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Dictation and Delegation in Securities Regulation

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When Congress undertakes major financial reform, either it dictates the precise contours of the law itself or it delegates the bulk of the rule making to an administrative agency. This choice has critical consequences. Making the law self-executing in federal legislation is swift, not subject to administrative tinkering, and less vulnerable than rule making to judicial second-guessing. Agency action is, in contrast, deliberate, subject to ongoing bureaucratic fiddling, and more vulnerable than statutes to judicial challenge.

This Article offers the first empirical analysis of the extent of congressional delegation in securities law from 1970 to the present day, examining nine pieces of congressional legislation. The data support what I call the dictation/delegation thesis. According to this thesis, even controlling for shifts in political-party dominance, Congress is more likely to delegate to an agency in the wake of a salient securities crisis than in a period of economic calm. In times of prosperity, when cohesive interest groups with unitary preferences can summon enough political will to pass deregulatory legislation on their behalf, the result will be laws that cabin agency discretion. In other words, when industry can play offense, Congress itself engages in the making of governing rules and does not punt to an agency—even on issues that would seem the logical province of administrative technocrats. In contrast, following a crisis, industry is forced to play defense rather than offense. Its goal is to minimize the deleterious impact of inevitable legislation by shifting regulation as much as possible to the agency level, where it has time to regroup and often delay regulation until the political pressure for reform abates.

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INTRODUCTION

Why does Congress sometimes dictate the contours of securities legislation itself and other times delegate rule making to administrative agencies? Answering this question begins with recognizing the importance of the modern administrative state in separation-of-powers doctrine and sheds light on special-interest influence on law-making. Though Congress is tasked with making law, the executive branch's administrative agencies implement and administer a sizable portion of Congress' enactments, determining by rule making what the law actually requires and how it will operate in practical terms.[1] Whenever Congress legislates, it has the option of writing detailed laws—what I call *dictating*—in which case the executive branch will have little or no substantive input into policy. Alternatively, Congress can hand off

1. *See* Chevron v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." (omission in original) (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)). *Compare* MAEVE P. CAREY, CONG. RESEARCH SERV., R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE *FEDERAL REGISTER* 6 tbl.1 (2015), *available at* https://fas.org/sgp/crs/misc/R43056.pdf [https://perma.cc/PG5L-42L6] (noting that federal agencies promulgated 3659 final rules in 2013), *with* Drew DeSilver, *Congress Ends Least-Productive Year in Recent History*, PEW RES. CTR: FACT TANK (Dec. 23, 2013), http://www.pewresearch.org/fact-tank/2013/12/23/congress-ends-least-productive-year-in-recent-history/ [https://perma.cc/EA4S-XLEG] (noting that Congress enacted only 65 laws in 2013).

broad rule-making authority to agencies—what I (like others) call *delegating*, thus giving the executive a substantial role in the policy-making process.[2]

Legal scholars and political scientists have puzzled over why lawmakers would ever voluntarily cede their power to another branch.[3] A benign explanation is that legislators delegate when they are too busy to master the intricacies of a complicated subject matter and instead choose to defer to the expertise of the administrative agency with deeper knowledge of the regulated industry. More sinister stories depict Congress as insulating itself from blame or avoiding hard choices by submitting targets of control to a "regulatory lottery."[4] This Article examines the dictation/delegation choice in the context of securities law.

To make the stakes concrete, compare the divergent paths of two different securities law provisions. Title I of the JOBS Act created a new category of firm, the emerging growth company (EGC), with reduced disclosure obligations and other advantages for firms undertaking an initial public offering (IPO).[5] For this provision, Congress dictated the precise contours of EGC status and rights—including on issues as to which one might expect deference to specialists. For example, Congress itself dictated the revenue ceiling a firm could not exceed in order to qualify as an EGC.[6] And the first EGC IPO took place only three weeks after enactment.[7]

Contrast with the EGCs the fate of the Volcker Rule. The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act" or "Dodd-Frank") was signed on July 21, 2010, and required various agencies to collaborate on a rule to prohibit banks from engaging in proprietary trading.[8] Regulators presented a

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2. DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 52–85 (1999).

3. *See generally* Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982); EPSTEIN & O'HALLORAN, *supra* note 2 (analyzing Congress's decision to delegate policy decisions to administrative agencies).

4. EPSTEIN & O'HALLORAN, *supra* note 2, at 31.

5. Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112-106, §§ 101–08, 126 Stat. 306, 307–13 (2012); *see also* Chris Brummer & Daniel Gorfine, *The JOBS Act Isn't All 'Crowdfunding,'* FORBES (Oct. 8, 2013, 8:00 AM), http://www.forbes.com/sites/realspin/2013/10/08/the-jobs-act-isnt-all-crowdfunding [https://web.archive.org/web/20160324055714/http://www.forbes.com/sites/realspin/2013/10/08/the-jobs-act-isnt-all-crowdfunding/#611a5ab67dc6] (summarizing Title I of the JOBS Act).

6. Brummer & Gorfine, *supra* note 5 (noting that Congress defined an EGC as a company with less than $1 billion in annual revenue).

7. The first EGC IPO was initiated on April 25, 2012, David Westenberg, *Natural Grocers Becomes First EGC To Traverse the IPO On-Ramp to Closing*, WILMERHALE (July 30, 2012), https://www.wilmerhale.com/blog/ipo/post/?id=17179872626 [https://perma.cc/ZF52-VWGN], twenty days after the JOBS Act was enacted on April 5, 2012. Steve VanRoekel, *The JOBS Act: Encouraging Startups, Supporting Small Businesses*, WHITE HOUSE: BLOG (Apr. 5, 2012, 4:12 PM), https://www.whitehouse.gov/blog/2012/04/05/jobs-act-encouraging-startups-supporting-small-businesses [https://perma.cc/U8Z7-6RGU].

8. *See* Jennifer Wu, Comment, Morrison *v. Dodd-Frank: Deciphering the Congressional Rebuttal to the Supreme Court's Ruling*, 14 U. PA. J. BUS. L. 317, 335 (2011) (noting that Congress passed "the Dodd-Frank Act on July 10, 2010"); Press Release, Bd. of Governors of the Fed. Reserve Sys., Agencies Issue Final Rules Implementing the Volcker Rule (Dec. 10, 2013), http://www.federalreserve.gov/newsevents/press/bcreg/20131210a.htm

proposed form of the Volcker Rule on November 7, 2011.[9] They gave the public until February 13, 2012, to comment on the proposed regulations and ultimately received over 17,000 comments.[10] The final rule was not released until December 10, 2013,[11] and it was then revised one more time, with the final regulation being approved over three and a half years after the legislation was initially signed.[12] Moreover, much of this rule is still not in effect yet. On December 18, 2014, "the Federal Reserve extended the Volcker Rule's conformance period for 'legacy covered funds' [a defined term] until July 21, 2016 and indicated it would likely extend the period further to July 21, 2017."[13]

The dominant narrative of securities regulation describes a pattern of financial boom and bust, followed by "bubble law," "quack" regulation that is a misguided populist reaction with little empirical support.[14] In other words, a crisis leads to reactionary legislation. This description may be accurate, but it is incomplete, because Congress sometimes legislates in the securities field in the absence of a precipitating crisis. Building on this reality, this Article puts forward a nuanced theory of congressional action in the securities field. The dictation/delegation thesis explains why and when Congress chooses to retain control over policy and why and when it chooses to punt to an agency in the realm of securities regulation.

Most members of Congress work for reelection, and reelection requires the financial support of constituents—particularly constituents that contribute regularly and generously to campaigns. These groups logically favor writing their preferences directly into the law—that is, dictation—over delegation because legislation can be largely self-executing and thus not subject to potentially unwanted administrative build-outs. Put simply, in times when the political climate allows for successful industry-sponsored legislation, Congress will tend to enact laws directly through dictation.

However, when a securities-related crisis arises, political pressure sometimes necessitates congressional intervention. In these cases, industry must play defense, and its best strategy for doing so is to channel key decision making to the agency

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[https://perma.cc/XK3F-QCTR].

9. Jeffrey L. Hare & Christopher N. Steelman, *Federal Regulators Release Volcker Rule Final Regulations*, DLA PIPER (Dec. 11, 2013), https://www.dlapiper.com/en/us/insights/publications/2013/12/federal-regulators-release-volcker-rule-final-re__ [https://perma.cc/C57Y-SS3E].

10. Craig Torres & Cheyenne Hopkins, *Bernanke Says U.S. Volcker Rule Won't Be Ready by July Deadline*, BLOOMBERG (Feb. 29, 2012, 1:03 PM), http://www.bloomberg.com/news/articles/2012-02-29/bernanke-says-dodd-frank-s-volcker-rule-won-t-be-ready-by-july-21-deadline [https://web.archive.org/web/20151020172045/http://www.bloomberg.com/news/articles/2012-02-29/bernanke-says-dodd-frank-s-volcker-rule-won-t-be-ready-by-july-21-deadline].

11. Hare & Steelman, *supra* note 9.

12. *See* Torres & Hopkins, *supra* note 10.

13. DAVID HARPEST & JOSHUA HOROWITZ, PRICEWATERHOUSECOOPERS, FIRST TAKE: TEN KEY POINTS FROM THE FED'S VOLCKER RULE COVERED FUNDS EXTENSION (2014), http://www.pwc.com/en_US/us/financial-services/regulatory-services/publications/assets/2014-volcker-rule-ccovered-funds.pdf [https://perma.cc/PM8M-AYZW].

14. *See, e.g.*, Stephen M. Bainbridge, *Dodd-Frank: Quack Federal Corporate Governance Round II*, 95 MINN. L. REV. 1779, 1784 (2011); Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521 (2005).

level. There, regulation can be delayed, diluted, and, if all else fails, disputed in court. Agency action is subject to inevitable delay because of the lengthy notice-and-comment rule-making process agencies must follow. What's more, industry groups have the time and money to lobby regulators during the rule-making process to shape agency choices in ways favorable to their own interests. Finally, the validity of any agency rule making can ultimately be challenged in court, whereas direct congressional action is relatively immune from judicial second-guessing.

Thus, the dictation/delegation thesis proposes that in noncrisis conditions when an industry has unitary preferences, it will favor dictation. Moreover, it hypothesizes that industry interest groups with a substantial history of campaign contributions and lobbying efforts will in noncrisis times succeed in persuading Congress to enact their preference for legislation that dictates the details of law—that is, articulates the precise contours of regulation. I do not mean to suggest a simple and inevitable binary world, where delegation necessarily follows crisis and dictation occurs only in noncrisis periods. Instead, I suggest that statutes exist along a continuum of dictation and delegation and that salient crises play a significant role in determining where along that continuum individual enactments fall. For the sake of clarity, I will emphasize that by *dictation* I do not mean *dictatorial*. *Dictation* refers to whether Congress chooses to make the law self-executing, leaving the agency with virtually nothing to do. *Delegation* is where Congress delegates the question to agency rule making—even if it hems in the rule makers with myriad dictatorial suggestions, the final contours of the rule are left to the agency's discretion.

This Article develops these ideas in six parts. Part I surveys the literature, describing how the scholarship on the political economy of securities regulation has narrowly focused on postcrisis legislation, at the expense of understanding the larger landscape of securities law. The political science and administrative law literatures, in contrast, do not consider how salient crises affect Congress's decision to dictate or delegate, nor how Congress's delegation patterns may wax and wane over time. Thus an unanswered question remains at the intersection of these fields: does Congress delegate differently in securities law in the wake of crisis? Part II articulates the dictation/delegation thesis. Part III offers brief histories of the relevant securities laws, including both postcrisis and noncrisis enactments. A word of explanation is appropriate here as to my definition of *crisis*. For the purposes of this study, economic malaise is not enough. Crisis legislation is legislation spurred either by a salient securities or market shock that provides a specific reason for legislators to look to securities regulation—as opposed to more general financial stimulus or tax policy—as the appropriate response. The Paperwork Crisis of 1967–70, which at its height caused Wall Street to suspend trading altogether on Wednesdays, spawned the Securities Investor Protection Act of 1970 (SIPA) and the Securities Amendments of 1975.[15] The financial fraud uncovered in the wake of the dot-com crash of 2000 prompted the Sarbanes-Oxley Act of 2002 (SOX),[16] and the financial crisis of 2008 produced the Dodd-Frank Act of 2010.[17] The noncrisis securities legislation includes the Small Business Investment Incentive Act of 1980 (SBIIA), National Securities

15. *See infra* Part III.A.1.
16. *See infra* Part III.A.2.
17. *See infra* Part III.A.3.

Markets Improvement Act of 1996 (NSMIA), Private Securities Litigation Reform Act of 1995 (PSLRA), Securities Litigation Uniform Standards Act of 1998 (SLUSA), and the Jumpstart Our Business Startups Act of 2012 ("JOBS Act").[18] Notably, Silicon Valley players strongly backed four of these five acts.[19]

Part IV of the Article tests the dictation/delegation thesis by conducting an original empirical study of the extent of delegation of legislation over a forty-five-year period, from 1970 to 2014. That time period spanned three separate financial crises and Congress's enactment of nine separate pieces of securities legislation. The data support the dictation/delegation thesis: more delegation occurs postcrisis. It then moves to anticipate two separate objections. One is that party politics offers a better explanation for congressional delegation—but the data show that Congress delegates more postcrisis, even controlling for divided government. A second potential critique is that Congress delegates in times of crisis because it has much less time to educate itself. But, with the exception of 1970's SIPA and SOX, all of the "crisis" legislation is more accurately characterized as "postcrisis" in nature. Each was in a state of equilibrium, seeking to address the root problems of the precipitating crisis so that it would not happen again.[20] Thus, there was ample time for dictating specific policies—if Congress had wished to do so.

As Part V explains, a more granular analysis of legislative acts reveals the limitations of the thesis. Most notably, the JOBS Act contains extensive delegations, even though it was not passed in response to a salient financial crisis. Because no scholar has yet examined the political economy of the JOBS Act, Part V.B looks closely at that subject, and the results are revealing. Three of the JOBS Act's titles were backed by Silicon Valley or by sophisticated financial institutions.[21] These titles contain minimal delegation.[22] In contrast, relative political novices backed two of the other titles of the JOBS Act, and in the last one its initial advocates signaled an assent to delegation to the SEC—perhaps because of formidable adverse interests in the form of state securities law administrators.[23] These titles contain more substantial delegation. Indeed, the crowdfunding title contains the second-highest number of delegations of any title in the sample.[24]

I. THE EXISTING LITERATURE

There are two standard accounts of the political economy that can apply to federal securities regulation. The first focuses on securities regulation itself, and on a particular aspect of it: it posits that Congress reacts to crisis by producing "bubble laws."

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18. *See infra* Part III.B.

19. SBIIA was backed by Heizer Corporation, a venture capital fund. *See infra* Part III.B.1. PLSRA and SLUSA were backed by Silicon Valley actors. *See infra* Part III.B.2. The JOBS Act was largely backed by Silicon Valley actors. *See infra* Part III.B.4.

20. *See infra* Part III.A (describing securities-related crises and Congress's responses to them).

21. Silicon Valley actors backed Title I. *See* discussion *infra* Part III.B.4. SecondMarket, a sophisticated financial institution, backed Title V. *See infra* Part V.B.1.b. Small banks supported the passage of Title VI. *See infra* Part V.B.1.c.

22. *See infra* Part V.B.1.

23. *See infra* Part V.B.2.

24. *See infra* Part V.B.2.b.

As to the second, it holds that Congress will delegate more in some fields than in others. Both of these accounts fall short in distinct ways: On one hand, securities law scholars have not sufficiently accounted for either the larger history of securities law or the crucial question of the degree to which a particular law delegates policymaking agency. On the other hand, the delegation literature has failed to account for the possibility that Congress may alternate between dictation and delegation in a given subject matter. Moreover, this literature overlooks the field of securities law entirely. This Part will offer a brief survey of both accounts.

First, a dominant narrative in the legal academy views congressional securities regulation as problematic "quackery," "bubble laws" produced in times of crisis by a foolish Congress that cares nothing for empiricism.[25] Part A will describe the arguments of these academics, most notably Roberta Romano, Stephen Bainbridge, and Larry Ribstein. Their pointed critiques are incisive but ultimately limited because they focus solely on postcrisis laws—most notably, Sarbanes-Oxley and Dodd-Frank. Panning back to examine the broader history of securities regulation reveals that Congress does not *always* legislate in reaction to crisis in the securities arena. Sometimes it intervenes in the securities realm in a noncrisis context, and when it does, it is much more likely to spell out the details of the law, delegating relatively little to agencies.

Part B examines the delegation literature. Both administrative law scholars and political scientists have focused on the important question of when and why Congress delegates to administrative agencies. Peter H. Aranson, Ernest Gelhorn, and Glen O. Robinson's foundational article addressed when a legislature might want to delegate to an agency—either to defer to bureaucratic expertise or to deflect politically sensitive questions to the agency level.[26] Matthew C. Stephenson used models to predict when Congress might delegate to agency or to courts.[27]

There is an underlying premise to these treatments that goes unspoken—namely, from the constituent's perspective, delegation is always second-best. The best-case scenario is not to delegate at all—to have one's preferences encoded directly into legislation, free from the risks of delay, dilution, and disputation that Part II will address.

Unlike the securities scholars, political scientists David Epstein and Sharyn O'Halloran focus on the degree of delegation a statute contains. Indeed, they construct a complicated model after coding 257 statutes to measure the extent of delegation in various categories of legislation.[28] Their analysis, however, suffers from a high degree of generality because the researchers collapse a diverse range of financial regulation into a single overarching descriptive category, "Banking and Finance."[29] They fail to identify securities regulation as a category at all.[30] More importantly, their self-professed goal is to determine substantive areas where Congress delegates

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25. *See, e.g.*, Bainbridge, *supra* note 14, at 1784; Romano, *supra* note 14.
26. *See* Aranson et al., *supra* note 3, at 5–7.
27. Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1036 (2006).
28. EPSTEIN & O'HALLORAN, *supra* note 2, at 89.
29. *See id.* at 202.
30. *Id.*

relatively more or less.[31] Their account is thus categorical and static: they do not account for the possibility that within a single area Congress might oscillate between dictation and delegation or for why that might be.

A. Legal Literature on the Politics of Securities Regulation

The standard narrative of financial regulation describes a "centuries-old cycle" of boom, bubble, bust, and regulatory response.[32] As a result, federal regulation inevitably expands after "significant economic turmoil."[33] Larry Ribstein, Stuart Banner, and others have traced this recurring pattern as far back as the South Sea Bubble of 1720[34] and the Future Trading Act of 1921, which followed "the most severe recession in the United States up to that time."[35] The Securities Act of 1933 and the Securities Exchange Act of 1934 followed the 1929 stock market crash and ensuing Great Depression.[36] SOX responded to the downturn of 2000 and the accompanying bankruptcies of Enron and WorldCom.[37] Dodd-Frank was an attempt to address the financial crisis of 2008.[38] Indeed, this pattern of financial crisis and regulation played out in both the United States and the United Kingdom in the eighteenth and nineteenth centuries.[39]

John C. Coates observes that this legislative cycle is natural.[40] After a salient crisis, "[e]ven if [the] legislative response[] [is] bad for the public," politicians benefit as long as the problem is complicated and the legislation has a chance to solve the problem.[41] He observes that "[a]ction allows politicians to show they can 'do something' while inaction requires politicians to defend a status quo tainted in the voting public's mind by the salient fact of market downturn or scandal."[42]

Four preeminent corporate law scholars have addressed this legislative pattern in important articles. Three of them, Roberta Romano, Larry Ribstein, and Stephen Bainbridge, decry financial regulation in response to crisis as "bubble law" or "quackery."[43] The fourth, John Coffee, defends postcrisis regulation, arguing that any excesses are ultimately leavened by agency action in a pattern he dubs the

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31. *See id.* at 197 (describing how the chapter divides legislation into categories to determine if Congress delegates more in "policy areas shrouded in uncertainty").

32. Larry E. Ribstein, *Bubble Laws*, 40 HOUS. L. REV. 77, 77–78 (2003).

33. Romano, *supra* note 14, at 1591.

34. Ribstein, *supra* note 32, at 94–95.

35. Romano, *supra* note 14, at 1591; *see also* John C. Coffee, Jr., *The Political Economy of Dodd-Frank: Why Financial Reform Tends To Be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019, 1021 (2012).

36. *See* Romano, *supra* note 14, at 1592.

37. Coffee, *supra* note 35, at 1020; Romano, *supra* note 14, at 1523.

38. *See* Coffee, *supra* note 35, at 1020.

39. *See* Romano, *supra* note 14, at 1593 (citing Stuart Banner's historical research).

40. *See* John C. Coates IV, *Private vs. Political Choice of Securities Regulation: A Political Cost/Benefit Analysis*, 41 VA. J. INT'L L. 531, 569 (2001) ("When crashes, scandals and recessions occur together, as they have in the past, the pressure (or opportunity) for politicians to act is most acute.").

41. *Id.*

42. *Id.*

43. *See generally* Bainbridge, *supra* note 14; Ribstein, *supra* note 32; Romano, *supra* note 14.

"regulatory sine curve."[44] Thus, the accepted perspective is that Congress legislates following crisis, and it does so to regulate. Coffee defends what the other three denounce, but all four agree on the underlying cycle. These four scholars do not address how and when a deregulatory legislative agenda could ever gain purchase in Congress—as it did, for example, in the JOBS Act.[45]

Professor Romano accepts the pattern as descriptively accurate—although she laments it. She explains that "financial exigencies embolden critics of markets to push their regulatory agenda. They are able to play on the strand of popular opinion that is hostile to speculation and markets because the general public is more amenable to regulation after experiencing financial losses."[46] The unhappy result is "quack corporate governance," passed in crisis and unsupported by empirical evidence.[47] Because she suggests that regulation works as a one-way ratchet, her policy prescription is for mandatory sunset provisions. At least with such a legislative check, cooler heads can prevail in due course and dial back the populist excesses of postcrisis legislation.[48]

Professor Larry Ribstein termed the legislative product of this regulatory cycle "bubble laws":

> In normal and boom times, new regulation would not help any distinct group enough to motivate the group to push for it. . . .
>
> Crashes destabilize this interest group equilibrium in several ways. First, the more marginal firms, start-ups, and others that profited from the boom and opposed regulation that might thwart it, are now financially too weak to have much political clout. Second, pro-regulatory forces can enlist new supporters by arguing that regulation would restore "investor confidence"—code for more buyers and therefore higher prices. Third, reformers can draw on populism and envy of the rich, which abates only as long as the rich generate significant wealth for the rest of us.[49]

Professor Stephen M. Bainbridge performed a similar post-mortem on Dodd-Frank, judging it, too, to be a "bubble law."[50]

> In ordinary times, Washington typically has more important issues on its plate than corporate governance. In a bubble period, moreover, federal regulatory action is even less likely because interest groups like shareholders and consumers may be lulled into inaction by the seemingly ever-rising value of their portfolios. . . . When the bubble inevitably

44. *See* Coffee, *supra* note 35, at 1029 ("This Article's fundamental premise is that a 'Regulatory Sine Curve' governs the intensity of the oversight exercised by financial regulators.").

45. To be fair, Bainbridge does in other work acknowledge deregulatory tendencies. *See* Stephen M. Bainbridge, *Insider Trading Regulation: The Path Dependent Choice Between Property Rights and Securities Fraud*, 52 SMU L. REV. 1589, 1603 (1999).

46. Romano, *supra* note 25, at 1593.

47. *Id.* at 1529.

48. *See id.* at 1593. ("A regulatory agenda, in short, does not generate popular support in a booming market.").

49. Ribstein, *supra* note 32, at 79 (footnote omitted).

50. Bainbridge, *supra* note 25, at 1784.

> bursts, investigators reviewing the rubble begin to turn up evidence of speculative excess and even outright, rampant fraud. Investors burnt by losses from the breaking of the bubble and outraged by evidence of misconduct by corporate insiders and financial bigwigs create populist pressure for new regulation.[51]

Professor John C. Coffee responded to the Romano-Ribstein-Bainbridge critique in *The Political Economy of Dodd-Frank: Why Financial Reform Tends To Be Frustrated and Systemic Risk Perpetuated*.[52] Coffee's analysis begins with an acceptance of Romano's premise that "Congress seems to only pass securities and financial reform legislation after a crash or similar crisis[.]"[53] For Coffee, however, this pattern is not fraught with illegitimacy and quack legislation—rather, it is reflective of salutary republican self-government.[54] He brands Romano, Ribstein, and Bainbridge as members of a "Tea Party Caucus," whose first tenet is "Congress should not legislate after a market crash, because the result will be a 'Bubble Law' that crudely overregulates."[55]

Coffee does not deny that republican self-government can produce overreaction in congressional treatment of securities laws. But he downplays this risk by arguing that administrative rule making can correct the excesses of postcrisis regulation.[56] He dubs this mellowing influence the "Regulatory Sine Curve."[57] One example should suffice.[58] Section 956 of Dodd-Frank required "covered financial institution[s] to disclose . . . the structures of all incentive-based compensation" paid to officers, directors and employees that "could lead to material financial loss to the covered financial institution."[59] While the legislative language could have required specific disclosures regarding the compensation of numerous individuals, including the very kinds of traders whose speculation led to the downfall of Barings Bank and massive losses at Societe Generale, the principal financial regulators jointly adopted rules that favored generalized narrative over quantitative data and left to the individual financial institution the calculus of which of its employees could cause a material financial loss.[60]

The battle lines are thus clear: Bainbridge, Romano, and Ribstein condemn congressional intervention in business law, advocating for increased state power, sunsets, and other measures to curb excessive regulatory legislation. Opposing them, Coffee argues that postcrisis financial regulation is a positive feature of representative democracy and that administrative agencies can temper any particularly

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51. *Id.* at 1785 (footnotes omitted).
52. *See* Coffee, *supra* note 35, at 1019–20.
53. *Id.* at 1021.
54. *See id.* at 1022.
55. *Id.* at 1024.
56. *See id.* at 1037.
57. *Id.*
58. *See, e.g.*, *id.* at 1065–78 (surveying the Regulatory Sine Curve as demonstrated by the implementation of the Dodd-Frank Act).
59. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 956(a)(1), 124 Stat. 1376, 1905 (2010) (codified at 12 U.S.C. § 5641 (2012)).
60. Coffee, *supra* note 35, at 1069–70.

egregious law. Despite their deep philosophical differences, however, all four scholars agree on the fundamental premise: at the level of federal legislation, law follows crisis.

But that is not always true. The JOBS Act of 2012[61] was not enacted in response to a crisis, and it marks a radical *de*regulation in securities law. Consider these specifics:

- Title I makes it easier for "emerging growth companies"—as defined, almost all companies—to go public.[62] Once public, it grants them relief from many normal disclosure requirements for up to five years.[63]
- Title II for the first time since 1933 allows private firms to solicit investors from the general public.[64]
- Title III for the first time allows private firms to accept investments from average investors.[65]
- Title IV raises the limit on funds that private firms can raise funds from $5 million to $50 million.[66]
- Title V raises the number of shareholders a firm can have while still remaining private from 500 to 2000.[67]
- Title VI allows public banks to go private with as many as 1200 shareholders, quadrupling the pre-JOBS-Act requirement of 300 shareholders.[68]

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61. Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112-106, § 101, 126 Stat. 306, 307 (2012).

62. *See* Brummer & Gorfine, *supra* note 5.

63. *See* § 101(a), 126 Stat at 307 (granting "emerging growth company" status until the earliest of a few dates including "the last day of the fiscal year . . . following the fifth anniversary of the date . . . pursuant to an effective registration").

64. *See* Chance Barnett, *The Crowdfunder's Guide to General Solicitation and Title II of the JOBS Act*, FORBES (Sept. 23, 2013, 10:40 AM), http://www.forbes.com/sites/chancebarnett/2013/09/23/the-crowdfunders-guide-to-general-solicitation-title-ii-of-the-jobs-act [http://web.archive.org/web/20161203041259/http://www.forbes.com/sites/chancebarnett/2013/09/23/the-crowdfunders-guide-to-general-solicitation-title-ii-of-the-jobs-act/#1e41831a539a] (describing Title II).

65. *See* Chance Barnett, *JOBS Act Title III: Investment Being Democratized, Moving Online*, FORBES (Oct. 23, 2013 9:29 PM), http://www.forbes.com/sites/chancebarnett/2013/10/23/sec-jobs-act-title-iii-investment-being-democratized-moving-online [http://web.archive.org/web/20161203041258/http://www.forbes.com/sites/chancebarnett/2013/10/23/sec-jobs-act-title-iii-investment-being-democratized-moving-online/#56627e68346e] (describing Title III).

66. Kendall Almerico, *SEC: Startups Can Now Raise $50 Million in 'Mini IPO,'* ENTREPRENEUR (Mar. 25, 2015), http://www.entrepreneur.com/article/244278 [https://perma.cc/4BHR-MUCW].

67. Susan Beblavi, Note, *JOBS Act Title V: Raising Threshold for Registration*, 90 DENV. U. L. REV. ONLINE 63, 63 (2013).

68. § 601, 126 Stat at 326 (amending shareholder threshold for registration from 300 to 1200 for a "bank or bank holding company").

The JOBS Act, then, came as a fundamental deregulation of securities law. In their "bubble law" critique, Romano, Ribstein, and Bainbridge do not discuss the possibility of democratic forces that act to deregulate, rather than impose new regulations.[69] Nevertheless, even before the JOBS Act, Congress passed such laws in 1980, 1995, 1996, and 1998.[70]

To be fair, Coffee is, for reasons of timing, the only one of these scholars who even had the chance to theorize the JOBS Act. But rather than acknowledging its importance, he swept the Act into his larger regulatory-sine-curve theory:

> Above all, this episode shows again that, once a crisis passes, Congress can easily be persuaded to repeal legislation that it passed in response to the crisis. This proves not that the original legislation was flawed, but more that Congress can be manipulated, has a limited attention span, and will sometimes accept makeweight arguments, particularly in an election year.[71]

Coffee's realist treatment of the JOBS Act misses its distinctive position as a freestanding deregulatory law. His regulatory sine curve story focused exclusively on administrative agency-, judiciary-, and industry-based actions that loosened the regulatory requirements.[72] It was *agency* implementation that sheathed the sword of Dodd-Frank section 956. With the JOBS Act *Congress* acted to deregulate—a distinctive type of deregulation that the conventional securities law narrative does not contemplate.[73]

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69. Bainbridge's other work paints a more nuanced picture of the political landscape and acknowledges that Congress can also pass deregulatory reform if it is ambitious enough to animate "Main Street." *See* Stephen M. Bainbridge, *The Politics of Corporate Governance*, 18 HARV. J.L. & PUB. POL'Y 671, 704 n.160 (1995).

70. *See infra* Part III.B (identifying and discussing securities legislation passed in the absence of crisis).

71. Coffee, *supra* note 35, at 1078.

72. *See id.* at 1030 ("The key implication of the Regulatory Sine Curve is not that legislation is futile, but that erosion of the statute's commands will predictably begin shortly after its passage.").

73. Coffee gives three instances of agency pullback from the congressional directions of SOX. First, although in SOX section 402 Congress prohibited company loans to executives, a group of twenty-five major law firms "released a memorandum explaining how they would interpret [the law] and the SEC quietly acquiesced." *Id.* at 1042. Coffee opined that "the bar simply replaced the SEC as the authoritative interpreter of the statute's meaning." *Id.* Second, Coffee details how Sarbanes-Oxley's most onerous provision, section 404(b)'s despised internal-control-audit requirement, was actually imposed by PCAOB, not Congress at all. *Id.* at 1038. Eventually the SEC and the PCAOB separately acted to mitigate the effects of section 404 on smaller companies. *See id.* at 1038–41. Third, while pursuant to the directives of SOX section 307 the SEC adopted standards of conduct for attorneys appearing before it, there has been "[t]otal silence" in SEC enforcement, "[d]espite numerous instances in which lawyers were clearly aware of executive misconduct." *Id.* at 1044.

B. The Delegation Literature

While securities law scholars have focused on "bubble" legislation, administrative law scholars and political scientists have focused on the more general question of congressional delegation. Public choice theorists of administrative law have concerned themselves with when legislators might choose to delegate to the agency.[74] Aranson, Gellhorn, and Robinson describe both managerial explanations for delegation—where Congress delegates for benign reasons such as reducing workloads, deferring to agency expertise, and assuring continuity of decision makers[75]—and political explanations, most notably where delegation removes a politically sensitive question to the less political and more "rational" agency forum.[76] In the end, Aronson et al. take a more cynical view, explaining delegation as a means for members of Congress to deliver private benefits to their constituents.[77] Later work has attempted to model how legislators might weigh the choice between delegating to an agency versus delegating to the courts.[78]

Political scientists also have focused on why Congress often delegates in practice. In general terms, they offer three reasons as to why Congress delegates in some areas rather than others. First, Congress delegates to promote relationships with constituents—to free up legislator time for service to constituents, to allow legislators to play the role of ombudsman for the constituent subject to the vagaries of agency bureaucracy, and maybe even to form a sort of "protection racket" where constituents who fail to contribute to the legislator's campaign may be threatened with unappealing regulation.[79] Second, a "regulatory lottery" may exist; on this view, when interest groups clash, they may prefer to take their chances with an agency rather than risk a costly battle for a particular outcome in the legislature.[80] The third posits that delegation allows for a legislative "win-win" in cases where a large group can be appeased that the agency will act "in the public interest" and more concentrated interest groups can lobby the agency to promulgate regulations favorable to them.[81]

Epstein and O'Halloran articulate the most robust delegation theory in their book, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making Under Separate Powers*.[82] They ask simply: "[W]hy does Congress delegate broad authority to the executive in some policy areas and not in others?"[83] Their answer to this

74. *See* Aranson et al., *supra* note 3, at 5.

75. *Id.* at 21; *see also* EPSTEIN & O'HALLORAN, *supra* note 2, at 29.

76. Aranson et al., *supra* note 3, at 25.

77. *Id.* at 63. Aranson, Gellhorn, and Robinson argue that such delegation is improper, and that the nondelegation doctrine should constrain Congress more. *See id.* ("The delegation of legislative authority to agencies, which facilitates the regulatory production of private benefits . . . has been a growing problem . . . . A renewed nondelegation doctrine that limits the original legislative delegations as well as any subsequent agency assumption of legislative power, however, should reduce the use of regulation to produce private benefits . . . .").

78. Stephenson, *supra* note 27, at 1036.

79. EPSTEIN & O'HALLORAN, *supra* note 2, at 30–31.

80. *Id.* at 31.

81. *Id.* at 32.

82. *Id.* at xv (introducing a summary of the book's content in the preface).

83. *Id.* at 7.

question is built around a "transaction cost politics" theory.[84] Analogizing to the familiar question confronting firms as to whether to "make or buy," Epstein and O'Halloran argue that legislators will sometimes "make" legislation themselves (that is, dictate exactly what the law will be) and at other times "buy" it from outside (that is, delegate to the executive).[85] Epstein and O'Halloran predict that the dictate-or-delegate decision "will be made in such a way as to maximize legislators' political goals"—that is, reelection.[86]

Epstein and O'Halloran test their theory by way of a large sample of important legislation from 1947 to 1990.[87] Their model yields several more detailed predictions, which they test on their sample.[88] But they do not separate out securities laws as a distinct category.[89] And more problematically, they look at each issue area as a whole, comparing, for example, the extent to which Congress delegates in tax law versus environmental law.[90] They do not examine variation in delegation between statutes in the same issue area.[91] Thus, they cannot account for why, in a single subject matter area, Congress might sometimes delegate and sometimes dictate.

Thus, a brief survey of the existing literature reveals the gap that this Article seeks to fill. The theory, explicated in the next section, is that the dominant securities law narrative tells only a third of the story. Yes, Congress acts postcrisis—but it also acts in the absence of crisis. Moreover, the nature of its legislation—more precisely, of its delegation—varies depending on whether a crisis precipitated it.

II. THE DICTATION VS. DELEGATION THESIS

Legislators seek to maximize their chances of reelection.[92] Reelection requires the backing of constituents that can mobilize support at the ballot box or can contribute the money that campaigns require. Thus, legislators care the most about constituents most likely to help them with reelection—those that contribute to the officeholder's campaign and have regularly done so in the past. All things being equal, then, repeat players fare better than single-issue constituents that seek a targeted intervention in politics.[93]

84. *Id.* at 7–9.

85. *See id.* at 7 ("[W]hen deciding where policy will be made, Congress trades off the internal policy production costs of the committee system against the external costs of delegation. Thus, Congress's decision to delegate is similar to a firm's make-or-buy decision . . . .").

86. *Id.* at 9.

87. *Id.* at 87 (introducing the data set based on Mayhew's list of important legislation). *See generally id.* at 86–120.

88. *See, e.g.*, *id.* at 196–231 (dividing legislation into different subject areas and discussing whether Congress delegates *more* in particular areas of law).

89. *Id.* at 199.

90. *Id.*

91. *Id.*

92. *Id.* at 47. "Since legislators' primary goal is reelection, it follows that policy will be made in such a way as to maximize legislators' reelection chances; delegation will follow the natural fault lines of legislators' political advantage." *Id.*

93. *Cf.* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974). Galanter first introduced the key distinction

The dictation/delegation thesis posits that, in general, legislators will dictate and delegate according to constituents' preferences—particularly the preferences of those constituents who are wealthy and politically active. In general, when industry has unitary preferences, a history of active campaign and political action committee contributions, and effective lobbying machinery, its preference is for legislation that dictates the details of law—that is, that articulates the precise contours of regulation. Thus, in times when the political climate allows for successful industry-sponsored legislation, the *first best* option for Congress is dictation rather than delegation.

In contrast, following a salient crisis, industry will play defense rather than offense. Its lobbying then focuses on minimizing the deleterious impact of inevitable legislation by shifting regulation as much as possible to the agency level. This strategy may be characterized as *delay, dilute, and dispute*. Agency action is by its nature slow, subject to lobbying, and vulnerable to challenge in the courts.

The balance of this Article will explore the manifestation of dictation and delegation in securities law over time, but one important caveat must precede that discussion. The securities law landscape is complicated. I do not intend to reduce it to a simple formula, whereby crisis necessarily precipitates delegation and noncrisis always prompts dictation. On the contrary, Part V will elaborate on statutes that do not neatly fit the dictation/delegation pattern. It is enough to suggest that the question of delegation is of fundamental concern in understanding the broad scope of securities regulation, and that we can discern revealing patterns in delegation over time.

A few examples from recent law show how much the delegation question matters. First, consider the inherent *delay* that delegation entails. Upon delegation, the agency must study the question and propose rules to the public.[94] Merely formulating rules to propose takes much time. For example, Title III of the JOBS Act required the Securities and Exchange Commission (SEC) to propose rules within 270 days after enactment, which would have been December 31, 2012.[95] Thus, the statute itself contemplated a nine-month delay. But the real-world delay was far longer: the agency did not even propose rules until October 2013, ten months after its congressionally imposed deadline.[96] In addition, once the agency proposes a rule, it is subject to a notice-and-comment period, after which the agency must craft a final

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between repeat players and one-shotters. *Id.* at 97–98. Galanter's insight was in the litigation realm, but his insights have traction in the political realm as well.

94. *See* Emily S. Bremer, *A Primer on the Informal Rulemaking Process,* ADMIN. CONF. U.S.: ADMIN. FIX (May 10, 2013, 11:56 AM), https://www.acus.gov/newsroom/administrative-fix-blog/primer-informal-rulemaking-process [https://perma.cc/QS6U-4CNV] (explaining that informal rule making requires an agency to publish its proposed rule, give the public an opportunity to comment, and promulgate a final rule after taking comments into account). There are two forms of agency rule making, but informal is the dominant method because formal requires more procedure in promulgating a rule, such that most agree it is impracticable. Edward Rubin, *It's Time To Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 107 (2003).

95. Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112-106, § 302(c), 126 Stat. 306, 320 (2012).

96. Press Release, Sec. & Exch. Comm'n, SEC Issues Proposal on Crowdfunding (Oct. 23, 2013), https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540017677 [https://perma.cc/3F46-HWG3].

rule that reflects a responsiveness to the public's input.[97] Hence, by its very nature, reform delegated is reform delayed.

Delay is not the only distinguishing feature of agency action; *dilution* can and often does occur at the agency level. While the SEC prepares its draft regulation, industry advocates can lobby to weaken any proposed reforms.[98] In the field of financial regulation, Professor Kimberly Krawiec conducted a groundbreaking study of federal regulators with various interest groups during the preproposal period for the Volcker Rule and found that financial institutions met with regulators 351 times, accounting for 78% of all such meetings.[99] During the same time period, public interest, labor, research, and advocacy groups met with these same regulators a total of only thirty-one times.[100] Krawiec found that "financial institutions, financial industry trade groups, and law firms representing such institutions and trade groups collectively accounted for 93.1% of all federal agency Volcker Rule meetings, whereas public interest, research, advocacy, and labor groups, and other persons and organizations, accounted for only 6.9%."[101]

While the meeting logs reveal only the incidence of the meetings, we can presume that in the course of the 351 times where financial industry representatives met with agency officials, they often advocated for positions favorable to their clients—positions that likely represented a dilution of Congress's regulatory intent in Dodd-Frank. The potential for such lobbying is a key feature of agency action; in contrast, if the law is self-executing, there is no need (or opportunity) to lobby further.

Credit risk retention under Dodd-Frank provides another example of dilution. In Dodd-Frank section 941, Congress sought to prevent banks from making subprime loans and securitizing them to palm all of the attendant risks of default onto investors by requiring that they retain some default risk on their balance sheets. But section 941 contained an exception for qualified residential mortgages (QRM), and Joshua White details how the housing and mortgage industries pushed back on the definition of QRMs, to the point that regulators reproposed the rule, which was diluted to the point of (in the words of Barney Frank) "effectively abolishing risk retention."[102]

Even without direct, industry lobbying, the SEC itself may be sympathetic to industry calls for deregulation or modulated regulation. Professor John Coates has argued that in times of crisis it functions as a "political circuit breaker," softening

97. Bremer, *supra* note 94.

98. *See* Elizabeth Shell, *Which Federal Agencies Do Lobbyists Target Most?*, PBS.ORG (June 13, 2014, 3:21 PM), http://www.pbs.org/newshour/updates/agencies-lobbies-target/ [https://perma.cc/7UJ5-PQXK] ("Since 1998, more than $41 billion has been spent by companies, unions and other organizations to lobby federal agencies and the U.S. Congress. In 2013, more than 9,900 lobbyists spent $3.23 billion trying to influence law writers and policy makers.").

99. Kimberly D. Krawiec, *Don't "Screw Joe the Plummer": The Sausage-Making of Financial Reform*, 55 ARIZ. L. REV. 53, 79–80 (2013).

100. *Id.* at 80. Krawiec notes, "This is nearly the same number of times that a single financial institution—J.P. Morgan Chase—met with federal agencies on Volcker Rule interpretation and implementation." *Id.*

101. *Id.* at 80.

102. Joshua T. White, *The Evolving Role of Economic Analysis in SEC Rulemaking*, 50 GA. L. REV. 293, 317–20, 323 (2015).

external pressures to regulate.[103] Professor Donald Langevoort likewise observes that action by the SEC may offer cover to Congress in the face of scandal by providing "illusory regulation" that leads the public to believe that more investor protection exists than is justified in reality.[104] And, in the "normal" political periods when securities-related topics are not on the "public agenda," the SEC will likely be more attuned to interest groups like corporations, large investors, investment banks, venture capital funds, and Wall Street law firms than to the general electorate.[105]

Finally, if the SEC engages in unwelcome rule making, industry can *dispute* agency action in court. Take the case of proxy access. Reformers have long argued that the corporate ballot gives no real choice to shareholders.[106] Elections are not contested: while shareholders can approve or disapprove management's nominees, they cannot include their own.[107] Section 971 of Dodd-Frank resolved a long-standing dispute about SEC authority to regulate in the realm of proxy access by granting the SEC the power to require public companies to include shareholder nominees in the corporate ballot.[108] Proxy-access reformers in 2010 would have been justified in expecting that the resulting SEC rules would finally make proxy access a reality.

Yet in *Business Roundtable v. SEC*,[109] the D.C. Circuit applied rigorous cost-benefit analysis to the SEC's final rules on proxy access and rejected them as "arbitrary and capricious" under the Administrative Procedure Act (APA).[110] According to the Court, the SEC "inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters."[111] Moreover, the Court came to this conclusion despite the significant amount of cost-benefit analysis the SEC actually undertook when drafting the rule.

Thus, if delay and dilution are not enough to make agency action more palatable, industry can dispute it in court. Even if the agency relies on empirical research in support of its action, a court may second-guess and ultimately overturn it as arbitrary and capricious.[112] In contrast, congressional legislation is all but immune from judicial review.

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103. Coates, *supra* note 40, at 553–57.

104. Donald C. Langevoort, *The SEC as a Lawmaker: Choices About Investor Protection in the Face of Uncertainty*, 84 WASH. U. L. REV. 1591, 1600 (2006).

105. Coates, *supra* note 40, at 561–62.

106. *See, e.g.*, Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 856 (2005) (stating that, "under current arrangements, shareholders seeking to exercise their theoretical power to replace directors face substantial impediments" and noting that, "outside the hostile-takeover context, the incidence of electoral challenges to directors is negligible").

107. *See id.* ("Challengers do not have the access to the corporate ballot and to the corporation's proxy machinery that incumbents enjoy.").

108. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 971, 124 Stat. 1376, 1915 (2010).

109. Bus. Roundtable v. Sec. Exch. Comm'n, 647 F.3d 1144 (D.C. Cir. 2011).

110. *Id.* at 1148.

111. *Id.* at 1148–49.

112. The court criticized the SEC for not appropriately considering studies that showed a

Delegation matters because any matter delegated to an administrative agency can be delayed, diluted, and ultimately disputed; matters as to which Congress itself dictates the law cannot. The dictation/delegation thesis predicts that in noncrisis conditions, where industry has unified preferences, Congress will dictate more; whereas in conditions where financial crisis is salient, Congress will delegate more. But caveats are in order. First, the dictation/delegation thesis speaks to general trends rather than hard-and-fast rules. There may well be instances of delegation in a noncrisis environment and occasions of postcrisis dictation. Moreover, there may be times when industry does not unite around a given policy. For example, as Aranson, Gellhorn, and Robinson argue, even in noncrisis times, if different repeat players favor conflicting positions, legislators may well delegate as a way to avoid affronting either side. Thus, the best prospects for dictating legislation occur when there is no instigating crisis and repeat players coalesce around a common policy goal.

The dictation/delegation thesis offers significant advances over the prior literature. From the securities regulation side, it offers more holistic method for evaluating legislation. Ribstein's critique of the political ramifications of boom-and-bust financial cycles is powerful but one-sided. Recall that he described a precrash regulatory equilibrium state in the following way:

> [N]ew regulation would not help any distinct group enough to motivate the group to push for it. Regulated entities therefore have enough clout to defeat significant increases in liability or regulation. Those who might shift the balance, such as consumers or investors, do not see a need for new regulation while they are riding a rising market.[113]

Yet in reality, regulation—or deregulation—*does* occur in boom times, and the dictation/delegation theory predicts that it will be of a distinctly dictating character. Particularly if industry's preferences are unitary and it has the political power to muscle through legislation in periods of economic expansion, regulatory changes (or, in the case of securities law, deregulation) that do occur are more likely to be set in congressional stone.

The dictation/delegation thesis challenges the delegation literature as well, moving past the generalization that Congress consistently dictates or delegates to administrative agencies in a given field. To be clear, it is of great interest and importance to be able to characterize the relative amount of delegation to agencies in the fields of immigration versus consumer-protection legislation, to take but two

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negative influence of proxy access on board performance—even though, by the court's own account, the agency discounted the studies "because of questions raised by subsequent studies, limitations acknowledged by the studies' authors, or [its] own concerns about the studies' methodology or scope." *Id.* at 1151 (alteration in original) (quoting Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56,668, 56,762–63 (Sept. 16, 2010) (to be codified at 17 C.F.R. pt. 200, 232, 240, 249)). One might be forgiven for thinking that the SEC had not undertaken any study of the subject at all—yet the agency had in fact relied on two empirical studies, one of which (unlike the studies cited by the court) was published in a respected, peer-reviewed journal. *See id.* at 1151 (noting the studies relied upon by the Commission).

113. Ribstein, *supra* note 32, at 79.

examples. Yet it is equally important to understand how and why, within a particular field, the forces of dictation and delegation modulate over time.

This Part has articulated a theory of dictation and delegation in securities regulation. What remains is to test it. The remainder of this Article will do so. The first order of business is to identify and describe the recent history of congressional securities regulation, grouped in terms of crisis and noncrisis legislation. The time period begins with SIPA and the Securities Amendments of 1975, which were among the most far reaching since the 1934 Securities Exchange Act up until that time. I first describe both the content and the political context of postcrisis securities legislation. I then move to noncrisis securities legislation. With the benefit of this history-in-a-nutshell of securities law, I can describe my methodology for coding instances of congressional delegation and present my findings.

III. SECURITIES LEGISLATION 1970 TO PRESENT DAY

A. Postcrisis

During the time period of 1970–2014 three crises arose that spurred Congress to enact new securities laws: the Paperwork Crisis of 1967–70; the accounting fraud scandals of Enron, WorldCom, and other firms after the bursting of the 2000 internet stock market bubble; and the financial crisis of 2008.

1. The Paperwork Crisis of 1967–70, the Securities Investor Protection Act of 1970, and the Securities Act Amendments of 1975

The Paperwork Crisis of 1967–70 likely has escaped the attention of most readers.[114] But it nearly crippled Wall Street, and its root cause lay in an utterly mundane problem: paper.

In the 1960s, stock trades required the physical delivery of a stock certificate —that is, an actual piece of paper.[115] "In the 1950s, [the] average daily volume [of trading] on the New York Stock Exchange had been 2.1 million shares."[116] Then, during the 1960s, the volume of trading exploded. From 1960 to 1965, average

114. Although a recent Delaware Chancery Court opinion does reference the crisis. *See In re* Appraisal of Dell, Inc., No. 9322-VCL, 2015 WL 4313206, at *1 (Del. Ch. July 13, 2015), *as revised* (July 30, 2015) ("Increased trading volume in the securities markets overwhelmed the back offices of brokerage firms and the capabilities of transfer agents. No one could cope with the burdens of documenting stock trades using paper certificates. The markets were forced to declare trading holidays so administrators could catch up. With trading volumes continuing to climb, it was obvious that reform was needed. Congress directed the SEC to evaluate alternatives that would facilitate trading.").

115. Adam J. Levitin, *The Paper Chase: Securitization, Foreclosure, and the Uncertainty of Mortgage Title*, 63 DUKE L.J. 637, 680–81 (2013).

116. Harvey A. Rowen, *The Securities Acts Amendments of 1975: A Legislative History*, 3 SEC. REG. L.J. 329, 331 (1976).

volume doubled to 4.4 million shares per day.[117] By the end of 1967, the total volume of trading increased 33.3% over the prior year.[118]

The existing system simply could not handle this rapid increase in trading volume, and the situation reached crisis levels: by mid-1967, the New York Stock Exchange (NYSE) Board of Governors began closing the exchange early to give members a chance to deal with the accumulated paperwork.[119] Beginning on January 22 of 1968, trading was limited to between the hours of 10:00 a.m. and 2:00 p.m.[120] In July and August of 1968, the NYSE shut down completely—that is, *ceased trading altogether*—every Wednesday.[121] The crisis caused a "wave" of failures of broker-dealers,[122] with "over 100 NYSE member firms [going] out of business" between 1968 and 1970.[123] Additionally, the NYSE itself spent over $130 million bailing out firms and their customers.[124] A House Committee Report did not mince words in declaring that the Paperwork Crisis "brought our Nation's securities market to its knees."[125]

Both the financial and political systems mobilized to respond to the crisis. Industry members coordinated a technological response, while Congress provided a federal backstop to reassure the customers of brokerage firms.[126] First, Wall Street CEOs formed BASIC, the Banking and Securities Industry Committee, to deal with the crisis.[127] Ultimately, they created the Central Certificate Service, the precursor to the Depository Trust and Clearing Corporation (DTCC), to create a modern technological solution to the problems that precipitated the Paperwork Crisis.[128]

At the same time, and in consultation with the SEC, Congress enacted SIPA, which created the Securities Investor Protection Corporation (SIPC).[129] The SIPC assured investors that, even if their broker-dealer failed, their money was safe, thus providing insurance to brokerage clients comparable to that provided by the Federal Deposit Insurance Corporation (FDIC) to bank depositors.[130] This quick response to the crisis served to reassure customers not to abandon broker-dealers entirely. In addition, the committees with jurisdiction over the securities industry promised Congress to begin studying the causes of the crisis with an eye toward recommending

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117. *Id.*

118. N.Y. STOCK EXCH., INC., CRISIS IN THE SECURITIES INDUSTRY: A CHRONOLOGY: 1967–1970, at 10 (1971), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1970/1971_0730_NYSECrisis.pdf [https://perma.cc/NHM6-PX4K].

119. *Id.* at 11.

120. *Id.* at 12–13.

121. 2 JERRY W. MARKHAM, A FINANCIAL HISTORY OF THE UNITED STATES: FROM J.P. MORGAN TO THE INSTITUTIONAL INVESTOR (1900–1970) 362 (2002).

122. JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET 464 (3d ed. 2003).

123. MARKHAM, *supra* note 121, at 364.

124. *Id.*

125. *Id.*

126. *See* Rowen, *supra* note 116, at 332.

127. CAPITAL MARKETS HANDBOOK § 8.06.k (John C. Burch, Jr. & Bruce S. Foerster eds., 6th ed. 2016), Westlaw CAPMH.

128. *Id.*

129. Rowen, *supra* note 116, at 332.

130. *Id.*

further legislation.[131] Hearings began in the House in August 1971, and the SEC convened hearings later that year.[132] After five years, these efforts produced the Securities Amendments of 1975. The buildup to this legislative reform involved extensive lobbying by both the NYSE and the Securities Industry Association.[133] Along the way, because of a series of scandals concerning the trading of municipal bonds, provisions that addressed this market were incorporated into the legislative package.[134]

The Paperwork Crisis thus prompted not one but two pieces of legislation. The first, SIPA, came at the end of the crisis and addressed the immediate problem of reassuring investors that if their broker-dealer failed they would not lose their investments.[135] And part of the bargain that produced this limited intervention was a de facto agreement by the industry that some form of more comprehensive regulation would follow.

How do these historical developments fit together with the dictation/delegation thesis? There was little delegation in the SIPA of 1970 and a high degree of delegation—indeed, the most of any of the acts in the sample time period—in the Amendments of 1975. This outcome, as Part IV will show, in fact may fit comfortably with the dictation/delegation thesis. SIPA represents the one time in the sample period where Congress truly acted to stop a crisis as it was unfolding—and it acted by dictating a concrete solution, the creation of the SIPC. The many delegations of the later 1975 Amendments reflects the more familiar pattern of heavy delegation that occurs once the triggering crisis has passed into recent history.

2. Enron, WorldCom, and the Sarbanes-Oxley Act of 2002

Professor Romano's 2005 article on the Sarbanes-Oxley Act ("Sarbanes-Oxley" or SOX) depicts the crisis state that spurred congressional action in these terms:

> After declining from July 2001 through shortly before Enron's financial restatements and collapse in the fall of that year, the market plunged starting in April 2002, with the S&P reaching bottom in July 2002. The low point, which represented more than a one-third loss in value of the index over the preceding year, occurred on the day before the conference committee reported out a bill (July 23), which was also the second trading day after the bankruptcy filing of WorldCom (it filed on a weekend). Congress was therefore operating in an environment in which investor losses were staggering. A subsequent study by the GAO indicated that one well-known measure of investor sentiment, which was inaugurated in 1996, was at its lowest recorded level in June and July 2002.[136]

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131. *Id.*
132. *Id.* at 333–34.
133. *Id.* at 338, 342.
134. *Id.* at 339.
135. *Id.* at 332.
136. Romano, *supra* note 14, at 1546.

Enron's bankruptcy spurred initial legislative efforts,[137] but these stalled. Subsequent revelations of accounting fraud at Adelphia, Global Crossing, and Tyco International,[138] with the WorldCom scandal as the tipping point, gave fresh impetus to reform efforts.[139]

Romano's critique of SOX posits that Congress legislated in the face of empirical studies that failed to support important provisions of the Act.[140] She singles out as examples of congressional "quackery" the following provisions: (1) the prohibition on company loans to executives, (2) the requirement that audit committees be independent, (3) the requirement of executive certification of financial statements, and (4) the ban on the provision of nonaudit services by auditors.[141]

The dictation/delegation hypothesis does not take any position on the costs and benefits of these provisions, although in prior work I have questioned the utility of director "independence."[142] Dictation/delegation simply predicts that SOX, passed as it was in the wake of a salient crisis, will fall on the delegation end of the spectrum. The question raised for current purposes by the four provisions highlighted by Professor Romano is whether they involved Congress in dictating policy, rather than delegating policy-making authority in a time of crisis. At first blush, these measures might seem to embody specific congressional policy prescriptions, but that account is too simplistic.

In fact, in SOX, Congress delegated much of the nitty-gritty implementation of the Act's requirements to the SEC and to a new legislatively created entity, the Public Company Accounting Oversight Board (PCAOB). For example, with respect to audit-committee independence (item number two above), the SEC had 270 days to promulgate rules directing the exchanges to implement their own response to these requirements.[143] Final agency rules elaborated on the meaning of "independence,"[144] and they also provided for a transition period,[145] exemptions,[146] and special rules for foreign private issuers.[147] As for officer certification of financial statements (item number three), Congress directed the SEC to require by rule each company filing under the 1934 Act to certify annual or quarterly reports,[148] and the resulting SEC rule, in contrast to the federal act, treats this subject in detail, specifying which filers are subject to the requirement (including foreign private issuers, banks and savings associations, and asset-backed securities issuers), and what "disclosure controls and procedures" mean.[149] As for the prohibition on nonaudit services by auditors (item

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137. *Id.* at 1558.
138. *Id.* at 1545.
139. *See* Coffee, *supra* note 35, at 1036.
140. Romano, *supra* note 14, at 1526–27.
141. *Id.* at 1529–43.
142. Usha Rodrigues, *The Fetishization of Independence*, 33 J. CORP. L. 447, 449 (2008).
143. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 301, 116 Stat. 745, 775–76.
144. 17 C.F.R. § 240.10A-3(b)(1) (2016).
145. *See* § 240.10A-3(a)(5) (providing varying compliance deadlines for "foreign private issuers and smaller reporting companies" compared to "other listed issuers").
146. § 240.10A-3(b)(1)(iv).
147. § 240.10A-3(b)(1)(iv)(C)–(E).
148. § 302(a), 116 Stat. at 777.
149. Management's Report on Internal Control Over Financial Reporting and Certification

number four), Congress itself enacted a laundry list of prohibited activities, but also delegated to the PCAOB the power to identify "any other services that the Board determines, by regulation, [to be] impermissible."[150] The SEC did not take up Congress's invitation to create new categories of forbidden nonaudit services, but—consistent with Congress's delegation of rule-making authority—it did elaborate on many of the congressionally established categories.[151]

With regard to the executive-loan prohibition (item number one), that restriction stemmed from a problem specific to WorldCom: using company stock as collateral, WorldCom's CEO, Bernie Ebbers, had borrowed millions of dollars to fund enterprises ranging from a Canadian cattle ranch to a trucking company to a minor league hockey team.[152] As WorldCom stock began to sink, his lenders pressured him to sell the stock, and the board authorized the corporation to loan Ebbers money to prevent a sell-off that would lower the stock price still further.[153] Congress responded by prohibiting company loans to executives—and in doing so created problems for company practices as routine as advancing newly hired executives money for relocation expenses.[154]

Thus, while Congress might have fashioned SOX in a manner unsupported by empirical data, it delegated many matters of implementation to the SEC. Nor is this assertion new or controversial. Other scholars have noted that the 2002 Congress "painted with a broad brush"[155] and left the SEC with "extensive rulemaking

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of Disclosure in Exchange Act Periodic Reports, 68 Fed. Reg. 36,636 (June 18, 2003) (to be codified at 17 C.F.R. pts. 210, 228, 240, 249, 270, 274).

150. § 201(a), 116 Stat. at 772.

151. For example, where Congress merely listed "actuarial services" in 15 U.S.C. § 78j-1(g)(4) (2012), the SEC's final rule specifies the following:

> Any actuarially-oriented advisory service involving the determination of amounts recorded in the financial statements and related accounts for the audit client other than assisting a client in understanding the methods, models, assumptions, and inputs used in computing an amount, unless it is reasonable to conclude that the results of these services will not be subject to audit procedures during an audit of the audit client's financial statements.

17 C.F.R. § 210.2-01(c)(4)(iv) (2016).

152. *See* Ken Belson, *WorldCom's Audacious Failure and Its Toll on an Industry*, N.Y. TIMES (Jan. 18, 2005), http://www.nytimes.com/2005/01/18/business/worldcoms-audacious-failure-and-its-toll-on-an-industry.html [https://perma.cc/47U3-BWH7].

153. *See generally* Floyd Norris, *A Crime So Large It Changed the Law*, N.Y. TIMES (July 14, 2005), http://www.nytimes.com/2005/07/14/business/a-crime-so-large-it-changed-the-law.html [https://perma.cc/S4G4-A8TS] ("Mr. Ebbers did not sell shares in his company in the months before it collapsed. . . . The reluctance to sell stock was part of the corporate culture he instilled at WorldCom, where selling shares was frowned upon as showing a lack of confidence in the company.").

154. *See* John C. Coffee, Jr., *Unintended Issues Under Sarbanes-Oxley*, DAILY REP. (Sept. 26, 2002), http://www.dailyreportonline.com/id=900005532398/Unintended-Issues-Under-SarbanesOxley [https://perma.cc/FBP7-7X2V].

155. Steven J. Cleveland, *The NYSE As State Actor?: Rational Actors, Behavioral Insights & Joint Investigations*, 55 AM. U. L. REV. 1, 74–75 (2005).

powers."[156] Indeed, as John Paul Lucci has detailed, Congress left the SEC with instructions to:

> (1) develop accounting standards under new Section 13(b) of the Securities Act; (2) define by rule prohibited non-auditing services; (3) prohibit the listing of companies on exchanges that do not comply with provisions of Sarbanes-Oxley; (4) develop procedures for CEO certification of financials; (5) clarify prohibited trades during blackout periods; (6) promulgate rules of professional responsibility for attorneys appearing before the commission; (7) develop rules for the treatment of "off-balance sheet transactions;" (8) require pro forma financial information to be filed with periodic reports; (9) require internal control reports; (10) report whether the company has developed internal ethics rules; (11) require disclosure of whether an audit committee has "at least 1 member who is a financial expert;" (12) develop rules for handling conflicts of interest involving security analysts; (13) define terms in certain circumstances; and (14) require document retention.[157]

Thus, while SOX may have breathed life into corporate governance proposals that lacked empirical support, it delegated much of the implementation to the SEC.

3. The Financial Crisis of 2008 and the Dodd-Frank Act of 2010

The financial crisis of 2008 began with rumblings in 2007 about the failure of two Bear Stearns hedge funds[158] and the bankruptcy of subprime mortgage lender New Century.[159] In 2008 a series of high-stakes events made clear that these failures were not isolated phenomena. JP Morgan Chase bought Bear Stearns with federal assistance,[160] and the federal government took over Fannie Mae and Freddie Mac.[161] Lehman Brothers filed for bankruptcy.[162] AIG received federal assistance.[163]

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156. Barbara Black, *Protecting the Retail Investor in an Age of Financial Uncertainty*, 35 U. DAYTON L. REV. 61, 65 (2009).

157. John Paul Lucci, *Enron—The Bankruptcy Heard Around the World and the International Ricochet of Sarbanes-Oxley*, 67 ALB. L. REV. 211, 232–33 (2003) (footnotes omitted).

158. Bess Levin, *The Fall of Bear Stearns: A Quickie Guide*, N.Y. MAG.: DAILY INTELLIGENCER (Mar. 18, 2008, 4:45 PM), http://nymag.com/daily/intelligencer/2008/03/a_quickie_guide_to_the_fall_of.html [https://perma.cc/J2BW-R4ZS].

159. Jonathan Stempel, *New Century Files for Chapter 11 Bankruptcy*, REUTERS (Apr. 2, 2007, 7:40 PM), http://www.reuters.com/article/us-newcentury-bankruptcy-idUSN0242080520070402 [https://perma.cc/3G65-TFNT].

160. Levin, *supra* note 158.

161. Neil Irwin & Zachary A. Goldfarb, *U.S. Seizes Control of Mortgage Giants*, WASH. POST (Sept. 8, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/09/07/AR2008090700259.html [https://perma.cc/265E-RDUX].

162. Andrew Ross Sorkin, *Lehman Files for Bankruptcy; Merrill Is Sold*, N.Y. TIMES (Sept. 14, 2008), http://www.nytimes.com/2008/09/15/business/15lehman.html [https://perma.cc/3NW4-THHD].

163. Matthew Karnitschnig, Deborah Solomon, Liam Plevin & Jon E. Hilsenrath, *U.S. To Take Over AIG in $85 Billion Bailout; Central Banks Inject Cash as Credit Dries Up*, WALL ST. J. (Sept. 16, 2008, 11:59 PM), http://www.wsj.com/articles/SB122156561931242905

Goldman Sachs and Morgan Stanley, the last two independent banks, converted to bank holding companies so that they could receive greater federal assistance.[164] Washington Mutual collapsed,[165] the stock market lost fifty-four percent of its value in less than eighteen months,[166] and the nation entered the "Great Recession."[167]

On July 10, 2010, Congress responded by passing the Dodd-Frank Wall Street Reform and Consumer Protection Act.[168] The stated purpose of Dodd-Frank was "[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail', to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes."[169] Each of Dodd-Frank's goals was ambitious. Together they represented a sweeping and tremendously complicated undertaking. The dictation/delegation theory predicts a high amount of delegation after any crisis. Given the crippling economic crisis of 2008 and the scope of the 2010 reforms, it is unsurprising that Dodd-Frank in fact contained a large number of delegations. Indeed, it called for 398 rule makings from fifteen different agencies.[170]

Congress delegated more to the agencies than they could reasonably handle. In April of 2011, nine months after the enactment of Dodd-Frank, only 5.4% of the rules had been finalized, and all twenty-six of the rule-making deadlines for that month were missed.[171] By July of 2011, regulators had only completed thirty-three, or 20%, of the 163 required rule makings mandated by Congress in that time frame.[172] In July

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[https://web.archive.org/web/20160922161549/http://www.wsj.com/articles/SB122156561931242905].

164. Jon Hilsenrath, Damian Paletta & Aaron Lucchetti, *Goldman, Morgan Scrap Wall Street Model, Become Banks in Bid To Ride Out Crisis*, WALL ST. J. (Sept. 22, 2008, 11:59 PM), http://www.wsj.com/articles/SB122202739111460721 [https://perma.cc/2UE6-WCLD].

165. Steve Schaefer, *The Great Recession's Biggest Bankruptcies: Where Are They Now?*, FORBES (Aug. 10, 2011, 11:44 AM), http://www.forbes.com/sites/steveschaefer/2011/08/10/the-great-recessions-biggest-bankruptcies-where-are-they-now [http://web.archive.org/web/20150310125134/http://www.forbes.com/sites/steveschaefer/2011/08/10/the-great-recessions-biggest-bankruptcies-where-are-they-now].

166. *Can Stock Values Simply "Disappear"? Yes.*, ELLIOT WAVE INT'L (Jan. 15, 2016, 4:00 AM), https://www.elliottwave.com/affiliates_pr/archives/2016/01/15/Can-Stock-Values-Simply-Disappear-Yes-aa.aspx [https://perma.cc/3EG3-FXB7].

167. Matt Egan, *2008: Worse than the Great Depression?*, CNN (Aug. 27, 2014, 5:34 PM), http://money.cnn.com/2014/08/27/news/economy/ben-bernanke-great-depression [https://perma.cc/ARR6-JS7K].

168. Jennifer Wu, Note, Morrison *v. Dodd-Frank: Deciphering the Congressional Rebuttal to the Supreme Court's Ruling*, 14 U. PA. J. BUS. L. 317, 335 (2011).

169. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

170. *Dodd-Frank Progress Report*, DAVIS POLK & WARDWELL LLP, https://www.davispolk.com/Dodd-Frank-Rulemaking-Progress-Report [https://perma.cc/EA7Q-TQPM].

171. Davis Polk & Wardwell LLP, *Dodd-Frank Rulemaking Progress Report: Progress as of May 1, 2011*, at 5 (2011), http://www.davispolk.com/files/uploads/FIG/050211_ProgressReport.pdf [https://perma.cc/3EFY-5CS2].

172. Davis Polk & Wardwell LLP, *Dodd-Frank Progress Report: July 22, 2011*, at 2 (2011), http://www.davispolk.com/files/uploads/FIG/072211_Dodd_Frank_Progress_Report.pdf [https://perma.cc/S3J6-4NK2].

alone, 104 deadlines were missed, and only thirteen rule-making requirements were finalized.[173] Only 25.5% of the deadlines were met by the end of 2011.[174] And by July 2012, the two-year anniversary of Dodd-Frank, 140 (63%) of the 221 rule-making deadlines had been missed, while eighty-one deadlines had been met.[175] (Additionally, only 119 of the 398 required rule makings were finalized, and 142 rule-making requirements had yet to be proposed.)[176] By the end of the fourth quarter of 2014, four and a half years after the passage of Dodd-Frank, 231 of the 398 total required rule makings had been finalized, "while 94 (23.62%) rulemaking requirements [had] not yet been proposed."[177]

One example of these delays is the Volcker Rule, which deals with a ban on banks' proprietary trading. Regulators presented a proposed form of the Volcker Rule on October 12, 2011,[178] and then gave the public until February 13, 2012, to comment on the proposed draft of the regulations.[179] Ultimately they received over 17,000 comments.[180] This torrent of public input led to more analysis and discussion by the agencies, and the final rule was not released until December 10, 2013,[181] over a year after the July 21, 2012, due date.[182] However, much of this rule is still not in effect. On December 18, 2014, "the Federal Reserve extended the Volcker Rule's conformance period for 'legacy covered funds' [a defined term] until July 21, 2016 and indicated it would likely extend [that] period" for yet another year.[183] The Federal Reserve also allowed delay until 2017 for collateralized loan obligations and the provision of the Volcker Rule that bans banks from placing their own money in risky hedge and private equity funds.[184]

The dictation/delegation thesis suggests that in times of crisis Congress will delegate more policy work to administrative agencies. Part IV will test this hypothesis, but first we turn to the other side of the legislative coin—noncrisis legislation.

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173. *Id.*

174. Davis Polk & Wardwell LLP, *Dodd-Frank Progress Report: January 2012*, at 2 (2012), http://www.davispolk.com/files/uploads/FIG/Jan2012_Dodd.Frank.Progress.Report.pdf [https://perma.cc/X7QV-CU2J].

175. Davis Polk & Wardwell LLP, *Dodd-Frank Progress Report: July 2012*, at 2 (2012), http://www.davispolk.com/files/uploads/FIG/July2012_Dodd.Frank.Progress.Report.pdf [https://perma.cc/58SG-FQUU].

176. *Id.*

177. *Dodd-Frank Progress Report*, *supra* note 170.

178. Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants, Release No. 34-65543, 76 Fed. Reg. 65,784 (proposed Oct. 12, 2001) (Release No. 34-65543 (Oct. 12, 2011) (to be codified at 17 C.F.R. pts. 240, 249)).

179. Torres & Hopkins, *supra* note 10.

180. *Id.*

181. *See* Harpest & Horowitz, *supra* note 13, at 1.

182. Torres & Hopkins, *supra* note 10.

183. *Id.*

184. Douwe Miedema, *Fed Expands Scope of Volcker Rule Delay Until 2017*, REUTERS (Dec. 18, 2014, 3:04 PM), http://www.reuters.com/article/2014/12/18/us-fed-volcker-idUSKBN0JW2GW20141218 [https://perma.cc/8TD9-SFBZ].

B. Noncrisis Legislation

Congress does sometimes act in the securities arena in the absence of crisis. Indeed, no salient crises spurred five modern instances of congressional action. And notably, in four of these five instances, the impetus for legislation came largely from Silicon Valley.

1. The Small Business Investment Incentive Act of 1980 (SBIIA)

The economy of the 1970s was not prosperous: the decade in fact saw a business downturn, double-digit inflation, and a recession. But there was no crisis that prompted the enactment of the SBIIA; the pressures for enactment came from another source.

Beginning in the early 1970s, private equity firms made the claim that the Investment Company Act of 1940, which, among other things, required that a fund have no more than 100 beneficial owners,[185] limited their ability to raise capital.[186] In particular, one venture capital fund, Heizer Corporation, lobbied Congress to address this problem by allowing formation of business development corporations (BDCs).[187] Congress responded in 1980 by passing SBIIA and thus creating BDCs, "publicly traded closed-end funds that make investments in private [or thinly traded] public companies" in the form of long-term debt or equity capital, with the goal of generating capital appreciation.[188] Significantly, Congress made all but one of the 1980 Amendments effective immediately.[189]

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185. Doug Cornelius, *Qualified Purchasers Under the Investment Company Act*, COMPLIANCE BUILDING (Apr. 21, 2010, 8:00 AM), http://www.compliancebuilding.com/2010/04/21/qualified-purchasers-under-the-investment-company-act [https://perma.cc/XP8Q-QHG9].

186. *See* Doran Howitt, *Business Development Companies: Boom or Bust*, INC. (May 1, 1982), http://www.inc.com/magazine/19820501/7594.html [https://perma.cc/Q3NQ-U88P] (noting that before the law passed in 1980, "[v]enture capitalists had lobbied long and hard for the law, claiming that it would improve the ability of innovative small businesses to raise capital for growth").

187. *See Small Business Investment Incentive Act: Hearing on H.R. 3991 Before the Subcomm. on Consumer Prot. & Fin. of the H. Comm. on Interstate and Foreign Commerce*, 96th Cong. 243–50 (1979) [hereinafter SBIIA Hearing] (statement of E.F. Heizer, Chairman and President, Heizer Corporation, asking Congress to pass SBIIA).

188. Kevin Mahn, *The ABCs of Business Development Companies*, FORBES (Dec. 1 2014, 10:18 AM), http://www.forbes.com/sites/advisor/2014/12/01/the-abcs-of-business-development-companies [https://web.archive.org/web/20161027112141/http://www.forbes.com/sites/advisor/2014/12/01/the-abcs-of-business-development-companies/#3301d1584d59].

189. Only Title V of SBIIA explicitly set an effective date. Small Business Investment Incentive Act of 1980, Pub. L. No. 96-477, § 507, 94 Stat. 2275, 2294 (1980). Interestingly, Title I of SBIIA, which concerns the BDCs, has the most delegations (eleven, all permissive) of any title of the Act. *Id.* at §§ 101–05, 94 Stat. at 2275–89. Upon further analysis, however, these delegations are of relatively minor points. *Id.* The Act articulates two specific ways a firm can qualify as a BDC and then grants the power to the SEC to, by rule, articulate further paths to BDC status. The other permissive delegations leave it to the SEC to hash out details of minimal importance. For example, Congress specifies that beneficial ownership in the case of legal separation, divorce, or death remains with the transferor, "pursuant to such rules and

Part IV will consider the SBIIA in detail, but a key point is worth noting here: in the midst of debate on the Hill, the dictation/delegation thesis played out in a remarkably explicit way. The SEC resisted industry efforts to secure new legislation, with Commissioner Philip Loomis arguing that "our position is that the bill in its present form is not needed because the goals can be accomplished—indeed, may already have been largely accomplished administratively—without further legislation."[190] Arthur Little, President of the National Association of Small Business Investment Companies (NASBIC) and CEO of Narragansett Capital Corporation, vehemently disagreed:

> [NASBIC] and others appearing before you today feel that the time for Congress to act on our Investment Company Act problem is long overdue. We have repeatedly come to Congress for legislative relief and been shunted back to the SEC for administrative relief which has been promised but never forthcoming, on at least those four occasions that I mentioned.[191]

He urged Congress to act "once and for all" and to no longer listen to "the repeated assurances of the [SEC]."[192]

It is unclear whether the SBIIA succeeded in its goals; indeed, some deemed it a failure.[193] Only seven companies had elected to be regulated as business development companies by August 1981, and by 1982 only two such companies had gone public.[194] One of those two companies was the selfsame Heizer Corporation that had lobbied on behalf of the amendments.[195] One commentator has gone so far as to describe the SBIIA as "the Heizer amendments to the Investment Company Act."[196]

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regulations as the Commission shall prescribe as necessary or appropriate." *Id.* § 102. Similarly, in Section 103 it specifies that companies that propose to make an initial public offering must notify the commission that they intend in good faith to file an election to become BDCs. *Id.* § 103. Congress delegated to the SEC the power to "by rule" prescribe the form and manner of the notification, but made clear that the company has the right to make the public offering. *Id.* Six of the remaining eight delegations also grant the SEC power to enlarge BDCs' rights. The remaining two delegate to the SEC the power to prescribe rules for limiting BDC insiders or affiliates from inside transactions.

190. SBIIA Hearing, *supra* note 187, at 35 (statement of Phillip A. Loomis, Comm'r, Securities and Exchange Commission).

191. *Id.* at 132 (statement of Arthur D. Little, President-Elect, National Association of Small Business Investment Companies).

192. *Id.* at 131.

193. *See* Duke K. Bristow & Lee R. Petillon, *Public Venture Capital Funds: New Relief from the Investment Company Act of 1940*, 18 ANN. REV. BANKING L. 393, 399 (1999).

194. Reginald L. Thomas & Paul F. Roye, *Regulation of Business Development Companies Under the Investment Company Act*, 55 S. CAL. L. REV. 895, 935 (1982).

195. Howitt, *supra* note 186.

196. Joseph W. Bartlett, *Another New Paradigm: Multiplex Capital Fund—A Quick and Expensive Way To Get into Action*, VC EXPERTS (May 2013), https://vcexperts.com/buzz_articles/1360 [https://perma.cc/A9GD-DFJX].

Heizer was apparently playing both the dictation and delegation game simultaneously. SEC Associate Director of Investments Lybecker:

The episode illustrates that sometimes not just an industry, but one or two particular firms, can find success in Congress—including success in the form of preempting agency control of a regulatory field.

2. The Private Securities Litigation Reform Act of 1995 (PSLRA) & Securities Litigation Uniform Standards Act of 1998 (SLUSA)

In 1994 House Speaker Newt Gingrich built a national political campaign around a so-called contract with America.[197] That campaign was successful and Republican majorities took control of the House and Senate in 1995.[198] One major focus of Republican lawmakers involved securities class actions. Reform efforts grew out of two main concerns. First, critics argued that securities class actions were simply too easy to file and triggered a lengthy and costly discovery process.[199] Pre-PSLRA abuses included plaintiffs' attorneys reportedly filing cut-and-paste complaints the day after the price of a security dropped.[200]

The second criticism was that these strike suits disproportionately harmed emerging high-technology companies,[201] "because they were risky enterprises subject to fluctuations in sales and revenues and, therefore, volatile stock prices."[202] Faced with the costs of extensive discovery, these companies often settled meritless suits to avoid a protracted and costly defense.[203] Silicon Valley companies thus

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> However, and I hope this is not speaking out of turn, we have been dealing with one of the people scheduled to testify later in your hearings, Mr. Heizer and his attorneys, in processing a draft application they intend to file for exemptive relief under the Investment Company Act, and we have worked out an approach to the upstream affiliate problem under section 17 that goes well beyond what we have done for all registered companies to take care of those problems inherent in venture capital companies.

SBIIA Hearing, *supra* note 187, at 74 (statement of Martin E. Lybecker, Associate Director, Division of Investment Management, Securities and Exchange Commission).

197. Katherine Q. Seelye, *The 1994 Campaign: The Republicans; with Fiery Words, Gingrich Builds His Kingdom*, N.Y. TIMES, (Oct. 27, 1994), http://www.nytimes.com/1994/10/27/us/the-1994-campaign-the-republicans-with-fiery-words-gingrich-builds-his-kingdom.html [https://perma.cc/A3E2-PBSA].

198. *See* Joel Seligman, *The Private Securities Reform Act of 1995*, 38 ARIZ. L. REV. 717, 718 (1996) ("After the Republican party gained control of both houses of Congress in the 1994 elections, the movement for private securities litigation reform took on a new urgency. On January 4, 1995, H.R. 10, the 'Common Sense Legal Reforms Act of 1995,' was introduced in the House, with five sponsors and 115 cosponsors. The original bill, drafted by California Congressman Christopher Cox, had its origins in one of the ten planks of the Republican party's 1994 election campaign Contract with America." (footnote omitted)).

199. *See* Hillary A. Sale, *Heightened Pleading and Discovery Stays: An Analysis of the Effect of the PSLRA's Internal-Information Standard on '33 and '34 Act Claims*, 76 WASH. U. L.Q. 537, 553 (1998) ("This ease in filing, they claimed, was resulting in strike suits.").

200. H.R. REP. NO. 104-369, at 31 (1995) (Conf. Rep.), *as reprinted in* 1995 U.S.C.C.A.N. 730, 730.

201. *See* Sale, *supra* note 199, at 555 ("[T]hose pressing for reform argued that start-up companies, primarily emerging high-technology companies, were hardest hit by strike suits.").

202. *Id.*

203. *Id.*

combined forces with accounting firms and venture capital firms in an effort to secure new rules,[204] producing "one of the most successful lobbying campaigns in the history of the Republic."[205] The PSLRA legislation imposed heightened pleading standards (including as to the defendant's state of mind) and putting off discovery until resolution of any motion to dismiss.[206]

Following the PSLRA's passage, both its proponents and opponents expected that it would cause a decrease in the number of securities class actions.[207] Yet the number of federal securities class-action lawsuits, while dipping in the year following PSLRA's passage, did not significantly decrease; indeed, the number of securities fraud complaints filed against companies reached its high point in 1998.[208] One explanation was that plaintiffs with less meritorious claims reacted to the PSLRA by funneling claims into state court. The empirics supporting this claim were mixed,[209] but advocates of SLUSA, which federally preempted state law securities claims, argued that PSLRA created "an explosion of cases being brought in state courts."[210]

One analysis ascribes the impetus behind SLUSA to an ongoing fight between Silicon Valley and the plaintiff's bar—and one particular attorney, William S. Lerach.[211] Lerach, an infamous plaintiffs' attorney who was later sentenced to two years in prison for charges involving paying "professional plaintiffs,"[212] was described as "the most feared of the class-action lawyers for plaintiffs."[213] After the 1995 passage of the PSLRA, he championed California Proposition 211, which "would have made it easier for investors . . . to file securities-fraud [suits] against

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204. *See* Leslie M. Kelleher, *Taking "Substantive Rights" (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 51–52 (1998) ("The PSLRA . . . was a direct result of lobbying efforts by accounting firms, securities firms, and high-tech industry . . . ."); *see also* Brian Cheffins, John Armour & Bernard Black, *Delaware Corporate Litigation and the Fragmentation of the Plaintiffs' Bar*, 2012 COLUM. BUS. L. REV. 427, 449 (2012) (citing the PSLRA as a result of the "backlash" to a surge in securities litigation aimed at, among others, high-tech companies); Manning Gilbert Warren III, *Federalism and Investor Protection: Constitutional Restraints on Preemption of State Remedies for Securities Fraud*, 60 LAW & CONTEMP. PROBS. 169, 170 (1997) (arguing that the lobbying effort of a coalition including Silicon Valley overwhelmed interests "representing rank and file investors" in the passage of the PSLRA).

205. Benjamin J. Stein, *Next Stop the Statehouse*, N.Y. TIMES, Dec. 31, 1995, at F11, http://www.nytimes.com/1995/12/31/business/viewpoint-next-stop-the-statehouse.html [https://perma.cc/U356-HPQQ].

206. Sale, *supra* note 199, at 557–58 (outlining the law's heightened requirements of plaintiffs).

207. Lisa L. Casey, *Shutting the Doors to State Court: The Securities Litigation Uniform Standards Act of 1998*, 27 SEC. REG. L. J. 141, 152 (1999).

208. *Id.* at 154.

209. (and suffered from unreliable data). *See id.* at 166–70.

210. *Id.* at 173.

211. Leslie Eaton, *The Silicon Valley Gang; An Influential Industry with Lots of Money Is Getting Its Way on Capitol Hill*, N.Y. TIMES (June 11, 1998), http://www.nytimes.com/1998/06/11/business/silicon-valley-gang-influential-industry-with-lots-money-getting-its-way-capitol.html [https://perma.cc/QS5J-68YF].

212. Lisa L. Casey, *Class Action Criminality*, 34 J. CORP. L. 153, 175–76 (2008).

213. Eaton, *supra* note 211.

[California] companies."[214] In response, Silicon Valley companies and venture capitalists organized a $40 million campaign and successfully defeated the measure.[215] Silicon Valley then turned to Congress to "make sure" it would never face "a similar threat, in California or anywhere else."[216] A *New York Times* investigation suggested that millions of dollars in Silicon Valley campaign contributions —"includ[ing] $150,000 to members of the Senate Banking Committee, which handled the litigation legislation but otherwise has little involvement in technology issues"—persuaded lawmakers to support SLUSA.[217] The article also implies that the power of Silicon Valley explains why Arthur Levitt Jr., "the politically astute chairman of the S.E.C., . . . reversed himself and agreed to support the litigation bill on the day his renomination was taken up by the Senate Banking Committee."[218] Whatever the reason for its passage, SLUSA successfully preempted state securities claims, funneling them instead to federal court and the more stringent rules PSLRA had earlier imposed. Both the PSLRA and SLUSA delegated very little to the SEC.

3. The National Securities Markets Improvement Act of 1996 (NSMIA)

NSMIA sheds light on another dynamic in the political economy of securities regulation: namely, the role of the states. In NSMIA, the mutual fund industry, small issuers, and the SEC joined together in supporting federal preemption of the patchwork of state rules that imposed reporting and other requirements on mutual fund operators. State regulation was problematic because each state imposed differing requirements on funds. And these problems were particularly acute because some states imposed merit-based regulation of fund offerings, departing sharply from the disclosure-centered model of federal regulation.[219]

There was an uneasy alliance between the SEC and industry members that backed federal preemption of state regulation. While one initial impetus for NSMIA came from a 1992 SEC study,[220] the other driver was a newly Republican Congress, which had recently enacted the PSLRA and was eager to continue to deregulate securities

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214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. *See* Paul S. Stevens & Craig S. Tyle, *Mutual Funds, Investment Advisers, and the National Securities Markets Improvement Act*, 52 BUS. LAW. 419, 428–29 (1997) ("Because such state laws were adopted to protect investors from making imprudent investments, they generally were designed to regulate the merits of securities offerings. The Securities Act, on the other hand, was not designed to protect investors from imprudent investments; instead, it aimed to safeguard investors from making uninformed investment decisions." (footnote omitted)).
220. *Id.* at 427–28 ("Although the NSMIA by no means included all of the staff's recommendations in the *1992 Study*, the study did provide the first impetus for the amendments adopted in 1996, including the liberalization of mutual fund advertising and a new exception from the Investment Company Act for investment companies whose securities are owned exclusively by 'qualified purchasers.'").

law.[221] In 1995, Representative Jack Fields (R-TX) introduced the "Capital Markets Deregulation and Liberalization Act," or the "Fields Bill."[222] A popular press article asserted that Republicans were "gunning" for the SEC with this bill, which reduced the number of SEC Commissioners from five to three[223] and cut its budget by twenty percent.[224] Some observers speculated that Fields had gone too far, alarming the very Wall Street backers he had sought to court. In any event, the final version of the NSMIA bill eliminated these cutbacks aimed at the SEC. That bill also introduced a new requirement that the SEC consider the promotion of efficiency and capital formation, as well as investor protection, when engaging in rule making.[225]

No matter how strained the SEC-Republican alliance might have been, they faced a common adversary: the fifty states, which were intent on defending their regulatory turf. Leading the state-protecting charge was the powerful North American Securities Administrators Association (NASAA), the organization of state securities-law administrators.[226] But the efforts of the NASAA were largely unavailing. In particular, the NSMIA as enacted provided for almost total federal preemption of state mutual-fund regulation.

In an instance of clear dictation, Title I of NSMIA provides that "covered securities" are exempt from state regulation of securities offerings, and if a security is "issued by an investment company that is registered, or that has filed a registration statement, under the Investment Company Act of 1940," then it is a covered security.[227] Lest there be any doubt, this provision's heading is "exclusive federal registration of investment companies." The federal preemption, "[p]robably the most significant provision" of NSMIA, took effect immediately upon signing.[228]

To be sure, the NASAA had some success: it successfully lobbied to continue to receive notice filings and to maintain the capacity to receive fees from fund offerings.[229] But "the primary effect is to prohibit states from performing the

221. Jennifer J. Johnson, *Private Placements: A Regulatory Black Hole*, 35 DEL. J. CORP. L. 151, 159 n.41 (2010).

222. Bill Atkinson, *Securities Laws Face Closest Look Since '33 Fields' Bill Seeks To Preempt State Oversight*, BALT. SUN (Nov. 12, 1995), http://articles.baltimoresun.com/1995-11-12/business/1995316045_1_investors-rounsaville-investment-advisers [https://perma.cc/9AQF-TRDA]; *see* Michael Schroeder, *Guess Who's Gunning for the SEC*, BLOOMBERG. (Aug. 13, 1995, 12:00 AM), http://www.bloomberg.com/bw/stories/1995-08-13/guess-whos-gunning-for-the-sec [https://perma.cc/953X-6MT5].

223. Schroeder, *supra* note 222.

224. Johnson, *supra* note 221, at 188.

225. Before NSMIA, the SEC's charge had been to see that its rules were "necessary or appropriate in the public interest," and to consider whether they protect investors. James D. Cox & Benjamin J.C. Baucom, *The Emperor Has No Clothes: Confronting the D.C. Circuit's Usurpation of SEC Rulemaking Authority*, 90 TEX. L. REV. 1811, 1818 (2012). Over time courts have used the language NSMIA introduced to review SEC rule making more strictly, most notably in the *Business Roundtable* case on proxy access. *Id.* at 1812–13.

226. *See* Stevens & Tyle, *supra* note 219, at 432; *see also* NORTH AM. SEC. ADMINS. ASS'N, http://www.nasaa.org/ [https://perma.cc/68GE-NURV].

227. National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, § 102(a), 110 Stat. 3416, 3418.

228. Stevens & Tyle, *supra* note 219, at 446.

229. *Id.*

'gatekeeper' function they previously exercised over investment company registration statements."[230]

NSMIA also imposed federal requirements on broker-dealers and financial advisors. As the final law attests, interest groups differed in their success in achieving their goals of preemption in the face of state opposition. Small issuers did not fare as well as did the mutual funds. Professor Rutheford B. Campbell applies public choice theory to conclude that the mutual fund industry and the state securities regulators, as cohesive interest groups, were able to protect their interests in NSMIA in a way that small issuers were not. Professor Campbell observes that "the millions of small issuers, who in total seemingly had more to gain or lose than either the mutual fund industry or the individual state administrators," lacked the political clout of mutual funds or the NASAA, and "received essentially nothing from the legislation."[231] Thus—in stark contrast to mutual fund operators—they remained subject to a patchwork of state regulations, without the benefit of federal preemption.

Professor Jennifer Johnson has argued that this reform was misguided. Another provision in NSMIA provided for total federal preemption of private placements. As she explains, most witnesses in the congressional hearings testified that the states should retain a role in private-placement disclosure regulation.[232] The overarching goal of NSMIA was to eliminate *duplicative* dual federal and state registration, but small private placements—those that were not national in scope—did not qualify because the federal government effectively exerted no regulatory authority over them. This preemption provision thus created a "regulatory black hole."[233] In explaining this outcome, Professor Johnson points out that representatives from the securities industry "dominated" the list of witnesses at the NSMIA hearings.[234] And these industries did more than just testify. Johnson reports on over $220,000 in contributions from industry PACs to Representative Fields in the two years prior to his introduction of the Fields Bill.[235]

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230. *Id.*

231. Rutheford B. Campbell, Jr., *The Impact of NSMIA on Small Issuers*, 53 BUS. LAW. 575, 585 (1998).

232. Johnson, *supra* note 221, at 159.

233. *Id.* at 161.

234. Including the Investment Company Institute (ICI), Securities Industry Association, the Public Securities Association, the American Bankers Association, the Managed Futures Association, the National Venture Capital Association, and the Investment Counsel Association. *Id.* at 186–87.

235. [S]ecurities, banking, and insurance political action committees contributed more than $220,000 to Representative Fields in the two years leading up to the Fields Bill's attempt to deregulate vast portions of the securities market. Top contributors included JP Morgan, Citicorp, First Boston, Nations Bank, Merrill Lynch, the American Bankers Association, Goldman Sachs, and the ICI. Similarly, House Commerce Committee Chairman, Representative Thomas Bliley, a Republican from Virginia, received tens of thousands of dollars from industry PACs. Data maintained by The Center for Responsive Politics indicates that from 1994-1996, PACs associated with the finance and insurance and real estate sector contributed $400,000 to Representative Fields (nearly 4x the contributions he received in the previous election cycle) and $100,816 to Representative Bliley. During this same time period, these PACs contributed

How does NSMIA square with the dictation/delegation thesis? Mutual fund operators achieved their first-best goal by securing federal preemption for their industry. To be sure, with that federal preemption came attendant agency delegation. But in context that outcome was not surprising, even though it involved a noncrisis related delegation of governance power. For one, an SEC study prompted the act, and it is to be expected that ensuing legislation would enhance SEC discretion. Moreover, the mutual fund industry backed the legislation, even with its delegation of power, because that delegation was far preferable to the status quo ante. In exchange for an exemption from regulation by fifty separate state securities regulation regimes, a modest empowerment of the SEC was a small price to pay.

4. The Jumpstart Our Business Startups Act of 2012 (JOBS Act)

The JOBS Act represents the most fundamental reform of securities regulation since 1975—arguably since 1934. I classify it as noncrisis regulation even though, to be sure, the pre-JOBS Act economy was in bad shape. But the 2008 financial crisis, three years in the past, was no longer salient. Certainly no immediate scandal prompted the JOBS Act. To the extent that the economy was suffering in 2011, there was no clear reason why legislators should look to securities regulation—as opposed to financial stimulus or tax policy—as the logical response. For these reasons, the JOBS Act is best viewed as noncrisis regulation. And because it is relatively recent and its story has not been told elsewhere, this section delves deeply into the legislation's origins.

In 2010 the nation remained in the grip of the recession catalyzed by the financial crisis of 2008. Unemployment was high.[236] The American public voiced its discontent with President Obama and the Democrats in power in the 2010 mid-term elections. In that "historic" wave, Republicans gained 63 House seats, the largest gain in one party's power since the 1940s.[237] In response, the Republican House Speaker John Boehner claimed a "mandate" to shrink the federal government's reach.[238]

In his State of the Union address on January 25, 2011, President Obama signaled a new willingness to deregulate. "To reduce barriers to growth and investment," he declared, "I've ordered a review of Government regulations. When we find rules that

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> $450,988 to Alfonse M. D'Amato, a Republican, who chaired the Senate Banking Committee from 1995-1998.

Id. at 186 n.207 (citation omitted).

236. *See Labor Force Statistics from the Current Population Survey*, BUREAU OF LABOR STATISTICS, http://data.bls.gov/timeseries/LNS14000000 [https://perma.cc/CRT2-8BUB] (showing unemployment in January of 2010 just below ten percent).

237. Michael Barone, *No Republican Wave in House Elections; It Already Occurred, in 2010*, WASH. EXAMINER (Sept. 4, 2014, 9:53 PM), http://www.washingtonexaminer.com/no-republican-wave-in-house-elections-it-already-occurred-in-2010/article/2552888 [https://perma.cc/WD3L-5YKW].

238. *Republicans Capture House in Historic Wave, Claim 'Mandate' To Shrink Government*, FOX NEWS (Nov. 3, 2010), http://www.foxnews.com/politics/2010/11/03/republicans-capture-house-historic-wave-make-gains-senate/ [https://perma.cc/KC9Y-CTHN].

put an unnecessary burden on businesses, we will fix them."[239] He termed this new program "Startup America."[240]

Part V.B. will delve into the interests that backed specific titles of the JOBS Act, but the catalyst for its passage was Title I, the so-called "IPO on-ramp." Title I was the brainchild of Kate Mitchell, a venture capitalist with Scale Venture Partners and outgoing chairman of the National Venture Capital Association, who was instrumental in the passage of the entire JOBS Act.[241]

In March of 2011 Mitchell participated in a conference at the Treasury Department called, "Access to Capital: Fostering Growth and Innovation for Small Companies."[242] "During a break [in the meeting], Mitchell ducked into an empty room with Greg Becker, CEO of Silicon Valley Bank; Steven Bochner, partner at Palo Alto law firm Wilson Sonsini Goodrich & Rosati; [and] Carter Mack, president of San Francisco investment bank JMP Group."[243] They created an ad hoc group called the IPO Task Force, made up of "entrepreneurs, bankers, accountants, academics, and investors" to discuss changes in the IPO process.[244] They also invited lobbyists for NYSE Euronext and the National Venture Capital Association to offer advice.[245]

As the IPO Task Force went about its work in the summer of 2011, the United

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239. Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 48, 53 (Jan. 25, 2011).

240. *Fact Sheet: White House Launches "Startup America" Initiative*, WHITE HOUSE, https://www.whitehouse.gov/startup-america-fact-sheet [https://perma.cc/V3UF-EKS5].

241. James Freeman, *Kate Mitchell: How Silicon Valley Won in Washington*, WALL ST. J. (Apr. 6, 2012, 10:23 PM), http://www.wsj.com/articles/SB10001424052702303299604577326270090887812 [https://web.archive.org/web/20160117002246/http://www.wsj.com/articles/SB10001424052702303299604577326270090887812].

242. Zachary M. Seward, *The JOBS Act Turns 1—and It's an Utter Failure*, ATLANTIC (Apr. 5, 2013), http://www.theatlantic.com/business/archive/2013/04/the-jobs-act-turns-1-and-its-an-utter-failure/274732 [https://perma.cc/7FDV-YPZ7].

243. *Id.*

244. Phil Mattingly & Robert Schmidt, *Startup Act Shows Silicon Valley Clout Growing in DC*, BLOOMBERG (May 31, 2012, 12:01 AM), http://www.bloomberg.com/news/2012-05-31/startup-act-shows-silicon-valley-clout-growing-in-dc.html [https://web.archive.org/web/20130914024925/http://www.bloomberg.com/news/2012-05-31/startup-act-shows-silicon-valley-clout-growing-in-dc.html]. Three IPO Task Force members were venture capitalists: Kate Mitchell (chair), Mark Gorenberg (Hummer Winblad Partners), and Tom Crotty (Battery Ventures). Three were "Public Investors": Jeff Cardon & Karey Barker (Wasatch Advisors) and Henry Ellenbogen (T. Rowe Price). Three were entrepreneurs: Magid Abraham (CEO, Comscore), Josh James (former CEO, Omniture), and Desh Deshpande (former CEO and co-founder, Cascade Communications & Sycamore Networks). Two were securities lawyers: Joel Trotter (Latham & Watkins) and Steve Bochner (Wilson Sonsini Goodrich & Rosati). Three were academics or accountants: Bill Sahlman (Harvard Business School), Carol Stacey (S.E.C. Institute), and Chuck Roberl (retired head of PWC Tech Practice). Four were investment bankers: Paul Deninger (Evercore), Carter Mack (JMP Securities), and Brent Gledhill & Brett Paschke (William Blair). IPO Task Force, *Rebuilding the IPO On-Ramp* 3 (Oct. 20, 2011), https://www.sec.gov/info/smallbus/acsec/ipotaskforceslides.pdf [https://perma.cc/42Q7-SA97] (slideshow accompanying IPO Task Force report).

245. *Id.*

States was in the midst of a crisis regarding the debt ceiling.[246] The government approached statutory limits on the amount it could borrow, and some Republicans advocated refusal to put in place a new and elevated debt ceiling.[247] On July 31, two days before the preexisting ceiling was to be reached, Congress struck a compromise.[248] Even so, just five days later, on August 5, 2011, Standard & Poors downgraded the credit rating of the United States from AAA to AA+.[249]

The following month, on August 8, 2011, President Obama signaled a willingness to engage with Republicans on the economy:

> These aren't Democratic proposals. These aren't big government proposals. These are all ideas that traditionally Republicans have agreed to . . . countless times in the past. . . .
>
> . . . .
>
> Markets will rise and fall, but this is the United States of America. No matter what some agency may say, we've always been and always will be a AAA country. For all of the challenges we face, we continue to have the best universities, some of the most productive workers, the most innovative companies, the most adventurous entrepreneurs on Earth.[250]

As these events unfolded, new Republican-backed bills were introduced, focusing on everything from raising the threshold for private companies to go public to easing restrictions on capital raising.[251]

On October 20, 2011, the IPO Task Force issued a report titled "Rebuilding the IPO On-Ramp: Putting Emerging Companies and the Job Market Back on the Road to Growth."[252] When Silicon Valley companies began pushing for Title I, many

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246. *See* Glenn Kessler, *Explaining the Debt Ceiling Debate*, WASH. POST: FACT CHECKER (June 29, 2011), http://www.washingtonpost.com/blogs/fact-checker/post/explaining-the-debt-ceiling-debate/2011/06/28/AGVM80pH_blog.html [https://perma.cc/LLU9-W6DX] (summarizing the crisis).

247. *See id.* (attributing such a position to Rep. Michele Bachmann and Sen. Jim DeMint, among others).

248. Carl Hulse & Helene Cooper, *Obama and Leaders Reach Debt Deal*, N.Y. TIMES (July 31, 2011) http://www.nytimes.com/2011/08/01/us/politics/01FISCAL.html [https://perma.cc/WXS5-AWEL].

249. Zachary A. Goldfarb, *S&P Downgrades U.S. Credit Rating for First Time,* WASH. POST (Aug. 6, 2011), http://www.washingtonpost.com/business/economy/sandp-considering-first-downgrade-of-us-credit-rating/2011/08/05/gIQAqKeIxI_story.html [https://perma.cc/R29D-TX8G].

250. Remarks on the National Economy, 2 PUB. PAPERS 933, 934 (Aug. 8, 2011).

251. *See generally* Susan Jones, *Republicans Remind Obama: Democrats Are Blocking House-Passed Jobs Bills*, CNS NEWS (Sept. 7, 2011, 6:10 AM), http://cnsnews.com/news/article/republicans-remind-obama-democrats-are-blocking-house-passed-jobs-bills [https://perma.cc/H8TF-TVML] (describing unpassed bills, including the Consumer Financial Protection & Soundness Improvement Act, the Reducing Regulatory Burdens Act, and the Clean Water Cooperative Federalism Act, among others that would have reduced regulations relating to capital raising, etc.).

252. IPO TASK FORCE, REBUILDING THE IPO ON-RAMP: PUTTING EMERGING COMPANIES AND THE JOB MARKET BACK ON THE ROAD TO GROWTH (2011), http://www.sec.gov/info/smallbus/acsec/rebuilding_the_ipo_on-ramp.pdf [https://perma.cc/K5UU-27ZX].

Republican candidates saw it as an opportunity to convince these companies and their employees to begin contributing to Republican campaigns. [253] Steve Case, of Revolution LLC, joined President Obama's new Council on Jobs and Competitiveness and also agreed to serve as chairman of the Startup America Partnership.[254] Case also made sure to keep contact with Republicans, advising Eric Cantor, the House Majority Leader, on proposals aimed at reducing rules and taxes on technology and start-up firms.[255]

The JOBS Act ultimately adopted two of the IPO Task Force's three recommendations nearly whole cloth: first, providing an "on-ramp" for emerging growth companies with annual gross revenues of less than $1 billion, and second, loosening restrictions on the ability of companies pre-IPO to communicate to investors.[256]

In October 2011, Case met with Cantor.[257] Cantor began encouraging House Republicans to strengthen their ties to technology firms.[258] During this time he also contacted "capital and private equity funds in Silicon Valley, Boston, the research triangle in North Carolina[,] and . . . Virginia. . . . ask[ing] for ideas and support."[259] Cantor, Representative Kevin McCarthy of California, and Representative Paul Ryan of Wisconsin worked together to make Silicon Valley connections.[260] Some of the notable companies they met with included Facebook, Google Inc., Apple Inc., and Microsoft Corp.[261] This push resulted in donations to Republican war chests totaling $248,000 just from northern California.[262]

Stephen Fincher introduced H.R. 3606—the first bill to contain Title I's On-Ramp provisions—on December 8, 2011.[263] President Obama signaled his support of pro-startup legislation in his January 24, 2012, State of the Union address:

> After all, innovation is what America has always been about. Most

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253. Mattingly & Schmidt, *supra* note 244.

254. *Steve Case, Chairman*, THE CASE FOUND., http://casefoundation.org/profile/steve-case/ [https://perma.cc/AM7G-YJ6L].

255. *See* Michelle Quinn, *You've Got JOBS: Case's New Mission*, POLITICO (Mar. 26, 2012, 11:35 PM), http://www.politico.com/news/stories/0312/74501.html [https://perma.cc/DX2R-2URW] ("Case, an independent with friends in both parties, worked with House Majority Leader Eric Cantor when he introduced the bills last month.").

256. Mattingly & Schmidt, *supra* note 244.

257. *Id.* ("Case met with Cantor the next day. He said, 'Why don't you just take what we're doing, since it already has the imprimatur of the White House behind it, and take it up?'").

258. *See* Robert Costa, *The Battle for Silicon Valley*, NAT'L REV. (Sept. 26, 2011, 04:00 AM), http://www.nationalreview.com/article/278304/battle-silicon-valley-robert-costa [https://perma.cc/H736-HUBH] (discussing Republican congressional outreach to technology firms).

259. Mattingly & Schmidt, *supra* note 244.

260. *See* Costa, *supra* note 258 (noting that the three refer to themselves as the "young guns").

261. Mattingly & Schmidt, *supra* note 244.

262. *Id.*

263. Press Release, Representative Stephen Fincher, Reps. Fincher and Carney Introduce Bipartisan Legislation To Help Small Companies Grow (Dec. 8, 2011), http://fincher.house.gov/press-release/reps-fincher-and-carney-introduce-bipartisan-legislation-help-small-companies-grow [https://perma.cc/S62B-L6N8].

> new jobs are created in startups and small businesses. So let's pass an agenda that helps them succeed. Tear down regulations that prevent aspiring entrepreneurs from getting the financing to grow. Expand tax relief to small businesses that are raising wages and creating good jobs. Both parties agree on these ideas. So put them in a bill, and get it on my desk this year.[264]

By March 8, 2012, the proposed JOBS Act had swelled to encompass industry-advantaging provisions from five other bills.[265]

Resistance to the JOBS Act came late. On March 16, 2012, SEC Commissioner Luis Aguilar urged that investor protection would suffer.[266] Mary Schapiro, the SEC chairman, sent a six-page letter criticizing the bill to Congress on March 13, 2012.[267] Senators Jack Reed (D-RI) and Carl Levin (D-MI) attempted to introduce investor-protective modifications in the Senate[268] on March 20, 2012, only to meet with stiff Silicon Valley resistance. Stymied on that front, Senator Jack Reed pushed to change the method for counting holders from record to beneficial holders—a move that ultimately failed[269] but succeeded in alarming Wall Street banks, who joined ranks in opposing the Reed amendment.[270] Joining the cause was a high-tech effort led by AngelList founder Naval Ravikant, who in thirty-six hours created a Twitter petition with 5000 signatures that could be sorted "by location and how influential, where they were, and what they'd invested in, and what they look like, and who their senator was"—and who was a major campaign donor.[271]

Ultimately the Senate passed the bill by a vote of 73–26 (including 26 "nay" votes

264. Address Before a Joint Session of Congress on the State of the Union, 2012 DAILY COMP. PRES. DOC. 5 (Jan. 24, 2012).

265. *See* H.R. 3606, 112th Cong. (as passed by House of Representatives, Mar. 8, 2012); *see also H.R. 3606 (112th): Jumpstart Our Business Startups*, GOVTRACK, https://www.govtrack.us/congress/bills/112/hr3606/text/eh#compare=rh [https://perma.cc/8ZQQ-CUBD] (comparing the version that engrossed in the House on March 8, 2012 with the version reported by House committee on March 1, 2012 and showing six additional titles).

266. Public Statement, Commissioner Luis A. Aguilar, Investor Protection is Needed for True Capital Formation: Views on the JOBS Act (Mar. 16, 2012), http://www.sec.gov/News/PublicStmt/Detail/PublicStmt/1365171490120#.VO9u9rDF8md/ [https://perma.cc/N8UG-6ZSZ].

267. Mattingly & Schmidt, *supra* note 244; *see also* Zach Carter & Ryan Grim, *Obama JOBS Act Leaves Labor Fuming in Democratic Feud*, HUFFINGTON POST (Apr. 5, 2012, 9:52 AM), http://www.huffingtonpost.com/2012/04/05/obama-jobs-act-labor_n_1404401.html [https://perma.cc/85X3-EHPT].

268. Carter & Grim, *supra* note 267.

269. *See* 158 CONG. REC. S1884, S1919 (daily ed. Mar. 21, 2012) (reporting the failure of a voice vote and motion to resume consideration on the following day).

270. *See* Mattingly & Schmidt, *supra* note 244 ("Lobbyists and lawyers from the banks flooded Senate offices with calls and analysis papers . . . .").

271. PandoDaily, *Naval Ravikant: How I Changed the Jobs Act*, YOUTUBE (Nov. 15, 2012), https://www.youtube.com/watch?v=ugDyaVLPj3w [https://perma.cc/NY6H-EBFG] (at timestamp 7:45/8:58).

from Democrats) on March 22, 2012,[272] and the House approved it 380–41,[273] with 145 Democrats voting in its favor.[274] The one significant victory reform-minded Democrats gained was an increase of SEC oversight of crowdfunding—Title III.[275] In the end, the JOBS Act's passage was claimed a resounding success—a rare instance of bipartisan legislation in the midst of a gridlocked Washington.[276]

IV. DICTATION, DELEGATION, AND THE DATA

Having surveyed the key pieces of securities legislation enacted by Congress from 1970 to 2014, we can turn to the extent to which it introduced into each statute delegations of authority to agency decision making. To that end, I have constructed a dataset that covers every title of each securities law enacted by Congress during this time period. These data include nine statutes that include sixty-six total titles. Although the number of acts is limited, they comprise the entire field of securities enacted during this forty-four-year period.

A. Methodology

My goal is to systematically categorize instances of delegation in securities law. Notably, political scientists David Epstein and Sharyn O'Hallaran undertake a similar project by coding 257 statutes in a variety of fields.[277] Epstein and O'Hallaran's methodology falls short for securities-law purposes in three regards. First, their coding scheme relies on the *Congressional Quarterly Almanac*, which lists "the key provisions of major legislation enacted during each year."[278] The result of this approach, however, is to omit altogether key pieces of securities legislation—including the JOBS Act and SBIIA—presumably because they do not qualify as "major legislation."

Second, Epstein and O'Halloran borrow from two earlier categorization systems. The first, Mayhew's classification of enacted laws, does not contain securities regulation.[279] The other, Poole and Rosenthal's roll-call vote study, aggregates banking and finance in one category.[280] Congress, however, delegates not by policy

272. Jim Abrams, *JOBS Act: Senate Passes Small Business Investment Bill*, HUFFINGTON POST (Mar. 22, 2012, 2:09 PM), http://www.huffingtonpost.com/2012/03/22/jobs-act-senate-small-business-bill_n_1373136.html [https://web.archive.org/web/20160305062913/http://www.huffingtonpost.com/2012/03/22/jobs-act-senate-small-business-bill_n_1373136.html] (last updated May 22, 2012).

273. Jonathan Weisman, *Final Approval by House Sends Jobs Bill to President for Signature*, N.Y. TIMES (Mar. 27, 2012), http://www.nytimes.com/2012/03/28/us/politics/final-approval-by-house-sends-jobs-bill-to-president-for-signature.html [https://perma.cc/FE2J-U8T9].

274. John Stanton, *Roll Call—House Sends JOBS Act to Barack Obama*, VOTE SMART (Mar. 27, 2012), http://votesmart.org/public-statement/679404/roll-call-house-sends-jobs-act-to-barack-obama&speechType=8#.WB6eRNUrLct [https://perma.cc/5GAZ-V3BR].

275. *See* Abrams, *supra* note 272.

276. Weisman, *supra* note 273.

277. EPSTEIN & O'HALLORAN, *supra* note 2, at 89.

278. *Id.* at 90.

279. *Id.* at 199.

280. *Id.* at 202.

area but by act, and the dictation/delegation hypothesis suggests that its delegation waxes and wanes over time.

Finally, Congress can delegate in different ways. Sometimes it affirmatively orders an agency to engage in rule making—what I term a mandatory delegation. Sometimes Congress permits but does not order agency rule making. Sometimes it preserves a space for agency discretion outside of rule making. Epstein and O'Halloran's coding elides the distinction between mandatory and permissive rule making and skips over instances in which an agency may exercise discretion even while not engaging in rule making.[281]

In sum, while Epstein and O'Halloran's study offers valuable insights, it does not fit my purpose of testing the dictation/delegation hypothesis in the securities field. As a result, I put to use, but expand upon, the coding scheme of Curtis W. Copeland's report on rule-making requirements and authorities in the Dodd-Frank Wall Street Reform and Consumer Protection Act.[282] Like Copeland, I categorize statutes as calling for *mandatory* rule making if they state that an agency—usually the SEC—"shall" promulgate rules, or when the statute's wording otherwise suggests that the agency must regulate.[283] Often, but not always, Congress imposes deadlines—for example, within 180 days, 90 days, or 270 days after the bill's effective date—when it mandates rule making.[284]

Next in the delegation spectrum is the category of *permissive* rule making, where Congress identifies areas in which the agency *may* create rules but is not ordered to do so. According to these statutes, the agency "may, by rule" or "may, by regulation" promulgate the substantive rule.[285] In these areas Congress does not expressly direct delegation, but permits it.

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281. Examples of delegation they cite include the following:

> (1) discretionary rulemaking authority; (2) the authorization of a program that allows the agency some discretionary authority; (3) the creation of a board or commission with authority to regulate some aspect of economic activity; (4) granting an agency authority to modify or change decision-making criteria; (5) allowing an agency to allocate moneys or benefits where the determine the sum and/or possible recipients of those benefits; (6) allowing the agency to waive or exempt constituents from certain rules or procedures; and (7) extensions of decision-making authority that would otherwise expire.

Id. at 91–92.

282. CURTIS W. COPELAND, CONG. RESEARCH SERV., R41380, THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: REGULATIONS TO BE ISSUED BY THE CONSUMER FINANCIAL PROTECTION BUREAU 4 (2010), http://www.llsdc.org/assets/DoddFrankdocs/crs-r41380.pdf [https://perma.cc/L29Q-EFJU].

283. *See, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922(a), 124 Stat. 1376, 1842 (2010) ("The term 'whistleblower' means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, *by rule or regulation*, by the Commission." (emphasis added)).

284. *See, e.g.*, § 924(a), 124 Stat. at 1850 (codified at 15 U.S.C. §78u-7 (2012)) ("The Commission shall issue final regulations implementing the provisions . . . not later than 270 days after the date of enactment of this Act.").

285. Copeland offers as other examples "may determine by rule," "may prescribe rules," "may be defined by the [agency], by regulation," and "shall prescribe such rules and issue

I do not attempt to code for dictations that Congress makes in its statutes, in large part because of the inherent judgment calls that such coding would necessitate. For example, consider the possible number of dictations when Congress states that SLUSA covers class actions that involve

> (i) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or (ii) any recommendation, position, or other communication with respect to the sale of securities of the issuer that—(I) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and (II) concerns decisions of those equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.[286]

This subsection can be seen as containing one, two, three, five, or more dictations, depending on the level of generality one chooses to employ. In any event, the critical questions considered here involve how often and when Congress chooses to delegate its authority. And identifying the number of instances of delegation in each relevant statute is a relatively objective task. Consequently, my data set itemizes delegations of congressional authority without attempting to enumerate dictations.

Certain delegations—what I term "ministerial," "catchall," and "timing" delegations—are excluded from my coding of congressional acts. Ministerial delegations occur when Congress simply orders the SEC to make rules to carry out a clear legislative mandate. One example is provided by JOBS Act section 303 in which Congress excluded crowdfunding investors from the total number of shareholders of record for the purposes of section 12(g) of the Exchange Act's threshold and then ordered the SEC to "issue a rule to carry out" the amendment within 270 days.[287] Catchall delegations occur when Congress sets a deadline for implementing whatever rules the legislation requires without specifying any particular content. For example, after delegating a variety of questions to the SEC, section 302 of the JOBS Act tasks the agency with "issu[ing] such rules as the Commission determines may be necessary or appropriate for the protection of investors to carry out sections 4(6) and section 4A of the Securities Act of 1933, as added by this title."[288] Timing delegations merely set forth a deadline for when rule making must occur.[289]

As well as coding delegations, I also code general grants of discretion to the SEC.

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such guidance as may be necessary" that were treated as discretionary rule-making provisions. Copeland, *supra* note 282, at 29–36.

286. Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, § 101(a), 112 Stat. 3227, 3228.

287. Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112-106 § 303, 126 Stat. 306, 321 (2012).

288. § 302(c), 126 Stat. at 320; *see also* § 924(a), 124 Stat. at 1850 ("The Commission shall issue final regulations implementing the provisions of section 21F of the Securities Exchange Act of 1934, as added by this subtitle, not later than 270 days after the date of enactment of this Act.").

289. *See, e.g.*, § 937, 124 Stat. 1885 ("Unless otherwise specifically provided in this subtitle, the Commission shall issue final regulations, as required by this subtitle and the amendments made by this subtitle, not later than 1 year after the date of enactment of this Act.").

For example, Title I of the JOBS Act provides that any new auditing rules adopted by PCAOB will not apply to emerging growth companies "unless the Commission determines that the application of such additional requirements is necessary or appropriate in the public interest, after considering the protection of investors and whether the action will promote efficiency, competition, and capital formation."[290] Here Congress does not use formal "shall, by rule," or "may, by rule," language, but as a functional matter it vests the agency with broad power. A more complicated coding problem is presented by Dodd-Frank section 912. That provision states that "[f]or the purpose of evaluating any rule or program . . . the Commission may (1) gather information from and communicate with investors or other members of the public; (2) engage in such temporary investor testing programs as the Commission determines are in the public interest or would protect investors; and (3) consult with academics and consultants, as necessary to carry out this subsection."[291] While such a provision is not a mandatory or permissive rule making, it gives the agency "testing" authority and a broad discretion as to its use. As a practical matter, the agency thus can impose significant duties on regulated businesses, and I have therefore coded this measure as involving congressional delegation.

My dataset also excludes provisions with no impact on the SEC's rule making. For example, titles granting financing to the SEC itself occur several times.[292] Other titles express a policy preference but contain no actual law. For example, Sarbanes-Oxley Title X consists of a single sentence: "It is the sense of the Senate that the Federal income tax return of a corporation should be signed by the chief executive officer of such corporation."[293] I attach no delegatory significance to this title, and exclude it from the sample.

The dictation/delegation hypothesis predicts that postcrisis legislative acts —namely, SIPA, the Amendments of 1975, Sarbanes-Oxley, and Dodd-Frank—will contain more delegation than their noncrisis legislative counterparts. In general, the data bear out the hypothesis, as shown by Figure 1, a summary of averages of post-crisis and noncrisis delegations. First, taking mandatory and permissive delegations, the average number for postcrisis delegations per act (48.25) is more than twice the number of noncrisis delegations (17.20). Adding in instances where Congress cedes areas of discretion to the agency magnifies this relationship: the average number of postcrisis delegations and instances of discretion, at 96, is more than four times that in noncrisis times, at 22. Thus it does seem that, on average, when Congress acts in the realm of securities law in the context of crisis, it tends to delegate more often to the SEC. However, the question whether crisis alone explains the extent of delegation requires further analysis because of the role that politics plays in legislation.

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290. *See, e.g.*, § 104, 126 Stat. at 310.

291. *See* § 912, 124 Stat. at 1824.

292. *See, e.g.*, Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, § 201, 112 Stat. 3227, 3233–34; National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, §§ 403–05, 110 Stat. 3416, 3441–44; Small Business Investment Incentive Act of 1980, Pub. L. No. 96-477, § 401, 94 Stat. 2275, 2291; Securities Acts Amendments of 1975, Pub. L. No. 94-29, §§ 22, 24, 89 Stat. 97, 162.

293. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §1001, 165 Stat. 745, 807.

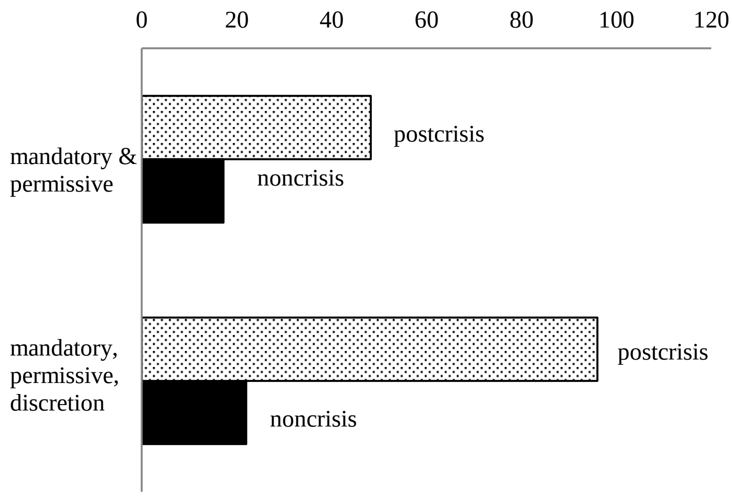

Figure 1. Delegation to Agency

When the same party controls the elected branches of government (Executive, House, and Senate), policy making becomes easier to the extent that the separate branches share similar goals and have incentives to work together to enact a shared agenda. Within this context, we might expect to see more delegations as Congress trusts the Executive to implement its agenda faithfully. In contrast, when opposite parties control Congress and the Executive, we might expect fewer delegations as Congress attempts to curb presidential authority over the agencies. In addition, when opposite parties control the House and Senate, we might actually observe more delegations as a means of striking a compromise between the two chambers. That is, because they might not agree on a specific set of rules, the two chambers might compromise by delegating greater authority to the regulatory agencies instead.

B. The Political Variable

A political explanation of congressional delegation in securities law focuses on the extent to which government is divided, or the extent to which a given party is in control of the three branches of government. To evaluate whether political factors overwhelm the effects of securities crises, I conducted a statistical analysis that weighs the two effects against one another. More specifically, I estimate a simple "count" model to evaluate the extent to which, first, securities crises and, second, partisan political alignments among the federal branches affect how Congress makes delegations to the SEC.[294]

For each statistical model, I estimate the predicted number of delegations for each title as a function of both "crisis" factors and "political" factors. More specifically, I

294. A "count" model is a maximum likelihood estimator (MLE) derived from the Poisson distribution, which is distributed on a positive, discrete interval. The purpose of the estimator is to determine whether certain input variables have a statistically significant effect upon the number of observed delegations, holding other relevant factors constant.

code whether each act was passed in response to a securities "crisis" ("1" if yes, "0" if no). If the dictation/delegation theory is correct, we would expect to see more congressional delegations amidst securities crises and fewer such delegations in the absence of such crises. Nevertheless, policy making does not occur in a vacuum. Hence, we might suspect that political factors also affect Congress's choice to delegate to the agencies.

To control for these political factors, I include two dichotomous explanatory variables that might affect the number of delegations Congress makes to executive agencies in any given title. I first control for whether the legislative and executive branches are controlled by the same party in the year in which the act was passed ("1" if yes, "0" otherwise). Second, I control for whether the U.S. House and Senate are controlled by the same party in the year in which an act was passed ("1" if yes, "0" otherwise).[295] Table 1, below, summarizes the data used for the analyses.

Table 1. Summary of variables used in statistical regression

Variable	Description	Mean (Std. Dev.)
Total Delegations	Dependent Variable: The total number of delegations in a given title of a given act	7.48 (13.03)
Permissive/Mandatory Delegations	Dependent Variable: The total number of permissive/mandatory delegations in a given title of a given act	4.21 (6.92)
"Crisis" Legislation	Dichotomous ("1" if the act was passed amidst a securities crisis, "0" otherwise.)	0.67 (0.48)
Divided President/Congress	Dichotomous ("1" if the act was passed when Congress and the Presidency were controlled by the same party, "0" otherwise)	0.73 (0.45)
Divided Senate/House	Dichotomous ("1" if the act was passed when the House and the Senate were controlled by the same party, "0" otherwise)	0.09 (0.29)

The key question for the purposes of this Article is whether crisis influences congressional delegation even when controlling for partisan control of the federal government. Multivariate statistical analysis reveals that the presence of securities crises plays a statistically significant and substantively meaningful role in the number of delegations Congress makes to executive agencies in a given title of a given act, *independent* of political divisions in government.

Figure 2, set forth below, uses the results from the multivariate regression

295. We are not restricted to these methodological choices alone. First, one might suppose that the relative distance among the political institutions might be a superior predictor of delegatory behavior than the binary measures specified above. I estimated the below models again using absolute ideological distances between the federal branches of government instead of the dichotomous indicators specified within the text. I note that the main results of the analysis hold with respect to the predicted effect "crisis" legislating has on the number of delegations Congress makes to executive agencies. I do observe differences, however, in the predicted effect politics plays in the decisional process among the federal branches.

analysis, to show this phenomenon graphically. Each pane of the figure shows Congress's predicted number of delegations to an agency, subdivided over whether a "crisis" exists (yes or no). The left-hand pane shows the predicted number of all types of delegations, and the right-hand pane shows the predicted number of "permissive" and "mandatory" types of delegations. The *y*-axis of each pane shows the predicted number of delegations a title will include, holding political control of the House, Senate, and presidency constant. The *x*-axis shows whether the act was passed in the midst of a securities crisis. The dark lines in the plot and the shaded regions represent the statistical models' best guess as to the effect the crisis variable has on the number of delegations (with 95% certainty).[296] The dots represent statistical outliers beyond the 95% certainty threshold and should not be considered reliable estimates of the effect a crisis plays on Congress's delegations.

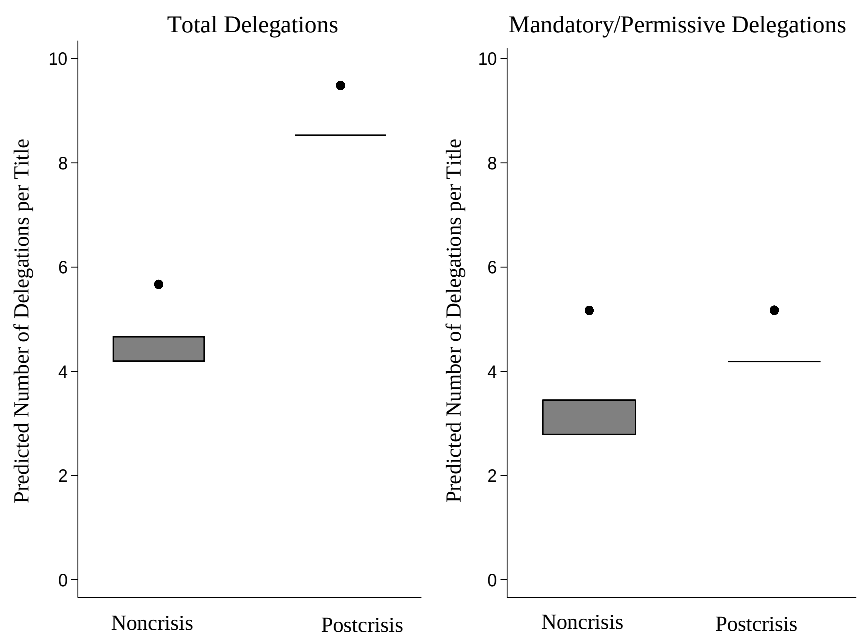

Figure 2. The two graphs depict the predicted number of delegations Congress makes to its agencies. The left-hand pane shows predictions among all types of delegations. The right-hand pane shows the predicted number of "permissive" or "mandatory" delegations. The *y*-axes in each frame shows the statistical model's predicted number of delegations, and the *x*-axes subset these predictions according to whether a given act was passed amidst a securities crisis.

Analyzing the content of the graphs in the figure, we see a striking result —namely, that after accounting for political party control, postcrisis Congress is nearly twice as likely to delegate as when there is no crisis. In the fully specified model, the statistical estimator predicts that any given title of a congressional act should contain approximately 4.5 delegations when no securities crisis exists. The

296. Indeed, uncertainty is the cornerstone to every statistical analysis. If the results did not vary by observations, we would not have recourse to statistical analysis because we would be certain of all outcomes.

actual data suggest, however, that Congress will make closer to 8.5 delegations. That is, when Congress has legislated within the context of a securities crisis, the number of total delegations is nearly *double* what one would see in the absence of crisis. The right-hand pane shows a similar (even if not quite as strong) effect among all mandatory and permissive types of delegations. In the midst of a crisis, the model predicts that Congress should make approximately four mandatory or permissive delegations, compared to only three when there exists no similar crisis. That is, by moving into a postcrisis period, the statistical estimator predicts the total number of permissive or mandatory delegations to increase by approximately twenty-five percent. These findings (across both models) are statistically significant. And they indicate that the presence of a crisis has important substantive implications as to how the federal government regulates securities, who will determine the scope of those regulations, and how often delegated authority will be exercised. No less important, the political control variables I included in each of the multivariate analyses prove to be of little significance.[297]

Table 2 presents the full results from the multivariate statistical analyses. I considered both the total number of delegations made in each title of every act, and I also considered the number of "permissive" or "mandatory" delegations in each title of every act. As such, the dependent variable in the regression models was the number of delegations in the titles of each act. I included three independent (or explanatory) variables in each of these models. First, I controlled for whether the act in question was passed in the wake of a securities crisis. Next, I controlled for political factors relating to partisan control of the elected branches of the federal government. More specifically, I controlled for whether Congress and the Executive were each controlled by one political party, and I also controlled for whether the House and the Senate were controlled by the same party. The results from each count model are included below in Table 2.

The results included in the table represent coefficient estimates from the maximum likelihood estimators. Positive values mean that the presence of the variable has a *positive* effect on the number of congressional delegations, and negative values mean the opposite. The crucial point for present purposes is revealed by the "Crisis" Legislation/Total Delegations box. It is here that we encounter the key finding of this study—namely, that the existence of a crisis produces a statistically

297. Indeed, neither political control variable achieved statistical significance. That is to say, we cannot conclude based upon this evidence that the political control of the presidency and/or the Congress has a noticeable effect on how Congress delegates authority to executive agencies, even when holding securities crises constant. Only in the model that analyzed mandatory or permissive delegations do we observe any political effect, but even this is slight. For example, the predicted effect of a political division between the president and Congress is negative (as hypothesized), but this effect is slight and arguably fails to achieve statistical significance. I do note, however, that the control for political divisions between the two chambers of Congress achieves statistical significance in the model analyzing mandatory or permissive delegations. I find that, holding all other political and crisis control variables equal, moving from a united Congress to a partisan divided one (i.e., one party controls the House, another controls the Senate) results in an increase in the number of predicted delegations (by about one), as above hypothesized. The figure above demonstrates this phenomenon graphically.

significant increase in the delegation of congressional authority when all forms of delegation are taken into account.

Table 2. Results from Multivariate Statistical Analysis. Notes: N=66. Values in the top portion of each cell represent MLE coefficient estimates, and values in parentheses indicate standard errors. Statistical significance values as follows: $p < .001$ (***), $p < .050$ (**), $p < .100$ (*).

Variable	Total Delegations	Permissive/Mandatory
"Crisis" Legislation	0.65***	0.35**
	(0.13)	(0.16)
Divided President/Congress	-0.13	-0.24*
	(0.11)	(0.14)
Divided Senate/House	0.25	0.57**
	(0.22)	(0.24)
Intercept	1.61***	1.31***
	(0.12)	(0.15)
Log-Likelihood	-516.68	-322.61

C. Crisis and Delegation

One obvious explanation for frequent delegation in postcrisis legislation is that in periods of crisis, Congress simply does not have the time to slow down and dictate precise policy prescriptions. Instead, it contents itself with big-picture matters and delegates the details to the agency. Indeed, this may well be a fair reading of the critique of bubble laws offered by Professors Romano, Ribstein, and Bainbridge: when Congress legislates under pressure it gets substantive policy wrong and perforce delegates too much to the SEC. In noncrisis situations, cooler heads prevail, and Congress dictates because it has the time to get policy questions right.

The data offer some support for this explanation. But that support is limited because only one act occurred in the midst of a crisis: SIPA (SOX occurred in the immediate *wake* of crisis). In addition, the story of SIPA is hard to square with the emergency-breeds-delegation thesis. It contained relatively little delegation —indeed, only nine instances of mandatory and permissive delegation, the third lowest in the entire period. In contrast, the Amendments of 1975 contained at least 188 delegations, the highest number of delegations of any act. These were part of the bargain struck after the relevant crisis had passed, and Congress sought to address long-term concerns raised by the crisis. Apart from SIPA, Sarbanes-Oxley was the only other piece of legislation passed in a crisis-like environment—that is, amidst the fallout of the failure of Enron, the WorldCom bankruptcy lent fresh urgency to Congress's efforts. Here there was a significant amount of delegation. Even so, in Dodd-Frank, which was enacted after the economy had passed through the throes of the financial crisis, even more delegations were made.

On balance then, Congress passed two of its four crisis-inspired acts after the crisis had occurred. Yet it engaged in extensive delegation in each of those two cases. As to the other two enactments, the results were mixed: Sarbanes-Oxley, passed in response to the catalyst of WorldCom's failure, delegated substantial authority to the governing agency, but SIPA did not. In sum, this pattern provides no significant support for the thesis that ongoing emergencies foster delegation; crisis-based motivation, rather than merely midst-of-crisis, appears to be the key driver of congressional delegation.

V. DISTINCTIVE STATUTES

A closer look at the data reveals some deviations from the overall pattern, as indicated by Figures 3 and 4 below. Figure 3 graphs Congress's mandatory and permissive delegations, act by act. Figure 4 shows Congress's mandatory and permissive delegations, as wells as instances where Congress granted the SEC discretionary authority. Most notably, the Amendments of 1975, Dodd-Frank, and Sarbanes-Oxley—all crisis-related measures—conform to the dictation/delegation thesis by containing a large number of delegations. But SIPA does not. As to the noncrisis legislation, SBIIA, PSLRA, and SLUSA conform, but NSMIA and the

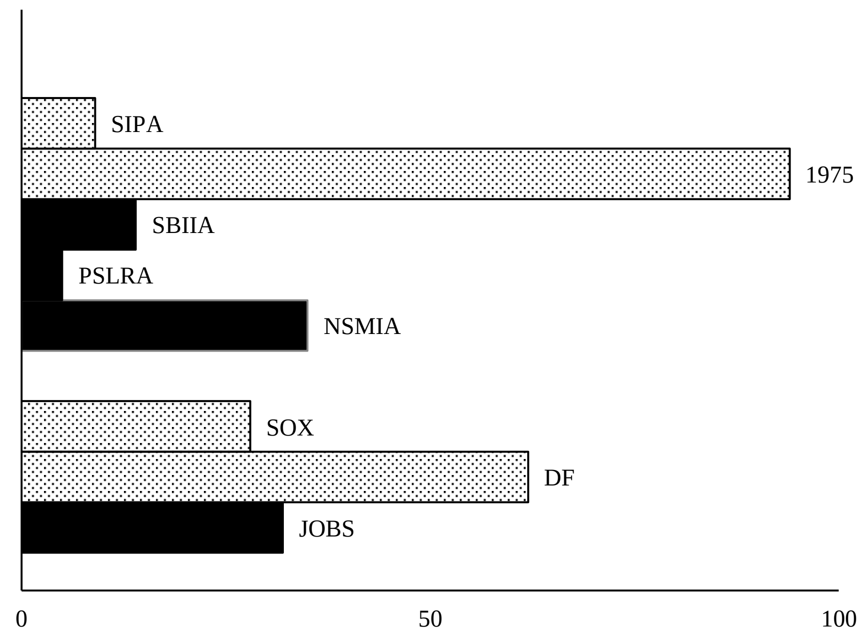

Figure 3. Mandatory and Permissive Delegation

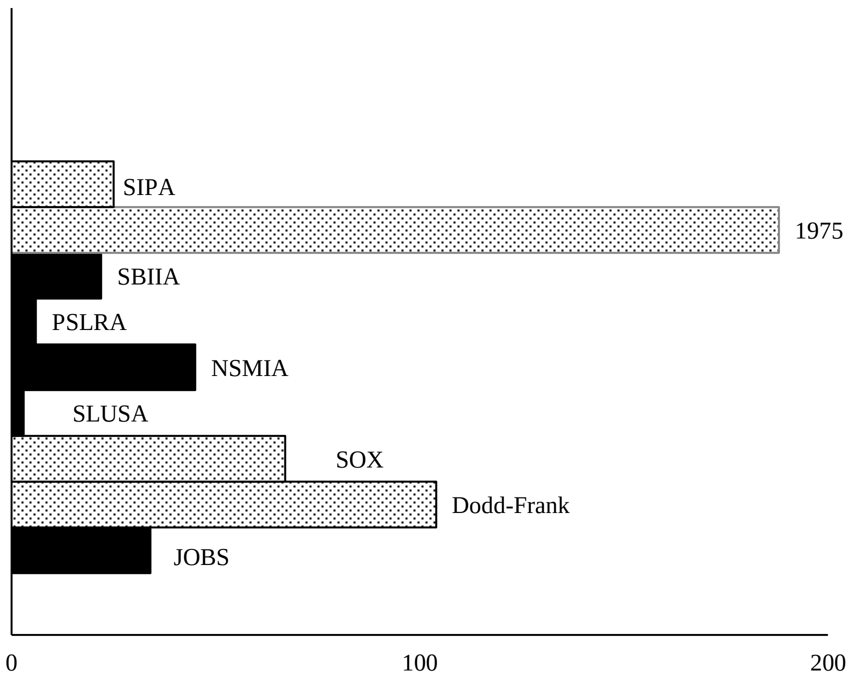

Figure 4. Mandatory, Permissive, and Instances of Agency Discretion

JOBS Act do not. The balance of this Part will attempt to account for these departures from the prevailing pattern.

A. SIPA & NSMIA

Why did SIPA—which was enacted in the midst of the Paperwork Crisis—embody very few delegations? The explanation is a simple one. At the time, Wall Street faced a crisis in public confidence as banks were unable to process the high volumes of paper that accompanied traditional stock transfers. Congress thus needed to act swiftly for a focused purpose—to reassure clients that, should their particular broker-dealer fail, they would not lose their money. And SIPA addressed this targeted problem in a targeted way, by creating the SIPC to serve as a federal backstop. As part of the larger legislative bargaining, however, Congress required a future study of root causes of the problem to find better means to address them after the immediate crisis had been remedied. Thus SIPA was a stopgap solution that kicked much of the work down the road. The result was Congress's follow-up legislation of 1975, which contains more instances of delegation than any of the other securities laws enacted during the sample period.

NSMIA also poses a special case, primarily because it presented the rare situation where an administrative agency came forward with the language of the Act. At the same time, the mutual fund industry and the SEC were allied against the states in seeking federal preemption of a then-operative patchwork of local securities regulation. Thus NSMIA sprang out of an exceptional situation in which delegation to an agency represented the lesser of two evils for a sizable business constituency. Put another way, NSMIA was the product of an unusual alliance between regulatory officials and regulated entities, which produced gains for both. And the gains to the agency came in the form of enhanced discretionary regulatory power.

B. JOBS Act: Two Laws in One

Understanding the JOBS Act's delegation story begins with recognizing a curiosity of the legislative process and result: the JOBS Act is the product of two separate and distinct forces. Half of the JOBS Act's titles conform to the dictation/delegation pattern of noncrisis congressional dictation. These are the half of the JOBS Act backed by significant moneyed interests: banks and Silicon Valley. The other half of the Act contains far more delegation. This section will explore the reasons for such marked divergence in delegation in a single Act.

1. Dictation in the JOBS Act

a. Title I

Title I, the catalyst for the JOBS Act's passage, is perhaps the most prescriptive of its provisions. Moreover, many of Title I's substantive provisions are drawn nearly verbatim from the suggestions of Kate Mitchell's IPO Task Force report. The report recommended creating a new category of issuer, the emerging growth company (EGC), and detailed its defining characteristics (total annual gross revenue of less than $1 billion) and the manner for exiting EGC status.[298] It identified particular disclosure rules to which EGCs should not be subject for five years.[299] It specified that EGCs should be able to disclose two years of audited financials at IPO, instead of the customary three years.[300]

Representative Stephen Fincher introduced the bill containing the Title I provisions on December 8, 2011,[301] and its provisions hewed closely to the IPO Task Force's recommendations. The Act defines emerging growth company using a specific metric: an issuer with total annual gross revenues of less than $1,000,000,000.[302] Title I similarly detailed the paths, including two suggested by the IPO Task Force report, by which an emerging growth company would shed its EGC status.[303]

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298. IPO TASK FORCE, *supra* note 252, at 20.

299. *Id.* at 21–23.

300. *Id.* at 22.

301. H.R. 3606, 112th Cong. (as introduced in House of Representatives, Dec. 8, 2011).

302. Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112-106 § 101(a), 126 Stat. 306, 307 (2012).

303. And those four paths were detailed:

> (A) the last day of the fiscal year of the issuer during which it had total annual gross revenues of $1,000,000,000 (as such amount is indexed for inflation every 5 years by the Commission to reflect the change in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics, setting the threshold to the nearest 1,000,000) or more; (B) the last day of the fiscal year of the issuer following the fifth anniversary of the date of the first sale of common equity securities of the issuer pursuant to an effective registration statement under this title; (C) the date on which such issuer has, during the previous 3-year period,

Title I also itemizes specific ways to relax the regulatory requirements for EGCs during the going-public process in highly specific ways that mirror the IPO Task Force's recommendations. First, EGCs may present two years of audited financial statements, rather than the three required of normal corporations.[304] Second, following the IPO Task Force's suggestion,[305] the title expands the permissible range of communications between the issuer and both analysts and potential investors.[306] Third, Title I tracks the IPO Task Force's recommendations specifying that these accommodations are "opt-in" rights and that emerging growth companies can forgo a particular exemption and instead comply with the normal issuer requirements.[307] Finally, and again taking a cue from the IPO Task Force report, it permits emerging growth companies to file confidential draft registration statements with the SEC prior to public filing.[308] This accommodation allows both the issuer and underwriter a chance to gauge the SEC's concerns with an offering prior to making the registration statement public.[309]

And that is not all. Title I details the exact provisions of the 1934 Act from which EGCs are exempt, provisions suggested by the IPO Task Force report: executive compensation, proxies, auditor rotation, and the much-reviled section 404 internal controls audit.[310] One could easily imagine that Congress would task the SEC with examining its rules and using its expertise to determine which of its rules warranted suspension for EGCs, engaging in an analysis of their relative utility given the burdens they place on issuers and the benefits they provide to investors. Yet Title I, far from deferring to agency expertise, dictated the law on its own—after itself taking dictation from the IPO Task Force report.

Title I makes only one, begrudging, allowance for the exercise of agency discretion. It states that after an EGC goes public, subsequent accounting rules that the Financial Accounting and Standards Board adopts "[will] not apply [to the EGC] unless the Commission determines that the application of such additional requirements is necessary or appropriate in the public interest, after considering the protection of investors and whether the action will promote efficiency, competition, and capital formation."[311] The provenance of this lone concession to agency discretion can also be traced to the IPO Task Force report.[312]

> issued more than $1,000,000,000 in non-convertible debt; or (D) the date on which such issuer is deemed to be a 'large accelerated filer', as defined in section 240.12b–2 of title 17, Code of Federal Regulations, or any successor thereto.

Id.

304. *Id.* § 102(b)(1).

305. IPO TASK FORCE, *supra* note 252, at 28.

306. JOBS Act § 105.

307. *Id.* § 107; IPO TASK FORCE, *supra* note 252, at 22.

308. *Id.* § 106; IPO TASK FORCE, *supra* note 252, at 29.

309. There is reason to believe that this feature is the most popular and useful of the JOBS Act Title I accommodations. *See* Usha Rodrigues, *The Effect of the JOBS Act on Underwriting Spreads*, 102 KY. L.J. 925, 933 (2013–2014).

310. JOBS Act §§ 102–104.

311. *Id.* § 104.

312. *See* IPO TASK FORCE, *supra* note 252, at 24 (recommending that the PCAOB should consider "cost of implementation for [EGCs]" among other things).

The bottom line is that Title I, using the IPO Task Force report as a template, created a new, easier path to public status for small companies—the very companies that pose the highest risk of defrauding investors. The Act exempts these companies from specific SEC regulations and articulates a less onerous path to the public markets. And the rules for securing such an exemption are detailed in the act itself, free from tinkering by agency officials—just what Silicon Valley wanted.

b. Title V

Title V represents another offensive deregulatory push, on a different front and by a different industry. The legislative history of Title V illustrates how attractive dictating, as opposed to delegating, legislation can be for regulated firms. Title V was enacted against the backdrop of section 12(g) of the Securities Exchange Act, which had required corporations with over 500 shareholders of record to register with the SEC—thus in effect coercing them to go public.[313] Both debate on Capitol Hill and behind-the-scenes campaign contribution data reveal how worrisome this requirement was to some firms.

Firms approaching the 500-shareholder number, including Pennsylvania-based convenience store Wawa, Inc., were particularly concerned about section 12(g).[314] But section 12(g) posed an even greater problem for SecondMarket, Inc., a relatively new company that provided a secondary market for trading the shares of private companies.[315] The more private companies allowed their shares to be traded on SecondMarket, the more their shareholder rolls began to bump up against section 12(g)'s threshold.[316] Thus, the law threatened to drive pre-IPO companies away from SecondMarket's exchange completely.

Wawa and SecondMarket responded in disparate and revealing ways to the threat that section 12(g) posed to their businesses. SecondMarket's CEO testified before Congress to persuade it of the seriousness of the problem (without mentioning the specific interest his firm had in raising the threshold).[317] He also made well-timed campaign contributions. Representative Jim Himes (D-CT) introduced an act on May 24, 2011, proposing to raise the registration threshold for banks and bank holding companies (as Title VI ultimately would do) and to require the SEC to study the

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313. Securities Acts Amendments of 1964, Pub. L. No. 88-467, § 3(c), 78 Stat. 565, 566–67 (codified at 15 U.S.C. § 78l(g)(1) (2006)).

314. *See* ANNE KIM, PROGRESSIVE POLICY INST., 501 SHAREHOLDERS: REDEFINING "PUBLIC" COMPANIES TO HELP EMERGING FIRMS 6 (2011), http://progressivepolicy.org/wp-content/uploads/2011/12/12.2011-Kim_501-Shareholders_Redefining-Public-Companies-to-Help-Emerging-Firms.pdf [https://perma.cc/X8UD-82KP] (describing Wawa's struggles with the 500-shareholder cap); *see also*, Usha R. Rodrigues, *The Once and Future Irrelevancy of Section 12(g)*, 2015 U. ILL. L. REV. 1529, 1556 (2015).

315. Rodrigues, *supra* note 314, at 1538.

316. *Id.* at 1539.

317. *See Legislative Proposals To Facilitate Small Business Capital Formation and Job Creation: Hearing Before the Subcomm. on Capital Mkts. & Gov't Sponsored Enters. of the H. Comm. on Fin. Sers.*, 112th Cong. 35, (2001) [hereinafter *Legislative Proposals Hearing*] (statement of Barry Silbert, Founder & Chief Executive Officer, SecondMarket, Inc.).

thresholds applicable to all companies.[318] Within two weeks two SecondMarket employees—its CEO and its head of public affairs—each donated $1000 to Representative Himes,[319] even though neither individual had ever before made an out-of-state political donation to any candidate.[320]

Senator David Schweikert (R-AZ) introduced legislation on June 14, 2011, proposing not agency action (as had H.R. 1965), but an outright legislative fix: raising the threshold to 1000 and excluding employees and accredited investors from the count entirely.[321] Accredited, or wealthy, investors[322] were the only individuals who could trade on SecondMarket's exchange.[323] Therefore, by definition, no SecondMarket transferees would count for the purposes of the Schweikert's new bill. Notably, SecondMarket's CEO had donated another $1000 to Representative Schweikert only one day before he introduced the bill.[324]

Recall that the other main corporate advocate for what would become Title V was Pennsylvania-based Wawa.[325] Wawa's employees were active in making campaign contributions.[326] But of particular note is an exchange that took place at a hearing before the Senate Committee on Banking, Housing, and Urban Affairs, involving both Wawa's Chief Financial and Administrative Officer Christopher Gheysens and Meredith Cross, Director of the SEC's Division of Corporation Finance. This exchange brought into clear focus the merits of dictation versus delegation from the perspective of corporate entities.[327]

Senator Pat Toomey (R-PA), acting as an advocate for his local corporate constituent, asked Gheysens whether it made "any difference to you guys" whether section 12(g)'s threshold was raised by Congress or the SEC.[328] Gheysens replied:

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318. *See infra* Part V.B.1.c.

319. *Individual Contributions Arranged by Type, Giver, then Recipient*, FED. ELECTION COMMISSION, http://www.fec.gov/finance/disclosure/advindsea.shtml (search "Employer" field for "SecondMarket") (listing contributions by Mark Murphy on June 6, 2011 and Barry Silbert on June 7, 2011, each in the amount of $1000 to Rep. Himes).

320. *Id.*

321. Private Company Flexibility and Growth Act, H.R. 2167, 112th Cong. §§ 2–3 (2011).

322. Individuals with a net annual income of over $200,000 or a total net worth of over one million dollars may invest in securities that are not registered, provided that those securities meet the general disclosure requirements of Rule 502. *Id.*; 17 C.F.R. § 230.501(a)(5)–(6) (2016).

323. Rodrigues, *supra* note 314, at 1539.

324. *Individual Contributions Arranged by Type, Giver, then Recipient*, *supra* note 319 (listing a contribution by Barry Silbert on June 13, 2011 in the amount of $1000 to Rep. Schweikert).

325. Rodrigues, *supra* note 314, at 1556.

326. *See* Usha R. Rodrigues, *The Price of Corruption*, 31 J.L. & POL. 45, 62 (2015) ("Wawa employees were not as politically engaged as SecondMarket's employees, but six of them made a total of $11,000 in donations to the Friends of Pat Toomey political action campaign on June 27, 2012, two months after the passage of the JOBS Act." (footnote omitted)).

327. *See Spurring Job Growth Through Capital Formation While Protecting Investors —Part I: Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs*, 112th Cong. 29–30 (2011) [hereinafter *Spurring Job Growth Hearing*].

328. *Id.* at 29.

"It does not. Either Congress or by rule of the SEC, the process to us, we are indifferent. The importance for us really is the timeline. We are at an inflection point."[329]

Senator Toomey then asked the SEC's Cross to provide "any sense for a timeframe . . . by which the agency would reach a decision about raising the [500-]shareholder limit."[330] Cross answered:

> [W]hen the limit was originally put in, it followed a robust study to understand the costs and the benefits and the economic consequences of a change in the rule. So we are doing that now. That takes time, I am afraid. So I expect that we would get the work done on the study during 2012, and then the Commission, if they decide they want to change the rule, would need to put out a rule proposal. So it is at least . . . more than a year away.[331]

Toomey responded, "I just have to say that is disappointing."[332]

Toomey may have been disappointed, but he should not have been surprised. Wawa faced the necessity of reducing its shareholder count by way of a reverse stock split that would cost it $40 million.[333] Given the exigencies of Wawa's timeline and the inherent delays of agency rule making, Wawa was in fact not "indifferent" at all. It needed deregulation posthaste—which meant baking an increase in the shareholder threshold directly into the legislation. And that is just what Wawa got in Title V of the JOBS Act.

Title V's ultimate language represented something of a compromise: it raised the proposed threshold to 2000, or 500 unaccredited investors.[334] Yet the important point for our purposes is what did *not* change: that Congress would dictate the appropriate trigger number, taking that task away from agency experts even as the SEC was studying this very issue. Members of Congress offered some anecdotal evidence about the burdens section 12(g) placed on firms.[335] But the empirical data do not support the argument that a large number of firms were forced to go public by the former section 12(g) threshold of 500 shareholders.[336] Thus, as with Title I, a

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329. *Id.*

330. *Id.* at 30.

331. *Id.*

332. *Id.*

333. *Id.* at 34; *see also* David Ingram & Alexandra Alper, *Wawa, Wegmans, Other Private Companies Ratchet up Lobbying Efforts To Keep Finances Secret*, HUFFINGTON POST (Dec. 29, 2011, 7:26 PM) http://www.huffingtonpost.com/2011/12/29/private-companies-lobbying_n_1175418.html [https://perma.cc/P9QT-7VTN] (last updated Feb. 28, 2012).

334. Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112-106, §501, 126 Stat. 306, 325 (2012).

335. *See* Rodrigues, *supra* note 314, at 1541 ("One House representative referred to 'a company in Newport, Vermont, that has been under a lot of regulatory pressure. They can't go over that 500 threshold.' Montana Senator Tester cited a seventy-five year old 'Montana-grown company' that 'has always believed in rewarding its employees so they can have a stake in the success of the firm, which now operates in 16 States,' but faced the choice of 'costly public registration or potentially eliminating existing employee shareholders.'" (footnote omitted)).

336. *Id.*

cohesive interest group succeeded in having its desired policy result encoded directly into the JOBS Act.

c. Title VI

Banks were the force behind Title VI, which specifically sought to allow banks to remain private longer[337] and to make it easier for public banks to go private or "go dark." Title VI originally sought to raise section 12(g)'s threshold to 2000 shareholders for banks and bank holding companies.[338] In a case of convergent evolution, Title V ultimately came to the same result with respect to all public firms. Title VI did relax one additional requirement solely for banks and bank holding companies, however, and that relates to making it easier for them to "go dark"—that is, for public companies to delist from a public exchange and return to private ownership.

Prior to the passage of the JOBS Act, once a company went public it could only go private again if it had fewer than 300 shareholders of record.[339] Professor Edward Rock argued that by making it relatively easy to go public but relatively difficult to go dark—because of the necessity for having 300 shareholders or fewer—U.S. securities laws created a "credible commitment" to public investors that once a firm went public, it would remain public.[340] Rock thus urged that the 300-shareholder exit level was a key feature of U.S. securities law.[341] Title VI of the JOBS Act quadrupled the going-dark threshold to 1200, and thereby weakened that credible commitment—at least, for banks and bank holding companies.[342]

While these proposed amendments may seem technical, they were of great importance to the banking community. Debate in Congress emphasized the burdens these purportedly out-of-date regulations placed upon small, community banks, by forcing them to go public once they reach 500 shareholders. As one witness stated: "Community banks . . . are the life blood of our local economies. . . . These are the banks we need to see lending to small businesses and homeowners, but they are hamstrung in their attempt to raise capital by outdated SEC registration requirements. This one is over half a century old."[343]

Representatives stressed the problems that the 500-shareholder threshold posed

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337. 157 CONG. REC. 16,462 (2011) (statement of Rep. Himes) (explaining that HR 1965, eventually Title VI of the JOBS Act, "would allow banks and bank holding companies to remain private" until it makes sense for them to go public).

338. H.R. 1965, 112th Cong. § 1(a)(1)(A) (as introduced in House of Representatives, May 24, 2011).

339. 15 U.S.C. § 78l(g)(4) (2006); *see also* Certifications of Termination of Registration Under Section 12(g), 17 C.F.R. § 240.12g-4(a)(1) (2016).

340. Edward Rock, *Securities Regulation as Lobster Trap: A Credible Commitment Theory of Mandatory Disclosure*, 23 CARDOZO L. REV. 675, 684, 688–89 (2002).

341. *Id.* at 688–89.

342. Jumpstart Our Business Startups Act (JOBS Act), Pub. L. No. 112-106 § 601, 126 Stat. 306, 326 (2012); *JOBS Act Implementation Update: Hearing Before the Subcomm. on Investigations, Oversight & Regulations of the H. Comm. on Small Bus.*, 113th Cong. 43–44 (prepared statement of Lona Nallengara, Acting Director, Division of Corporation Finance, SEC, and John Ramsay, Acting Director, Division of Trading and Markets, SEC).

343. 157 CONG. REC. 16,462 (2011) (statement of Rep. Hoyer).

for banks: "they are then forced to lower their number of shareholders by buying back stock which, all too often, means losing local shareholders who keep these banks connected with their local communities."[344] Allowing community banks more freedom to take on new investors, Representative Womack argued, removes a barrier to capital formation.[345]

Senator Kay Hutchison (R-TX) introduced Senate Bill 556, on March 10, 2011, and its substantive provisions survived unscathed in the JOBS Act.[346] On May 24, 2011, Representative James Himes (D-CT) introduced an identically worded companion bill in the House.[347] From their inception, both bills dictated to regulators regarding the main purpose of legislation, providing that for banks and bank holding companies, the shareholder registration threshold be raised to 2000 persons and raising the threshold for deregistration from 300 to 1200 persons.

Title VI tracks the language of the original House and Senate bills almost verbatim. Although the title directs the SEC to "issue final regulations to implement this title and the amendments made by this title,"[348] there was in effect almost nothing for the SEC to do except alter its previous regulation as Title VI directed. Indeed, according to my coding scheme, there is not a single instance of delegation in Title VI. It simply dictates the law.

This dictation is all the more noteworthy because Congress was well aware that the SEC was in fact at the time studying the very question of shareholder registration thresholds. The head of the SEC's Division of Corporation Finance testified to lawmakers that the agency was in the process of gathering the relevant data.[349] Congress thus preempted any agency action—and without having before it any empirical data as to the kind of banks and bank shareholders that would be affected by deregulation.

Title VI illustrates the dictation/delegation thesis in action. How large a company should become before being forced to go public is a serious question. Data were available. The SEC was looking into the matter. Congress could easily have delegated the issue to the SEC. But no crisis loomed and regulated banks saw the opportunity to "play offense" in seeking a favorable regulatory change. That change required forestalling agency action and their efforts to secure that result survived unscathed from the bill's introduction to become enshrined in statutory law.

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344. *Id.*

345. *Id.* at 16,463 (statement of Rep. Womack).

346. S. 556, 112th Cong. (as introduced in Senate, Mar. 10, 2011). Hutchison would introduce Senate Bill 1941, a similar bill omitting language requesting a study of registration thresholds for non-banks, on December 5, 2011. S. 1941, 112th Cong. (as introduced in Senate, Dec. 5, 2011).

347. H.R. 1965, 112th Cong. (as introduced in House of Representatives, May 24, 2011).

348. Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112-106 § 602, 127 Stat. 306, 327 (2012).

349. *Legislative Proposals Hearing*, *supra* note 317, at 69–73 (2011) (prepared statement of Meredith Cross, Director, Division of Corporation Finance, Securities & Exchange Commission); *Spurring Job Growth Hearing* supra note 327, at 10 (2011) (statement of Meredith Cross, Director, Division of Corporation Finance, Securities & Exchange Commission).

2. Delegation in the JOBS Act

Thus far we have seen how Silicon Valley, the financial industry, Wawa, and SecondMarket mounted a successful campaign to dictate preferred changes in the JOBS Act. But other groups were less successful in playing offense: while they secured some regulatory wins, they came at the cost of large measures of delegation. To understand the importance of the changes wrought by these titles, the reader should have clearly in mind the pre-JOBS Act rules of investing. Prior to the JOBS Act, federal law limited the average investor to investing in the shares of publicly traded companies that have made extensive, and expensive, disclosures with the SEC.[350] Only accredited investors could invest in private firms.[351] And private firms could not "generally advertise" for investors—that is, solicit the general public for investment funds.[352] Instead, they had to use password-protected websites, private brokers, and other methods designed to protect the general public from learning about these ventures.[353] Title II of the JOBS Act eliminated this ban on general solicitation; Title III for the first time allowed the general public to invest in still-private firms; and Title IV increased the amount private firms could raise from investors.

a. Title II

Enacting Title II required industry members to persuade Congress to allow for general solicitation—that is, advertising to the general public. Naval Ravikant, a co-founder of AngelList, was a key backer of Title II, which in the end relaxed the ban on general solicitation. In Ravikant's account, his team "approach[ed] the problem like a startup."[354] Traditionally a bill's backers submit Word documents with names demonstrating support for their position. Indeed, unions submitted such a document with 3600 opposing the measure.[355] But Ravikant organized a 36-hour viral Twitter campaign, and had 5000 investors and entrepreneurs sign the petition.[356] It included data about signatories, including home district and campaign contribution history.[357] Ravikant called it "beautiful and visual," boasting that they "crushed it," using technology as a weapon.[358] Press accounts credited the success of passage to Ravikant's viral push.[359]

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350. Usha Rodrigues, *Securities Law's Dirty Little Secret*, 81 FORDHAM L. REV. 3389, 3436 (2013).

351. *Id.*

352. Nate Nead, *Summary of JOBS Bill and Update*, INVESTMENTBANK, http://investmentbank.com/summary-of-jobs-bill-and-update/ [https://perma.cc/L2U8-ZB4X].

353. Kristen A. Young, *Compliance with the Securities Laws in Crowdfunded Securities Offerings: Startups It's Your Responsibility!*, 34 REV. BANKING & FIN. L. 581, 589 (2015).

354. PandoDaily, *supra* note 271 (timestamp 7:00/8:58).

355. *Id.* (timestamp 8:15/8:58).

356. *Id.* (timestamp 7:30/8:58).

357. *Id.* (timestamp 8:00/8:58).

358. *Id.* (timestamp 8:30/8:58).

359. *See, e.g.*, Brad Stone, *AngelList, the Social Network for Startups*, BLOOMBERG (Jan. 17, 2014, 12:36 PM), http://www.bloomberg.com/bw/articles/2014-01-16/angellist-the-social

In terms of lobbying, Ravikant took an equally nontraditional approach: even though he was told "that's not the way it's done," they paid lobbyists on a contingent fee-like basis; these lobbyists, in other words, were entitled to full payment only if the legislation passed.[360] Thus Ravikant played a different kind of offense from the traditional method employed by the other interest groups lobbying for Titles I, V, and VI.

Kevin McCarthy (R-CA) introduced the initial bill.[361] In stark contrast to the elaborate legislative dictation of Titles I, V, and VI, it tasked the SEC with revising its rules so that "the prohibition against general solicitation or general advertising . . . shall not apply to offers and sales of securities made pursuant to section 230.506, provided that all purchasers of the securities are accredited investors."[362] In other words, it delegated the main question to the SEC. The devil of general solicitation was in the detail of how to allow private firms to offer to the general public while ensuring that only investors of the requisite high income or net worth to qualify as accredited investors actually purchased the stock.

Requiring that any purchasers be accredited investors clearly presupposed some sort of verification process. Representative Maxine Waters (D-CA) was concerned about sales to unaccredited investors who might be "seduced by public advertising" and take advantage of the laxity of self-certification procedures to lie about their assets in order to qualify as accredited investors.[363] Thus, she introduced an amendment that would become part of the final bill, tasking the SEC with defining what constituted "reasonable steps to verify" that purchasers are accredited investors.[364] Representative Waters's amendment made clear that the SEC had work to do in this arena, and expressly delegated to the agency the duty of figuring out the best mechanism. And that caused delay. Although the SEC proposed rules on these topics on August 29, 2012, it was not until it promulgated final rules on July 10, 2013 that the ban on general solicitation was lifted, effective September 13, 2013.[365]

Thus, for all Ravikant's boasting about unconventional lobbying choices, what Title II's history shows is that, while success fees may incentivize a lobbyist to get a bill passed, they might well result in a bill that can pass Congress easily—one that

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-network-for-startups#p2 [https://perma.cc/MJT4-9ALB] (discussing Ravikant's success with AngelList and noting that AngelList "lobbied the U.S. government to further relax fundraising restrictions in the JOBS Act"); Ondi Timoner, *How Naval Ravikant Risked It All To Pull the Veil Back on Venture Capital*, HUFFINGTON POST BLOG (Oct. 7, 2013, 11:55 AM), http://www.huffingtonpost.com/ondi-timoner/how-naval-ravikant-risked_b_4047044.html [https://perma.cc/R3QY-P9HP].

360. PandoDaily, *supra* note 271 (timestamp 7:10/8:58).

361. H.R. 2940, 112th Cong. (as introduced in House of Representatives, Sept. 15, 2011).

362. Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112-106, § 201, 126 Stat. 306, 313 (2012).

363. Catherine T. Dixon, *Title II of the JOBS Act: Are Reports of the Death of General Solicitation Premature?*, INSIGHTS, June 2012, at 2, 5.

364. *Id.*

365. Samuel Guzik, *SEC Issues Final JOBS Act Regulations Allowing Public Solicitation of Investors in Private Placements Under Rule 506 of Regulation D; New Proposed Regulations Regulating Rule 506 Private Placements Also Issued for Public Comment on July 10, 2013*, CORP. SEC. LAW. BLOG (July 12, 2013), http://corporatesecuritieslawyerblog.com/?p=172 [https://perma.cc/R8GE-2DPG].

kicks the hard questions of implementation to the agency, where they can be delayed and made more complicated. The traditional industry approach to lobbying, on display in Titles I, V, and VI, resulted in the safest, surest, and swiftest deregulatory result: dictation.

b. Title III: Crowdfunding

Before 2012, the only way the general public—that is, individuals who did not qualify as accredited investors—could obtain a share of the equity of a corporation was when it went public. Yet as crowdsourcing—whether by way of donations (KickStarter, Indiegogo, or Gofundme) or by loans made with interest (Prosper Marketplace) or interest-free (Kiva)—became more mainstream, it whetted the public's appetite for the chance to invest their dollars for profit in the equity of private companies. As Paul Spinrad, an early supporter of federal deregulation to permit crowdsourcing, put it:

> The original federal laws governing the sale of securities were written in the 1930s, when people had no way to fact-check a smooth telephone voice and some fancy letterhead mailed with a New York City postmark. But now, in a world of information ubiquity, these antiquated investor protections were stifling innovation, economic health, community, and the pursuit of happiness.[366]

The history of the legalization of crowdfunding is an irresistibly underdog tale. In true entrepreneurial fashion, Spinrad, while "[b]rowsing the SEC website," hit upon the idea of submitting a public petition for a crowdfunding website.[367] Spinrad partnered with the Sustainable Economies Law Center and on July 1, 2010, filed a "Petition for Rulemaking: Exempt securities offerings up to $100,000 with $100 maximum per investor from registration," financed (fittingly enough) by the donations of fifty-two individuals.[368] But while Spinrad provided some initial intellectual impetus for legalizing crowdfunding, he characterized his work to further a crowdfunding exemption as "a hobby," explaining, "Between working in perpetual crunch mode at [his regular job], having two preschool-age kids, and not having a dishwasher, there's no way I could do the massive amount of Washington DC face-time that is mandatory for any federal law change."[369]

Enter Sherwood Neiss, Jason Best, and Zak Cassady-Dorion, who created a

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366. Paul Spinrad, *How Crowdfunding and the JOBS Act Got Started, Told by the Guy Behind the Big Idea*, CROWDSOURCING.ORG (Sept. 19, 2012, 6:21 PM), http://www.crowdsourcing.org/editorial/how-crowdfunding-and-the-jobs-act-got-started-told-by-the-guy-behind-the-big-idea/19288 [https://web.archive.org/web/20160414052759/http://www.crowdsourcing.org/editorial/how-crowdfunding-and-the-jobs-act-got-started-told-by-the-guy-behind-the-big-idea/19288].

367. *Id.*

368. Jenny Kassan, Sustainable Economies Law Center, Petition for Rulemaking: Exempt Securities Offerings up to $100,000 with $100 Maximum per Investor from Registration (July 1, 2010), http://www.sec.gov/rules/petitions/2010/petn4-605.pdf [https://perma.cc/2SDX-DHRZ].

369. Spinrad, *supra* note 366.

regulatory framework they named "Startup Exemption."[370] As described in their short video titled "The Story Behind Crowdfund Investing (Or 'How 3 guys changed the rules of the game in 460 days')),"[371] the exemption they proposed would be limited to $10,000 per individual investor, with firms able to raise a total of $1 million through crowdfunding.[372] Thanks to "77 year" old regulations, it would take "an Act of Congress" to change the rules and, as the video puts it, "What can 3 regular guys get done in Washington?"[373]

The video goes on to observe that there are three "must-haves" needed to get anything done in Washington:

1. "[a] large team of D.C. insiders & lobbyists (However Jason, Zak, and Woodie don't live in D.C. and don't have any political experience.)";[374]
2. "[a] million-dollar budget" (as opposed to the $54,273 the trio spent on fifteen trips to DC and the November 2011 rally, including $273 for coffee);[375] and
3. "[a]t least 5 years from start to finish" (it took 460 days).[376]

On September 8, 2011, President Obama endorsed crowdfunding,[377] and on the same day the White House Office of Science and Technology Policy (OSTP) signed a report that supported a $1 million crowdfunding exemption.[378] Notably, the Occupy Wall Street movement began September 17 of the same year.[379] With the

370. *About Us*, STARTUP EXEMPTION, http://www.startupexemption.com/about-us [https://perma.cc/A8F2-ST88].

371. *How 3 Guys Legalized Crowdfunding in 460 Days*, STARTUP EXEMPTION (May 21, 2012), http://www.startupexemption.com/archives/300 [https://perma.cc/Q2NA-PZCQ].

372. *Compare the Bills*, STARTUP EXEMPTION, http://www.startupexemption.com/compare-the-bills [https://perma.cc/FS9J-243F]; *see also Exemption Framework*, STARTUP EXEMPTION (last updated Oct. 27, 2011), http://www.startupexemption.com/exemption-framework [https://perma.cc/NF2P-96K9].

373. *How 3 Guys Legalized Crowdfunding in 460 Days*, *supra* note 371 (timestamps 0:30, 0:41/2:37).

374. *Id.* (timestamp 1:11/2:37).

375. *Id.*

376. *Id.*

377. *Fact Sheet: The American Jobs Act*, WHITE HOUSE (Sept. 8, 2011), http://www.whitehouse.gov/the-press-office/2011/09/08/fact-sheet-american-jobs-act [https://perma.cc/4ELW-XSFT]; *see also* David Mashburn, Comment, *The Anti-Crowd Pleaser: Fixing the Crowdfund Act's Hidden Risks and Inadequate Remedies*, 63 EMORY L.J. 127, 144 (2013) ("[I]n September 2011, President Obama endorsed crowdfunding in his proposed American Jobs Act as a way to stimulate the sluggish economy.").

378. Aneesh Chopra & Tom Kalil, *The President's American Jobs Act: Fueling Innovation and Entrepreneurship*, WHITE HOUSE: BLOG (Sept. 8, 2011, 11:20 PM), http://www.whitehouse.gov/blog/2011/09/08/president-s-american-jobs-act-fueling-innovation-and-entrepreneurship [https://perma.cc/X9ZC-YEGT].

379. Sarah Kunstler, *The Right To Occupy—Occupy Wall Street and the First Amendment*, 39 FORDHAM URB. L.J. 989, 989–90 (2012) ("[The protest was prompted by] a call put out by *Adbusters* magazine in July of 2011 featuring the image of a ballerina posing atop the iconic bronze bull sculpture of Wall Street—while protesters gather in the background amid a cloud

rise of this populist movement—with its anti-big bank, pro-"99%" message—crowdfunding's promise of rejecting traditional funding mechanisms in favor of "the people" continued to gain traction.

On September 14, Patrick McHenry (R-NC) introduced a three-page bill that allowed ordinary investors to invest the lesser of $10,000 or 10% of their annual income or net worth in companies seeking to raise $5 million or less.[380] The initial bill McHenry introduced did, in fact, dictate. It specified that companies could rely on investors' certification of their own income and that any such investors would be excluded from Section 12(g)'s shareholder of record cap.[381] It also included no delegation of authority to the SEC.

But Title III did not maintain this "short and sweet" character for long. In contrast to McHenry's original crowdfunding bill, the final language of Title III delegates many details to the SEC. Under the second subsection alone, the SEC is called upon to take the following actions with respect to crowdfunding intermediaries:

1. provide whatever disclosures, "including disclosures related to risks and other investor education materials, as the Commission shall, by rule, determine appropriate";[382]
2. establish standards for investor-education information;[383]
3. determine whether it is appropriate for crowdfunding investors to demonstrate to an intermediary an understanding on any "other matters";[384]
4. formulate "measures to reduce the risk of fraud . . . including obtaining a background and securities enforcement regulatory history check on each officer, director, and person holding more than twenty percent of the outstanding equity of every issuer whose securities are offered by such person;"[385]

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of tear gas—and the following text: WHAT IS OUR ONE DEMAND? #OCCUPYWALLSTREET SEPTEMBER 17TH. BRING TENT.").

380. H.R. 2930, 112th Cong. § 2(a) (as introduced in House of Representatives, Sept. 14, 2011).

381. *Id.* § 2(b). Interestingly, McHenry later attributed his initiating the bill because of the plight of a signature American company, Pabst Blue Ribbon beer. Eric Blattberg, *Congressman McHenry Promotes His Crowdfunding Bill, Trashes Competing Senate Legislation*, CROWDSOURCING.ORG (Jan. 24, 2012, 10:25 AM), http://www.crowdsourcing.org/editorial/congressman-mchenry-promotes-his-crowdfunding-bill-trashes-competing-senate-legislation/10501 [https://web.archive.org/web/20150326125720/http://www.crowdsourcing.org/editorial/congressman-mchenry-promotes-his-crowdfunding-bill-trashes-competing-senate-legislation/10501]. PBR was up for sale, and two advertising executives tried to crowdsource a bid for the company. The pair obtained over $200 million in pledges from approximately five million Americans before the SEC called a halt to the campaign. *Id.*; Danielle Sacks, *Shaking Up Crowdfunding*, FAST COMPANY (May 14, 2012, 5:00 AM), http://www.fastcompany.com/1835677/shaking-crowdfunding [https://perma.cc/2C43-D2AY].

382. Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112-106 § 302(b), 126 Stat. 306, 316 (2012).

383. *Id.*

384. *Id.*

385. *Id.*

5. establish a period before any sale of securities before which information must be provided to the SEC and potential investors;[386]

6. determine when it is appropriate to allow crowdfunding investors to cancel their commitment;[387]

7. make efforts the SEC determines appropriate to ensure that no investor in a twelve-month period has purchased securities that exceed the investment limits;[388]

8. determine what steps to protect the privacy of investor information are appropriate.[389]

Indeed, Title III contains twenty-three separate provisions whereby Congress entrusts the SEC with promulgating a rule or articulating a standard in connection with crowdfunding.[390]

One explanation for the SEC's substantial rule-making role in Title III is that the crowdfunding legislation was the most hotly debated of all the JOBS Act provisions. Democratic legislators, in particular, were alert to the danger of exposing ordinary investors to the risks of investing in private companies.[391] Equally noteworthy is that Title III was not of significant interest to Silicon Valley, the banks, and the stock exchanges that had lobbied hard for Titles I, V, and VI.[392] Indeed, these repeat players took a negative view of the radical crowdfunding proposal due to fears that it would lead to the demise of the larger legislative package.

To be sure, even while Title III contains many delegations of rule-making power, a delegation does not necessarily translate into the grant of actual policy-making authority. Many scholars, among them Steven Bradford[393] and Joan Heminway,[394] have argued that Congress placed undue burdens on crowdfunding regulation when it delegated it to the SEC, by tying the agency's hands in ways that rendered crowdfunding unworkable. These criticisms have merit: indeed, in Title III Congress was quite dictatorial in a manner that hamstrung much of the promise of equity crowdfunding. But *dictatorial* and *dictating* are not the same thing: All I mean to say when characterizing Title III as an example of extensive delegation is that Congress

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.*

390. §§ 301–05, 126 Stat. 316–23.

391. *See* Tanya Prive, *Why Equity Crowdfunding Could Be Dangerous for Investors and Entrepreneurs*, FORTUNE (May 6, 2016, 8:00 AM), http://fortune.com/2016/05/06/equity-crowdfunding-could-be-dangerous/ [https://perma.cc/BUA6-XVVT].

392. *See* Michael Kane, *Our Reaction to Title III Crowdfunding*, HEDGEABLE: SOPHISTICATED DIGITAL INV. (June 6, 2016), https://www.hedgeable.com/blog/2016/06/our-reaction-to-title-iii-crowdfunding/ [https://perma.cc/JDX5-KH8N].

393. C. Steven Bradford, *The New Federal Crowdfunding Exemption: Promise Unfulfilled*, 40 SEC. REG. L.J. 195 (2012).

394. Joan MacLeod Heminway, *How Congress Killed Investment Crowdfunding: A Tale of Political Pressure, Hasty Decisions, and Inexpert Judgments That Begs for a Happy Ending*, 102 KY. L.J. 865, 880–81 (2013–2014).

did not make it self-executing, and delegated many of the details to the SEC. Backed by underdogs as Title III was, delegation was probably the best it could get.

c. Title IV

Title IV represents something of a puzzle: it is the odd case where sophisticated players contented themselves with delegation instead of dictating in the statute itself. Title IV revitalized Regulation A, a longstanding registration exemption under the Securities Act of 1933.[395] Before the JOBS Act, Regulation A allowed small companies to raise up to five million dollars in capital but required them to file an offering statement with the SEC and provide an offering circular to potential investors.[396] The issuing company was also required to adhere to each state's blue-sky laws.[397] These requirements were less onerous than the costly requirements of full registration under the Securities Act of 1933, but over time they proved not to be worth the trouble.[398] In 1997, there were fifty-six qualified Regulation A offerings.[399] By 2011, there was only one.[400] In the meantime, support grew to revise Regulation A.[401] The result of this process was Title IV of the JOBS Act. That title increased the amount of capital private firms can raise Regulation A offerings from $5 million to $50 million.[402]

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395. JD Alois, *SEC's Number #1 Story of 2015: Regulation A+ Rules*, CROWDFUND INSIDER (Jan. 2, 2016, 3:00 PM), http://www.crowdfundinsider.com/2016/01/79593-secs-number-1-story-of-2015-regulation-a-rules/ [https://perma.cc/8HQ7-SRTY].

396. Stephen J. Choi, *Gatekeepers and the Internet: Rethinking the Regulation of Small Business Capital Formation*, 2 J. SMALL & EMERGING BUS. L. 27, 32–33 (1998).

397. Alois, *supra* note 395.

398. On average, companies that go public incur approximately $3.7 million in IPO costs and cede underwriter fees of five to seven percent. PRICEWATERHOUSECOOPERS, CONSIDERING AN IPO? THE COSTS OF GOING AND BEING PUBLIC MAY SURPRISE YOU 1 (2012), https://www.pwc.com/us/en/deals/publications/assets/pwc-cost-of-ipo.pdf [https://perma.cc/M5ZV-B7DV]. Additionally, once a company is public, it spends approximately $1.5 million per year as a result of being public. *Id.*

399. U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-839, SECURITIES REGULATION: FACTORS THAT MAY AFFECT TRENDS IN REGULATION A OFFERINGS 8 (2012), http://www.gao.gov/assets/600/592113.pdf [https://perma.cc/9LGY-TA2V].

400. *Id.* at 9.

401. At the 2009 Annual SEC Government-Business Forum on Small Business Capital Formation, one out of twenty-six securities regulation recommendations related to Regulation A, and it simply stated that "[t]he Regulation A $5 million ceiling should be increased." SEC. & EXCH. COMM'N, 2009 ANNUAL SEC GOVERNMENT-BUSINESS FORUM ON SMALL BUSINESS CAPITAL FORMATION: FINAL REPORT 14–18, 17 (2010), http://www.sec.gov/info/smallbus/gbfor28.pdf [https://perma.cc/LP6Z-3NHV]. At the 2010 meeting, three out of thirty-six recommendations advocated for distinct changes to Regulation A. SEC. & EXCH. COMM'N, 2010 ANNUAL SEC GOVERNMENT-BUSINESS FORUM ON SMALL BUSINESS CAPITAL FORMATION: FINAL REPORT 17–22 (2011), https://www.sec.gov/info/smallbus/gbfor29.pdf [https://perma.cc/ZEM2-9LSQ] (recommending some type of change to Regulation A in recommendations 4A, 5, 7B, and 16).

402. Press Release, U.S. Sec. & Exch. Comm'n, SEC Adopts Rules To Facilitate Smaller Companies' Access to Capital (Mar. 25, 2015), https://www.sec.gov/news/pressrelease/2015-49.html [https://perma.cc/8NF5-HC85].

Title IV has an out-of-step quality because it contains several instances of delegation to the SEC, despite its support from sophisticated players. The surface explanation is that sophisticated players themselves asked for these delegations, but the more complex explanation relates to resistance that interest groups, such as the NASAA, expressed to the idea of broad federal preemption.

With regard to the surface explanation, the following chronology is telling. In December 2010, the House Financial Services Committee conducted a hearing unambiguously titled *A Proposal To Increase the Offering Limit Under SEC Regulation A*.[403] William Hambrecht, founder, Chairman, and CEO of WR Hambrecht and Company testified,[404] as did Michael Lempres, of SVB (Silicon Valley Bank) Financial Group, and Congresswoman Anna Eshoo, whose district encompassed Silicon Valley.[405] Surprisingly, both Hambrecht and Lempres urged Congress to explicitly increase the Regulation A ceiling while allowing the SEC to promulgate detailed rules.[406] Lempres stated: "[T]he ideal solution would be a mandate from Congress to raise the offering limit for Regulation A and to set a minimum ceiling figure. I do like the idea of revisiting it periodically and deferring to SEC the terms and conditions."[407] Hambrecht agreed:

> I do think, though, that there are some time pressures here, and that everybody would like to see this get going *quickly*.
>
> I think if the SEC has a rule change, they have to go through a process that could take some time, and I would think a congressional mandate would move it quickly, and then definitely leave the SEC to implement it and to change whatever they see fit to change . . . .[408]

Hambrecht is a sophisticated Silicon Valley presence; he founded what became Hambrecht & Quist, the firm that took Apple and Adobe Systems public and pioneered the auction IPO.[409] It is unclear why he would assert that a congressional mandate that would raise the limit to $50 million, coupled with SEC rule making, would ultimately result in a "quick" change in the law. Lempres, a Silicon Valley Bank representative, was presumably also aware of the issue. Yet in the 2010

403. *A Proposal To Increase the Offering Limit Under SEC Regulation A: Hearing Before the H. Fin. Servs. Comm.*, 111th Cong. (2010).

404. *Id.* at 8 (statement of William R. Hambrecht, Founder, Chairman & CEO, WR Hambrecht & Co.).

405. *Id.* at 3, 10. Hambrecht later stated to a reporter that Eshoo was the "real prime mover" in assembling the hearing. Timothy P. Carney, *Want a Voice in Washington? Invest in a Politician*, WASH. EXAMINER (Dec. 12, 2010, 12:00 AM), http://www.washingtonexaminer.com/want-a-voice-in-washington-invest-in-a-politician/article/108230 [https://perma.cc/22GY-3EZ9].

406. *A Proposal To Increase the Offering Limit Under SEC Regulation A*, *supra* note 403, at 22.

407. *Id.*

408. *Id.* (emphasis added).

409. Matthew J. Belvedere, *Google Made More IPO Money My Way: Bill Hambrecht*, CNBC (Aug. 19, 2014, 10:58 AM), http://www.cnbc.com/2014/08/19/google-made-more-ipo-money-my-way-bill-hambrecht.html [https://perma.cc/T2YM-TJBB]; *see also About WR Hambrecht + Co*., WR HAMBRECHT + CO., https://wrhambrecht.com/about/ [https://perma.cc/2Q43-F3NM].

hearing, they asked only for Congress to raise the overall threshold; the details they were content to leave with the SEC.

Perhaps Hambrecht knew that House Democrats would not have supported a bill that dictated blue-sky-law preemption at the congressional level as opposed to by way of SEC action. Indeed, there are several indications that Title IV would not have garnered the bipartisan support it needed to pass in both chambers of Congress had it explicitly dictated blue-sky law preemption. At a subcommittee hearing in 2011, AFL-CIO spokesman Damon Silvers was openly hostile toward the bill and the prospect of less consumer protection.[410] Congressmen Lynch (D-MA) expressly endorsed Mr. Silvers's views.[411] Additionally, when the bill moved from the committee to the House floor in early 2011, the Democrats signaled that they would fight federal preemption, reasoning that state blue-sky laws protected investors.[412] In May of 2014, Representative McHenry (R-NC) introduced a bill to dictate blue-sky preemption, but the bill ultimately languished in the Democrat-controlled Senate.[413] Finally, while it did not make much of an appearance in the legislative debate, the NASAA lobbied aggressively against blue-sky law preemption throughout the SEC's ensuing rule-making process.[414]

Whether because of political resistance, or because its backers did not ask for dictation, in Title IV Congress delegated the question of federal preemption to the SEC. It was not until December of 2013 that the SEC proposed rules—rules that, notably, provided for exemption from the operation of all state blue-sky laws.[415]

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410. *Legislative Proposals To Promote Job Creation, Capital Formation and Market Certainty: Hearing Before the H. Subcomm. on Capital Mkts. & Gov't Sponsored Entities of the H. Comm. on Fin. Servs*., 112th Cong. at 16 (2011) (statement of Damon A. Silvers, Policy Director and Special Counsel, ALF-CIO stating that Title IV "should be called the 'Promote Penny Stock Fraud Act.'"); *id.* at 17 (framing the committee's proposed bill as a "systematic effort to strip the SEC of the resources necessary to protect American investors").

411. *Id.* at 17 ("I want to associate myself—and I do this rarely—but I want to associate myself with the remarks of Mr. Silvers."). This is not altogether surprising because Massachusetts used merit review to bar its residents from buying Apple stock in the 1980s because it was deemed to be too risky. Samuel Guzik, *The State of Massachusetts vs. Regulation A+: State Regulators Take the SEC to Court*, CROWDFUND INSIDER (May 26, 2015, 8:15 AM), http://www.crowdfundinsider.com/2015/05/68299-the-state-of-massachusetts-vs-regulation-a-state-regulators-take-the-sec-to-court/ [https://perma.cc/766K-A2GY].

412. H.R. REP. NO. 112-206, at 13 (2011), http://financialservices.house.gov/uploadedfiles/hr1070hreport.pdf [https://perma.cc/XC97-DCAC] ("Regulation A securities are sometimes high-risk offerings that may be susceptible to fraud, making the protections provided by state review essential. To address these concerns, the Democrats offered an amendment to clarify that state securities would only be preempted if the Regulation A security is sold on an exchange or sold only to a qualified purchaser. While that amendment was defeated, we will continue to work to ensure that the final bill provides adequate oversight.").

413. Guzik, *supra* note 411.

414. JD Alois, *NASAA Continues To Lobby SEC on Blue Sky Review & Title IV of the JOBS Act*, CROWDFUND INSIDER (Feb. 28, 2015, 11:19 AM), http://www.crowdfundinsider.com/2015/02/63544-nasaa-continues-to-lobby-sec-on-blue-sky-review-title-iv-of-the-jobs-act/ [https://perma.cc/H54G-NG6L].

415. Kiran Lingam, *The Reg A+ Bombshell: $50M Unaccredited Equity Crowdfunding Title IV Takes Center Stage*, CROWDFUND INSIDER (Mar. 25, 2015, 1:20 PM), http://www

Thus, as with general solicitation and crowdfunding, delegation meant delay. However, in this case, the bill's backers ultimately achieved at the agency level the federal preemption that it would have been difficult to attain in Congress. Perhaps in this case Hambrecht and his Silicon Valley allies made the shrewd choice that delegation was the better part of valor.

3. Data

The data in Figures 5 and 6, which split the JOBS Act into Titles I, V, and VI, on the one hand, and II, III, and IV, on the other, confirm that indeed, the JOBS Act is, in delegation terms, really two acts. Almost all of the delegations brought about by the Act occur in Titles II, III, and IV. Kate Mitchell's IPO Task Force backed Title I, and that title contained the sole permissive delegation in Titles I, V, or VI. Title V, backed by SecondMarket and Wawa, contained no delegations or agency discretion of any kind. And neither did Title VI, which loosened section 12(g) requirements for financial institutions.

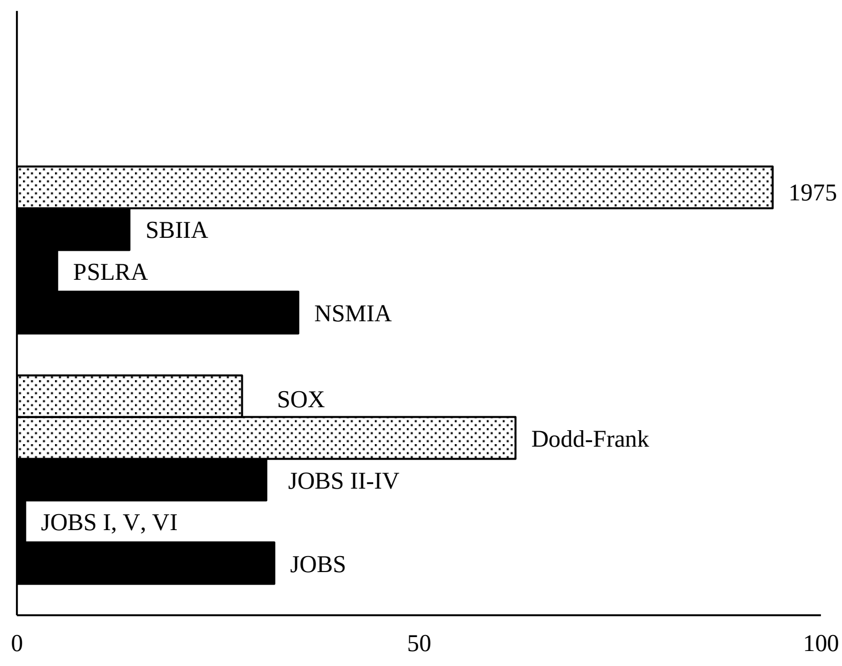

Figure 5. Mandatory and Permissive

.crowdfundinsider.com/2015/03/65007-the-reg-a-bombshell-50m-unaccredited-equity-crowdfunding-title-iv-takes-center-stage/ [https://perma.cc/T9ZD-AQ7U].

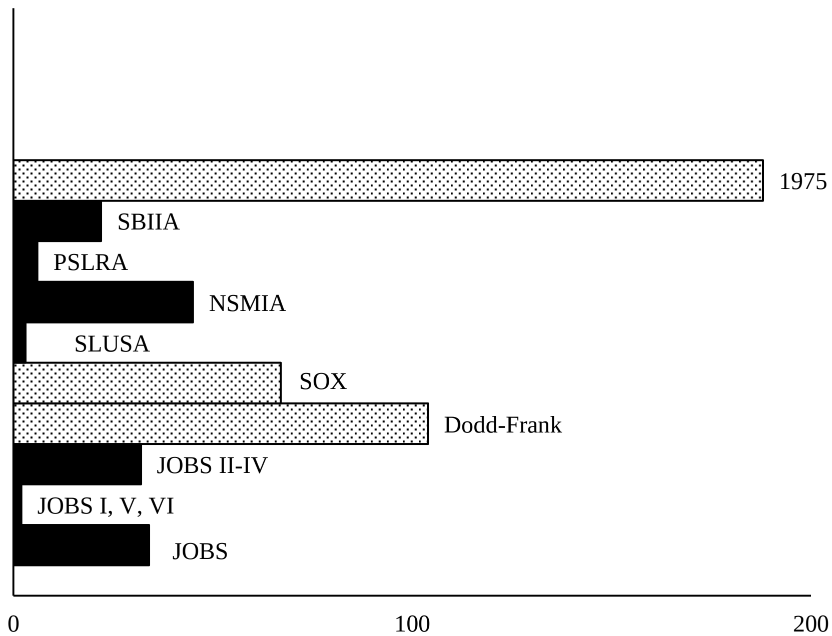

Figure 6. Mandatory, Permissive, and Instances of Agency Discretion

CONCLUSION

The dictation/delegation thesis posits that the political economy of securities regulation is more complicated than prior scholarship suggests. Professors Romano, Ribstein, and Bainbridge may be correct that "bubble laws" follow financial crises, but these bubble laws often delegate much of the real implementation work to administrative agencies. At the agency level, regulation is necessarily delayed, and may be diluted and disputed as well. On the flipside, in noncrisis times, it may well be possible for industry members to secure deregulation at the congressional level —and, in these instances, the resulting legislation will tend to dictate. Even controlling for divisions between Congress and the executive, and within the legislative branch, whether a crisis gives rise to legislation is a statistically significant predictor of legislative delegation.

To be sure, the data show that the dictation/delegation thesis does not play out in a lockstep fashion. If the genesis for a bill comes from an administrative agency and delegation is a lesser evil than the status quo of state regulation—as was the case with NSMIA—resulting legislation can contain significant delegation.[416] Likewise, even in the midst of a genuine crisis, Congress will sometimes eschew delegation in an effort to move swiftly and directly, with a focused goal in mind, as it did with SIPA.[417] Finally, even acts like the JOBS Act—adopted in a noncrisis setting—may

416. *See supra* notes 218–20 and accompanying text.
417. *See supra* notes 129–30 and accompanying text.

reflect a mix of dictation and delegation strategies.[418] Here, dictation-oriented sophisticated players backed the core of the Act, but supplementary provisions were added to it by less experienced political actors more willing to countenance agency oversight. And, in the case of Title IV, delegation may have been proved the best offense after all, since it ultimately secured federal preemption at the agency level that would have been risky to attempt in Congress.[419] Parsing the amount of delegation ultimately may offer clues as to the differing power of the various interest groups that join together to support a single legislative package.

The dictation/delegation thesis continues to matter in securities law. Notably, the FAST Act, signed by President Obama on December 4, 2015, was an omnibus bill that encompassed provisions from what had been colloquially known as "JOBS Act 2.0."[420] These titles do not form part of this Article's data sample because, unlike the other enactments, they are not separate, free-standing securities-focused laws, but rather a part of an enormous multisubject enactment. The political economy that gave rise to the securities provisions of this legislation would be too hard to disentangle from the larger whole (and in any event the comparison would not be fair). Yet it is worth noting that these provisions are generally dictatorial. For example, Title LXXI (its title number showcases the breadth of the legislation into which it was inserted), Improving Access to Capital for Emerging Growth Companies, makes technical changes: it shortens the time from twenty-one to fifteen days before a road show that an EGC needs to publicly disclose its confidential filing, permits smaller reporting companies to use forward incorporation by reference to update information (thereby relieving them from having to disclose historical financial statements that will not be part of the final registration statement), and provides a one-year grace period if an issuer is an ECG when it publicly files for its IPO but loses its EGC status during the course of SEC review.[421] The only delegations to the SEC are ministerial ones.[422] Similarly most of the other FAST Act securities provisions dictate policy rather than delegating it.[423]

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418. *See supra* Part V.B.

419. *See supra* notes 376–80 and accompanying text.

420. *See, e.g.*, Garrett A. DeVries, Rosa A. Testani, Susan H. Lent & Ryan Thompson, *Jobs Act 2.0—New FAST Act Legislation Signed into Law To Facilitate Capital Formation*, AKIN GUMP STRAUSS HAUEUR & FELD LLP: AG DEAL DIARY (Dec. 9, 2015), https://www.akingump.com/en/experience/practices/corporate/ag-deal-diary/jobs-act-2-0-new-fast-act-legislation-signed-into-law-to-1.html [https://perma.cc/7XDB-GXEJ].

421. Fixing America's Surface Transportation (FAST) Act, Pub. L. No. 114-94, §§ 71001–03, 129 Stat. 1312, 1783–84 (2015).

422. Note, while the SEC must revise its general instructions for Forms S-1 and F-1, I classify these as ministerial changes where the SEC has no discretion to exercise.

423. Title LXXVI, Reforming Access for Investments in Startup Enterprises, provides a new resale exception for issuers. § 76001, 129 Stat. at 1787–90. It dictates a host of requirements, as long as each purchaser is an accredited investor, there is no general solicitation, and the issuer provides "reasonably current" information, including among other details, financial statements from the past two years, including a balance sheet and income statement, the issuer's name, address, nature of business, officers and directors, transfer agent, the exact title, class, and par value of the security, the number of shares. It further specifies that such statements be prepared according to GAAP and that they are presumed current if the balance sheet is within sixteen months of the transaction and the income statement is within twelve

This Article poses a challenge for public choice and administrative law scholars. How often does the pattern of delegation versus dictation repeat itself in other subject areas? It may be that the securities field is sui generis; that perhaps this pattern of postcrisis delegation and noncrisis dictation cannot be generalized beyond its narrow confines. Securities regulation offers a distinctively attractive place from which to launch the delegation/dictation thesis, whatever its reach may ultimately prove to be, because securities law is relatively noncontroversial in the public mind. Testing the validity of the dictation/delegation thesis in more politically charged fields such as banking regulation and tax may reveal different strategies employed by industries looking to implement their policy preferences into law and regulation. The dictation/delegation thesis offered and tested here is thus an important step—but only a first step—in further exploring its importance to the field of delegation.

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months of the transaction. If the balance sheet is from more than six months prior to the transaction date, it must be accompanied by additional income statements from the time of the balance sheet up until six months prior to the transaction date. The title goes on to dictate still more requirements, and contains not a single delegation. Title LXXXIV, Small Company Simple Registration, directs the SEC to revise Form S-1 to allow smaller reporting companies to automatically update information in an S-1 registration statement after by incorporating reports filed with the SEC after the registration statement is deemed effective. This ability to "forward-incorporate" avoids the cost and complication of smaller companies having to update the statement with supplements or post-effective amendments. This is a ministerial delegation, since all the SEC must do is implement Congress' directive. However, the dictation/delegation pattern is no binary. Title LXXII, Disclosure Modernization and Simplification does contain two substantial delegations.