Securities and Exchange Commission
Oral History Project
Interview with Paul Mahoney
Conducted on March 29, 2011, by Kenneth Durr

KD: Interview with Paul Mahoney, March 29, 2011 in Charlottesville, Virginia, by Kenneth Durr. Let's go back to the beginning. I noticed that you started as an engineering major.

PM: That's right.

KD: Seems a little unusual for someone who came through your career track.

PM: No, actually I don't think so at all. Engineering is a problem-solving discipline. Law is a problem-solving discipline. I think the only barrier that engineers sometimes find in transitioning into law is writing skills. I was fortunate to have some very good instructors in college, both in writing and in the analytical part of engineering, so I think it was actually very good preparation for law.

KD: How far along were you at MIT when you started to think about law?

PM: Really not until the beginning of my senior year. I was having a little bit of concern about career choices, because I had done engineering work over the summers. While I liked the intellectual challenge of my coursework, I just didn't find the work that I was doing over the summers to be all that personally exciting and fulfilling. As it just so happened, I had been reading a number of works of history and biography in my spare

time and kept finding these lawyers popping up all over the place doing interesting things and decided that maybe I would give that a shot. I don't think it was an especially careful process, as might not be all that surprising when we're talking about a twenty-one year old. In any event, I'm glad I did it.

KD: You went to Yale.

PM: That's right.

KD: Tell me a little bit about the program as you found it when you got there. Who were some of the leading lights in the law program there?

PM: Yale at the time I was there had a reputation as a place that was halfway between a standard legal education and a free-floating PhD program. Obviously, an awful lot of its graduates end up becoming academics. I think in my class I'd probably estimate that 20 percent of my classmates ended up teaching somewhere or other.

I was very lucky at Yale because they have—like we do here at Virginia—one of your first year classes in a very small group. My small group professor was George Priest, who was, at that time, an up and coming young leader in the law and economics movement. I found that way of organizing my thinking about law to be quite powerful and persuasive. So George was someone who had a tremendous influence on my intellectual development as a lawyer.

I then took a course from Guido Calabresi, who also was a very important figure in law and economics. That just furthered my interest in law and economics as a methodology. I didn't end up moving into the same substantive areas of interest. George Priest was an antitrust and regulated industries scholar. Guido was a little harder to pigeonhole, but his most famous law and economics work was in torts. Those were not areas that I ended up moving into, but the methodology I found quite powerful.

KD: I think it might have been Frank Easterbrook who said that the Chicago school was really at Yale for a period of time. It sounds like this might have been that period of time.

PM: Certainly there were some very strong law and economics people on the Yale faculty at that point.

KD: You touched on one of my questions, which was antitrust. My understanding is that antitrust was really one of the areas in which law and economics worked itself out to a great degree early on.

PM: Exactly.

KD: Did you make a conscious decision to look elsewhere?

PM: No, I actually took just about every antitrust course that was available in law school and I

thought it was really interesting. That was what I planned to make my practice. Then I ended up taking evidence, of all things, from Ralph Winter, who had already been appointed to the bench by President Reagan. I was unbelievably lucky that he ended up hiring me to clerk for him, which was just one of the great pieces of luck of my entire career.

He had been a corporate law scholar of considerable prominence and success and also was interested in securities law, which he taught occasionally at Yale. He didn't during the time I was there, so I didn't have the chance to take it. That's another of the lovely ironies of this. I never took a course in securities regulation.

I found myself during my clerkship just spending an immense amount of time talking about corporate and securities law with Ralph Winter. That really persuaded me that that was where my intellectual interests were going to lie. I was also aided in that after my second year in law school, just before I took Ralph's evidence course, I was a summer associate at Sullivan & Cromwell and worked on some securities deals. Talking with Ralph about the intellectual context of that and having seen a little bit of it in the real world really lit the fire.

KD: I want to get back to that in a minute. Let's talk a little bit about the nuts and bolts of working in the second circuit as a clerk. How did Judge Winter divide up the work? How much did he give you to do?

PM: At that point in time he was quite new on the bench. I was one of his third set of law clerks. The chamber still ran fairly informally. It was as much an ongoing seminar as anything else. All four of us, the three law clerks and Ralph—and by the way, we called him Ralph—all just spent a lot of time each day debating and talking about the cases that were on the docket.

The clerks, of course, like in any chambers, did the bench memos that prepared the judge for a sitting. We did first drafts of opinions, but Ralph had a very strong sense of where he wanted the analysis to go. So oftentimes, you would try something out and he'd come back and say, "Let's move it in this direction." There was a lot of back and forth.

KD: Just verbally with him? Or would he take a pencil to it?

PM: Some of each. He certainly would sit down with a blue pencil and do a lot of actual revising. He would also just sit down and talk with you about where he thought the analysis needed to go.

KD: You're in the big show for securities and in corporate matters here in the second circuit.

PM: Yes, yes.

KD: Do you remember if there were some notable cases from which you learned a lot or got a lot of opportunity?

PM: Actually, the very first case I worked on when I came into the chambers was *United States v. Waste Management*, which was an antitrust challenge to a merger case. I remember having hours of debate about what was the right way to determine the potential anti-competitive impact of that particular merger. It began a theme that ran through that entire term.

We ended up having a lot of cases where Ralph, because he was also interested in antitrust, had a very strong opinion – he was very Chicago school, meaningin his view, the whole point of antitrust was to protect consumers. This was still an era in which the courts were coming around to that way of thinking, but they weren't all the way there yet. I remember in *Waste Management* we were really talking about what's best for consumers here? Can you get there given what the statutory standards are?

We had another case that was not an antitrust case, but a very similar idea, which I got a huge kick out of, the *Battipaglia* case, which was a case about New York's alcoholic beverage control law. The basic issue was the interaction between the 21st Amendment and the commerce clause and how much could New York regulate alcoholic beverage sales consistent with the commerce clause. Did the 21st Amendment just give a complete override to the commerce clause?

As luck would have it, a companion case—I guess not technically a companion case, but a case raising effectively the same issues, also from New York—ended up in the

Supreme Court the next year. Justice Marshall ended up writing the majority opinion, finding parts of New York's alcoholic beverage control law to violate the commerce clause.

Interestingly, it was a very similar analysis. How do you reconcile the states' constitutionally granted authority to limit alcoholic beverage sales with the rights—not of consumers in that state, because after all, the 21st Amendment does allow the state to regulate the sale of alcoholic beverages within its borders, but it doesn't allow it to regulate the sale of alcoholic beverages in other states. In each case, there was a pretty decent argument that one of the real purposes of the statute was to effectively harm consumers in other states, or certainly an effect of the statute was to harm consumers in other states. That ended up really triggering the alarm bells that went off in the Winter chambers whenever you saw consumers being harmed by something that was ostensibly for their benefit.

KD: Then that wasn't an antitrust case; it just sort of worked out with the same set of issues?

PM: Yes, it had the same set of issues about consumer welfare. There was a case involving FDA review of a medical device. I think it was called *Diapulse*. Similarly, the FDA seemed to have been applying its own standards for approving devices inconsistently, which led one to worry that the deciding factor was much more producer welfare than consumer welfare. That again set off the alarm bells in the Winter chambers.

KD: Now I noticed that Judge Winter had actually clerked for Thurgood Marshall, as well.

PM: Yes, yes, indeed.

KD: Is that where the connection was made for you?

PM: I don't have any doubt, although Ralph constantly denied that he had anything to do with my getting the job. I don't believe that for a minute. I don't have any doubt that his connection to Marshall was important, certainly to Marshall, in hiring me. That was, again, just a tremendous piece of luck.

KD: Tell me a little bit about your first day on the job, coming into the Supreme Court.

PM: It's overwhelming because the physical space is just so extraordinary. I think anyone would admit, no matter how much they might try to pretend otherwise, that physical space is an important part of how you relate to your task. Just being in this absolutely extraordinary building, where it just seemed like every surface was either marble or mahogany, and where as a twenty-five or twenty-six year-old law clerk, you have an office that's nicer than that of any partner at a law firm, it does make quite an impression on you.

Of course, you also are surrounded by these incredible people. The other clerks are just some of the most brilliant people I've ever been around. Of course, some of them I'm still around. One of the clerks from that term, John Setear, is on our faculty. Pam Karlan,

who clerked that year, was on our faculty for some years and is now on the Stanford faculty.

Bill Stuntz, who unfortunately just passed away, was clerking for Justice Powell. He ended up on our faculty here before joining the Harvard faculty. Danny Richman, who is on the Columbia faculty, was a clerk. Jon Weinberg, who is now on the Wayne State faculty, was another Marshall clerk. Rebecca Brown, who is on the USC faculty, was a Marshall clerk. It was just an extraordinary group of people.

KD: Sounds like you might have had the opportunity to get together and compare notes. Everybody's working for different justices.

PM: Oh, yes, yes.

KD: Tell me a little bit about what those conversations were like? What were the differences and the similarities that you folks would see?

PM: The Supreme Court has been analogized to nine law firms sharing the same space. I think that is actually a good way of thinking about it. The clerks were very cognizant of the fact that they belonged to a specific chambers. You ended up engaging in the kinds of negotiations that lawyers engage in with one another, sometimes with the client's explicit authorization, and sometimes just as an exploratory matter, to see what you might be able to take back to the client and see if there might be a deal to be had.

KD: You're talking about the terms by which there might be an agreement on a particular case?

PM: Exactly. You might know that another justice has a concern about a particular issue and so you might say, well, if you were to write the opinion this way, would that assuage the concerns, et cetera. Again, the justices themselves are having those conversations with one another and the clerks are having them. Everyone understands that the clerks are agents, not principals. So the justice may or may not do what you suggest. I think all the clerks were very good and sensible about that. Everyone kept in mind the fact that they were a law clerk and not a justice.

Marshall used to have this very funny and endearing practice, which would occur when you were in the justice's own inner office, talking about a particular issue with an opinion. You might be arguing, "Gee, we ought to write it a different way", either because that would bring another justice on board or just because you thought that was analytically the right way to go about it. You'd argue it back and forth.

Sometimes Marshall would conclude that he'd heard enough and you were not going to change his mind. Usually you could pick up on the non-verbal cues that he had made up his mind and further argument was going to be fruitless. If you persisted, he would sometimes, without even looking up, just raise his arm and point to the commission that was hanging on his wall, which was a nice way of reminding you that he was the justice

and you were the law clerk and he had the last word.

KD: One would think that he may not have the background in corporate law that someone even in your position might have had. Did you find that he would draw on yours and others' expertise in cases like that, more than others?

PM: I think when he started off on the Second Circuit he didn't have a lot of background and maybe even not a lot of interest in corporate law, but he developed it very quickly. He actually took considerable pride at having been on the court that got the most corporate and securities cases and having been effectively self-taught in those areas. He didn't, at all, shy away from corporate and securities law cases. He really drew on his experience on the Second Circuit in those cases.

He was also a tremendous admirer, although they would disagree on a lot of issues, of Henry Friendly. When you got a corporate or securities case, he would invariably ask whether Friendly had written any opinions in that area. He would often read whatever you brought to him that Friendly might have written to give him at least what he thought of as a well-informed perspective on the issue, even if he ultimately didn't end up agreeing.

KD: That's a lot of influence that Henry Friendly had from his position, I guess.

PM: Absolutely.

KD: Let's dig into some of the cases that came up, if you can remember any of those.

PM: The unfortunate fact is there were no securities law cases in which the Marshall chambers wrote that term. There were some very interesting cases involving, I guess one might just call it economic regulation, more generally, or perhaps even broader than that, just business-related cases, but not securities cases.

KD: Had you pretty much committed to studying securities law at this point?

PM: I was pretty sure at that point that I was transitioning out of my interest in antitrust and towards an interest in corporate and securities law, yes. There were some interesting regulatory issues that came up that term. I really had fun working on those cases in the Marshall chambers, and I can now speak on this a little bit more than I might have been able to previously because of the fact that the Marshall papers have been made available to scholars broadly. So people are able to go and figure out which law clerks worked on which cases.

I'm not saying anything that's not publicly available information, to say that my co-clerks—Danny Richman is now a criminal law professor and my other co-clerks were much more interested in the constitutional issues. I was the only clerk who was interested in the business-related questions, so it was nice to be able to work on a lot of those cases.

There was, for example, a case, *Exxon Corp. v. Hunt*, which involved whether parts of New Jersey's environmental cleanup cost recovery program were preempted by the Superfund statute. It ends up being largely a question of statutory interpretation and then applying the standard rules of preemption. It was certainly a case that was going to have a significant economic impact. I just remember working extremely hard on that case, thinking, "You really have to get this right because this has significant consequences for the economy."

There was a case called *FDIC v. Philadelphia Gear*, which involved whether a stand-by letter of credit issued by a bank against a promissory note that was collateral constituted an insured deposit. The majority said, “No, it doesn't. It really doesn't look like the other things that the FDIC covers as an insured deposit. “

Marshall decided to dissent based on the straightforward language of the statute, which seemed to count that instrument as an insured deposit, even though one might argue that that was not the smartest policy conclusion. It seemed to Marshall, and I think he was absolutely right about this, to be what the statute said.

Marshall had a real understanding of the costs associated with uncertainty. Obviously, he had a point of view about economic regulation that we would think of as a standard liberal point of view. But he didn't see any point in uncertainty as a regulatory tool. He thought you decide what to do and then you do it consistently, which I think is exactly

right.

KD: So let people know what the rules are?

PM: Let people know what the rules are so that they can arrange their businesses with the rules in mind. I think that was very clear in that dissent. I think it was generally clear in his approach to these regulatory cases.

KD: Did you see him change his mind in any of these cases?

PM: There was one case in which, and again, this is a matter of public record—it's been written on—he changed his mind. There was a case about summary judgment standards in antitrust, the *Matsushita* case. The idea was the plaintiffs, if I'm remembering correctly, were making a claim about anticompetitive conduct that was implausible on its face. To believe it, you would have had to believe that Matsushita was deliberately incurring losses over a period of decades just for some outside hope that someday they might be able to charge an anticompetitive price.

The question is can you grant summary judgment to the defense in a case like that? Marshall initially concluded that you couldn't grant summary judgment there. I wrote a bench memo before the case was argued, contending that this was actually an appropriate case for summary judgment. I cited some prior Marshall opinions as part of the basis for believing that.

Of course, the judges vote in conference. So they go into their conference room and only the justices are there. Marshall would come back from conference and he would tell the clerks, "Here are the cases where we're in the majority. Here are the cases where we are in dissent. Here's the opinions we've been assigned." So you'd know how the cases were coming out. He came back from conference and announced that the plaintiffs were going to win in the Matsushita case.

But then, I think it was that same evening or maybe it was the next day, he called the chambers after going home and said that on further reflection about the case he had changed his mind and that we should inform the other chambers of it. He ended up being in what was then the majority, finding that summary judgment was appropriate in the case.

KD: How important was it that it was a private plaintiff, rather than a government antitrust case?

PM: Marshall was a former solicitor general, as you know. I think he had a sense, from that experience, that the government's views on a case like that were probably entitled to a little bit of deference. I suspect that it being a private antitrust case did have some effect on his thinking.

KD: Any other high points of your time working with Justice Marshall?

PM: Really, the high point did not per se have to do with specific cases. The high point had to do with the fact that you were working for someone who was not merely a justice of the Supreme Court, but a true hero. Chief Justice Rehnquist, when Marshall stepped down, said very astutely that Marshall was perhaps the only person on the court who would have been famous as a lawyer even if he'd never sat on the Supreme Court. (Of course, Justice White would have been famous as a football player.) The Supreme Court was only the final act in what I think one could fairly say was the most extraordinary legal career of the 20th century. One got constant reminders of that in conversation with the justice.

KD: How so?

PM: Well, going back to the question, the high point of the clerkship was the fact that every day we would gather in the justice's office and it was basically almost like a case management meeting. You would just go through where we all stood with various assignments and who was working on what and what progress we were making, et cetera.

Inevitably, at some point, something that someone said would remind Marshall of a story from his bottomless well of stories and you would be treated to just some of the most extraordinary reminiscences that one could possibly get. I recently saw Lawrence Fishburnein the play, *Thurgood.* It was really fun and a little bit chilling to hear some of the same stories coming out of Fishburne's portrayal as I had heard sitting in Marshall's

chambers.

KD: It must be something to be that closely connected with a legend.

PM: Yes, absolutely, absolutely.

KD: Well, let's move on. You went from there to Sullivan & Cromwell?

PM: That's right, yes.

KD: It sounds as if you were academically inclined. Did you intend to make a go of the practice or what were you thinking at that point?

PM: At that point I wasn't sure whether I wanted to be an academic. I was sure that if I ever did become an academic, it was going to be in corporate and securities law. It seemed to me that that was a field in which one really needed to get practical experience, certainly to have credibility as a teacher. I went in really not knowing. I thought there was a possibility that this would be something that I would continue to do for a full career. I thought that there was also a possibility that I might end up trying something else, whether it was working in government or working as an academic.

KD: Tell me what kind of work you were able to do. I would assume that you'd come in as something of a generalist at the entry level in the firm.

PM: Yes. As a young lawyer there are two strategies that one can follow. One can try to become incredibly knowledgeable and competent about a particular area that you think is going to be an important one in the practice and become sort of a go-to person on that type of transaction or issue or what have you. Or you can take what I think is a riskier, but ultimately potentially more rewarding tactic, which is to stay a generalist. I could see at Sullivan & Cromwell and other firms at that level that there were people among the very senior ranks whom every client wanted to talk to when they had something that was a new problem that had never really come up before.

Rodge Cohen, who was recently the chairman of Sullivan & Cromwell, and Bill Williams, who was one of the leading securities lawyers of his generation, were folks that a client always wanted to hear what they thought about an issue that was just a new issue or for which there was no clear answer. That seemed to me to be the type of lawyer you really wanted to be; someone who had a sufficiently broad scope of experience and understanding so that when there was a new problem, you were there helping figure out how to solve it.

KD: So how did you go about doing that?

PM: I tried to be fairly ruthless about what assignments I took on and didn't take on. I tried very hard to do a broad range of things. I did some securities offerings, some M&A, some bank regulatory work, some bank transactional work, a little bit of investment

company work, really tried to do as many different types of things as I could and just learn as much as I could.

KD: You must have been spending a lot of time learning, I would think.

PM: Yes, that was an incredibly intense period. I worked long hours. My wife was working long hours, too. She was at Wachtell Lipton doing M&A, so I think we both sort of understood that this was just going to be a period of our lives when we would work insane hours, but that that probably wouldn't be true our entire lives.

KD: Any notable cases that we should talk about, particularly having to do with securities?

PM: A couple things I would say. I was practicing during the relatively early days of structured finance. One would've never imagined structured finance would become a household word twenty years later, but that, I guess, was notable. Certainly that was a period in which people were trying to work out what was the best way to structure these deals.

Similarly, my practice started at a relatively early stage in the development of the swaps market. Again, if you had told me that swaps would become a household name twenty-plus years down the road, I would've been very surprised by that. But that was, similarly, an era in which what was then the International Swaps Dealers Association, but later changed its name to International Swaps and Derivatives Association, was still working

out the documentation for swaps, so those were interesting times as well.

KD: Were you working for the investment banks?

PM: Most of my clients were investment banks, although I certainly represented a lot of issuers of securities and acquirers or targets in M&A deals, companies that were engaged in joint ventures or project financings of various sorts. Another thing that was just fascinating at that time was Margaret Thatcher's prime ministership in the U.K. So there were a lot of U.K. privatization transactions going on. Sullivan & Cromwell represented the crown or the investment banks in some of those transactions; in fact, many of those transactions.

KD: Did you have any interface with the SEC?

PM: Almost nonstop, because on any transaction you were working on, there would be the routine layer of interactions with the SEC. There were also a lot of informal conversations, just to get a sense of what the staff's views were on particular issues.

KD: Corporation finance, market reg, who would you talk to?

PM: More often corporation finance. One thing that was a constant during the period I was practicing was investment bankers trying to come up with ways of providing a little bit more liquidity to privately placed securities. So Rule 144A comes in just as I'm leaving

to become an academic. That was really a response to a buildup of pressure behind the dam, because there were increasing numbers of private deals, especially of non-U.S. issuers. You had investment banks trying to figure out ways of providing some liquidity to the purchasers in those deals.

You found yourself really with angels dancing on the head of a pin, trying to figure out, "Well, would this be okay? Would this structure work?" You'd be asking questions of people on the staff. You'd be asking questions of other lawyers. "What do you think is okay here? Where are the boundary lines?" The boundary lines just weren't clear. So it was a very important step for the SEC to come out with Rule 144A.

KD: You're describing a series of transactions or consultations that informed that.

PM: Yes. I think the same thing was basically true with Regulation S, which also came down the road just as I was ending my time in practice. Similarly, there was just constant questioning in the Eurodollar market about what are the rules. Because the rules were what one might call a common law, you have the original SEC release on the topic and then you have what people have done, and what the staff had seemed to get nervous about, and what it hadn't seemed to get nervous about. There was a constant process of trying to figure out, as market conditions changed and issuers wanted to tweak what they'd done before, what tweaks were okay and what tweaks were not okay.

KD: Were you still practicing when the recession in 1990 hit?

PM: My last day on the job was somewhere around April or May 1990. It was in the early stages of that recession.

KD: So not seeing any fallout from your clients at that point?

PM: No, that's right.

KD: Tell me a little bit about the decision to go into teaching and what brought you here.

PM: An important part of the decision to go into teaching was that so many of my former co-clerks and friends were academics. I'd encounter them and they would just rave about what a wonderful job this was and how much they enjoyed it. I think both Julia, my wife, and I were reaching a stage of really having to decide, do I want to position myself for this to be what I do for the rest of my career? Or do I want to try something different?

I don't know that the decision-making process was the most careful and analytical one, but we both had this gut feeling that maybe this was a good time to take a little bit of a risk and see if it panned out. I decided to give this a try. At that stage, the hiring process was a little less formal than it is today. Today there is this AALS job fair in Washington D.C. and pretty much everyone goes through that.

In that era, it was entirely possible to get on the radar screen by just writing letters to the

deans of law schools and saying, "I'm interested in teaching," and see what would happen. I wrote to probably about a dozen law schools, basically all places where there was at least some tradition of strength in law and economics. I knew that was going to be my research methodology. I also knew that unlike a lot of people who, at that time and certainly later, were going into the fields I was interested in, I don't have a PhD in economics. I thought it was really essential that I go to some place where you had people who were working at the cutting edge that I could learn from.

Virginia was a very strong center for law and economics and so that was one of the places that I was particularly interested in. I also had friends on the faculty. Bill Stuntz and Pam Karlan, whom I've mentioned, who I clerked with, were here on the faculty. Dan Ortiz, who was a year ahead of me in law school and as a law clerk, was on the faculty here. Saul Levmore, whom I'd known a little bit prior to coming down here, was on the faculty. John Jeffries, who actually had taught me criminal law as a visiting professor at Yale, was on the faculty here. It certainly was a nice place to come and interview and get to know people.

I was just amazed at the place, I really was. It stood out among all of the law schools that I interviewed with because the faculty was a real community. People, even though they worked in different methodologies and different substantive fields, reaching different conclusions, all were incredibly warm and cooperative with one another.

The other thing that astonished me was how happy the students were. I thought my law

school experience at Yale was a lot of fun and interesting and the students got along well with one another. But Virginia had really taken this to another level. The students just seemed incredibly kind to one another. They also seemed remarkably close to the faculty. People were very much on a first-name basis and got along with one another and that all struck me as being incredibly healthy.

KD: I'm intrigued by your research agenda and how it worked itself out in the last twenty years. That's a huge subject, lots of complications. I would like to attempt to tackle some of the high points in the next few minutes, if I can. Had anyone, using law and economics as a methodology, dug as deeply into securities law in the early 1990s as you were anticipating doing? Was there someone that you could talk to and say, "This is where I want to go?"

PM: Yes. There were certainly people, I think of Dan Fischel and Frank Easterbrook as being two obvious examples, who were using law and economics to say important things about securities regulation. Bernie Black went into teaching just a little bit before I did. He had some very impressive technical skills and was also working in that area. The same thing is true of Marcel Kahan, who also entered teaching about the same time as I did. Jennifer Arlen is another person who entered teaching just a little bit before I did and was interested in securities law. So there were people a little bit older, like Dan and Frank, and then there were people more or less my same generation. There were plenty of people to talk to about how you go about doing this.

KD: I'm going to jump around. I'm picking on some of the subjects that I find intriguing and if I'm missing something important, let me know. One of the first highlights is the mandatory disclosure and agency problems paper which really puts you right into the middle of the kinds of subjects you're going to look at. Where did that come from? How did you develop that interest and then build it up?

PM: During the entire time that I was practicing, I would notice that if one were talking to staff at the SEC, they had a genuine pride in the history of their agency and the role it played in the new deal. That was a very healthy thing. The SEC was, and I think still is, an incredibly talented group of people. Because of the role it played in shaping the modern securities markets, it was able to attract extraordinarily talented people. I thought that that sense of the agency, as having a past, was something really positive.

There was also a negative. I thought that often the agency's views about its own past, or perhaps more accurately, the past of the markets and how regulation affected the markets, was a little uncritical. A goal that I had right from the first day I became an academic was to better understand what the markets had been like prior to the SEC, what the law had been like prior to the SEC, to understand how the securities reforms of the 1930s and the creation of the SEC affected that and really, one might say, just to do a revisionist history of the New Deal securities reforms.

I think that in finance, as in war, the winners tend to write the history. Most of what I read about the 1920s and thirties and the role of securities law and the SEC seemed to be

written from a somewhat triumphalist perspective. It seemed to me that it was past time for someone to go back who didn't have a particular axe to grind and just say, "What really happened?" One of the first things that struck me as I did that was how much of the basic framework of the '33 Act, in particular, had been anticipated in prior law. That was really the origin of that particular paper.

KD: The point being that the prior law was informed by the needs of the industry as it existed, the dominant players in the industry in those previous years?

PM: Yes and it was attentive to the persistent principal/agent problems that, in some sense, are the root issue that one deals with everywhere in corporate and securities law. I thought prior law was quite attentive to the existence of those problems. One of the big messages of the paper is that subsequent scholars and regulators perhaps lost track of that and read into the '33 Act something that hadn't really been there at its outset, this idea that regulators could help people figure out what price to pay for a security. I just didn't think of that as being part of the original plan.

The original plan was that you were going to inform investors thoroughly about all of the myriad conflicts of interest that might lie beneath the surface of a transaction that they were considering. But whether this was a good deal or not on the merits was really not going to be a concern of the regulatory system.

KD: Now this is something you came back to with your political economy of the '33 Act?

PM: Right, yes.

KD: Essentially that's really the same concept. There's a few years between those, but do you see those as being part of the same overall project?

PM: Yes. The second paper just added on something to the first. The first asked about what the law was and wasn't and the second paper thought a little bit more about the institutional structure of securities regulation, both from the industry side and the regulatory side. It asked the question, "Did the existence of the SEC and the '33 Act affect the way in which the industry went about its business? Were they, in turn, able to shape the way the regulatory system worked in order to serve their own interests?"

It seems to me that's got to be the first question, or an early question you ask about any regulatory system. We all think about the regulators acting on the industry. I think you also have to ask, how does the industry act on the regulators? Does that provide benefits or costs to the ultimate consumers or investors, as the case may be?

KD: That's like a case of regulatory capture, or maybe regulatory co-optation, I guess.

PM: Yes, yes. I wrote a subsequent paper about the blue sky laws that had the same underlying task. Did the industry manage to get some of what it wanted from these reforms? Was that a good thing or a bad thing for investors?

KD: Tell me a little bit about the research process here. You weren't necessarily trained as a historian, but you're doing all kinds of historical work here. What kinds of sets of information would you use for the blue sky law project?

PM: What I would typically do is start with primary legal materials, that is to say, the statutes, the legislative history. In a number of states around the time of the blue sky laws, there were various sorts of legislative hearings or commissions that were put in place to try to investigate the industry. I would look at those records. I would look at contemporary press accounts. Although this is very hit-and-miss because you didn't have industry groups that were quite as well-organized as they are today, if possible I would look at documents from industry groups.

Certainly in the '33 Act paper there was an organization of investment bankers and they had an annual convention and people would give speeches and you'd see the transcripts of those. That was really very useful in trying to get a sense of what the industry was thinking and trying to infer from that what its strategy might be in dealing with legislatures who were clearly interested in creating some sort of reform legislation.

That would all be a piece of it. Then the question is always, “Is there systematic data that you can come up with?” For the '33 Act paper, I knew that there had been an antitrust suit against the investment banking industry in the late 1940s or 1950s. In fact, Sullivan & Cromwell had represented some of the investment banks in that, so I knew a little bit

about that litigation. It turned out that our library here at UVA had some of the documents that were produced in that litigation. There were other documents that were at other law school libraries and even Sullivan & Cromwell had a few bits and pieces of the record remaining.

From that I concluded that one could put together, not a 100 percent comprehensive, but certainly a reasonably comprehensive look at the underwritings that were done prior to the SEC, and then after the SEC, and say something useful about what was happening with the market share of the major investment banks in underwriting.

KD: Something that was a departure from those although working in the same area, and this is an article that's been cited a lot, is the exchange as regulator article. Does that fit in with this overall research program or is it somehow different?

PM: It's a little bit different, but I think in the same vein. What's different about it is instead of saying, "Here's what the law and framework looked like before the securities laws" versus afterwards, it's a little bit more of a thought experiment, saying, "Let's pretend for a minute we didn't have the securities laws. What do we think we would have? What kind of structures would ordinary principles of corporate law, contract law, property law, et cetera, create, plus extrapolation from what we know the industry was doing to regulate itself before the securities laws? What would that produce and what would that look like?" I think of it as being in service of the same basic idea, which is to compare the world without the regulatory system we have to the world with it, but here engaging

in a little bit more hypothetical reasoning.

KD: Given that, fifteen years on, are you surprised by some of the things that you've seen? What are the factors in the structure of the markets that you never anticipated when you were doing that work?

PM: Certainly technology has opened up a variety of trading platforms that really don't look much like traditional exchanges. I think the SEC has been right to spend a lot of time thinking about that and how the regulatory system ought to deal with that.

KD: Some of that was just emerging in the 1990s.

PM: That's right. It was very early days, yes.

KD: Terrific. Any other academic subjects that we should talk about before we sort of wrap up?

PM: No. I'm still really working, to the extent I can with my current administrative duties, on bits and pieces of what the pre-SEC markets looked like and how things changed once the regulatory system came into being. I know that's going to be an ongoing interest. I'm hoping, once I step down from this job, to be able to look more at what's happened in the last decade, from Sarbanes-Oxley through Dodd-Frank. With luck, by the time I'm done here, one will be able to look at before and after data and say something useful about that.

KD: You'll be at a bit more of a historical remove as well.

PM: Exactly, exactly. I think it's very hard to talk about these things when passions are still running high. I don't think that tends to produce the most careful analytical work.

KD: Something I'd love to wrap up with is your perspective on the business of teaching law and how the students and the professors have changed over the years. One of the points that one could take as a comparison is that you came in at a point where the law and economics movement was fairly new and there was a lot of vibrancy. What are you seeing now that reminds you of that?

PM: I think the behavioral psychology people are probably at a stage a lot like the stage law and economics was at when I went into teaching. They are able to say a lot of interesting and new things. I also think that there's a focus, at the moment, on the low-hanging fruit. As that field matures, they're going to have to get more systematic in developing kind of a broader perspective on how everything fits together.

KD: Corporate and securities law, are you seeing continued interest in that?

PM: Absolutely, because the students remain very interested in it. As a consequence, I think it's actually a great field for a young academic to go into. An awful lot of the people who go into academic life travel a path that will tend to push one into constitutional law,

administrative law, criminal law, et cetera. I think there's a lot of room for talented would-be academics to make a name for themselves in corporate and securities law.

KD: Terrific. Anything else we should talk about?

PM: I think that's good.

KD: Great. Thanks very much.

PM: Sure. You're very welcome.

[End of Interview]