The Administrative Origins of Mandatory Disclosure

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The birth of mandatory corporate disclosure is one of the defining narratives of the modern regulatory state. The brightest legal minds of their generation were called down from the ivory tower to help FDR rein in the excesses of Wall Street. Inspired by their intellectual mentor Louis Brandeis, they overcame fierce resistance from the securities industry (who opposed any regulation) as well as from the corporatist wing of New Deal reformers (who favored a broader economic planning role for the government) to craft a legislative solution that was so well-conceived that it has remained in place essentially unchanged for nearly a century–the Securities Act of 1933.

Except this foundational narrative turns out to be more of an origin myth. Drawing on archival sources, oral histories, and other primary documents, this Article presents a revisionist history of the origins of mandatory disclosure that looks past the abstractions of statutory text to the realities of administration. I show that the real mandatory disclosure regime implemented in the 1930s was not the Brandeisian statutory system crafted by legal luminaries, but was an entirely different, more corporatist regime invented by an obscure mid-level official in defiance of those legislative directives.

This Article excavates the lost history of mandatory disclosure. It is a story of how creative and resourceful administration by an ordinary mid-level official transformed – and likely redeemed – one of the foundational regulatory programs of the modern administrative state. But it is also a story of legislative failure by iconic lawyer intellectuals and their favored model of economic regulation.

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INTRODUCTION

Following the Crash of 1929 and in the Great Depression that followed, President Franklin D. Roosevelt took office with a mandate to crack down on Wall Street "money changers." An initial proposal, approved by the U.S. Senate, would have given the federal government broad economic planning power to pick and choose which companies could issue securities based on the underlying merits of the enterprise. A rival proposal, co-drafted by James Landis under the direction of Felix Frankfurter and the influence of Louis Brandeis, only required companies to make disclosures, leaving it up to markets to determine which companies were worthy of investment. Congress chose the Brandeisian disclosure bill. Ninety years later, this "truth-in-securities" law (official name: the Securities Act of 1933) still provides the foundation for the regulation of capital markets in the United States.

So goes the familiar, compelling origin story of mandatory disclosure in the United States. The brightest legal minds of their generation came down from the ivory tower to solve a critical, vexing public policy challenge—how to rein in the excesses of financial capitalism without discouraging socially valuable market activity. Applying their unparalleled expertise, raw intelligence, and political acumen, these men overcame fierce resistance–both from the securities industry, who opposed new regulation, and from "corporatists" in the New Deal government, who sought a broader economic planning role for the government–and crafted a bold, unprecedented legislative solution that was so elegant, so balanced, and so well-conceived that it has remained in place essentially unchanged for nearly a century.

Variations of this account of the origins of mandatory disclosure appear in histories of the New Deal,[2] the SEC,[3] investment banking,[4] and accounting,[5] and biographies and memoirs of key players.[6] It's repeated in judicial opinions,[7] legal treatises,[8] and

2. *See, e.g.*, MICHAEL HILTZIK, THE NEW DEAL: A MODERN HISTORY 85–92 (2011); ADAM COHEN, NOTHING TO FEAR 149–53 (2009); RONALD EDSFORTH, THE NEW DEAL: AMERICA'S RESPONSE TO THE GREAT DEPRESSION 193–94 (2000); ANTHONY J. BADGER, THE NEW DEAL: THE DEPRESSION YEARS 98–101 (1989); JOSEPH P. LASH, DEALERS AND DREAMERS 130–36 (1988); KENNETH S. DAVIS, FDR: THE NEW DEAL YEARS, 1933–1937, at 81–90 (1986); ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY 307–09 (1966); WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 58–60 (1963); ARTHUR M. SCHLESINGER, JR., THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL 440–42 (1958).

3. *See, e.g.*, JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET 1–72 (3d ed. 2003); MICHAEL E. PARRISH, SECURITIES REGULATION AND THE NEW DEAL 42–72 (1970); RALPH F. DE BEDTS, THE NEW DEAL'S SEC: THE FORMATIVE YEARS 30–55 (1964); A.C. Pritchard & Robert B. Thompson, *Securities Law and the New Deal Justices*, 95 VA. L. REV. 841, 849–52 (2009); Thomas K. laonaa, *With the Consent of the Governed: SEC's Formative Years*, 1 J. POL'Y ANALYSIS & MGMT. 346, 347–48 (1982).

4. VINCENT P. CAROSSO, INVESTMENT BANKING IN AMERICA: A HISTORY 352–58 (1970).

5. ROBERT CHATOV, CORPORATE FINANCIAL REPORTING: PUBLIC OR PRIVATE CONTROL? 31–36 (1975).

6. *See, e.g.*, DAVID NASAW, THE PATRIARCH: THE REMARKABLE LIFE AND TURBULENT TIMES OF JOSEPH KENNEDY 204, 215–16 (2013); MICHAEL PERINO, THE HELLHOUND OF WALL STREET 287–89 (2011); H.W. BRANDS, TRAITOR TO HIS CLASS: THE PRIVILEGED LIFE AND RADICAL PRESIDENCY OF FRANKLIN DELANO ROOSEVELT 334–37 (2008); JEAN EDWARD SMITH, FDR 323 (2007); WILLIAM LASSER, BENJAMIN V. COHEN: ARCHITECT OF THE NEW DEAL 71–81 (2002); THOMAS K. MCCRAW, PROPHETS OF REGULATION 171–76 (1984); MICHAEL E. PARRISH, FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS 233–37 (1982); BRUCE ALLEN MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION 131–36 (1982); DONALD A. RITCHIE, JAMES M. LANDIS: DEAN OF THE REGULATORS 43–48 (1980); NELSON L. DAWSON, LOUIS D. BRANDEIS, FELIX FRANKFURTER, AND THE NEW DEAL 78–81 (1980); ALFRED STEINBERG, SAM RAYBURN: A BIOGRAPHY 111–14 (1975); DAVID E. KOSKOFF, JOSEPH KENNEDY: A LIFE AND TIMES 54–55 (1974); RAYMOND MOLEY, THE FIRST NEW DEAL 306–15 (1966); JAMES M. LANDIS & NEIL NEWTON GOLD, THE REMINISCENCES OF JAMES LANDIS 155–72 (1964), *microformed on* Colum. Univ. Oral Hist. Collection No. 112 (Colum. Univ.); RAYMOND MOLEY, AFTER SEVEN YEARS 175–84 (1939); James M. Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29 (1959).

7. *See, e.g.*, Cochran v. SEC, 20 F.4th 194, 219 (5th Cir. 2021) (en banc) (Oldham, J., concurring); Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 170 (1994); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194 (1976); United Hous. Found., Inc. v. Forman, 421 U.S. 837, 849 (1975); SEC v. Cap. Gains Rsch. Bureau, Inc., 375 U.S. 180, 186–87 (1963).

8. LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, SECURITIES REGULATION 304–16 (6th ed. 2011); THOMAS LEE HAZEN, PRINCIPLES OF SECURITIES REGULATION 16–17 (4th ed. 2017).

casebooks,[9] in contemporary scholarship on securities regulation,[10] administrative law,[11] and disclosure,[12] and above all, in pronouncements by securities regulation policymakers.[13] SEC Chair Gary Gensler has invoked this origin story to justify and explain countless regulatory actions taken under his watch–from climate disclosure,[14] to

9. STEPHEN J. CHOI & A.C. PRITCHARD, SECURITIES REGULATION: CASES AND ANALYSIS 112–13 (5th ed. 2019); JOHN C. COFFEE, JR., HILLARY A. SALE, M. TODD HENDERSON, SECURITIES REGULATION: CASES AND MATERIALS 3–4 (13th ed. 2015); ALAN R. PALMITER, SECURITIES REGULATION: EXAMPLES & EXPLANATIONS 20–21 (6th ed. 2014).

10. *See, e.g.*, DONALD C. LANGEVOORT, SELLING HOPE, SELLING RISK 7, 19–20 (2016); ANNE M. KHADEMIAN, THE SEC AND CAPITAL MARKET REGULATION 23–31 (1992); ROBERTA S. KARMEL, REGULATION BY PROSECUTION 40–42 (1982); RUSSELL B. STEVENSON, CORPORATIONS AND INFORMATION 79–82 (1980); Michael D. Guttentag, *An Argument for Imposing Disclosure Requirements on Public Companies*, 32 FLA. ST. U. L. REV. 123, 125–26 (2004); Cynthia A. Williams, *The SEC and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1227–35 (1999); Paul G. Mahoney, *Mandatory Disclosure As A Solution to Agency Problems*, 62 U. CHI. L. REV. 1047, 1077 n.123 (1995); Jonathan R. Macey, *Administrative Agency Obsolescence and Interest Group Formation*, 15 CARDOZO L. REV. 909, 923–24 (1993); George Benston, *Security for Investors*, *in* INSTEAD OF REGULATION 175–76 (Poole, ed. 1982); Gregg A. Jarrell, *The Economic Effects of Federal Regulation of the Market for New Security Issues*, 24 J.L. & ECON. 613, 619–21 (1981).

11. *See, e.g.*, ROBERT E. CUSHMAN, INDEPENDENT REGULATORY COMMISSIONS 327–29 (1941); Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 413–19 (2007).

12. *See, e.g.*, ARCHON FUNG, MARY GRAHAM & DAVID WEIL, FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY 6–7 (2007); MARY GRAHAM, DEMOCRACY BY DISCLOSURE: THE RISE OF TECHNOPOPULISM 1–2, 13 (2002).

13. *See, e.g.*, Robert J. Jackson, Jr., Comm'r, SEC, Competition: The Forgotten Fourth Pillar of the SEC's Mission (Oct. 11, 2018), https://www.sec.gov/newsroom/speeches-statements/speech-jackson-101118 [https://perma.cc/D7W7-BXME]; Kara M. Stein, Comm'r, SEC, Remarks at the "SEC Speaks" Conference (Feb. 21, 2014), https://www.sec.gov/news/speech/2014-spch020421kms [https://perma.cc/MPZ6-6VKD]; Elisse B. Walter, Comm'r, SEC, Remarks at "The SEC Speaks in 2009" (Feb. 6, 2009), https://www.sec.gov/news/speech/2009/spch020609ebw.htm [https://perma.cc/75BY-9354]; Arthur Levitt, Chairman, SEC, The SEC Perspective on Investing Social Security in the Stock Market (Oct. 19, 1998), https://www.sec.gov/news/speech/speecharchive/1998/spch223.htm [https://perma.cc/P32K-53DY]; David S. Ruder, Chairman, SEC, Remarks before the 10th Annual Conference on Securities Regulation and Business Law Problems: The Evolution of Disclosure Regulation (Mar. 10, 1988), https://www.sec.gov/news/speech/1988/031088ruder.pdf [https://perma.cc/8AKL-NMVM]; Caroline A. Crenshaw, Comm'r, SEC, Moving Forward Together – Enforcement for Everyone (Mar. 9, 2021), https://www.sec.gov/newsroom/speeches-statements/crenshaw-moving-forward-together [https://perma.cc/3LPC-HWAY]; James C Treadway, Jr., Comm'r, SEC, Keynote Speech to Third Annual Seminar of Securities Activities of Banks, A Seamless Web: Banks, New Activities & Disclosure (Sept. 29, 1983), https://www.sec.gov/news/speech/1983/092983treadway.pdf [https://perma.cc/G9JD-53L3]; *see also infra* notes 14–16, 18–20 (collecting speeches by Chair Gary Gensler).

14. Gary Gensler, Chair, SEC, Statement on Proposed Mandatory Climate Risk Disclosures (Mar. 21, 2022), https://www.sec.gov/newsroom/speeches-statements/gensler-climate-disclosure-20220321[https://perma.cc/2K4C-PEH7]; Gary Gensler, Chair, SEC, Prepared Remarks Before the Principles for Responsible Investment "Climate and Global Financial Markets" Webinar, (July 28, 2021), https://www.sec.gov/newsroom/speeches-statements/gensler-pri-2021-07-28 [https://perma.cc/NRR3-FF5N]; Gary Gensler, Chair, SEC, Remarks Before the Investor Advisory Committee (June 9, 2022), https://www.sec.gov/newsroom/speeches-statements/gensler-iac-remarks-060922 [https://perma.cc/8LUM-STMS]; Gary Gensler, Chair, SEC, Remarks at Financial Stability Oversight Council Meeting (July 28, 2022), https://www.sec.gov/newsroom/speeches-statements/gensler-statement-financial-stability-oversight-council-meeting-072822 [https://perma.cc/CB2V-N633].

regulation of private funds,[15] SPACs,[16] and crypto,[17] to "pay versus performance" disclosure,[18] enforcement,[19] and more.[20]

These conventional accounts of the origins of mandatory disclosure regime converge around three core assumptions:

> (1) The drafting and enactment of the Securities Act of 1933 is the major defining event that established the essential character of the regime, and therefore studying the legislative history of that statute is a useful way to understand the regime;[21]
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> (2) The mandatory disclosure regime reflected a deliberate rejection of the corporatist model of economic regulation—in which government would partner with big business to plan the economy as embodied most famously by the National Industrial Recovery Act[22]—and an embrace of a "Brandeisian" philosophy of economic regulation–in which the government would maintain an adversarial relationship with business (making rules and suing businesses who violated them) and otherwise let market forces operate;[23] and
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> (3) Elite lawyers like James Landis, Felix Frankfurter, and others who shaped the Securities Act are the regime's true intellectual founders, and therefore

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15. Gary Gensler, Chair, SEC, Prepared Remarks at the Institutional Limited Partners Association Summit, (Nov. 10, 2021), https://www.sec.gov/newsroom/speeches-statements/gensler-ilpa-20211110 [https://perma.cc/6JJP-EEF7]; Gary Gensler, Chair, SEC, Prepared Remarks: "Dynamic Regulation for a Dynamic Society" Before the Exchequer Club of Washington, D.C. (Jan. 19, 2022), https://www.sec.gov/newsroom/speeches-statements/gensler-dynamic-regulation-20220119 [https://perma.cc/KU2X-CPAL].

16. Gary Gensler, Chair, SEC, Healthy Markets Association 2021 Healthy Market Structure Conference (Dec. 9, 2021), https://healthymarkets.org/2021-healthy-market-structure-conference [https://perma.cc/3G7M-CPBR].

17. Ephrat Livni, *Gary Gensler's Reflects on His First Year as S.E.C. Chair*, N.Y. TIMES (Apr. 16, 2022), https://www.nytimes.com/2022/04/16/business/dealbook/gary-gensler-sec.html (on file with the *Journal of Corporation Law*).

18. Statement, Gary Gensler, Chair, SEC, Statement on Pay versus Performance (Jan. 28, 2022), https://www.sec.gov/newsroom/speeches-statements/gensler-statement-pvp-012822 [https://perma.cc/2SFR-BP59]; Statement, Gary Gensler, Chair, SEC, Statement on Final Rule Regarding Pay Versus Performance (Aug. 25, 2022), https://www.sec.gov/newsroom/speeches-statements/gensler-statement-pay-vs-performance-082522 [https://perma.cc/ATL8-GDCE].

19. Gary Gensler, Chair, SEC, "This Law and Its Effective Administration": Remarks Before the Practising Law Institute's 54th Annual Institute on Securities Regulation (Nov. 2, 2022), https://www.sec.gov/news/speech/gensler-remarks-practising-law-institute-110222 [https://perma.cc/EH5D-5LGN].

20. *Financial Services and General Government Appropriations for 2023: Hearing Before the Subcomm. On Fin. Servs, & General Gov't of the H. Appropriation Comm.*, 117th Cong. 183 (2022) (testimony of Gary Gensler, Chair, SEC); *Oversight of The U.S. Securities and Exchange Comisssion: Hearing Before the S. Comm. on Banking, Hous., & Urb. Affs.*, 117th Cong. 5 (2022). Gensler seems self-aware regarding his historical obsession, telling one audience: "As some of you may know, I often like to talk about the founding of our nation's securities laws in the 1930s." Gary Gensler, Chair, SEC, Remarks on Cybersecurity and Securities Laws at the Northwestern University Pritzker School of Law (Jan. 24, 2022), https://www.sec.gov/newsroom/speeches-statements/gensler-cybersecurity-securities-laws-20220124 [https://perma.cc/6DTF-94K5].

21. *Infra* Part II.

22. *See infra* Part III.B (discussing NIRA as paradigmatic corporatist New Deal legislation).

23. *Infra* Part III.

> studying these men's backgrounds, ideas, efforts, and motivations is a useful way to understand the regime.[24]

This paper questions all three assumptions. I present a revisionist history that draws on archival sources, oral histories, and other primary sources to excavate the origins of *real* mandatory disclosure in the United States.[25] I make three main claims.

First, real mandatory disclosure in the 1930s significantly contradicted the regime Congress laid out in the Securities Act. In the statute, Congress required any company planning to sell securities to first file a "registration statement" with a federal agency[26] making extensive disclosures. The company then could move forward with a sale only after this statement became "effective." Under the statute, a statement would become effective automatically after twenty days unless the agency commenced a formal enforcement action to block the sale based on a "material" misstatement or omission. The statute also provided for an "examination" procedure the agency could use to gather needed background information to support its enforcement efforts. As it considered the legislation, Congress emphasized that, during the twenty-day waiting period, the agency would conduct only a "preliminary" and "cursory" review of the registration statements for "obvious" departures. Congress also squarely considered and rejected giving the agency discretionary authority to accelerate the effectiveness of amended filings. The legislative history is similarly crystal clear that a fixed twenty-day waiting period was designed to provide predictability to market participants, enabling issuers and their underwriters to prepare for the sales on a pre-determined date with a measure of confidence.

This carefully calibrated statutory regime was never implemented. Instead, immediately following enactment, the agency tossed it aside and implemented a wholly different system. Instead of relying on formal proceedings to police inadequate disclosures as the statute directed, agency staffers responded to virtually all registration statements with letters flagging "deficiencies" and demanding the company make revisions or withdraw the offering. Instead of conducting a "preliminary review" for "obvious" problems as Congress directed, the agency conducted what it described as a "careful and critical" analysis of every statement it received. Instead of these statements becoming automatically effective after twenty days as the statute envisioned, the vast majority of registration statements were delayed far beyond that timeframe, and the timing in virtually all cases was subject to the unpredictable and varying exercise of agency discretion. Instead of policing only "material" omissions or misstatements in registration statements as Congress had directed, the agency, by its own admission, used the deficiency letter process to correct *non*-material errors. Instead of using statutory "examinations" to gather

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24. *Infra* Part IV.

25. In addition to publicly available sources and databases, I rely on archival materials from the Roosevelt Presidential Library, the Columbia Rare Book & Manuscript Library, Washington & Lee Law School Library, the Harvard Law Library Historical & Special Collections, and the SEC Historical Society's online archive. I also searched for, but failed to find, relevant materials in the Albert & Shirley Small Special Collections Library at the University of Virginia (Frank Bane papers), the Dolph Briscoe Center for American History at the University of Texas (Sam Rayburn papers), the West Central Minnesota Historical Research Center at the University of Minnesota (Charles March papers), and the Center for Legislative Archives (National Archives and Records Administration).

26. Initially, the FTC. In 1934, Congress created the SEC and shifted these responsibilities over to that new agency. Throughout the paper, I refer to "the agency" for simplicity.

information, the agency simply demanded it in deficiency letters. Despite Congress' express refusal to give the agency discretionary authority to "accelerate" the effectiveness of amended filings, the agency made extensive use of precisely this authority. Thus, I conclude that the Securities Act failed to authorize, much less explain, the reality of mandatory disclosure in the 1930s. Conventional statute-centric accounts of the origin of mandatory disclosure are therefore analyzing the wrong thing.[27]

Second, real mandatory disclosure was primarily neither a rejection of corporatist economic planning nor an embrace of Brandeisian regulatory philosophy, but rather an expedient response to a shortfall in administrative capacity. Out of the gate, the agency confronted a mismatch between the overarching task and the limited resources at its disposal to execute that task. Abandoning the statutory system and creating the deficiency letter process helped the agency close this capacity shortfall in several ways. Most importantly, it transformed elite private securities professionals (lawyers, accountants, bankers) from adversaries to partners, enabling the agency to draw upon these private actors' substantial expertise and manpower in carrying out the mandate.[28]

But the agency's ingenious alternative system also fundamentally and irrevocably transformed the essential character of the regime. Conventional accounts have correctly characterized the statute as a thoroughly Brandeisian regulatory system: a disclosure-based regime that left the primary organizing force in competition and markets, based around an adversarial relationship between government and business, abjuring oversized bureaucracy. The shift to the deficiency letter system moved things far closer to the corporatist model. Key disclosure and accounting rules were developed behind closed doors as a co-production of agency staff and elite securities professionals, who enjoyed unique access to the machinery of government and thus could charge a premium for their services. The deficiency letter system gave rise to widespread belief–and occasionally the reality–that government was doing more than merely enforcing disclosure rules and was affirmatively engaged in economic planning, approving, and disapproving of particular corporate issuances on the merits.[29] The deficiency letter system redeemed the mandatory disclosure system, but only by compromising its core philosophy.

Third, understanding the origins of *real* mandatory disclosure requires looking past iconic lawyer-intellectuals like Frankfurter and Landis who created the statute, to the obscure mid-level agency official actually responsible for the real mandatory disclosure regime–Baldwin Bane. I provide the first biographical account of this figure. As I show, his background and intellectual commitments sharply distinguished him from the icons ordinarily treated as the founders of the regime. It is precisely Bane's unique perspective and position that empowered him to jettison the statutory regime and replace it with the administrative system as he did. The upshot: contrary to conventional accounts, real mandatory disclosure was more of a derogation of the hyper-elite legal culture of the 1930s than a product of it.[30]

This Article excavates the lost history of mandatory disclosure. It is a story of how creative and resourceful administration by an ordinary mid-level official transformed—and

27. *Infra* Part II.
28. *Infra* Part III.A.
29. *Infra* Part III.B.
30. *Infra* Part IV.

possibly redeemed—one of the key regulatory programs of the modern administrative state. But it is equally a story of legislative failure by iconic, elite lawyer-intellectuals and the Brandeisian model of economic regulation they promoted.

This Article makes several contributions. The central contribution is to historical interpretations of the origins of securities regulation in the United States. As noted above, this history has been a subject of consistent interest not only to scholars of history, law, and finance, but also to contemporary regulators, lawyers, and judges.[31]

It also contributes to other areas in the history of the New Deal, including the question of how pre-existing administrative capacity (and the lack thereof) shaped various New Deal initiatives;[32] how elite legal professionals shaped these programs both from inside the government and out;[33] and the intellectual history of how competing progressive regulatory philosophies shaped various New Deal programs.[34]

The Article proceeds in five parts. Part I provides background, beginning with the well-known origins of the Securities Act of 1933, moving to the wholly different regime that was developed to implement it immediately after enactment, and then showing how this second regime (and not the first) became the real foundation of modern securities regulation. Part II shows that the real, on-the-ground administration of mandatory disclosure in the 1930s was fundamentally at odds with the text, history, and purpose of the statute that purportedly authorized it. Part III argues that the real mandatory disclosure system was defined less by a commitment to Brandeisian regulation than by a pragmatic struggle to make up for limited administrative capacity, and how the expedient action taken to expand such capacity ultimately transformed the essential character of the regime. Part IV provides a biographical account of Baldwin Bane, the founder of real mandatory disclosure, and it shows how Bane's background set him far apart from the super-elite lawyers ordinarily regarded as the founders of securities regulation—and also enabled him

31. This is a descriptive historical project. In a separate paper, I evaluate the costs and benefits of the deficiency letter process today. *See* Alexander I. Platt, *Rethinking the IPO Bureaucracy* (working paper) (on file with author).

32. A leading legal historian has argued that "Problems of state administrative capacity deserve more attention in the legal history of the New Deal . . . ." Nicholas Parrillo, *"The Government at the Mercy of Its Contractors": How the New Deal Lawyers Reshaped the Common Law to Challenge the Defense Industry in World War II*, 57 HASTINGS L.J. 93, 97 (2005). For foundational contributions, see KENNETH FINEGOLD & THEDA SKOCPOL, STATE AND PARTY IN AMERICA'S NEW DEAL (1995); Theda Skocpol & Kenneth Finegold, *State Capacity and Economic Intervention in the Early New Deal*, 97 POL. SCI. Q. 255 (1982); Margaret Weir & Theda Skocpol, *State Structures and the Possibilities for "Keynesian" Responses to the Great Depression in Sweden, Britain, and the United States*, *in* BRINGING THE STATE BACK IN (Evans, Rueschemeyer & Skocpol eds., 1985).

33. *See, e.g.*, Daniel R. Ernst, *Lawyers, Bureaucratic Autonomy, and Securities Regulation During the New Deal* (Geo. L. Fac., Working Paper No. 115, 2009) [hereinafter Ernst, *Lawyers*]; Daniel R. Ernst, *The Shallow State: The Federal Communications Commission and the New Deal*, 4 U. PA. J.L. & PUB. AFFS. 403 (2019) [hereinafter Ernst, *The FCC*]; Daniel R. Ernst, *"In a Democracy We Should Distribute the Lawyers": The Campaign for a Federal Legal Service, 1933–1945*, 58 AM. J. LEGAL HIST. 4 (2018) [hereinafter Ernst, *Democracy*]; PETER H. IRONS, THE NEW DEAL LAWYERS (1982); RONEN SHAMIR, MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL (1995).

34. *See, e.g.* Jessica Wang, *Neo-Brandeisianism and the New Deal: Adolf A. Berle, Jr., William O. Douglas, and the Problem of Corporate Finance in the 1930s*, 33 SEATTLE U. L. REV. 1221 (2010); LAURA PHILLIPS SAWYER, AMERICAN FAIR TRADE 267–89 (2018); HAWLEY, *supra* note 2; ALAN BRINKLEY, THE END OF REFORM (1995).

to jettison the statutory system and invent the administrative one. Part V considers how and why the real history of mandatory disclosure was "lost."

I. BACKGROUND: ONE STATUTE, TWO REGIMES

In May 1933, President Roosevelt signed the Securities Act into law, creating a federal mandatory disclosure regime for securities issued to the public. Two months later, a mid-level administrator at the agency charged with administering that statute tossed that statutory regime aside and invented a new one. That second regime forms the basis of much of the contemporary securities enforcement apparatus.

A. The Statutory Scheme: Registration Statements to Become Automatically Effective After 20 Days Absent Formal Administrative Proceedings

Section 5(a) of the Securities Act of 1933 made it illegal to "sell or offer to buy" any security unless a registration statement was "in effect" for that security.[35] The statute specified that these registration statements had to be filed with the Federal Trade Commission (FTC) disclosing certain information regarding the issuer, its business, and the offering.[36]

Section 8 outlined the process by which one of these statements would become "effective"—or not. Section 8(a) provided that "[t]he effective date of a registration statement shall be the twentieth day after the filing thereof." The rest of the section enumerated three mechanisms by which the agency could intercede in this process:

> (1) Refusal Order. The Commission could prevent ("refus[e] to permit") the effectiveness of a registration statement that "appears . . . on its face incomplete or inaccurate in any material respect" by issuing an order prior to the effective date (after notice and opportunity for hearing).[37]
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> (2) Stop Order. The Commission could "suspend" the effectiveness of any registration statement that "includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading" by issuing a "stop order" at "any time" (i.e., before or after the effective date) after notice and opportunity for hearing.[38]
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> (3) Examination. The Commission could also "make an examination in any case in order to determine whether a stop order should issue" including by demanding production of books and papers, examining the issuer, underwriter, and others, and subjecting the issuer's finances to certification by an independent accountant.[39]

35. Securities Act of 1933 § 5(a), Pub. L. No. 73-22, 48 Stat. 74, 77 (codified as amended at 15 U.S.C. § 77e).

36. Securities Act of 1933 § 7, Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77g); Securities Act of 1933 Schedule A, Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77aa).

37. Securities Act of 1933 § 8, Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77h).

38. *Id.*

39. *Id.*

Section 8 also provided that a registrant who filed an amendment to their own registration statement prior to its effective date would restart the 20-day clock unless it was filed "with the consent of" or "pursuant to an order of" the Commission.[40]

B. The Administrative Enforcement Scheme: Registration Statements to Become Effective Only After Agency Review and Agency-Directed Revisions

Two months after enactment, on the date the statute took effect,[41] a large number of registration statements were filed with the FTC's newly created Securities Division; some accounts have the number at "more than 100."[42] The newly appointed director of that division, Baldwin Buckner Bane,[43] directed his staff to review these voluminous and complex filings. The staff, which consisted initially of just a dozen or so employees recently reassigned from other components of the agency,[44] was later expanded to deal with the mountain of paperwork.[45] After completing the review, Bane's staff reported back that *all* registration statements were materially deficient and recommended the Commission commence formal proceedings across the board.[46]

Bane did not accept this recommendation. Nor did he select a subset of the most egregious statements to pursue via formal action. Instead, Bane had his staff send letters to all registrants advising them of the apparent deficiencies in their filings and "inviting" them

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40. *Id.* If the amendment was filed "with the consent of the Commission" or "pursuant to an order of the Commission," it would not restart the 20-day clock. *Id.*

41. *See* Securities Act of 1933 § 3(a)(1), Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77(c) (providing a 60-day lag before registration obligations kicked in).

42. Accounts vary regarding the precise number of registration statements filed during this initial period. *New Approaches to Disclosure in Registered Security Offerings: A Panel Discussion*, 28 BUS. LAW. 505, 531 (1973) (statement of Harold Marsh) (discussing the "more than 100" filings); RITCHIE, *supra* note 6, at 50 (41); Edward N. Gadsby & Ray Garrett, Jr., *"Acceleration" Under the Securities Act of 1933—A Comment on the A.B.A.'s Legislative Proposal*, 13 BUS. LAW. 718, 721 (1958) (85); Byron D. Woodside, *Development of S.E.C. Practices in Processing Registration Statements and Proxy Statements*, 24 BUS. LAW. 375, 377 (1969) ("more than 80"); Ray Garrett, Jr., Former Chair, SEC, Keynote Speech, Disclosure and "Corp Fin" Branch Chiefs: The SEC Review Process (June 6, 1977), https://www.sechistorical.org/collection/papers/1970/1977_0606_DiscCorpFinChief.pdf [https://perma.cc/K3L7-L3EZ] (24); *$100,000,000 Share Registrations In*, WASH. POST, Jul. 15, 1933, at 17 ("More than 60"); *Hundred Millions of New Stocks Listed With U.S. in Week*, CHI. TRIBUNE, Jul. 15, 1933, at 22 (65 plus "a dozen more"); *Securities Act Registration is $75,000,000*, WASH. POST, Jul. 8, 1933, at 2 ("half a hundred").

43. RITCHIE, *supra* note 6, at 49; Arthur H. Dean, *Book Review*, 50 MICH. L. REV. 1388, 1390 (1952) (reviewing LOUIS LOSS, SECURITIES REGULATION (1951)); LOUIS LOSS, SECURITIES REGULATION (1951); *Testimony of Baldwin B. Bane, Director, Division of Corporation Finance, SEC, Before the H. Subcomm. on Interstate & Foreign Commerce*, 82d Cong. 394 (1952) [Hereinafter: Bane, *1952 Testimony*].

44. Woodside, *supra* note 42, at 377.

45. *E.g.*, *Securities Act Registration is $75,000,000*, *supra* note 42 (noting the "sudden flood of bulky financial statements on the first day of official regulation caught the commission unprepared for fast handling of the reports" and that "the commissioners met and designated additional personnel to assist in the securities work"); *65 New Issues Filed Under Securities Act*, N.Y. TIMES, Jul. 15, 1933, at 17 (noting that at the end of the first week "Mr. Bane's division now has about three dozen employees engaged in the new work of handling security registrations and checking them for errors").

46. *New Approaches to Disclosure in Registered Security Offerings: A Panel Discussion*, *supra* note 42 at 531; RITCHIE, *supra* note 6, at 50; Gadsby & Garrett, *supra* note 42, at 721; Woodside, *supra* note 42, at 377; Garrett, *supra* note 42; HOMER KRIPKE, THE SEC AND CORPORATE DISCLOSURE: REGULATION IN SEARCH OF A PURPOSE 13 (1979).

to file amendments correcting these, with the implicit threat of a formal action if they declined to do so.[47]

This "deficiency letter" technique became immediately regularized, displacing the statutory scheme as the agency's primary disclosure enforcement process.[48] Some aspects of the process were subsequently codified into regulations approved by the full Commission.[49] For decades to follow, the vast majority of registration statements provoked one or more of these letters.[50] Administering this informal process became a "primary function" of the agency,[51] and pushed formal proceedings under §8 to the background.[52]

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47. *New Approaches to Disclosure in Registered Security Offerings: A Panel Discussion*, *supra* note 42, at 531; RITCHIE, *supra* note 6, at 50; Gadsby & Garrett, *supra* note 42, at 721; Woodside, *supra* note 42, at 377; Garrett, *supra* note 42.

48. *E.g.*, *Hearing Before the Subcomm. of H. Comm. on Appropriations*, 73d Cong. 151 (1934) (statement of Baldwin Bane) (describing the deficiency letter process as an essential part of the core administration of the securities act); Baldwin B. Bane, *The Federal Securities Act of 1933*, 14 B.U. L. REV. 35, 37 (1934).

49. *E.g.*, Exchange Act Release No. 47, 1933 WL 28860 (Sept. 22, 1933).

50. Rodney Starkey, *The Special Problems and Responsibilities of the Accountant Under the New Act* at 13 (1935) *reprinted in* AMERICAN MANAGEMENT ASSOCIATION, FINANCIAL MANAGEMENT SERIES 38–62, 1932-1940 (noting in 1935 that deficiency letters are sent in "practically every case"); Letter from Adolf Berle to William Douglas (Sept. 23, 1937), https://www.sechistorical.org/collection/papers/1930/1937_0923_DouglasCongratulationsT.pdf [https://perma.cc/U7XQ-VWML] (noting in 1937 that "only six or seven registration statements have gone through without deficiency letters"); George Bates, *The Waiting Period Under the Securities Act*, 14 HARV. BUS. REV. 203, 208 (1937) (noting that deficiency letters "are not the exception, but the rule"); Gullie Goldin, *'Perversion' of 1933 Securities Act Charged by Former Employee of SEC*, N.Y. TIMES, Jun. 25, 1939, at B1 (noting that "[i]t is unusual that a registration statement filed without prior consultation with the SEC will become effective at the end of the twenty day period without a deficiency notice"); WALTER GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS 56 (1941) (noting in 1941 that "fully four-fifths" of registration statements filed received deficiency letters); MONOGRAPH OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, 77TH CONG., ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES: SECURITIES AND EXCHANGE COMMISSION 24 (Comm. Print 1941) [hereinafter, MONOGRAPH]; Bane, *1952 Testimony*, *supra* note 43, at 423 (noting that, between 1946 and 1951, less than 4 percent of registration statements that went effective did not receive a deficiency letter); EDWARD T. MCCORMICK, UNDERSTANDING THE SECURITIES ACT AND THE S.E.C. 239 (1948) (noting in 1948 that the "majority" of filings get deficiency letters); LOSS, *supra* note 43, at 172 (noting in 1951 that "in the overwhelming majority of cases, . . . the examining group drafts a letter of comment setting forth the respects in which it appears that the registration statement is deficient"); ALLEN CHOKA, INTRODUCTION TO SECURITIES REGULATION 13 (1958) ("The SEC almost always suggests that some changes be made in the Statement."); Robert Logan, The Disclosure of Information under the Securities Act of 1933 (Apr. 1939) (Ph.D. dissertation, Northwestern University) (on file with author) (finding that, of the 171 registration statements filed by alcohol businesses between 1933 and 1937 *none* became effective without amendment).

51. SEC, ANNUAL REPORT OF THE SECURITIES AND EXCHANGE COMMISSION 26 (1935) [hereinafter, SEC, FIRST ANNUAL REPORT]; *see also* SEC, THIRTEENTH ANNUAL REPORT OF THE SECURITIES AND EXCHANGE COMMISSION 2 (1947) ("one of the main functions") [hereinafter, SEC, THIRTEENTH ANNUAL REPORT]; *Cf.* William Douglas, *Keeping the Investor Informed* (Jul. 11, 1936) ("[W]hile the Commission has the power to issue stop orders . . . its chief function is an office of registry."), quoted in Logan, *supra* note 50, at 4.

52. E. Merrick Dodd, *The United States Securities and Exchange Commission: 1942–1946*, 10 MOD. L. REV. 255, 256 n.7 (1947) (noting that deficiency letter "substantially superseded the stop order as a method of enforcement"); Joel Seligman, *The Historical Need for a Mandatory Corporate Disclosure System*, 9 J. CORP. L. 1, 41 (1983) ("Historically the SEC has issued few stop orders, instead employing the less formal device of letters of deficiency to persuade issuers to make full and accurate disclosures or withdraw their registration statements.").

One challenge for this alternative enforcement regime was that, for registrants, making the changes requested by these deficiency letters could take significant time,[53] which was difficult to find given the statute's rigid 20-day period. To make a difference, corrections had to be made before investors could begin buying the securities—if not, investors would be making purchasing decisions based on incomplete and erroneous disclosures. The challenge was that section 8(a) provides that, in the absence of formal proceedings under section 8, a registration statement would become effective automatically after 20 days. By the time the agency reviewed the registration statement, identified deficiencies, drafted the letter, and got it to the registrant, there often wouldn't be much time (if any) for the registrant to consider and make the requested changes. This would have meant that materially deficient statements would become effective, investors could buy the securities in reliance on these deficient statements, and the registrant would be facing potential liability.

To avoid this result and create more time for registrants to implement the changes requested in the deficiency letters, Bane ingeniously instructed his staff to invite registrants in receipt of a deficiency letter to immediately file a "delaying amendment"—requesting a trivial change to the original filing.[54] The effect, under the statute, would be to restart the 20-day clock and buy some time to make the needed substantive changes.[55]

This maneuver solved the time-crunch problem, but it created a new one—delaying effective dates beyond the 20-day period contemplated by the statute. Bane again came up with creative administrative solutions to mitigate these delays. Where registrants were able to get their substantive amendment on file and approved by the agency before the end of the original 20-day clock, the registrant could simply seek to withdraw its initial delaying amendment, thereby restoring the original 20-day clock.[56] The agency also encouraged registrants to request the flexible remedy of "acceleration" of their effective date once the deficiencies had been remedied and typically granted such requests freely.[57]

The deficiency letter technique had a significant impact on which registration statements became effective. In many cases, receipt of a deficiency letter significantly changed the cost-benefit calculus for registrants. A registrant's interest in moving forward with an offering may, in some cases, be contingent on presenting the information a certain way or on omitting certain information. After receiving a deficiency letter, the registrant may no longer be interested in moving forward with the offering. The agency permitted registrants to voluntarily ***withdraw*** their filings before the effective date upon receiving the "consent" of the Commission.[58] By 1936, the combination of ubiquitous deficiency letters and encouraged withdrawal led to the withdrawal of registration statements covering

53. SEC, THIRTEENTH ANNUAL REPORT, *supra* note 51, at 3 (it is "rarely possible" for requested amendments to be made within 20 days).

54. Exchange Act Release No. 47, 1933 WL 28860 (Sept. 22, 1933).

55. *Id.*; LOSS, *supra* note 43, at 172.

56. Exchange Act Release No. 47, 1933 WL 28860 (Sept. 22, 1933).

57. LOSS, *supra* note 43, at 173. Congress formalized this authority in 1940. *Infra* Part I.C.

58. Exchange Act Release No. 47, 1933 WL 28860 (Sept. 22, 1933).

approximately $300 million in securities–more than three times the amount that had been blocked through formal stop and refusal orders.[59]

C. The Triumph of The Administrative Regime

Congress ratified the deficiency letter process in 1940 by amending section 8(a) of the Securities Act to provide express legal authority for the "acceleration" technique that the agency had been deploying.[60] As explained above, "acceleration" is the administrative technique Bane invented to mitigate delays created by the deficiency letter process—upon receipt of a deficiency letter, the registrant would send one or more "delaying amendments" to continuously restart the 20-day clock; once the deficiencies were corrected to the agency's satisfaction, the registrant would request (and the agency would typically grant) "acceleration" of effectiveness to minimize any further unnecessary delays. In the 1940 legislation, Congress gave the agency express power to make registration statements effective after 20-days "or such earlier date as the Commission may determine, having due regard to the adequacy of the information respecting the issuer theretofore available to the public, to the facility with which the nature of the securities to be registered, their relationship to the capital Structure of the issuer and the rights of holders thereof can be understood, and to the public interest and the protection of investors."[61] The legislative history confirms that the intent of the amendment was to assure that the Commission had power to accelerate effectiveness of registration statements,[62] as does the SEC's implementing regulation and first annual report issued after the legislation was passed.[63]

The deficiency letter process continues to this day.[64] The agency's review of filings is now performed by a team of more than 280 attorneys, accountants, and other professionals, distributed across nine industry-specific offices under the SEC's Division of Corporation Finance (which replaced the Registration Division in 1942).[65] Letters have been rebranded "comment letters," to avoid the stain associated with a purported "deficiency." Since 2004, these letters and companies' responses have been publicly available.[66] And the 2012 Jumpstart Our Business Startups Act allowed some companies

59. SELIGMAN, *supra* note 3 at 149; *see also* Seligman, *supra* note 52, at 43 (finding that, of the 32,312 registration statements filed with the SEC between 1955 and 1971, 66 were subject to a stop order and 546 were withdrawn in response to a comment letter).

60. *See* Investment Company Act of 1940 § 301, Pub. L. 76-768, 54 Stat. 789, 857-58 (codified as amended at 15 U.S.C. § 77h(a)).

61. *Id.*

62. 76 CONG. REC. 10069-70, 10249-50.

63. Statement of Commission Policy with Respect to the Acceleration of the Effective Date of a Registration Statement, Exchange Act Release No. 2340, 1940 WL 967 (Aug. 22, 1940); SEC, SIXTH ANNUAL REPORT 118 n.1 (1941); *see also* LOSS, SELIGMAN & PAREDES, *supra* note 8, at 1034–35 (explaining that the 1940 legislation amended the Securities Act to "permit the Commission to accelerate the effective date").

64. *See Filing Review Process*, SEC (Sept. 27, 2019), https://www.sec.gov/about/divisions-offices/division-corporation-finance/filing-review-process-corp-fin [https://perma.cc/9ENU-E3PC]; CHOI & PRITCHARD, *supra* note 9 at 533–35; COFFEE ET AL., *supra* note 9, at 244–47.

65. Erik Gerding, Director, SEC Div. of Corp. Fin., Statement on the State of Disclosure Review (June 24, 2024), https://www.sec.gov/newsroom/speeches-statements/gerding-statement-state-disclosure-review-062424 [https://perma.cc/4G2S-JZFD]; *SEC Reorganized; 90 Jobs Abolished*, N.Y. TIMES, Aug. 20, 1942, at 29.

66. Press Release, SEC, SEC Staff to Publicly Release Comment Letters and Responses (Jun. 24, 2004), https://www.sec.gov/news/press/2004-89.htm [https://perma.cc/P9U9-7UVB].

to file their initial registration statement "confidentially" and provided that any correspondence between the issuer and the agency would only become public if and when the company ultimately moved forward with the offering.[67] Other than that, the process looks more or less the same as it did in 1933.

A similar process has also been adopted by securities regulators around the world.[68] The SEC also implemented similar processes to enforce other disclosure requirements. Section 13 of the 1934 Exchange Act required annual and other periodic disclosures by exchange-listed securities but the statute was silent as to any method of reviewing these disclosures or informally enforcing this requirement short of litigation and enforcement.[69] Soon after the act was passed, these disclosures came to be reviewed by the same group with the same comment letter process.[70] Another section of the Exchange Act, which required registration by Exchanges, spelled out a process somewhat akin to the deficiency letter for reviewing those filings.[71]

Similarly, in the Investment Company Act of 1940, Congress provided for the filing of registration statements and periodic reports by investment companies with the Commission. Section 8(e) borrowed from the deficiency letter procedure to enforce these disclosure requirements. Indeed, while the bill was under consideration in Congress, an SEC official described this to a House Committee hearing as the mechanism "for giving

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67. Jumpstart Our Business Startups Act of 2012 § 106(a), Pub. L. 112-106, 126 Stat. 306, 312 (codified as amended at 15 U.S.C. § 77f(e)).

68. *E.g.*, Regulation (EU) 2017/1129 of the European Parliament and of the Council of June 14, 2017, on the Prospectus to Be Published When Securities Are Offered to the Public or Admitted to Trading on a Regulated Market, and Repealing Directive 2003/71/EC, 2017 O.J. (L 168) 12 Art. 20 § 4 (requiring approval of prospectus before listing and outlining process where regulator may demand issuer make amendments and provide additional information before granting approval); UK FINANCIAL CONDUCT AUTHORITY, PROSPECTUS REGULATION RULES SOURCEBOOK § 3.1.2 (2024) (incorporating the EU regulation); BILLY K.M. AU ET AL., HONG KONG INITIAL PUBLIC OFFERINGS 75–76 (2021) (outlining the process of "regulatory vetting" whereby Hong Kong regulators review the listing application and make comments and queries to issuer before the application is approved); TORYS LLP, INITIAL PUBLIC OFFERINGS IN CANADA 30–31 (2017) (describing Canadian IPO process and the process whereby the regulator's staff lawyers and accountants provide multiple rounds of comments on prospectuses in letters and via phone calls and that the issuer must resolve these comments before the offering can move forward); *see also* Directive 2003/71/EC, of the European Parliament and of the Council of 4 November 2003 on the Prospectus to be Published When Securities are Offered to the Public or Admitted to Trading and Amending Directive 2001/34/EC, 2003 O.J. (L 345) 64 (previous version of EU regulation including substantially similar process).

69. Securities Exchange Act of 1934 § 13, Pub. L. 73-291, 48 Stat. 881, 894-95 (codified as amended at 15 U.S.C. § 78m) (requiring periodic disclosures); Securities Exchange Act of 1934 §§ 18–22, Pub. L. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78r–78v) (providing for private liability, enforcement, investigations, and hearings).

70. *E.g.*, SEC, SECOND ANNUAL REPORT OF THE SECURITIES AND EXCHANGE COMMISSION 4 (1936). Congress would codify this review of periodic reports in 2002. Sarbanes-Oxley Act of 2002 § 408, Pub. L. 107-204, 116 Stat. 745 (codified as amended at 15 U.S.C. § 7266).

71. Exchange Act § 6 required registration by exchanges. Securities Exchange Act of 1934 § 6, Pub. L. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. § 78f). Like Securities Act § 8, the provision stated that exchanges could register by filing an application and required the Commission to respond to such applications within 30 days either by entering "an order either granting or, after appropriate notice and opportunity for hearing, denying registration." *Id.* But, unlike the Securities Act, this provision also explicitly provided for informal administrative-directed process by which the agency could direct amendments be made, and the timeline could be extended. *Id.*

notice of deficiency," borrowing the language of the informal procedure that had been adopted for Securities Act filings.[72]

In sum, the informal procedure invented in 1933 has survived 90 years and has laid the foundation for much of the contemporary disclosure enforcement regime.

II. THE SECURITIES ACT DOES NOT AUTHORIZE OR EXPLAIN REAL MANDATORY DISCLOSURE IN THE 1930S

The deficiency letter process implemented in the 1930s described above is not articulated in the Securities Act. Indeed, in many fundamental respects, it directly contradicted that statute. This Part draws on contemporaneous historical materials to show how the deficiency letter regime departed from or contradicted the statute's text, legislative history, and purposes. Prior histories, which have focused on this statute, cannot provide a complete account of the origins of this regulatory regime.

This Article challenges the conventional origin story of the mandatory disclosure regime. Many versions of this story explicitly assert that this legislation established the fundamental character of the regime that has basically persisted for the next 90 years.[73] Many others suggest as much by placing the drafting and enactment of the Securities Act at the center of the analysis and failing altogether to consider the administrative realities of that regime or the extent to which these realities constituted substantial departures from the statute. Only a few of the many accounts collected above reviewing the origins of mandatory disclosure in the United States even mention the administrative realities of the mandatory disclosure regime in the 1930s—and virtually *none* mention the fact that these administrative realities constituted a substantial departure from the regime enacted by Congress.[74] A very small number of sources hint at a possible conflict between the regime

72. *Investment Trusts and Investment Companies: Hearings before the Subcomm. of the H. Comm on Interstate and Foreign Commerce*, 76th Cong. 109 (1940) (statement of David Shenker).

73. *See, e.g.*, SELIGMAN, *supra* note 3, at 39–40; HILTZIK, *supra* note 2, at 91; SUSAN M. PHILLIPS & J. RICHARD ZECHER, THE SEC AND THE PUBLIC 9 (1981); PERINO, *supra* note 6 at 289; LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 314 (5th ed. 2003); HAZEN, *supra* note 8, at 16–17; MCCRAW, *supra* note 6, at 154; Frank Easterbrook & Daniel Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669, 669 (1984); PALMITER, *supra* note 9, at 20; Merrill Lynch v. Dabit, 547 U.S. 71, 78 (2006); STEVENSON, *supra* note 10, at 80; Adam Pritchard, *Corporate Governance, Capital Markets, and Securities Law*, *in* OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 1063, 1068 (Gordon & Ringe, eds. 2018); Mark Uyeda, Comm'r, SEC, Remarks at the "SEC Speaks Conference" 2022 (Sept. 9, 2022), https://www.sec.gov/newsroom/speeches-statements/uyeda-speech-sec-speaks-090922 [https://perma.cc/ZD8S-RKWA]; Crenshaw, *supra* note 13; DE BEDTS, *supra* note 3, at 54–55. Similarly, influential accounts present the statutory section 8 enforcement mechanism, with its 20-day clock, as if that fully described the real regime. BADGER, *supra* note 6, at 99 ("Prospective issuers had to file detailed financial statements with the Federal Trade Commission and wait for twenty days before securities could be issued.").

74. *See* SELIGMAN, *supra* note 3, at 149–50 (asserting that SEC's early use of deficiency letters as enabling the SEC to "increase the number of allegedly false or misleading securities prospectuses that it prevented from reaching investment markets"); *id.* at 619–20 (praising the deficiency letter technique as an "ingenious use of the administrative process" that helps explain why the securities regulations have "endured as well as they did long after enthusiasm for the New Deal period's policies generally had waned"); LOSS, SELIGMAN & PAREDES, *supra* note 8, at 360 ("Historically, the SEC has issued few stop orders; instead it has employed the less formal device of comment or *deficiency* letters to persuade issuers to make full and accurate disclosures or withdraw their registration statements."); *id.* at 1038–54 (acknowledging that "the heavy artillery provided by section 8 is

and the statute but only indirectly and in passing and without analyzing the conflict in detail or considering its implications.[75]

To be clear, the argument is not that deficiency letter process was *illegal* in the sense that a court would have struck it down.[76] Rather, I use the tools of statutory analysis to show that the administrative choice to adopt the deficiency letter process constituted a radical and dramatic departure from the regime outlined by Congress. My aim is to show that the deficiency letter process constituted an unanticipated, independent, contingent, transformative event in the origins of mandatory disclosure such that the many historical accounts that focus narrowly on the drafting and enactment of the 1933 Act are missing something fundamental.

A. Text

1. Section 8 Expressly Enumerates Three Mechanisms for the Agency to Interfere with Pre-Effective Registration Statements and Impliedly Precludes Unenumerated Mechanisms to Do This.

Section 8 provided for registration statements to become effective automatically after twenty days, absent agency intervention. The statute enumerates three powers available to the agency to interfere with this process: the agency could initiate refusal order proceedings under subsection (b), initiate a stop order under subsection (d), or initiate an investigation under subsection (e). If none of these steps were taken, the statute contemplates that the 20-day period would pass, and the registration statement would become effective.

What the statute does *not* mention is anything like the deficiency letter process that was actually adopted to enforce the disclosure mandate. The statute allows for amendments and indicates that these will reset the clock to twenty days, but it does *not* empower the agency to request amendments other than through the formal processes mentioned above.

Baldwin Bane, the chief architect and administrator of the deficiency letter system, candidly admitted that the statute did not provide for this method. In a 1939 *New York Times* piece he wrote: "It is true that the act does not specifically provide any particular method of informally advising registrants of errors or defects in their registration

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reserved for flagrant cases" and describing the deficiency letter process as "an excellent example of the vaunted flexibility of the administrative process"); CHOI & PRITCHARD, *supra* note 9, at 533–35 (describing the comment letter process without reference to its tensions with the underlying statute); CHATOV, *supra* note 5, at 99 (discussing the early deficiency letter process without reference to its relation to the underlying statute); Jarrell, *supra* note 10, at 622 (describing the Securities Act regime and then describing the "deficiency letter" procedure, without discussing any conflict between the two).

75. HAZEN, *supra* note 8, at 88 ("The procedures spelled out in 1933 Act § 8 do not provide an accurate picture of the SEC registration review process as it generally proceeds."); COFFEE ET AL., *supra* note 9, at 244–45 (describing the rigidly timed regime laid out in section 8 and then noting "[t]his is not the way that it has worked out at all" and outlining the current comment letter system); PALMITER, *supra* note 9, at 136–37 (outlining the section 8 scheme and then noting that "[i]n practice, the SEC only rarely uses its refusal and stop-order authority" and then outlining the comment letter process).

76. Any such claim would face at least three obstacles. First, there is a major anachronism involved in applying 21st century post-APA, textualist interpretive methodology to a 1933 statute. Second, as a practical matter, the informal, non-final nature of the deficiency letter process would likely have made it extremely insulated from any judicial review. Third, Congress ratified the deficiency letter process in 1940, so any case for illegality would be very moot. *See* discussion *supra* Part I.C.

statements."[77] Similarly, James Landis, who worked with Bane to get the system up and running and went on to supervise its operations throughout the mid-1930s (as FTC Commissioner, SEC Commissioner, and ultimately SEC Chair), later candidly described the deficiency letter system as an "extra-legal development."[78] Two of Bane's early SEC deputies noted in 1937 that "The Act provides no informal method of bringing about correction or supplementation of a registration statement."[79] Early treatises on Securities Regulation acknowledged the same point,[80] as did many leading sources on administrative law in the 1940–50s,[81] prominent voices from industry,[82] and several mid-century SEC chairmen[83] and other agency officials.[84]

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77. Baldwin Bane, *SEC's Work Defended as Liked by Investors and Registrants*, N.Y. TIMES, Jul. 2, 1939, at F1; *see also* Bane, *1952 Testimony*, *supra* note 43, at 392 ("Neither the Securities Act nor the Securities Exchange Act made provision for the administrative processing of registration statements and applications. The statutes expressly provide for formal proceedings to test the accuracy and adequacy of the filings required to be made . . . .").

78. JAMES LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 46 (1960).

79. Adolph C. Johnson & Andrew Jackson, *The Securities and Exchange Commission: Its Organization and Functions Under the Securities Act of 1933*, 4 LAW & CONTEMP. PROBS. 3, 10 (1937).

80. MCCORMICK, *supra* note 50, at 35 (discussing the deficiency letter process and acknowledging that "It will be noted that the only administrative control over registration specifically provided in the act is through formal proceedings"); LOSS, *supra* note 58, at 172 ("Without the benefit of specific statutory authority a very workable examination procedure has been developed."). One contemporary hornbook also makes the point. HAZEN, *supra* note 8, at 88 ("The procedures spelled out in 1933 Act § 8 do not provide an accurate picture of the SEC registration review process as it generally proceeds."); *see also* DAVID RATNER, SECURITIES REGULATION 128 (2d ed. 1980) (noting the deficiency letter process is "not provided for in the Act").

81. MONOGRAPH, *supra* note 50, at 24 (discussing the deficiency letter but conceding that "in terms the acts seem to offer only a choice between automatic effectiveness upon the lapse of the statutory period or complete ineffectiveness through formal proceedings"); GELLHORN, *supra* note 50, at 56 (extolling the deficiency letter as a "striking illustration of the efficacy of informal adjudication" but noting that the applicable statutes provide only "that a registration statement becomes effective automatically after the lapse of a stated period, unless in the interval the commission institutes a 'stop order proceeding.'"); Kenneth Culp Davis, *Administrative Powers of Supervising, Prosecuting, Advising, Declaring, and Informally Adjudicating*, 63 HARV. L. REV. 193, 206 (1949) ("From the statute one might suppose that the decisive determination would be made on the basis of what is produced at the hearing. In practice, however, the crucial function is neither adjudication nor rule-making, but supervising, with virtually no safeguards or judicial review.").

82. Bates, *supra* note 50, at 208 (discussing the deficiency letter and stating that "those charged with administering the act have gone a considerable distance beyond the apparent legislative intent"); Arthur H. Dean, *Twenty-Five Years of Federal Securities Regulation by the Securities and Exchange Commission*, 59 COLUM. L. REV. 697, 719 (1959) ("The Securities Act itself says nothing about deficiency letters, but merely provides in section 8 for the institution of stop order proceedings, which involve a formal notice and hearing, when the registration statement filed is incomplete or inaccurate in any material respect."); James Sargeant, *Private Offering Exemption*, 21 BUS. L. 118, 128 (1965) ("There is nothing in the statute that talks about a deficiency letter.").

83. Garrett, The SEC Review Process, *supra* note 42 (discussing the deficiency letter and noting that "if one reads the statute and takes it literally, a stop order is the prescribed method for the Commission to challenge deficient statements"); Gadsby & Garrett, *supra* note 42, at 721 ("The technique involved in the use of a staff letter of comment followed by amendment and acceleration is an administrative method which is not described in the statute.").

84. Abba David Poliakoff, *SEC Review: Comfort or Illusion*, 17 U. BALT. L. REV. 40, 43 (1987) ("The 1933 Act does not specifically provide for this type of review of registration statements filed with the Commission."); Interview by Richard Phillips with Milton Kroll, Former Comm'r, SEC, in Washington, DC (Sept. 13, 2001), https://www.sechistorical.org/collection/oral-histories/kroll091301Transcript.pdf [https://perma.cc/W7LE-

The explicit enumeration of certain powers is sometimes taken as impliedly precluding unenumerated others. As Chief Justice John Marshall recognized in 1824, such an enumeration "presupposes something not enumerated."[85] Marshall was referring to Article I of the Constitution, but the same principle has sometimes been carried over to other contexts.[86]

Under this principle, by expressly providing three distinct formal actions that the agency could take to intercede along a registration statement's pathway towards effectiveness, the Securities Act arguably impliedly precluded other methods to do so—including the deficiency letter system. Early on, the agency itself seemed to embrace this reading of the statute. The FTC's annual report for the Fiscal Year ending June 30, 1933—a month after the Securities Act was enacted but before it took effect and before the deficiency letter system was invented—construed the statute as restricting the agency's authority to the expressly enumerated administrative powers. It first explains that "[u]nless action is taken by the Commission to the contrary, registration statements become effective 20 days after filing . . . ." Then, it explains the kinds of "action" the Commission could take "to the contrary" are those defined by the terms of section 8: namely formal proceedings under 8(b) and 8(d).[87] Similarly, the SEC stated in a 1936 legal filing that "For the day to day administration of the registration provisions of the Act, the Commission must depend on the administrative remedy of the stop order . . . ."[88]In reality, the "day to day" administration revolved around a procedure that cannot be found anywhere in the text of the statute.

2. Section 8 Expressly Authorizes the Agency to Act Only on Material Misstatements or Omissions in Registration Statements and Impliedly Precludes the Agency from Acting on Immaterial Ones.

The statute did not give the agency any power to correct immaterial misstatements or omissions. The trio of remedies contained in section 8 empowered the agency to address material misstatements or omissions. Subsection (b) gave the agency power to enter a refusal order if it found the registration statement was "incomplete or inaccurate in any ***material*** respect." Subsection (d) gave the agency power to enter a stop order if it found the registration statement "includes any untrue statement of a ***material*** fact or omits to state any ***material*** fact required to be stated therein or necessary to make the statements therein not misleading." Subsection (e) gave the agency authority to pursue an examination to determine whether a stop order under subsection (d) should be entered—incorporating, by reference, the materiality requirement from that section.

L5N3] (discussing deficiency letter and noting that "When the act was passed, all it said was that you file a registration statement, and twenty days later it becomes effective unless the commission issues a stop order").

85. Gibbons v. Ogden, 22 U.S. 1, 196 (1824).

86. *E.g.*, Raleigh & G.R. Co. v. Reid, 80 U.S. 269, 270 (1871) ("When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.").

87. FTC, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED JUNE 30 1933 14–15 (1933); *see also Securities Rules Issued Under Act*, N.Y. TIMES, Jul. 7, 1933, at 23L ("Expert accountants of the commission will study the statements and make a report, after which the commission may order the proposed issue withheld from sale or permit it to be offered to the public.").

88. Brief for Respondent at 19, Jones v. SEC, 298 U.S. 1 (1936).

Nevertheless, correcting immaterial deficiencies is precisely what the agency used the deficiency letter process to do.[89] For instance, the SEC's 1936 report explained that "If the statement is ***not*** materially deficient, the issuer is advised and permitted to correct it by amendment."[90] Similarly, SEC Chair Jerome Frank reportedly told an agency staffer in the late 1930s that he tried and failed to curtail this practice: "I tell those fellows to ease up on picayune deficiencies, but I can't make them do it."[91] Another SEC Chair, James Landis, later observed "a considerable tendency to indulge in lint-picking in these letters."[92] An early empirical study of the deficiency letter process found that "Frequently the amendments [that resulted from the deficiency letter process] give so little additional information that one might suspect deficiencies were cited as a matter of procedure when a response was not clear, or when, for some other reason it did not satisfy the examiner."[93] In 1937, Adolf Berle wrote to incoming SEC Chair William Douglas that "It is no advertisement for the S.E.C. that only six or seven registration agreements have gone through without deficiency letters. This would prove either that everybody trying to register was a knave or a fool; or else that the applicable law was too obscure to be understood."[94] In sum, although Congress expressly gave the agency no authority to correct immaterial deficiencies in registration statements, the agency invented the deficiency letter regime precisely to do this.

3. Section 8 Expressly Authorizes the Agency to Demand Information from Issuers Related to Registration Statements only Through Formal Examinations and Impliedly Precludes the Agency from Demanding such Information Outside of Those Channels.

The statute provides a single procedure by which the agency could obtain additional information relevant to the registration statement—the formal, transparent, and procedurally cumbersome examination procedure outlined in subsection (e). The deficiency letter process effectively rewrote the statute by providing an alternative,

89. Starkey, *supra* note 50 at 13 ("In practically every case after these statements have been filed for examination and review pending their release to the public, it has been necessary for registering companies also to file numerous amendments rectifying what have proved to be in most cases minor deficiencies or infractions."); Bates, *supra* note 50, at 208 ("Though materiality is the theoretical basis for choice, many of the facts [flagged in deficiency letters] may actually be of trivial importance."); MCCORMICK, *supra* note 50, at 292, 294 (noting the frequent criticism "that the matters cited in the 'letters of deficiencies' are frequently immaterial and inconsistent" and concluding that the criticism was "undoubtedly justified during the long period in which the Commission was 'getting its bearings'"); *The Securities Act of 1933*, 33 COLUM. L. REV. 1220, 1227–28, n. 72 (1933) (discussing October 1933 regulations as "enabl[ing] the Commission to force even minor corrections" that would be "insufficient to form the basis for a refusal to register"); Dean, *Book Review*, *supra* note 43, at 1394 (noting that the Comm'n requires "non-essential and irrelevant detail[s]").

90. SEC, SECOND ANNUAL REPORT OF THE SECURITIES AND EXCHANGE COMMISSION 31 (1936).

91. KRIPKE, *supra* note 46, at 3.

92. LANDIS, REPORT, *supra* note 78, at 46.

93. Logan, *supra* note 50, at 42.

94. Letter from Adolf Berle to William Douglas (Sept. 23, 1937), https://www.sechistorical.org/collection/papers/1930/1937_0923_DouglasCongratulationsT.pdf [https://perma.cc/D4QU-YGHZ]; *see also* A.A. Berle, *Accounting and the Law*, 13 ACCOUNTING REV. 9, 12 (1938) (complaining about deficiency letters stating that "most questions of accounting are settled by the star-chamber process, and chiefly by sub-examiners"); *see also* KRIPKE, *supra* note 46, at 13–14 (criticizing the "picayune" and "nitpicking" nature of errors spotted in the deficiency letter process).

streamlined, informal mechanism by which the Commission could obtain information from registrants outside of that process. Instead of bothering with the section (e), the agency came to depend heavily on the extra-statutory deficiency letter process to obtain information.[95]

The non-statutory deficiency letter process also enabled the agency to circumvent the substantive limitations on the types of information it could obtain through the section (e) process. The Commission frequently used the informal deficiency letter process to solicit information from issuers *beyond* anything that was required to be in the registration statement solely for the Commission's own edification.[96]

4. Unlike Other Parts of the Securities Act, Section 8 Does Not Impose an Intent Requirement, Which Impliedly Precludes any Intent-Based System for Initiating Section 8 Actions.

Several remedies outlined in the Securities Act incorporated a standard of intent. One provision exempted from liability anyone who made material misstatements or omissions in the course of selling a security if they could show that they "did not know and in the exercise of reasonable care could not have known of such untruth or omission."[97] Another provided criminal penalties for "willful" violations of the act.[98] Another exempted from liability for false statements in a registration statement anyone (other than the issuer) who had "reasonable ground to believe, and did believe, at the time such part of the registration statement became effective, that the statements therein were true."[99]

The remedies afforded to the agency in section 8, by contrast, contained no intent requirement.[100] The formal actions under that section may be taken if there has been a material misstatement or omission without regard to anyone's intent.

And yet, soon after the agency developed the deficiency letter process, it effectively grafted an extra-statutory intent requirement onto the section 8 procedure. So long as the registration statement reflected a "sincere" and "honest" effort to comply with the law, the agency would rely on the deficiency letters process to correct any deficiencies; only where

95. *See supra* Part I.B.

96. SEC, FIFTH ANNUAL REPORT OF THE SECURITIES AND EXCHANGE COMMISSION 24 (1939) ("[T]here may be instances where it may be necessary first to request the registrant to furnish additional information to contribute to an understanding of a complicated situation."); Bane, *1952 Testimony*, *supra* note 43, at 411 (noting that the agency "quite frequently" uses the deficiency letter process to obtain "material for our information and analysis of the registration statement, and not as a part of that statement"); Goldin, *supra* note 50 (noting that deficiency letters "may even go so far as to request the registrant to furnish merely for the 'the information of the commission' and not for the registration statement, considerable collateral information and data not called for by the Securities Act or any rule").

97. Securities Act of 1933 § 12(a)(2), Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77l).

98. Securities Act of 1933 § 24, Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77x).

99. Securities Act of 1933 § 11(b)(3), Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77k).

100. Securities Act of 1933 § 8, Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77h).

the agency detected an "intentional or reckless disregard" of the rules, formal proceedings would be called for.[101]

In sum, although section 8 was enacted as a strict liability regime, the agency's deficiency letter process transformed it into an intent-based scheme where innocent misstatements or omissions would receive deficiency letters and only intentional ones would receive formal section 8 proceedings.

B. Legislative History

1. A "Preliminary" Review

The legislative history of the Securities Act shows that Congress understood and intended that the agency would be able to undertake only a preliminary and cursory review of registration statements for obvious defects during the 20 days between filing and effectiveness. The House Committee Report explained that it "intended to enable the Commission to make a preliminary check-up of any obvious departures from the standards set by the law . . ."[102] and emphasized that the commission's functions regarding the initial filing of the registration statement were "limited merely to determining whether the information so filed is complete and accurate on its face."[103] The Conference Report similarly emphasized that, during the 20-day waiting period, "the Commission is expected during this period to make only a preliminary check-up."[104]

This expectation was baked into the waiting period itself. In 1933, William Douglas (who would go on to Chair the SEC) observed:

> In the twenty day waiting period the Commission's check cannot but be superficial. . . . The Commission can never be so well acquainted with the internal affairs of thousands of different companies as to be able to appraise critically the truth of the intricate and detailed mass of facts from which the

101. SEC, THIRD ANNUAL REPORT OF THE SECURITIES AND EXCHANGE COMMISSION 3 (1937); SEC, FOURTH ANNUAL REPORT OF THE SECURITIES AND EXCHANGE COMMISSION 35 (1938); Johnson & Jackson, *supra* note 79, at 11; Jay W. Blum, *The Federal Securities Act, 1933-36*, 46 J. POL. ECON. 52, 54 (1938); James Joseph Byrne, *Securities Exchange Commission*, 10 ALB. L. REV. 140, 141 (1940); Dodd, *supra* note 52, at 176; MCCORMICK, *supra* note 50, at 35; *see also* 25 Fed. Reg. 6737 (July 15, 1960) (deficiency letter "is not generally employed where the deficiencies appear to stem from careless disregard of the statutes and rules or a deliberate attempt to conceal or mislead or where the Commission deems formal proceedings in the public interest."); *In re* Doman Helicopters, Inc., 41 S.E.C. 431, 440–41 (1963) (noting the deficiency letter was "developed by us for the purpose of assisting those registrants who have conscientiously attempted to comply with the Act"); Woodside, *supra* note 42, at 378 ("The formal investigation or administrative proceeding was reserved for the egregious case, the suspected fraud, the very careless, where good faith was doubted, or where the Commission believed some matter of principle should be explored formally and made the subject of an opinion, through which it could publicize its views.").

102. H.R. REP. NO. 73-85, at 25 (1933); *The Furnishing of Information and the Supervision of Traffic in Investment Securities in Interstate Commerce: Hearing before the H. Comm on Interstate and Foreign Commerce*, 73d Cong. 20 (1933).

103. *See* sources cited *supra* note 102.

104. 77 CONG. REC. 3879-3888, at 3901(1933) (Conf. Rep.).

> registration statement is drawn. At very best the power is a check on flagrant abuses and excesses.[105]

Other commentators observed the same thing.[106]

But the deficiency letter process actually implemented by the agency was anything but "preliminary" or cursory. In 1945, the agency itself explained that it subjected "all registration statements to ***careful and critical*** analysis."[107] One contemporaneous critic noted:

> In contrast with the pervading theory of the act, the Commission has been inclined to make, not a "preliminary check-up" to see if a statement is "on its face" complete and accurate, but a painstaking examination by experts to see whether every fact in which they can conceive that an investor might be interested is disclosed.[108]

Another former agency official emphasized that "Congress did not empower the commission to place a registration statement under a microscope immediately upon its filing and then proceed like a laboratory technician to make a tedious search for all kinds of flaws."[109]

In sum, although the legislative history unequivocally indicates that Congress intended for the agency's review during the 20-day waiting period to be "preliminary" and "cursory," the agency implemented a process that involved a dramatically more intense and careful level of scrutiny.

2. No Large Bureaucracy to Review Filings

Congress also repeatedly rejected the idea of creating a large bureaucratic staff charged with reviewing filings. For instance, some scholars have observed that during the debate over the Securities Act that "several Congressman proposed the establishment of a corps of government workers to audit public companies" but "this idea was rejected after lobbyists from the accounting profession persuaded Congress to rely on the certified public accounting sector for this function."[110] While the bill was on the House Floor, one representative explained that one benefit of the disclosure-only version that had been adopted over the alternative, more expansive role for government to conduct "merits" review, was that it would avoid the massive bureaucracy:

> To have adopted the alternative theory, to wit, the assumption of a governmental responsibility as to the worthiness of such securities, it would have been

105. William O. Douglas & George E. Bates, *The Federal Securities Act of 1933*, 43 YALE L.J. 171, 212 (1933).

106. Fred Rodell, *Regulation of Securities by the Federal Trade Commission*, 43 YALE L.J. 272, 275 (1933) ("[I]n the short space of time allotted the Commission for investigation, concealed inaccuracies and clever deceit will often slip through undetected.").

107. *In re* Universal Camera Corp., 19 S.E.C. 648 (1945). In the 1960s and 70s, when the agency adopted a tiered review system to deal with backlogs, it contrasted the "regular" / "customary" review process with "cursory" review—implying that the regular review was not cursory. SEC Release 33-4934 (Dec. 2, 1968); SEC Release No. 33-5231 (Feb. 3, 1972).

108. Bates, *supra* note 50, at 208.

109. Goldin, *supra* note 50.

110. William E. Bealing, Jr., Mark W. Dirsmith & Timothy Fogarty, *Early Regulatory Actions by the SEC*, 21 ACCT., ORGS. & SOC'Y 317, 324–25 (1996).

> necessary to set up a vast and extensive bureau of investigation, charged with appraisal of property, estimating the probable usefulness of patent rights, or likelihood of productivity of every kind of enterprise.[111]

Nevertheless, after the bill was enacted and the deficiency letter process implemented, precisely this large bureaucracy was established, as Congress repeatedly obliged Bane's requests for additional personnel to deal with the workload created by the deficiency letter system he invented. On July 7, 1933, when the FTC's registration section opened for business, it employed just a dozen or so employees to review the registration statements. Immediately after they received the flood of letters and decided to pursue a close and careful examination and write deficiency letters, the staff expanded rapidly. By the end of 1933, Bane reported to Congress that he had 60 people under his direction to review registration statements and draft deficiency letters.[112] By Fall of 1934, when it transitioned over to the SEC, it had more than 100.[113] In 1952, it was up to 175.[114]

3. No Discretion to Accelerate Effectiveness

At a critical moment, Congress considered and squarely rejected the idea of giving the agency discretion to "accelerate" effectiveness of registration statements.[115] While the bill was pending before the conference committee, the FTC sent a memorandum (drafted

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111. 73 CONG. REC. 2931 (1933) (statement of Rep. Wolverton). Meanwhile, in the Senate, during the testimony of a representative of the accounting industry, the discussion turned to the bill's requirement of certification of disclosures by independent auditors, and a Senator asked whether the public interest would be better served if any such "check up or any guarantee as to the correctness" of the registration statement be done "by some Government agency rather than by some private association of accountants"? The accounting industry representative rejected the idea out of hand as "impractical" since such a review "involves such a large force" and suggested that, "if a corporation wished to issue some securities and had been employing independent public accountants for 20 years those accountants should be able to make this examination more economically and quickly than the government." Then the following dialogue:

> Sen. Reynolds: Suppose that we decide in the final passage of this bill here to employ five or six hundred auditors from your organization, that would be all right then, would it not?
>
> Mr. Carter: I do not think the Government could employ five or six hundred independent accountants.
>
> Sen. Reynolds: Why could they not?
>
> Mr. Carter: I do not think the type of men that are in the public practice of accountancy would leave their present practice to go in the Government employ.
>
> Sen. Reynolds: Well, if it were sufficiently remunerative they would?
>
> Mr. Carter: Yes; if the Government made their time worth while. . . .
>
> Well, you will have to build some more buildings in Washington to house them if you are going to do that.
>
> Sen. Reynolds: Then we had better not pass this bill at all.

Securities Act: Hearings on S. 875 Before the Senate Comm. on Banking and Currency, 73d Cong., 57–60 (1933).

112. *Independent Offices Appropriation Bill for 1935 Hearing Before the Subcomm. of H. Comm. on Appropriations*, 73d Cong. 149 (1933) (statement of Baldwin Buckner Bane, Director of Securities Division).

113. *Stock Control is Taken Over by Commission*, CHI. DAILY TRIB., Sept. 2, 1934, at A10.

114. Bane, *1952 Testimony*, *supra* note 43, at 398.

115. *See supra* Part I.B. (explaining the background of acceleration and its central core place in the deficiency letter regime).

by Baldwin Bane) endorsing the House version but also proposing to change the language of section 8(a) to give the FTC discretion to make a filing that has been amended go effective faster than the fixed period provided by statute:

House Version § 8(a)[116]	FTC Proposal § 8(a)[117]
The effective date of a registration statement shall be the thirtieth day after the filing thereof, except as hereinafter provided. If any amendment to any such statement is filed prior to the effective date of such statement, the registration statement shall be deemed to have been filed when such amendment was filed**; except that an amendment filed with the consent of the Commission, prior to the effective date of the registration statement, or filed pursuant to an order of the Commission, shall be treated as a part of the registration statement.**	The effective date of a registration statement shall be the thirtieth day after the filing thereof, except as hereinafter provided. If any amendment to any such statement is filed prior to the effective date of such statement, the registration statement shall be deemed to have been filed when such amendment was filed, **unless the Commission shall otherwise specifically direct.**

The Conference Committee rejected the FTC's proposal, and the law was passed as initially passed by the House—without any agency authority to accelerate effectiveness of filings.[118] James Landis, who had drafted section 8, was involved in advising the conference committee.[119] But, as discussed above, immediately after enactment the FTC began relying on acceleration anyway.[120] Also, as discussed above, in 1940 Congress revisited the issue and amended the statute to expressly provide this authority.[121]

In sum, although Congress expressly declined in 1933 to grant the agency the discretionary power to accelerate effectiveness of filings, the deficiency letter regime implemented by the agency relied extensively on precisely this prohibited acceleration technique. More precisely, what Baldwin Bane tried and failed to accomplish through legislation, he was able to accomplish through administrative fiat.

C. Purpose

Timing in securities issuances was and remains a matter of critical importance. The waiting period in section 8 was hotly controversial when initially proposed because of the delay it introduced to a process that, until that point, had hinged on the ability to strike while the iron was hot. By providing a ***fixed*** waiting period and a limited, carefully defined set of ways the Commission could affirmatively act on the registration statement prior to

116. H.R. 5480 73d Cong. (as passed House May 5, 1933) (emphasis added).

117. *See* Memorandum from the FTC on HR 5480 ("Suggestions with Reference to H.R. 5480 as it Passed the House of Representatives") (on file with Harvard Law School Library, James McCauley Landis Collection, Folder #34) (emphasis added).

118. The committee did make some other, unrelated changes to the provision, including shortening the waiting period from 30 to 20 days.

119. Landis, *Legislative History*, *supra* note 6, at 46.

120. *Supra* Part I.B.

121. *Supra* Part I.C.

its effective date, the statute aimed to balance the two competing considerations. On the one hand, the waiting period allowed for a "cooling off" period prevent high-pressure sales tactics and allowed the agency to conduct a "preliminary and cursory" review to spot glaring errors. On the other hand, the waiting period was fixed, and the agency's powers were carefully restricted, so that the system still provided valuable measure of certainty to issuers and underwriters.

Section 8's principal drafter, James Landis, deliberately designed the section as a constraint on the bureaucracy. He explained, "[t]o avoid the delays of bureaucracy we insisted that time should run in favor of the registrant in the absence of any affirmative action by the Commission."[122] A different SEC Chair later explained, "the draftsmen who drew the act and the Congress which enacted it confidently expected that a registration statement in the ordinary case would lie in the Commission's files for 20 days without amendment and would thereupon become effective without Commission action."[123]

But, again, this carefully calibrated statutory system was never implemented. The substitution of the deficiency letter process led inexorably to substantial delays and uncertainties in the registration process. The statutory 20-day waiting period was all but ignored. Instead, the vast majority of registrations became effective after more than (in some cases much more than) 20 days.[124] Also gone was the predictability that had been baked into the statutory process; instead of being confident that the offering would move forward in 20 days, issuers now had the timing of their offerings dictated by the unpredictable exercise of discretion by administrators. The result was a substantial increase

122. Landis, *Legislative History*, *supra* note 6, at 35; *see also* JAMES LANDIS, THE ADMINISTRATIVE PROCESS 107 (1938) ("The acquisition of an effective registration statement flows from the passage of time."); MCCRAW, *supra* note 6, at 174 (explaining that Landis recognized that "the delay must remain limited. Knowing that the proper timing of stock issues was vital to their success, Landis proposed twenty days as a way of forcing prompt action not only from business but also from regulators. Delay could not continue, for if the regulators found nothing wrong with the documents, or if they simply did not get around to checking the, the registration would automatically become effective at the end of the twenty days. The cooling-off period functioned in the manner of the traditional injunction at weddings: speak now or forever hold your peace."); RITCHIE, *supra* note 6, at 46 (noting that Landis "wanted to define [the FTC's] responsibilities in such a detailed manner as to make administration almost a matter of mechanical and compulsory routine.").

123. Gadsby & Garrett, *supra* note 42, at 721.

124. Goldin, *supra* note 50 ("Will [a hypothetical registration statement] become effective at the expiration of twenty days after filing? Can the registrant go forward with his business plans and make commitments on the reasonable expectation that the funds will be available promptly? Is he justified in relying on the twenty-day waiting period prescribed in the securities act? The answer in all probability is 'No.'"); LOSS, *supra* note 43, at 174 (reporting that, by 1945, median time between filing and effective dates was 30.5 days); SEC, THIRTEENTH ANNUAL REPORT *supra* note 51, at 3–4 (reporting the median delay between filing and effective date was 29 days in 1946 and well over 20 in 1947); Earle C. King, Chief Accountant, SEC, Address of Earle C. King Before the Annual Meeting of Pennsylvania Institute of Certified Public Accountants (June 24, 1947) (reporting a review of 100 deficiency letters that they resulted in "serious delay in obtaining effective registration"); CHOKA, *supra* note 50, at 14 ("The 20-day period, by and large, is ignored completely."); H. Orvel Sebring, *Log Jam on the Potomac-The Current Delay Problem of the SEC*, 15 BUS. LAW. 921, 926 (1960) (reporting that, in 1956, less than half of all registration statements became effective in 20 days, and, in 1959, less than a quarter did); LANDIS, REPORT, *supra* note 78, at 6 ("The statutory period of 20 days during which a normal registration statement covering the issuance of new securities becomes effective under the Securities Act of 1933 has in practice been lengthened to some 40 to 60 days."); Bane, *1952 Testimony*, *supra* note 43, at 435 (noting that, between 1947 and 1951, less than one out of every twenty registration statements became effective in 20 days or less with no amendment filed); *see also* COFFEE ET AL., *supra* note 9, at 245 (noting that since the 1950s "the possibility of becoming effective in the basic 20-day period originally set by Congress became practically nonexistent").

in expense for registrants.[125] In sum, although a core purpose embodied in section 8 was to provide determinacy and speed, the deficiency letter process significantly undermined that purpose by rendering that fixed 20-day period a dead letter.

D. Counterarguments

When questions were raised in the 1930s and 40s about the legal foundations of the deficiency letter process, some argued that this process was "necessary" to avoid the harm that would have flowed from filing formal proceedings against all the registrants who filed deficient statements. Bane characterized the process as an act of administrative beneficence—a way to "afford[] registrants every opportunity to amend their statements and get them in proper shape without the disparaging effect of a stop order."[126] Similarly, the 1941 Attorney General Report on Administrative Procedure identified the procedure as a salient example of how "informal proceedings" can be "used to prevent hardship by interlocutory orders."[127]

But this defense paves over the essential antecedent policy choice. Absent the deficiency letter process, the agency would ***not*** have commenced formal proceedings against all the same registrants. It lacked the budget and personnel necessary to do so. The plausible framing here is not a choice between, e.g., 100 deficiency letters and 100 formal proceedings, but rather between 100 deficiency letters and perhaps five to ten formal proceedings. The agency would have had to exercise more prosecutorial discretion

125. Paul J. Bickel, *Effect of Recent Federal Legislation on the Practice of the Law of Business Associations*, 7 OHIO ST. U. L.J. 130, 143 (1941); Dean, *Book Review*, *supra* note 43, at 1394.

126. Bane, *Federal Securities Act of 1933*, *supra* note 48, at 37; *see also* Bane, *SEC's Work*, *supra* note 77 (stating that deficiency letters were "generally accepted as a distinct service to registrants"); Garrett, The SEC Review Process, *supra* note 42 ("It was equally obvious to Baldy that public financing would indeed grind to a halt if every registration statement got bogged down in a stop order proceeding. He therefore came up with the startling suggestion that the registrants be informed of the staff comments and be given an opportunity to cure the asserted deficiencies by amendment").

127. ATTORNEY GENS. COMM. ON ADMIN. PROC., FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 39-40 (1941); *see also* Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 377 (1942) (noting that SEC developed "informal methods for correcting deficiencies" in order to avoid instituting formal proceedings which "may be nearly as damaging to the registrant as a final adverse decision"); GELLHORN, *supra* note 50, at 56–57 (agency invented deficiency letter because it "realized" that the formal proceedings provided in the statute would cause "[p]ublic reflection . . . [to be] case on the securities proposed to be sold, and their successful flotation would become all but impossible" and therefore the "abandonment" of formal proceedings "was unquestionably much to the advantage of those who were theoretically to be benefitted by formality of procedure"); E. Merrick Dodd, *supra* note 52, at 176 (Most defects in registration statements are non-fraudulent in character, and it is desirable that a way be found for curing such defects without subjecting issuers to the unfavorable publicity of stop-order proceedings."); MCCORMICK, *supra* note 50 at 35 ("To institute formal proceedings" in instances where a registration statement was "unwittingly" defective "would result in the destruction of many of the most useful purposes of the act"); Peter Woll, *Informal Administrative Adjudication: Summary of Findings*, 7 UCLA L. REV. 436, 449 (1960) ("formal procedure . . . would cause injustice to the private parties coming under the Commission's jurisdiction by preventing expedition in the operation of their businesses and causing them to suffer the delay and expense indigenous to formal proceedings."); Woodside, *supra* note 42, at 378 (the deficiency letter process was necessary to make the statute "workable"); Ralph Demmler, *Address to ABA*, 10 BUS. LAW. 42, 44 (1954) ("since timing is important in most offerings and since formal . . . proceedings would in many cases make the offering forever impossible, the commission's practice is to advise the issuer informally of deficiencies . . . .").

regarding which deficiencies were bad enough to warrant the initiation of formal proceedings.[128]

E. Conclusion

Scholars have presented an enormous variety of competing and overlapping explanations for the creation of the mandatory disclosure regime in the 1930s. The most familiar account regards the Securities Act as a democratic (and/or populist) response to the stock market crash of 1929 and the Great Depression that followed—events that created a demand for a crackdown on Wall Street that FDR rode to office.[129] A related, but distinct, view is that mandatory disclosure was a *reasoned* regulatory response to the market failures these events signaled.[130] Less romantically, some interpret the Securities Act as a product of interest group politics; these accounts emphasize that the bill's drafters had ties to and sympathies with the regulated industry, that industry lobbyists got friendly amendments inserted to the bill along the way, and that elite investment banks and accountants were not harmed and even benefitted from the law's passage.[131]

Notwithstanding their variety, these accounts are united by a strong assumption of legislative primacy. They take the drafting and enactment of the Securities Act of 1933 as the key transformational moment and subject of analysis. It is that legislative event that (on these accounts) fundamentally defines the regime and is the main subject to be observed

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128. *New Approaches to Disclosure in Registered Security Offerings: A Panel Discussion*, *supra* note 45, at 531 ("There was, however, another clear choice which [Bane] had and presumably rejected, other than instituting over 100 stop order proceedings and that was to inform his staff in connection with 95% to 99% of their comments that if they ever made any more asinine comments like that, they would be fired."); Demmler, *supra* note 127, at 43, (discussing and rejecting view that "the Commission should let the registrant file papers which it thinks follow the rules and forms, sell on the basis of the papers filed and assume responsibility, penal and civil, under the liability provisions of the act").

129. *E.g.*, Merrill Lynch v. Dabit, 547 U.S. 71, 78 (2006); SELIGMAN, *supra* note 3, at 39–72; PHILLIPS & ZECHER, *supra* note 76, at 8–9; MCCORMICK, *supra* note 50, at 18–27; KHADEMIAN, *supra* note 10, at 26–27; COHEN, *supra* note 6, at 149; HILTZIK, *supra* note 2, at 85; KARMEL, *supra* note 10, at 39; LASSER, *supra* note 6, at 71; PAUL G. MAHONEY, WASTING A CRISIS 37 (2015); RITCHIE, *supra* note 6, at 44; LANGEVOORT, *supra* note 10, at 7; Stuart Banner, *What Causes New Securities Regulation—300 Years of Evidence*, 75 WASH. U. L.Q. 849, 850 (1997); CHOI & PRITCHARD, *supra* note 9, at 18; PALMITER, *supra* note 9, at 2021; Jarrell, *supra* note 10, at 619–21; Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194 (1976); Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 170 (1994); STEVENSON, *supra* note 10, at 80–81. A complexity in this account is that contemporary economists generally doubt any strong link between the Great Crash and the Great Depression. *E.g.*, MAHONEY, *supra* note 129, at 39.

130. E.g., SELIGMAN, *supra* note 3, at 604; DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945 367–68 (2001); LISA FAIRFAX, BUSINESS ORGANIZATIONS 353 (2019); SEC v. Cap. Gains Rsch. Bureau, Inc., 375 U.S. 180, 186–87 (1963); United Hous. Found., Inc. v. Forman, 421 U.S. 837, 849 (1975); *see also* James Burk, *The Origins of Federal Securities Regulation: A Case Study in the Social Control of Finance*, 63 SOC. FORCES 1010, 1015 (1985) (stating that the "market failure" explanation is "commonly accepted today by historians of securities regulatory policy").

131. LASSER, *supra* note 6, at 80–81; Paul G. Mahoney, *The Political Economy of the Securities Act of 1933*, J. LEGAL STUDS. 30 (2001); MAHONEY, *supra* note 129, at 37, 66–76; Henry G. Manne, *Economic Aspects of Required Disclosure Under Federal Securities Laws*, in WALL STREET IN TRANSITION 33–36 (Manne & Solomon eds. 1974); PARRISH, *supra* note 3, at 42; PARRISH, *supra* note 6, at 236; GARY JOHN PREVITS & BARBARA DUBIS MERINO, A HISTORY OF ACCOUNTANCY IN THE UNITED STATES 270–76 (1998); Barbara D. Merino, *Financial Reporting in the 1930s in the United States Preserving the Status Quo*, 27 ACCT. F. 270 (2003); KENNEDY, *supra* note 13, at 368.

and explained. This assumption reflects a formalistic view of how government works: Congress makes the laws; the executive branch "executes" them.

But this formalistic account breaks down and fails to explain reality in this case. The Securities Act did not merely issue broad commands about mandatory disclosure and delegate the task of filling in the details to an agency. Rather, the statute embodied careful and detailed instructions about how the program was to be administered. As Landis later wrote, the statute reflected a "deliberate effort . . . to define the duties and the activities of the administrative in such a detailed manner as to make administration almost a matter of mechanical and compulsory routine."[132] The executive branch rejected those detailed instructions and came up with a wholly different system.

The deficiency letter system is less an exercise of delegated authority than an open defiance of Congressional directives.[133] For those accustomed to thinking of the Securities Act as the foundation of modern securities regulation, this claim constitutes significant revisionism warranting a rethinking of the meaning of the "founding" moment in securities regulation.

III. LIMITED ADMINISTRATIVE CAPACITY AND THE ORIGINS OF REAL MANDATORY DISCLOSURE

In the first 100 days of FDR's first term, Congress enacted a barrage of legislation dramatically expanding the federal government's power to regulate the economy.[134] But legislative mandates are not self-executing; without the practical capacity to execute them, they are merely words on a page.[135] By the end of FDR's Presidency, this capacity had been vastly expanded, but back in the summer of 1933, just a few months after Roosevelt took office, when Baldwin Bane sat down to deal with the tidal wave of registration statements filed on the first day the Securities Act took effect, he faced a serious capacity short-fall.

The Commission initially assigned just a dozen or so employees from other components of the agency to assist with this work.[136] None of these staffers had prior experience administering such a program—since no such program had ever existed. All had been career professionals at the FTC and not drawn from the securities industry. Bane himself had no prior experience in finance, securities, or corporations.[137] Nor did anyone

132. LANDIS, THE ADMINISTRATIVE PROCESS, *supra* note 122, at 54 ("The presence of a very limited discretionary power in the administrative to depart from the positive requirements of the 1933 Act arose from a partial distrust, held by the Congress, as to the quality and courage of the administrative. . . .").

133. This is not to deny that the enactment of the Securities Act did play an essential enabling role. The registration requirement, formal sanctions enumerated in section 8, and assignment to the FTC were all necessary prerequisites for the regime that resulted—the deficiency letter system would not have been possible without these prerequisites.

134. *See* COHEN, *supra* note 6.

135. As Reuel Schiller notes, "the emergence of the administrative state was not simply the process of political actors implementing the desires of their constituents for more state control over the economic and social order," but rather "was shaped by the way these political impulses were refracted by existing institutional structures, both constitutional and bureaucratic in nature." Schiller, *supra* note 11 (collecting sources); *see also, e.g.*, Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 220 (2015) (distinguishing legal, political, and practical modes of administrative capacity).

136. Woodside, *supra* note 42, at 377.

137. *Infra* Part IV.B.3.

on the FTC.[138] Nor could his staff draw on any consolidated set existing authoritative disclosure or accounting principles or guidelines to guide their review—Congress had precisely tasked the agency with *creating* such rules as part of implementing the new disclosure regime.[139]

Cooperation from the industry was hardly assured. The securities industry was still seething from the enactment of the bill and a well-resourced campaign was already underway to disparage and dismantle the new regime.[140] Nor could Bane necessarily depend on the President or Congress; the Securities Act was only a small piece of the transformation pursued in the first 100 days of FDR's first term.[141]

So, when his office was flooded with approximately 100 registration statements in July 1933, all set to take effect in 20 days, Bane faced a dramatic mismatch between the task he'd been assigned and the administrative capacity at his disposal to execute that task.[142] According to contemporaneous accounts, Bane's division was "unprepared,"[143] "by no means organized"[144] and would be "hard pressed"[145] to deal with its work.

Section A of this Part argues that real mandatory disclosure arose above all else as Bane's expedient solution to the urgent problem posed by this capacity shortfall. Bane's procedural innovation is what made the mandatory disclosure regime *actually work*.[146] But as section B of this Part states, this expedient adaptation had consequences. Even as it helped the agency overcome the administrative capacity deficit, the deficiency letter system also fundamentally transformed the character of the mandatory disclosure regime.

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138. LANDIS & GOLD, *supra* note 6, at 173 ("So far as the Federal Trade Commission was concerned, none of their members really knew anything about securities . . . .").

139. PREVITS & MERINO, *supra* note 131, at 270–80.

140. CAROSSO, *supra* note 4, at 358–61; SHAMIR, *supra* note 33, at 44–46; CHATOV, *supra* note 5, at 74–90; SELIGMAN, *supra* note 3, at 78–100; Ernst, *Lawyers*, *supra* note 33, at 5. Bane was well aware of this mounting opposition, going on a speaking tour in the Fall of 1933 to respond to it. *Defends Securities Act*, WALL ST. J., Dec. 22, 1933, at 4; *New Securities Act Discussed by Bane*, WALL ST. J., Nov. 29, 1933, at 12.

141. *See, e.g.*, COHEN, *supra* note 6.

142. To be sure, as noted above, Bane likely could have stayed within the technical confines of the statute by picking five to ten of the worst offenders, suing them, and letting the rest go through.

143. *E.g.*, *Securities Act Registration is $75,000,000*, *supra* note 42.

144. *File 50 Securities Under New Law*, N.Y. TIMES, Jul. 8, 1933, at 16.

145. *Securities Rules Issued Under Act*, N.Y. TIMES, Jul. 7, 1933, at 23.

146. *See* LANDIS & GOLD, *supra* note 6, at 173 ("if it hadn't been for Baldwin Bane, I don't think that act would have ever stood up under the pressures it was under."); Telegram from Harold Bradford to FDR (Jun. 30, 1934) (on file with the Franklin D. Roosevelt Presidential Library & Museum, Folder DF 1060a, SEC Endorsements Bane, B.B.) (Bane was "responsible for the outstanding success of the Federal Securities Act"); Letter from John Brookes (Lawyer) to FDR (Feb. 5, 1935) (on file with the Franklin D. Roosevelt Presidential Library & Museum, Folder DF 1060a, SEC Endorsements Bane, B.B.) ("I feel that [Bane] had considerable to do in laying the ground-work for the constructive and able administration which is now being given the Securities Act by the Commission itself."); *see also* SELIGMAN, *supra* note 3, at 619–20 (one "general explanation" for how the SEC's "laws endured as well as they did long after enthusiasm for the New Deal period's policies generally had waned" is the SEC's "unusual prowess in exploiting the flexibility of the administrative process" and citing the deficiency letter process as an example).

A. The Deficiency Letter Process Expanded Administrative Capacity

1. Bringing Elite Professionals into the Fold

The genius of the deficiency letter process was in the way it transformed elite securities professionals (lawyers, accountants, bankers) from adversaries of the new regime to partners. Bringing in the professions enabled the agency to draw on this substantial private expertise in executing its new mandate, and thereby help overcome the shortfall in administrative capacity. The statute contemplated an arms' length, adversarial relationship between government and business, in which the government would unilaterally make disclosure rules and sue companies that violated them.

The deficiency letter process transformed this relationship. The production of disclosure and disclosure rules became a public-private partnership—jointly produced by the regulators and the elite gatekeeping professions in the iterative deficiency letter process. As James Landis later explained, "The major reforms in regard to underwriting practice, corporate disclosure, and accounting techniques that the Commission has brought about—and it has brought about many—are not of public record" because these changes were brought about through the deficiency letter process.[147] Instead of a top-down system of rulemaking and enforcement, the deficiency letter system integrated sophisticated private actors into an iterative, informal rulemaking process.

Bane extolled the deficiency letter system in these terms. The system enabled the "registration process and the rules and regulations of the commission" to be "carefully developed" and adapted to "suggestions of some of the most experienced, lawyers, accountants and business men in the country," rather than a strictly top-down fashion.[148] The system essentially brought these private actors into a partnership with the government, as Bane wrote, giving them "the opportunity of creating a true and honorable profession by the assumption and adequate discharge of *public* responsibilities."[149] On Bane's description, the system enlisted the *private* securities professionals in the *public* function of creating and enforcing the new disclosure regime.

Historians have noted that, although the Securities Act had provided for the administrative development of accounting rules,[150] the agency chose not to use that power and instead allow for the development of those rules by the accounting industry.[151] What

147. LANDIS, THE ADMINISTRATIVE PROCESS, *supra* note 122, at 109 ("The trend of decisional policy is not readily discoverable from the stop order opinions of the commission. The nature of these reforms can only be found by an examination of the successive amendments prior to the effective date—amendments made in the hope that the corrected form of disclosure will avert the bringing of a proceeding.").

148. *Defends Securities Act*, *supra* note 140.

149. Baldwin B. Bane, *The Securities Act of 1933*, CERTIFIED PUBLIC ACCOUNTANT, Oct. 1933, at 587, 592 (emphasis added); *see also* Baldwin B. Bane, Chief, Sec. Div. of the FTC, On the Securities Act of 1933: Delivered before the Convention of Affiliated Better Business Bureaus, (Sept. 12, 1933), https://www.sec.gov/news/speech/1933/091233bane.pdf (on file with the *Journal of Corporation Law*).

150. Securities Act of 1933 § 19(a), Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77s(a)).

151. SELIGMAN, *supra* note 3, at 197–201 (reviewing decision by SEC's early chairs to "leav[e] the promulgation of accounting principles almost entirely to the accounting profession"); MCCRAW, *supra* note 6, at 186–92; PREVITS & MERINO, *supra* note 131, at 270–90 (reviewing history of accounting in the 1930s and concluding that "accountants had withstood the threat of loss of professional autonomy"); JOHN C. COFFEE, JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 123–30 (2006) (similar).

these scholars miss, however, is the central role that the extra-statutory deficiency letter process played in facilitating this. The deficiency letter process created an attractive platform for collaboration between the agency and the accounting industry to develop the accounting principles in an iterative, non-litigious, ongoing public-private partnership.[152]

2. Preempting Attack and Avoiding Scandal

The move to the deficiency letter system also protected the capacity of the agency to execute its mandate by insulating the regime from potentially devastating political attack.

First, the deficiency letter system may have convinced elite professions that it was in their best interest to preserve, not attack, the regime. As noted above, the deficiency letter system gave these private lawyers, accountants, and bankers a seat at the rulemaking table—involving them in the development of disclosure policies. For another thing, (as developed more below) the secrecy of this deficiency letter process ensured that elite professionals enjoyed privileged access and information that they could sell at a premium to clients. The combination quickly helped these elite professionals to see that they stood to benefit from the new regime.

Second, the deficiency letter system allowed the agency to steer away from the direct, potentially disastrous public confrontations with the securities industry that the statute seemed to invite. Bane explained that, if the agency were to rely on the section 8 formal enforcement to correct every material deficiency, as the statute suggested:

> The commission under such a policy would be justly charged with obstructionist tactics, of standing by in silence knowing of defects in a registration statement without attempting to assist the registrant to comply with the requirements of the law, of laying a trap for the unwary or the inexperienced registrant, of employing unfair methods. The commission under such a policy could fairly be accused of an unintelligent administration of the law.[153]

The deficiency letter process provided a way to avoid the politically costly confrontations with the securities industry that had been set up by the statute. Finally, carefully inspecting and editing every single registration statement before it took effect might have prevented a politically disastrous scandal that might have occurred had a properly filed registration statement later turned out to contain many materially false statements leading to significant investor losses.[154]

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152. *See* Letter from Donald L. Pomeroy to FDR (Feb. 1, 1935) (on file with the Franklin D. Roosevelt Presidential Library & Museum, Folder DF 1060a, SEC Endorsements Bane, B.B.) (extolling Bane as having "converted many enemies of the Act to friends"); Ernst, *Lawyers*, *supra* note 33, at 4–6 (discussing Wall Street lawyers' quick progression through the "five stages of grief for the Old Deal"—moving rapidly from hostility to acceptance as they came to understand the advantages the system posed to their interests).

153. Bane, *Federal Securities Act of 1933*, *supra* note 48, at 37; *see also* Bane, *SEC's Work*, *supra* note 77 (stating that deficiency letters were "generally accepted as a distinct service to registrants"); Garrett, The SEC Review Process, *supra* note 42 ("It was equally obvious to Baldy that public financing would indeed grind to a halt if every registration statement got bogged down in a stop order proceeding. He therefore came up with the startling suggestion that the registrants be informed of the staff comments and be given an opportunity to cure the asserted deficiencies by amendment.").

154. *See* KRIPKE, *supra* note 46, at 16 (attributing the SEC's aggressive and often picayune deficiency letter process to the agency's "self-protective defensiveness": "When investors lost money, the SEC did not want to be

3. Expanding The Mandate

The deficiency letter system also helped expand the administrative capacity more directly by convincing Congress that more resources were needed. As noted above, during the consideration of the Securities Act, Congress had squarely considered and rejected the idea of creating a large government bureaucracy staffed by accountants and lawyers to review registration statements.[155] But, once the deficiency letter process was up and running, Bane was able to repeatedly show Congress that he needed a greater budget and greater staff to keep up with the mounting workload. For instance, in a December 1933 hearing, Bane walked Congress through the details of the deficiency letter process,[156] explained that "the demand on the Commission's time and employees is continually increasing, and that demand is really just beginning";[157] and noted that "you can work the men overtime, without regard to hours, and build up and maintain an spirit de corps, but you cannot keep it up indefinitely."[158] Similarly, in a 1934 article, Bane explained that the deficiency letter process "an examination by the staff of the division of statements requiring amendments several times, and with the small staff available has meant continuous work without regard to days or hours."[159] And, in 1952 testimony, Bane told a Congressional committee that his Division had fallen behind in its work reviewing filings:

> The reason we are now behind is lack of personnel. That is the chief and very nearly the only reason—lack of personnel. We just do not have manpower to take care of these filings ['33 Act] against which there is a time limit running and at the same time keep reasonably current on these filings ['34 Act] against which there is no time limit which naturally have to be put aside to take care of the time-limit work. We just do not have enough personnel to go back and pick that up.[160]

In none of these hearings did Bane or anyone on the Committee raise the fact that the statute had not actually contemplated comprehensive review by the Commission of any of these filings, or that the system of such review had been invented by none other than Bane himself. Congress repeatedly obliged Bane's requests for additional personnel to deal with the workload created by the deficiency letter system he invented. The staff at Bane's disposal ballooned from just a dozen at the outset, to 60 at the end of 1933, to more than 100 the following year, all the way up to 175 in 1952.[161]

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in the position of having permitted any optimistic or unverifiable statements, or of having failed to warn investors against the possible occurrence of every conceivable adverse development.").

155. *Supra* Part II.B.2.

156. *Independent Offices Appropriation Bill for 1935 Hearing Before the Subcomm. of H. Comm. on Appropriations*, 73d Cong. 2d Sess. 149 (Dec. 7, 1933).

157. *Id.* at 120.

158. *Id.* at 154.

159. Bane, *supra* note 51.

160. Bane, *1952 Testimony*, *supra* note 43, at 396-98.

161. *Independent Offices Appropriation Bill for 1935*, *supra* note 156; *Stock Control is Taken Over by Commission*, *supra* note 117; Bane, *1952 Testimony*, *supra* note 43, at 398.

B. The Deficiency Letter Process Made the Mandatory Disclosure Regime More Corporatist

Historians have distinguished two regulatory philosophies competing inside the New Deal: Corporatism and Brandeisianism.[162]

***Corporatism*:** Corporatists accepted that big business was here to stay and favored a big government to work in a partnership with business to manage the national economy. The approach favored centralized economic planning over reliance on free competition and markets. Concerns about antitrust, concentration, and transparency should be set aside to enable effective collaboration among business and government leaders on wages, production levels, and more.[163] The National Industrial Recovery Act represents the high-water mark of New Deal corporatism.[164] The statute, a core feature of Roosevelt's "First 100 Days," authorized the President to work with trade/industry associations to develop and administer "codes of fair competition" for particular industries. The Court famously struck down this statute as an unconstitutional delegation of legislative authority in 1935.[165]

Brandeisianism: The namesake of the rival framework is one of the Justices who voted to strike down that statute—Louis Brandeis.[166] Brandeis spread his philosophy through judicial opinions, non-judicial writings,[167] and by cultivating a loyal following among elite lawyers inside the Roosevelt administration.[168] Brandeisians rejected bigness in business and government. The government's proper role was as market regulator—setting and enforcing clear rules designed to protect free markets and competition—not as a partner to big business or central economic planner. Antitrust laws should be vigorously enforced to break up large entities and encourage competition among small entities. Transparency and disclosure were key regulatory tools—ensuring businesses and government stayed in line by subjecting them to the "best disinfectant."[169]

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162. *E.g.*, HAWLEY, *supra* note 2, at 12–14, 35–52; LASH, *supra* note 2, at 79–81; COHEN, *supra* note 6, at 228–29; IRONS, *supra* note 33, at 20–21; DAVIS, *supra* note 6, at 86–87; PARRISH, *supra* note 6, at 221–22; Wang, *supra* note 34; MOLEY, THE FIRST NEW DEAL, *supra* note 6, at 306. Some accounts emphasize Keynesianism as a third progressive alternative to Brandeisianism and Corporatism. *E.g.*, Michael Sandel, *America's Search for a New Public Philosophy*, ATLANTIC (Mar. 1996).

163. For descriptions of the corporatist regulatory philosophy in the 1930s, see, e.g., HAWLEY, *supra* note 2, at 43–46; LASH, *supra* note 2, at 79; COHEN, *supra* note 6, at 228–29; IRONS, *supra* note 33, at 19; William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins*, 34 J. CORP. L. 99, 102–03, 113–114 (2008).

164. *E.g.*, HAWLEY, *supra* note 2, at 35–52; IRONS, *supra* note 33, at 19–21; Bratton & Wachter, *supra* note 163, at 114–17; SAWYER, *supra* note 38, at 267–89; BARRY KARL, THE UNEASY STATE 112–19 (1983).

165. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

166. After the decision, Brandeis sent a private message to President Roosevelt "This is the end of this business of centralization, and I want you to go back and tell the President that we're not going to let this government centralize everything. It's come to an end." PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 349–52 (1984); *see also* Nelson Dawson, *Brandeis and the New Deal*, *in* BRANDEIS AND AMERICA 44–45 (1989); LEWIS PAPER, BRANDEIS 350–51 (1983); LEUCHTENBURG, *supra* note 2, at 149.

167. *E.g.*, LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY (1914); LOUIS D. BRANDEIS, BUSINESS – A PROFESSION (1914); LOUIS BRANDEIS, THE CURSE OF BIGNESS (1934).

168. Dawson, *supra* note 166, at 42–43.

169. For general descriptions of the Brandeisian philosophy in the 1930s, see, for instance, HAWLEY, *supra* note 2, at 47–51; LASH, *supra* note 2, at 79; COHEN, *supra* note 6, at 228, IRONS, *supra* note 3, at 20; DAVIS, *supra*

Each philosophy had its adherents inside the New Deal.[170] Roosevelt himself was agnostic.[171] Some scholars identify a shift over time, with the so-called "First New Deal" defined by a more corporatist approach, and the "Second New Deal" defined by a more Brandeisian one.[172] Other scholarship depicts a more chaotic story.[173]

Differences aside, historians and other scholars agree that the Securities Act was a fundamentally Brandeisian intervention.[174] Unlike rival proposals which would have given the federal government authority to choose *which* companies could move forward with offerings based on the *merits* of the enterprise (a form of corporatist central economic planning) the final bill was a disclosure-centric regime that left the primary organizing force in competition and markets, not the government.[175] Further, the statute contemplated

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note 6, at 86–87; PARRISH, SECURITIES REGULATION, *supra* note 6, at 222; LOSS, SELIGMAN & PAREDES, *supra* note 8, at 309–10; Alan Brinkley, *The Antimonopoly Ideal and the Liberal State: The Case of Thurman Arnold*, 80 J. AM. HIST. 557, 568 (1993); Wang, *supra* note 34, at 1222; Dawson, *supra* note 166, at 38–40.

170. Leading adherents of the corporatist approach include Moley, Tugwell, and Adolf Berle. *See* Bratton & Wachter, *supra* note 163 (describing Berle's corporatism); Dawson, *supra* note 166, at 42–44. Leading Brandeisians include Felix Frankfurter, and to a lesser extent Perkins. *See* LASH, *supra* note 2, at 79; COHEN, *supra* note 6, at 228–29.

171. HILTZIK, *supra* note 2, at 7–8; COHEN, *supra* note 6, at 5–7; 229.

172. BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 302 (2000); MICHAEL JANEWAY, THE FALL OF THE HOUSE OF ROOSEVELT 4–5, 17 (2004); MELVIN I. UROFSKY, FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES 37 (1991); COHEN, *supra* note 6, at 288; H.N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 104 (1981); HAWLEY, *supra* note 2, at 15; JEFFERSON COWIE, THE GREAT EXCEPTION: THE NEW DEAL & THE LIMITS OF AMERICAN POLITICS 96–97, 108–14 (2016); Dawson, *supra* note 166, at 44; PAPER, *supra* note 166, at 339–60.

173. E.g., KENNEDY, *supra* note 130, at 153–54; ROBERT F. HIMMELBERG, THE GREAT DEPRESSION AND THE NEW DEAL 49–50 (2000).

174. *E.g.*, HAWLEY, *supra* note 2, at 306–08; SELIGMAN, *supra* note 3, at 41, 621; COHEN, *supra* note 6, at 153; KARMEL, *supra* note 10, at 39; SCHLESINGER, *supra* note 2, 19, 444–45; MURPHY, *supra* note 10, 131–35; LOSS, SELIGMAN & PAREDES, *supra* note 8, at 309–14; CAROSSO, *supra* note 4; STEVENSON, *supra* note 10, at 81; GRAHAM, *supra* note 16, at 1–2; DE BEDTS, *supra* note 3, at 34; DAWSON, *supra* note 166, at 78–81; LEUCHTENBURG, *supra* note 2, at 59.

For adherents of the view that the First New Deal was predominantly corporatist, and the second new deal was Brandeisian, the Securities Act therefore seems to be out of place. *E.g.*, ACKERMAN, *supra* note 172, at 302; PAPER, *supra* note 170, at 344–45; DAWSON, *supra* note 166, at 78–81; LEUCHTENBURG, *supra* note 2, at 149.

Reference here is to the Securities Act of 1933. Later securities laws would edge closer to the corporatist model. *E.g.*, LOSS, SELIGMAN & PAREDES, *supra* note 8, at 314.

175. *E.g.*, SELIGMAN, *supra* note 3, at 40–41, 56, 70; PARRISH, SECURITIES REGULATION, *supra* note 6, at 51, 53, KARMEL, *supra* note 10, at 42; PERINO, *supra* note 6, at 288; KHADEMIAN, *supra* note 10, at 28; LOSS, SELIGMAN & PAREDES, *supra* note 8, at 309-15; LASH, *supra* note 2, at 131; CHATOV, *supra* note 5, at 34; PALMITER, *supra* note 9, at 20–21; HAZEN, *supra* note 8, at 16–17. The statute went so far as to make it "unlawful" for anyone to represent to any prospective purchaser of a security that the FTC "has in any way passed upon the merits of, or given approval to, such security." Securities Act of 1933 § 23, 15 U.S.C. § 77w. The explicit rejection of any governmental "merits" review was a persistent theme of the discussion and debates leading to the bill. *E.g.*, *Hearing on H.R. 4314 before the H. Comm on Interstate and Foreign Commerce*, 73d Cong. 140–41 (1933); *Message of the President of the United States Transmitting a Recommendation to Congress for Federal Supervision of Traffic in Investment Securities in Interstate Commerce*, H.R. DOC. NO. 73-12 (1933); H.R. Rep. No. 73-85, *supra* note 104 (statement of Rep. Mapes); 73 Cong. Rec. 2925 (statement of Rep. Bulwinkle); 73 Cong. Rec. 2931 (May 5, 1933) (statement of Rep. Wolverton); 73 Cong. Rec. 2950 (May 5, 1933) (statement of Rep. Reilly). Early agency leaders repeatedly emphasized in their public remarks that the government was *not* engaged in economic planning by picking good companies from bad ones. *E.g.*, *1935 Urgent Supplemental Appropriations, Hearing Before the Subcomm. of the H. Comm. On Appropriations.*, 74th Cong. 10 (statement of

a classically Brandeisian relationship between government and business, with the government setting disclosure rules[176] and then imposing sanctions through formal transparent proceedings when those rules were violated.[177] In addition, the primary drafters of the Securities Act were heavily influenced by Brandeis,[178] and leading corporatists greeted the legislation with hostility.[179] Unlike corporatist legislation like NIRA, the constitutionality of the Securities Act was generally affirmed by courts.[180] And the Securities Act embraced a Brandeisian disavowal of oversized government bureaucracy;[181] although some legislators had proposed that, as part of the disclosure regime, the government itself would employ auditors to review the financial disclosures of public companies, that proposal was flatly rejected.[182]

SEC Chair Kennedy); *File 50 Securities Under New Law*, *supra* note 144; *Securities Rules Issued Under Act*, *supra* note 145; *U.S. Official Defends New Securities Law*, CHI. DAILY TRIB., Sept. 20, 1933, at 25; Baldwin Bane, *Speech on The Securities Act of 1933 Before the Bond Club of Philadelphia* (Dec. 21, 1933), https://www.sec.gov/news/speech/1933/122133bane.pdf [https://perma.cc/8QHR-GK8A].

176. Securities Act of 1933 § 5, Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77e).

177. Securities Act of 1933 § 8, Pub. L. No. 73-22, 48 Stat. 74 (codified as amended 15 U.S.C. § 77h).

178. LANGEVOORT, *supra* note 10, at 7; MOLEY, FIRST NEW DEAL, *supra* note 6, at 306; HIRSCH, *supra* note 172, at 113; MURPHY, *supra* note 10, at 131–35; MCCRAW, *supra* note 6, at 157, 175; Dawson, *supra* note 166, at 46; LEUCHTENBURG, *supra* note 2, at 59; J. ROBERT BROWN JR., THE REGULATION OF CORPORATE DISCLOSURE § 4.01 (4th ed. 2022); DAVIS, *supra* note 6, at 86; JANEWAY, *supra* note 176, at 17; PARRISH, SECURITIES REGULATION, *supra* note 6, at 61; MORTON KELLER, REGULATING A NEW ECONOMY 208 (1990); John H. Walsh, *A Simple Code of Ethics: A History of the Moral Purpose Inspiring Federal Regulation of the Securities Industry*, 29 HOFSTRA L. REV. 1015, 1040 (2001); EDSFORTH, *supra* note 6, at 194; Roberta S. Karmel, *Management Fraud – What are the Standards*, L.A. DAILY J., Dec. 15, 1978, at 12; DAWSON, *supra* note 10, at 78–81.

179. SELIGMAN, *supra* note 3, at 71–72; SCHLESINGER, *supra* note 2, at 444–-45; LEUCHTENBURG, *supra* note 2, at 60; KARMEL, *supra* note 10, at 42–43; LOSS, SELIGMAN & PAREDES, *supra* note 8, at 310–13; LANGEVOORT, *supra* note 10, at 7; Pritchard & Thompson, *supra* note 3, at 852–56; DE BEDTS, *supra* note 3, at 51–53; *see, e.g.*, William O. Douglas, *Protecting the Investor*, 23 YALE REV. 521, 528, 530 (1933) (discussing the "futility of placing hope for substantial progress merely on the truth about securities"; calling for a "broader" base of governmental control over corporate management, the protection of shareholder minorities, corporate capital structure, "mobilizing the flow of capital to various productive channels" and "the fundamental problem of the increment of power and profit inherent in our present forms of organization"; and identifying the NIRA and AAA as models); A.A. Berle, *High Finance: Master or Servant*, 23 YALE REV. 20, 42–43 (1933) (criticizing the Securities Act as "not of supreme importance" because it "leaves unsolved the major questions" and would have prevented "few, if any, of the transactions of investment bankers adumbrated by the Senate committee recently" and calling for a broader approach modeled on the NIRA); Letter from Adolf Berle to Wooden (Apr. 12, 1933), *in* NAVIGATING THE RAPIDS 1918–1971: FROM THE PAPERS OF ADOLF A. BERLE 86 (Beatrice Bishop Berle & Travis Beal Jacobs, eds., 1973) (criticizing the securities bill "made up by Felix Frankfurter, apparently without consulting any of the banking or accounting people").

180. Barry Cushman, *The Securities Laws and the Mechanics of Legal Change*, 95 VA. L. REV. 927, 936–37 (collecting examples of these cases).

181. MCCRAW, *supra* note 6, at 175 ("Through the stop order, the cooling-off period, and the change in burden of proof for subpoena processes, Landis paved the way for smoother enforcement of the law. And in so easing its enforcement he also made unnecessary the large government bureaucracy that otherwise might have been needed to achieve the goals of the legislation."); Henry G. Manne & Ezra Solomon, *Economic Aspects of Required Disclosure Under Federal Securities Laws*, *in* WALL STREET IN TRANSITION: THE EMERGING SYSTEM AND ITS IMPACT ON THE ECONOMY 29 (1974) ("One of the strongest defenses for disclosure laws [in the 1930s] was that they did not require an inefficient bureaucracy to pass on the merits of securities.").

182. *Supra* Part II.B.2.

But the Brandeisian Securities Act was never implemented. The deficiency letter process implemented in its stead turned the regime towards something that looked much more like the Corporatism of NIRA.

1. From Adversaries to Partners

As noted above,[183] the deficiency letter process radically reshaped the relationship between government and business. Instead of an adversarial relationship between government and business that had been contemplated by statute, the deficiency letter process created an ongoing collaborative partnership between the agency staff charged with reviewing the disclosures and the elite "gatekeeping" professions (lawyers, accountants, investment bankers) who helped businesses draft them. The substance of disclosure rules was developed not by administrative fiat (as the statute contemplated), but through an iterative process over successive registration statements through a dialogue between the agency staff on one hand and the accountants, lawyers, and bankers on the other side of the table. The development of the disclosure rules through this collaboration with elite gatekeepers ended up looking more like a close cousin of the industrial codes to be developed under the corporatist NIRA than most modern scholars have recognized. This "collaborative" relationship epitomizes corporatist governance—and is antithetical to Brandeisian governance.

2. Making Disclosure Regulation Less Transparent

The formal enforcement remedies provided for in section 8 of the Act were transparent mechanisms. When the agency decided to pursue a formal action under that statute, the markets would have access to that fact as well as the basis for the SEC's complaint. And, ultimately, when the action was heard and resolved by an adjudicator, the world would have access to the adjudicator's opinion. Under the statutory regime, therefore, the law governing the new disclosure regime would develop in the cold light of day.

The deficiency letter process dramatically altered this process. Although the matters discussed in deficiency letters were often a matter of great public interest—relating to the agency's evolving interpretation and application of the brand new securities statute—the agency determined from the outset not to make this correspondence publicly available.[184] As a result of the deficiency letter process, the most important developments of the disclosure rules were made in secret correspondence between the agency and individual issuers (and their counsel) instead of in publicly available opinions.

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183. *Supra* Part III.A.1.

184. Bane, *1952 Testimony*, *supra* note 43, at 422 (telling Congress that deficiency letters are not public and that it would be a mistake to make them public because "[w]e sometimes raise things in a letter of deficiency that are afterward explained away, and it might cause great embarrassment to the parties if put out."). Much later, in 1975, the agency would propose making this correspondence presumptively public—only to withdraw the proposal a few years later. *See* SEC, Confidential Treatment of Information, 40 Fed. Reg. 4944 (Feb. 3, 1975) ("The Commission is now of the view that normally it is unnecessary to withhold letters of comment prepared by its staff with respect to various registration statements and applications for registration, replies thereto received from members of the public, or related material."); SEC, Withdrawal of Rule Proposal Concerning Commission Records and Information, 44 Fed. Reg. 31227 (May 31, 1979). Finally, the agency made the correspondence public in 2004. SEC Staff to Publicly Release Comment Letters and Responses, *supra* note 66.

Key administrators recognized as much.[185] Asked by Congress about this in 1952, Bane openly explained that the deficiency letter "is not public, because, as you can well see, there are many reasons why it shouldn't be. We sometimes raise things in a letter of deficiency that are afterward explained away, and it might cause great embarrassment to the parties if put out."[186] Such secrecy was anathema to the Brandeisian model, and much more typical of the corporatist one.

3. Facilitating Concentration

The secretive nature of the deficiency letter process created a key advantage for elite, repeat players. The only way to learn about the SEC's evolving interpretation of the disclosure rules was to participate in regular dialogue with the agency about its disclosure rules—i.e., by filing a lot of registration statements. The elite gatekeepers involved in relatively higher volume of offerings thus got a big leg up. Any issuer would naturally prefer to hire someone familiar with the SEC's secretive process and would be willing to pay more for the privilege of doing so.

Adolf Berle complained in a 1937 letter to incoming SEC Chair William Douglas about the agency's heavy reliance on deficiency letters:

> I hate to see the great Wall Street law firms who have really preyed on business for years collecting twice their usual tribute annually (as they now do) solely on the ground that they and they alone can guide their people safely through the mazes of administrative rulings with substantially uncontrolled interpretation.[187]

Similarly, an accounting industry leader noted in 1935 noted the "just criticism" that the deficiency letter process "tends to concentrate business thereunder in the hands of a few experts, not necessarily those most skilled in the subject matter with which they are called upon to deal, but those who are most thoroughly versed in the technical provisions of the law."[188] An early treatise explained that, as a result of the deficiency letter process, "A major underwriter who registers many new issues with the Commission in the course of a year will naturally 'know the ropes' much better than the small underwriter who comes as a stranger or only rarely."[189]

Paul Mahoney finds empirical evidence that the Securities Act led to increased concentration and profitability for elite underwriters.[190] The deficiency letter process

185. LANDIS, THE ADMINISTRATIVE PROCESS, *supra* note 122, at 109.

186. Bane, *1952 Testimony*, *supra* note 43.

187. Letter from Adolf Berle to William Douglas (Sept. 23, 1937), https://www.sechistorical.org/collection/papers/1930/1937_0923_DouglasCongratulationsT.pdf [https://perma.cc/4UFP-2VFU]; Bickel, *supra* note 125, at 142 ("Lawyers who practice extensively in this field have learned the technique which enables them to exercise foresight against numerous deficiencies with which the novice would be met."); *id.* at 148 ("Fees of lawyers and accountants are about twice as much as they were in the case of comparable securities issued before the passage of the act."); Woodside, *supra* note 42, at 381 (noting that over time, section 8 proceedings declined, and "[a]n informed securities bar developed.").

188. Starkey, *supra* note 50, at 13.

189. MCCORMICK, *supra* note 50, at 292.

190. Mahoney, *The Political Economy of the Securities Act of 1933*, *supra* note 131, at 26–30; MAHONEY, *supra* note 129, at 71–76.

provides an additional explanation for these findings. Facilitating industrial concentration is a hallmark of corporatist regulation—and anathema to the Brandeisian model.

4. Encouraging "Bigness" In Government

As noted above, the deficiency letter process radically expanded the magnitude of the government's role and footprint—with the agency's staff ballooning in size and capacity to deal with the new self-created task. By 1952, Bane directly supervised a staff of 175 individuals, across 12 specialized units, each with a section or group chief and multiple analysts, examiners, attorneys, and accountants, all devoted to the task of reviewing registration statements (and other filings), drafting deficiency letters, and working closely with the private securities professionals to produce the disclosures that investors would rely on.[191] After hearing Bane's description of the deficiency letter process, one congressional representative noted: "I seem to feel that the potential registrant can therefore come in to the SEC and practically have the statement prepared by your staff."[192] Again, this expansive government bureaucracy seems contrary to the Brandeisian ideal and more akin to the corporatist one.

5. Economic Planning

As noted above, the proponents of the Securities Act took very seriously the need to avoid any appearance that the government was picking and choosing which companies could offer securities based on the underlying merits of the company.[193] For instance, President Roosevelt's March 1933 statement to Congress urging them to consider and pass securities legislation included the caveat: "Of course, the Federal Government cannot and should not take any action which might be construed as approving or guaranteeing that newly issued securities are sound in the sense that their value will be maintained or that the properties which they represent will earn profit."[194]

But the adoption of the deficiency letter process significantly contributed to exactly this perception. An early critic noted that a "serious result" of the process "has been that, notwithstanding notice to the contrary, the average layman has not understood clearly that the government through the Commission does not undertake to pass on the merits of an issue."[195] An SEC chair noted that "[t]he processing of registration statements by the Division of Corporation Finance has given rise to a widespread public misconception, namely, that the Commission 'approves' securities issues."[196] Numerous others also noted the same thing.[197] Even courts came to accord the Commission's "review and clearance

191. Bane, *1952 Testimony*, *supra* note 43, at 400–01.

192. *Id.* at 402. Bane resisted the characterization, insisting that a potential registrant can only get "assistance of my staff, so far as the requirements of the act and the rules are concerned, in the preparation of any part of the statement." *Id.*

193. *See generally supra* note 175.

194. 73 CONG. REC. 937 (1933).

195. Starkey, *supra* note 50, at 14.

196. Demmler, *supra* note 127, at 47.

197. *E.g.*, Bates, *supra* note 50, at 208–09 ("The present practice lends increasing encouragement to the view that the Commission is 'approving' registered securities.").

procedures . . . some evidentiary value, particularly where the Commission's staff has directed its attention to the disclosures in question."[198]

Later, the deficiency letter process would push the agency beyond the mere *appearance* of merits review to the real thing. The commission developed a practice of denying acceleration to various categories of disfavored issuers and offerings irrespective of whether they had made full disclosure of the disfavored characteristic.[199] And, most recently, the SEC has apparently attempted to dissuade some disfavored companies from going public by flooding them with an enormous volume of comment letters, stringing the process out for over a year in some cases.[200]

C. Conclusion

Conventional wisdom interprets the origins of mandatory disclosure as an essential philosophical choice between competing New Deal regulatory philosophies. Specifically, the government rejected the corporatist model of economic regulation (as embodied in the notion of "merits review") and embraced the Brandeisian one. To the contrary, I have argued, the birth of *real* mandatory disclosure was driven less by philosophy than by expediency. Faced with a significant short-fall in administrative capacity to implement the overarching goal of the statute, the agency adapted by inventing a new enforcement system that would help it close that capacity-gap. In the process, however, the original Brandeisian character of the regime was substantially compromised.

IV. THE FOUNDER OF REAL MANDATORY DISCLOSURE

Conventional accounts of the origins of mandatory disclosure emphasize the trio of elite lawyers who drafted the '33s Act (James Landis, Benjamin Cohen, Thomas Corcoran), their supervisor (Felix Frankfurter), and their intellectual mentor (Louis Brandeis).[201] These iconic figures, it is assumed, are the men chiefly responsible for the

198. Poliakoff, *supra* note 84, at 56.

199. *See* LOSS, SELIGMAN & PAREDES, *supra* note 8, at 1065 (discussing the SEC's 1940s and 50s policies of denying acceleration where the selling stockholder did not bear his "equitable proportion" of the expense of registration; where directors and officers were indemnified against civil liability under the Securities Act; and where the registration statement related to preferred stock with a par value less than its liquidation preference); Claudia H. Allen, *Bylaws Mandating Arbitration of Stockholder Disputes?*, 39 DEL. J. CORP. L. 751, 775–82 (2015) (discussing the SEC staff's contemporary policy of denying acceleration to issuers with provisions requiring mandatory arbitration of stockholder disputes).

200. Dave Michaels & Peter Rudegeair, *SEC Scrutiny Blocks Some Crypto Firms from Going Public*, WALL ST. J. (Jan. 24, 2023), https://www.wsj.com/articles/sec-scrutiny-blocks-some-crypto-firms-from-going-public-11674527071 (on file with the *Journal of Corporation Law*).

201. *E.g.*, SELIGMAN, *supra* note 3, at 39–72; PARRISH, *supra* note 3, at 57–58; HILTZIK, *supra* note 2, at 88–90; LASSER, *supra* note 6, at 72–81; MCCRAW, *supra* note 6 at 171–75; BADGER, *supra* note 6, at 98–100 (describing the securities laws as "the quintessential reform of Felix Frankfurter and his disciples"); *infra* Part IV.B (collecting sources discussing Brandeis' influence on the Securities Act); Cochran v. SEC, 20 F.4th 194, 219 (5th Cir. 2021) (en banc) (Oldham, J., concurring); Jackson, Jr., *supra* note 13; Levitt, *supra* note 13; Williams, *supra* note 10, at 1227–35; Walter, *Remarks*, *supra* note 13; Schiller, *supra* note 11, 413–19; Pritchard & Thompson, *supra* note 3, at 849–52; CHATOV, *supra* note 5, at 33–36; JUSTIN O'BRIEN, THE TRIUMPH, TRAGEDY AND LOST LEGACY OF JAMES M. LANDIS: A LIFE ON FIRE 13 (2014). *But cf.* SELIGMAN, *supra* note 8, at 619

regime, and therefore it is their backgrounds, motivations, and actions that can best explain the shape the regime took.

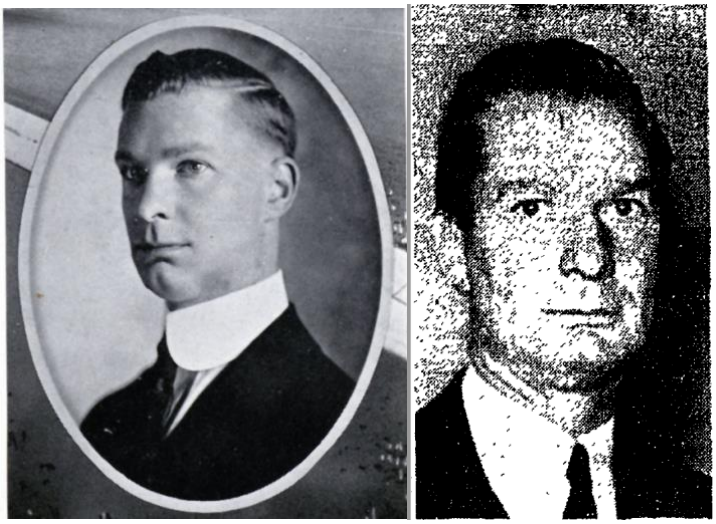
But, for all their fame and accomplishments, none of these men can claim responsibility for *real* mandatory disclosure. Instead, the key figure in the creation, implementation, and routinization of the deficiency letter process that has been at the core of the mandatory disclosure regime for the last 90 years is a little-known, mid-level, career civil servant named Baldwin Buckner Bane.[202]

(attributing the SEC's long-term success to its "unusually talented staff," but attributing this, "in large measure," to Felix Frankfurter).

To be sure, other figures have been often identified as key figures in the creation of securities regulation. Few doubt the essential role played by Ferdinand Pecora, who was appointed to chief counsel to the Senate Banking Committee at the end of the Hoover administration to lead a series of hearings on the causes of the crash of 1929 and made the most of that opportunity—turning the hearings into a national media phenomenon that fanned the popular demands for a Wall Street crackdown. *E.g.*, SELIGMAN, *supra* note 8, at 1–38; SCHLESINGER, *supra* note 2, at 434–43; PERINO, *supra* note 6, at 287–88; LEUCHTENBURG, *supra* note 2, at 59; KHADEMIAN, *supra* note 10, at 27; DAVIS, *supra* note 2, at 362; LASH, *supra* note 2, at 130; HILTZIK, *supra* note 2, at 85; KARMEL, *supra* note 10, at 39; Burk, *supra* note 130, at 1022–24; CAROSSO, *supra* note 4, at 352; RITCHIE, *supra* note 6, at 44; CHATOV, *supra* note 5, at 30–31; STEPHEN J. CHOI & A.C. PRITCHARD, SECURITIES REGULATION: ESSENTIALS 18–19 (2008); LANGEVOORT, *supra* note 10, at 7; Jarrell, *supra* note 10, at 620; STEVENSON, *supra* note 10, at 81; DONALD A. RITCHIE, ELECTING FDR: THE NEW DEAL CAMPAIGN OF 1932 168–69 (2007).; DE BEDTS, *supra* note 3, at 43–46. And, of course, the Securities Act wouldn't have been possible without President Roosevelt, who smartly made cracking down on Wall Street a part of his 1932 campaign. MCCORMICK, *supra* note 50, at 18–27; KHADEMIAN, *supra* note 10, at 26–27; COHEN, *supra* note 6, at 149; HILTZIK, *supra* note 2, at 85; MAHONEY, *supra* note 129, at 41; Walsh, *supra* note 172, at 1019–47; LANGEVOORT, *supra* note 10, at 7; Jarrell, *supra* note 10, at 620; DANIEL R. FUSFELD, THE ECONOMIC THOUGHT OF FRANKLIN D. ROOSEVELT AND THE ORIGINS OF THE NEW DEAL 238 (1956). Others emphasize roles played behind the scenes by Sam Rayburn and Raymond Moley, among others. COHEN, *supra* note 6, at 151; LASH, *supra* note 2, at 131; HILTZIK, *supra* note 2, at 86–88; PARRISH, *supra* note 6, at 58–59; DE BEDTS, *supra* note 3, at 36–38.

202. *See* Part I.B (collecting evidence attributing the innovation to Bane). Seligman attributes the "populariz[ation] of the development" to Landis. SELIGMAN, *supra* note 3, at 620 ("Even before the SEC was created in 1934, FTC Commissioner James Landis popularized the idea of forwarding a 'deficiency letter' to issuers when a registration statement was insufficient, rather than seeking a stop order."). I have not found any evidence (in Seligman's book or elsewhere) suggesting that Landis was the main force behind the deficiency letter system and, as discussed above, I found many first- and second-hand accounts attributing this to Bane.

Figure 1: The Father of Real Mandatory Disclosure
Baldwin B. Bane (1917 & 1934)[203]



Bane is almost completely unknown today. Most histories of the origins of mandatory disclosure fail even to mention his name. There is no biography of Bane. Nor does any library hold his papers. No one recorded an oral history. He deserves recognition. Section A provides a biographical sketch of this important overlooked historical figure. Section B considers how Bane's distinct background, experience, and intellectual and ideological commitments set him apart from the elite lawyers typically associated with the birth of securities regulation and shows how this different perspective and position explain how and why Bane was able to build the real mandatory disclosure system.

A. Life and Career of Baldwin Bane

Bane was born in 1891 in Stanardsville, Virginia—a tiny hamlet nestled in the shadow of the Blue Ridge Mountains.[204] Before his tenth birthday, his family had relocated at least twice within the state (to Smithfield[205] and Charlottesville[206]) and then his father (a Methodist Reverend) and mother both passed away. Baldwin spent his adolescent years

203. Photograph of Baldwin B. Bane, *in* WASHINGTON & LEE LAW YEARBOOK (1917); Photograph of Baldwin B. Bane, *in Key Officials Named to Head Important Divisions of SEC: New SEC Official*, CHRISTIAN SCI. MONITOR (July 17, 1934).

204. *Baldwin B. Bane of S.E.C. Dies at 70*, N.Y. TIMES, May 25, 1962, at 33; *SEC Proxy Rules, Hearing Before the H. Subcomm. Of the Comm. On Interstate & Foreign Commerce*, 78th Cong. 217 (1943) [hereinafter Proxy Rules Hrg.].

205. *See* WILLIAM ARMSTRONG CROZIER, WILLIAM DICKINSON BUTLER & HOWARD RANDOLPH BAYNE, THE BUCKNERS OF VIRGINIA AND THE ALLIED FAMILIES OF STROTHER AND ASHBY 163 (1907). Larry DeWitt, *Clark Bane Hutchinson on her Father Frank Bane*, SOC. SEC. PIONEERS (July 18, 1997), https://www.ssa.gov/history/fbane.html [https://perma.cc/2LJF-96UT].

206. *See* IDRESS HEAD ALVORD, HEAD: DESCENT OF HENRY HEAD (1695–1770) IN AMERICA 176 (1948); DeWitt, *supra* note 205.

along with his two younger siblings with his grandmother in Ashland,[207] and graduated from Randalph-Macon College.[208] He spent several years at a nearby prep school, teaching history and mathematics and coaching football and baseball.[209] In 1915, Bane enrolled in law school at Washington & Lee in Lexington, graduating with an LL.B. in 1917.[210] After law school, Bane joined the Army as an officer and served in France during World War I.[211]

Upon his return from France, Bane took a job at the FTC in 1919 as an "attorney examiner"[212]—"trying cases; doing investigatory work, and interpretive work, and so forth."[213] His cases included false advertising,[214] antitrust enforcement,[215] and appellate matters.[216]

Bane's record at the FTC earned him the appointment as director of the newly created Securities Division in 1933. He would devote the next 25 years of his life to the

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207. DeWitt, *supra* note 205. His grandfather, a medical doctor, had passed away before Baldwin was born. *See* ALVORD, *supra* note 206.

208. *See infra* note 211.

209. *Id.* (stating, seemingly incorrectly, that Bane taught at Randolph Macon during this period).

210. Proxy Rules Hrg., *supra* note 204, at 217.

211. *Rules for Sales of Securities to be Given Today*, WASH. POST, July 6, 1933, at 2; Proxy Rules Hrg., *supra* note 204, at 217.

212. Bane, *1952 Testimony*, *supra* note 43, at 395 (testifying to Congress regarding his experience that he had "practically none," explaining "I came out of the University and went into the army almost immediately" and then "very shortly after I came out of the Army I went with the Federal Trade Commission."); *see also Alumni Bulletin*, WASH. & LEE U. BULL., Vol. XXII, No. 15 (Feb. 1924) ("Baldwin B. Bane '17 is connected with the Federal Trade Commission.").

213. Bane, *1952 Testimony*, *supra* note 43 at 394; *see Notes of Departmental Personnel*, WASH. POST, Dec. 18, 1927, at A4 (noting Bane "had returned to Washington, from New York City, where he handled a case").

214. Bane successfully prosecuted the Royal Baking Powder Company for a misleading advertising campaign that deceived consumers into believing its baking powder solely contained cream of tartar and no phosphate, when, in fact, it contained phosphate—culminating in an order directing the company to "cease and desist" from such misleading advertising going forward. Complaint at 1, 4, FTC v. Royal Baking Powder Co., 4 FTC (1921) (No. 539) (listing Bane and one other FTC attorney on the case).

215. For instance, Bane helped investigate an alleged antitrust violation in Kentucky's egg and poultry market. *Competition in Egg Buying*, N.Y. PRODUCE REV. & AM. CREAMERY VOL. 53 NO. 7, at 289 (Dec. 14, 1921). Bane also assisted in the prosecution of a significant price fixing conspiracy among steel manufacturers. *In re* U.S. Steel Corp. et al., Dkt. 760, 8 FTC 1, 3 (July 21, 1924) (noting that Bane "participated . . . during a portion of the preparation and trial of the case" and served as the "principal attorney" for the Commission in an investigation of a merger between three steel companies). *Merger Hearing Resumed*, THE IRON AGE (Feb. 5, 1925); *see also Hearing in Bethlehem Merger Case to Be Resumed*, THE IRON AGE (Jan. 22, 1925), at 307; *Investigating Merger*, THE IRON AGE 1251 (Nov. 8, 1923).

216. *E.g.*, Int'l Shoe Co. v. FTC, 29 F.2d 518 (1st Cir. 1928) (listing Bane among attorneys for the United States), *rev'd*, 280 U.S. 291 (1930) (listing Bane as a "Special Attorney" on the brief for the United States); *see also* Int'l Shoe Co v. FTC, 279 U.S. 849 (1929) (initially denying cert and listing Bane as one of the attorneys for the United States); Int'l Shoe Co. v. FTC, 279 U.S. 832 (1929) (granting cert and listing Bane as one of the attorneys for the United States). Other federal court matters Bane participated in include Macfadden Publ'ns v. FTC, 37 F.2d 822 (D.C. Cir. 1930) (denying private party's request for Mandamus to order the FTC to issue subpoenas on a third party). For a discussion of some of these matters in the context of FTC's early history, see Marc Winerman & William Kovacic, *Outpost Years for a Start-up Agency: The FTC from 1921–1925*, 77 ANTITRUST L.J. 145, 184–86 (2010) (*U.S. Steel* case); *id.* at 190–91 (*Bethlehem Steel* merger); Marc Winerman & William E. Kovacic, *The William Humphrey and Abram Myers Years: The FTC From 1925 to 1929*, 77 ANTITRUST L.J. 701, 737–39 (2011) (*International Shoe* case).

administration of the Securities Act and other securities regulation statutes.[217] He played a critical role in the administration of the deficiency letter procedure he'd pioneered, overseeing the process for several decades as the head of the FTC's securities division,[218] executive assistant to the SEC,[219] head of the SEC's registration division,[220] and finally as head of the SEC's rebranded Division of Corporation Finance.[221]

Bane's contributions extend far beyond the deficiency letter process. He was chiefly responsible for a host of key administrative developments, including defining of what counts as a "public offering" based on counting investors,[222] defining the scope of section 11 liability,[223] and the notion that shareholder proposals of a "general political, social or economic nature" may be excluded by companies.[224] Landis later described him as "one of the great civil servants I've met."[225] Another SEC Chair described Bane as "one of those remarkable figures in the Civil Service whose presence can hardly be planned, but who show up from time to time in critical places when needed."[226]

Bane apparently never married[227]—a fact that set him apart from the vast majority of men of his age[228] as well as ***every single man*** Roosevelt appointed to the Securities and Exchange Commission, at least through the 1930s.[229]

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217. *Deaths*, WASH. POST., May 25, 1962, at B11.

218. *Rules for Sales of Securities to Be Given Today*, *supra* note 211.

219. *Key Officials Named to Head Important Divisions of SEC*, *supra* note 203; *Burns Made Counsel of Securities Board*, WALL ST. J., July 17, 1934, at 1.

220. SEC, THIRD ANNUAL REPORT, *supra* note 101.

221. *SEC Reorganized*, *supra* note 68; *Two Men Mentioned for Post*, N.Y. TIMES, Jan. 9, 1935, at 4.

222. Churchill Rodgers, *Purchase by Life Insurance Companies of Securities Privately Offered*, 52 HARV. L. REV. 773, 791 (1939).

223. *Bane Interprets Securities Law*, N.Y. TIMES, Sept. 23, 1933, at 21 ("[T]rading losses as distinguished from losses due to material, misleading or inadequate statements as of the time of offering the security, afford no ground for action.").

224. *See* SEC Release No. 34–3638, Concerning Rule X-14A-7 Of Regulation X-14 of the General Rules and Regulations (1945) (releasing an "opinion of Baldwin B. Bane" on the meaning of the phrase "a proposal which is a proper subject for action by the security holders" as used in Rule X-14A-7).

225. *Id.* at 173.

226. Ray Garrett, Chair, SEC, Speech at N.Y.U.: Life Begins at Forty (Oct. 26, 1974), https://www.sec.gov/news/speech/1974/102674garrett.pdf [https://perma.cc/MP5N-GDFS].

227. *Baldwin Bane, Adviser to SEC*, WASH. POST, May 26, 1962, at C5 (noting only his brother, Frank Bane, as a survivor); *Deaths*, *supra* note 217 (describing Bane as "son of the late Mr. and Mrs. Charles L. Bane, brother of Frank Bane of Washington D.C."). Bane's alma mater, the Washington & Lee Law School, maintained records on its alums, and their record for Bane confirms that he was not married. Washington & Lee Law School Alumni Records (on file with author).

228. Robert Schoen et al., *Marriage and Divorce in Twentieth Century American Cohorts*, 22 DEMOGRAPHY 101, 102 (1985) (finding that 89% of men born between 1888 and 1892 who survived to age 15 got married at least once).

229. *Cf.* James W. Graham, *The Wedding that Changed American History*, TIME (Oct. 7, 2014), https://time.com/3462557/kennedy-wedding [https:perma.cc/6JEY-QZWM] (describing Joseph Kennedy's 1914 marriage; Kennedy was appointed chair of the SEC in 1934); *G.C. Mathews' Rites Are Held in Illinois*, N.Y. TIMES, July 14, 1946, at 38 (noting that George C. Mathews was survived by his widow; Mathews was appointed to the Commission in 1934); RITCHIE, *supra* note 6, at 27–28 (describing Landis' 1926 marriage; Landis was appointed to the Commission in 1934 and appointed chair in 1935); *Robert Healy, Member of SEC, Dies.* N.Y. TIMES, Nov. 18, 1946, at 7 (noting that Healy was survived by his widow; Healy was appointed to the Commission in 1934); *Ex-Justice Ferdinand Pecora, 89 Dead.*, N.Y. TIMES, Dec. 8, 1971, at 40 (noting that Pecora married in

The final years of Bane's remarkable run at the SEC were troubled. Bane apparently developed a drinking problem and was removed as Director of Corporation Finance for that reason in 1952.[230] He was then temporarily reassigned to a face-saving position as "Executive Adviser," but was soon pressured to leave the SEC altogether after President Eisenhower came to power and appointed a Chair with a mandate to rein in the bureaucracy. [231] He died in 1962.

B. Real Mandatory Disclosure Was Created in Bane's Image, Not Landis'

The men typically identified as the founders of mandatory disclosure are legal and intellectual superstars. They comprise a close network of elite lawyers with a common set of affiliations and commitments who played an integral role in shaping the New Deal. Brandeis provided an intellectual guiding light for the group from his seat on the Supreme Court.[232] Frankfurter had the ear of the President and helped place these men (and others) in numerous roles across the administration before taking a seat on the Court himself. Landis would lead the SEC and then return to Harvard, where he'd write the leading academic justification for the expansion of administrative authority in the New Deal.[233] Corcoran and Cohen also served in important roles throughout the New Deal.

These men had a lot in common. All five attended and/or taught at Harvard Law School, and were steeped in the distinct intellectual culture of that institution.[234] Four

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1910; Pecora was appointed to the commission in 1934); DAVID WILMA ET AL., POWER FOR THE PEOPLE: A HISTORY OF SEATTLE CITY LIGHT 72 (2010) (noting that J.D. Ross married in 1907; Ross was appointed to the Commission in 1935); *William O. Douglas*, OYEZ https://www.oyez.org/justices/william_o_douglas [https://perma.cc/4GQJ-2EV3] (noting that William Douglas married in 1923; Douglas was appointed to the Commission in 1936 and was appointed chair in 1937); *Jerome Frank Dies; New Deal Braintruster*, CHI. DAILY TRIB., Jan. 14, 1957, at B10 (noting that Jerome Frank married in 1914 and was survived by his wife; Frank was appointed to the Commission in 1937 and made chair in 1939); *John Wesley Hanes Sr, Aide to Roosevelt and Corporate Chief.*, N.Y. TIMES, DEC. 31, 1987 at 24 (noting that Hanes was survived by his wife; Hanes was appointed to the Commission in 1938); *Eicher's Death May Halt Sedition Trial*, MUSCATINE J., Nov. 30, 1944, at 1 (noting that Edward C. Eicher married in 1908; Eicher was appointed to the Commission in 1938 and made chair in 1941); Talbot Lake, *This New Dealer Strives to Keep Prices Fair*, SUSSEX-SURREY DISPATCH, Dec. 12, 1940 (noting that Leon Henderson married in 1925; Henderson was appointed to the Commission in 1939).

230. SELIGMAN, *supra* note 3, at 269.

231. *Id.* ("[Eisenhower's SEC Chair Ralph] Demmler found his conviction that 'there was some dead wood that could be dispensed with without any damage to work' corroborated by the presence of . . . *a former director of the Corporation Finance Division who had been retained as an executive assistant after developing a drinking problem*. Demmler pressured all three to leave . . . ."); *S.E.C. Adviser Retires*, N.Y. TIMES, Jan. 5, 1955, at 38 (noting that Bane moved from director of Corporation Finance to "executive adviser" in 1952 and that this position was "abolished" upon Bane's retirement).

232. LANGEVOORT, *supra* note 10, at 7; MOLEY, , FIRST NEW DEAL, *supra* note 6, at 306; HIRSCH, *supra* note 172, at 113; MURPHY, *supra* note 6, at 131–35; MCCRAW, supra note 6, at 157, 175; Dawson, *supra* note 166, at 46; LEUCHTENBURG, *supra* note 2, at 59; BROWN JR., *supra* note 178; DAVIS, *supra* note 2, at 86; JANEWAY, *supra* note 172, at 17; PARRISH, SECURITIES REGULATION, *supra* note 6, at 61; KELLER, *supra* note 178, at 208; Walsh, *supra* note 178, at 1040; EDSFORTH, *supra* note 2, at 194; Karmel, *supra* note 178, at 12; DAWSON, *supra* note 6, at 78–81.

233. LANDIS, THE ADMINISTRATIVE PROCESS, *supra* note 122.

234. LASSER, *supra* note 6, at 13, 72–73 (describing intersecting Harvard affiliations of Cohen, Landis, Frankfurter, and Corcoran); SELIGMAN, *supra* note 3, at 61–63 (same); RITCHIE, *supra* note 6, at 16–20 (Landis' Harvard time); STRUM, *supra* note 166, at 15–29 (discussing Brandeis' time at Harvard law school).

served on the U.S. Supreme Court as clerks (Landis and Corcoran) or Justices (Frankfurter and Brandeis.)[235] The odd man out (Cohen) also clerked for a very prominent federal judge.[236] They each possessed expertise in statutory drafting and analysis, financial law, or both.[237] Four belonged to religious minorities and faced discrimination on that account.[238] Several were immigrants themselves or children of immigrants.[239] In sum, these men comprised a tight network of elite lawyers, with Frankfurter and Brandeis at the center, sharing a common intellectual language and vision of law and regulation.

Bane was not in this club. He did not come from Harvard. Nor did he work at the Supreme Court (or any other court). He was not hand-picked by Frankfurter. He had no experience either in drafting statutes or in financial law. No ivory tower intellectual, Bane was an affable good-old boy, a high-school football coach who could trace his Virginian family lineage back to a Revolutionary War colonel and beyond.[240] Bane's background sets him far apart from the men ordinarily taken as the founders of mandatory disclosure. But, as I argue, it is precisely Bane's difference that best explains his key decision to jettison the carefully crafted statutory system in the summer of 1933 and substitute in the new deficiency letter system.

Per Irons, Harvard's emphasis in this era was "on lawyers as members of the emerging mandarinate of the regulatory state." IRONS, *supra* note 33, at 7. The Harvard/SEC connection runs deep. The first two chairs of the SEC were Harvard alums (Kennedy and Landis) and bonded over their connection. RITCHIE, *supra* note 6, at 65. The first three general counsels of the agency were also Harvard Law graduates. Ernst, *Lawyers*, *supra* note 33, at 7. Half of the SEC's legal staff in 1935 graduated from Harvard Law. *Urgent Supplemental Appropriations for 1935: Hearing Before the Subcomm. of the H. Appropriations Comm. in Charge of Deficiency Appropriations*, 74th Cong. 16–18 (1935). After taking leave from his Harvard faculty post to draft the Securities Act, serve as FTC Commissioner, SEC Commissioner, and SEC Chair, Landis would return to serve as Dean of Harvard Law School. RITCHIE, *supra* note 6, at 16–20. Many of the most influential chroniclers of the SEC's early history graduated from Harvard and/or served on the faculty, including Joel Seligman, Louis Loss, and Thomas McCraw. Harvard today maintains one of the main collections of papers on the early SEC.

235. Frankfurter arranged for Landis to clerk for Brandeis, and for Corcoran to clerk for Holmes. RITCHIE, *supra* note 6, at 21–23.

236. Frankfurter arranged for Cohen to clerk for federal judge Julian Mack. LASSER, *supra* note 6, at 16.

237. BADGER, *supra* note 6, at 99; O'BRIEN, *supra* note 201, at 21; LASSER, *supra* note 6, at 72–75; SELIGMAN, *supra* note 3, at 61–63; RITCHIE, *supra* note 6, at 45; MCCRAW, *supra* note 6, at 171 (discussing Brandeis' "uncanny ability to analyze financial statements").

238. RITCHIE, *supra* note 6, at 59; LASSER, *supra* note 6, at 4 (Cohen, Corcoran); *id.* at 16–17 (Frankfurter, Brandeis); *see also* Ernst, *Lawyers*, *supra* note 33, at 8 (explaining that the SEC's Jews and Catholics "because of their ethnicity, would have been denied a job at" elite corporate law firms). Cohen, Frankfurter, and Brandeis were Jewish. Corcoran was Catholic.

239. Lasser, *supra* note 6, at 7–8 (describing Cohen's immigrant parents); Frankfurter was born in Austria. IRONS, *supra* note 33, at 8. Landis was born in Japan to American missionaries and did not set foot in the United States until his early teens. O'BRIEN, *supra* note 201 (describing Landis as "an outsider, born in Tokyo"); MCCRAW, *supra* note 6, at 155. Corcoran was the grandchild of Irish immigrants and became a frequent guest of FDR at the White House where he entertained the president by singing "Irish ballads and sea chanties." Kenneth Crawford, *Thomas G. (Tommy) Corcoran, Lobbyist of New Deal Era, Dies*, WASH. POST, Dec. 7, 1981, at D6.

240. More precisely, a *disgraced* Revolutionary War colonel: Mordecai Buckner. *See* CROZIER, BUTLER & BAYNE, *supra* note 212 (discussing Buckner family history in Virginia). Buckner was court martialed and found guilty for having abandoned his troops on the battlefield. *Id.*

1. Indifference To Statutory Details

The legal elites ordinarily assumed to be the founders of mandatory disclosure shared a commitment to the art of statutory design. Frankfurter, Landis, and Cohen, each had expertise and well-developed views on both drafting and analyzing legislation.[241]

Although Landis would later become associated with a more flexible view of administration,[242] in the early 1930s, he was still laser-focused on *statutory* enforcement mechanisms.[243] In an important 1931 article introducing the idea of legislation as a subject for research and teaching at law schools, Landis waxed philosophical about the "ingenuity of many legislatures" in producing a huge array of enforcement mechanisms, sanctions, and procedures.[244] Thus Landis' main contribution to the Securities Act was the carefully calibrated set of remedies contained in section 8.[245]

For Bane, not so much. Bane candidly admitted on several occasions that the deficiency letter system he set up had no statutory basis.[246] But, from his perspective, that was no reason to hesitate. His philosophy was to get the overarching task done in the most "sensible" and "orderly" way possible,[247] without worrying about the minutiae of statutory details. If the statute set up a goal but an unintelligent system of administration, Bane's ethos was to find a new way to achieve that goal—statutory technicalities be damned. Letters to FDR encouraging his appointment to the commission from Senators, regulators, and securities professionals consistently praised Bane's effectiveness, efficiency, and practicality as an administrator.[248] Later, Landis likely had Bane in mind when he wrote in 1938:

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241. *E.g.*, SELIGMAN, *supra* note 3, at 60; MCCRAW, *supra* note 6, at 158–59, 172–75; RITCHIE, *supra* note 6, at 35–37; 46; LANDIS & GOLD, *supra* note 10, at 138–41; LASSER, *supra* note 6, at 21–22, 55–56.

242. LANDIS, *supra* note 122.

243. *E.g.*, MCCRAW, *supra* note 6, at 172, 350 (discussing Landis' focus on "above all, the problem of incentives for implementation and enforcement").

244. *See* O'BRIEN, *supra* note 201, at 4 (*citing* J.M. Landis, *The Study of Legislation at Law Schools: An Imaginary Inaugural Lecture*, 39 HARV. GRADUATES MAGAZINE 433, 437 (1931)).

245. MCCRAW, *supra* note 6, at 173–175; RITCHIE, *supra* note 2, at 46 ("Drafting of the important liabilities and enforcement provisions fell largely to Landis, who was eager to apply his law school ideals.").

246. Bane, *supra* note 77 ("It is true that the act does not specifically provide any particular method of informally advising registrants of errors or defects in their registration statements."); Bane, *1952 Testimony*, *supra* note 43, at 392 ("Neither the Securities Act nor the Securities Exchange Act made provision for the administrative processing of registration statements and applications.").

247. Bane, *supra* note 77.

248. All of the following letters are on file with the Franklin D. Roosevelt Presidential Library & Museum, Folder DF 1060a, SEC Endorsements Bane, B.B.: Letter from U.S. Sen. Duncan Fletcher, Chair, Sen. Banking Comm. to FDR (Oct. 22, 1935) (Bane was "largely responsible for organizing [the SEC], the efficiency and effectiveness of which has reflected credit on the Administration."); Letter from Lord, Abbett & Co. to FDR (Jun. 4, 1941) ("an excellent executive"); Letter from Chapman & Cutler to FDR (Mar. 2, 1935) ("Mr. Bane possesses the tact and practical grasp of matters necessary to the problems at issue."); Letter from Clark Howell, Chair, FAA, to FDR (Jan. 19, 1935) ("Mr. Bane is a conscientious, efficient, and exceptionally competent gentleman."); Letter from O'Melveny, Tuller & Myers Letter to FDR (Jun. 19, 1934) ("We have all been definitely impressed not only with Mr. Bane's legal ability but with the *effective* manner in which he has handled the administration of the Securities Division.") (emphasis added); Letter from U.S. Sen. Harry Byrd to FDR (June 28, 1934) ("I feel certain he is qualified both from his familiarity with the conditions that made necessary the creation of this Commission and his years of *efficient* and faithful service . . . .") (emphasis added); Letter from Attorney Guilford Jameson to FDR (June 28, 1934) ("In a short time he created a division in the Federal Trade Commission which

> One of the ablest administrators that it was my good fortune to know, I believe, never read, at least more than casually, the statutes that he translated into reality. He assumed that they gave him power to deal with the broad problems of an industry, and, upon that understanding, he sought his own solutions.[249]

Critically, Bane had no major involvement in the drafting of the statute.[250] Cohen wrote to Landis after the statute was first passed that it was "a little unfortunate for us that the Act passed so nearly as we drafted it" because it "gives us too much of a parental interest in the darned thing."[251] Bane had no such parental interest. And so, when the time came to choose between a specific but impractical statutory regime and a non-statutory but more effective alternative system, Bane had no reason to hesitate.

2. Indifference To Brandeisian Regulatory Philosophy

Bane was also not ideologically wedded to the Brandeisian regulatory philosophy animating the Securities Act. Unlike Frankfurter, Landis, and others, Bane was no acolyte of Brandeis, nor was he steeped in the elite legal culture that favored his regulatory philosophy. Indeed, Bane was an ordinary civil servant, far removed from the high-level ideological disputes inside the New Deal between various philosophies of regulatory design. Thus, Bane had no ideological reason to hesitate before abandoning the Brandeisian (formal, transparent, adversarial) enforcement system provided by the statute in favor of a more corporatist (collaborative, secretive, informal) one.[252]

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functioned *efficiently* in carrying out the purposes of the Act. The establishment of this division and the proficiency with which it has carried on the work of the Commission is indeed a high testimonial of Mr. Bane's ability as an administrator.") (emphasis added); Telegram from Iowa Securities Commissioner to FDR (Jan. 11, 1935) ("Know him personally to be qualified and *efficient* from every standpoint.") (emphasis added); Letter from Gann, Secord and Stead to FDR (Mar. 6, 1935) (stating that "he very ably and *efficiently* handled a number of troublesome problems.") (emphasis added); Letter from Covington, VA Chamber of Commerce to Hon. A Willis Robertson (Mar. 26, 1935) ("We believe he is entirely competent. . . .").

249. LANDIS, THE ADMINISTRATIVE PROCESS, *supra* note 122, at 75. I believe the reference is likely to Bane here not only because of Bane's significant departure from the statute in setting up the deficiency letter system (which Landis witnessed first-hand and close up), but also because Landis worked so closely with Bane in his time at the FTC and SEC and later described Bane in similar terms as "one of the great civil servants that I've met." LANDIS & GOLD, *supra* note 6, at 173. The failure of section 8 may have played a major role in transforming Landis' views over the 1930s. He entered the decade as a leading proponent of the study and craft of legislative sanctions, and section 8 was his chance to put that theory into practice. But, after he witnessed first-hand that failure of this mechanism, and Bane's ingenious, extra-legal invention of the deficiency letter process to substitute, by 1938, his outlook had decisively shifted—from precisely crafted legislative sanctions to flexible and creative administration.

250. In his role as FTC attorney, Bane did draft a memo to the Congressional Conference committee as it was attempting to reconcile the House and Senate version. Landis, *Legislative History*, *supra* note 6, at 46 ("The Federal Trade Commission submitted a carefully detailed memorandum, which I later learned was prepared by Baldwin B. Bane . . . ."); *Suggestions with Reference to H.R. 5480 as it Passed the House of Representatives* (Harvard Landis Archives – "Memorandum by FTC on HR 5480 #34"). However, the memo for the most part simply endorsed the House version, which is the version that ultimately was enacted.

251. LASSER, *supra* note 6, at 80.

252. *See infra* Part IV.B.

3. Lack Of Financial Expertise

Landis stated that Bane "didn't have too much knowledge of the operation of corporations."[253] Another SEC chair noted that Bane "had no pretensions to great scholarship or sophistication in financial matters."[254] He might have gotten away without it except that such expertise was also generally wanting both among Commissioners above him and among the staff underneath him.

The statutory design threatened to expose this lack of expertise. Under section 8, Bane was in the fraught position of having to publicly challenge the work-product of elite securities professionals who drafted the registration statements Bane was charged with reviewing for material deficiencies. An aggressive barrage of formal enforcement actions accusing these professionals of making materially false statements to investors would likely be resisted with utmost force. The resulting conflict could prove intensely embarrassing for Bane personally and politically disastrous for the regime.[255]

The deficiency letter system was a way out of this dilemma. For an administrator without substantial financial expertise at his disposal, the deficiency letter system provided a way to achieve the statute's overarching goals without engaging in such high-stakes public conflict with the securities industry. As noted above, Bane described the system in precisely these terms.[256]

But more than merely steering away from conflict, the deficiency letter process also provided a further advantage: allowing Bane (and the agency as a whole) to compensate for his own lack of relevant expertise by *drawing* on the expertise of these elite private professionals. Each round of deficiency letters provided an opportunity for learning without the risk of a public blowback. As noted above, Bane specifically endorsed the deficiency letter system on these terms.[257] And, more generally, calling on the securities industry to share their expertise with the Commission was a major theme in Bane's public statements.[258]

4. Personality For Relational Administration

Bane's background and character may have inclined him to seek out the kind of collaborative, relational approach to administration embodied in the deficiency letter system. For one thing, unlike the Jewish and Catholic men listed above, who might have struggled to cultivate the trust and cooperation of the WASP-dominated securities professionals, Bane was a "Southern country boy"[259] and might not have faced those same barriers.[260] Bane had an ability to connect with people and earn their trust and confidence.

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253. LANDIS & GOLD, *supra* note 6, at 173.

254. Garrett, *supra* note 226.

255. *Supra* Part III.B.1.

256. *Id.*

257. *Id.*

258. *See Defends Securities Act*, *supra* note 140 (quoting Bane, urging "issuers, bankers, lawyers, accountants, and other experts" to "advise the Commission in the wise exercise of its powers" instead of advancing "propaganda for amendments to the act"); Bane, *The Securities Act of 1933*, *supra* note 149 (discussing the accounting association's "invaluable service to the Commission in getting this Act started").

259. Garrett, *Life Begins at Forty*, *supra* note 226.

260. *Cf.* Ernst, *Lawyers*, *supra* note 33, at 8 (noting that many elite corporate lawyers were presumably "put off by having to negotiate with the [SEC's] Jews and Catholics").

His law school yearbook describes him as holding "an enviable position of leadership in the law school, both within and without the classroom," owing to his "forceful personality, backed by common sense and tact," as well as "his ability to tell a story well."[261]

Over his decades at the SEC, he developed a substantial and loyal following among agency staff.[262] In 1960, Landis stated: "Even today, you'll find people in the Federal Trade Commission who date back to Bane's era, still with a great fond of memory of the guy. . . [H]e built up a force of say 40 or 50 guys that were tremendously loyal to him."[263] Similarly, one securities lawyer noted that Bane, "more than any other person with whom I came in contact at Washington, has the happy faculty of harmoniously working with his subordinates who are universally treated as his equals."[264] And a senior government official noted that Bane was "highly regarded by the personnel of the Commission and enjoys their affection and confidence."[265] Letters to FDR from Senators, regulators, and securities professionals encouraging Bane's appointment to the Commission consistently emphasized his winning and open personality: e.g., Bane possessed a "splendid spirit of cooperation"[266]; was a "very pleasant gentleman"[267]; he was widely "liked"[268]; possessed "scrupulous honesty and fairness to all persons who come in contact with him, and enthusiasm."[269]

Bane's affability extended even to his adversaries. A lawyer Bane had faced off against in a major case for several years (back when Bane was an attorney-advisor at the FTC) later wrote a letter to the President urging him to appoint Bane to a seat on the SEC.[270] The American Society of Certified Public Accountants wrote that, members "have not always agreed with some of his decisions but he has always looked them straight in the eye . . . ."[271] In this respect, Bane was wildly different from Landis, who was widely regarded as brilliant lawyer, but was by all accounts a quite difficult and combative person

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261. WASHINGTON & LEE LAW YEARBOOK 1917, 47 (1917).

262. LANDIS & GOLD, *supra* note 6, at 175–76 ("Even today, you'll find people in the Federal Trade Commission who date back to Bane's era, still with a great fond of memory of the guy. . . [H]e built up a force of say 40 or 50 guys that were tremendously loyal to him."); Letter from Barthell & Rundall to FDR (Nov. 18, 1935) (on file with the Franklin D. Roosevelt Presidential Library & Museum, Folder DF 1060a, SEC Endorsements Bane, B.B.) (writing that Bane, "more than any other person with whom I came in contact at Washington, has the happy faculty of harmoniously working with his subordinates who are universally treated as his equals").

263. LANDIS & GOLD, *supra* note 6, at 175–76.

264. Letter from Barthell & Rundall to FDR (Nov. 18, 1935) (on file with the Franklin D. Roosevelt Presidential Library & Museum, Folder DF 1060a, SEC Endorsements Bane, B.B.).

265. Letter from Clark Howell, Chair, FAA, to FDR (Jan. 19, 1935) (on file with the Franklin D. Roosevelt Presidential Library & Museum, Folder DF 1060a, SEC Endorsements Bane, B.B.).

266. Letter from Director of Utah Securities Commission to Sen. Carter Glass (Feb. 21, 1935) (on file with the Franklin D. Roosevelt Presidential Library & Museum, Folder DF 1060a, SEC Endorsements Bane, B.B.).

267. Letter from Koontz Hurlbutt & Revercomb to FDR (Jan. 9, 1935) (on file with the Franklin D. Roosevelt Presidential Library & Museum, Folder DF 1060a, SEC Endorsements Bane, B.B.).

268. Letter from President of NASC to FDR (Jan. 15, 1935) (on file with the Franklin D. Roosevelt Presidential Library & Museum, Folder DF 1060a, SEC Endorsements Bane, B.B.).

269. Letter from Sen. Royal Copeland to FDR (Jan. 24, 1935) (on file with the Franklin D. Roosevelt Presidential Library & Museum, Folder DF 1060a, SEC Endorsements Bane, B.B.).

270. *See* Letter from Thomas H. Malone to FDR (Jan. 23, 1935) (on file with the Franklin D. Roosevelt Presidential Library & Museum, Folder DF 1060a, SEC Endorsements Bane, B.B.).

271. Letter from Am. Soc'y of CPAs to FDR (Jun. 25, 1934) (on file with the Franklin D. Roosevelt Presidential Library & Museum, Folder DF 1060a, SEC Endorsements Bane, B.B.).

to work with.[272] Cohen was notoriously shy and unassuming,[273] and Frankfurter has been described as "eternally combative."[274]

For Bane, who easily earned the trust of people around him, the deficiency letter process would have presented an appealing mode of governance. Whereas the statute contemplated an arms' length, adversarial relationship between the staff and the industry, the deficiency letter process created an environment for trust, partnership, and collaboration to flourish. And sure enough, Bane developed many strong relationships with the securities professionals who he interacted with through this process. Among the many letters urging President Roosevelt to appoint Bane to the Commission included leading law firms,[275] accounting firms,[276] industry groups,[277] and investment houses.[278]

For instance, the American Society of Certified Public Accountants told Roosevelt Bane "would receive the cordial endorsement of the accountancy profession" which holds Bane in "the very highest esteem and regards him as an efficient administrator."[279] Prominent Wall Street investment house Lord, Abbett & Co. endorsed Bane, telling the President that their "work has brought us into fairly frequent contact with Mr. Bane and his department, and we have thus had the opportunity to judge the quality of his work" which led them to conclude that Bane was "tough, but he is fair."[280] The law firm Kirkland Fleming Green & Martin (now known as Kirkland & Ellis LLP) similarly endorsed Bane, noting that they'd "had considerable contact" with him and had been "impressed not only

272. O'BRIEN, *supra* note 201, at 3 (Landis was "socially distant throughout his career"); SELIGMAN, *supra* note 3, at 63–64; RITCHIE, *supra* note 6, at 5, 17, 47, 81–82; MCCRAW, *supra* note 6, at 156.

273. SELIGMAN, *supra* note 3, at 62–63; RITCHIE, *supra* note 6, at 45.

274. IRONS, *supra* note 33, at 8.

275. All of the following are on file with the Franklin D. Roosevelt Presidential Library & Museum, Folder DF 1060a, SEC Endorsements Bane, B.B.: Telegram from McCune Caldwell & Downing to FDR (June 5, 1934); Letter from Kirkland Fleming Green & Martin to FDR (June 4, 1934); Telegram from Baker Botts Andrews and Wharton to FDR (June 1934); Letter from Fisher Boyden Bell Boyd & Marshall to FDR (June 2, 1934); Letter from Sonnenschein Berkson Lautman Levinson & Morse to FDR (June 15, 1934) ; Letter from O'Melveny, Tuller & Myers to FDR (June 19, 1934); Letter from J. Bruce Kremer to FDR (June 22, 1934); Telegram from Fisher Boyden Bell Boyd & Marshall to FDR (Jan. 8, 1935); Letter from Koontz Hurlbutt (Jan. 9, 1935) (on file with the Franklin D. Roosevelt Presidential Library & Museum); Letter from Malone & Wade to FDR (Jan. 23, 1935); Letter from Ely Bradford Thompson & Brown to FDR (Feb. 4, 1935); Letter from Chapman and Cutler to FDR (Mar. 2, 1935) (on file with the Franklin D. Roosevelt Presidential Library & Museum); Letter from Marston Friedlund & Friedlund to FDR (Mar. 2, 1935); Letter from Gann Secord and Stead to FDR (Mar. 6, 1935); Letter from John Brooks to FDR (Feb. 5, 1935).

276. Letter from Am. Soc'y of CPAs to FDR, *supra* note 271; Letter from A.M. Pullen & Co. to Sen. Carter Glass (forwarded to FDR) (Mar. 16, 1935) (on file with the Franklin D. Roosevelt Presidential Library & Museum, Folder DF 1060a, SEC Endorsements Bane, B.B.); Letter from S.B. Hoover & Co. to Rep. Willis Robertson (Forwarded to FDR) (Mar. 21, 1935) (on file with the Franklin D. Roosevelt Presidential Library & Museum, Folder DF 1060a, SEC Endorsements Bane, B.B.); Letter from R.L. Persinger & Co. to Sen. Carter Glass (Forwarded to FDR) (Mar. 18, 1935) (on file with the Franklin D. Roosevelt Presidential Library & Museum, Folder DF 1060a, SEC Endorsements Bane, B.B.).

277. Letter from Col. Chamber of Commerce to FDR (Jan. 17, 1935) (on file with the Franklin D. Roosevelt Presidential Library & Museum, Folder DF 1060a, SEC Endorsements Bane, B.B.); Letter from Col. Mining Assn. to FDR (Jan. 17, 1935) (on file with the Franklin D. Roosevelt Presidential Library & Museum, Folder DF 1060a, SEC Endorsements Bane, B.B.).

278. Letter from Lord Abbett & Co. to FDR (June 4, 1941) (on file with the Franklin D. Roosevelt Presidential Library & Museum, Folder DF 1060a, SEC Endorsements Bane, B.B.).

279. Letter from Am. Soc'y of CPAs to FDR, *supra* note 271.

280. Letter from Lord Abbett & Co. to FDR, *supra* note 278.

with his ability but his sincerity of purpose and his untiring industry…"[281] The law firm Baker Botts Andrews and Wharton (now known as Baker Botts LLP) also wrote to pass along and join in the support for Mr. Bane they had heard from "numerous friends" who'd had contact with Bane and had been "very favorably impressed with Mister Bane's ability both as a lawyer and as an administrator."[282] And law firm O'Melveny, Tuller & Myers (now known as O'Melveny & Myers LLP) endorsed Bane based on their "frequent" contact with him, which led them to be "definitely impressed not only with Mr. Bane's legal ability but with the effective manner in which he has handled the administration of the Securities Division."[283]

Bane also may have seen the deficiency letter system as a way to advance his own career. Bane was eager to rise in the ranks, aspiring to a seat on the SEC.[284] Bane was repeatedly considered for open seats on the commission when it was initially created in 1934,[285] and when there were open seats in 1935,[286] 1937,[287] 1941,[288] and as late as 1948.[289] Unlike Landis et al., Bane did not have powerful allies inside the administration. So, he needed to look elsewhere for support and advancement. Building strong ties with the elite private professionals might have seemed like a good way to move his career forward. (However, Bane never got the political appointment he desired and served out his long tenure as a career civil servant.)

C. Conclusion

On the conventional origin story, mandatory disclosure was invented by a small group of hyper-elite, academically-inclined lawyers with unparalleled expertise in relevant areas under the mentorship and leadership of Brandeis and Frankfurter. The truth is that the system these lawyers invented was so ill-matched to reality that it was immediately discarded in exchange for a wholly different one. The man responsible for the real regime, Baldwin Bane, was equipped with a very different set of intellectual and ideological commitments. It was precisely this difference that empowered him to create the real mandatory disclosure regime. Contrary to the conventional accounts, real mandatory disclosure was less a product of elite legal culture than its derogation.

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281. Letter from Kirkland Fleming Green & Martin to FDR, *supra* note 275.

282. Telegram from Baker Botts Andrews and Wharton to FDR, *supra* note 275.

283. Letter from O'Melveny, Tuller & Myers to FDR, *supra* note 275.

284. LANDIS & GOLD, *supra* note 6, at 176.

285. *Pecora is Willing to Rule Exchanges*, N.Y. TIMES, June 28, 1934, at 1; Tully Nettleton, *A Missionary to Wall Street*, CHRISTIAN SCI. MONITOR, June 27, 1934, at 5.

286. *Senate Group Backs Kennedy Aids on SEC*, WASH. POST, Jan. 16, 1935, at 3.

287. Letter from Sen. Edwin Johnson to FDR (June 2, 1937) (on file with the Franklin D. Roosevelt Presidential Library & Museum, Folder DF 1060a, SEC Endorsements Bane, B.B.); Letter from Sen. Morris Shepherd to FDR (Nov. 3, 1937) (on file with the Franklin D. Roosevelt Presidential Library & Museum, Folder DF 1060a, SEC Endorsements Bane, B.B.).

288. Letter from Lord Abbett & Co. to FDR, *supra* note 278.

289. Jerry Kluttz, *Supreme Court Ruling Asked on Veterans' Job Preference*, WASH. POST, Feb. 12, 1948, at B1.

V. HOW THE HISTORY WAS LOST

Given the popularity and longevity of the conventional origin story, it is worth pausing to consider how the real history might have gotten lost. On reflection, there is an abundance of forces and events that plausibly conspired to displace the real history of mandatory disclosure as I have described it above and replace it with the familiar, statute-centric, elite-driven account.

Legislative Ratification: By ratifying the deficiency letter system in 1940, Congress undercut incentives to investigate the legal foundations of that system.[290] After 1940, careful analysis of the legality of the deficiency letter system could no longer be used in mounting a legal or public challenge to the agency's practices.[291] Thus, the most well-developed legal critiques of the deficiency letter process all were produced before 1940.[292]

Winners' History: The legal elites who star in the conventional accounts were able to shape historical narratives to their advantage. These men achieved substantial individual notoriety within their lifetimes and have been persistently of interest to historians and academics. The individual success they achieved allowed them to shape narratives around the origins of mandatory disclosure in a way that overstated their successes and minimized their failures—through media interviews, speeches, writings, oral histories, private papers, and other channels.

Landis, in particular, took an active role in shaping the narrative over his career.[293] Landis had been brought down to Washington by Frankfurter from Harvard Law School, where he had received his LL.B. and had returned to join the faculty following a clerkship with Justice Brandeis, to help draft the Securities Act. As noted above, Landis' expertise focused on administrative enforcement and sanctions,[294] and his main contribution to the Securities Act was the carefully calibrated set of remedies contained in section 8.[295] Given the immediate failure of the system, one might have thought Landis would have been a bit shy about attaching his name to it. To the contrary, though, in various first-hand accounts of the birth of the mandatory disclosure regime, Landis emphasizes that it was *precisely* his expertise on crafting administrative sanctions that allowed him to "devise tools to bring about compliance . . . that were somewhat new" and proceeds to list, as examples, several devices contained in section 8 of the Securities Act.[296] The legend of Landis—cultivated

290. *See* discussion *supra* Part I.C (discussing ratification).

291. To be clear, even before 1940 there are reasons to doubt that any such judicial challenge would have been possible. *See* discussion *supra* note 76.

292. *See* Goldin, *supra* note 50 (denouncing the practice as a "perversion"); Bates, *supra* note 50, at 208 (describing the Commission's methods as standing "in contrast with the pervading theory of the Act").

293. *See, e.g.*, LANDIS & GOLD, *supra* note 6; Landis, *Legislative History*, *supra* note 6, at 29 (relying on "personal reminiscences" because "documentation of this history is scanty"); LANDIS, THE ADMINISTRATIVE PROCESS, *supra* note 122.

294. *E.g.*, MCCRAW, *supra* note 6, at 172 (discussing Landis' focus on "using all the incentives" to encourage individuals involved in the industry to support implementation and enforcement).

295. MCCRAW, *supra* note 6, at 173–75; RITCHIE, *supra* note 6, at 46 ("Drafting of the important liabilities and enforcement provisions fell largely to Landis, who was eager to apply his law school ideals.")

296. LANDIS & GOLD, *supra* note 6, at 138–41. Actually, while Landis takes credit for innovating the core idea of a 30-day waiting period when he sat down with Benjamin Cohen to draft the Securities Act in April 1933, that idea had actually been proposed and discussed extensively at earlier House Hearings on the subject in late March and early April 1933. *See Hearing on Fed. Securities Act Before the H. Comm. On Interstate and Foreign*

by the man himself—evidently managed to persuade generations of historians that Landis' special academic expertise played a key role in inventing the mandatory disclosure regime. In fact, precisely the opposite is true. For instance, a leading historian concludes:

> By thinking carefully about the nature of the industry and by drawing on his professional knowledge of the arsenal of sanctions available to Congress, Landis had planted valuable tools of enforcement within the basic securities law. Unlike so many other draftsmen of regulatory legislation, he recognized the importance of matching the sanctions to the problems. Through the stop order, the cooling-off period, and the change in burden of proof for subpoena processes, Landis paved the way for smoother enforcement of the law. And in so easing its enforcement, he also made unnecessary the large bureaucracy that otherwise might have been needed to achieve the goals of the legislation.[297]

But, as I have shown, Landis' expertly crafted administrative enforcement mechanisms had little to do with the actual administration of the law. The section 8 procedures were almost entirely sidelined and replaced with the deficiency letter regime.[298]

Bane did not have the same opportunities to retroactively shape the historical narrative. Unlike Landis and the other "Happy Hot Dogs," Bane was never a legal celebrity[299] and so his role had been easily lost to history. Moreover, Bane spent his career as a loyal civil servant—not chasing individual attention or glory—and thus it is unsurprising that he never attempted to draw attention to his own contributions or how they contradicted the underlying statute he was charged with administering.[300]

Political Value: The Brandeisian thrust of the conventional narrative is useful to regulators and other stakeholders seeking to legitimize the regime. A core theme of the conventional account is the rejection of more intrusive, expansive, corporatist regulatory alternatives that were contemplated and rejected. This narrative is often used to demonstrate that the system is eminently reasonable and to undercut concerns about expansive and unbounded governmental incursions into markets. When SEC Chair Gary Gensler introduced the agency's climate disclosure proposal as an implementation of the same "core bargain" from the 1930s that "investors get to decide which risks to take, as long as public companies provide full and fair disclosure and are truthful in those disclosures," he is fortifying the proposal with Brandeisian armor—emphasizing that the regime leaves all power in markets, not government planners.[301]

Com., 73d Cong. 49–50 (1933) (statement of Rep. Bulwinkle proposing 30-day waiting period); *Hearing on Fed. Securities Act Before the H. Comm. on Interstate & Foreign Commerce*, 73d Cong. 130 (1933) (statement of Rep. Thompson stating that FTC Chief Counsel Judge Healy had "just handed" him a proposed amendment adding a 30-day waiting period).

297. *See* MCCRAW, *supra* note 6, at 175 ("Given the haste with which Landis and his colleagues were forced to work, . . . it seems remarkable that they were able to do such a meticulous job with the Securities Act of 1933."); LANDIS & GOLD, *supra* note 6, at 138–41 (discussing the process necessary to pass the Securities Act of 1933).

298. *See* discussion *supra* Part II.A.

299. *Compare* RITCHIE, *supra* note 6, at 54, 59, 64 (discussing Landis' fame as a legal celebrity in the 1930s).

300. When Bane was called to speak or write about the statute, he faithfully promoted the standard account. *E.g.*, *SEC's Work Defended as Liked by Investors and Registrants*, *supra* note 77 ("It should be recalled that prior to the passage of the present act, Congress considered more rigorous forms of legislation and discarded them in favor of the 'disclosure' type of statute.").

301. *See supra* notes 14–19.

Similarly, the leading historian of the SEC, Joel Seligman, captures this thesis, concluding at the end of his very influential volume, *The Transformation of Wall Street*:

> [T]he most important reason that the SEC has endured, I submit, is that ultimately it is based on a regulatory theory that works. At its core, the primary policy of the federal securities laws involves the remediation of information asymmetries. . . . The remediation of information asymmetries has provided a third and superior alternative to laissez-faire capitalism and the regulation of fundamental economic conditions such as entry or merger. . . .[302]

The history that I provide above—involving overriding Congress's directives, creating a secretive partnership between agency staffers and elite securities professionals, ballooning government bureaucracy, and more—may make for a less attractive story.

For proponents and stakeholders of the securities regulation regime, there is perhaps no topic more delicate than the relationship between agency staff and the elite private professionals who comprise and represent the securities industry. While this relationship has been (and remains) critical to the agency's capacity to effectuate its regulatory program, it also generates persistent concerns of regulatory capture and related issues.[303] The conventional historical narrative about the birth of mandatory disclosure sidesteps this sensitive topic by portraying a fundamentally independent governmental creation imposed from above on the corporate sector. By contrast, my revisionist story depicts a much greater degree of interdependence between government and business from the very beginning—showing how the deficiency letter system brought the private securities industry into the system and how the partnership between staff and industry was essential from the very beginning of the real mandatory disclosure system.

Similarly, the dominant origin story that highlights contributions of well-known historical figures is appealing because it borrows the prestige and fame of those actors for the regime itself.[304] A regime created by a mid-level nobody is just much less appealing than one created by a team of the smartest lawyers of the twentieth century.

Researching Administrative History*:* As a practical matter, legislative history is often more accessible than administrative history. For most statutes, there is a relatively small set of standard sources—hearings, floor debates, committee reports, bill drafts, signing statements—that scholars can draw on to form the backbone of an account. Statutes also create a set of easily identifiable actions for scholars to draw on—the dates the statute was enacted and first took effect; precedent proposals; contemporaneous judicial opinions, legal briefs, and scholarly writings that cite the statute; and media articles, politician speeches, industry reactions all keyed to those events. The creation and enactment of statutes invariably involve at least some well-known historical figures—Presidents, Congressional leaders, and representatives of interest groups who testify at hearings—who may provide promising avenues for researchers to access more information regarding the background of the statute.

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302. SELIGMAN, *supra* note 3, at 620–21.

303. *E.g.*, Alexander I. Platt, *The Non-Revolving Door*, 46 J. CORP. L. 751 (2021) (reviewing literature on the revolving door between the SEC and the securities industry).

304. For some conservative skeptics of the administrative state, Landis symbolizes something they vehemently oppose–and so tying him to the mandatory disclosure regime may be a way to discredit the latter. *See* Cochran v. SEC, 20 F.4th 194, 214 (5th Cir. 2021) (discussing Landis' role in shaping the New Deal).

By contrast, administrative history does not always come with an off-the-rack roadmap. In some cases, key agency decisions and actions are not made part of the public record—and sometimes there are no records at all. For an informal program like the deficiency letter system, the whole point of the program was to engage companies secretly without triggering public reaction, records are few and far between. Indeed, the SEC's deficiency letters were not made public as a matter of course until 2005—more than 70 years after the agency started sending them out. Further, for a program with questionable legal foundations like the deficiency letter system, the agency understandably was not attempting to create an explicit public record of precisely what it was doing. Moreover, for some agency actions (like the deficiency letter program), there may be no historically salient individuals or leaders involved—which makes it harder for researchers to dig into the foundations of the program.

There is also a longstanding intellectual bias among legal scholars to underemphasize informal agency administration in favor of more formal discrete actions like legislation, judicial review, rulemaking, and enforcement.[305]

Intellectuals Writing About Intellectuals*:* For the intellectuals who study and retell the origin of mandatory disclosure, the conventional account is highly flattering. Heroic legal elites came down to DC from the ivory tower to apply their unparalleled expertise to resolve a vexing public policy challenge and their solution was so well-conceived that it has lasted for nearly a century. It is easy to see how scholars have not been eager to challenge this account, which places legal intellectuals at the center of a major, popular, lasting, public-policy achievement of the 20th century.[306]

CONCLUSION

This paper has presented a revisionist history of the origins of mandatory disclosure. I have argued that conventional accounts get three things wrong. First, they focus on the drafting and enactment of the Securities Act of 1933, when, in fact the real mandatory disclosure system in the 1930s substantially contradicted that statute. Second, they interpret the mandatory disclosure regime as a philosophical rejection of corporatist economic planning and an embrace of Brandeisian model of regulation, when, in fact, the real mandatory disclosure system was mainly an expedient response to a shortfall in administrative capacity—and effectively transformed the regime into a far more corporatist system. Third, they focus on the set of hyper elite iconic lawyers involved in creating that statute, when, in fact, the real system was created by an obscure mid-level government official named Baldwin Bane whose background sets him far apart from those iconic figures.

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305. For critical discussions, see Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239 (2017); ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY MASHAW (Nicholas R. Parrillo ed. 2017); ELIZABETH FISHER & SIDNEY A. SHAPIRO, ADMINISTRATIVE COMPETENCE: REIMAGINING ADMINISTRATIVE LAW (2020).

306. *Cf.* LEO TOLSTOY, WAR AND PEACE 1252 (2007 ed., trans. Richard Pevear & Larissa Volokhonsky) ("[H]istory is written by scholars, and . . . it is natural and pleasant for them to think that the activity of their estate is the basis for the movement of all mankind . . . .").

Narratives matter.[307] For many regulators, lawyers, judges, and scholars, the origins of mandatory disclosure have long provided a deep source of meaning, legitimacy, and professional identity. This Article may invite critical reflection on the normative weight the narrative has been asked to bear.

307. *E.g.*, Mark J. Roe & Roy Shapira, *The Power of the Narrative in Corporate Lawmaking*, 11 HARV. BUS. L. REV. 233 (2021).