



2009

Lawyers, Bureaucratic Autonomy, and Securities Regulation During the New Deal

Daniel R. Ernst

Georgetown University Law Center, ernst@law.georgetown.edu

This paper can be downloaded free of charge from:

http://scholarship.law.georgetown.edu/fwps_papers/115

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.

Follow this and additional works at: http://scholarship.law.georgetown.edu/fwps_papers



Part of the [Administrative Law Commons](#), [Banking and Finance Commons](#), [Corporation and Enterprise Law Commons](#), [Ethics and Professional Responsibility Commons](#), [Legal History, Theory and Process Commons](#), and the [Securities Law Commons](#)

GEORGETOWN LAW

Faculty Working Papers



September 2009

Lawyers, Bureaucratic Autonomy, and Securities Regulation During the New Deal

Daniel R. Ernst

Professor of Law

Georgetown University Law Center

ernst@law.georgetown.edu

This paper can be downloaded without charge from:
Scholarly Commons: http://scholarship.law.georgetown.edu/fwps_papers/115/
SSRN: <http://ssrn.com/abstract=1470934>

Posted with permission of the author

“I believe in the stock exchanges,” declared the New Deal lawyer Thomas G. Corcoran during a congressional hearing on the Securities Exchange Act of 1934. “I do not believe you should kill them. I do believe you should regulate them—not because I have any social philosophy in regard to the subject—but because as a sheer matter of economic wisdom they should be regulated.” Speaking not long after the Dow Jones Industrial Average had fallen 89 percent and joblessness reached 25 percent, Corcoran charged that unregulated financial markets “have cost many millions of dollars; they have cost 12,000,000 men their jobs.” With the lawyer for the New York Stock Exchange glowering nearby, he defended the bill’s grant of sweeping power to federal administrators. The stock exchanges “cannot be expected tamely to submit to regulation,” he advised. To create a commission to regulate America’s financiers and not to endow it with broad powers was to “put a baby into a cage with a tiger to regulate the tiger.” The danger was all too real that “the stock exchanges and the forces allied with stock exchanges, which are supposedly being regulated,” would actually “regulate the regulators.”¹

Corcoran and the other New Deal architects of securities regulation faced an old problem in American statecraft: how to endow public bureaucracies with the capacity and autonomy to address an economic calamity whose solution could only be worked out over time. In other industrial nations, university-educated aristocrats staffed royal or imperial bureaucracies that were well-entrenched long before the appearance of mass political parties. The United States, in contrast, bureaucratized after it democratized; patronage-hungry politicians and powerful organized interests already held the high ground when administrative agencies marched onto the field of economic governance.² The ensuing conflict had not gone well for the administrators. In the states, lackluster appointments and intrusive judicial review had made the attempts of

public utility commissions to set rates for water, gas, electric, and street railways “a failure, if not a farce.”³ The Interstate Commerce Commission had established itself as a legitimate regulator of the nation’s railroads but was bewildered by the catastrophic collapse in freight tonnage after the onset of the Great Depression.⁴ The Federal Trade Commission, created in 1914 with a broad mandate to check industrial combination and outlaw unfair methods of business competition, was “suffering from an advanced stage of bureaucratic rot.” Legislators roamed its halls at will; federal judges routinely overturned its orders. Its mission, critics complained, had shrunk to “preventing false and misleading advertising in reference to hair restorers,” “a somewhat inglorious end to a noble experiment.”⁵

The New Deal’s regulators of securities and related corporate matters avoided this fate; their authority and competence grew throughout the Thirties. The Securities Act of 1933, passed during the First Hundred Days, entrusted the Federal Trade Commission with the administration of a tough system of disclosure and registration for new issues of securities. The Securities Exchange Act of 1934 shifted those duties to a new Securities and Exchange Commission (SEC), regulated stock exchanges, and expanded the disclosure regime to include all publicly traded securities. In 1935 the SEC—the “greatest nest of New Dealers in Washington”—was drafted into President Franklin D. Roosevelt’s war on private power companies with the passage of the Public Utility Holding Company Act, which empowered the agency to order radical simplifications of the industry’s elaborate corporate structures.⁶ In 1936 and again, more extensively, in 1938, Congress expanded the SEC’s mandate to regulate the over-the-counter market in securities. The Chandler Act of 1938 and the Trust Indenture Act of 1939 extended the SEC’s reach to “protective committees” that reorganized failed corporations and to trustees

for the assets that secured bonds and other debt instruments. Finally, in 1940 the SEC's long investigation of mutual funds culminated in the Investment Company Act and the Investment Advisers Act.⁷

Two factors help account for the emergence of the SEC as a successful regulator of securities markets and related financial matters by 1940. First, a crucial group of "gatekeepers" to capital markets, corporate law firms located on Wall Street and other financial centers, were incorporated into the new regulatory system.⁸ Second, the securities regulators learned not only how to fashion a durable collaboration with populist and progressives in Congress but also how to use the SEC's talented staff and access to information to build a case and new constituencies for expanding their mandate. I consider each factor in turn.

Professionalism and Progress

To anyone taking a long view, the New Deal's turn to lawyers was not surprising. A century earlier, Tocqueville had seen the legal profession as an American analogue to European aristocracies. Their "study and specialized knowledge," he wrote, gave lawyers "a rank apart in society" and made them "a somewhat privileged intellectual class" and a ready supply of public officials. The progressive intellectual Herbert Croly later concurred. "No other great people, either in classic, medieval, or modern times," Croly maintained, "has ever allowed such a professional monopoly of governmental functions." Even by American standards, however, the New Deal was exceptionally a "lawyer's deal," to quote the historian Jerold Auerbach. "Not in any preceding administration had there been such dependence upon lawyers' skills or such

affinity for lawyers' values."⁹ And even by New Deal standards, the regulation of securities was exceptionally the work of a legal elite--lawyers who had either worked in large corporate law firms or at least had the credentials to do so, namely, top grades at law schools that employing the case method system of instruction, usually identified as Harvard, Columbia, and Yale.

The New Deal lawyers brought a great deal to securities regulation; they also had a great deal to learn on the job. What they brought, in addition to "Wall-Street-grade" legal talent, was first-hand or hearsay knowledge of the corporate law firm, a crucial actor in the finance capitalism of the early twentieth century. Since 1900, large, urban law firms had developed close and profitable relationships with investment banks and other financial entities. Critics charged that in the issuance of securities and, especially, in corporate reorganizations the Wall Street lawyers had forsaken "the traditions of the officers of the court" in their "avarice" for fees.¹⁰ The New Deal lawyers had to persuade the corporate lawyers to give up on self- or unregulated financial markets that had been so profitable for them and to take more seriously the role of gatekeeper to the capital markets. Even after the Stock Market Crash, the challenge was great. "There are still too many in 'the Street'" who believed that the corporate legal practice of the Twenties would "flourish as of old," the Harvard law professor Felix Frankfurter complained to his friend and president, Franklin D. Roosevelt. "It is hard for some folks to realize that new social and economic standards ever come into play."¹¹

The realization would come more quickly, the New Dealers realized, if corporate lawyers could see their own stake in the new regime. The Wall Street lawyers' rapid progress through the five stages of grief for the Old Deal can be seen in the system of disclosure established in the Securities Act of 1933. The act was part of the crush of legislation enacted in the First Hundred

Days with only weak and ineffective opposition.¹² But if the spring of 1933 was one of those rare occasions when money spoke and nobody listened, soon (in Frankfurter's words) Wall Street "got out of the storm cellar of fear" and "began a systematic campaign to undermine the essentials of the Act." Frankfurter was particularly angered by their "bleating" that the 1933 act "curbs legitimate investment business because no conscientious man can really undertake to make himself responsible for many of the facts as to which presentations must be made" in a registration statement. "There is no question," Frankfurter told FDR, "but that the leading bankers and big law firms are trying to create a bankers' strike."¹³

As the law professor John C. Coffee, Jr., has written, the crucial provision that sped acceptance of the new statute was the defense it gave to bankers, officers, and directors who unwittingly made a material misstatement after having conducted "a reasonable investigation" and acquired "reasonable grounds" to believe its accuracy. The businesspeople, in turn, counted on their lawyers to conduct the "due diligence" investigations that immunized them from suit. Due diligence quickly became "the mainstay of securities practice," Coffee observes, "a Full Employment Act for law firms."¹⁴ Robert T. Swaine, a titan of the Wall Street bar, believed that the securities laws and other federal regulation kept Cravath, Swaine & Moore afloat during the Great Depression. "Most of the larger corporate clients have issued securities since 1933, requiring registration with the SEC," Swaine wrote in 1948, "and most of those who have not had new issues have securities listed on stock exchanges, creating multitudinous problems and voluminous paperwork." Every stockholders' meeting raised "its grist of questions" about balance sheets, notices, proxy statements, and annual reports. All of it required the attention of a specialist, for no field of law contained "more pitfalls for the unwary banker or corporate

executive or for the inexperienced lawyer than that of SEC jurisdiction.”¹⁵

Coffee argues that the securities bar did not just profit from due diligence; they “accepted it as a normative concept.”¹⁶ Much evidence suggests that the corporate lawyers had accommodated themselves to the SEC’s growing mission by 1940, albeit often after a period of determined resistance. The Sullivan & Cromwell lawyer Arthur Dean lobbied against the securities act in 1933; in 1937 Dean considered its merits “out of the realm of controversy and bitterness.” It had become a permanent “part of our social fabric,” he wrote, because it represented “the aspirations of a people who do not again wish to see their life savings put in jeopardy.” The securities lawyer, Dean declared, should “endeavor to the best of his ability to see that no essentially important element is concealed from the buying public”; he must insist “that all of his questions be answered fully, fairly and frankly and that no avenues of investigation be closed to him”; and he must banish “‘Weasel’ wording” from prospectuses “to help the investor.”¹⁷ Wall Street lawyers “did all they could to assist us in achieving a reasonable result without lousing up the delicate financial machinery” of the securities industry, the second-in-command of the SEC’s Trading and Exchange Division recalled.¹⁸ At length, some of the lawyers’ more uncompromising clients wondered what had happened to the ideal of zealous advocacy. After being blasted in the Investment Banker for “selling the investment banking industry down the river in order to get the Investment Trust bill” through Congress, Dean ruefully wrote to Chairman Jerome Frank that “we will just have to have thick skins and grin and bear it.” He did not want anything to disturb “the very cordial relations which are being established between the Securities and Exchange Commission and the investment banking community.”¹⁹

Dean struck such a cordial tone because he saw Frank not just as an officeholder but also a professional peer, for Frank had been a masterful corporate reorganizer in Chicago and New York City. Much the same could be said for the corporate bar's view of the SEC as a whole. If, as the political scientist Daniel Carpenter has argued, successful administrators typically choose a governing metaphor that "defines the self-understanding of the agency as well as the view of the agency which prevails among those actors who oversee and interact with it," the SEC chose the law firm.²⁰ Lawyers constituted a majority of the five-person commission throughout the 1930s; in 1940 every division head (save publicity and research) was legally trained, each division had "a heavy quota of attorneys in key jobs," and the Legal Division itself accounted for a further ninety-five lawyers.²¹ As a rule, the SEC used the same meritocratic standard the law firms employed in selecting their associates, academic performance at elite law schools. (The trick, a general counsel explained, was to get to "crackerjack law students" before they "heard too many of the siren-songs of the well-flunkeyed metropolitan law shops."²²) Twelve of the first twenty-four lawyers hired for the Legal Division held law degrees from Harvard, another four had law degrees from Columbia or Yale, and at least one of the two Michigan law graduates had led his class. The three general counsels who served in the 1930s were all graduates of the Harvard Law School, and although the first had no personal knowledge of the corporate law factory, the second and third had worked at Cotton & Franklin and Milbank, Tweed, respectively. Other early SEC lawyers served apprenticeships at Gaston, Snow and Ropes & Gray in Boston and Sherman & Sterling and other leading firms in New York City.²³

The typical SEC lawyer adopted the work habits of a law firm associate rather than the clockwatching that prevailed at "old-line" agencies.²⁴ Entry-level salaries often exceeded those

of the law firms, and although a disparity would emerge and grow the longer they stayed in government, the SEC's lawyers still found consolation in knowing that they were "working on the side of the angels" and had weightier responsibilities than classmates who were still "carrying their 'bosses' briefcases" in the firms.²⁵ Gerhard Gesell, a brilliant Yale law graduate, recalled that when he started at the SEC in 1935,²⁶

[General Counsel John J. Burns] dumped responsibility on everyone willing and able to take it. If you survived, you got more to do. If you didn't, you shuffled papers in a back room. We were literally writing laws, then interpreting them, and then implementing and enforcing them by regulations and lawsuits. At the same time we were figuring out what additional laws were necessary to make the security markets work. It was a night and day and weekend business. The General Counsel's office was busy every night, often to midnight and beyond. There was much to be done. The "esprit de corps" was high, and of course the opportunities, particularly for a younger lawyer, unlimited.

The corporate bar grumbled about the youthfulness and brashness of many of the agency's lawyers. "Elderly financial practitioners think of the SEC as a place full of rookie traffic cops out making a record at the expense of sedate Sunday drivers," reported a business journalist. Presumably many were also put off by having to negotiate with the Legal Division's Jews and Catholics, who, because of their ethnicity, would have been denied a job at their firms.²⁷ Still, the ability of the SEC's lawyers meant that the Wall Street bar met them as

members of a shared professional community in which new norms of financial probity could take root and grow.²⁸

Political Learning

The corporate bar's acceptance of the securities regulation was not just a sociological development; it took a political event, the emergence of a coalition of New Deal lawyers and professional politicians, to force through the laws that finally convinced the Wall Street lawyers that their world had changed. In 1933, at least, the lawyers were very much the junior members of the coalition because of their near-total ignorance of party politics. Few knew how to obtain a political endorsement for their own job; as Vice President John N. Garner complained, they were "boys who had never worked a precinct."²⁹ Roosevelt, populist Democrats, and progressive Republicans put securities regulation on the legislative agenda; they voiced popular outrage and used their knowledge of congressional deal-making to get the SEC's statutes and substantial appropriations passed. Before long, however, the SEC's lawyers developed their own expertise in the use of political power. In part this was a process of fashioning a *modus vivendi* with professional politicians, but it was also "political learning" in a more technical sense, "the capacity to draw upon administrative resources of information, analysis, and expertise for new policy lessons and appropriate conclusions on increasingly complex issues."³⁰ SEC's lawyers, accountants, economists, statisticians, and other experts collected data on stock issues, the practices of broker-dealers and stock exchanges, and many other financial matters, which they used to write regulations, to create and perfect regulatory techniques, to bring enforcement

proceedings, and to draft legislation expanding the agency jurisdiction.

Such “entrepreneurial policy innovation” has been identified as a hallmark of “autonomous” bureaucracies, but the SEC’s initiatives took hold only as long as they addressed the partisan needs of their allies in Congress and the presidency.³¹ In its fullest sense, then, the New Deal’s system of securities regulation was a collaboration of professionalism and partisanship. The limits of what the collaboration could accomplish were reached by the end of 1939, after which policymakers subordinated concern for investors and the containment of finance capitalism to mobilization for war.³²

The historian Lizabeth Cohen has argued that the New Deal’s “growing attentiveness to consumers” was one way of “institutionalizing and protecting the public interest.” “Empowering consumers to speak for the public became a way of mitigating the power of other political blocs,” Cohen observed. It also permitted the New Deal to “resuscitate a severely damaged economy while still preserving the free enterprise system.”³³

Ceteris paribus, Cohen’s observation for consumers holds true for Franklin D. Roosevelt’s solicitude for investors. In his acceptance speech at the Democratic National Convention, Roosevelt endorsed the platform’s call for the regulation of utility and other holding companies, the control of stock exchanges, and the separation of commercial banks from broker-dealers and investment banks to “protect the savings of the country from the dishonesty of crooks and from the lack of honor so common in high financial places.” (“We know well that in our complicated, interrelated credit structure if any one of these credit groups collapses”—he had mentioned municipal and corporate bonds, mortgages, and railroad securities—“they may all

collapse. Danger to one is danger to all.”)³⁴ In his first inaugural address, with a bow to Justice Louis Brandeis, he called for “an end to speculation with other people’s money”; in a message to Congress he similarly insisted that “those who manage banks, corporations, and other agencies handling or using other people’s money are trustees acting for others.”³⁵ In March 1934 Roosevelt called for the regulation of stock exchanges to protect “the average investor, who is of necessity personally uninformed,” from the “unnecessary, unwise, and destructive speculation” of others. After the exchange act passed, he hailed it in a fireside chat as part of his administration’s program of ending “past evils in the banking system, in the sale of securities, in the deliberate encouragement of stock gambling, in the sale of unsound mortgages and in many other ways in which the public lost billions of dollars.”³⁶ In his second inaugural address, FDR touted the New Deal’s “practical controls over blind economic forces and blindly selfish men,” and in 1940, he characterized legislation regulating mutual funds and investment advisors as the latest milestone in his Administration’s “vigorous program . . . to protect the investor.”³⁷

Small wonder, then, that when Justice Harlan Fiske Stone, a former Sullivan & Cromwell partner, looked for the philosophy informing the various statutes the SEC administered in 1940, he settled upon the idea that the “investing public” no longer controlled the corporations it nominally owned and therefore required the help of “impartial and expert” administrators.³⁸ This was very much the view of the New Deal lawyers who drafted securities legislation and administered it at the Securities and Exchange Commission.³⁹ Many in Congress also championed securities laws as the best way to “restrict the gambling activities of a small group of men who have no interest in the welfare of the Nation, but who, regardless of the effect everybody knew it would have on the conditions of the country, ruthlessly manipulated the

markets and brought about the conditions from which the Nation is now suffering.”⁴⁰ Yet had the diffuse interests of investors been the only political force behind securities legislation, Congress would not have been able to pass so much of it over the concentrated opposition of investment bankers, stock exchanges, and utility companies. The SEC owed its successes in the 1930s not simply to its able lawyers or the protests of investors but also to congressmen from “sparsely settled” states, “colonized by New York capital.”⁴¹ In particular, as Corcoran recalled, the anti-colonialism pitch to the Texans to get free of the domination of New York and Chicago finance made them the prime movers in the legislation to regulate the investment houses, the stock exchanges, and the utility holding companies.”⁴²

The foremost of these was the chairman of the House Committee on Interstate Commerce, Sam Rayburn. As the historian Jordan A. Schwarz wrote, Rayburn “saw national economics with the eyes of someone who had worked the cotton fields of East Texas,” and, like all such cotton farmers, he “believed that railroads charged exorbitant rates to haul their cotton and that railroad finances were too closely tied to venal investment bankers in Wall Street.” His interest in corporate finance dated from a battle to give the Interstate Commerce Commission jurisdiction over railroad securities in 1914. When the Roosevelt administration’s first attempt to write a “truth-in-securities” law floundered, Rayburn accepted the offer of assistance, brokered by the Brain Truster Raymond Moley, from three of Frankfurter’s proteges, Benjamin V. Cohen, Thomas G. Corcoran, and James Landis. That a Midwestern Jew, a Northeastern Catholic, and a Princeton-educated son of a Presbyterian missionary could collaborate easily with a Baptist cotton farmer is only surprising at first glance. As Schwarz recognized, although the lawyers were Northerners and the congressman revered Robert E. Lee, they had a common

enemy in the old-money, Wall Street elite.⁴³

Their collaboration grew over time. In 1933, the “Three Musketeers” drafted the Securities Act and offered advice as Rayburn saw the measure through his committee, the House, and a conference with the Senate. They had a more public role in the more contentious drafting and passage of the Securities and Exchange Act of 1934. Corcoran’s masterful presentation of the bill in congressional hearings made him a hero among New Deal liberals and a bete noire to congressional conservatives, one of whom dubbed the Georgetown mansion Corcoran and Cohen rented “the Little Red House.”⁴⁴ Rayburn praised them unstintingly. “Taken together these two fellows made the brightest man I ever saw,” he enthused. “They never insisted on their own views. When I told them what I wanted, they started to work to put it into legislation, and they wrote it in such a way as to make it stick.”⁴⁵ The New Dealers were careful to repay the compliment. Corcoran, who would have a still more controversial role in the bitter battle over the Public Utility Holding Company Act, proudly acknowledged that “Rayburn taught me all the politics I know.”⁴⁶ He, Cohen, Landis, and William O. Douglas called the SEC the “Rayburn Commission”; Corcoran lobbied the Public Works Administration to finance a dam in Rayburn’s district; and Landis dedicated his Storrs lectures “to Sam Rayburn of Texas, whose quiet desire to serve his country has fashioned so greatly the administrative process.”⁴⁷

Rayburn, of course, famously advised a newly confirmed chairman of the Federal Communications Commission in the early days of the Kennedy administration. “Just remember one thing, son. Your agency is an arm of the Congress. You belong to us. Remember that and you’ll be all right.”⁴⁸ Rayburn’s relationship with the SEC in the 1930s was quite different. The FCC’s broadcast licenses were valuable political currency; the SEC was the custodian of no

comparable state-created patronage.⁴⁹ Further, Rayburn and his congressional allies knew that pressing too hard for the patronage the agency did possess—notably, legal positions—might jeopardize its ability to perform its complex regulatory mission. To be sure, as Landis awkwardly conceded, “in order to assure uninterrupted means for the effective pursuit of policies,” the commission could not ignore “personal antagonisms arising out of a disregard of patronage.” Yet the SEC’s top lawyers usually managed to keep patronage appointees off their legal staffs, typically by making them “trial examiners,” quasi-judicial officials who presided over hearings far from the commission’s councils of war.⁵⁰

Congressional leaders and agency lawyers realized early in Roosevelt’s first term that securities and corporate policymaking required them to work as a team. Rayburn and his allies would advance the ball as far as the existing knowledge of a problem and their votes in Congress could take them and then hand it off to the SEC. Sometimes the SEC would hand it back to Congress after having improved the chances for new legislation; sometimes it would just run with the ball itself. For example, Benjamin Cohen and the other drafters of the 1934 act realized that a sensible securities policy required not just the regulation of stock exchanges but also of trading on the much larger over-the-counter market. In 1934, however, that market was largely terra incognita, so Congress simply directed the SEC to make “comparable” rules and regulations for securities traded “otherwise than on a national stock exchange.” Milton Katz, a brilliant young lawyer who had worked on the investment bankers code at the National Recovery Administration, was hired to develop a policy. In 1936 the SEC went back to Congress for a modest amendment that drew upon accrued experience, and in 1938 it again returned for more extensive legislation, which took account of the emergence of the voluntary associations of

investment bankers, brokers, and dealers that became the National Association of Securities Dealers.⁵¹

Congress also helped the SEC by authorizing it to conduct investigations that made the case for further regulation. The most successful instance was a study of corporate reorganizations authorized by the Securities Exchange Act of 1934 and conducted by the Yale law professor William O. Douglas. While an associate at Cravath, Swaine & Moore, Douglas had labored on one of the largest and most lucrative reorganizations in American history, and he had studied corporate reorganizations as a professor, but he could not build a convincing case for reform until he acquired subpoena power and ample funding as chairman of the SEC's Protective Committee Study. One legislative product of his study, the Chandler Act, made corporate reorganizations far less lucrative for the legal elite; another, the Trust Indenture Act, did the same for a restructuring outside of bankruptcy.⁵² Other statutorily authorized investigations were less successful. Another study authorized in the 1934 act, looking to forbid traders from serving as both brokers for others and dealers for their own account, ended in a stalemate.⁵³ A study of mutual funds authorized in the 1935 act did not bear legislative fruit until 1940, after the SEC's liberal and populist supporters were overwhelmed by a coalition of conservative Democrats and Republicans. So compromised was the Investment Company Act that Joel Seligman, the leading historian of the SEC, deemed it the agency's "greatest legislative defeat during the Roosevelt administration."⁵⁴

Where Congress's original delegation of legislative power was broad enough, a well-funded and well-staffed SEC could take the initiative and force its opponents to overturn a rule in Congress, if they could. The "uptick" rule against short-selling, adopted in 1938, rested well

within the bounds of the Securities Exchange Act's delegation of the power, and Chairman William O. Douglas effectively marshaled extensive data collected by the Trading and Exchange Division in its defense.⁵⁵ Similarly, the SEC repeatedly strengthened its regulation of proxies under the 1934 act. A requirement that stockholders be told the names of officers paid more than \$20,000 (or about \$254,000 today) survived attack in a hostile Congress in 1943. On that occasion, a revival of populist protest against corporate capitalism, now in the guise of war profiteering, joined with concern for investors to preserve the agency's regulation.⁵⁶

How might this sketch of the emergence of securities regulation in the New Deal inform policymaking seventy-five years after the creation of the Securities and Exchange Commission? Surely not by identifying irrefragable lessons, for too much has changed in the interim. In 1934 the SEC had only the Federal Reserve Board as a substantial rival in the regulation of corporate and financial institutions at the national level; today these agencies are joined by the Office of the Controller of the Currency, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, and the Commodities Future Trading Commission in a "crazy quilt structure of fragmented authority."⁵⁷ In 1934 Thomas Corcoran could quickly dispatch the concern that regulation "might drive the exchanges to Montreal"; today "regulatory arbitrage" by corporations seeking the most congenial market for their securities is a well-recognized phenomenon, and international bodies are trying to head off a global race to the bottom.⁵⁸ In the 1930s corporate law firms had stable and extensive relationships with investment bankers and corporations; since 1970 they often handle only a part of a complicated financial matter, while an

in-house general counsel screens their view of the client.⁵⁹ Within government, lawyers no longer have the making and implementation of securities policy largely to themselves; in particular, the rise of risk management has shifted authority to economists and other more quantitatively adept professionals. Congress has much greater “legislative capacity” since the days when it needed Frankfurter’s proteges to produce securities bills for it, but its members have to negotiate a more complicated committee system and build larger campaign war-chests than Sam Rayburn could have imagined—including, by one reckoning, contributions of over \$7 million from hedge funds to congressional candidates in the 2008 election.⁶⁰

That said, the New Deal era of securities regulation may well be a source of potentially useful analogies for policymaking today. First, it suggests that policy makers might consider how the New Dealers designed securities regulation to give gatekeeping professionals in the private sector a financial and intellectual stake in the new system. In all likelihood, we will continue to need professionals in the private sector to acquire information and interpret rules and orders for their regulated clients; our regulatory scheme should be designed to let them do this comprehensively and authoritatively. Further, because any regulatory scheme is bound to be imperfect and incomplete at birth, it will take a village of private practitioners and government officials to bring it to maturity.⁶¹ Such a collective project is most likely to emerge and its premises become part of a shared professional identity if the government’s professionals are as talented as their private counterparts.

Second, the New Deal experience suggests the importance of fashioning a durable collaboration between agencies and their congressional and presidential supporters. Congress had to alter the balance of power to change the hearts and minds of “the Street.” The New

Dealers who drafted the securities acts quickly learned to address the partisan needs of their legislative sponsors as well as the economic logic of securities markets, not simply to pass the law but also to create a lasting constituency for the agency in Congress. In the 73rd and 74th Congresses, those needs were not limited to the protection of investors; they included Southern and Western grievances, dating from the nineteenth century, against Eastern capital. Very few of the Ivy-League-trained lawyers who created or staffed the SEC could claim that populist legacy as a birthright, but just as the drafters of the Interstate Commerce Act of 1887 saw to it that, in Landis's phrase, the "Granger viewpoint" was embodied in its provisions, so did the architects of the 1933 and 1934 acts try to infuse the commitments of its congressional majority into the statutes.⁶² They gave the SEC the capacity for political learning not to put it beyond the reach of partisan politics but to ensure that it engaged with partisan politics on favorable terms. Decades after its creation, the SEC continued to advance the enacting coalition's goal of regulating finance capitalism "in the public interest or for the protection of investors."⁶³

1. Senate Committee on Banking and Currency, Stock Exchange Practices, 73d Cong., 2d sess., February 27, 28, 1934, 6574, 6467.
2. Martin Shefter, Political Parties and the State (Princeton, N.J.: Princeton University Press, 1994).
3. Charles E. Clark to Benjamin V. Cohen, December 28, 1936, box 7, Benjamin V. Cohen Papers, Manuscripts Division, Library of Congress; see Keller, Regulating a New Economy, 58-65.
4. Morton Keller, Regulating a New Economy (Cambridge, Mass.: Harvard University Press, 1990), 45-55; James W. Ely, Jr., Railroads and American Law (Lawrence: University Press of Kansas, 2001), 269-70.
5. Thomas I. Emerson, Young Lawyer for the New Deal: An Insider's Memoir of the Roosevelt Years (Savage, Md.: Rowman & Littlefield Publishers, 1991), 30; Abram Myers, quoted in Pendleton Herring, Public Administration and the Public Interest (1936; New York: Russell & Russell, 1967), 115; see Keller, Regulating a New Economy, 39-40.
6. Joseph Alsop and Robert Kintner, Men around the President (New York: Doubleday, Doran & Co., 1939), 70.
7. For an expert and succinct summary of these statutes, see Louis Loss, Securities Regulation (Boston: Little, Brown, 1951), 82-103.
8. John C. Coffee, Jr., Gatekeepers: The Professions and Corporate Governance (New York: Oxford University Press, 2006), 1-3. For the SEC and the accountants, see Thomas K. McCraw, Prophets of Regulation (Cambridge, Mass.: Harvard University Press, 1984), 188-92.

9. Alexis de Tocqueville, Democracy in America, trans. Henry Reeve (London: Longman, Green, 1862), 320-31; Herbert Croly, The Promise of American Life (1909; New York: Macmillan, 1911), 132; Jerold S. Auerbach, Unequal Justice: Lawyers and Social Change in Modern America (New York: Oxford University Press, 1976), 226.
10. Securities and Exchange Commission, Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees (Washington, D.C.: Government Printing Office, 1937), 1: 212-23. On the corporate bar in the early twentieth century, see Robert W. Gordon, "The American Legal Profession, 1870-2000," Cambridge History of Law in America, ed. Michael Grossberg and Christopher Tomlins (New York: Cambridge University Press, 2008), 3: 92-98.
11. Felix Frankfurter to Franklin D. Roosevelt, July 6, 1933, in Roosevelt and Frankfurter: Their Correspondence, 1928-1945, ed. Max Freedman (Boston: Little, Brown, 1967), 147.
12. Lash, Dealers and Dreamers, 134-35; Joel Seligman, The Transformation of Wall Street: A History of the Securities and Exchange Commission and Modern Corporate Finance (Boston: Houghton Mifflin, 1982), 65-66.
13. Frankfurter to George A. Brownell, December 1, 1933, reel 69, FF-LC; Frankfurter to Benjamin V. Cohen, June 13, 1933, quoted in Joseph P. Lash, Dealers and Dreamers: A New Look at the New Deal (New York: Doubleday, 1988), 136; Frankfurter to Roosevelt, October 1, 1933, reel 133, Felix Frankfurter Papers, Manuscripts Division, Library of Congress (FF-LC).
14. Coffee, Gatekeepers, 202-04.
15. Robert T. Swaine, The Cravath Firm and Its Predecessors, 1819-1948 (New York:

- Cravath, Swaine & Moore, 1948), 2: 713-14, 704-5. Corporate lawyers were not always so appreciative. When the SEC's third general counsel "flippantly chided" an eminent corporate lawyer "for an apparent ungratefulness for the additional legal business the Securities Act brought to him," he "received the morose answer: 'Yes, the same way plague brings work to doctors.'" "Address of Chester T. Lane, General Counsel, Securities and Exchange Commission, before the Bar Association of the City of New York," May 5, 1939, <http://www.sec.gov/news/speech/1939/050539lane.pdf>.
16. Coffee, Gatekeepers, 204.
 17. Arthur H. Dean, "The Lawyer's Problems in the Registration of Securities," Law and Contemporary Problems 4 (1937): 154, 181, 182. Jerome Frank boasted of a similar conversion by a lawyer who initially thought the Chandler Act was "the craziest thing I ever heard of." House Committee on Appropriations, Independent Offices Appropriation Bill for 1941, 76th Cong., 3d sess., December 14, 1939, 396.
 18. The Making of the New Deal: The Insiders Speak, ed. Katie Louchheim (Cambridge, Mass.: Harvard University Press, 1983), 146 (Francis Thornton Greene). Much evidence of fair-minded exchange between SEC and Wall Street lawyers over the drafting of rules and forms survives. See, e.g., James M. Landis to Baldwin Bane, September 28, 1936, box 1, entry 171, inventory ww, Records of the Securities and Exchange Commission, Record Group 266, National Archives 2, College Park, Md. (RG 266); Arthur W. Dean to W.C. Gilman, June 29, 1937, box 31, entry 9, inventory A1, *ibid.*; John M. Dry to Harold Neff, February 11, 1938, box 35, *ibid.*
 19. Arthur Dean to Jerome N. Frank, August 2, 1940, box 27, entry 72, inventory UD, RG 266. The previous month Dean had told a study group on administrative law that

- although “I fought the Commission as hard as anybody and I have been as mad as anybody, . . . by and large we should work with these administrative agencies.” He expected to be able to work “things out in cooperation” with the SEC, provided its personnel remained “of proper caliber.” Transcript of Proceedings before the Attorney General’s Committee on Administrative Procedure, July 10, 1940, 142-43, box 2, entry 385, Records of the U.S. Department of Justice, Record Group 60, National Archives 2.
20. That is, the metaphor of the large corporate firm provided the SEC with a model of internal organization, including “an implied hierarchy” and “a portrait of the ideal-typical member,” and thereby fostered “cohesion, coordination, and commitment” among its staff. Daniel P. Carpenter, The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862-1928 (Princeton: Princeton University Press, 2001), 23-24.
 21. “SEC,” Fortune 21 (June 1940): 128. In the legal sociologist Terence Halliday’s formulation, the SEC was a “primary institutional sphere” for lawyers, in which their assertions of “technical” authority typically prevailed and their assertions of “normative” authority often did. Terence C. Halliday, Beyond Monopoly: Lawyers, State Crises, and Professional Empowerment (Chicago: University of Chicago Press, 1987), 29-47.
 22. Allen E. Throop to William O. Douglas, November 2, 1937, box 16, entry 172, RG 266.
 23. Joseph P. Kennedy to James P. Buchanan, January 14, 1935, www.sechistorical.org; James M. Landis to Austin W. Scott, December 27, 1935, box 1, entry 171, RG 266; Louis Loss, Anecdotes of a Securities Lawyer (New York: Little, Brown, 1995), 44; The Reminiscences of Chester T. Lane (1951), pp. 234, 180, Oral History Collection, Columbia University.

24. James H. Rowe, Jr., to Thomas G. Corcoran, [January 1939], box 211, Thomas G. Corcoran Papers, Manuscripts Division, Library of Congress.
25. Bernard Meltzer, interview by Kurt Hohenstein, September 24, 2005, 10, <http://www.sechistorical.org/collection/oralHistories/interviews/meltzer/MeltzerBernard09242005Transcript.pdf>; Loss, Anecdotes, 31. On salaries, see “SEC,” 168; Alexander B. Hawes, interview by Katie Louchheim, n.d., box 72, Katie S. Louchheim Papers, Manuscripts Division, Library of Congress.
26. Gerhard A. Gesell, “The SEC Years, 1935-1940,” box 171, Gerhard Alden Gesell Papers, Manuscripts Division, Library of Congress; see also Gesell, interview by Katie Louchheim, June 27, 1981, box 73, Louchheim Papers.
27. “SEC,” 128. On the ethnic chauvinism of the Wall Street bar, see Jerold S. Auerbach, “From Rags to Robes: The Legal Profession, Social Mobility and the American Jewish Experience,” American Jewish Historical Quarterly 65 (1976): 249-274.
28. Several SEC lawyers attested to this mutuality. Making of the New Deal, 143 (Milton V. Freeman); Meltzer, interview, 17.
29. The quoted language is a paraphrase by a press agent who overheard Garner’s remark. Russell Lord, The Wallaces of Iowa (Boston: Houghton Mifflin, 1947), 353. For a typical encounter of a New Deal lawyer with the endorsement system, see Reminiscence of Chester T. Lane, 239. One of the few Wall-Street-grade lawyers known to have been active in local Democratic politics before joining the New Deal, Edward Foley, may have been an exception that proved the rule. He worked for the leading New York law firm specializing in municipal bonds and therefore regularly dealt with politicians in his practice. (John Mitchell, Richard Nixon’s campaign manager and attorney general, was

also a municipal bond lawyer.) Foley would become general counsel of the Public Works Administration, which administered a \$3.3 billion appropriation, the nearest New Deal counterpart to our recent “stimulus package.” Frank Watson to Katie Louchheim, October 2, 1976, box 7, Louchheim Papers; U.S. News, May 15, 1939, box 82, Edward H. Foley Papers, Harry S Truman Library.

30. Hugh Heclo, Modern Social Politics in Britain and Sweden (New Haven: Yale University Press, 1974), 305-06, quoted in Kenneth Finegold and Theda Skocpol, State and Party in America’s New Deal (Madison, Wis.: University of Wisconsin Press, 1995), 63.
31. Carpenter, Forging of Bureaucratic Autonomy, 33.
32. Seligman, Transformation of Wall Street, 212-13; Reminiscences of Chester T. Lane, 580.
33. Lizabeth Cohen, A Consumers’ Republic: The Politics of Mass Consumption in Postwar America (New York: Vintage Books, 2003), 24.
34. Democratic Party Platform, June 27, 1932,
<http://www.presidency.ucsb.edu/ws/index.php?pid=29595>; FDR, Address, July 2, 1932,
<http://www.presidency.ucsb.edu/ws/index.php?pid=75174>. See Seligman,
Transformation of Wall Street, 19-20.
35. FDR, First Inaugural Address, March 4, 1933,
<http://www.presidency.ucsb.edu/ws/index.php?pid=14473>; “Message from the President,” Cong. Rec. 77 (March 29, 1933): 937; see Louis Dembitz Brandeis, Other People’s Money and How the Bankers Use It (New York: Frederick A. Stokes, 1914).
36. He also reminded the “very small minority of the people of this country” who believed in gambling on the stock market of “the old philosophy of Benjamin Franklin that the way to wealth is through work.” FDR, “Stock Exchange Practices,” 73d Cong., 2d sess.,

- February 9, 1934, Sen. Doc. No. 132; FDR, Fireside Chat, September 30, 1934,
<http://www.presidency.ucsb.edu/ws/index.php?pid=14759>.
37. FDR, Second Inaugural Address, January 20, 1937,
<http://www.presidency.ucsb.edu/ws/index.php?pid=15349>; “Statement on Signing Two
Statutes to Protect Investors,” August 23, 1940,
<http://www.presidency.ucsb.edu/ws/print.php?pid=15993>.
38. Securities and Exchange Commission v. United States Realty and Improvement Co., 310
U.S. 434, 449 n. 6 (1940).
39. Felix Frankfurter, “The Federal Securities Act: II,” *Fortune* 8 (1933): 53; William O.
Douglas, “Protecting the Investor,” *Yale Review* 23 (1934): 521-33; James M. Landis,
“Address . . . before the New England Council,” November 22, 1935,
<http://www.sec.gov/news/speech/1935/112235landis.pdf>.
40. 78 *Cong. Rec.* 7689 (April 30, 1934) (Adolph Sabath).
41. Jordan A. Schwarz, *The New Dealers: Power Politics in the Age of Roosevelt* (New
York: Alfred A. Knopf, 1993), 253.
42. Thomas G. Corcoran, interview by Joe B. Frant, July 26, 1969, box 602, Corcoran
Papers.
43. Schwarz, *New Dealers*, 252-53; Lash, *Dealers and Dreamers*, 130-36; Michael E. Parrish,
Securities Regulation and the New Deal (New Haven, Conn.: Yale University Press,
1970), 56-57. Another outspoken Southern defender of the SEC who excoriated power
companies and railroads was Mississippi’s John Rankin. George B. Shepherd, “Fierce
Compromise: The Administrative Procedure Act Emerges from New Deal Politics,”
Northwestern University Law Review 90 (1996): 1611-13.

44. Monica Lynne Niznik, "Thomas G. Corcoran: The Public Service of Franklin Roosevelt's 'Tommy the Cork'" (Ph.D. thesis, University of Notre Dame, 1981), 102-04; Max Stern, "The Little Red House," Washington-Times Herald, May 19, 1934.
45. Rayburn quoted in Niznik, "Thomas G. Corcoran," 110-11. That Cohen and Corcoran complied with a request to alter a bill did not mean that they gave up on the underlying issue. "If Ben took certain things of the bill in one place because he had to make a concession, he'd just slip it in somewhere else," Joseph Rauh recalled of Cohen's drafting of the Public Utility Holding Company Act. Joseph Rauh, Jr., interview by Katie Louchheim, January 4, 1982, box 73, Louchheim Papers.
46. Thomas G. Corcoran, Benjamin V. Cohen, and Kenneth Crawford, interview by Katie Louchheim, March 27, 1976, box 72, Louchheim Papers.
47. Schwarz, New Dealers, 147, 254; William O. Douglas, "Foreword," George Washington Law Review 28 (1959): 3; James M. Landis, The Administrative Process (New Haven, Conn.: Yale University Press, 1938).
48. Newton N. Minow, review of Politics and the Regulatory Agencies, by William L. Carey, Columbia Law Review 68 (1968): 384.
49. Louis L. Jaffe, "The Scandal in TV Licensing," Harper's Magazine 215 (September 1957): 77-84.
50. Landis, Administrative Process, 62; Making of the New Deal, 145 (Greene); Reminiscence of Chester T. Lane, 377-78; Rowe to Corcoran. Brief biographical sketches of the first twenty-four lawyers in the Legal Division suggest only one obvious patronage appointee, John F. Boland, who attended the Georgetown Law School in the evening while working as a congressional secretary. Kennedy to Buchanan. Bernard

Meltzer, who worked at the SEC from 1938 to 1940, could recall “only one guy in the whole General Counsel’s office that people had a question about,” and “he wasn’t there for very long.” Meltzer, interview, 21.

51. Senate Committee, Stock Exchange Practices, 6547 (Thomas G. Corcoran); Milton Katz to Willard L. Thorp, box 6, Milton Katz Papers, Harry S Truman Library, Independence, Mo.; Report of the Senate Committee on Banking and Currency on S. 3255, Sen. Rep. No. 1455, 75th Cong., 3d sess. (1938), in Milton Katz, Cases and Materials on Administrative Law (St. Paul, Minn.: West Publishing Co., 1947), 33-34; Seligman, Transformation of Wall Street, 138-44, 183-89.
52. David A. Skeel, Debt’s Dominion: A History of Bankruptcy Law in America (Princeton, N.J.: Princeton University Press, 2001), 101-27.
53. Seligman, Transformation of Wall Street, 144-49, 222-31. For a more favorable assessment of the outcome of the segregation study, see Parrish, Securities Regulation and the New Deal, 210-12.
54. Seligman, Transformation of Wall Street, 222.
55. Walter C. Louchheim, Jr., to William O. Douglas, October 5, 1937, box 23, entry 172, inventory ww, RG 266; Douglas, “Foreword,” 4; William O. Douglas, Democracy and Finance: The Addresses and Public Statements of William O. Douglas, ed. James Allen (New Haven: Yale University Press, 1940), 64-73.
56. Phil Nicholas, Jr., “The Agency That Kept Going: The Late New Deal SEC and Shareholder Democracy,” Journal of Policy History 16 (2004): 226-27; see Mark Leff, “The Politics of Sacrifice on the American Home Front in World War II,” Journal of American History 77 (1991): 1296-1318.

57. John C. Coffee, Jr., and Hillary A. Sale, “Redesigning the SEC: Does the Treasury Have A Better Idea?” (December 2008), 9, <http://ssrn.com/abstract=1309776>.
58. Senate Committee, Stock Exchange Practices 6569-70, 6578-79; Claire Kelly, “The Hardening of Soft Law in Securities Regulation” (March 31, 2009), <http://ssrn.com/abstract=1371188>.
59. Coffee, Gatekeepers, 224-30.
60. Center for Responsive Politics, “Hedge Funds: Money to Congress,” <http://www.opensecrets.org/industries/summary.php?cycle=2008&ind=f2700>.
61. For a influential assessment of the “proministrative state” in twentieth-century America, see Brian Balogh, “Reorganizing the Organizational Synthesis: Federal-Professional Relations in Modern America,” Studies in American Political Development 5 (1991): 119-72. James Willard Hurst discussed lawyers as “administrators of social relations” in The Growth of American Law: The Law Makers (Boston: Little, Brown, 1950), 345-46.
62. “Symposium on Administrative Law,” American Law School Review 9 (1939): 181.
63. Securities Exchange Act of 1934, Sec. 11(a).