

Still Free to Harm: A Response to Professor Farber

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Professor Farber has written a painstakingly fair review of my book, *Freedom to Harm*. I am gratified that he found the book to be an important addition to the administrative law literature, and I find little in his review with which to take issue. One aspect of the review, however, inspired me to think more carefully about the book's primary thesis and the implications that it has for the future of health, safety, and environmental protection in the United States.

Professor Farber's review begins with a concise, thumbnail sketch of the chapters of the book devoted to the origins of the Laissez Faire Revival in the Chicago School, early think tanks, and a now-famous memorandum¹ written by soon-to-be Justice Lewis Powell to his friend and neighbor, the regulatory affairs director for the U.S. Chamber of Commerce.² That document laid out a strategy for the business community's response to the landmark health, safety, and environmental legislation enacted during what I call the "Public Interest Era," the period of great social ferment spanning from the mid-1960s to the late 1970s.³ The result was the creation of an "idea infrastructure" of think tanks, sponsored university research, and institutions like the Federalist Society that aggressively advanced what I call a "laissez faire minimalist"⁴ (and Professor Farber calls a "libertarian"⁵) agenda.

The review then turns to the four assaults on the federal regulatory programs during the last two years of the Carter Administration and the first three years of the Reagan Administration, the 104th ("Gingrich") Congress, the George W. Bush Administration, and the last two years of the first Obama Administration.⁶ Rather than focusing on the history of the four

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1. Memorandum from Lewis F. Powell, Jr., to Eugene B. Sydnor, Jr., Chairman, Educ. Comm., U.S. Chamber of Commerce (Aug. 23, 1971), available at <http://law.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumPrinted.pdf>.

2. Daniel A. Farber, *The Thirty Years War over Federal Regulation*, 92 TEXAS L. REV. 413, 414–18 (2013) (book review).

3. THOMAS O. MCGARITY, FREEDOM TO HARM: THE LASTING LEGACY OF THE LAISSEZ FAIRE REVIVAL 6, 22–26 (2013).

4. See *id.* at 41–56.

5. Farber, *supra* note 2, at 416.

6. *Id.* at 419–21.

waves of deregulatory fervor as they played out in each of the regulatory agencies as described in the book, Professor Farber directs the reader's attention to the institutional contexts in which all four assaults on regulation played out—Congress, the rulemaking process in federal agencies, and the enforcement process in the federal agencies and the states.⁷

That approach allows Professor Farber to highlight a phenomenon that the book may obscure—the fact that while the assaults on agency rulemaking and enforcement achieved some impressive successes (especially with respect to reduced agency budgets and resources), the assaults on the bedrock health, safety, and environmental laws in Congress failed miserably.⁸ His overall conclusion is that “the regulatory footprint of the government has grown rather than shrunk over the three decades since Ronald Reagan took office.”⁹ And this, he concludes,¹⁰ was not a welcome development for the libertarians whose goal was to shrink government regulation to the size that it could, in Grover Norquist's trenchant metaphor, be dragged into the bathroom and drowned in the bathtub.¹¹ In this Response, I will follow Professor Farber's organizational scheme because it highlights our differences and facilitates my attempt to clarify the book's major thesis.

I. The Assaults on Legislation in Congress

Professor Farber accurately relies on the book's historical description of the four assaults for the propositions that Congress failed to gut the major health, safety, and environmental statutes and, in fact, enacted some protective statutes that empowered regulatory agencies to promulgate new rules imposing additional regulatory requirements on the relevant industries.¹² These developments were deeply disappointing to the libertarians who occupied the business community's idea infrastructure.¹³

7. *Id.* (Congress); *id.* at 422–28 (the rulemaking process); *id.* at 428–37 (the enforcement process).

8. *See id.* at 421.

9. *Id.* at 428.

10. *See id.* at 437.

11. Jeremy W. Peters, *For Tax Pledge and Its Author, a Test of Time*, N.Y. TIMES, Nov. 19, 2012, <http://www.nytimes.com/2012/11/20/us/politics/grover-norquist-author-of-antitax-pledge-faces-big-test.html> (quoting Grover Norquist).

12. *See* Farber, *supra* note 2, at 419–21. In the area of financial regulation, by contrast, Congress did gut some of the important regulatory statutes like the Glass-Steagall Act, which Congress repealed during the second term of the Clinton Administration. MCGARITY, *supra* note 3, at 171–72.

13. *See* MCGARITY, *supra* note 3, at 283–84 (noting that by mid-2008, the “opulent citadels of laissez faire minimalism” had to finally concede—in the face of powerful evidence such as the growing body of regulation—that the core theory of the business community's idea infrastructure had failed).

It is at this point that Professor Farber's review inspired me to think more deeply about the thesis of my book. Although the book began with a description of the business community's careful nurturing of libertarian thinkers like Friedrich Hayek and Milton Friedman and featured a description of modern-day libertarians like Grover Norquist and the scholars associated with the Cato Institute, I did not mean to suggest the successes and failures of the assaults on regulation were primarily attributable to their efforts. The conservative think tanks and academic centers that I describe in the book were responsible for the ideological "air war" that paved the way for the business community's attempts to relieve itself of the federal government's regulatory burdens.¹⁴ The business community played only a secondary role in establishing and supporting these institutions, most of which received the bulk of their early support from a few wealthy individuals and foundations with antigovernment agendas that I referred to as the "founding funders."¹⁵

The business community played a much more profound role in the "ground war," where lobbyists and Astroturf grassroots organizations attempted to derail protective regulatory legislation and to persuade Congress to enact deregulatory legislation.¹⁶ When it came to repealing existing regulatory legislation, the business community's interest was more ambiguous.¹⁷ Unlike the libertarians, who have no use for regulatory legislation of any kind, the business community needs to preserve the façade of regulatory protections to maintain public confidence in its products and services.¹⁸ My guess is that Tom Delay's attempt to repeal the Clean Air Act¹⁹ was a nonstarter in the business community not just because the chances of passing such radical legislation were extremely low,

14. *Id.* at 55.

15. *Id.* at 37–40.

16. *Id.* at 59–64, 68.

17. I recognize, of course, that there is considerable overlap between "libertarians" and the "business community." Many libertarians are prominent businesspersons and vice versa. MURRAY N. ROTHBARD, *FOR A NEW LIBERTY: THE LIBERTARIAN MANIFESTO* 389–90 (2d ed. 2006). But the business community has frequently rejected libertarian prescriptions when they run counter to its economic interests. *See id.* at 388–90. For example, in addition to its ambivalence on whether health, safety, and environmental statutes should be repealed, the business community can be downright hostile to libertarian attempts to reduce subsidies to particular industries and barriers to foreign imports. *See* Timothy P. Carney, *The Case Against Cronies: Libertarians Must Stand Up to Corporate Greed*, ATLANTIC (Apr. 30, 2013), <http://www.theatlantic.com/business/archive/2013/04/the-case-against-cronies-libertarians-must-stand-up-to-corporate-greed/275404> (noting a pattern of government regulation that benefits big business but should be "worrisome to free-marketeers").

18. MCGARITY, *supra* note 3, at 288–89 (noting that some in the business community applauded the efforts of Obama to balance "freedom of commerce" with "protect[ing] the public against threats to our health and safety." (alteration in original)).

19. CHRISTOPHER J. BAILEY, *CONGRESS AND AIR POLLUTION: ENVIRONMENTAL POLITICS IN THE US* 258–59 (1998).

but because the business community needed for members of the public to believe that EPA was there to protect them and their children from the adverse effects of air pollution. Thus, the general lack of statutory retrenchment was not necessarily unwelcome in the business community, even if it profoundly disappointed the libertarians in the think tanks and academia.

A better measure of the impact of the four assaults on regulation in Congress is the extent to which Congress enacted new and more restrictive legislation. To answer this question, we must address the counterfactual. What would the health, safety, and environmental statutes have looked like had the four assaults not taken place? Professor Farber acknowledges that in the area of health, safety, and environmental regulation (though perhaps not in the areas of consumer and financial regulation) there have been few “major regulatory breakthroughs.”²⁰ It is, of course, difficult to speculate about what legislation Congress would have passed if the business community’s armies of lobbyists had not descended upon Washington every time a crisis induced Congress to consider protective legislation. But one of the points I try to make in the book is that the familiar pattern of congressional enactment of legislation in response to crises that highlight the failures of existing statutes has, to some degree, been disrupted during the Laissez Faire Revival of the past thirty years.²¹ Congress enacted the Food Safety Modernization Act in response to a confluence of crises resulting from foodborne disease outbreaks of the late 2000s,²² but it failed to enact significant legislation in response to the Upper Big Branch mine disaster,²³ the *Deepwater Horizon* oil spill,²⁴ and the ongoing crisis of global warming and associated climate change.²⁵ Had the business community’s idea and influence infrastructures not been fully resourced to beat back legislative attempts to respond to these crises, it is certainly likely that Congress would have enacted protective legislation to fill in the gaps left open by past legislative efforts. Thus, the business community can be pleased with this aspect of its thirty-year war on regulation in Congress.

20. Farber, *supra* note 2, at 419.

21. See MCGARITY, *supra* note 3, at 68 (comparing the proactive approach to regulation of the Public Interest Era to the approach taken in the past thirty years where few protective regulations were promulgated or enforced).

22. *Id.* at 252–53.

23. *Id.* at 263.

24. See *id.* at 249–50 (noting that after the *Deepwater Horizon* disaster, the Administration continued to rely heavily on private certifications instead of strengthening agency enforcement and regulations).

25. See *id.* at 117 (recounting Congress’s inability to enact legislation to address emerging environmental problems after the third assault on regulation).

II. The Assaults on Rulemaking

The business community can also be pleased with the results of its assaults on agency implementation of regulatory statutes through rulemaking. Indeed, when the business community failed to prevent Congress from enacting modest expansions in regulatory authority, it often prevented the regulatory agencies from implementing those statutes in a way that posed serious threats to the economic interests of the regulated companies.²⁶ Congress may have required the Food and Drug Administration (FDA) to promulgate implementing regulations within strict statutory deadlines in the Food Safety Modernization Act,²⁷ but the FDA has thus far not been able to surmount the considerable analytical hurdles and White House-imposed review requirements that now make high-stakes rulemaking exceedingly difficult. Nearly four years after the statute was enacted, the agency has not finalized any of the regulations necessary to implement the statute's requirements for growers, processors, and importers of the foods that we all eat,²⁸ and foodborne illness outbreaks continue unabated.²⁹

In analyzing what the book has to say about rulemaking, Professor Farber focuses heavily on the role of the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget. Although Congress assigned to that office the quite modest task of implementing the Paperwork Reduction Act,³⁰ presidents since President Reagan have elevated that office to the role of general overseer of the regulatory process.³¹ Farber acknowledges that "OIRA has unquestionably impacted the rulemaking process" and that the "OIRA process has also undoubtedly slowed the regulatory process."³² But he takes away from the book "the impression that presidential selection of agency heads has been a more important factor along with influence by higher-level White House staff."³³ The business community derailed or slowed down regulations by lobbying OIRA officials, but it also accomplished that goal by lobbying

26. See, e.g., *id.* at 136–38 (describing some of the hurdles to actually writing the rules in the context of the FDA).

27. See *id.* at 253–54 (noting that the FDA had already missed some implementation deadlines after sixteen months).

28. See Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEXAS L. REV. 1139, 1140–42 (2014) (discussing the continuous delay at the FDA and some of its factors).

29. *Id.* at 254 (referring to cantaloupes infected with salmonella that infected other people and honeydew melons that were recalled due to contamination with listeria).

30. See 44 U.S.C. § 3503 (2006) (establishing OIRA to implement the Paperwork Reduction Act).

31. MCGARITY, *supra* note 3, at 69.

32. Farber, *supra* note 2, at 427–28.

33. *Id.* at 428.

agency leaders in connection with major rulemaking initiatives, inundating the agencies with blunderbuss comments on particular proposals, and challenging final rules in court.³⁴ The overall effect of the four assaults on rulemaking was to slow down the progress of rulemaking, prevent or derail many rulemaking initiatives that were not required by statute, and reduce the stringency of the rules that the agencies did promulgate.

Professor Farber agrees with me that “[e]fforts to stall or block rulemaking entirely have been more successful” than the attempts to roll back health, safety, and environmental legislation and that, consequently, “the regulatory statutes have never been fully implemented.”³⁵ But he maintains that the libertarians cannot be happy about the fact that the agencies have enacted more new regulations than they have repealed existing regulations.³⁶ This is undoubtedly true, but the business community should take some pleasure in the fact that the process for promulgating high-stakes rules has become so bogged down with procedural and analytical accretions, and so vulnerable to lobbyist-inspired political overtures from congresspersons and White House officials, that agencies rarely employ it when not compelled to do so by a statute or judicial order. For example, the Occupational Safety and Health Administration (OSHA) promulgated no regulations of any significance during the entire George W. Bush Administration and the first term of the Obama Administration.³⁷ When compared to the counterfactual world in which the four assaults on rulemaking did not take place, the current state of federal rulemaking is no doubt far more desirable to the business community.

III. The Assaults on Enforcement

It does not matter how stringent and comprehensive the regulations that an agency promulgates are if those regulations are not enforced. Referring to enforcement as the “Achilles’ [h]eel”³⁸ of regulation, Professor Farber agrees with me that the absence of effective enforcement may be the area in which the impact of the four assaults on regulation has been the most profound.³⁹ He distills from the book descriptions of the debilitation of the offices responsible for enforcement in each of the health, safety, and environmental agencies described there and highlights the light hand with

34. See MCGARITY, *supra* note 3, at 67–68.

35. Farber, *supra* note 2, at 428.

36. *Id.*

37. See MCGARITY, *supra* note 3, at 89–90 (noting that the only regulation passed by OSHA during the second Bush administration was a long-delayed standard that came in response to a direct court order and that inaction continued into Obama’s first term).

38. Farber, *supra* note 2, at 428.

39. See *id.* at 436.

which upper-level agency enforcement officials treated violators in some administrations, often over the objections of the inspectors in the field.⁴⁰

Professor Farber agrees with me that the overall evidence “demonstrates that agency enforcement budgets have not kept up with the scope of their responsibilities and that presidents unfavorable to regulation have used enforcement budgets as one way to deregulate without attracting public notice.”⁴¹ But he argues that this evidence may not tell the whole story. He correctly points out that state agency enforcers and citizen enforcement lawsuits can fill the gaps in the federal enforcement presence.⁴² This is only true, however, in the limited areas in which states have been delegated the power to enforce federal regulations and in which the relevant statutes provide for direct citizen enforcement against violators. While virtually all states have empowered their own environmental and food and drug agencies to enforce the relevant federal laws, not every state has the equivalent of the Consumer Product Safety Commission, and state enforcers play virtually no role in enforcing the regulations governing airline safety and offshore drilling for oil and gas.⁴³ Only a very few federal statutes, concentrated in the area of environmental protection, empower private citizens to sue in federal court to enforce federal regulations.⁴⁴

Professor Farber also mentions the role that state tort law can play in providing an incentive to comply with federal regulations,⁴⁵ pursuant to the “negligence per se” doctrine under which a defendant’s violation of a statute or regulation gives rise to a presumption that the defendant’s conduct was negligent.⁴⁶ Here it may have been useful for Professor Farber to draw on the chapter in *Freedom to Harm* that describes four similar assaults by the business community and its allies in the idea infrastructure against the civil justice system in the states.⁴⁷ As a result of these protracted assaults, in many states, legislators and elected judges (both assisted by

40. *Id.* at 429–36.

41. *Id.* at 436.

42. *Id.*

43. MCGARITY, *supra* note 2, at 15 (discussing state implementation of environmental, food, and drug agencies to monitor those areas at the state level); *id.* at 183–96 (examining the goals and limitations of the Consumer Product Safety Commission); *id.* at 148, 150, 158 (describing the establishment of the Federal Aviation Administration (FAA) and later cuts in the FAA’s funding for inspectors that could only be filled with inspectors hired by the airlines themselves); *id.* at 114–15, 117 (describing the *Deepwater Horizon* oil spill and the limited national response and concluding that few significant measures have been taken to promote long-term safety).

44. *Id.* at 279–80.

45. Farber, *supra* note 2, at 436.

46. *See id.* at 436 & n.214.

47. *See* MCGARITY, *supra* note 3, at 197–214.

generous campaign contributions from the business community⁴⁸) erected barriers to liability that prevented juries from holding defendants accountable for their irresponsible conduct.⁴⁹ In any event, Professor Farber would probably agree that after-the-fact jury awards for conduct that crippled innocent victims are no substitute for before-the-fact enforcement of rules designed to prevent death and injury.

Conclusion

Professor Farber is persuaded that “the major regulatory statutes have never been fully implemented” and that this is not a good thing from the perspective of advocates for strong regulatory protections against irresponsible corporate conduct that poses risks to others.⁵⁰ At the same time, he suspects that “libertarians may also be dismayed by the facts that, despite everything, the statutes are still there and the body of regulations implementing them seems to get larger every year.”⁵¹ He notes that observers with an economic bent might also be disappointed by a “slow and erratic” regulatory process that does not expeditiously put into place rules with positive benefit–cost ratios and an enforcement regime that does not insist that companies subject to those rules comply with them.⁵² I do not expect that many members of the business community are in the first group. I suspect that the second group contains a much larger number of corporate officials than the first. To the many business leaders who are in the third category, I can only echo Professor Farber’s observation that a broken regulatory system may not ultimately be in their best interest and urge them to call for an end to the ongoing assault on the protective governmental infrastructure that Congress has created to protect consumers, workers, public health, and the environment.

48. See, e.g., at 206–09 (noting how Karl Rove, a tobacco-industry lobbyist at the time, picked Texas as a battleground state for tort reform, where he funneled \$10 million in business-community funds into the campaigns for new judges who would promote his cause). Chapter Fifteen, titled “Civil Justice,” provides more details about these assaults on the civil justice system.

49. *Id.* at 208–09.

50. Farber, *supra* note 2, at 437.

51. *Id.*

52. *Id.*