize the LULD breakers. *See, e.g.*, Korn & Tham, *supra* note 67 ("Despite all these efforts, not much has changed. . . . [LULD Breakers] at best, . . . will limit the effect of a flash crash – not prevent it.").

the prevention of a market swoon.

In essence, the SEC blessed the attempts of NASDAQ, a large exchange, to provide intra-day information on a website that might quell a storm of panic selling by professional traders – an undesirable activity linked, in part, to the Flash Crash. It is questionable whether such reform will meet even that modest goal. But in approving the LULD protocol, the SEC has exhibited a seismic shift towards rationality. Specifically, business models that prosper from Bull Markets have seen the need to curtail trading *both* when stocks fall sharply and rise just as quickly. Notably, this need to curb upwards volatility was highlighted by an academic years ago.[134]

Overall, the continuing hazards posed by stock exchange self-regulation of volatility—i.e., remedies that have been superficial and belated—can be linked to clear tendencies. And the central government's heavy hand, so omnipresent throughout stock exchange history,[135] is completely absent from the recent trend of trusting exchanges to create and calibrate their own brakes.

Stated otherwise, on matters of permissible volatility, the SEC has deferred greatly to the exchanges[136] who, though private, for-profit entities,[137] nonetheless readily accept the light touch of SEC supervision.[138] The combination of these facts has led to the precarious present position that, while Congress and the White House sit on the sidelines, exchanges at once steering economies towards long-term recovery and dependent upon daily trading revenue decide when to cease and when to resume trading.[139]

The hazard posed by this self-interest is highlighted by the clear examples of industry de-regulation during the boom and bust times of the last decade.

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[134] Tamar Frankel, *What Can Be Done About Stock Market Volatility?*, 69 B.U. L. REV. 991, 996 (1989) (decrying trading halts that address "only down-trends" and noting that "up-trends" are equally capable of producing "bubbles" and runs on the market).

[135] *See supra* pp. 7–8.

[136] *See, e.g.*, Opulent Fund, L.P. v. NASDAQ Stock Mkt., Inc., No. C-07-03683 RMW, 2007 U.S. Dist. LEXIS 79260, at *14 (N.D. Cal. Oct. 12, 2007) (quoting Weissman v. Nat'l Ass'n of Sec. Dealers, Inc., 500 F.3d 1293, 1296 (11th Cir. 2007)) ("[A]s a private corporation, NASDAQ may engage in a variety of non-governmental activities that serve its private business interests, such as its efforts to increase trading volume.").

[137] *See* Joe Mont, *SIFMA Challenges Regulatory Role of Stock Exchanges*, COMPLIANCE WEEK (Aug. 6, 2013) (noting the industry voice's faulting the conflict of interest posed by "for-profit" stock exchanges fulfilling statutory duties of self regulation).

[138] *See Overview*, NATIONAL STOCK EXCHANGE: REGULATION, http://www.nsx.com/content/regulation (last visited Feb. 24, 2014) ("The Securities and Exchange Commission (SEC) regulates the National Stock Exchange, similar to all other exchanges.").

[139] In the Spring of 2013, the SEC opened for comment a proposal that would condense and codify Commission requirements of stock exchanges regarding the testing of their automated systems ("Regulation SCI"). The proposal does not set standards for market halts or breakers and largely reiterates the delegation of authority to the individual market centers in this regard. *See* Regulatory Systems Compliance and Integrity, SEC Release No. 34-69077 (March 8, 2013), *available at* www.sec.gov/rules/proposed/2013/34-69077.pdf.

1. 2004 Net Capital Ruling

Since 1965, SEC Rule 15c3-1 ("the Net Capital Rule") has been in force.[140] The Rule serves at least three purposes: (1) avoidance of dependence on customer funds; (2) efficient operation of markets; and (3) deterrence to violative conduct.[141] The Rule is generally perceived as establishing "early warning thresholds."[142] Concurrently, even errors in (or omissions of) requisite calculations are disciplinable.[143]

It is now axiomatic that the SEC erred when, in April 2004, it privately agreed to a relaxation of the Net Capital Rule in favor of the largest broker-dealers.[144] The agreement, to which all five SEC Commissioners acquiesced, permitted the nation's largest financial service firms to legally "upstream" funds to their Bank Holding Companies, thus freeing up millions in funds for purchase of investments.[145] The ugly compromise received far-reaching attention in the years since, even inviting scrutiny from such off-topic popular periodicals as *Rolling Stone Magazine*.[146]

It was thus no coincidence that the largest financial firms came to the SEC seeking relief from the strict and ubiquitous Net Capital Rule before feeling comfortable with the now notorious rush to unprecedented leveraging.[147] The SEC expressly responded, via a formal rule interpretation allowing certain broker-dealers to utilize a "voluntary, alternative method of computing deductions to net capital. . . ."[148] In return, this short list of firms

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[140] 17 C.F.R. § 240.15c3-1 (2013).

[141] *See* SEC, Net Capital Rule, 54 Fed. Reg. 40,395, 40,396 (Oct. 2, 1989) (to be codified at 17 C.F.R. pt. 240) ("Finally, if the liability of a broker-dealer to its customers from violations of state and federal law is to be a deterrent to improper conduct, a firm should be required to maintain a reasonable financial stake in its business.").

[142] *See* JOHN C. COFFEE, JR., & HILLARY A. SALE, SECURITIES REGULATIONS, 666–67 (11th ed. 2009).

[143] *See* Direct Brokerage, Inc., Exchange Hearing Panel Decision No. 05-171, 2006 WL 2918766, at *1 (Sept. 12, 2006) (Found violations of both SEC "Rule 15c3-1 thereunder and NYSE Rule 325 by failing to maintain [firm] net capital at required levels and failing to compute net capital as required").

[144] Kevin Drawbaugh, *US SEC Clears New Net-Capital Rules for Brokerages*, REUTERS (Apr. 28, 2004), *excerpted by* SECURITIES CLASS ACTION CLEARINGHOUSE, STANFORD L. SCH., http://archive.is/Pp6i (last visited Feb. 24, 2014).

[145] *See* Stephen Labaton, *Agency's '04 Rule Let Banks Pile Up New Debt, and Risk*, N.Y. TIMES, Oct. 3, 2008, at A1 (discussing the exemption codified in Alternative Net Capital Requirements for Broker-Dealers That Are Part of Consolidated Supervised Entities, Exchange Act Release No. 49,830, 69 Fed. Reg. 34,428, 34,428 (June 21, 2004)); *see also* WILLIAM D. COHAN, HOUSE OF CARDS: A TALE OF HUBRIS AND WRETCHED EXCESS ON WALL STREET 531 (2009) (referencing the June 2004 changes to net capital rules that permitted "securities firms to increase the amount of leverage they could use on their balance sheets to forty times equity while traditional banks, by statute, had to keep the leverage closer to ten times equity").

[146] *See generally* Matt Taibbi, *Wall Street's Naked Swindle*, ROLLING STONE, Oct. 15, 2009; *see also* Julie Satow, *Ex-SEC Official Blames Agency for Blow-Up of Broker-Dealers*, N.Y. SUN, Sept. 18, 2008, at B1 (discussing the collapse of Lehman Brothers, Bear Stearns, and Merrill Lynch).

[147] *See* COFFEE & SALE, *supra* note 142, at 66667.

[148] SEC, Alternative Net Capital Requirements for Broker-Dealers That Are Part of Consolidated Supervised Entities, 69 Fed.Reg. 34,428, 34,428 (June 21, 2004) (to be codified at 17 C.F.R. pts. 200 and 240).

agreed to a heightened internal alarms system and to subject its holding company and affiliates to "group-wide Commission supervision" termed consolidated entity supervision.[149]

Consolidated entity supervision was, by all accounts, a disaster.[150] With the express blessing of their most immediate regulator, the largest broker-dealers facilitated leveraging at the parent company level that would reach Biblical proportions.[151] Both the ensuing blurred ledgers and billions in trading losses were unprecedented. Perhaps predictably, this success in weakening regulation of monies to be used for trading spread to the rules governing where the monies would be traded.

2. Rescission of NYSE Rule 97

To be sure, the latter half of 2008 evidenced quick revisions to regulatory rules. Parent companies of struggling brokerage firms were transformed overnight into bank holding companies for the purpose of opening windows to federal reserve loans.[152] In September and October 2008, the SEC even took the dramatic step of temporarily banning short-selling to shield the stock of a select list of financial service providers.[153]

However, just a few months earlier in 2008, a spirit of haughtiness still permeated the securities industry. Between December 2005 and December 2007, the DJIA had grown twenty-one out of twenty-five months.[154] The Bull Market's growth had been so unstinting that a noted Professor at the University of Chicago believed that the "central problem of depression-prevention has been solved, for all practical purposes."[155] Amidst the economic euphoria, the NYSE requested and received permission from the SEC to eliminate an anti-fraud prohibition that had been a part of its rulebook for decades.

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[149] *Id.*

[150] *See* Labaton, *supra* note 145 (discussing the exemption codified in Alternative Net Capital Requirements for Broker-Dealers That Are Part of Consolidated Supervised Entities, *supra* note 148).

[151] *See* CHARLES R. MORRIS, THE TRILLION DOLLAR MELTDOWN: EASY MONEY, HIGH ROLLERS, AND THE GREAT CREDIT CRASH 84 (2008) (describing "extreme leveraging in the financial sector" that led to institutional and market ruin in October 2008).

[152] *See Bank of America in Talks to Acquire Merrill Lynch*, DEALBOOK (Sept. 14, 2008, 4:22 PM), http://dealbook.nytimes.com/2008/09/14/bank-of-america-in-talks-to-buy-merrill-lynch/?_r=0 (noting that the "shotgun marriage" between failing Bear Stearns and JPMorgan Chase earlier in the year, a deal made possible by the Treasury Department guaranteeing $29 billion in troubled assets).

[153] Press Release, SEC, Statement Concerning Short Selling and Issuer Stock Repurchases (Oct. 1, 2008), www.sec.gov/news/press/2008/2008-235.htm (prohibiting, on a temporary basis, short selling in delineated financial companies); *see also* Order Extending Emergency Order Pursuant to Section 12(K)(2), Exchange Act Release No. 58723, 94 S.E.C. Docket 818, 2008 WL 4444067 (Oct. 2, 2008).

[154] *See Dow Jones Industrial Average*, YAHOO FIN., http://finance.yahoo.com/echarts?s=%5EDJI+Interactive#symbol=%5Edji;range=20051128,20071130;compare=;indicator=volume;charttype=area;crosshair=on;ohlcvalues=0;logscale=off;source=undefined (last visited Feb. 24, 2014).

[155] PAUL KRUGMAN, THE RETURN OF DEPRESSION ECONOMICS AND THE CRISIS OF 2008 9 (2009) (quoting Robert Lucas, Presidential Address at the 115th Annual Meeting of the American Economic Association (Jan. 4, 2003), http://pages.stern.nyu.edu/~dbackus/Taxes/Lucas%20priorities%20AER%2003.pdf.

Specifically, NYSE Rule 97 ("Limitation on Members' Trading Because of Block Positioning") prohibited all trades in the last half-hour of the trading day on a "plus tick" –i.e., a price higher than the last sale – when a firm had acquired a block position in the same stock earlier in the day.[156] The logic was simple: traders are inclined to bid a stock's price up, an anomaly made possible by the world valuing a stock based on its last trade of the day, when in possession of a block of the stock. Rule 97 was aggressively enforced by the NYSE as one of many measures to combat stock manipulation through exchange trading.[157] But giddy with a market that had risen for so long, the NYSE proposed in February 2008 to drop Rule 97 from its arsenal.[158] Less than forty days later the Rule was unceremoniously removed,[159] a move that received scant attention,[160] and the stock market became a bit more volatile as each trading day ended.

3. Removal of the "Uptick Rule"[161]

Likewise, in July 2007, the SEC abolished the rule that had cabined short selling since the aftermath of the Depression.[162] For decades, the "uptick rule" had prevented successive short selling on the stock exchanges, thus preventing a party (or parties) from conspiring to pit a company's share price by repeatedly buying its shares at lower prices. Yet the SEC acquiesced to the position that the market had grown robust enough to withstand this form of chicanery, and concluded in the relevant release that the uptick rule constituted "restrictions where they no longer appear

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[156] NYSE Information Memo No. 02-56, Rule 97 – Limitation of Members' Trading Because of Block Positioning (Dec. 2, 2002), http://www.nyse.com/nysenotices/nyse/rule-changes/detail?memo_id=02-56.

[157] *See, e.g.*, Thomas Andrew Wallace, Exchange Hearing Panel Decision 94-132, 1994 WL 721681, at *6 (Oct. 31, 1994). The panel found a registered representative of a brokerage to have caused a violation of Rule 97 by effecting a trade "for the purpose of improperly influencing the price of [a] security." *Id.* at *1. The author of this article, former Trial Counsel for the N.Y.S.E., served as one of the attorneys representing the N.Y.S.E. Division of Enforcement in this case. *Id.*

[158] *See* Self-Regulatory Organizations, Exchange Act Release No. 34-57236, 92 S.E.C. Docket 1418, 2008 WL 426154, at *1 (Jan. 30, 2008). The panel stated "the Exchange believes that, in active and volatile market conditions, incremental movements of a penny or more occur almost instantaneously, lessening the ability to influence the closing price of a security." *Id.* at *2.

[159] *See* Self-Regulatory Organizations, Exchange Act Release No. 34-57455, 92 S.E.C. Docket 2452, 2008 WL 762940, at *2–3 (Mar. 7, 2008) ("The Commission notes that other venues are available for market participants to effect block position transactions without the restrictions currently imposed by NYSE Rule 97.").

[160] *See* Ann L. Vlcek, Comment to *Proposed Rule Changes to Rescind Rule 97*, SEC (Feb. 27, 2008), http://www.sifma.org/issues/item.aspx?id=272. Only one comment was received by the SEC on the Rule 97 rescission proposal. The Securities and Industry Financial Markets Association ("SIFMA") stated that it "fully" supported the rescission. *Id.*

[161] Formerly 17 C.F.R. § 240.10(c) (2000) (repealed 2007).

[162] Opinions on the significance of the uptick rule's rescission vary greatly. *Compare* Jeff Benjamin, *Did Repeal of the Uptick Rule Unleash Market Havoc?*, INVESTMENTNEWS.COM (Sept. 10, 2007, 9:21 AM), http://www.investmentnews.com/article/20070910/FREE/70910009 (referencing the "finger-pointing exercise that assigns much of the blame to an obscure rule change"), *with* Barbara L. Minton, *Repeal of the Uptick Rule: A Planned Program to Obliterate the Stock Market,*" NATURALNEWS.COM (Dec. 5, 2008), http://www.naturalnews.com/025003.html.

effective or necessary."[163] Clearly, the restriction was still necessary. After the rule was abolished, short selling grew exponentially, and is labeled as one of the accelerants (if not causes) of the Crisis.[164]

In sum, the most recent sustained Bull Market amply demonstrates that left to its own devices, the stock exchange deregulates in favor of more voluminous trading. It seems clear, then, that stock exchanges should not be left to their own devices. To that end, it is suggested that four changes are warranted. These changes would both expand upon the knowledge gleaned from the latest market downturn, and more equitably preserve the market gains from the ensuing recovery. The proposed changes would both reintegrate the federal government into day-to-day regulation of the exchanges and also animate the clear, prescient observations of those who have filed public comments to germane SEC rule filings. The changes advocated herein essentially seek more mechanistic inhibitors, and uniform guidance thereon.

IV. A RATIONAL PROPOSAL (OR TWO)

It is manifestly clear that, as either an imaginary fence or a practical wall,[165] the Market-Wide Circuit Breakers' greatest effect will continue to be on the behavior of the institutions and the experts. Experts, situated literally or figuratively on an exchange trading floor, are most likely to augment a decline and thus warrant a "cooling off period." Likewise, the Limit-Up Limit Down mechanism, triggered all too often, will require rounds of fine tuning to better serve its purpose of protecting the individual stock trader. In order to truly stave off the prolonged, decimating volatility that cripples households and savings, more meaningful changes need to be effected at several levels.

A. Legislative Reform

Although the Dodd-Frank Reform Act of 2010 did much to restore investor confidence, the law did nothing to enhance regulation of stock exchange trading. Additionally, despite the SEC's implementation of a version of the discarded uptick rule in 2010,[166] the protections afforded by

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[163] Regulation SHO and Rule 10A-1, Exchange Act Release No. 34-55970, 90 S.E.C. Docket 2604, 2007 WL 1880054, at *1 (June 28, 2007).

[164] *See, e.g.*, Mark McQueen, *Bring Back the "Uptick" Rule*, WELLINGTON FIN. (Sept. 9, 2007), http://www.wellingtonfund.com/blog/2007/09/09/bring-back-the-uptick-rule/#axzz2f1WjmXQY, (detailing post-repeal trading days in 2007 that outpaced 1987 for volatility); E.S. Browning, *New Rules for Picking a Bottom?*, WALL ST. J., Sept. 11, 2007, at C1.

[165] Aouriri et al., *supra* note 100 ("Statistical evidence suggest that about 2/3 of the Mar[.]-Apr[.] 1994 down slide was caused by the program traders trying to lock in their profits before all hell broke loose.").

[166] Press Release, SEC, SEC Approves Short Selling Restrictions (Feb. 24, 2010), http://www.sec.gov/news/press/2010/2010-26.htm (describing agency adoption of Rule 201, an alternative uptick rule restricting short selling in any stock that has dropped more than 10% in one day).

the original seventy-year-old version are still needed. This remedy should be popular among academics and aggrieved market players alike: it involves simply resurrecting prior language, practices, and enforcement mechanisms.[167]

Further, the present efforts to establish an SEC foothold in the daily review of trading across markets—e.g., the standardized audit trail[168]—should be subordinated to the creation of meaningful coordination of halts and resulting prices across markets. Stated bluntly, unifying trading results onto a single scorecard should be placed second to the goal of informing those making investment decisions why and how often stock trading has stopped and restarted.

B. Administrative Change

The exchanges have successfully impressed upon officials in Washington, D.C. and beyond the need to keep markets open during periods of extreme volatility.[169] Whether it be by lobbying the President to avoid a period of respite (i.e., 1987), or through rule proposals that include minimal trading pauses (i.e., 2010 and 2012), the exchanges have attained buy-in to not only the notion that "the show must go on" but also that only they can choose the musical score.

To be sure, as the purported experts, many administrative agencies enjoy judicial deference. However, the SEC enjoys a protectorate over the stock exchanges that may be unsurpassed. Deference to the SEC on minimally technical questions has rendered the possibility of judicial intervention remote.[170] Decades ago the Third Circuit went so far as to mock a private litigant who challenged SEC rulemaking regarding price spreads, declaring that "[a] court is no better equipped to decide whether a securities dealer must disclose the price at which it buys its wares and whether its profits are unconscionable than it is to decide the same questions as to those who sell hamburgers, jewelry, or any other product."[171]

Simply put, the SEC needs to be held more accountable to its public

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[167] *See, e.g.*, McQueen, *supra* note 164; *The SEC Uptick Rule Change: Bad Timing for a Bad Idea*, TICKER SENSE (Mar. 20, 2008), http://tickersense.typepad.com/ticker_sense/2008/03/the-sec-uptick.html; *see also* David P. McCaffrey, *Review of the Policy Debate Over Short Sale Regulation During the Market Crisis*, 73 ALB. L. REV. 483, 516 (2010).

[168] *See supra* note 24 and accompanying text.

[169] *See, e.g.*, Staff Legal Bulletin No. 8, SEC (Sept. 8, 1998), http://www.sec.gov/interps/legal/slbmr8.htm (stating the views of the SEC's Division of Market Regulation about the need for broker/dealers to maintain enough internal systems capacity to operate properly when trading volume is high); *see also* NYSE Rule 51 (2013), http://rules.nyse.com/NYSETools/bookmark.asp?id=sx-policy manual-nyseDealingsupontheExchangeR5156&manual=/nyse/rules/nyse-rules/ (requiring NYSE member firms to remain open "for the transaction of business on every business day").

[170] *See, e.g.*, Bd. of Trade of Chicago v. SEC, 923 F.2d 1270, 1272–73 (7th Cir. 1991) (deferring to the Commission on statutory interpretation of the term "exchange").

[171] Ettinger v. Merrill Lynch Pierce Fenner & Smith, Inc., No. 84-3925, 1986 WL 36297, at *1 (E.D. Pa. Dec. 22, 1986), *judgment rev'd in part, vacated in part*, 835 F.2d 1031 (3d Cir. 1987).

comment process. A prime example here is Regulation SHO, the tepid set of reforms adopted during the last decade by the agency in response to widespread dissatisfaction with the regulation of short selling. As one commentator noted:

> The overwhelming majority of the over 4,300 comments the SEC received on the final proposal favored new restrictions on short sales. Most favoring new restrictions called for restraints that were tighter than the SEC's final rule. The numerous comments by individual investors, and the demands by legislators for new controls, demonstrated vividly the longstanding suspicion of short selling. Thus, there was a striking gap between the research on the effects of short selling and political sentiment favoring restrictions.[172]

Moreover, while the retail investor has become vital to the success of the American stock exchange, far more responsible for its ups and downs than hedge funds,[173] his voice remains unheeded. More specifically, although the SEC opened the Limit-Up-Limit-Down for public comment in 2011,[174] some stark yet accurate observations were largely disregarded in the mechanism's final manifestation.[175]

In short, the SEC public comment process is not working, and federal courts pose little obstacle to a strong-minded federal agency.[176] The SEC rulemaking process must be modified to closely tie the substance of final rules more closely to the spirit—if not, the word—of the comment submissions from investors. The Office of Management and Budget can monitor the agency's progress in this regard.

C. Protection For the Long Term Investor

More pointedly, the voice of those not situated on the exchange trading floor need to be heeded in formulating responses and remedies to intolerable volatility. The stock market was rescued twenty years ago by the influx of investments from pension funds.[177] Nowadays, while consistently

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[172] McCaffrey, *supra* note 167, at 516.

[173] *See* Smith, *supra* note 14, at 18; *see also* LEWIS, *supra* note 66, at 61–62 (contrasting the bond market and stock market, and noting the presence of "millions" of retail investors in the stock market led to a perception of greater fairness in the stock market).

[174] *See* Self-Regulatory Organizations, Exchange Act Release No. 34-67090, 103 S.E.C. Docket 2754, 2012 WL 1963372, at *4–6 (May 31, 2012).

[175] *Id.* at *56; *see also* Rosenbaum, *supra* note 122.

[176] *See, e.g.*, WILLIAM F. FOX, UNDERSTANDING ADMINISTRATIVE LAW 168 (6th ed. 2012) ("[S]ome cases in which agency rulemaking has been overturned because the agency failed to address significant comments in the preamble to the final rule.").

[177] *See* GASPARINO, *supra* note 72, at 102 ("By the mid- to late 1990s . . . [s]mall investors were flocking to the markets in droves. Much of it was out of necessity with the end of company pension plans, which forced people to save for retirement through 401(k) and other investment plans.").

boasting of the number of pensions and large plans invested in the stock market,[178] the exchanges have concurrently forgotten the needs of such investors. Pensions and other funds with long term goals are notoriously cautious to act, as well as diversified in holdings.[179] It is commonly accepted that the appeal of the mutual fund is its unwavering strategy: it is designed to gradually prosper and avoid market imprudence or excess.[180] Indeed, those managing pension funds are often lampooned for their stereotypical inability or unwillingness to change course.[181]

This deliberate approach to the market, while universal, was nonetheless a very poor match for the 2008–2009 Swoon, as confessed by one sizeable fund:

> **How Your Pension Benefits Are Invested**
>
> The Trustees of our Fund oversee and monitor the work of our Investment Team, which handles the day-to-day management of the Fund's investments. The team works with a variety of investment managers to ensure that the Fund's assets are invested in a broad array of investment opportunities within the allocation policy set by the Trustees, maximizing returns while protecting against losses. This disciplined and diversified investment strategy served us and other funds well for many years. But the economy's dramatic plunge in 2008 hit all areas across the board and no asset class, and therefore, no pension fund was immune.[182]

Market losses devastate the investments of large entities; however, these entities, mammoth by design, are slow to react to daily market

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[178] *See* Hibah Yousuf, *Investors Pour Record $8 Billion into U.S. Stocks*, CNN MONEY (Jan. 17, 2013), http://buzz.money.cnn.com/2013/01/17/stocks-funds-inflows/ (detailing the highest mutual fund investment in U.S. markets in one week since such records began being tallied in 2007).

[179] *See, e.g.*, *The Economy and Your Pension Funds*, 1199SEIU FUNDS, http://1199seiubenefits.org/fund-features/fund-spotlights/spotlight-on-pension-and-retirement/the-economy-and-your-pension-funds/ (last visited Feb. 24, 2014). 1199SEIU is one of the largest pension plans in the nation. *About us: History and Accomplishments*, 1199SEIU FUNDS, http://1199seiubenefits.org/about-1199seiu-funds/who-we-are/ (last visited Feb. 24, 2014).

[180] *See, e.g.*, RUSSELL KINNEL, FUNDSPY: MORNINGSTAR'S INSIDE SECRETS TO SELECTING MUTUAL FUNDS THAT OUTPERFORM 50 (2009), ("You want [fund] managers that stick to their guns and do not chase what's trendy at the moment."). The advice to avoid short-term goals rings even more clearly for the direct retail investor; *see also* Andrea Coombes, *Should 401(k) Savers Bail on Bond Funds?*, MARKET WATCH (July 11, 2013, 6:01 AM), http://www.marketwatch.com/story/should-401k-savers-bail-on-bond-funds-2013-07-12 ("Many investors hit the 'sell' button on bonds in June—but if your focus is on retirement, think through your options before you follow the crowd.").

[181] *See, e.g.*, *Mom and Pop Investors Miss out on Stock Market Gains*, MONEYNEWS (Sept. 30, 2012, 4:01 PM), http://www.moneynews.com/InvestingAnalysis/investors-retail-stock-market/2012/09/30/id/458138 (citing the "inertia" of retirement accounts invested in the stock market).

[182] *The Economy and Your Pension Funds*, 1199SEIU FUNDS, http://1199seiubenefits.org/fund-features/fund-spotlights/spotlight-on-pension-and-retirement/the-economy-and-your-pension-funds/ (last visited Feb. 24, 2014).

moves.[183] When passive, such entities are openly decried in financial periodicals.[184] When reacting to the market, these fiduciaries are still, nonetheless, faulted. For example, the California State Retirement System dramatically altered its investment strategy nine months after the commencement of the 2008–2009 Swoon to only lukewarm praise.[185] Further, any fundamental switch in strategy draws the ire of stakeholders and observers alike.[186] Despite the sizable presence of such plans in the market, lawsuits aimed at slowing wholesale changes such as mergers and bailouts are notoriously unsuccessful.[187] Further still, as the Second Circuit recently reminded us, those charged with recalibrating investment strategies for such entities are given great latitude and owe a very forgiving fiduciary duty to pension plan participants.[188]

All of which supports the notion that the stock exchanges, which benefit mightily from the business of pension plans and similar grouped investments, must: (1) more meaningfully impose trading halts, and (2) more equitably publicize these halts. Market-Wide Circuit Breakers need to trigger more frequently—i.e., for more than merely one to two hours—and in lockstep coordination with all the major stock exchanges. In this regard, the individual Market- Wide breakers would do well to mimic the LULD's targeted focus upon the national market system stock.[189]

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[183] *See* John Seiler, *Market Crash Slams State Pension Funds*, BEFORE IT'S NEWS (Aug. 9, 2011, 3:11 PM), http://beforeitsnews.com/libertarian/2011/08/new-market-crash-slams-state-pension-funds-928777.html ("[CalPERS] just can't beat the market. Fundamentally, they *are* the market.") (quoting Dan Pellissier, President of California Pension Reform).

[184] *See* Aaron Elstein, *NY State's Pension Fund is 26% Poorer*, CRAIN'S N.Y. BUS. (May 29, 2009, 8:55 AM), http://www.crainsnewyork.com/article/20090529/FREE/905299995 (reporting losses of 26% in the fund for the fiscal year ending March 2009).

[185] *See* Press Release, California State Teachers Retirement System, CalSTRS Acts in Face of Historic Global Market Drop (July 21, 2009), http://www.calstrs.com/news-release/calstrs-acts-face-historic-global-market-drop (Describes the pension fund's "shifting [of] 5 percent of the portfolio from global equities to fixed income, real estate and private equity to purchase quality assets from distressed sellers" and another five percent "to create a new asset class," and adoption of "a new asset allocation mix that further diversifies the portfolio while reducing its stake in the global stock markets").

[186] *See* Michael Kranish, *Pension Insurer Shifted to Stocks: Concern Increases as Losses Mount; Failing Plans Could Overwhelm Agency*, BOSTON GLOBE, March 30, 2009, at A1 (noting criticism from, among other observers, the White House).

[187] *See* Press Release, California State Teachers Retirement System, California Public Pension Funds Seek to Lead Bank of America Class Actions (Mar. 23, 2009), http://www.calstrs.com/news-release/california-public-pension-funds-seek-lead-bank-america-class-actions (discussing the lawsuit, which was ultimately unsuccessful, that sought to block the merger between Bank of America and Merrill Lynch).

[188] *See, e.g.*, Mark Hamblett, *Circuit Rejects Suit by Lehman Retirees Who Lost Savings*, N.Y.L.J., July 16, 2013, at 1 (describing the Second Circuit's dismissal of plaintiff class' ERISA claims against "executives and directors" alleged to have breached fiduciary duties to Lehman Brothers retirees when the Lehman Stock Fund pitted after the eponymous broker-dealer filed for bankruptcy in September 2008). The Second Circuit cited the established standard of "minimal judicial review for challenges to a fiduciary's management of an ESOP [Employee Stock Ownership Plan]." *Id.* (citing Moench v. Robertson, 62 F.3d 553, 566 (3d Cir. 1995)).

[189] *See supra* pp. 20–22 (indicating that the NMS stocks are at the core of the LULD breaker).

Conversely, the LULD Breaker—confused in mission[190] and complicated in design[191]—needs to be simplified and meaningfully broadcasted, as opposed to merely publishing it in a chart.[192] If a stock is trading wildly, that news should be made widely and immediately available to parties situated on the trading floor and elsewhere. Even such a broadcast rule for only part of the trading day would pose meaningful change; the most recent data demonstrates the most reputable of stock issues tend to fluctuate most within two hours of opening, thus making a "morning window" for universal dissemination of the news of a halt a truly useful tool.[193]

D. Atmospheric Change

The Federal Reserve remains the insurer of our stock exchange's liquidity.[194] A more frequent transition in that storied agency's head[195] could inspire more frequent adjustments to exchange remedial measures in general and circuit breaker triggers in particular. Even the present White House, which in 2010 successfully ushered through regulatory reform against a sea of opposition, needs to question the continued support for the delegation of all meaningful supervision to the stock exchanges themselves. It bears noting that for centuries the American exchanges—themselves variations on the world model[196]—unilaterally controlled the publication of their trading data. Although the finalizing of the national audit trail in 2013, whereby the SEC will ultimately view daily trading across a variety of markets,[197] appears progressive, that reform relies too heavily on determinations made at the local level. As the result of a late rulemaking

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[190] Press Release, SEC, Statement on Meeting With Exchanges (May 10, 2010), http://www.sec.gov/news/press/2010/2010-74.htm (announcing SEC investigation into whether the Flash Crash was the result of erroneous trades).

[191] *See, e.g.*, *Trading Halts Code*, NASDAQ, http://www.nasdaqtrader.com/Trader.aspx?id=TradeHaltCodes (last visited Feb. 24, 2014). NASDAQ's web site lists over two dozen "Trade Halt Codes" (e.g., "Halt – News Released"). *Id.* The code labeled "T5: Single Stock Trading Pause in Effect" appears to most approximate the initial breaker inspired by the May 2010 Flash Crash. *Id.*

[192] *See* Quast, *supra* note 108.

[193] *See, e.g.*, *Historical Prices: International Business Machines Corporation (IBM)*, YAHOO FIN., http://finance.yahoo.com/q/hp?s=IBM (last visited Feb. 24, 2014) (showing the minute-by-minute price of IBM, which moved from $189.16 per share at 10:05 a.m. on August 9, 2013 to $187 at 11:00 a.m.); *Historical Prices: Google, Inc.*, YAHOO FIN., http://finance.yahoo.com/q/hp?s=GOOG (last visited Feb. 24, 2014) (showing the price of Google, Inc., which moved from $892.49 at 10:00 a.m. to $892.15 at 10:15 a.m. during the same trading day).

[194] *See* A. Scott Berg, *A League of His Own*, VANITY FAIR, Aug. 2013, at 70 (explaining the creation of the Federal Reserve as one of President Woodrow Wilson's most progressive innovations).

[195] Binyamin Appelbaum, *Uncertainty at Fed Over its Stimulus Plans and Its Leadership*, N.Y. TIMES, June 19, 2013, at B1 ("Only three people have held the Fed chairmanship in the last 30 years. . . ."). In February 2014, Janet Yellen took over the position of Federal chair. Sam Frizell, *Janet Yellen Sworn in to Lead Federal Reserve*, TIME (Feb. 3, 2014), http://time.com/3866/janet-yellen-sworn-in-to-lead-federal-reserve/.

[196] Escobar, *supra* note 18 ("Over in America, it took nearly another century for our first official stock exchange to emerge.").

[197] In 2012 the SEC mandated that all exchanges share trade data in hopes of creating a truly "consolidated" daily audit trail. *See supra* notes 43–48 and accompanying text.

compromise, the exchanges themselves can determine the timing and inclusion of error and other select forms of trades.[198]

Until such time as volatility is minimized on broad, meaningful levels, the retail investor remains as vulnerable as the uninformed stock customers decried 100 years ago by Louis Brandeis. Simply put, stock exchanges need to involve disinterested parties in operational decision-making. Such participation would inevitably lengthen breaks and provide greater accessibility to news thereof throughout the trading day. Addressing even one or two of these pressing needs would work to forestall prolonged periods of decline. At the present time, none of the volatility mechanisms address any of these needs.

V. CONCLUSION

Nearly 50 years ago, John Kenneth Galbraith wrote, "[o]f all the mysteries of the stock exchange there is none so impenetrable as why there should be a buyer for everyone who seeks to sell. October 24, 1929, showed that what is mysterious is not inevitable."[199] Likewise, as disastrous events such as the 2008–2009 Swoon or the 2010 Flash Crash amply indicate, the predictability of a fair, timely purchase/sale of stock on a stock exchange—or the continuous existence of that exchange—should not be taken lightly. It bears noting that the decision to keep a stock exchange open is not free from conflict of interest: both the exchanges[200] and the federal government earn fees from exchange transactions,[201] whether these deals result from nearly unfathomable amounts of daily trades in both Bull and Bear Markets.

The optimal solution to our volatile markets would probably lie somewhere between a complete ban of so-called "flash trading,"[202] free distribution of market prices and transactions,[203] and faster interaction by

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[198] *See supra* notes 43–48 and accompanying text.

[199] *See* GALBRAITH, *supra* note 43, at 99.

[200] *See* NYSE Information Memo No. 96-12, *supra* note 19. The stock exchanges charge a commission to each member based upon revenues (calculated by shares executed) that is required by rule to be meticulously and timely tallied each month. *Id.* (explaining that monthly form 600TC required of all members must record floor brokerage revenue that "include[s] income received from non-member broker-dealers as well as public institutional and retail customers").

[201] 15 U.S.C. § 78ee (2012). The SEC, per statute, collects fees from stock exchanges as determined by the amount of trading volume. *Id.*; Securities Exchange Act of 1934 § 31b, at http://www.law.uc.edu/sites/default/files/CCL/34Act/sec31.html ("(b) EXCHANGE-TRADED SECURITIES—Subject to subsection (j), each national securities exchange shall pay to the Commission a fee at a rate equal to $15 per $1,000,000 of the aggregate dollar amount of sales of securities (other than bonds, debentures, other evidences of indebtedness, security futures products, and options on securities indexes (excluding a narrow-based security index)) transacted on such national securities exchange.").

[202] The SEC proposed a complete ban on the practice in 2009, but the practice nonetheless continues under an exception to SEC Rule 602. *See* Press Release, SEC, SEC Proposes Flash Order Ban (Sept. 17, 2009), http://www.sec.gov/news/press/2009/2009-201.htm.

[203] *See* NYSE, nyse.nyx.com (last visited Feb. 24, 2014) (click NYSE MKT tab under Market Movers heading). The Stock Exchange still charges a fee for real-time information; the information on their web sites is 15 minutes delayed. *Id.*

money managers with rapidly changing indices.[204] On the former point, textbook authors have aptly noted the following:

> As a public policy matter, flash orders raise concerns of fairness and market stability. First, investors cannot reap profits from flash trading without access to computing power that is prohibitively expensive to the average investor. While other trading strategies (statistical arbitrage, for example) are dependent upon significant processing power, success at these strategies still seems primarily determined by ability (either in programming or analysis). To some, flash orders have arguably crossed the line dividing skilled traders harnessing computer power to realize their ideas to just trading ahead of the market.[205]

But, until the practice of flatly outlawing computerized advantages takes hold, artificial brakes on the imbalanced market remain the best means of preventing a complete market meltdown. The trick, it would seem, is to make such breaks longer, more connected, better publicized, and more consistent with the findings of public scrutiny.

The danger of inaction may come from the "invisible hand"[206] itself. More recently, large stock brokerage firms or their affiliates have increasingly created internal "dark pools" to fill customer orders; these arrangements, among other things, provide more anonymity for customer orders.[207] Moreover, frustrated by a marketplace that increasingly appears to favor high-frequency traders, there has emerged a drive to slow down trading.[208] One of Canada's largest financial institutions has modified its New York trading desk to actually weaken the pace of its customers' orders – and thus evade the software utilized by the quickest of traders.[209] While the bank has lobbied for regulatory changes, it has simultaneously embraced a trading model that seeks to achieve customer loyalty at the expense of volume of commissions. The move is credited with the firm's rise to "ninth largest broker for American stocks."[210]

Indeed, the inability of pension plans and other glacially-paced market players to compete is of direct consequence to a vast number of

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[204] *See supra* notes 169–76 and accompanying text.

[205] SCOTT & GELPERN, *supra* note 83, at 905 (footnote omitted).

[206] *See* ADAM SMITH, THE WEALTH OF NATIONS 288 (1776) (coining the phrase the "invisible hand" of the market to indicate, among other things, remedies emanating from the private sector).

[207] Nathaniel Popper, *Regulators Fret Over Rise of Trading in the Shadows,* N.Y. TIMES, Apr. 1, 2013, at B1 (noting that the percentage of "stock trading taking place away from the public exchanges" had increased to close to 40% since an average of 16% in 2008).

[208] *See* Nathaniel Popper, *Royal Bank of Canada Gains by Putting the Brakes on Traders*, DEALBOOK (June 25, 2013, 7:57 PM), http://dealbook.nytimes.com/2013/06/25/royal-bank-of-canada-gains-by-putting-the-brakes-on-traders/.

[209] *Id.*

[210] *Id.* (noting that Royal Bank was ranked 18th in 2010).

investors; regardless of the debate over the market's effect upon nest eggs in the last five years, the fact remains that by 2014 approximately 20% of Americans will work past age 65.[211] Clearly, pensions need the protection of the trading centers that benefit from their trading activity.

One hundred years ago, Brandeis coined the haunting phrase "Other People's Money" to connote a callousness in financial relations that would foreshadow catastrophe on a macroeconomic level. He concluded his eponymous work with a quote from President Woodrow Wilson: "[e]very country is renewed out of the ranks of the unknown, not out of the ranks of the already famous and powerful in control."[212] The two men might as well have aimed their concerns at the stock exchanges, time-honored but feared market centers that now—for better or worse—hold our collective fates. It is likely that the time has come to wrest the stopgap measures from those undesirous of stoppage, but seemingly enamored of (wealth) gaps.[213] Outside forces may now need to determine when, how often, and for how long the trading stops, as well as how the stops are communicated.

The upside of generating market confidence is self evident, as there is more American currency in circulation now than at any other time in history.[214] Yet, even while the nation is enjoying another dazzling Bull Market, a new skepticism has also arisen.[215] Simply put, it is imperative that the SEC, the White House, Congress, the courts, and the stock exchanges themselves commence acting with a sense of urgency to more meaningfully stabilize trading in the marketplaces that—for better or worse—serve as both originator and mirror of the nation's economy.

Of course, the greatest volatility confronting the nation's exchanges may take the face of competitiveness, as the number of exchanges is dwindling[216] and the cyberspace model has supplanted Hollywoodesque visions of trading floors. Abroad, few seemed concerned with the level of scrutiny attending daily stock exchange operations.[217] Domestically, our

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[211] Katy Steinmetz, *The Game of Happiness*, TIME, July 8–15, 2013, at 45.

[212] *See* BRANDEIS, *supra* note 9, at 223.

[213] Rana Foroohar, *The Risks of Reviving A Revived Economy*, TIME (Nov. 7, 2012), http://swampland.time.com/2012/11/07/the-risks-of-reviving-a-revived-economy/ (Discusses IMF research that countries with bigger wealth gaps tend to have shorter periods of high growth and generally "more volatile economies").

[214] *Briefing*, TIME, July 22, 2013, at 11 (noting $1.19 trillion in circulation at the end of June 2013).

[215] *See* Maureen Farrell, *Doomsday Investors Betting on Market Crash*, CNN MONEY (May 23, 2013, 7:14 AM), http://money.cnn.com/2013/05/24/investing/hedge-funds-crash/index.html (describing the success of a company presently selling "crash protection" to banks and pension funds as part of the new financial art of "'black swan' hedging").

[216] *See* Self-Regulatory Organizations, Exchange Act Release No. 34-67037, 103 S.E.C. Docket 2604, 2012 WL 1865429, at *1 (May 21, 2012) (granting permission for the elimination of the term "Amex" from the remnants of the absorbed American Stock Exchange).

[217] *See France Implements Bail-In*, DAVIS POLK & WARDWELL (July 23, 2013), http://www.davispolk.com/sites/default/files/07.23.13.France.Implements.Bail_.In__0.pdf (detailing French measures to address supervisory frameworks, the separation of proprietary and customer trading

leaders have identified bank liquidity,[218] SEC image,[219] pernicious trading practices,[220] and unemployment[221] as the culprits requiring our most immediate attention. To its credit, the SEC has placed intolerable volatility due to "trading glitches" on its extremely busy agenda.[222] But though the stock exchange does remain at the center of our economic fate,[223] holding captive our nest eggs and measuring a trading day in billions of dollars, its operations and its halts must immediately be made more equitable and productive.

The modern American stock exchange and its crashes are very complicated beasts with conflicting causes. While we struggle to both feed and contain the exchange Leviathan, let us nonetheless recognize that it must sometimes be put to sleep, if only to give us time to flee.

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activities, and limits to fees on customers – but failing to note any concern over the volatility of the Parisian Bourse).

[218] *See Basel III Leverage Ratio: U.S. Proposes American Add-on; Basel Committee Proposes Important Denominator Changes*, DAVIS POLK & WARDWELL (July 19, 2013), http://www.davispolk.com/sites/default/files/07.19.13.Basel_.3.Leverage.pdf (Describes the late-hour proposal to require insured depositary subsidiaries of bank holding companies to maintain a "supplementary leverage ratio of at least 6%").

[219] *Rakoff's Revenge*, ECONOMIST, April 13, 2013 ("T[he] Senate unanimously approved Mary Jo White on April 8th to lead America's Securities and Exchange Commission (SEC) on the basis of her reputation as a prosecutor and defence attorney.").

[220] *See* Nathaniel Popper, *Finra Scrutinizes High-Speed Trading Firms*, DEALBOOK (July 18, 2013, 1:59 PM), http://dealbook.nytimes.com/2013/07/18/finra-scrutinizes-high-speed-trading-firms/?_php=true&_type=blogs&_r=0 ("Regulators are taking a closer look at whether high-frequency trading firms might represent a threat to the stability of financial markets.").

[221] *See* SHEAR & WEISMAN, *supra* note 60.

[222] Sarah N. Lynch, *U.S. Regulators Weigh Fixes After Trading Debacles*, REUTERS (Feb. 19, 2013, 4:33 PM), http://www.reuters.com/article/2013/02/19/us-financial-regulation-exchanges-idUSBRE91I15720130219 ("Nasdaq's [2012] botched handling of the Facebook initial public offering and Knight Capital's [2012] $440 million losses due to a software error.").

[223] As more broker-dealers assume trade-filling responsibilities, it is not altogether certain that the exchange business model shall survive. *See* Press Release, SIFMA, SIFMA Calls for Review of SRO Structure (Aug. 1, 2013), http://www.sifma.org/newsroom/2013/sifma-calls-for-review-of-sro-structure/ (detailing a letter to the SEC requesting examination of the possible obsolescence of American stock exchanges in order to ensure "safe, sound, and efficient markets that investors can have confidence in"). More specifically, "high frequency trading" itself may go the way of the buggy whip. *See* William Alden, *Inquiry into High-Speed Trading Widens*, DEALBOOK (Mar. 18, 2014, 12:05 PM), http://dealbook.nytimes.com/2014/03/18/schneiderman-announces-inquiry-into-services-for-high-speed-traders/ (announcing the intentions of the New York State Attorney General to scrutinize exchanges such as the New York Stock Exchange and the NASDAQ for helping to foster "insider trading 2.0"); *see also* Keri Geiger and Sam Mamudi, *High-Speed Trading Faces New York Probe into Fairness*, BLOOMBERG (Mar. 18, 2014, 4:15 PM) (announcing that the Attorney general was similarly looking into private trading venues and "the strategies deployed by the high-speed traders themselves"). And at least one market titan has heeded the call for the private sector to curtail opportunistic practices. *See* Scott Patterson, *Traders' Access to Releases Curbed – Berkshire's Business Wire Stops Granting High-Speed Firms Direct Access to Earnings, Other News*, WALL ST. J., Feb. 21, 2014, at C1 (detailing the decision by Warren Buffett "to stop giving high-speed traders direct access to corporate earnings" after his discussions with the New York Attorney General's office).