Three Stories: A Comment on Pritchard & Thompson's *A History of Securities Laws in the Supreme Court*

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Adam Pritchard and Robert Thompson's *A History of Securities Laws in the Supreme Court* should stand for decades as the definitive work on the Federal securities laws' career in the Supreme Court across the twentieth century.[1] Like all good histories, it both tells a story and makes an argument. The story recounts how the Court dealt with the major securities laws, as well the agency charged with enforcing them, the Securities and Exchange Commission (SEC), and the rules it promulgated, from the 1930s into the twenty-first century. But the book does not just string together a series of events, "one damn thing after another";[2] it also provides an explanation of why things changed, an account of causes. In this short comment I want to highlight their account, compare it to another account of these events that may (or may not) differ from theirs, and suggest an admittedly unconventional way that readers can test for themselves whether they accept the causal account provided by Pritchard and Thompson. How to do this? Perhaps by telling stories.

So here is the first story, which I see as an abridgement of the historical story told by Pritchard and Thompson:

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1. A.C. PRITCHARD & ROBERT B. THOMPSON, A HISTORY OF SECURITIES LAWS IN THE SUPREME COURT (2023).

2. An often used quote whose origin is unclear. *See, e.g.*, Jonathan B. King, *The Three Faces of Thinking*, 57 J. HIGHER ED. 78, 84 (1986) (attributing the quote to "an Oxford history don").

I. THE STORY IN THE BOOK

In March 1933 Franklin D. Roosevelt was inaugurated president of the United States, an event that opened a new era for the regulation of the sale and trading of securities.[3] That year and the next, under Roosevelt's aegis, Harvard law professor Felix Frankfurter led a team of brilliant young lawyers to draft new statutes that would tame the previous decade's wild speculations in securities and restore confidence in the nation's deflated securities markets.[4] Within a few weeks two of Frankfurter's proteges, Ben Cohen and James Landis, would draft the Securities Act of 1933[5] and together with another prodigy, Tommy Corcoran, would guide it through Congress.[6] A year later Cohen and Corcoran would again shepherd a major new act, the Securities Exchange Act of 1934,[7] through Congress; together a tight-knit group of Harvard lawyers had remade the nation's securities markets. The 1934 Act created a new agency, the SEC, which would soon take charge of administering those laws, its early success largely guaranteed by the fact the Wall Street operator Joseph P. Kennedy Sr. was its first chair.[8] Were that not enough, in 1935, again at Frankfurter's urging, Roosevelt pushed for an act to smash the nation's utilities holding companies, the Public Utilities Holding Company Act (PUHCA).[9] By then opposition to the New Deal was rising, and PUHCA almost foundered in Congress, until Senator Hugo Black exposed the utilities companies' lobbying campaign against the new bill and pushed through a slightly watered-down version of the bill.[10] (Later bills, less significant for our story, were adopted towards decade's end.[11]) Black's loyal service would soon earn him appointment to the U.S. Supreme Court.[12]

For the next ninety years the legitimacy, meaning, and reach of these men's work—the Securities Acts—would be fought out in front of courts, with the most important of these disputes winding up before the nine justices of the United States Supreme Court. Initially, fears abounded that the justices would reject the securities acts in whole or part, as the reactionary "four horsemen" who dominated the bench opposed much New Deal

3. PRITCHARD & THOMPSON, *supra* note 1, at 1 (The book's first sentence: "On March 4, 1932, Franklin D. Roosevelt (FDR) became President . . .").

4. *See id.* at 2–3 (Service in the New Deal afforded Frankfurter an opportunity to turn "theory into practice.").

5. Securities Act of 1933, 15 U.S.C. §§ 77a–77aa (2024).

6. PRITCHARD & THOMPSON, *supra* note 1, at 21.

7. Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78rr (2024).

8. PRITCHARD & THOMPSON, *supra* note 1, at 27.

9. Public Utilities Holding Company Act of 1935, 15 U.S.C. § 79 (2004) (repealed 2005).

10. PRITCHARD & THOMPSON, *supra* note 1, at 30.

11. E.g., the Investment Advisers Act of 1940, 15 U.S.C. § 80b (2024), and the Investment Company Act of 1940, 15 U.S.C. § 80a (2024).

12. *Id.* at 51.

legislation and several remaining justices, notably Louis Brandeis, also lacked sympathy for many aspects of the New Deal.[13] The first securities decision handed down by the court, *Jones v SEC*,[14] written by arch-reactionary Justice George Sutherland, appeared to fulfill these fears, as the Court refused to defer to the SEC's interpretation of the Securities Act and, along the way, compared its processes to that of England's infamous Star Chamber.[15]

Yet soon after this the justices' opinions became more favorable the various securities acts and the SEC, a change attributable to the court's changing membership and, perhaps, Roosevelt's abortive 1937 threat to pack the court.[16] In Pritchard and Thompson's terminology, opinions taking a "restrictive" approach to the securities laws and the SEC were soon outnumbered by "expansive" opinions.[17] Retirements and deaths opened the way for Roosevelt to place on the court men whom he knew as political allies and who would vote his way.[18] Black, Frankfurter, William Douglas, Robert Jackson, and Frank Murphy ascended to the bench, and the opinions they authored quenched fears that the court would reject the new securities acts wholesale. "With so many of the justices involved in the drafting, implementation, or the litigation defense of those laws, thoroughgoing support for the SEC and its mission was almost inevitable."[19]

For over three decades, the justices' opinions usually took an expansive approach to the securities laws and the activities of the SEC.[20] To be sure their support ebbed and flowed, particularly during the 1950s when several of the justices began to sense the SEC had become a bit of a backwater administrative agency due less respect than its 1930s incarnation.[21] Yet even during such times the Court largely deferred to the SEC,[22] due perhaps to the lack on the court of a justice who was both deeply knowledgeable in the securities laws and able to rally the other justices to his cause. Two who might have become leaders in securities issues on the high

13. *See, e.g.*, *id.* at 33–34 (Brandeis after rejection of the National Industry Recovery Act).

14. 298 U.S. 1 (1936).

15. PRITCHARD & THOMPSON, *supra* note 1, at 35 (quoting *Jones*, 298 U.S. at 28). Notably the vote in *Jones v. SEC* was 6-3, with Justices Cardozo, Brandeis, and Stone dissenting. PRITCHARD & THOMPSON, *supra* note 1, at 35.

16. Historians and legal scholars still debate whether Roosevelt's court-packing plan caused justices to quell their opposition to New Deal programs. *See, e.g.*, Daniel Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69, 70–72 (2010).

17. PRITCHARD & THOMPSON, *supra* note 1, at 277–79 (classifying Supreme Court opinions from the 1930s and 1940s).

18. *Id.* at 254–55.

19. *Id.* at 58.

20. *See id.* at 277–80 (showing "expansive" opinions easily outnumbering "restrictive" ones).

21. *Id.* at 97 (quoting memo from Justice Douglas speaking of the SEC's deterioration since the 1930s).

22. *Id.* at 55 ("Throughout the period the Court deferred to the SEC's expertise.").

court did not do so, chiefly to personal quirks. Before his appointment Felix Frankfurter had been the nation's leading authority on administrative law and after his appointment developed a skeptical view of the securities acts. Yet his professional hauteur managed to alienate his brethren to the point where he wielded little influence on the court.[23] William Douglas was another who seemed a natural leader of the court on securities matters—he was after all a former chair of the SEC—but he apparently stopped caring much about the securities laws by the 1950s.[24] At the same time other personnel developments, on and off the court, helped sustain the high court's deference to the SEC, and its expansive readings of the securities laws, through the 1960s. William Cary's appointment as chair of the SEC in 1961 reinvigorated the agency, while the arrival of two relatively liberal justices to the court, Byron White and Arthur Goldberg, added voices sympathetic to expansive interpretive approaches to the securities laws, embracing a broad view of insider trading restrictions based on Rule 10b-5 and implied rights of action under Rules 10b-5 and 14a-9.[25]

All this changed in 1972, due largely to the fact that in that year President Richard Nixon named Lewis Powell to the high court. Powell soon led a "counterrevolution" in securities law.[26] While previous justices had dutifully taken and reviewed securities laws cases, none since the 1930s seemed deeply invested in them, even those whose earlier careers (Frankfurter, Douglas, Wiley Rutledge) would have suggested otherwise.[27] But Powell had spent his career as a corporate and securities lawyer advising issuers about the securities laws,[28] and over the next decade and a half his colleagues came to defer to him and his expertise. When the Court faced securities laws case Powell would "lead[] the discussion in conference and expect[] to write the opinion in his area of expertise."[29] While Powell's court did not gut the laws or abandon deference to the SEC, it increasingly handed down restrictive readings of the securities laws,[30] cut off expansive insider trading liability,[31] refused to recognize additional private right of

23. *Id.* at 260–63.

24. *Id.* at 263 (noting that Douglas's autobiography does not mention a single securities case as Justice).

25. *Id.* at 265.

26. *Id.* at 85.

27. Rutledge had been a corporate law professor. *Id.* at 11.

28. *See id.* at 4.

29. *Id.* at 143.

30. *Id.* at 283-287 (tallying "expansive" and "restrictive" Supreme Court opinions).

31. *Id.* at 146 (discussing Chiarella v. United States, 445 U.S. 222 (1980)).

action,[32] and blocked attempts to create a substantive federal corporate law, particularly in the takeover arena.[33]

Yet all things must pass, and when Powell retired in 1987 the court was left with no dominant personality both expert and interested in the securities laws—nor has it gained one since. Lacking leadership, the justices' securities law opinions have since then "yo-yo[ed] between expansive and restrictive results from case to case."[34] Not only has the justices' securities jurisprudence meandered, it has not been very good; without Powell the justices' opinions have been "at times trivial, and at others mediocre."[35] Nor, it seems, is there any great hope for change in the near future. Until a justice is again appointed with both knowledge and interest in securities laws, we are stuck with the highest court in the land handing down securities decisions that show little knowledge of, well, the securities laws.

This is one way of telling a story about the Supreme Court and the securities laws. It is a story in which shifts in the Court's jurisprudence are predominantly attributed to great men (mostly) and their quiddities.[36] Could there be a different way to tell this story? Here I make a stab at a different account:[37]

II. ANOTHER STORY

In 1933 American capitalism faced the most severe challenge it would ever confront, as the Great Depression threw millions out of work and the corporate economy seized up and teetered on the edge of complete disintegration.[38] The economic collapse had many causes, but one was surely that the mechanisms of finance had during the previous decade swept up large amounts of investors' capitol, encouraged its deployment in short-term speculation, and ultimately lost it.[39] One response to this catastrophe was a fundamental reconfiguration of the nation's politics. In the

32. *Id.* at 169.

33. *See id.* at 226–45 (Supreme Court's takeover jurisprudence driven by Powell's outmoded views).

34. *Id.* at 202.

35. *Id.* at 272.

36. The bulk of Pritchard and Thompson's account runs from 1993 to 1994, drawing heavily on the papers of retired Supreme Court justices, the last of whom, Harry Blackmun, left the court in 1994. *See id.* 275. The Court's first female justice, Sandra Day O'Connor, was appointed in 1981, towards the end of this period, the second, Ruth Bader Ginsburg, in 1993, at its very end.

37. The historiography of twentieth-century politics in the United States is vast and disputed. I have cobbled together this second story from the available literature but make no claim that it is the right story, though I do not think it is terribly wrong, either.

38. *See* ERIC RAUCHWAY, THE GREAT DEPRESSION AND THE NEW DEAL: A VERY SHORT INTRODUCTION 55–60 (2008).

39. DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929–1945 366–67 (2001).

early 1930s the pro-business Republican party that had dominated national politics for decades went into decline and was eclipsed by the Democratic Party, which in 1932 ran on a platform promising to fetter unfettered capitalism.[40] The Democrats, having constructed a new alliance of working-class, white Southern, and African-American voters, won that election and would dominate American politics for decades.[41]

After initial enthusiasm for either a return to smallholder capitalism or for more thoroughgoing management of the economy, the new administration, following evolving popular opinion, eventually settled on a more hands-off approach to the economy in which government regulation would fall short of government planning and where large corporations would be tamed but not terminated.[42] Central to this new economic order would be a vastly expanded Administrative State in which apolitical expertise would predominate.[43] A new constellation of three-letter agencies appeared in Washington, one of which, the SEC, was set up chiefly to ensure the steady flow of capital to corporations by reassuring middle-class investors that they had full and accurate information about companies whose securities they bought and sold.[44]

Early on, the New Deal faced repeated legal challenges as partisans of the old order fought rearguard battles against the new regime and even won a few victories, as when they persuaded the Supreme Court to hold a centerpiece of the early New Deal, the National Industrial Recovery Act (NIRA), unconstitutional.[45] But economic recovery, however slow and unsteady it was, eventually persuaded most Americans to support the expansion of the Federal government under the New Deal, and in the wake of sustained popular support by the end of the decade judicial opposition to the reforms largely disappeared.[46] As World War II loomed, both right-

40. DONALD A. RITCHIE, ELECTING FDR: THE NEW DEAL CAMPAIGN OF 1932 86 (2007) (Roosevelt was convinced Americans wanted "a party of liberal thought and planned action.").

41. Steven M. Gillon, *The Democratic Party 1932–1968*, *in* 1 PRINCETON ENCYCLOPEDIA OF AMERICAN POLITICAL HISTORY 247, 247 (Michael Kazin, Rebecca Edwards & Adam Rothman eds., 2010).

42. ALAN BRINKLEY, THE END OF REFORM: NEW DEAL LIBERALISM IN DEPRESSION AND WAR 4 (1995) (speaking of the liberalism developed by the end of the 1930s as "less challenging to the existing structures of corporate capitalism than some of the ideas it supplanted").

43. The administrative state in the United States predated the New Deal, but there can be little dispute it grew enormously during that period. *See generally* DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940 (2014).

44. KENNEDY, *supra* note 39, at 366–68.

45. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (invalidating the National Industrial Recovery Act).

46. The story of judicial acceptance of administrative agencies is complex and unfinished. *See generally* ERNST, *supra* note 43.

wing attempts to unmake the New Deal and left-wing ambitions to expand it further faded.[47]

Thus arose what has been called in retrospect the "New Deal Order," a set of political, social, and economic arrangements that predominated from the 1930s to the 1970s, marked by Democratic Party dominance, an uneasy accord between labor and capital, government oversight but not management of the economy, and a mildly progressive Welfare State administered by both government and private parties.[48] Its initial phase of growth ended with the outbreak of the second world war, but it was consolidated during the 1940s and especially 1950s as even many more conservative politicians declined to challenge its fundamental tenets.[49] The administrative and welfare states expanded slowly again during the 1960s, as a decade of economic prosperity made more widespread intervention in the economy appear a live possibility.[50] These overarching political-social-economic developments and configurations largely explain the career of the securities laws during these decades. After facing early opposition in the 1930s those laws and the agency charged with administering them, the SEC, became generally accepted by Congress and the courts, as did most other administrative agencies; like other parts of the administrative state they were a bit becalmed in the late 1940s and 1950s, particularly when Republicans claimed the White House from 1952 to 1960, but they gained steam again in the 1960s as the nation's government entered a new era of expansion and new optimism briefly flared about the possibilities of government action.

By the end of the 1960s rumblings of revolt against this now thirty-year-old regime could be heard. Fiscal strains produced by simultaneous spending on the Great Society and the Vietnam War revived opposition to "big government," a development helped along by social strains produced by the civil rights movement and growing social liberalization.[51] A new conservative movement, one that saw the New Deal as its enemy, began to gain strength in the 1970s, culminating in the "Reagan Revolution" of

47. *See generally* BRINKLEY, *supra* note 42.

48. *See generally* STEVE FRASER AND GARY GERSTLE, INTRODUCTION, RISE AND FALL OF THE NEW DEAL ORDER, 1930–1980 (1989). There is rapidly developing an enormous literature on the decades that I briefly sketch over the next couple of pages. *See, e.g.*, GARY GERSTLE, THE RISE AND FALL OF THE NEOLIBERAL ORDER: AMERICA AND THE WORLD IN THE FREE MARKET ERA (2022); JEFFERSON COWIE, THE GREAT EXCEPTION: THE NEW DEAL AND THE LIMITS OF AMERICAN POLITICS (2016); BEYOND THE NEW DEAL ORDER: U.S. POLITICS FROM THE GREAT DEPRESSION TO THE GREAT RECESSION (Gary Gerstle, Nelson Lichtenstein & Alice O'Connor eds., 2019).

49. JAMES T. PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES 1945-1974 270–73 (1996).

50. Robert M. Collins, *Growth Liberalism in the Sixties*, *in* THE SIXTIES: FROM MEMORY TO HISTORY 14, 22–26 (David Farber ed., 1994).

51. *See, e.g.*, COWIE, *supra* note 48, at 179–96.

1980.[52] Even before then, conservative businessmen had mobilized against government regulation, a movement given voice in the U.S. Chamber of Commerce's 1971 "Powell Memorandum."[53] And interwoven with these developments was a burgeoning intellectual critique of regulation, championed by such figures as the economist Milton Friedman and, in the legal academy, Robert Bork, who focused his criticism on antitrust law.[54] Given these larger developments, little surprise that courts, including the Supreme Court, began to take a more skeptical view of regulatory statutes and agencies, including the securities laws and the SEC.[55]

Yet revolutions eventually burn out, and by the late 1980s the initial wave of anti-government and deregulatory enthusiasm seems to have crested. To be sure, politics did not simply return to the *status quo ante*. Democrats in the 1980s moved away from the positions the party held in the early 1970s and increasingly coalesced around "neoliberal" policies that displayed greater faith in markets and greater skepticism about regulation than were common at the height of the Great Society.[56] That party's return to power in 1992 only cemented the change. Republicans remained more hostile to regulation and government intervention in the economy than did Democrats, but the crusading zeal of the 1980s was tempered even after a Republican candidate won the contested presidential election of 2000.[57] In such an ambiguous period, with neither party permanently ascendant, significant changes in domestic regulatory policy were driven less by long-term political shifts than by more immediate events that demanded immediate responses, for example the series of corporate scandals in 2001 that produced the Sarbanes-Oxley Act[58] or the financial crisis in 2008 and the resulting Dodd-Frank Act.[59] Unsurprisingly, judicial interpretations of the securities acts since the 1980s reflected this larger trend, as opinions taking a restrictive approach to the laws, and looking skeptically on the SEC's actions were interspersed with opinions reading them more expansively and deferring to the agency.[60]

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52. *See* DAVID FARBER, THE RISE AND FALL OF AMERICAN CONSERVATISM: A SHORT HISTORY 184–94 (2010).

53. KIM PHILLIPS-FEIN, INVISIBLE HANDS: THE BUSINESS CRUSADE AGAINST THE NEW DEAL 156–65 (2009).

54. *See* JONATHAN LEVY, AGES OF AMERICAN CAPITALISM: A HISTORY OF THE UNITED STATES 574–78 (2021).

55. *See, e.g.*, PRITCHARD & THOMPSON, *supra* note 1, at 8–11.

56. NELSON LICHTENSTEIN AND JUDITH STEIN, A FABULOUS FAILURE: THE CLINTON PRESIDENCY AND THE TRANSFORMATION OF AMERICAN CAPITALISM 3–5, 72–79 (2023).

57. Of course, other events in the early 2000s eclipsed the administration's domestic agenda. *See* JOHN ROBERTS GREENE, THE PRESIDENCY OF GEORGE W. BUSH 106–15, 311 (2021).

58. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

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

60. PRITCHARD & THOMPSON, *supra* note 1, at 202.

III. COMPARING THE STORIES

Above I have told two seemingly different stories about the progression of the securities laws, and their interpretation by the United States Supreme Court, over the past ninety years.

The first story, the story distilled from *A History of Securities Law in the Supreme Court*, is a story of individuals and personal agency. Causation is always a knotty question in any historical account, but the causal account presented in first story is, I think, fairly clear. [61] The causes of changes in the first story—the reasons why the securities laws developed the way they did, and why the Supreme Court handled securities cases the way it did—were the actions and decisions of specific individuals, actions that were in turn the product of those individuals' histories and loyalties as played out in contingent historical circumstances. The 1933 Act was born and shaped out of the demands of Franklin Roosevelt, mediated through Felix Frankfurter and implemented by Jerome Cohen, Tommy Corcoran, and James Landis;[62] a similar story lies behind the 1934 Act,[63] while the Public Utilities Holding Company Act of 1935 owed its existence to the very public malfeasance of one man, Samuel Insull, and the clever politicking of another, Hugo Black.[64] Judicial acceptance of the securities acts from the 1930s to the 1950s is attributed to the fact the justices were overwhelmingly former soldiers of FDR, with details often shaped by the justices' personal animosities.[65] The new energy behind the securities laws in the 1960s is partly attributed to the appointment of the energetic William Cary to lead the agency.[66] And of course, the radical shift in the Court's jurisprudence in the 1970s, from expansive to restrictive, is the product of the particular qualities of Lewis Powell, aided by the fact that none of his colleagues appear to have either understood or cared much about the securities laws.[67] When Powell retired he took with him his consistent and deeply informed approach to these laws, leaving their interpretation to justices who just didn't care as much about them.[68] While many individuals appear in this story, the narrative arc turns around Powell; the history of modern securities laws and the courts is divided into three parts:

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61. For an introduction to issues of causation in the philosophy of history, see Daniel Little, *Philosophy of History*, STAN. ENCYC. OF PHIL. (Edward Zalta ed., 2020), https://plato.stanford.edu/archives/win2020/entries/history/ [https://perma.cc/889Q-H5GX].

62. PRITCHARD & THOMPSON, *supra* note 1, at 20–25.

63. *See id.* at 25–27.

64. *See id.* at 27–30.

65. *Id.* at 256.

66. *See id.* at 130–32.

67. *See id.* at 85.

68. *See id.* at 202.

before, during, and after Powell.[69] Now, this summation of Pritchard and Thompson may be a bit exaggerated—their book's opening chapter is after all entitled "The Administrative State and Capitalism," and they readily acknowledge that "trends in Court's cases" reflect "shift in political attitudes towards social control of finance"—but I think it captures a good deal of their approach.[70]

If I paint with a broad brush, I don't really feel bad about it, because I think at its core Pritchard and Thompson's story rings true—their account, centered on personalities and the internal politics of the Court, appears to be a correct account of how and why the securities laws won judicial acceptance and how and why the Supreme Court's interpretation of them varies over the years. But where does that leave the second story presented above? That story, cobbled together to provide a counter-narrative to Pritchard and Thompson's account, attributes changes in the securities laws to seemingly impersonal forces, most notably tectonic shifts in the nation's dominant political, social, and economic arrangements over the past century. Does the fact that the first story seems right make the second story wrong? After all, while we can say the Securities Acts were the products of a few Felix Frankfurter proteges, their deeper origins surely lie in the tumult of the global Great Depression and the early New Deal in the United States, when the SEC was only one of FDR's many alphabet agencies and not necessarily the most important. Expansive judicial readings of the securities acts and deference to the SEC, common from the 1940s to the 1970s, may have owed their existence to justices uninterested in securities laws, but similar broad and creative readings of other areas of the law were common during the era of the Warren Court;[71] the retreat from such broad approaches during the 1970s and 1980s was in part attributable to Powell's presence on the court, but they are also an aspect of an era when more conservative approaches were becoming popular in other areas of the law;[72] and inconsistent approaches to the securities laws appeared again at the end of the 1980s when Democrats in particular tried to move towards a post-New Deal order where markets were given new respect and regulations new scrutiny.[73] I confess that this historical schema presented in the second story does not perfectly match the three eras of securities laws charted by Pritchard and Thompson (before, during, and after Powell), but it is close enough to be suggestive.

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69. *Id.* at 253 (table dividing Supreme Court securities decisions into periods before, during, and after Powell's terms).

70. *Id.* at 253.

71. *See, e.g.*, LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE TWENTIETH CENTURY 312–17 (2002).

72. *See id.* at 524–31.

73. *See supra* text accompanying note 56.

This is probably the point in this comment where I should land squarely on one side or the other, and tell the reader which story, at least in my judgment, is more true. But I can't do that. These two stories, competing or not, raise deeper questions about the nature of historical explanation that have long engaged historians and certainly won't be resolved here.[74] Pointing solely to a handful of individuals to explain historical change seems inadequate (and is surely not what Pritchard and Thompson do). But so does attributing change completely to impersonal "larger forces" and "historical movements," as that approach seems to miss some essential quality of how humans truly act and how, for example, courts reach decisions. In asking why the securities laws came about, and why the Courts read them the way they did, we lose something vital if we don't foreground the historical actors who actually drafted the acts and authored the opinions. It matters that Ben Cohen and James Landis drafted the '33 Act, that Lewis Powell was seen by his colleagues as a securities laws savant, that since his departure no justice has cared much about securities laws.

There is of course no way to rigorously test these two stories, to quantify the correctness of each and come out with a clear answer as to which is preferable. The best I can offer is a thoroughly un-rigorous thought experiment, one way to at least test our intuitions as to whether individuals mattered in the development of the Securities laws across the last ninety years. It is a counterfactual account of the career of the securities laws and especially the people who made and shaped them.[75] It simply asks: what if things had happened otherwise? I made this story up.

IV. A THIRD STORY

People have often wondered whether the Federal securities laws, adopted with such hope during the 1930s, could have could have enjoyed more success in their early days. Perhaps if Franklin Roosevelt had named a Wall Street operator as first chair of the SEC, the agency and the laws it administered would have attracted less opposition. But FDR instead chose New Deal wunkerkind James Landis, who in the end alienated many of

74. For an introduction, see generally KEITH JENKINS, WHAT IS HISTORY (3d ed.) (2003).

75. Counterfactual reasoning abounds in both history and law, though more often implicit than explicit. *See, e.g.*, ALLAN MEGILL, HISTORICAL KNOWLEDGE, HISTORICAL ERROR: A CONTEMPORARY GUIDE TO PRACTICE 100 (2007) ("As philosophers have long known, statements about causation presuppose counterfactuality."); Robert Strassfeld, *If... Counterfactuals in the Law*, 60 GEO. WASH. L. REV. 339, 342 ("Although such counterfactual thinking often remains disguised or implicit, we encounter it whenever we identify a cause, and quite often when we attempt to fashion a remedy.") (1991).

the allies a more diplomatic and connected first chair might have made.[76] Still, the securities laws survived the 1930s, and even after the PUHCA's "death penalty" provision was held unconstitutional in 1946 the agency functioned well enough, though the Supreme Court understandably looked skeptically upon its activities during its first few decades.[77] A more deferential era began in the 1950s and persisted through the 1980s, as the Supreme Court, under Chief Justices Earl Warren and then Arthur Goldberg,[78] increasingly deferred to the SEC and largely adopted an expansive view of its powers, reading the securities acts broadly—an approach epitomized by the Court's 1980 decision in the *Chiarella* case where the Court, in a decision authored by Justice Charles Clark, upheld a broad approach to regulation of insider trading.[79] Starting in the 1960s the SEC earned a sterling reputation, initially due to the chairmanship of William Cary; it was briefly tarnished by a scandal in the early 1970s linked to Watergate, but had its reputation restored under Chairman Lewis Powell, a well-respected Virginia securities lawyer who provided stability from 1973 to 1977.[80] Deference to the SEC and a willingness to read the securities laws broadly continued even in an era when government involvement in other areas of the economy met with increased skepticism, a development perhaps attributable to the lack of leadership on the court. No justice in the 1970s or 1980s either knew or cared enough about securities laws to reverse course, and while Ronald Reagan appointed some jurists to the Supreme Court with interest in regulation, in the end they failed to persuade other members of the court to take a more restrictive approach to those laws—Justice Robert Bork's real interest lay in antitrust, while Justice Richard Posner's assumed superiority managed to alienate his colleagues as he proved unsuccessful at the coalition-building so necessary

76. Landis wanted and was expected to be named first chairman of the SEC, but the job went to Joseph P. Kennedy. THOMAS MCCRAW, PROPHETS OF REGULATION 182 (1984).

77. The constitutionality of the PUHCA's death penalty provision was upheld by the Supreme Court in 1946. *See* North Am. Co. v SEC, 327 U.S. 626 (1946).

78. Arthur Goldberg was named to the Supreme Court in 1962 but resigned three years later; Chief Justice Earl Warren was succeeded by Warren Burger. BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 274, 311 (1995).

79. The *Chiarella* decision rejected a broad prohibition against insider trading, Chiarella v United States, 445 U.S. 222 (1980) and Judge Charles Clark of the Fifth Circuit was mentioned as a possible nominee to the Court in the 1970s but never nominated. Leslie H. Southwick, *Charles Clark*, MISS. ENCYC., https://mississippiencyclopedia.org/entries/charles-clark/ [https://perma.cc/DYL2-2LVL].

80. After a Watergate-related scandal, Ray Garrett was named chair of the SEC in 1973. JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN FINANCE 448–49 (3d ed. 2003).

to the court.[81] Since then, the Court's securities laws jurisprudence has continued the largely deferential path it has followed since the 1950s.

The above third story is of course not what happened, and making up a story does not prove anything.[82] But that was not the point. Rather, this counterfactual puts our assumptions to a test by asking whether the alternative history seems plausible—in other words, does it seem likely that, had there been different individuals in place, the history of the Supreme Court and the securities laws would have been different? My personal answer is "yes," that whatever sweeping and impersonal events helped produce a new legal and administrative structure regulating securities in the 1930s, the evolution of the laws over the past ninety years was decisively shaped by the individuals who carried out and interpreted those laws. While both stories told above are accurate, the better explanation for the historical changes under consideration here is Pritchard and Thompson's.

CONCLUSION

For now, it is enough to say that Pritchard and Thompson's excellent work, which I expect will remain the standard work on the Supreme Court and the securities laws for decades, has not only told the story of how the Supreme Court shaped the securities laws but has opened up new avenues for research and reflection. I look forward to further works which will tie the story they tell to larger stories about political and legal change in modern America. Perhaps one day we will be able to answer the question: Was it really all down to Lewis Powell?

81. Robert Bork was nominated to the Supreme Court in 1987, but his nomination was rejected by the Senate. *Robert H. Bork*, AM. NAT'L BIOGRAPHY, https://www.anb.org/display/10.1093/anb/9780198606697.001.0001/anb-9780198606697-e-21596?rskey=A0C0bA&result=1 [https://perma.cc/7CS3-WUNL]. Judge Richard Posner was mentioned as a possible nominee in the 1980s, but never nominated. WILLIAM DOMNARSKI, RICHARD POSNER 138–39 (2016).

82. DAVID HACKETT FISCHER, HISTORIANS' FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT 16 ("Fictional questions can also be heuristically useful to historians . . . But they *prove* nothing.") (1969).