

Culture Wars: Rate Manipulation, Institutional Corruption, and the Lost Normative Foundations of Market Conduct Regulation

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ABSTRACT

The global investigations into the manipulation of the London Interbank Offered Rate (Libor) have raised significant questions about how conflicts of interest are managed for regulated entities contributing to benchmarks. An alternative framework, which brings the management of the rate process under direct regulatory supervision, is under consideration, coordinated by the International Organization of Securities Commissions taskforce. The articulation of global principles builds on a review commissioned by the British government that suggests rates calculated by submission can be reformed. This paper argues that this approach is predestined to fail, precisely because it ignores the lessons of history. In revisiting the initial framing for market conduct regulation, this paper illuminates the lost normative underpinnings of the disclosure paradigm. By exploring the shadows of the past, it provides an essential guide for how to fix the legitimacy crisis engendered by the Libor scandal.

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I. INTRODUCTION

The manipulation of the London Interbank Offered Rate (Libor) and associated benchmarks has far-reaching consequences for the financial institutions involved and for the integrity of the regulatory regimes charged with their oversight. The scandal derives from pervasive and widespread collusion between traders and those responsible—in major banks—for submitting hypothetical rates at which individual banks could raise financing. When aggregated by Thomson Reuters, those rates produce a daily benchmark interest rate. This rate is then used to benchmark trillions of dollars of derivative contracts in the over-the-counter (OTC) marketplace. The misconduct, designed to facilitate trading positions, as well as to create the erroneous impression of the health of individual banks, corrupted the market. To date, three major banks—Royal Bank of Scotland (RBS), Barclays in the United Kingdom, and the Swiss-domiciled UBS—have reached settlements with regulatory authorities in the United States, the United Kingdom, Japan, and Switzerland, with the cumulative fine standing at \$2.6 billion dollars. These settlements mark the start rather than the conclusion of the process. An investigation in Singapore implicated major U.S. banks in attempts to manipulate the Singapore Interbank Offered Rate (Sibor). It is, therefore, only a matter of time before regulatory attention crosses the Atlantic to Manhattan.

The ongoing litigation risk cascades outwards from civil and criminal enforcement to individual and institutional class action claims. The structural and reputational risks are just as significant. Six years after the August 2007 onset of the global financial crisis, with the vaporization of the securitization market, regulatory authorities across the globe remain mired in crisis management. Within that timeframe, we have moved progressively from a rubric of “too big to fail” to a dawning recognition that systemically important financial firms are not only too big to manage and

regulate but also too big to litigate effectively against. This recognition comes through most notably in the caustic and incisive questioning of Senator Elizabeth Warren.¹ We are now at a paradigmatic tipping point. Given Libor's pricing implications for the OTC marketplace as the key floating rate benchmark, has it become too big to change? This remains very much an open question.

British regulatory authorities maintain that Libor and submission-based benchmarks can be reformed. In sharp contrast, the United States is much more wary of reliance on the judgments of individual bankers. The chair of the Commodity Futures Trading Commission (CFTC), Gary Gensler, is cognizant of the need for an urgent replacement to Libor "to restore market integrity and promote financial stability."² As he put it in a recent interview with the *Financial Times*, "A benchmark that becomes untethered [from reality] becomes vulnerable to all sorts of misconduct. . . . It's best that we not fall prey to accepting that Libor or any other benchmark is too big to replace."³ The Financial Stability Oversight Council in the United States has provided strong support for this proposition. This umbrella network of financial regulators has demanded a transition to an observable transaction framework, as a matter of urgency.⁴

1. Justin O'Brien, *Educating Regulators: A Professorial Master Class*, CENTRE FOR L., MARKETS & REG., UNIV. NEW S. WALES (Feb. 15, 2013) (Austl.), <http://clmr.unsw.edu.au/article/compliance/market-conduct-regulation/educating-regulators-professorial-masterclass>; Malcolm S. Salter, *Short-Termism at Its Worst: How Short-Termism Invites Corruption . . . and What to Do About It* (Edmond J. Safra Working Paper Grp., Paper No. 5, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2247545; Gregg Fields, *What Institutional Corruption Shares with Obscenity* (Edmond J. Safra Working Paper Grp., Paper No. 6, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2252033.

2. Brooke Masters & Philip Stafford, *CFTC's Gensler Says Libor 'Unsustainable'*, FIN. TIMES (Apr. 22, 2013), <http://www.ft.com/intl/cms/s/0/f5d2c816-ab4b-11e2-ac71-00144feabdc0.html#axzz2SAkFoWi5>.

3. *Id.*

4. FIN. STABILITY OVERSIGHT COUNCIL, 2013 ANNUAL REPORT 14 (2013), available at <http://www.treasury.gov/initiatives/fsoc/Documents/FSOC%202013%20Annual%20Report.pdf>. The report states that

[t]he shift away from banks funding each other in an unsecured market has led to a scarcity or outright absence in longer tenors of real transactions underpinning these benchmark rates and has exacerbated vulnerabilities of these benchmarks. Yet currently, hundreds of trillions of dollars in derivatives, loans, and other financial instruments reference these benchmarks. This situation leaves the financial system with benchmarks that are prone to and provide significant incentives for misconduct.

Given these vulnerabilities and the real risk that they will remain, in order to ensure market integrity and support financial stability, the Council recommends that U.S. regulators cooperate with foreign regulators, international bodies, and market participants to promptly identify alternative interest rate benchmarks that are anchored in observable transactions and are supported by appropriate governance structures, and to develop a

The interventionist agenda reflects the renewed power of the United States Department of Justice to frame financial regulation discourse, a position it last accrued in the immediate aftermath of the passage of the Sarbanes–Oxley Act in 2002.⁵ Given its centrality in leading an international investigation that to date has seen the imposition of \$2.6 billion in fines against three leading banks—RBC, Barclays, and UBS—the Department of Justice’s emphasis on retribution, accountability, and punishment matters as much as the development of fair, effective, and efficient markets.⁶ The renewed emphasis on criminal prosecutions, albeit against foreign subsidiaries, stands in marked contrast to the lack of criminal indictments in relation to unethical and dubious conduct exposed by the financial crisis. This can be traced, in part, to public outrage over the statute of limitations precluding holding those responsible to account for their actions and, in part, to the simplicity and blatant nature of the Libor deception. The Libor investigation, which remains at an early stage, has exposed systematic and pervasive corruption in the rate-setting process.

Recent investigations uncovered *systematic false reporting and manipulations* of reference rate submissions dating back many years. This *misconduct* was designed to either increase the potential profit of the submitting firms or to convey a misleading picture of the relative health of the submitting banks. These actions were *pervasive, occurred in multiple bank locations around the world, involved*

plan to accomplish a transition to new benchmarks while such alternative benchmarks are being identified.

Id. Observable transactions, however, are no guarantee against manipulation. See Salter, *supra* note 1; see also Andrew Cornell, *UBS Traders ‘Tried to Game’ Australian Benchmark*, AUSTL. FIN. REV. (Mar. 5, 2013), http://www.afr.com/p/business/companies/ubs_traders_tried_to_game_australian_0Bbkz7A5PfZvHJQpe3UytK. The mechanism for setting the rate was abolished on March 28, 2013. Lincoln Feast, *Australia to End Interbank Rate-Setting Panel After Libor Scandal*, REUTERS (Mar. 28, 2013), <http://www.reuters.com/article/2013/03/28/australia-libor-bbsw-idUSL2N0CJ2DG20130328>.

5. The power dissipated through a series of miscalculations that saw its authority diminish, most notably the continued prosecution of individual KPMG partners after the firm itself agreed to a negotiated prosecution. See JUSTIN O’BRIEN, *REDESIGNING FINANCIAL REGULATION: THE POLITICS OF ENFORCEMENT* 27–54 (Wiley 2006).

6. “Libor will prove to be one of the largest, if not the largest white-collar case [sic] in history. It goes after financial institutions, and it goes after the most major players in Wall Street.” Interview by FRONTLINE PBS with Lanny Breuer, Assistant Att’y Gen., Dep’t of Justice Criminal Div. (Nov. 30, 2012), available at <http://www.pbs.org/wgbh/pages/frontline/business-economy-financial-crisis/untouchables/lanny-breuer-financial-fraud-has-not-gone-unpunished>; see also Gregg Fields, *No Charge: Why Regulatory Institutions Have Prosecuted So Few Bankers; and Why It Matters*, EDMOND J. SAFRA CTR. BLOG, HARVARD U. (Nov. 3, 2012), <http://www.ethics.harvard.edu/lab/blog/254-no-charge>

*senior bank officials at several banks, and affected multiple benchmark rates and currencies, including LIBOR, EURIBOR, and the Tokyo Interbank Offered Rate (TIBOR). Each of the banks that faced charges engaged in a multi-year pattern of misconduct that involved collusion with other banks. These revelations have undermined the public's confidence in these benchmarks.*⁷

The paucity of institutional memory in leading banks, the fact that manipulation continued even after bailouts, and a baleful reality of continued compartmentalized responsibility have made business ethics appear to be little more than an oxymoron.⁸ As the investigation moves inexorably towards the major Wall Street banks involved in these accountability deficits, debates are likely to intensify, hence, in part, the movement in the United States towards a more radical approach.

In the United Kingdom, by contrast, a much more nuanced approach has been adopted, marked by an extensive consultation process (albeit one dominated by insiders).⁹ Martin Wheatley, chair of the Finan-

7. FIN. STABILITY OVERSIGHT COUNCIL, *supra* note 4, at 137 (emphasis added).

8. Alasdair MacIntyre, *Why Are the Problems of Business Ethics Insoluble?*, in MORAL RESPONSIBILITY AND THE PROFESSIONS 358 (Bernard Baumrin & Benjamin Freedman eds., 1982) (“Effectiveness in organizations is often both the product and the producer of an intense focus on a narrow range of specialized tasks which has as its counterpart a blindness to other aspects of one’s activity.”); see also Alasdair MacIntyre, *Social Structures and Their Threats to Moral Agency*, 74 PHIL. 311, 322 (1999) (Compartmentalization occurs when a “distinct sphere of social activity comes to have its own role structure governed by its own specific norms in relative independence of other such spheres. Within each sphere those norms dictate which kinds of consideration are to be treated as relevant to decision-making and which are to be excluded.”). For another systemic cause, see Salter, *supra* note 1.

9. See HM TREASURY, THE WHEATLEY REVIEW OF LIBOR: FINAL REPORT 75 (2012) [hereinafter WHEATLEY REVIEW], available at http://cdn.hm-treasury.gov.uk/wheatley_review_libor_final_report_280912.pdf (outlining case for reform). The review recommended that Libor should no longer be administered by the British Banking Association but by a new body chosen through a tendering process. *Id.* at 8. The tendering process—which opened on February 26, 2013, a day after the British Banking Association agreed to its mandate at an extraordinarily general meeting—is overseen by an independent committee led by the cross-bench peer, Baroness Sarah Hogg, the chair of the Financial Reporting Council, which regulates the audit profession in the United Kingdom. Other members of the committee include Paul Fisher (Bank of England), George Handjinicolaou (Deputy CEO of the International Swaps and Derivatives Association), John Kingman (Second Permanent Secretary at the Department of Treasury), John Stewart (Chair of Legal & General former head of National Australia Bank), Colin Tyler (Association of Corporate Treasurers), and Martin Wheatley (Financial Conduct Authority). The terms of reference note that the tender process will result in a recommendation to the British Banking Association, which will then enter a contract with the new administrator. Moreover, “the new administrator will be required to be authorized by the Financial Conduct Authority (FCA). The administrator will also be expected to administer and govern LIBOR in such a manner that credibility will be restored in the benchmark in accordance with any relevant FCA rules, both new and existing.” HOGG TENDERING ADVISORY COMM. FOR LIBOR, TERMS OF REFERENCE 1 (2013), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/

cial Conduct Authority and an important figure in the regulatory redesign, is as critical as his counterparts in the United States of Libor's shortcomings. He has referred to it as "a broken system built on flawed incentives, incompetence[,] and the pursuit of narrow interests that are to the detriment of markets, investors[,] and ordinary people."¹⁰ Critically, however, Wheatley concluded that Libor "can be fixed through a comprehensive and far-reaching program[] of reform. Although the current system is broken, it is not beyond repair, and it is up to us—regulators and market participants—to work together towards a lasting and sustainable solution."¹¹ This is a very dubious assumption.

There is no attempt in this policy calibration to change the normative foundations of the market. Instead, it is predicated on a continued belief that a re-ordering of technical rules and reliance on general principles will be sufficient. Without tackling the social norms of the market, however, the agenda is likely to privilege symbolism over substance. As this paper will show, such reasoning is a tactical and strategic mistake.

At its core the reform process, which envisages a gradual transfer towards observable transactions, is predicated on continued reliance on market participants to operate ethically within an ostensibly more rigorous system of oversight.¹² It does so because of an acknowledged fear that "a transition to a new benchmark or benchmarks would pose an unacceptably high risk of significant financial instability, and risk large-scale litigation between parties holding contracts that reference LIBOR."¹³ Notwithstanding the Financial Conduct Authority's renewed emphasis on the critical importance of culture, both renewal and reform are likely to fail unless the core ethical deficit at the heart of contemporary banking is systematically addressed.

The pre-tendering process in the United Kingdom, the pronouncements of the Financial Stability Oversight Council in the United States,

191850/the_hogg_tendering_advisory_committee_for_libor_terms_of_reference.pdf. The British government expects a successor body to be in place by this summer. *Id.*

10. Martin Wheatley, Managing Dir., Fin. Servs. Auth., Speech Delivered at the Wheatley Review of LIBOR, Pushing the Reset Button on LIBOR (Sept. 28, 2012), available at www.fsa.gov.uk/library/communication/speeches/2012/0928-mw.shtml.

11. *Id.*

12. "While Libor needs to be reformed to address the weaknesses that have been identified, it would not be appropriate for the authorities to completely take over the process of producing a benchmark which exists primarily for the benefit of market participants." WHEATLEY REVIEW, *supra* note 9, at 7. The review, however, places within a statutory framework provided by the Financial Services Authority (now Financial Conduct Authority) "an Approved Persons regime, to provide the assurance of credible independent supervision, oversight and enforcement, both civil and criminal." *Id.* at 8.

13. *Id.* at 7.

and the consultation process coordinated by the International Organization of Securities Commissions (IOSCO) fail to provide confidence that the framing will specify any normative obligation.¹⁴ Likewise, there has been little evidence of tangible changes to deleterious cultural framing from within the entities themselves, beyond handwringing.¹⁵ The failure to take into account the way in which the banking sector has interacted with myriad parliamentary and congressional inquiries provides evidence that such an emasculated approach to regulatory redesign will not produce the kind of transformation broader society demands in the aftermath of the bailouts necessary to save the banking sector from its own misjudgments and irresponsibility. A reliance on stated obligation to society from the sector is simply not credible given the scale of the deception exposed in the rate manipulation scandal.

It is dispiriting—but nonetheless inescapable—that the financial sector’s commitments to enhanced self-regulation have proved incapable of arresting a decline in its trustworthiness.¹⁶ For example on Wednesday, September 29, 2010, senior financiers based in London committed to subjugating the profit motive of trading floors and financial advisors to what was termed “a larger social and moral purpose which governs

14. INT’L ORG. OF SEC. COMM’NS, PRINCIPLES FOR FINANCIAL BENCHMARKS CONSULTATION REPORT (2013), available at http://www.csrc.gov.cn/pub/csrc_en//affairs/AffairsIOSCO/201304/P020130418535691256394.pdf. “The majority of IOSCO members do not regulate Benchmark Administrators or Submitters. Nor does this Report make specific recommendations with respect to any particular Benchmarks. Nonetheless, IOSCO members should consider whether regulatory action (or recommendations for action by other relevant National Authorities in their own jurisdiction) may be appropriate to encourage implementation of the principles.” *Id.* at 5. For discussion of the principles, see *infra* notes 117–122 and accompanying text.

15. In evidence before the Treasury Select Committee on January 9, 2013, the head of investment banking at UBS, Andrea Orcel, conceded “these are industry-wide problems. . . . We all got probably too arrogant, too self-convinced that things were correct the way they were. I think the industry needs to change.” Mark Scott, *UBS Executives Questioned by Parliament over Rate-Rigging Case*, N.Y. TIMES (Jan. 9, 2013, 7:37 AM), <http://dealbook.nytimes.com/2013/01/09/british-parliament-questions-ubs-executives-in-wake-of-1-5-billion-fine/?src=dlbksb>. Mark Carney, the incoming Governor of the Bank of England, notes that

over the past year, the questions of competence have been supplanted by questions of conduct. Several major foreign banks and their employees have been charged with criminal activity, including the manipulation of financial benchmarks, such as LIBOR, money laundering, unlawful foreclosure and the unauthorized use of client funds. These abuses have raised fundamental doubts about the core values of financial institutions.

Mark Carney, Governor, Bank of Eng., Address at the University of Western Ontario Ivey School of Business, *Rebuilding Trust in Global Banking* (Feb. 25, 2013) (Can.).

16. Justin O’Brien, *Re-Regulating Wall Street: Substantive Change or the Politics of Symbolism Revisited?*, in *THE FUTURE OF FINANCIAL REGULATION* 423 (Iain MacNeil & Justin O’Brien eds., Hart Publ’g 2010).

and limits how they behave.”¹⁷ Corporate responsibility to society, it was argued, could not be shirked or delegated by the board and senior management: “Ultimately, it is the responsibility of the leaders of financial institutions—not their regulators, shareholders or other stakeholders—to create, oversee and imbue their [organizations] with an enlightened culture based on professionalism and integrity. As leaders of financial institutions we recognize and accept this personal responsibility.”¹⁸

The pledge provided what appeared to be a demonstrable commitment to higher ethical standards. It is indicative that the key signatory was Marcus Agius, the chairman of Barclays, one of the first financial institutions to accept pervasive wrongdoing in the Libor scandal. However, the public commitments entered into in 2010 are rendered indefensible by Barclays’s initial failure to admit responsibility in the Libor scandal. It is indicative that the pledge coincided with the regulatory investigation into Barclays and the other banks involved in contributing to Libor. Moreover, the financial penalties extracted from the bank simply amount to a cost of doing business. It is telling that regulators only moved to force the resignation of senior personnel after public and parliamentary outrage at the paucity of the initial settlement. It is, therefore, essential to evaluate the drivers of deviance at both a descriptive and theoretical level before ascertaining whether the reform agenda proposed is going to be workable.

Corporate culpability for individual ethical failures is invariably and inevitably informed by the relative strength or weakness of organizational culture (that is, the degree to which egregious conduct is informed by a disconnect between stated and lived values).¹⁹ The disjunction can lie along a continuum, ranging from unthinking or willful neglect, through reliance on formal but often transacted-around compliance programs, to misaligned incentives.²⁰ These corporate agendas take place within broader governance and legal frameworks.

17. Marcus Agius et al., *Financial Leaders Pledge Excellence and Integrity*, FIN. TIMES, <http://www.ft.com/intl/cms/s/0/eb26484e-cb2d-11df-95c0-00144feab49a.html#axzz2C8HKL1jb> (last updated Sept. 29, 2010, 6:40 AM).

18. *Id.*

19. Jesper B. Sorensen, *The Strength of Corporate Culture and the Reliability of Firm Performance*, 47 ADMIN. SCI. Q. 70, 73–91 (2002). Sorensen defines culture narrowly as a system of shared values (that define what is important) and norms that define appropriate attitudes and behaviors for organizational members (how to feel and behave). *Id.* at 72; see also Linda Smircich, *Concepts of Culture and Organizational Analysis*, 28 ADMIN. SCI. Q. 339 (1983) (noting that research into corporate culture is an inquiry into the social order).

20. Gedeon J. Rossouw & Leon J. van Vuuren, *Modes of Managing Morality: A Descriptive Model of Strategies for Managing Ethics*, 46 J. BUS. ETHICS 389 (2003) (noting a five stage process

Recent legislative innovations to address cultural failings, particularly in the United States, have resulted in the design of regulatory structures that are suboptimal for societal welfare. Ironically, flawed legislative framing, the complexity of Dodd–Frank, and the glacial pace of implementation enable the very defects in the financial sector regulation that legislators seek to remedy. The Volcker Rule, which restricts proprietary trading, is an obvious example.²¹ A clear rule has transmogrified into a complex implementation process, informed by waves of exceptions that undercut legislative intent and undermine regulatory authority. Likewise, the deception at the heart of the multifaceted Libor scandal points to patterns of conduct that have institutionalized inefficient and unfair markets, a diametrically opposed outcome to that envisaged in market conduct legislation. As such, on both a descriptive and analytical level, within both individual entities and the broader regulatory “regime,”²² the entire regulatory process represents what Lawrence Lessig has termed a form of “institutional corruption”—that is, it “describes an influence, financial or otherwise, within an economy of influence, that weakens the effectiveness of an institution, especially by weakening public trust in that institution.”²³

in which corporate activity moves from “(1) immorality; (2) reactivity; (3) compliance; (4) integrity; (5) total alignment”); *see also* Donald W. Light, *Strengthening the Theory of Institutional Corruptions: Broadening, Clarifying, and Measuring* (Edmond J. Safra Working Paper Grp., Paper No. 2, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2236391.

21. Gregg Fields, *Reformers at Bay: Analyzing Institutional Failure in the Implementation of Dodd–Frank*, EDMOND J. SAFRA CTR. BLOG (Nov. 14, 2012), <http://www.ethics.harvard.edu/lab/blog/256-reformers-at-bay>. Daniel Tarullo of the Federal Reserve has noted that the problem of articulating the final rule is exacerbated by the number of regulatory agencies involved: “We have basically five different agencies involved, we have 22 separate individuals, each of whom has a vote, none of whom works for anyone but themselves. This is a matter of taking some time to take everyone’s interest into account, to develop enough of a consensus that we can move forward.” Darrell Delamaide, *Volcker Rule Delay Shows Financial Reform’s Flaws*, USA TODAY (Apr. 10, 2013, 7:12 PM), <http://www.usatoday.com/story/money/business/2013/04/10/delamaide-column-volcker-rule/2070951/>. For an international approach favoring elevation of broad principles over protracted rule-making, see Andrew G. Haldane, Exec. Dir. of Fin. Stability, Speech Delivered at the Federal Reserve Bank of Kansas City’s 36th Economic Policy Symposium: The Changing Policy Landscape, The Dog and the Frisbee (Aug. 31, 2012), available at <http://www.bankofengland.co.uk/publications/Documents/speeches/2012/speech596.pdf>.

22. CHRISTOPHER HOOD ET AL., *THE GOVERNMENT OF RISK* 9 (Oxford Univ. Press 2001) (describing a regulatory regime as a “complex of institutional [physical and social] geography, rules, practice and animating ideas that are associated with the regulation of a particular risk or hazard”).

23. Lawrence Lessig, Dir., Edmond J. Safra Ctr. for Ethics, Speech Delivered at the Edmond J. Safra Center for Ethics, *Institutional Corruption* (Oct. 12, 2009), available at <http://www.youtube.com/watch?v=0-IEDiUFXUk>. *See generally* LAWRENCE LESSIG, *REPUBLIC LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011). The evolving definition is discussed in Lawrence Lessig, *Institutional Corruptions* (Edmond J. Safra Working Paper Grp., Paper No. 1, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2233582. For analysis of

Credible, ongoing reform must demonstrate that the dangers of institutional corruption have been addressed. Approved standing by a regulatory agency is no longer sufficient bulwark to ethical commitment, a fact explicitly acknowledged by the Parliamentary Commission on Banking Standards.²⁴ This criticism of regulatory effectiveness can be transcended, however, if one recalls the original emphasis of the disclosure paradigm—the quintessential tool in market conduct regulation. In its initial framing, disclosure did not rest on technicalities that can be transacted around. At its core, it is a normative demand, a point explicitly made by its designers as they crisscrossed the United States in a battle over the legitimacy of the reform process.²⁵ Demanding truth in securities is, in essence, a moral claim. Seen from this perspective, what is required is not the retirement of the paradigm but, rather, its rejuvenation. This paper, therefore, explores how the ethical deficit in the financial industry can be addressed by revisiting the debates that accompanied the passage of the New Deal architecture.

interaction between legislative design and regulatory policy, see FRED S. MCCHESENEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION 157 (1997) (characterizing politicians “not as mere brokers redistributing wealth in response to competing private demands, but as independent actors making their own demands to which private actors respond”).

24. It is indicative that Sir James Crosby, the former chief executive of HBOS who stewarded the bank to the brink of collapse before its bailout in 2008, received a knighthood for his services to the financial industry and served as Deputy Chairman of the Financial Services Authority (FSA) following his departure from the bank, until forced to resign in 2009. See PARL. COMM’N ON BANKING STANDARDS, ‘AN ACCIDENT WAITING TO HAPPEN’: THE FAILURE OF HBOS, 2012–13, H.L. 144, at 52 (U.K.), available at <http://www.publications.parliament.uk/pa/jt201213/jtselect/jtpebs/144/144.pdf>.

In the view of this Commission, it is right and proper that the primary responsibility for the downfall of HBOS should rest with Sir James Crosby, architect of the strategy that set the course for disaster, with Andy Hornby [his successor as Chief Executive Officer], who proved unable or unwilling to change course, and Lord Stevenson [the Chairman], who presided over the bank’s board from its birth to its death. Lord Stevenson, in particular, has shown himself incapable of facing the realities of what placed the bank in jeopardy from that time until now. Apart from allowing their Approved Persons status at HBOS to lapse as their posts were wound up, the FSA appears to have taken no steps to establish whether they are fit and proper persons to hold Approved Persons status elsewhere in the UK financial sector. In cases of this importance the Commission believes that simply allowing Approved Persons status to lapse is insufficient. The Commission therefore considers that the FSA should examine, as part of its forthcoming review of the failure of HBOS, whether these three individuals should be barred from undertaking any role in the financial sector.

Id. at 42–43.

25. Baldwin B. Bane, Chief, Sec. Div. of the Fed. Trade Comm’n, Address at the Annual Meeting of the American Society in Milwaukee, Wisconsin on the Securities Act of 1933 (Sept. 19, 1933), reprinted in THE CERTIFIED PUBLIC ACCOUNTANT 587, 592 (1933).

The New Deal remains the paradigmatic and most sophisticated holistic attempt to shift cultural mores by imposing external restraints on capital market governance. As with the contemporary manifestation of financial crisis, the New Deal architects were forced to confront questions associated with opacity and complexity in the design and marketing of financial products: how to embed restraint, and how to define and limit systemic risk. Despite the similarities in terms of scale and societal impact, there is one fundamental difference. In sharp contrast to the piecemeal reforms of today, the New Deal was based on a fundamental rethinking of corporate and regulatory purposes. Disentangling the ideational roots of these disputes, then and now, provides critical evidence as to why the New Deal was so transformational and why Libor and associated reform of too big to fail, shadow banking, and the derivatives market has, to date, proved so ineffective.

The vehicle to achieve this is a reappraisal of James M. Landis. An outstanding theoretician and practitioner of regulatory design, he was primarily responsible for the design and implementation of the disclosure paradigm.²⁶ Reaching into the history of market conduct is far from an esoteric exercise. It is critical to understanding current problems in the fields of public administration and socio-legal approaches to regulation in general. As Lambright and Quinn have highlighted,

[B]etter understanding of the practice of administrative leadership advances theory. Application of theory by those in positions of authority raises the level of practice. Reading about leaders who truly make a difference for others can inspire, teach, and help attract the best and brightest of a new generation to public service.²⁷

Indeed, it is an approach favored by Landis himself, as he pondered a return to Harvard after establishing and then leading the Securities and Exchange Commission.²⁸

26. John Braithwaite & Peter Drahos, *Globalisation of Corporate Regulation and Corporate Citizenship*, 3 FLINDERS J. L. REFORM 33, 56 (1999), reprinted in 2 INTERNATIONAL CORPORATE LAW ANNUAL 3, 25–26 (Fiona MacMillan ed., Hart Publ'g 2003) (describing Landis as a seminal scholar of regulatory strategy).

27. W. Henry Lambright & Madison M. Quinn, *Understanding Leadership in Public Administration: The Biographical Approach*, 71 PUB. ADMIN. REV. 782, 788 (2011).

28. James M. Landis, Chairman, U.S. Sec. & Exch. Comm'n., Address Before the Third Annual Eastern Law Students Conference at the Catholic University of America School of Law 1 (Mar. 20, 1937), available at <http://www.sec.gov/news/speech/1937/032037landis.pdf>. (“One grasps for shadow, the better to comprehend sunlight. One reaches into the past, more clearly to know today and tomorrow. It is the privilege of all who care about education to test the depth and quality of that shadow, for there, perhaps more than anywhere, one must try to pierce the brilliance of continuing dawns.”).

This paper is structured as follows. Part II examines the critical importance of Landis's work in providing practical and theoretical justification for state intervention in the regulation of securities markets. The review draws on a series of interviews Landis provided to the Columbia University Oral History Project.²⁹ Personal papers deposited with the Harvard Law School and Harvard University Archives, made available to scholars for the first time in January 2013, provide additional context that enrich our understanding of both the initial debates and their contemporary relevance. Part III details the extent of the corruption uncovered by the Libor investigation. Part IV sets out concrete steps capable of changing banking culture by revisiting the strategies initially used by Landis as both a practitioner and theoretician of regulatory policy. It is argued that revitalizing this approach provides the basis to restore much needed confidence in market conduct and in regulatory authority. Part V concludes.

II. JAMES M. LANDIS AND THE ADMINISTRATIVE PROCESS

An appreciation in the *Harvard Law Review* on his death in 1964 noted that James M. Landis was “‘on fire’ as a student. This may well be taken to epitomize his career.”³⁰ Landis was to become a critical architect of the Securities Act (1933), which governed new issuance, and the Securities Exchange Act (1934), which extended regulatory oversight to existing securities, demanded regular financial reporting, and mandated associational governance through the establishment of the Securities and Exchange Commission (SEC).³¹ He served on the SEC's inaugural board, becoming its chair following the departure of Joseph Kennedy in 1934, with the public endorsement of his predecessor.³² As Joseph Ken-

29. JAMES M. LANDIS, THE REMINISCENCES OF JAMES M. LANDIS (Oral History Collection, Columbia Univ. 1964).

30. Erwin N. Griswold, *James McCauley Landis—1899–1964*, 78 HARV. L. REV. 313, 313 (1964). “Surely a man who has done so much should be judged by the best that he can do; and Landis at his best was a great lawyer and legal scholar.” *Id.* at 316.

31. For biographies of Landis, see THOMAS K. MCCRAW, PROPHETS OF REGULATION (1984) and DONALD A. RITCHIE, JAMES M. LANDIS: DEAN OF THE REGULATORS (1980). On his death in July 1964, the *New York Times* noted he “‘achieved the rare distinction of being regarded as a conservative by liberals and as an extreme liberal by conservatives.” See *James M. Landis Found Dead in Swimming Pool at His Home*, N.Y. TIMES, July 31, 1964, at 1. For institutional history of the SEC, see JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE (3d ed. 2003).

32. *Landis Heads SEC; Succeeds Kennedy*, N.Y. TIMES, Sept. 24, 1935, at 35 (quoting Kennedy saying: “I see no reason in the world why any business interests need have the slightest misgiving that he will not give them the fairest and squarest deal a man can get. I would deem it an honor to have him as a trustee of anything I owned. He is thoroughly cognizant of the importance of the successful administration of these acts in helping to revive the business of the country”). It was to be a

nedly left the SEC headquarters, he interrupted Landis's first press conference by calling out, "Good-bye Jim. Good luck to you. Knock 'em over."³³ Landis authored an influential thesis on regulatory rulemaking, legitimacy, and authority that retrospectively provided theoretical justification for the proposition that law is made, not found.³⁴ Two decades later, he prepared a seminal study for the President-elect, John F. Kennedy, on how and why the regulatory apparatus he was so instrumental in designing, predicated on rule by experts, had failed.³⁵ Notwithstanding the personal tragedy of Landis's subsequent thirty-day imprisonment in August 1963 (commuted to hospitalization) and suspension from the New York Bar for failing to file income tax returns,³⁶ the Columbia in-

lifelong association. See DAVID NASAW, *THE PATRIARCH: THE REMARKABLE LIFE AND TURBULENT TIMES OF JOSEPH P. KENNEDY* 769 (2012) (noting appointment of Landis as special advisor to President-elect John F. Kennedy in 1960 and articulating that, next to family, Joseph Kennedy "trusted no one to watch out for his son as he did Jim Landis").

33. *Landis Heads SEC; Succeeds Kennedy*, *supra* note 32. The position allowed Landis to experiment with a regulatory design he had first articulated in 1931. Critical in this context was the decision on which "device for enforcement" is to be used. See James M. Landis, *The Study of Legislation at Law Schools: An Imaginary Inaugural Lecture*, 39 HARV. GRADUATES MAG. 433 (1931).

The criminal penalty, the civil penalty, the resort to the injunctive side of equity, the tripling of damage claims, the informers' share, the penalizing force of pure publicity, the license as a condition of pursuing certain conduct, the confiscation of offending property—these are the samples of the thousand and one devices that the ingenuity of many legislatures has produced. Their effectiveness to control one field and their ineffectiveness to control others, remains yet to be explored.

Id. at 437.

34. JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).

35. JAMES M. LANDIS, *REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT* (1960), available at http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1960/1960_1221_Landis_report.pdf; see also LANDIS, *supra* note 29, at 638 ("[R]outine business before these administrative agencies was much too heavy to permit them to do the broad kind of policymaking that was essential. They didn't have the power to delegate enough of their duties, so that they could keep, in a sense, their desks clean and their minds free to think about the major problems they faced."). The arguments foreshadowed many made by regulatory capture theorists. See George J. Stigler, *Public Regulation of the Securities Markets*, 37 J. BUS. 117 (1964). For review, see Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139 (2001).

36. Following an investigation by the Department of Justice, he was charged and sentenced to one month in prison and commuted to hospitalization. Edward Ranzal, *Landis Jailed for Tax Delays*, N.Y. TIMES, Aug. 30, 1963. He was subsequently suspended from practice. It was an ignominious end to an illustrious career. The most complete account to date can be found in VICTOR S. NAVASKY, *KENNEDY JUSTICE* 427–40 (1971); see also NICHOLAS DEB. KATZENBACH, *SOME OF IT WAS FUN: WORKING WITH RFK AND LBJ* (2008). In a promotional interview for the book, Katzenbach, who was the Deputy Attorney General at the time of the Landis prosecution, described it as something that had to be done (of which, he argued, Landis himself was aware and accepted) but that "did not amount to a row of beans." Interview by GOVERNINGworks with Nicholas deB. Katzenbach, former U.S. Att'y Gen. (Nov. 23, 2010), available at [http://bigthink.com/users/nicholaskatzenbach#!video_idea_id=5612](http://bigthink.com/users/nicholaskatzenbach/#!video_idea_id=5612). Katzenbach's video account, much more forceful and remorseful than the

interviews—read in conjunction with the recently released Harvard material, contemporary scholarly debates, and media interventions— provide a treasure trove that helps illuminate the past and provide a navigational aid to contemporary problems.³⁷

This material makes clear that in design and application, the normative question of *why* one regulates trumps the technical considerations of

written version, is predicated on the belief that politics can and does result in brutal outcomes. The political calculation is contained in a secret recording made by John F. Kennedy of a conversation with Katzenbach immediately prior to the admission of guilt:

JFK: If anybody ever gets the idea that the president's friends can get away with it . . . gosh I think it would be an awful morale cracker to the internal revenue, uh to taxpayers, the next time that anyone got arrested they'd say well what the hell about Landis?

NDK: That's right. That's right. I'm afraid that's right. But I don't think . . . I think we'd take it into court and it could done quickly . . . and . . .

JFK: How quickly and quietly could it be done?

NDK: It can't be done absolutely quietly but I think that if Dean [William] Warren [of Columbia Law School], who's his counsel, would cooperate, I think we could get it all over with maybe in one session.

Telephone Recordings: Dictation Belt 23D.5. James M. Landis and the IRS, JOHN F. KENNEDY PRESIDENTIAL LIBR. & MUSEUM (July 25, 1963), <http://www.jfklibrary.org/Asset-Viewer/Archives/JFKPOF-TPH-23D-5.aspx>. A deal was struck pursuant to which Landis would plead guilty, but the sentencing judge recused himself and was replaced by Chief Justice Sylvester Ryan. Katzenbach described imprisonment as an exercise in “judicial ego.” See KATZENBACH, *supra*, at 102. This claim was rejected by Chief Justice Ryan, who in 1981, maintained the verdict was fair, not cruel.

Cruel. What was so cruel? Here is a man who has enjoyed every advantage life can offer; while poor Irish and Jewish and Italian and colored kids were clawing their way out of the gutter, this guy was getting every break. Now, when he has been caught, the Government slobbers over him, the Dean of Columbia Law [William Warren] slobbers over him and everybody in the courthouse is falling over himself to make it easy for him. I had to do my duty and my duty was to show that Landis was no better than anyone else.

Milton Gould, *James M. Landis—Classic Case of Hubris*, N.Y. L.J. (Dec. 14, 1981) (quoting Chief Justice Ryan). This leaves unexplained the level of discrepancy as to why the initial judge recused himself. According to Navasky, it was based on a conflict arising from an association with Landis's law partner, Justin Feldman. NAVASKY, *supra*, at 437. The real reason, however, is more problematic. In an interview with the author, the prosecutor in the case, Robert Morgenthau, maintained the case was a tragedy of Greek proportions, with Landis's fate sealed when Thomas Corcoran, an exceptionally senior lawyer and close confidante of Oliver Wendell Holmes (for whom he clerked), Roosevelt, and Lyndon B. Johnson, went to the sentencing judge after the initial hearing to argue that the administration expected leniency. Chief Justice Ryan was informed of Corcoran's deliberate and inexcusable attempt to influence the outcome of the case. The Chief Justice, already personally slighted because the Kennedy Administration had previously passed him over for a vacancy in the Court of Appeals, was furious and determined to send a clear message to the administration. Interview with Robert Morgenthau, former U.S. Att'y, S. Dist. N.Y., in New York, N.Y. (Jan. 25, 2013). A full account is forthcoming in JUSTIN O'BRIEN, *A LIFE ON FIRE: THE TRIUMPH, TRAGEDY AND LOST LEGACY OF JAMES M. LANDIS* (forthcoming 2014).

37. See, e.g., *Landis Retiring*, *Reviews SEC Acts*, N.Y. TIMES, Sept. 10, 1937, at 33.

how one regulates. The critical argument advanced here is that unless this lost dimension is restored, regulatory intervention will be incapable of changing practice. Once again, progressing the regulatory agenda necessitates a deep awareness of the lessons of history. In this section we do so through a three-stage process: first, we trace the rationale for intervention; second, we detail the explicit normative foundation of the underpinning legislation; and third, we evaluate the basis on which this was theoretically justified.

A. *The Rationale for Intervention in Capital Markets*

For the progenitors of the original administrative state, the aim was not to operate within accepted paradigms—legal, institutional, and theoretical—but to destabilize them by creating an alternative reality, one that legitimated state intervention. Extending far beyond the narrow realm of banking and securities regulation, the New Deal was designed to recalibrate society itself through the guidance of neutral experts. The scale of the ambition, as outlined in Franklin D. Roosevelt’s speech accepting the Democratic nomination for the presidency in 1932, remains as breathtaking in its audacity as it is eerily apposite to contemporary problems in financial services:

Out of every crisis, every tribulation, every disaster, mankind rises with some share of greater knowledge, of higher decency, of purer purpose. Today we shall have come through a period of loose thinking, descending morals, an era of selfishness, among individual men and women and among Nations. Blame not Governments alone for this. Blame ourselves in equal share. Let us be frank in acknowledgment of the truth that many amongst us have made obeisance to Mammon, that the profits of speculation, the easy road without toil, have lured us from the old barricades. To return to higher standards we must abandon the false prophets and seek new leaders of our own choosing.³⁸

38. Franklin D. Roosevelt, Address Accepting the Presidential Nomination at the Democratic National Convention in Chicago, Illinois (July 2, 1932). The rhetoric intensified by the time of the inauguration:

The moneychangers have fled from their high seats in the temple of our civilization. We may now restore that temple to the ancient truths. The measure of the restoration lies in the extent to which we apply social values more noble than mere monetary profit. . . . [T]here must be an end to a conduct in banking and in business which too often has given to a sacred trust the likeness of callous and selfish wrongdoing. Small wonder that confidence languishes, for it thrives only on honesty, on honor, on the sacredness of obligations, on faithful protection, on unselfish performance; without them it cannot live.

The New Deal engendered debates that were as much political as judicial, practical as theoretical. They took place in the context of domestic industrial and financial failure and looming conflagration in Europe: the rise of the Soviet Union, the emergence of Fascism in Italy, and Nazism in Germany. Experience, experiment, and avowed faith in the rule of experts to solve the complexities of modern society underpinned a powerful interdisciplinary intellectual movement. Given the opportunity to simultaneously translate theory into practice and generate theory from practice, the crisis also revealed significant conceptual shortcomings in prior policy design.

The power to effect change was exponentially increased by the temporary fracturing of previously powerful electoral and ideational coalitions.³⁹ In the legal realm, it was informed by Justice Oliver Wendell Holmes's pithy comment that "the life of law has not been logic; it has been experience."⁴⁰ As with their economic counterparts, legal realists and pragmatists used the institutions created by the New Deal as a laboratory to explore how an alliance between government and business could best institutionalize restraint. The critical objective was not, however, the overthrow of capitalism or the financial system but rather credible, ongoing, and sustainable reform in which a regulatory authority could guide a

Restoration calls, however, not for changes in ethics alone. This Nation asks for action, and action now.

Franklin D. Roosevelt, U.S. President, Inaugural Address in Washington, D.C. (Mar. 4, 1933).

39. Academics played a critical role in this process, most notably Adolf A. Berle at Columbia University. Scholars have noted Berle's 1931 recruitment as a founding member of then-Governor Franklin D. Roosevelt's Brains Trust. See JORDAN A. SCHWARZ, *LIBERAL: ADOLF A. BERLE AND THE VISION OF AN AMERICAN ERA 70-75* (1987). Harvard University was also a critical source of ideas on the shaping of regulatory purpose; in particular, Felix Frankfurter was irritated by the degree to which Berle influenced economic policy. JAMES SRODES, *ON DUPONT CIRCLE: FRANKLIN AND ELEANOR ROOSEVELT AND THE PROGRESSIVES WHO SHAPED OUR WORLD 198* (2012). It is indicative of Frankfurter's standing that his elevation to the Supreme Court could be deemed a demotion. See Matthew Josephson, *Jurist—I*, *NEW YORKER*, Nov. 30, 1940. For Landis's criticism of Berle as too cautious, see LANDIS, *supra* note 29, at 237 (noting Berle's caution in relation to the establishment of the SEC, Landis recalled that "it was perfectly honest on the part of Berle, no question about that. It would not be fair to accuse him of trying to favor the other side. That would be the wrong way of looking at it. But the approach was that of gradualism, not jumping in headlong.").

40. OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881). For Holmes, "state interference is an evil, where it cannot be shown to be a good." *Id.* at 89. Holmes provided a signed copy to the British social scientist Harold Laski, who returned it via diplomatic pouch to Landis, then-Dean of Harvard Law School, for safekeeping. "What worries me is the irreplaceable loss that will occur if men lose the vision of liberty that alone has been the moving force to bring about the idea of civilization. To speak freely, to write freely and to think freely—give us these and we can rebuild our libraries; but if those liberties are destroyed, libraries are but recitals of a dead past which may not be inquired into." Letter from James M. Landis to Harold Laski (Oct. 28, 1940) (on file with Harvard University Archive, Dean's Office UAV.512.20: 1940-47, Correspondence Box 15).

given industry as a whole towards socially beneficial outcomes. As expected, it also prompted concern that democracy itself could be threatened.⁴¹ Roosevelt needed critical intellectual support in this battle of ideas, and it was no surprise that he turned to James M. Landis.

Landis was the critical figure in the academic and policy debates over the rise and justification for the administrative process.⁴² He was steeped in it as both an academic and a policymaker. As early as 1930, he had dismissed any restrictions on agency discretion as little more than an attempt to curtail the legitimate exercise of public power for the public good.⁴³ At the asking of his long-term confidant, professor Felix Frankfurter, to help the Roosevelt Administration transform an initial 1932 election pledge to regulate securities into credible legislation, Landis began a commute from Cambridge to Washington that was to transform the governance of Wall Street and American society through the auspices and example of the SEC.

Putting into practice the ideas developed in his innovative course on legislation at Harvard, he became one of the most significant policy actors of his generation (and arguably in the history of regulatory design). Landis stewarded the agency through early legitimacy and accountability firefights with the financial sector, showing as much acumen in navigating the complexity of political contingency and judicial gamesman-

41. These pressures intensified as the United States made preparations for entry into World War II, fracturing old alliances in the process. Typical, for example, was an exchange between Senator Burton Wheeler and Landis: "I am quite frank in saying to you, that I cannot understand how any intelligent person, including yourself, can possibly be for giving these wide powers to the President. . . . For College professors and Dean's [sic] to [be] taking steps that will inevitably lead to totalitarianism in the name of saving Democracy indicates to me that our republican form of Government is on the way out. If they have not the courage to stand up and try to preserve Democracy in times of a crisis, or an alleged crisis, how can they expect the uneducated to do so." Letter from Burton Wheeler to James Landis (Feb. 4, 1941) (on file with Harvard University Archive, Dean's Office UAV.512.20: 1940-47, Correspondence Box 24). For a discussion of competing ideational perspectives, see IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIMES* 29-57 (2013).

42. Landis "persistently emphasized the necessity of using all the incentives potentially inherent in the industry to give every person involved—executive, accountant, broker, banker—a stake in helping to enforce the law." MCCRAW, *supra* note 31, at 172. Landis gave an explicit justification of associational endeavors, noting that increased complexity calls "for greater surveillance by government of the appropriate use of these resources to further the admittedly dim but recognizable aims of our society." LANDIS, *supra* note 34, at 4; *see also* Braithwaite & Drahos, *supra* note 26, at 56 (noting the "regulatory genius" of the partnership model).

43. James M. Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886 (1930); for a critique of Landis's approach, see Ronald J. Pestritto, *The Progressive Origins of the Administrative State: Wilson, Goodnow, and Landis*, 24 SOC. PHIL. & POL'Y 16, 26-37 (2007).

ship as in legislative drafting.⁴⁴ Although the enforcement methods used by the SEC had come under attack from a Supreme Court and a legal profession deeply troubled by the expansion of the administrative rule, the agency had been deemed constitutional, if potentially dangerous. In *Jones v. SEC*, a case that ostensibly centered on subpoena power over withdrawn securities offerings, the Supreme Court had publicly questioned the methods used by the SEC. Justice Sutherland noted that its demands were both wholly arbitrary and unreasonable, invoking by analogy the notorious Star Chamber.

Arbitrary power and the rule of the Constitution cannot both exist. They are antagonistic and incompatible forces; and one or the other must of necessity perish whenever they are brought into conflict. . . . Our institutions must be kept free from the appropriation of unauthorized power by lesser agencies as well. And if the various administrative bureaus and commissions, necessarily called and being called into existence by the increasing complexities of our modern business and political affairs, are permitted gradually to extend their powers by encroachments—even petty encroachments—upon the fundamental rights, privileges and immunities of the people, we shall in the end, while avoiding the fatal consequences of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guaranties.⁴⁵

Tracing the rationale from the initial framing of the Securities Act (1933) and Securities Exchange Act (1934) to the publication of *The Administrative Process* (1938) indicates the centrality of specifying regulatory purpose. Specificity was essential in legitimizing a new approach

44. JAMES BURK, VALUES IN THE MARKETPLACE: THE AMERICAN STOCK MARKET UNDER FEDERAL SECURITIES LAW 43 (1988).

45. *Jones v. SEC*, 298 U.S. 1, 24–25 (1936). Dissenting, Justice Cardozo noted: [A] commission which is without coercive powers, which cannot arrest or amerce or imprison though a crime has been uncovered, or even punish for contempt, but can only inquire and report, the propriety of every question in the course of the inquiry being subject to the supervision of the ordinary courts of justice, is likened with denunciatory fervor to the Star Chamber of the Stuarts. Historians may find hyperbole in the sanguinary simile. *Id.* at 33 (Cardozo, J., dissenting). Correspondence between Felix Frankfurter and Supreme Court Justice Harlan Stone revealed profound skepticism with this reasoning. According to Frankfurter, “Sutherland writes as though he were still a United States senator, making partisan speech.” Chief Justice Stone was even more caustic in reply; the judgment, he maintained, “was written for morons, and such will no doubt take comfort from it.” Mark Tushnet, *Administrative Law in the 1930s: The Supreme Court’s Accommodation of Progressive Legal Theory*, 60 DUKE L.J. 1565, 1608 (2011) (quoting an exchange of letters dated April 7, 1936, on file with Harvard Law School Special Collections Library).

to governance. It was predicated on a dual interlocking framework. First, it limited the grounds for judicial challenge on constitutionality grounds. Second, it limited suspicion of the exercise of arbitrary power. Rules and decisions would only be developed on the basis of rigorous evaluation. Within this framework, the specific forms of disclosure were designed to inform the investing public of actual practice. So doing, it was argued, made it possible to incrementally change the boundaries of what could be considered as acceptable in any given market. The entire approach was predicated on industry's acceptance of responsibility for past excesses and a concomitant mindfulness in the exercise of leadership in the aftermath of the exposure of past deficiencies. Within this context, the abiding strength (and limitations) of the Landis approach to governance becomes clear.

The combination of elite wisdom and capacity to both capture and utilize populist sentiment to nudge discourse and practice necessitates demonstrable evidence of judgment, courage, and integrity. At the heart of the compromise lies an uneasy compact on how to evaluate such expertise. In the initial framing, this was conceived as the remit of impartial career-driven bureaucrats, prepared to forgo personal material advancement in exchange for societal improvement. This conception's critical flaw, however, is exposed when claims to expertise are evaluated according to different normative criteria. This shift and implications for regulatory design, legitimacy, and authority are explored more fully below. First, however, it is essential to highlight the ingenuity of the design.

B. The Normative Foundations of the Disclosure Paradigm

Primary responsibility for the 1932 electoral promise to introduce securities regulation was initially given to Houston Thompson, a former Federal Trade Commissioner, whose carriage of it was, according to Landis, "a complete debacle."⁴⁶ The problem was that rather than implementing "what Mr. Roosevelt had set forth in his message [in his electoral pledge, Thompson] sought to introduce a standard of qualification." As Landis observed, "[B]y qualification I mean that some federal agency would determine whether securities themselves, no matter how truthfully they might be described, could nevertheless not be sold on the basis that

46. LANDIS, *supra* note 29, at 158.

they didn't meet certain standards of qualification. These standards were never well described."⁴⁷

For Landis, such an approach—based on the very predilections and bias he identified in the decisions of the Supreme Court from *Lochner* onwards—was doomed to fail. Poor drafting and excessive deference combined to make the approach unworkable. Landis reasoned,

It was a terribly poorly drafted piece of legislation. In the first place it didn't carry out the President's ideas. In the second place, it introduced sanctions and responsibilities on the federal government for the quality of securities that were being sold, which even today [1963] I don't believe the federal government and I don't believe even a state agency ought to exercise.⁴⁸

This reasoning represented a clear limit to what regulators should do. As Landis explained it,

[M]y fundamental belief is that if the truth is told about these things, then it is up to the parties to decide whether they want to buy them or not. If they want to buy them, and speculate, well, let them go ahead and speculate. I've always felt that the furthest that practical administration could go was to call for a statement of the truth about any enterprise; but that some governmental agency should say you shouldn't buy stock in ABC company—I don't know who can decide a thing like that.⁴⁹

47. *Id.* at 157. "Brandeis said to me, 'Houston Thompson has every great quality that makes a great lawyer, except one. He's got a great bearing, he's got a good presence.' I said, 'What quality does he lack, Mr. Justice?' Brandeis replied, 'Brains.'" *Id.*

48. *Id.*

49. *Id.* at 158. It was a formulation that was to stand the test of time. "A fundamental purpose, common to these statutes, was to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry." SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963). This necessitates, however, balancing valid and spurious claims. See O'BRIEN, *supra* note 5, at 66–67 (citing Judge Milton Pollack's argument that the federal securities laws are not meant "to underwrite, subsidize and encourage . . . rash speculation in joining a free-wheeling casino that lured thousands obsessed with the fantasy of Olympian riches but which delivered such riches to only a scant handful of lucky winners." *In re Merrill Lynch & Co.*, 273 F. Supp. 2d 351, 358 (S.D.N.Y. 2003)). Increasingly, however, there are suggestions that the SEC should be given the power to ban either specific products or access to them. See Saule T. Omarova, *From Reaction to Prevention: Product Approval As a Model of Derivatives Regulation*, 3 HARV. BUS. L. REV. 98 (2013), available at <http://www.hblr.org/?p=3111>; see also Saule T. Omarova, *License to Deal: Mandatory Approval of Complex Financial Products*, 90 WASH. U. L. REV. 63, 113–33 (2012). For comparative review of how this is achieved with pharmaceutical products, see DANIEL CARPENTER, REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA (2010).

None of this is to suggest that Landis was in any way either enamored by or trustful of Wall Street; rather, his strategy was based on explicit enrollment and a sustained attempt to leverage the restraining power of reputation, a commodity that had been devalued by certain sections and practices of the financial industry. Reliance on truth and reputation were narrower and more easily communicable frameworks. In conjunction with Benjamin Cohen, another Frankfurter connection, and assisted by Tommy Corcoran, a Wall Street veteran, brilliant academician, and consummate lobbyist, the trio “knocked this thing out in two days.”⁵⁰ “This thing” was to be the initial draft for the Securities Act (1933), on which Cohen and Landis were to serve as consultants under the direction of the legislative draftsman of the House of Representatives, Middleton Beaman. Landis’s taped interviews provide a revealing insight into how the process unfolded:

For two days, Beaman wouldn’t allow you to put a pencil to paper. He wanted you to know just exactly what you wanted to do, before you started writing. I know that both Cohen and I were a little suspicious of him, as to whether he didn’t want to kill this whole thing, with all these dilatory tactics. But within four or five days, we began to appreciate his work and his method of approach. I guess we worked for three or four weeks perfecting the draft, and with his help . . . we put this thing together. In my opinion and the opinions of a great many other people, it’s about as good a piece of legislative draftsmanship as you can find in federal legislation.⁵¹

Soon after the law was enacted, Landis was called upon to return to Washington as a consultant to the Federal Trade Commission, where he found the agency “had no conception about how to administer this Act. . . . They had no sympathy with this legislation. It was pretty much dammed by Wall Street and regarded as one of these crackpot New Deal measures.”⁵² Subsequently promoted to commissioner, Landis recalled an early meeting with Roosevelt, during which the President recounted that “the Republicans never want to do anything, so they’re always united. But we Democrats want to do things, and we get disunited in wanting to do things.”⁵³ Thereafter, according to Landis, he assumed leadership: “I didn’t bother him. I mean I assumed the responsibility of deciding

50. LANDIS, *supra* note 29, at 160.

51. *Id.* at 162–63.

52. *Id.* at 173.

53. *Id.* at 178.

things that I felt I had the right to decide.”⁵⁴ As Landis recounts the history of the passage of the Securities Exchange Act (1934), the extent of that delegation becomes clear. Along with Ferdinand Pecora, whose congressional investigations had created the contingency for fulfilling electoral pledges in relation to regulating securities, separating investment and commercial banking, and replacing *caveat emptor* with a disclosure philosophy,⁵⁵ Landis was invited to the White House:

Roosevelt met us—well he was in bed when he interviewed us, gave us an interview. He had stacks of papers around him, I know. I recall that. Well Ferdi didn’t know anything about the Boss. Great investigator the guy was, really a great investigator, but from the standpoint of a creative artist, he just didn’t have that quality. Of course, we built on his work. We built completely on his work. But he just doesn’t have that quality of putting together the work in the form of draft legislation. But we both went up to him, to see the President and the President asked a few questions about the bill. I don’t think we spent more than 20 or 30 minutes. We covered this, we covered that—quite intelligent questions—and he hadn’t read the bill. Then he said, ‘All right. Go ahead.’⁵⁶

Landis was always alert to the possibility that congressional amendments were in fact traps for the unwary. For example, proposed amendments in the Senate to the corporate “death sentence” provision of the Public Utility Holding Company legislation were ostensibly designed to provide the SEC additional discretion on whether to exercise that power. For Landis, however, the reforms would have made it “completely impossible for any commission to administer a statute of that nature because the pressures on the commission should be insufferable. Physical standards such as were proposed—that was capable of administration. But to draw a distinction between good and bad holding companies

54. *Id.* at 187. For Landis it was only through experimentation that effective policy could be implemented. In a 1937 speech in Philadelphia, he argued, “[B]roadly speaking[,] the problems of legislation and administration divide themselves into two phases. The first relates to the determination of what policies to pursue; the second to the discovery of how to make the chosen policies effective.” MCCRAW, *supra* note 31, at 202.

55. MICHAEL PERINO, *THE HELLHOUND OF WALL STREET: HOW FERDINAND PECORA’S INVESTIGATION OF THE GREAT CRASH FOREVER CHANGED AMERICAN FINANCE* 292–94 (2011) (noting how the Securities Exchange Act had finally put a cop on Wall Street).

56. LANDIS, *supra* note 29, at 199. This freedom to act is a constant refrain in the reminiscences. Recalling another meeting, Landis noted, “[H]e might not have helped you at all. He might have just thrown the problem right back at you. The feeling of joviality that he gave you, the stimulation and what not—then you’d go back and solve the damn problem yourself, without too much advice from the President.” *Id.* at 244.

seemed an impossible thing.”⁵⁷ Again, here is evidence of good regulatory design: clearly enunciated legislative power linked to equally clear objectives, and discretion only applied after careful and intensive scrutiny that was capable of surviving legal challenge. Throughout his career, Landis was determined to ensure flexibility without subjecting the agency to accusations of economic or ideological bias—a leitmotif that underpins his book *The Administrative Process* (1938), the retrospective theoretical justification for what amounted to a new form of government. It remains the defining text of the field.⁵⁸ An evaluation of its conceptual framing provides regulators and scholars with a roadmap for navigating the Libor and associated scandals, which are merely contemporary manifestations of long-standing problems.

C. *The Legitimacy of the Administrative Process*

As with *The Modern Corporation and Private Property* (1932), the classic Berle and Means treatise on the implications of the separation of ownership and control in major corporations, Landis’s book was designed to inform an increasingly polarized debate over corporate purpose and responsibility.⁵⁹ Its central premise and critical thrust was to position

57. *Id.* at 217.

58. Landis dedicated *The Administrative Process* to Senator Sam Rayburn, the charismatic Democrat who facilitated the passage of the securities legislation. The gesture was greatly appreciated by the lawmaker. “It will remain of course one of my very prized possessions as my admiration of the author is as much as it should be for any man and to have you dedicate this volume to me is an honor that I will appreciate to my last day.” Letter from Senator Sam Rayburn to James M. Landis (Sept. 26, 1938) (on file with Harvard University Archive, Dean’s Office UAV.512.20: 1937–39, Correspondence Box 4).

59. Landis wrote to Professor Paul Sayre: “Some day I hope I can get time to really explore and extend some of the ideas that were there advanced in a rather tentative manner, or better, I hope that someone else will do it.” Letter from James M. Landis to Professor Paul Sayre, University of Iowa Law School (Feb. 14, 1939) (on file with Harvard University Archive, Dean’s Office UAV512.20: 1937–39, Correspondence Box 5). It is important to note, however, that notwithstanding the intensity of the debate, there was acceptance from within the business world that Landis had generated an original third way:

I have read with a great deal of interest and profit your lectures, [published as] *The Administrative Process*. . . . Your explanation of the place in Government of commissions would go a long way towards eliminating some of the misunderstandings in regards to their functions. I am particularly impressed with the emphasis you develop as a basic principle underlying the Administrative Process to take care of and foster and develop the well being of the industry over which it has jurisdiction. . . . Investors cannot have much confidence in going into public utilities or other securities if they have the feeling, whether or not justified, that Government agencies are giving more attention to policing and punishing than to fostering.

regulatory lawmaking as an essential precondition for democracy.⁶⁰ In a critical passage Landis argued,

[I]f the doctrine of the separation of power implies division, it also implies balance, and balance calls for equality. The creation of administrative power may be the means for that balance, so that paradoxically enough, though it may seem in theoretic violation of the doctrine of the separation of power, it may in matter of fact be the means for the preservation of the content of that doctrine.⁶¹

Letter from Frank Scheffey, Co-Dir. of Investment Banking Conference, to James M. Landis (Jan. 16, 1939) (on file with Harvard University Archive, Dean's Office UAV512.20: 1937-39, Correspondence Box 5). Landis replied on January 25, 1939:

[T]he quarrel that I have with some of the administrative process is that many of the administrators think of their duties purely in terms of police. A person of George Mathews' [an original SEC commissioner] stamp was not only a sincere and courageous policeman, but he readily saw that to leave any permanent impress upon the industry something would have to be done to get into the inside of it as well as the outside. I only hope that the small efforts we participated in in this connection won't go completely on the rocks.

Letter from James M. Landis to Frank Scheffey (Jan. 25, 1939) (on file with Harvard University Archive, Dean's Office UAV512.20: 1937-39, Correspondence S-Z Box 5).

60. For his critics, foremost among them his predecessor as Dean of Harvard Law School, Roscoe Pound, the rise of the administrative state was something to be feared. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 219 (1992). The political disagreements were matched by personal rivalries. Landis noted that "faculty politics is about as dirty politics as can evolve." LANDIS, *supra* note 29, at 150-51. He also wrote:

[I]t is curious how much the New Deal has been tied in with the development of administrative law and how frequently men who damn it are really doing so because they hate to see effective instrumentalities evolve to achieve the policies of the New Deal. Pound's attacks, for example, seem to me to have two prime sources: one of them is a Republicanism that saw no good in the rise of populism despite the scholarly mind that knew it was inevitable, and the second is an experience with the administration of prohibition. I often tell my class that they have to discount my views on administrative law because they have been formulated as a result of contact with fairly high level commissions, but for the same reason they must discount Pound's ideas because they have been fashioned out of experiences with prohibition agents, than which I suppose it would be difficult to get a lower class of administrative officials.

Letter from James M. Landis to Walter Gellhorn, Columbia Law School (Feb. 22, 1946) (on file with Harvard University Archive, Dean's Office UAV.512.20: 1940-47, Correspondence Box 11).

61. LANDIS, *supra* note 34, at 46. For contemporary review, see Chester Rorhlich, *Business Administration and the Law*, N.Y. TIMES, Oct. 16, 1938 (noting support for Landis's admonition that "governmental administration should be determined by needs rather than numerology"). Academic colleagues had noted that the book was, in fact, a manifesto. On the lectures that were to be published as *The Administrative Process*, the Dean of Yale Law School, Charles Clark, wrote that "they state positively, with force and reasoned argument, what to date has been so generally said only by way of defense from attacks. I think they well might prove a Bible for the Washington departments." Letter from Charles Clark, Dean of Yale Law School, to James M. Landis (Jan. 27, 1938) (on file with Harvard University Archive, Dean's Office UAV.512.20: 1940-47, Correspondence Box 9).

Therefore, for Landis the rise of the administrative state was an exercise in modernization, legitimated by “the inadequacy of a simply tripartite form of government to deal with modern problems.”⁶²

Landis believed that legitimacy originated in how the initial grant of authority was framed. This grant must “specify not only the subject matter of the regulation but also the end which the regulation seeks to attain.”⁶³ Once delegated, regulatory rulemaking, like law itself, was merely “an instrument, or a social institution, if you will for the advancement of the health of society as a whole.”⁶⁴ According to legal historian Jessica Wang, the formulation “reflected legal pragmatism’s view of law as a process and ongoing experiment, rather than a set body of rules.”⁶⁵ Landis considered it a much more complete agenda. “The expansion of regulatory activity is, of course, the most outstanding characteristic of the nature of twentieth century governmental development,” which is founded on the “creation rather than the restriction of liberties,” he wrote in 1939.⁶⁶

This framing was a critical response to a concerted campaign led by the American Bar Association to defenestrate the commissions.⁶⁷ This campaign ended only with the passage of the Administrative Procedure Act (1946), which opened regulatory decision making to extensive judicial review.⁶⁸ By that stage, however, Landis had already faced an existential moment in handling the deportation hearing for Harry R. Bridges at Angel Island in San Francisco Bay, a hearing that tested and demon-

62. LANDIS, *supra* note 34, at 1; *see also* Edward L. Glaeser & Andrei Shleifer, *The Rise of the Regulatory State*, 41 J. ECON. LITERATURE 401 (2003). “The regulation of markets was a response to the dissatisfaction with litigation as a mechanism of social control of business.” *Id.* at 402.

63. LANDIS, *supra* note 34, at 51.

64. Jessica Wang, *Imagining the Administrative State: Legal Pragmatism, Securities Regulation, and New Deal Liberalism*, 17 J. POL’Y HIST. 257, 264 (2005) (citing a letter sent by Landis to Harvard colleague Sidney Simpson on May 27, 1936).

65. *Id.* at 265. The following chairmen of the SEC, William O. Douglas and Jerome Frank (both of whom were academic lawyers), mirrored this approach, taking a much more aggressive view of enforcement. Wang underplays the extent to which Landis was constrained by initial legitimacy battles. Without clearing the space, it is unlikely that Douglas could have adopted his more aggressive approach.

66. James M. Landis, *Law and the New Liberties*, 4 MO. L. REV. 105, 106 (1939).

67. AMERICAN BAR ASS’N, *THE ABA REPORT OF THE SPECIAL COMMITTEE ON ADMINISTRATIVE LAW* 331–68 (1938).

68. *See* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996); *see also* HORWITZ, *supra* note 60, at 230–33.

strated his integrity and the strength of the paradigm of administrative law.⁶⁹

Thus, the battle over the authority to intervene was fought and won as early as 1937. Ongoing deference to agency power has been recognized in cases that date back to the 1940s, and it was definitively ruled upon in 1984 in the landmark *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* ruling.⁷⁰ Judicial deference to agency interpretations was based on pragmatism. Courts would give deference to agency interpretations depending upon “the thoroughness evident in [the agency’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”⁷¹ Additionally, courts looked to see if the agency opinion had “warrant in the record and a reasonable basis in law.”⁷² Accordingly, while some deference was accorded to agencies, the amount of deference varied considerably, based on the facts surrounding the interpretation.⁷³ *Chevron* changed the basis for deference. It laid out a two-step process for determining the validity of an

69. JAMES M. LANDIS, IN THE MATTER OF HARRY R. BRIDGES: FINDINGS AND CONCLUSIONS OF THE TRIAL EXAMINER 133 (1939) (“That Bridges’ aims are energetically radical may be admitted, but the proof fails to establish that the methods he seeks to employ to realize them are other than those that the framework of democratic and constitutional government permits.”). Charles Wyzinski wrote to Landis:

Quite apart from the political and social factors[,] which made this case so important in the history of this country, this report is certain to become famous as an example of the administrative process as a whole. There is perhaps no task more difficult for a lawyer, or judge than to make an impartial statement of facts in a case where emotion runs high, perjury abounds and economic and social forces clash. But you have done it. And every citizen has reason to be grateful not merely for your labor, but more particularly for the sacrifice of your personal interests which the job involved.

Letter from Charles Wyzinski to James M. Landis (Dec. 10, 1940) (on file with Harvard University Archive, Dean’s Office UAV.512.20: 1940–47, Correspondence Box 24); *see also* Letter from James M. Landis to Julius Smith (Feb. 8, 1940) (on file with Harvard University Archives, Dean’s Office UAV.512.20: 1940–47, Correspondence Box 21) (“I do not think that our Administrative agencies are best manned by men who do not believe in the content of the rights which it is their sworn duty to maintain. I make no claim—and I think that is clear from my writings—that officials of the Labor board, to take a specific example, should be partial to employees as against employers; I do claim that officials of the Labor Board should be zealous in their sworn duty to maintain the right to collective bargaining against unfair, labor practices. Yet it is the former you accuse me of, not the latter.”).

70. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

71. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

72. *Nat’l Labor Relations Bd. v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 131 (1944) (citing *Rochester Tel. Corp. v. United States*, 307 U.S. 125 (1939)).

73. “The decision whether to grant deference depends on various attributes of the agency’s legal authority and functions and of the administrative interpretation at issue.” Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 562 (1985).

agency's statutory construction.⁷⁴ First, if Congress's intent in enacting a statute is clear, then the court must ensure that the agency has given effect to that unambiguously expressed intent.⁷⁵ If, however, a statute is silent or ambiguous with respect to the specific issue, then a court must apply a second step, which is to ask whether the agency's interpretation is based on a permissible construction of the statute.⁷⁶

In developing its two-step framework, the Court articulated three reasons to justify its decision to defer to the agency: implicit delegation,⁷⁷ agency expertise,⁷⁸ and political accountability.⁷⁹ First, with respect to the "implicit delegation" rationale, the Court reasoned that with the power to administer a congressionally created program comes the power to formulate policy and make "rules to fill any gap left, whether implicitly or explicitly, by Congress."⁸⁰ When Congress explicitly leaves a gap for an agency to fill, the agency's interpretation controls so long as it is not arbitrary, capricious, or manifestly contrary to the statute.⁸¹ When delegation is implicit, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."⁸² This interpretation effectively expanded the powers of legitimate agency rulemaking. Second, while the Court had previously alluded to "agency expertise" in the decisions of *Skidmore* and *Hearst*,⁸³ in *Chevron* it clarified that "[j]udges are not experts," at least not in these technical areas.⁸⁴ Agency personnel are highly qualified to make technical determinations and are charged with making these determinations.⁸⁵ Regardless of whether Congress actually intended to delegate to the agency, it simply makes sense to defer to such expertise.⁸⁶ Third, the Court was of the view that the Executive, unlike the Judicial

74. *Chevron*, 467 U.S. at 842–43.

75. *Id.*

76. *Id.* at 843.

77. *Id.* at 844.

78. *Id.* at 865.

79. *Id.*

80. *Id.* at 843.

81. *Id.* at 843–44.

82. *Id.* at 844.

83. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 137–38 (1944) (opining that the agency administrator had "accumulated a considerable experience in the problems" that the agency faced); see also *Nat'l Labor Relations Bd. v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 130–31 (1944) (commenting that administrators had the benefit of "[e]veryday experience in the administration of the statute," which "gives it familiarity with the circumstances and backgrounds of employment relationships").

84. *Chevron*, 467 U.S. at 865.

85. *Id.*

86. *Id.*

Branch of government, is accountable to the public.⁸⁷ It is therefore more appropriate for the political branch of the government to resolve conflicting policies “in light of everyday realities.”⁸⁸ In a pointed reference, the Court held that “[f]ederal judges, who have no constituency, have a duty to respect legitimate policy choices made by those who do.”⁸⁹ The reasoning and logic mirrors the rationale first outlined by Landis in the maelstrom of the battle over the constitutionality of the administrative process, but it is a logic that the recent jurisprudence of the D.C. Circuit in particular appears to have disregarded. However, deference to regulatory authority is only half of the story. The other half is how the regulatory agency deploys that deference.

The exercise of regulatory power has a large impact on the extent to which the agency enjoys bipartisan political or broader community support. This is determined in part by the performance of the market and in part by the accountability of the agency. Here again, revisiting Landis’s thought and practice on regulatory design pays dividends, most notably his work as a hearing examiner in 1940 in which he faced an existential choice between bowing to populism or demonstrating the efficacy of independence, based on integrity and evidence.⁹⁰ The manner in which

87. *Id.*

88. *Id.* at 865–66.

89. *Id.* at 866. However, the recent activism of the Court of Appeals for the District of Columbia against SEC rulemaking questions the stability of this framework:

By substituting its own policy judgment for that of Congress, the D.C. Circuit threatens not just the ability of administrative agencies to formulate regulatory policy, but also the ability of Congress to direct agency policymaking. Explicit congressional determinations regarding regulatory policy warrant greater judicial deference than the courts have given to them.

Jill E. Fisch, *The Long Road Back: Business Roundtable and the Future of SEC Rulemaking*, 36 SEATTLE U. L. REV. 695, 698 (2013).

90. This was explicitly recognized by the two men who helped draft the original framework—Benjamin Cohen and Thomas Corcoran. *See, e.g.*, Letter from Benjamin Cohen to James M. Landis (Jan. 18, 1940) (on file with Harvard University Archive, Dean’s Subject Files, UAV.512.25: 1932–1946, Benjamin Cohen [1937–1940], Box 2) (“As I wrote you last summer, I thought it was a fine and courageous thing for you to take on, a job which was bound to involve stepping on a number of toes. Nonetheless you have done it with rare distinction and I think it should give you great satisfaction to know you have performed a most difficult public service with superb tact, skill and ability.”); *see also* Letter from Thomas Corcoran to James M. Landis (Jan. 11, 1940) (on file with Harvard University Archives, Dean’s Subject Files UAV.512.25: c. 1932–1946, 1937–1940, Box 2) (“I do want to tell you belatedly, just to relieve the monotony of the brickbats I suppose you’ll get for months that I think your courage to speak the truth in the Bridges matter was worthy of you and the hopes of many of us in you and the traditions of the greatest job in the United States which you now hold [as Dean of Harvard Law School]. The more I see of these shifting sands and the endless irreconcilability of political ambition, the more I know you were a million times wise in choosing to build where you were entirely your own master.”).

Landis handled the investigation and the clarity of his final report was essential to demonstrate the efficacy of the administrative process, secure its legitimacy, and uphold the rule of law.⁹¹ All of this poses a critical question: What happened to the New Deal paradigm?

The shorthand answer is that definitions of expertise have changed, and the lack of meaningful acceptance by industry of the moral obligations associated with the disclosure paradigm has brought us to a tipping point. However, this is not new. Indeed, it was evident as early as 1960 and was identified by Landis himself in what was to be his last public intervention in regulatory politics. In late 1960, Landis provided an extraordinary report to President-elect John F. Kennedy.⁹²

The report highlighted both the ambition and the intrinsic flaws associated with the delegation of discretion. The policy problem was that once authority was ceded, it became impossible to limit or retract. Indeed,

91. There are contemporary and uncanny resonances in the exercise of discretion in the dispute between Judge Jed Rakoff and the SEC regarding the SEC's preference for resolving disputes through settlements instead of litigation. See *SEC v. Bank of Am. Corp.*, 653 F. Supp. 2d 507, 510 (S.D.N.Y. 2009), in which Judge Jed Rakoff described the proposed settlement in relation to the claim that Bank of America had misled investors over the payment of bonuses to executives within Merrill Lynch as "a contrivance designed to provide the S.E.C. with the facade of enforcement and the management of the Bank with a quick resolution of an embarrassing inquiry." Judge Rakoff reluctantly signed off on the settlement, citing judicial restraint but stating that the settlement was "half-baked justice at best." *SEC v. Bank of Am. Corp.*, No. 09 Civ. 6829, 2010 WL 624581, at *5 (S.D.N.Y. Feb. 22, 2010). This settlement of \$2.43 billion was preceded by a similar derivative suit settled in May 2012 for \$20 million. Peter J. Henning & Steven M. Davidoff, *For Bank of America, More Trouble from Merrill Lynch Merger*, N.Y. TIMES (Sept. 28, 2012), <http://dealbook.nytimes.com/2012/09/28/the-cost-of-putting-the-merrill-lynch-merger-behind-it/>. Similar frustration has been voiced by Judge Ellen Segal Huvelle who refused to endorse a \$75 million fine agreed by Citigroup to settle charges that the bank had misled investors over its sub-prime exposure. See Kara Scannell, *Judge Won't Approve Citi-SEC Pact*, WALL ST. J. (Aug. 17, 2010), <http://online.wsj.com/article/SB10001424052748704868604575433833841630548.html> ("I look at this and say, 'Why would I find this fair and reasonable?' . . . You expect the court to rubber-stamp, but we can't."). See generally Binyamin Appelbaum, *U.S. Judges Sound Off on Bank Settlements*, N.Y. TIMES, Aug. 23, 2010, at B1, available at <http://www.nytimes.com/2010/08/24/business/24judges.html> (noting broader opposition to recent settlements proposed with Barclays, Citigroup, and Bank of America); for recent media coverage of Rakoff's dispute with the SEC, see *Rakoff's Revenge: Rejection of Settlements for Financial Institutions Are Catching On*, ECONOMIST, Apr. 13, 2013, available at <http://www.economist.com/news/finance-and-economics/21576132-rejections-settlements-financial-institutions-are-catching-rakoffs>. For a discussion of wider risks to regulatory authority, see Justin O'Brien, *The Façade of Enforcement: Goldman Sachs, Negotiated Prosecutions, and the Politics of Blame*, in *HOW THEY GOT AWAY WITH IT: WHITE COLLAR CRIMINALS AND THE FINANCIAL MELTDOWN* 178 (Susan Will et al. eds., 2012).

92. SUBCOMM. ON ADMIN. PRACTICE & PROCEDURE, SENATE COMM. ON THE JUDICIARY, 86TH CONG., REP. ON THE REGULATORY AGENCIES TO THE PRESIDENT-ELECT (Comm. Print 1960).

[O]n the contrary, the tendency is to expand them as more and more complex problems arise. The legislative standards under which the delegations are made are similarly increasingly loosened so that not infrequently the guide in the determination of problems that faces the agencies is not much more than their conception of the public interest.⁹³

Landis, however, maintained that delegation was necessary and rendered even more persuasive given the increased complexity of modern society, the incapacity of Congress to devote the time or the resources to deal with them, and a conviction that “the issues involved were different from those that theretofore had been traditionally handled by courts and thus were not suited for judicial determination.”⁹⁴

Landis further warned Kennedy that, in sharp distinction to the optimism that accompanied the New Deal, the “fires that then fed a passion for public service have burned low.”⁹⁵ He attributed this to rising cynicism, unacceptable delays, increased costs, and deterioration in the quality of staffing:

[The] prevalence is threatening to thwart hope so bravely held some two decades ago by those who believed that the administrative agency, particularly the ‘independent’ agency, held within it the seeds for the wise and efficient solution of the many new problems posed by a growingly complex society and a growingly benevolent government.⁹⁶

Urgent action was required because “the spark, the desire of public service, has failed of re-ignition.”⁹⁷

Complaining of sinecures and the power of practitioners to gain privileged off-the-record access to senior commission staff, Landis foreshadowed many of the recurrent problems associated with the regulatory capture literature.⁹⁸ Landis also complained bitterly about the failure to address foreseeable problems. Absent such planning, the need for ad hoc solutions to the particular manifestations of the problem precedes and,

93. *Id.* at 4.

94. *Id.*

95. *Id.* at 9.

96. *Id.* at 6.

97. *Id.* at 10.

98. The concern about moral rectitude of regulatory authorities pre-dated the passage of the Securities Exchange Act of 1934. Ferdinand Pecora, who administered the hearings regarding Wall Street abuse, said the legislation to create a specialist agency to monitor the securities market would “be a good or bad law depending upon the men who administer it.” SELIGMAN, *supra* note 31, at 100.

indeed, may preclude any basic policy formulation.⁹⁹ However, as Landis put it, where the greatest gaps exist are in the planning for foreseeable problems. This ultimately is a question of political design, a fact Landis always recognized.¹⁰⁰

By 1960, the unease about governmental power and authority—that was to transmogrify into outright opposition in the Reagan era and beyond—was already apparent. The problem intensified because the definition of what constituted expertise became contested, not least because the repository of knowledge moved geographically from Washington, D.C. to Wall Street itself, where it was legitimated by appeals to an earlier moral order and an elevation of freedom of contract over the substantive demands of the disclosure paradigm.¹⁰¹

This reframing of discourse did not happen by accident; rather, it was the result of a considered and sustained campaign that corrupted both the capacity and legitimacy of regulatory intervention. The implications of this narrow framing are now playing out in the Libor scandal, which, unlike the design and marketing of sophisticated financial products, is based on straightforward (and readily understandable) fraud and deceit. It is in this broader political context that Libor and its reform have such potential programmatic and paradigmatic power. This in turn has profound implications for the conceptual frameworks that underpin contemporary regulatory practice, practice that is informed by timidity rather than audacity, inaction, and the maintained faith in what Roosevelt would have termed false prophets. It is a response that would—justifiably—have horrified both the President and his chief regulatory architect, James M. Landis.

Undoubtedly, any successful proposal to extend responsibility and accountability to those involved in product design, rather than clarifying the enabling conditions governing marketing and sale, would constitute a seismic shift in the structure of the financial services industry. Specifically, it would breach the self-referential logic of private law. The integra-

99. See JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 16 (Greenwood Press 1974) (1938).

100. It is more than a little ironic that Landis was to fall afoul of a foreseeable problem in the non-payment of his income tax. It meant his effective retirement from public life. MCCRAW, *supra* note 31, at 207.

101. See Seumas Miller, *Institutions, Integrity Systems and Market Actors*, in *PRIVATE EQUITY, CORPORATE GOVERNANCE AND THE DYNAMICS OF CAPITAL MARKET REGULATION* 339 (Justin O'Brien ed., Imperial College Press 2007). As Miller points out, “even the most staunch free marketeers have normative or ethical commitments: they are committed, in particular, to the ethical value of the social institution of private property, the moral force of contractual obligations, and the human right of individual freedom.” *Id.* at 342.

tion of more explicit interventionist normative objectives with enabling ones may also significantly change the ethical boundaries of global finance. Before evaluating the reform agenda, it is essential to explain just how debilitating and unsustainable the ethical deficit has become.

III. THE COMMODIFICATION AND CORRUPTION OF KNOWLEDGE

The sense of frustration and, indeed, despair within the British government and regulatory agencies over the behavior of Barclays, and other banks, in submitting patently false returns to the Libor panel that sets global interest rate benchmarks was palpable from the outset. The avuncular Business Secretary, Vince Cable, spoke of the need to clean up what he termed the “cesspit” of British banking following the admission by Barclays in June 2012 that it had manipulated the rate.¹⁰² The Governor of the Bank of England, Mervyn King, accused the bank of “deceitful manipulation.”¹⁰³ The scandal, he said, provides evidence that “something went very wrong with the UK banking industry and we now need to put it right.”¹⁰⁴ Perhaps the most telling reflection, however, came from Lord Adair Turner, the outgoing Chairman of the Financial Services Authority (FSA), which itself was later disbanded as a consequence of failing to police the market. For Lord Turner, the manipulation revealed a “degree of cynicism and greed which is really quite shocking . . . and that does suggest that there are some very wide cultural issues that need to be strongly addressed.”¹⁰⁵ This dismay also informs the findings of the United Kingdom Treasury Select Committee, which is equally dismissive of regulatory capacity.¹⁰⁶ The concern that a failure of

102. Oliver Wright, Simon English & Jim Armitage, *Cable: The City Is a Massive Cesspit*, INDEPENDENT (June 30, 2012), <http://www.independent.co.uk/news/business/news/cable-the-city-is-a-massive-cesspit-7900034.html> (U.K.).

103. Philip Aldrick, *King Attacks 'Deceitful' Banking Culture*, TELEGRAPH (June 29, 2012), <http://www.telegraph.co.uk/finance/economics/9364187/King-attacks-deceitful-banking-culture.html> (U.K.).

104. *Id.*

105. Patrick Jenkins, John Gapper & Brooke Masters, *The Gathering Storm*, FIN. TIMES (June 29, 2012), <http://www.ft.com/intl/cms/s/0/26d8a33c-c1e0-11e1-8e7c-00144feabdc0.html#axzz2SAkFoWi5>.

106. HOUSE OF COMMONS TREASURY COMMITTEE, FIXING LIBOR: SOME PRELIMINARY FINDINGS, 2012–13, H.C. 481-I (U.K.), available at http://www.parliament.uk/documents/commons-committees/treasury/Fixing%20LIBOR_%20some%20preliminary%20findings%20-%20VOL%20I.pdf; see also FIN. SERVS. AUTH., INTERNAL AUDIT REPORT: A REVIEW OF THE EXTENT OF AWARENESS WITHIN THE FSA OF INAPPROPRIATE LIBOR SUBMISSIONS (2013) (U.K.), available at <http://www.fsa.gov.uk/static/pubs/other/ia-libor.pdf>. The *Internal Audit Report* found,

[T]he FSA’s focus on dealing with the implications of the financial crisis for the capital and liquidity positions of individual firms, together with the fact that contributing to or administering LIBOR were not ‘regulated activities’, led to the FSA being too narrowly

regulatory oversight facilitated the development of such a pernicious culture informs parliamentary evaluation. This suspicion has played out in the nature of the settlement arrangements and public concern about whether they are sufficient to change culture. The efficacy of regulatory settlements depends on their contractual terms rather than the size of the newspaper headlines they generate.

Barclays's disclosure and settlement derived from a joint transatlantic investigation into how the Libor rate is calculated. Barclays agreed to pay \$200 million to the CFTC, \$160 million to settle related charges brought by the Department of Justice, and \$93.2 million to the FSA in the United Kingdom. The cumulative fines reflected the fact that the manipulation did not simply predate the crisis but continued throughout it.¹⁰⁷ In December 2012, UBS became the next bank to settle. This time the penalty increased to \$1.5 billion (\$700 million for the CFTC, \$500 million for the Department of Justice, \$260 million for the FSA, and \$63 million in disgorgement of profits for the Swiss regulatory authority, which does not have the capacity to levy direct fines). In other words, U.S. regulatory authorities secured just under 80% of the total financial penalties. The Department of Justice also announced that criminal prosecutions would proceed against two traders. Furthermore, a non-prosecution agreement with the parent company was announced in exchange for a \$400 million fine. UBS Securities Japan, the subsidiary of the Swiss firm at the heart of the scandal, agreed to plead guilty to manipulating the Libor rate in exchange for a \$100 million fine. In February 2013, RBS became the third bank to settle (\$150 million to the Department of Justice, \$325 million to the CFTC, and \$137 million to the FSA). Media reports suggest that Deutsche Bank is next to seek a settlement

focused in its handling of LIBOR-related information. This was both in terms of challenging and inquiring about that information, and considering its conduct responsibilities in relation to the Principles for Businesses and any potential for consumer or market detriment.

FIN. SERVS. AUTH., *supra*, at 9. This criticism of the FSA's emphasis on technical compliance is even more pronounced in the findings of the Parliamentary Commission on Banking Standards, as evidenced in its coruscating report of the FSA's failure to regulate HBOS. "The FSA's approach also encouraged the Board of HBOS to believe that they could treat the regulator as a source of interference to be pushed back, rather than an independent source of guidance and, latterly, a necessary constraint upon the company's mistaken courses of action." PARLIAMENTARY COMMISSION ON BANKING STANDARDS, 'AN ACCIDENT WAITING TO HAPPEN': THE FAILURE OF HBOS, 2012-13, H.L. 144, H.C. 705, at 49 (U.K.), available at <http://www.publications.parliament.uk/pa/jt201213/jtselect/jtpebs/144/144.pdf>.

107. Press Release, Fin. Servs. Auth., Barclays Fined £59.5 Million for Significant Failings in Relation to LIBOR and EURIBOR (June 27, 2012), available at <http://www.fsa.gov.uk/library/communication/pr/2012/070.shtml>.

with its home regulator, BaFin. Like its Swiss counterpart, BaFin lacks power to impose financial penalties but can either revoke a license or demand board changes if knowledge of wrongdoing can be directly attributed.¹⁰⁸ In addition, largely beneath the radar lies an antitrust investigation by the European Commission, which has the power to impose material fines of up to 10% of global turnover in cartel cases, a formulation explicitly used by the Competition Commissioner.¹⁰⁹ The possibility of

108. An investigation by BaFin led by its head of banking supervision, Raymond Roeseler, has found no “evidence of systematic crime involving management board members.” Madeleine Nissen & Ulrike Dauer, *BaFin: Bank Boards Knew Nothing of Rate-Rigging*, WALL ST. J. (Apr. 26, 2013), <http://blogs.wsj.com/riskandcompliance/2013/04/26/bafin-bank-boards-knew-nothing-of-rate-rigging/>. This leaves unresolved the question of whether the lack of knowledge can be attributed to willful blindness.

109. Alex Barker, *Brussels Turns up Pressure over Libor*, FIN. TIMES (Feb. 21, 2013), <http://www.ft.com/intl/cms/s/0/8e9b61a4-7c47-11e2-91d2-00144feabdc0.html#axzz2SAkFoWi5>. Joaquín Almunia, the Vice President of the European Commission responsible for Competition Policy, noted in a recent speech that “it is simply unacceptable that leading figures in the business behave as if it were above the law and immune from social responsibility. We need to foster a new ethics in the business using the most appropriate means.” Joaquín Almunia, Vice President, Eur. Comm’n, Speech Delivered at Fordham Law School, Competition Enforcement in the Knowledge Economy (Sept. 20, 2012), available at http://europa.eu/rapid/press-release_SPEECH-12-629_en.htm. In a speech in Paris on February 22, 2013, Almunia went further, arguing that the European Union would address the issue as a cartel violation of anti-trust law: “The revelation of the LIBOR manipulation scandal has highlighted some of the most irresponsible [behavior] ever seen in the financial industry. The time has come to push for a real cultural change in the sector.” Joaquín Almunia, Vice President, Eur. Comm’n, Speech Delivered at 4e Conférence Internationale Concurrences, Paris, Fr, La Concurrence au Service de L’Achèvement du Marché Unique, (Feb. 22, 2013), available at http://europa.eu/rapid/press-release_SPEECH-13-151_fr.htm. Almunia has announced that the European Union expects the first case to be brought by the end of 2013. Joaquín Almunia, Vice President, Eur. Comm’n, Address to American Bar Association Antitrust Section Spring Meeting (Apr. 12, 2013). Notwithstanding the fact that RBS admitted violation of antitrust law in the United States, a class action has been dismissed in New York, leaving it very much a question of public enforcement. *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MD 2262 (NRB), 2013 WL 1285338, at *62 (S.D.N.Y. Mar. 29, 2013) (“While public enforcement is often supplemented by suits brought by private parties acting as ‘private attorneys general,’ those private actions which seek damages and attorney’s fees must be examined closely to ensure that the plaintiffs who are suing are the ones properly entitled to recover and that the suit is, in fact, serving the public purposes of the laws being invoked.”). The unanswered question is whether given the absence of multi-billion dollar class action settlements, public enforcement will impose sufficient additional non-financial penalties in settlement negotiations to ensure changes to practice. As Judge Buchwald has made clear, at least in the Southern District of New York, public enforcement agencies are the only ones with the authority and legitimacy to implement such changes. *LIBOR-Based Fin. Instruments Antitrust Litig.*, 2013 WL 1285338, at *62. This was largely attributable to an earlier statement by Judge Buchwald:

Your job as plaintiffs’ counsel looking for whopping attorneys’ fees is not to piggyback on the government. . . . I don’t understand, as someone who has some familiarity with the plaintiffs’ bar, why you guys weren’t all over this earlier. You are not entitled to massive attorneys’ fees if all you do is wait for the government to act, jump on their back and say we want massive damages [for our clients] and we want one-third of them.

insurance restrictions and materiality associated with any cartel settlement has made a global settlement a priority.¹¹⁰

In each individual case to date, the disjuncture between stated and lived values is linked to the failure of internal compliance or disclosure to counteract it. The financial penalties alone, while substantial, are unlikely to change culture if regarded as a price for doing business. The hoary bifurcation of whether prescriptive “rules” or more granular articulation of “principles” are more effective in guiding market behavior is redundant. Each had failed to address what is now widely acknowledged to be a systemic ethical deficit.¹¹¹

The moral deficit underscores how ineffective the normative capacity of compliance is in embedding cultural change if perceived to be little more than a necessary minimum legal and mechanistic response to (unwarranted) external restraints.¹¹² The extraordinary testimony provided

Richard Vanderford, *Libor Plaintiffs Blasted by Judge for ‘Piggybacking’ on DOJ*, LAW360 (Mar. 5, 2013), <http://www.law360.com/articles/421024/libor-plaintiffs-blasted-by-judge-for-piggybacking-on-doj>. For background on the judgment, see Justin O’Brien, *A Delayed Reckoning: The US Federal District Court and Libor*, CENTRE FOR L., MARKETS & REG., UNIV. NEW S. WALES (Apr. 1, 2013) (Austl.), <http://clmr.unsw.edu.au/article/compliance/internal-risk-management/delayed-reckoning-us-federal-district-court-and-Libor>. On April 29, 2013, a key component of the case was re-filed in California. See Complaint and Demand for Jury Trial, *Charles Schwab Corp. v. Bank of Am. Corp.*, No. CGC-13-531016 (Cal. Super. Ct. Apr. 29, 2013), available at <http://articles.law360.s3.amazonaws.com/0437000/437357/schwab.pdf>. Similarly, the city of Houston has chosen to move forward with a contingency fee class action seeking to recover money that it believes it lost as a consequence of Libor mispricing. See Jeremy Heallen, *Houston City Council Votes to Sue over Libor Manipulation*, LAW360 (Apr. 3, 2013), <http://www.law360.com/articles/429887/houston-city-council-votes-to-sue-over-libor-manipulation>.

110. For evidence of concerns about renewal strategies on professional indemnification and director and officer strategies linked to payment of litigation expenses, see Alistair Gray, *Protection Becomes a Scarcer Resource*, FIN. TIMES (Apr. 29, 2013), <http://www.ft.com/intl/cms/s/0/515735ca-8a66-11e2-9da4-00144feabdc0.html#axzz2SAkFoWi5>. The article quotes Charles Beresford-Davies, head of U.K. Risk Management at the insurance brokerage firm Marsh: “Insurers have been looking at the landscape fairly pessimistically. . . . Every time everyone thinks it’s done, something else comes out [of] the woodwork.” *Id.*

111. “The limitation of a pure principles-based regime have to be recognized. I continue to believe the majority of market participants are decent people; however, a principles-based approach does not work with people who have no principles.” Hector Sants, Chief Exec., Fin. Serv. Auth., Speech at The Reuters Newsmakers Event, Delivering Intensive Supervision and Credible Deterrence (Mar. 12, 2009), available at http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2009/0312_hs.shtml

112. This also informs the thinking of an otherwise anodyne independent review of Barclays. “There are increasing demands from regulators, politicians and the wider public that banks of the standing of Barclays comply with the spirit and not just the letter of the law.” ANTHONY SALZ, SALZ REVIEW: AN INDEPENDENT REVIEW OF BARCLAYS’ BUSINESS PRACTICES 10 (2013), available at <http://group.barclays.com/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobheaderna me1=Content-Disposition&blobheadertype=MDT-Type&blobheadervalue1=inline%3B+filename%3DRead-the-Salz-Review-report-PDF-3MB.pdf&blobheadervalue2=abinary%3B+charset%3DUTF>

by senior bankers at RBS to the British Parliamentary Commission on Banking Standards in February 2013 offers a compelling rationale to externally validate protestations of commitment to cultural reform. Following a standard script, the banking executives were, in turn, shocked at the crookedness involved in the manipulation of Libor, dismayed at the lack of moral restraint, and keen to differentiate between ethical bankers and amoral traders.

The class system that has always informed city mores was, therefore, at the fore. As the elite blamed the collusion that undermined Libor on the traders, altogether it appeared a different breed governed (if at all) by elastic conceptions of probity. A familiar refrain was evident. If the bankers, ostensibly in control, were guilty of anything, it was, according to then-serving head of investment banking John Hourican, excessive trust.¹¹³ So what, if anything, have the bankers remembered? It would appear not a lot, other than self-pity and special pleading. “As I have said to some people who have been willing to listen, they should not waste my death,” Mr. Hourican told the Commission.¹¹⁴ He had resigned to take “ultimate responsibility” for something for which he should not necessarily be blamed.¹¹⁵ The issue was not a core concern given the fact that the board and senior executives thought that they had to prioritize dealing with an existential threat to the bank.¹¹⁶ Instead of dealing with misaligned incentives, the bank had (it was inferred, himself included) exhibited “blind trust” in the actions of traders.¹¹⁷ It was a message repeated by the bank’s chief executive, Stephen Hester, who will keep his job if not his bonus. The scale of the abuse was, Mr. Hester intoned, “too readily redolent of a selfish and self-serving culture in the banking indus-

F-8&blobkey=id&blobtable=MungoBlobs&blobwhere=1330702135471&ssbinary=true. The review recommends that “[t]he Board and senior leadership, as custodians of Barclays’ reputation, should promote and safeguard the trust in which it is held. They should state clearly Barclays’ purpose and report regularly on how it is fulfilling that purpose.” *Id.* at 12. It does not define what that purpose is or should be beyond platitudes about the need to uphold “the highest standards of customer care.” *Id.* at 58; see also Salter, *supra* note 1; Jay Youngdahl, *Investment Consultants and Institutional Corruption* (Edmond J. Safra Working Paper Grp., Paper No. 7, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2255669;

113. See PARLIAMENTARY COMMISSION ON BANKING STANDARDS, ORAL EVIDENCE TAKEN BEFORE THE PARL. COMM’N. ON BANKING STANDARDS, 2012–13, H.C. 606-xxxv, at 14 (U.K.), available at <http://www.publications.parliament.uk/pa/jt201213/jtselect/jtpcbs/c606-xxxv/c606xxv.pdf>.

114. *Id.* at 21.

115. *Id.* at 4.

116. *Id.* at 14.

117. *Id.* at 21.

try as a whole . . . which needs to be addressed . . . and of course that is exactly the reason for this Commission's existence."¹¹⁸

Of course, nodding to the authority of the Commission is not the same as abiding by its recommendations. The scale of the crisis was such that, according to the bank's chairman, Sir Philip Hampton, no useful purpose could be served by "a series of assassinations."¹¹⁹ The forced departure of Mr. Hourican would suffice. Yet, this left many uncomfortable questions, most forcibly articulated by the designate-Archbishop of Canterbury, Justin Welby, himself a former corporate executive. How many whistleblowers, asked the Archbishop, had come forward in advance of regulatory inquiries?¹²⁰ Mr. Hourican and his colleagues could provide only one answer: none.¹²¹ The Archbishop was incredulous: "Why? Was there not one person anywhere who thought . . . this is just not the right way to behave? . . . How do you set a culture in the future?"¹²²

The manner in which the bank staff reacted to this line of questioning speaks volumes about the malaise facing international banking. Mr. Hourican cautioned that he wanted "the culture of the company to be one of calling each other to attention, much rather than using a whistleblowing channel. Having a lot of whistleblowing in a company . . . is almost as bad," he declared, without explaining what he meant by either statement.¹²³ Attempts to elucidate meaning became harder as he sought to justify the unjustifiable: "[W]hat we want to have is a culture where people hold each other to a high level of moral account," he argued, trumpeting the fact that 1,000 graduates had been appointed,¹²⁴ without explaining how these junior-level appointments could "stand[] up and feel[] the anger that exists around the issue, the industry[,] and . . . our company,"¹²⁵ exert control; or be protected from contamination of a pervasive

118. PARLIAMENTARY COMMISSION ON BANKING STANDARDS, ORAL EVIDENCE TAKEN BEFORE THE PARL. COMM'N. ON BANKING STANDARDS, 2012–13, H.C. 606-xxxvi, at 17 (U.K.), available at <http://www.publications.parliament.uk/pa/jt201213/jtselect/jtpcbcs/c606-xxxvi/c606xxxvi.pdf>; see also Helia Ebrahimi & Harry Wilson, *RBS Executive John Hourican Tells Colleagues 'Not to Waste My Death'*, TELEGRAPH (Feb. 11, 2013), <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/9863797/RBS-executive-John-Hourican-tells-colleagues-not-to-waste-my-death.html> (U.K.).

119. PARL. COMM'N., *supra* note 118, at 7.

120. PARL. COMM'N., *supra* note 113, at 24.

121. *Id.*

122. *Id.*

123. *Id.* at 25.

124. *Id.*; *Id.* at 14.

125. *Id.* at 21.

culture that the executive admitted they were shocked by. Ignorance is, however, a shocking abdication of reasonability.

Hourican's colleague, Johnny Cameron, was asked directly how to test for the moral culture of a trading floor. His answer, as reported by the *Telegraph*, was instructive: "That's straying into philosophical territory. I do think that traders have a particular approach to life and need much tighter controls."¹²⁶ By inference bankers were, and remain, a different breed, which could be trusted by the establishment, including the Church of England—formally represented in the Commission by Archbishop Welby who was less than impressed by the bankers' reprise of the Pardoner's refrain in *The Canterbury Tales*, Chaucer's classic work: *Radix Malorum Est Cupiditas* ("Greed is the Root of All Evil").

The crisis and its aftermath demonstrate that much more holistic approaches to risk management, which link private rights to public duties, are required. It is this more holistic approach that informed the early (and now partially lost) agenda of both the Federal Trade Commission and the Securities and Exchange Commission under James M. Landis. The recently released archives also make clear that across a whole swathe of industries, there was early recognition at the Federal Trade Commission and the Securities and Exchange Commission that, far from weakening power, the acquiescence of industry to the creation of codes of conduct provided an opportunity to retain it. Reclaiming this history becomes essential given the apparent interest of the British Banking Association and Martin Wheatley at the Financial Conduct Authority in the development of a code of conduct administered by either regulatory agencies or a body regulated by industry¹²⁷ and given the fact that, as of

126. Rachel Cooper, *RBS Executives Quizzed by MPs: As It Happened*, TELEGRAPH (Feb. 11, 2013), <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/9862613/RBS-executives-quizzed-by-MPs-as-it-happened.html> (U.K.).

127. Anthony Browne, Chief Executive Officer of the British Banking Authority (BBA), advocated for the establishment of a Banking Standards Board:

[A] body independent of the industry, with responsibility for monitoring and upholding professional and ethical standards, and sharp enough teeth to give it bite. It is early days, but it is an idea that many in the industry are keen to pursue. However, the proof will be in the pudding. There would be no point in setting up a banking standards board if it was a whitewash—in fact, it would be totally counterproductive.

Anthony Browne, Opening Address at the BBA's International Banking Conference 3–4 (Oct. 17, 2012), available at <http://hb.betterregulation.com/external/Anthony%20Browne%20speech%20at%202012%20International%20Banking%20Conference%20-%202017%20Oct%202012.pdf>. In January 2013, the BBA submitted an options paper to the Parliamentary Commission on Banking Standards, canvassing support for a code of conduct administered by either the Financial Conduct Authority, its prudential counterpart, or administered through what it termed the Banking Standards Review Council. Press Release, British Banking Ass'n, BBA Publishes Options Paper on Banking Standards (Jan. 15, 2013), available at <http://www.bba.org.uk/media/article/bba-publishes-options-paper-on-banking>

April 2, 2013, Libor itself became a regulated activity.¹²⁸ The critical question, therefore, is whether the self-referential development and subsequent policing of a code of conduct is either desirable or sustainable? History suggests caution.

IV. REGULATING CULTURE

The redesign of Libor takes place in a conceptual vacuum. It is mired by a preference for tick-the-box compliance over ethical substance. The reform agenda is predicated on the introduction of new systems to collate information but provides no guidance to ascertain whether they actually work in changing the culture of individual firms or the market as a whole. Along with the *Wheatley Review*,¹²⁹ the most articulated conception of responsibility lies with the release of IOSCO principles in April 2013, related to governance, quality of data and methodology, and accountability.¹³⁰ Each seeks to place primary responsibility on an administering organization, with any outsourcing subject to oversight by the administrator. The framework is tailored to the disclosure of any material conflicts of interest to [non-defined] stakeholders and any relevant Regulatory Authority, along with publication of control mechanisms, such as whistleblowing.¹³¹

The IOSCO principles, in line with the *Wheatley Review*, further call for use of only

prices, rates, indices or values that have been formed by the competitive forces of supply and demand, and be anchored by observable transactions entered into at arm's length between buyers and sellers in the market for the Interest the Benchmark measures. This principle recognizes that bona-fide observable transactions in markets provide a level of confidence for the prices or values used as the basis of the Benchmark are credible.¹³²

-standards/press-releases. This code of conduct was explicitly canvassed in the *Wheatley Review*. "The Review recommends that the LIBOR administrator, through the oversight committee, should draft a code of conduct, in collaboration with contributors and market participants, which should serve as a manual for the internal governance and organisation of LIBOR submission, detailing the specific requirements for firm behaviour and procedures." WHEATLEY REVIEW, *supra* note 9, at 30.

128. Press Release, British Banking Ass'n, LIBOR Becomes a Regulated Activity (Apr. 2, 2013), available at <http://www.bba.org.uk/media/article/libor-becomes-a-regulated-activity>.

129. WHEATLEY REVIEW, *supra* note 9, at 30–33.

130. INT'L ORG. OF SEC. COMM'NS, *supra* note 14, at 7–11.

131. *Id.* at 7–8. Nowhere do the IOSCO principles define what constitutes "effectiveness."

132. *Id.* at 8.

This does not appear to take into account the fact that these too can be manipulated (as uncovered by the CFTC investigation of UBS traders' attempts to manipulate the Australian Bank Bench Rate, heralded as a potential alternative until the Australian Financial Markets Association scrapped the process in March 2013).¹³³ Moreover, IOSCO calls for the development of a code of conduct for those involved in submitting rates but does not define what is required in this process.¹³⁴ The lack of specificity is troubling given the evidence provided by the head of UBS to the Parliamentary Commission on Banking Standards in January:

Regulators monitor, and control frameworks monitor and try to catch issues, *but the difference is made by the people who are on the front line*. They need to change their standards and abide by certain rules, not because they are imposed on them but because they believe in them.¹³⁵

The question of warranted trust in belief is therefore critical, and the failure to address it is a fundamental flaw. While the *Wheatley Review* mandates that the “contributing banks and the rate administrator will together establish a code of conduct outlining requirements and responsibilities of individual firms,”¹³⁶ nowhere does it articulate what is meant by “responsibility.” Once again, we find painful lessons from history in what happens when codes of conduct are presented as assurance of cultural change either by an industry seeking to protect its position or a regulator seeking to enhance its authority.

In 1933, the notoriously erratic General Hugh Johnson, the head of the National Recovery Administration (NRA) in the United States, a new agency mandated to establish codes of conduct, ignored the possibility that these codes could be exceptionally problematic if not designed effec-

133. See Feast, *supra* note 4. The lack of explicit acknowledgement is rendered more difficult to comprehend given the fact that Gary Gensler, the head of the CFTC, serves on the IOSCO task-force.

134. INT'L ORG. OF SEC. COMM'NS, *supra* note 14, at 22 (Principle 13). IOSCO requires policies; it does not articulate what those policies should be or that they are, in fact, working. Likewise, the key accountability provision governing complaints (Principle 15) requires only the introduction of a system rather than a requirement to demonstrate that that system works. *Id.* at 23. The lack of granularity makes the recommendation for external audit (Principle 17) rather weak. *Id.* at 24–25. The relationship with regulatory agencies (Principle 18) seeks to make information available on request rather than providing for ongoing collaboration to ensure cultural change. *Id.* at 25.

135. PARLIAMENTARY COMMISSION ON BANKING STANDARDS, ORAL EVIDENCE TAKEN BEFORE THE PARL. COMM'N. ON BANKING STANDARDS, 2012–13, H.C. 606-xix (U.K.) (Response of Andrea Orcel, Chief Exec. Officer, UBS, to Question 1874) (emphasis added), available at <http://www.publications.parliament.uk/pa/jt201213/jtselect/jtpebs/c606-xix/c60601.htm>.

136. WHEATLEY REVIEW, *supra* note 9, at 33.

tively. For Johnson, the NRA, unrestrained by past restrictions on coordinated responses, marked an innovative “sociological experiment.” As he told a meeting of the National Retail Dry Goods Association in New York in January 1934, the NRA was not only more nimble but it could become a vital partner, something he deemed the Federal Trade Commission (FTC) incapable of.¹³⁷

The speech was a rearguard action against the FTC, which had increasingly come to see the NRA itself as a failed experiment. Critically, the suspicion within the FTC coincided with the promulgation of the Code of Fair Competition for Investment Bankers, which was endorsed on November 27, 1933. The code had ensured that power to determine the extent of compliance would remain with the banks themselves. It mandated that the management committee administering the code would contain twenty-one voting members: fifteen appointed by the president of the Investment Banking Association of America, six through a “fair method to represent employers not members of the IBA[,] and a representative appointed without vote by the President of the United States of America.”¹³⁸ The effect was to lock the administration into a framework completely controlled by industry.

Landis, by then heavily embroiled in disputes over the operation of the Securities Act, was horrified by the way in which industry was behaving. “How truly despicable some of their tactics are. I really thought they were essentially decent though somewhat misguided people, but I have my doubts now,” he wrote Frankfurter on December 13, 1933. Those doubts were in part informed by unease about the willingness of industry to engage in meaningful partnership. This unease was captured by an internal report prepared for Landis and the other members of the FTC on the workings of the NRA. Assigned to be the chief legal liaison to General Johnson’s NRA, Millard Hudson was flabbergasted by what

137. Hugh Johnson, Speech Delivered at the National Retail Dry Goods Association (Jan. 24, 1934).

There was—and there is about as much cooperation between the Federal Trade Commission and the Industry as there is between a lion tamer with a black-snake whip, a revolver, and a strong-backed chair, standing in a cage with six great jungle cats snapping and snarling on six star-spangled hassocks—that is their version of economic planning and industrial self-government.

Id.

138. INV. BANKERS ASS’N OF AM., CODE OF FAIR COMPETITION FOR INVESTMENT BANKERS (1933).

he termed the “chaotic conditions” at the agency.¹³⁹ He reported on December 6, 1933:

There is hardly an important form of monopolistic practices which the Federal Trade Commission and the courts have endeavored to prevent in the past, that is not authorized and more or less explicitly provided for in these codes; not of course by individuals, but what is a great deal worse, by the cooperative activities of whole industries. It would be an exaggeration to say that any remonstrances against these things have resulted in any substantial improvement.¹⁴⁰

Two weeks later, Hudson provided a more in-depth account of regulatory failure. “The industries, having got the bit in their teeth, are running amok, and are bent upon destroying the good work accomplished by the Commission in the past and to prevent its doing any more in the future,” he reported on December 22nd.¹⁴¹ Hudson cited four principal reasons. First, no representative of the Commission had power to draw up and enforce a model code. Second, legal representatives were “practically all young inexperienced men, many of whom knew nothing whatever about the Commission’s work. It was easy for the industries to put things over on them.”¹⁴² Third,

having given the industries in the early codes practically everything they asked for, it was difficult to refuse those which came later. But the most alarming development is the unwillingness of the Administrator to set up any effective form of control over the administration of the codes. He is leaving it, by his own statement, as far as possible to the boards set up within the industries themselves. This means that matters in which they are interested will receive attention and probably little else will.¹⁴³

The internal report was forwarded to Roosevelt, who in turn handed over responsibility for evaluation of code operation to the FTC, effectively limiting the power of the NRA long before the Supreme Court deemed it

139. Memorandum from Millard E. Hudson to the Fed. Trade Comm’n (Dec. 22, 1933) (on file with the Harvard Law School, Papers of J.M. Landis, Box 18-8).

140. Memorandum from Millard E. Hudson to the Fed. Trade Comm’n: Work at the NRA (Dec. 6, 1933) (on file with the Harvard Law School, Papers of J.M. Landis, Box 18-8).

141. *Id.*

142. *Id.*

143. *Id.* The importance of Hudson’s insights cannot be overstated given the quixotic hope expressed in the *Wheatley Review* that ongoing calibration can be expected. “The benefit of industry guidance is that the rate administrator can develop the code of conduct over time; as both LIBOR and the market that it is intended to assess evolve, the requirements of its users will also change.” WHEATLEY REVIEW, *supra* note 9, at 31.

unconstitutional the following year. The release of the new material suggests that the administration had come to the conclusion that the partnership approach was a failure long before then, although for very different reasons.¹⁴⁴

For Landis and the other designers of the disclosure paradigm, its power, first set out in the Securities Act (1933) and reinforced by the Securities Exchange Act the following year, lay primarily in the capacity to set, evolve, and frame broader discourse. The aim was not to mandate organizational change as some early commentators, including William O. Douglas, advocated.¹⁴⁵ Instead, disclosure was a means to an end, a necessary response to societal obligation. It was a message repeatedly pressed by senior officials, first at the FTC and then the SEC.

144. The loss of authority angered Johnson, who embarked on an increasingly histrionic and futile campaign to change the President's mind. In his New York address, he argued:

[I]t is stated that I suppressed a report of the Federal Trade Commission to the [P]resident on the operation of the NRA. I asked the Federal Trade Commission to send a man over here to see if we were doing properly what we had to do. He came but he never said a word to me. I now understand that he did report to the Commission in a paper marked confidential—one of those X21 confidential spy reports which no one had the courtesy to discover to me. There is suppression for you. I now learn that someone has sent it to the [P]resident. But I never heard of that report until last night when a self-invited counter espionage agent told me about its subject matter. There was nothing in it but a charge that we have made mistakes. Nobody is louder in that assertion than I. Apparently the [P]resident—gentleman that he is—ignored it.

Johnson, *supra* note 137.

145. See William O. Douglas & George E. Bates, *The Federal Securities Act of 1933*, 43 YALE L.J. 171 (1933). Douglas viewed the disclosure paradigm as insufficient. What was required, he argued, was a much more substantive re-ordering of relations between market participants. This essentially corporatist approach, advocated mainly by the Columbia-based members of the original Roosevelt "brains trust," was always regarded as suspect by Landis and his colleagues at Harvard, most notably Felix Frankfurter. The personal nature of these disputes became clear in January 2013, when Harvard Law School released additional personal papers of Landis, the driving force behind the creation and management of the Securities and Exchange Commission. Letters of James M. Landis (on file with the Harvard Law School). The papers include correspondence between Landis and Frankfurter, arguably the most influential academic advisor to the Roosevelt administration. This correspondence reflects a growing frustration by both men towards industry opposition to and academic misunderstanding of the paradigm shift associated with the passage of the Securities Act and its corollary, the Securities Exchange Act of 1934. Most notably, this derision was directed towards Douglas himself, who, it is clear, neither man entirely trusted from the very beginning. On March 6, 1934, Landis noted to Frankfurter that "Douglas seems to me to lack a tremendous sense of the realities that are involved in this problem and how the relentless drive for profits leads men to do things and then defend them." *Id.* On March 17, 1934, Frankfurter replied that "Douglas is trying to reflect too much the people in the big offices and the business schools, among whom he likes to appear as a sound and knowing fellow." *Id.* Frankfurter further stated that Douglas had privately opined that his "public articles against us are a form of high strategy. Well it's too high for my eyes to scale." *Id.*

Speaking in 1933, for example, Baldwin Bane, the chief of the securities division of the FTC, which had primary initial responsibility for administering the Securities Act, argued that the only legislation

that is founded upon a moral background that has been passed in the past twenty years, is the Securities Act. Its aim was to restore to a numbed national conscience some semblance of sensitivity. It was of a spirit such as this that the Securities Act was born, free of vindictiveness that might easily have been attached to it, reasonable in its demands and build upon tried experience in their formulation. It would be idle to pretend that it does not ask something of the security world, but it also promises much in return—the opportunity of creating a true and honorable profession by the assumption and adequate discharge of public responsibilities.¹⁴⁶

When responsibility was transferred to the SEC the following year, its first chairman, Joseph Kennedy, gave a reinforcing address in Boston:

We are seeking to recreate, rebuild, restore confidence. Confidence is an outgrowth of character. We believe that character exists strongly in the financial world; so we do not have to compel virtue; we seek to prevent vice. Our whole formula is to bar wrong-doers from operating under the aegis of those who feel a sense of ethical responsibility. We are eager to see finance as self-contained as it deserves to be, when ruled by Honor and Responsibility. . . . When abuses occur, checks and corrections arise. But the application of these processes is not the dead hand that some proclaim it to be. Instead, it is the assurance of Life and Strength, when Honesty and Intelligence are present. We have been brought into being to help you as part of the public, which erects government for its service. But you best can help yourselves. You can make the investing of money honest. Then you will truly become brothers' keeper. And to me that is to acquire merit.¹⁴⁷

In 1937, Landis told the *New York Times*, somewhat optimistically, that brokers “are beginning to realize more clearly that their interest is tied up with the public interest. They are beginning more often to subordinate their own interest to the larger interest. People are beginning also to look upon the exchanges not so much as private institutions as public utilities.”¹⁴⁸ Therefore, this linkage between private and public purpose

146. Bane, *supra* note 25, at 592.

147. Joseph P. Kennedy, Chairman, U.S. Sec. & Exch. Comm'n, Address to the Boston Chamber of Commerce (Nov. 15, 1934), available at <http://www.sec.gov/news/speech/1934/111534kenedy.pdf>.

148. Scott, *supra* note 15.

lay at the heart of the experiment. For Landis, “the art of regulating an industry requires knowledge of the details of its operations [and the] ability to shift requirements as the condition of the industry may dictate.”¹⁴⁹ The real tragedy here is not the misplaced optimism of Landis but the misplaced trust in financial services sector statements that through their disclosures they had recognized their obligations.

Landis’s early faith in governance by experts had already eroded by the time of the John F. Kennedy’s election in 1960. In part, this derived from what he saw as the failure of the agencies to remain focused on narrow regulatory purpose, a process that intensified because of patronage appointments at the level of the commission and declining commitments to the public service as a career. This, in turn, suggests the need for the dynamic integration of rules, principles, and social norms within an interlocking responsive framework.

This explicit normative foundation has been lost in a debate over technicalities. Interestingly, it is a foundation that is not referenced in any of the official pronouncements on Libor. It does, however, underpin a separate British government-sponsored investigation into the operation of the capital markets. As John Kay has persuasively argued, sustainable reform must be predicated on capability to “restore relationships of trust and confidence in the investment chain, underpinned by the application of fiduciary standards of care by all those who manage or advise on the investments of others.”¹⁵⁰

Kay’s formulation builds on an insight first advanced by the recently retired managing director of the FSA, Hector Sants. He had famously complained that it was impossible for principles-based regulation to work when those charged with informal authority to maintain the integrity of the system had no principles.¹⁵¹ This was not simply a particularly memorable aside. It reflected belated cognizance of the importance of what Oliver E. Williamson has termed the “non-calculative” social contract.¹⁵²

149. SELIGMAN, *supra* note 31, at 62.

150. JOHN KAY, THE KAY REVIEW OF UK EQUITY MARKETS AND LONG-TERM DECISION MAKING 9 (2012) (U.K.), available at http://www.ecgi.org/conferences/eu_actionplan2013/documents/kay_review_final_report.pdf.

151. “[T]he limitation of a pure principles-based regime have to be recognized [sic]. I continue to believe the majority of market participants are decent people; however a principles-based approach does not work with individuals who have no principles.” Sants, *supra* note 111.

152. See Oliver E. Williamson, *The New Institutional Economics: Taking Stock, Looking Ahead*, 38 J. ECON. LITERATURE 595, 597 (2000). Williamson notes that analysis of this “level one” component of social theory is conspicuously absent from regulatory studies. The other three levels comprise institutional arrangements viewed primarily through property rights and positive political

Sustainable reform must also be consistent with principles of good regulation. It must be proportionate, consistent in application, transparent, and targeted. It is also clear, however, that the construction of accountability mechanisms cannot rely on self-certification alone. It demands external validation. The recent history of financial regulation has demonstrated conclusively the dangers of past self-referential framing. Ironically, the framework to measure and evaluate culture was outlined in 2010 by Sants while serving as the chief executive of the FSA. The regulatory executive, who now runs compliance and government and regulatory relations at Barclays, argued for triadic calculation: “[E]ven if you believe the regulator should and could judge culture, how would the regulator facilitate or enforce the adoption of its judgments by firms?”¹⁵³

Starting from the premise that society has the right to expect ethical behavior and warranted commitment to stated values, Sants maintained that regulators cannot avoid judging culture, a term he judged less problematic and more amenable to measurement than ethics:

What should matter to the regulator are the outcomes that the culture delivers and that the firm can demonstrate it has a framework for assessing and maintaining it. . . . The regulator must focus on the actions a firm takes and whether the board has a compelling story to tell about how it ensures it has the right culture that rings true and is consistent with what the firm does.¹⁵⁴

This framing lies at the heart of the disclosure paradigm, and it must inform the operation and validation of codes of conduct. As we have seen with the leadership of British banking in particular, being an “Approved Person” is in itself no guarantee of integrity.¹⁵⁵ The tragedy for both the banking industry and its regulators is that neither internal nor external oversight of the kind outlined by Sants was pursued until it was too late. Equally, the *Kay Review* appears unread or at least undigested. However, accountability and integrity, as Sants and Kay pointed out, are essentially design issues linked to normative agendas. It is time to get to work. A necessary starting point would be virtual attendance at the imaginary inaugural lecture James M. Landis offered in 1931. It is time to go back to the seminar room.

theory, governance mechanisms through transaction cost economics, and resource allocation frameworks generally examined through agency theory. *Id.*

153. Hector Sants, Chief Exec., Fin. Servs. Auth., Speech Delivered at the Mansion House Conference on Values and Trust, Can Culture be Regulated? (Oct. 4, 2010), available at http://www.fsa.gov.uk/library/communication/speeches/2010/1004_hs.shtml.

154. *Id.*

155. See *supra* text accompanying note 24.

V. CONCLUSION

The initial success of the New Deal experiment can be traced to the combination of five ideational and political economy factors. First, the policy imperatives of the initial Roosevelt Administration (1932–36) advanced the necessity and legitimacy of state intervention. Second, the policy imperatives were predicated on a rebalancing of private rights and public duties, a strategy that was subsequently overwhelmingly endorsed at the ballot box in 1936. Third, a progressive whittling away of the influential freedom of contract model generated legitimacy. Fourth, the nascent administrative agencies, in particular the Securities and Exchange Commission, placed a “cop on the beat,” doing much to restore public confidence. Fifth, the initial emphasis was not on direct enforcement, but on changing industry practice through an associational model of governance.

The model clearly specified its purpose. It sought to enroll market actors within a regulatory paradigm that replaced *caveat emptor* with a disclosure philosophy. At its core was a belief that sustainable reform could only be achieved at an industry-wide level in which there was an internalization of responsibility. The tragedy is that there remains very little acceptance of that obligation, notwithstanding the bailouts of the financial sector. The response of industry, now, as then, is to engage in negotiations in bad faith, limiting acceptance of responsibility. The Libor scandal demonstrates how little has changed in banking culture and the resulting policy framework how little has changed in regulatory framing. We will all pay the price for that miscalculation. This paper has taken seriously James M. Landis’s admonition that we should explore the shadows of the past to illuminate the present and future. It is time for this to be a corporate, regulatory, and political, as well as an academic, task.