Book Review From the Great Recession to the Covid-19 Pandemic
A Financial History of the United States

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BOOK REVIEW:
FROM THE GREAT RECESSION TO THE COVID-19 PANDEMIC A FINANCIAL HISTORY OF THE UNITED STATES

Rigers Gjyshi

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I. INTRODUCTION

In the most recent addition to his Financial History of the United States series,1 Professor Markham takes us through another decade-long journey that is complete with villains, heroes, political scandals, IP theft, and much more. He skillfully follows the progression of historical events over the years, while also pausing for deep dives into specific topics that transcend the years. In addition to providing the facts, the author goes the extra mile by layering his analysis and drawing conclusions to aid the reader in understanding the true impact of the events. His approach is helpful for two reasons, first, it provides the reader an overview of historical events related to a particular topic; second, it gives a roadmap for additional research in that topic.

To its core, the book is a chronicle of significant events that impacted the U.S. and international financial systems from the Great Recession—which turned out to be a foundational transformation of our financial and regulatory systems—to the Covid-19 pandemic, which upended life as we know it (without a doubt exciting times to be a human, though readers of his prior volumes likely felt the same). The book, with its slick cover and eloquent writing, is sure to engage a wide audience: from the casual reader to academic researchers and practicing attorneys. To be sure, the book will likely create more questions than answers and will prove to be a true bonanza to those who have an inquisitive mind.

In writing this review, there were plenty of topics that warrant further attention, but there are two areas that come into focus. First, the impact that the Great Recession had on American (un)employment. Second, the impact of information asymmetry on our financial markets and the cutthroat race to monetize that asymmetry. This review focuses on those areas.

II. FAILURE TO LAUNCH—A PERSPECTIVE ON THE IMPACT OF GREAT RECESSION ON THE AMERICAN LABOR FORCE

As the author journeys through the Great Recession, the reader readily sees the impact on their personal and professional lives. One example is the student loan explosion. The author points out that “[t]he amount of outstanding student loans increased from $253 billion in 2003 to $966 billion in 2012,” and much of it was funded by the federal government. At first look, the figures are mind blowing, but upon further inquiry one realizes that this was a byproduct of mass unemployment—the national unemployment rate doubled from 5% in 2007 to 10% in 2009. Under pressure to address such high unemployment, the federal government decided to effectively socialize education, and offered unemployed Americans the choice to go back to school to retool/reskill and become more competitive instead of facing periods of idleness further undermining one’s professional security. By and large, we chose to go back to school, and by 2010, some 20.4 million Americans were enrolled in a post-secondary academic institution—that figure stood at 17.2 million students in 2006. Some would argue that this mass re-education of the American workforce, though not cheap, served as one of the biggest investments in the American workforce and may have served as a catalyst to the ensuing digital revolution and artificial intelligence era.

The challenge, as the book points out, however, was the typical case moral hazard whereby colleges (undergraduate and graduate) were charging premium at the taxpayers’ expense—by 2018, the amount of outstanding student loans stood at about $1.5 trillion—with no accountability (self or otherwise) on the part of the college administrations or the federal government at a time when the American taxpayer was under severe financial stress.

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2 Id. at 64.
5 MARKHAM, supra note 2, at 64.
Another challenge with this “get-back-to-school” approach is that it seemed more focused on lower skilled positions (nearly half of the post-secondary enrollment was at two-year community colleges) and resulted in depressed wages across the professional spectrum. Imagine a world where a new graduate with high student debt has six months to monetize their degree in a world of 10% unemployment. For some, the result was a “race to the bottom” that required compromising for positions that were once attainable without incurring that debt. Take legal employment, for example. The formula used to be simple: put in your time in law school, graduate top 10% of your class (optional, though preferable), and turn a summer internship into a well-paying associate position. As the aftermath of the Great Recession unfolded, however, that formula went out the window along with the job offers. New graduates from eminent law schools, which were charging outlandish tuition rates in exchange for near-guaranteed employment, were being told they no longer had a job. This created a waterfall effect whereby these attorneys were now applying for positions (e.g., insurance defense) that would otherwise be for graduates from lesser-known schools (which were also boasting very high post-graduation employment rates), or positions that would normally be reserved for non-lawyers (e.g., regulatory compliance). Indeed, in the aftermath of the Great Recession, unemployment in the legal field rose significantly, with some 2,000 jobs being lost in 2008, compared to an increase of over 8,000 positions the year before.

The Great Recession affected the American and world economies in a scale not seen since the Great Depression. For early career professionals, especially so-called knowledge workers, this meant a significant delay in their career growth and wages from which we never recovered. In 2010, President Obama declared that “Your future is in your hands. Your life is what you make it.” For those entering the workforce in that period, those catchy words reflected a bleak reality defined by a mountain of debt in an unemployed America.

6 Schmidt, supra note 4.
III. INFORMATION ASYMMETRY

A. Thoughts on High-Frequency Trading

An imperative that has held true during our history is that whoever controls access to information has a material advantage over the competition. This is particularly true in the financial markets with billions of dollars being spent to ensure first access to information. Take co-location and the attempt to regulate it.\(^\text{10}\) Co-location refers to the practice of placing computer servers as close to securities exchanges to secure first mover advantage over trading data, some of which is not public.\(^\text{11}\) As the author points out, despite regulatory focus on punishing insider trading and restrictions on accessing market information through Regulation NMS, preferential access to trade data (even non-public data elements) has become big business. Exchanges and peripheral businesses charge premium for early access to non-public trading data by high-frequency traders so they can incorporate the data points in their trading models and take advantage of non-public orders ahead of the competition.\(^\text{12}\)

To take advantage of the data, financial firms also spend heavily to hire talent that can write the algorithms to make sense of the data. The author touches on this when he describes the travails of Sergey Aleynikov, a former Goldman Sachs employee, whom the Justice Department, and later the state of New York, would spend significant amount of time and resource prosecuting.\(^\text{13}\) The FBI arrested Aleynikov while he was returning to the New York area from Chicago after meeting with a potential new employer, the Teza Group.\(^\text{14}\) The FBI charged that Aleynikov went to those meetings while in possession of his former employer’s proprietary source code.\(^\text{15}\) In diving more into the case, some additional facts prove interesting. The Teza Group was started by former Citadel employees, including Misha Malyshev, a Russian immigrant.\(^\text{16}\) Having trained as a physicist, even earning a degree in

\(^\text{10}\) See Markham, supra note 1, at 151–54.


\(^\text{12}\) Markham, supra note 2, at 151–54.

\(^\text{13}\) See id. at 117.


\(^\text{15}\) Id.

astrophysics from Princeton, Malyshev joined Citadel, where he helped develop a quantitate trading group that generated some $1 billion in annual profits and earned him about $200 million in compensation.17

Malyshev drew Ken Griffin’s ire, however, when it was revealed during Aleynikov’s arrest, that Malyshev had started his own trading firm. Citadel promptly sued, charging that Malyshev was in violation of a non-compete agreement. The allegations also charged that by hiring an accused software thief, there was a substantial risk that the Teza Group may also be illegally using proprietary code that was developed during Malyshev’s employment at Citadel.18 Though the case was based on shaky legal grounds, and only appeared to serve as a stalling tactic, it did result in Malyshev being convicted of two counts of perjury when it was discovered that he had scrubbed his computer hard drives, deleted active files, and gave testimony that he had not.19 Malyshev had argued that he had scrubbed his hard drive to get rid of pornographic materials that he had downloaded, however, a forensic review of the hard drives revealed that the scrubbing had lasted some two hours and included active files.20 Needless to say, Aleynikov did not join the Teza Group, which continues to be in business as a registered investment adviser, but the case illustrates the cutthroat tactics involved in accessing and leveraging information in the quantitative trading world.

B. Thoughts on Government Sponsored Insider Trading

The author also highlights another interesting challenge created by the information asymmetry: that of insider trading. Insider trading refers to trading securities of a publicly traded company based on material non-public information. For a successful prosecution of insider trading, one must prove, among other things, that the information was material (i.e., if it became known, it would affect the price of a security) and that it was non-public (i.e., the information was not available to the public), which presents its own challenges in an increasingly digital world where information sharing is near instantaneous.21 As the author points, insider trading was created through

19 Taub, supra note 17.
21 See 17 C.F.R. § 240.10b5-1 (2023).
administrative fiat whereby the SEC ruled that traders should have equal access to material non-public information.\(^{22}\) Since that decision, insider trading enforcement actions have become a routine weapon in the regulatory arsenal and typically involve some sort of a corporate insider (an employee or someone otherwise affiliated with the corporation) who owed a fiduciary duty to the corporation. That fiduciary duty requires that the holder of the information act in the best interest of the company and trading on that information, the argument goes, would be a violation of that duty because the insider used their position as an insider for their personal economic advantage.\(^{23}\) One challenge of this traditional view is that it does not account for third parties who are not corporate insiders and who may not owe a fiduciary duty to the corporation. Take for example, the hacker who hacked into the SEC database that contained confidential information about a company,\(^{24}\) or the government employee who may have been privy to non-public information about Covid-19 shutdowns; are they liable for insider trading if they traded on that information? Under the traditional theory of insider trading,\(^{25}\) the answer would appear to be a resounding “No,” though the underlying actions certainly appear illegal.

One legal theory that may be used to prosecute such cases is that of information misappropriation adopted by the Supreme Court in *United States v. O’Hagan*.\(^{26}\) In that case, the defendant, who was a partner at a law firm, obtained material non-public information about the firm’s client who was contemplating a tender offer.\(^{27}\) The partner was not directly involved in the representation and obtained the information through other conversations with other partners at the firm.\(^{28}\) Based on that information, O’Hagan bought stocks and options of the tender offer target. Once the deal was announced, O’Hagan exited his position at a profit.\(^{29}\) The question became whether the traditional theory of insider trading could support a conviction given that O’Hagan was not a fiduciary (i.e., insider) of the corporation to which the information belonged. The Court espoused the legal theory that gave rise to liability under SEC Rule 10b-5 when a person misappropriated (effectively embezzling it) the information and profited from it without disclosing it to

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\(^{22}\) See Markham, supra note 1, at 75 (citing *In re Cady Roberts*, 40 S.E.C 907 (1961)).


\(^{24}\) Markham, supra note 1, at 130.


\(^{27}\) *Id.* at 647–48.

\(^{28}\) *Id.*

\(^{29}\) *Id.*
the source of the information. The SEC later amended rule 10b5-1 to incorporate this new insider trading theory, but O’Hagan, like many other cases, put on display a challenge with insider trading jurisprudence; that is, given the nature of the crime, it is near impossible to devise a standard theory for prosecuting such cases, resulting in judicial lawmaking that is based on the fact pattern of individual cases.

Relying on court-driven jurisprudence, however, can be problematic because it is not designed to anticipate other areas of potential areas of concern. For example, insider trading took a new meaning during the Covid-19 pandemic and the ensuing global shutdown. Government actors, to contain the fallout from shutting down the U.S. economy, were consulting with key non-governmental entities (i.e., the Jaime Dimon’s of the world) in order to limit the impact that such a drastic measure would have on the economy. The question became whether the people who had access to the information were under a duty to abstain from trading in securities of publicly traded corporations. They clearly did not abstain, as the stock market crashed at an astonishing speed; at one point, during the so-called Black Monday 2 (yes, there a couple such Mondays), the Dow Jones Industrial index fell nearly 13%. This also presented a conundrum for those in the private sector who were working with the government to contain the fall-out as they had to consider whether to react to the shutdown information by serving the best interest of the companies to whom they owed a fiduciary duty, or whether they needed to abstain from trading in order to avoid a charge under the misappropriation theory of insider trading. The Securities and Exchange Commission saw this as a growing problem and ramped up its enforcement efforts. For example, it charged a Pfizer employee with Rule 10b-5 violations for trading Pfizer stock ahead of vaccine news, though it stopped at only issuing veiled threats to U.S. government employees who were found to have sold securities holdings after closed door meetings about the Covid-19 related shutdowns.

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30 Id. at 653.
31 17 CFR § 240.10b5-1 (2023) codifies that “manipulative or deceptive device[s] or contrivance[s]” in 17 CFR § 240.10b-5 (2023) to “include, among other things, the purchase or sale of a security of any issuer, on the basis of material nonpublic information about that security or issuer, in breach of a duty of trust or confidence that is owed directly, indirectly, or derivatively, to the issuer of that security or the shareholders of that issuer, or to any other person who is the source of the material nonpublic information.”
Even more concerning than private actors attempting fraud on the American taxpayer, however, were the actions of government officials. As the author discusses, there has been a long history of government officials taking advantage of the information asymmetry for personal enrichment (the Alexander Hamilton passage was particularly amusing given his veneered standing in the annals of American history).\footnote{Markham, supra note 1, at 117–18.} The practice led to the passage of the Stock Act in 2012,\footnote{STOCK Act, Pub. L. No. 112-105, 126 Stat. 291 (2012). The STOCK Act was intended to beef up the Ethics in Government Act of 1978, which also targeted the information asymmetry favoring government officials. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (1978).} which was indented to prevent insider trading by some government employees, particularly members of Congress. However, the Stock Act has proved to be somewhat of a non-event, with no known cases of current serving officials being charged, leaving only public outrage as the remedy. Particularly challenging is the fact that, aside from its general prohibition, it primarily relies on post-facto disclosures of securities transactions. In private institutions, e.g., investment and commercial banks, employees who may have access to material non-public information, generally have to pre-clear their personal securities transactions. That is, they must ask for permission before executing a trade. This control allows their employer to then determine whether the trade is permissible, shielding both the employee and the employer from potential liability. To fully implement this control, covered employees must disclose and give their employers full access to their personal securities accounts for monitoring. If a conflict is found then the trade request is denied, which is a far cry from the requirements under the STOCK act.

Another consideration is whether government officials can be held accountable under the misappropriation theory of insider trading under SEC Rule 10b5-1. The argument goes that the government official was privy to material non-public information, which was disclosed in confidence and used to affect a transaction for one’s personal benefit without having an ex-ante disclosure in place. Though intriguing, a successful prosecution would likely face a couple of challenges. First, rule 10b5-1 still requires the existence of a fiduciary duty by the person who provided the information. Secondly, proving intent in a successful charge of insider trading is a fact-intensive exercise and would likely require extensive discovery of Congressional records, putting it in a direct collision course of the U.S. Constitution’s Speech and Debate Clause. Third, any action would require some show of damages, and the question become who was damaged by these actions. The American people? This fraud on the market/people theory would likely result in many current politicians and their family members being subject to prosecution.
IV. CONCLUSION

Read it!