CAN REGULATION PROTECT "SUCKERS" AND "FOOLS" FROM THEMSELVES? REFLECTIONS ON THE RHETORIC OF INVESTORS AND INVESTOR PROTECTION UNDER THE FEDERAL SECURITIES LAWS

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I. INTRODUCTION

Rhetoric matters. In the Classical Western Tradition, the theory and craft of rhetoric occupied an honored place.[1] In contemporary political philosophy, the role of reasoned public debate has been receiving new attention.[2] In modern regulation the point is less recognized. Rhetoric is considered, if at all, as *obiter dicta*, a "remark by the way" that is not essential to the substantive matter at hand.[3] This limited view is mistaken. Rhetoric illuminates the underlying premises and policies on which a regulatory regime is founded. The rhetoric of regulation warrants careful scrutiny.

With this in mind, it is worth examining the rhetoric of securities regulation. In the early 1930s, President Franklin Roosevelt explained the legislative program that led to enactment of the Securities Act of 1933 ("Securities Act")[4] and the Securities Exchange Act of 1934 ("Exchange Act")[5] as intended to protect investors.[6] During the floor debates in Congress on these two acts, Senators and Representatives rose to argue that investor protection was needed, and that in the unregulated market no one was providing it.[7] This much is well-known. However, it is largely forgotten that Senators and Representatives opposing the policy of investor protection rose to attack it with harshly negative arguments. Much of their rhetoric consisted of their characterization of investors. Investors, these members said, are "suckers" and "fools" and would remain so despite any effort to protect them.[8] In this rhetoric, investors were characterized as thoughtless gamblers,[9] as driven by the "hope and delusion of becoming rich overnight without work or effort,"[10] and as losing money through their own weakness and incompetence.[11] Any attempt to protect them through regulation would be futile. Of all "diseases," one Senator said, "suicide" is the hardest to prevent.[12]

In any event, the rhetoric of suckers and fools failed. It did not stop federal securities regulation. After extensive floor debates both the Securities Act[13] and the Exchange Act[14] were passed. Nonetheless, this characterization of investors did have at least one significant consequence. It posed a challenge to those supporting the proposed investor protection regime, and it evoked a rhetorical response.

To meet this challenge, Senators and Representatives supporting the policy of investor protection rose with their own rhetorical characterizations of investors. They asked if everyone

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[1] *See e.g.,* ARISTOTLE, ON RHETORIC: A THEORY OF CIVIL DISCOURSE (G.A. Kennedy trans.) (1991).
[2] *See e.g.*, AMY GUTMAN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 10-13 (2004).
[3] *See generally* BLACKS LAW DICTIONARY, 967 (5th ed. 1979) ("obiter dictum" are words of an opinion entirely unnecessary for the decision of the case, that are introduced by way of illustration, analogy, or argument).
[4] Securities Act of 1933, ch. 38, 48 Stat. 74 (1933) (codified as amended at 15 U.S.C. §§ 77a et seq.) (hereinafter cited as "Securities Act").
[5] Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (1934) (codified as amended at 15 U.S.C. §§ 78a et seq.) (hereinafter cited as "Exchange Act").
[6] *See infra* Section II.
[7] *Id.*
[8] *Id.* at Section II.A.1.
[9] *Id*. at Section II.A.2.a.
[10] *Id*.
[11] *Id*. at Section II.A.2.b.
[12] *Id. at* Section II.A.1.
[13] *See supra* note 4.
[14] *See supra* note 5.

who had lost money in the collapsing stock market of the early 1930s had been a sucker or a fool.[15] No, they said, in the unregulated market the "innocent suffered with the guilty."[16] From this proposition two distinct characterizations of investors were drawn.

The first characterization described investors as gullible lambs. Members of Congress arguing this line said that investors could be "uninformed" and "credulous," and as "innocent and gullible as lambs."[17] Regulation, these members said, should protect investors who "have not shown that they can protect themselves."[18] This characterization of investors occupied an ambiguous place in the Congressional debates. While several members supporting regulation expressed it, none of the specific policies they proposed to protect these gullible investors – establishing federal merit review for securities offerings;[19] prohibiting margin lending;[20] and prohibiting door-to-door sales -- was passed.[21]

The second characterization described investors as intelligent and trusting. Members of Congress arguing this line said that investors could be clear-headed, sober, intelligent, and "solid little fellows."[22] Regulation, these members said, should protect investors who "tried to invest intelligently;"[23] who were thrifty and had "trust" in the nation's great financial institutions;[24] and who wanted an even chance in a market free of the "deliberate introduction of a mob psychology."[25] This characterization of investors was used in the Congressional debates to support the policy of investor protection embedded in the proposed legislation. It ultimately carried the day, by substantial majorities in both chambers.[26]

This three-way characterization of investors – suckers and fools versus gullible lambs versus intelligent and trusting – was the rhetorical environment in which the federal investor protection regime was born. This article discusses the rhetoric of investors and investor protection in five parts. Following this Introduction, Part II discusses the challenge raised by the rhetoric of suckers and fools in Congress's floor debates on the securities laws in the early 1930s; how supporters of the policy of investor protection responded; and how the rhetoric of intelligent and trusting investors carried the day. Part III turns to the rhetoric of investors and investor protection in modern securities regulation; discusses four examples; and asks what they signal about the status of the received policy and rhetoric. Part IV considers a final example, the rhetorical crisis of the New Economy, as seen in Congress's floor debates on the Sarbanes-Oxley legislation.[27] In Part V the article concludes that the different characterizations of investors argued in the debates of the early 1930s, and the different types of policies to which each characterization leads, can still be seen in contemporary rhetoric. There are signals of change,

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15 *See infra* Section II.B.
16 *Id*. at Section II.B.1.
17 *Id*. at Section II.B.2.
18 *Id*.
19 *See* LOUIS LOSS & JOEL SELIGMAN, 1 SECURITIES REGULATION 119 (1989) (in a merit review system regulators have power to "halt 'nonmeritorious' issues").
20 *See* ENCYCLOPEDIA BRITANNICA ONLINE, *Margin,* http://www.britannica.com/eb/ article-9050869 (when purchasing on margin, buyer supplies only a percentage of the price and borrows the remainder from broker, pledging the securities as collateral).
21 *See infra* Section II.C.
22 *Id*. at Section II.B.3.
23 *Id*. at Section II.B.3.a.
24 *Id*. at Section II.B.3.b.
25 *Id*. at Section II.B.3.c.
26 *Id.* at Section II.C.
27 *See infra* note 613.

but as of its most recent major action, Congress, the ultimate forum for the rhetoric of regulation, continues to uphold the policy of investor protection and espouse the rhetoric of the intelligent and trusting investor. The article closes with a few words from one of the subjects of the piece, a sucker, in this case self-confessed, who speaks to the meaning of his investment folly.

*** * * A Note on Methodology * * ***

A policy debate, even in a great deliberative body, is not an academic exercise. One should not expect members of Congress to speak with the formality of classical rhetoric.[28] Instead, their arguments should be taken as they expressed them. In many cases they spoke in epithets or adjectives. Yet, in a rhetorical exchange, a well-chosen epithet or a colorful adjective can speak volumes. In addition, one should not expect members of Congress to speak with the analytical precision of the social sciences.[29] In some remarks members of Congress wove disparate lines of argument so tightly together that it is almost impossible to separate them. Nonetheless, by treating the floor debates of the two earliest federal securities laws as a single policy debate, and attending very carefully to the members' own words, enough material is available to identify the rhetorical premises challenging and supporting the federal policy of investor protection.

II. THE RHETORICAL CONFLICT OF THE EARLY 1930S

In the early 1930s, when President Franklin Roosevelt began sending securities legislation to Congress, he said that his broad purpose was "protecting investors."[30] Later, when Senators and Representatives rose in Congress to support the legislation, they also said that action was needed to protect investors. For example, Representative Kopplemann said that until the previous generation financial panics had hurt only men and women of means.[31] "Those people knew what they were doing and took their chances."[32] Therefore, no legislation had been needed.[33] But in the 1930s, Kopplemann continued, stock exchange activities were not confined to people of wealth.[34] Bankers, tradesmen, industrialists, shopkeepers, stenographers, housewives, laborers, and maids-of-all-work either owned stock or were putting away for the day when they could.[35] For those people, Kopplemann concluded, "protection is needed."[36]

Moreover, members of Congress said, in the unregulated market no one was providing such protection. Senator Norbeck said that in an investigation of finance conducted by the Senate, "we tried to ascertain who protected the investor."[37] The investigation found, he continued, that

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[28] *See e.g.,* EDWARD P.J. CORBETT & ROBERT J. CONNORS, CLASSICAL RHETORIC FOR THE MODERN STUDENT (4th ed. 1999) (discussing classical "arrangement" of rhetoric).

[29] *See e.g.,* Donald Langevoort, *Taming the Animal Spirits of the Stock Market: A Behavioral Approach to Securities Regulation*, 97 NW. U. L. REV. 135 (2002) (discussing possible impact of new behavioral sciences on premises of those supporting and opposing regulation).

[30] 77 CONG. REC. 937 (1933) (Message from the President).

[31] 78 CONG. REC. 8026 (1934) (statement of Rep. Kopplemann).

[32] *Id*.

[33] *Id*.

[34] *Id*.

[35] *Id*.

[36] *Id*.

[37] 77 CONG. REC. 3231 (1933) (statement of Sen. Norbeck) (committee member) (discussing operations of Kreuger & Toll). When a member served on a committee responsible for the securities legislation, in the Senate the

it had not been the attorneys of the bonding houses nor of the stock exchange, not the brokerage houses nor the banking houses, and not the directors.[38] Similarly, Representative Cooper said: "people who invest their money in securities are entitled to some protection; and if those who are charged with holding these securities do not protect them, then they have a right to come to this legislative body and ask for protection."[39] The country, Senator Fletcher said, "justly demands that the public have some protection, real investors some safeguards, and honest business a legitimate chance."[40]

These demands were sharpened by the recent performance of the securities markets. In the late 1920s, the stock market had gone through a period of rapidly rising prices. New technologies like radio had grown dramatically[41] and drawn vast sums in investments.[42] Because the new field was "wholly unsurveyed," and "illimitable with respect to future accomplishment," speculators had run up stock prices to extraordinary heights.[43] In 1928, President Coolidge suggested that the economy had entered a "New Era" as important and as different from the past as the changes brought about by the adoption of the factory method of production.[44] In this New Era there would be sustained demand for stocks.[45] A year later, a leading business person said that in this "much discussed" New Era the value of shares and the volume of dividends had increased with "almost magic speed."[46] Then suddenly, in 1929, the bubble burst. After a sharp market crash in 1929, stocks continued to decline until, by 1932, the Dow Jones Industrial Average Index had lost almost 90% of its pre-crash value.[47] It was suggested that half the securities floated since the First World War had proven worthless;[48] that the American people had "lost perhaps a hundred billion dollars through the purchase of stocks and bonds;"[49] and that an amount equal to perhaps a third of the total national wealth had been lost in the stock market.[50] The vast optimism that had created dreams of a New Era with sustained demand for stocks stood revealed as a speculative mania. As the *Wall Street Journal* opined in 1930, it had been a "mushroom" and an "illusion" that had made people "feel rich for a little season."[51] The mania had also, the public quickly learned, been fed by numerous abusive practices by securities

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Committee on Banking and Currency, *see* CONGRESSIONAL DIRECTORY, 73d Cong., 1st Sess., at 175 (June 3, 1933); or in the House the Committee on Interstate and Foreign Commerce, *see id*. at 197; it will be shown thus: "(committee member)" at the first citation to a statement by that member.

[38] 77 CONG. REC. 3231 (1933) (statement of Sen. Norbeck) (referring to Kreuger & Toll's American director).

[39] 78 CONG. REC. 7928 (1934) (statement of Rep. Cooper of Ohio) (committee member).

[40] 77 CONG. REC. 3801 (1933) (statement of Sen. Fletcher) (committee member).

[41] *See generally* TOM LEWIS. EMPIRE OF THE AIR; THE MEN WHO MADE RADIO, 162 (1991) (production of radios jumped from only a few sets in 1921; to 100,000 in 1922; to 500,000 in 1923).

[42] *See e.g.,* 78 CONG. REC. 8491 (1934) (statement of Sen. Fess) (discussing experience of the Radio Corporation).

[43] *Id*.

[44] *Year Starts Well*, WALL ST. J., Jan. 4, 1928, at 28.

[45] *Id*.

[46] *Colonel Ayres Revises His Views*, WALL ST. J., Jan. 16, 1929, at 18.

[47] *See* Dow Jones Industrial Average Index (1900-2007 Monthly), http://stockcharts.com/charts/historical/djia1900.html (comparing 1929 to 1932).

[48] H.R. 85, 73rd Cong., 1st Sess., 2 (May 4, 1933).

[49] 77 CONG. REC. 2918 (1933) (statement of Rep. Rayburn).

[50] *Id*.

[51] *Passing of a Mushroom*, WALL ST. J., Jan. 10, 1930, at 1.

professionals.[52] In the early 1930s, Senate hearings revealed these practices,[53] to growing public anger.[54]

In 1933 and again in 1934 Congress considered legislation to implement the President's program to protect investors. The content of this legislation is well known, and does not require extensive description. In 1933 Congress passed the Securities Act.[55] The Securities Act is generally concerned with the initial distribution of securities.[56] When securities are offered to the public through interstate commerce they must be registered with the federal government and specified information about them must be disclosed in a registration statement and in a prospectus given to buyers.[57] The government "has no authority to approve any security or to pass on its merits. Its sole function is to ensure that the registration statement is accurate and complete."[58] The statute also contains a general antifraud provision and imposes civil and criminal liabilities for material misstatements and omissions in the registration statement or prospectus.[59] In 1934 Congress passed the Exchange Act.[60] The Exchange Act is generally concerned with the post-distribution or secondary trading of securities.[61] As initially enacted it had four basic purposes: "to afford a measure of disclosure to people who buy and sell securities; to prevent and afford remedies for fraud in securities trading and manipulation of the markets, to regulate the securities markets, and to control the amount of credit that goes into those markets,"[62] generally, in regards to the last, through the regulation of margin.[63] The Act also created the Securities and Exchange Commission ("Commission") to administer the federal securities laws,[64] and established the "protection of investors" as a standard to govern many of the Commission's administrative actions.[65]

Much of the rhetoric surrounding passage of this legislation focused on how it would stop securities fraud, or more particularly, those who commit fraud. Members of Congress said that the "fraudulent promoter has taken an incredible toll;"[66] and that "downright dishonesty, chicanery, thievery, and conspiracy to cheat and defraud" had previously controlled the stock exchanges.[67] A small number of "marauding speculators"[68] – described variously as a "small

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[52] VINCENT P. CAROSSO, INVESTMENT BANKING IN AMERICA: A HISTORY, 322-51 (1970).
[53] *Id*.
[54] *See id*., at 353.
[55] *See supra* note 4.
[56] *See generally* LOSS & SELIGMAN, 1 SECURITIES REGULATION 3, *supra* note 19 at 225.
[57] *Id*.
[58] *Id*.
[59] *Id*.
[60] *See supra* note 5.
[61] LOSS & SELIGMAN, 1 SECURITIES REGULATION 3, *supra* note 19 at 226.
[62] *Id*.
[63] *See supra* note 20 (defining margin).
[64] *See* Exchange Act § 4, *codified at* 15 U.S.C. § 78d.
[65] As initially enacted, the Securities Act provided in six provisions that the protection of investors would govern administrative action by the federal securities regulator. *See* Securities Act, *supra* note 4 at §§ 3(b), 7, 8(c), 10(b)(2), 10(b)(3), and 10(b)(4). As initially enacted, the Exchange Act so provided in 32 provisions. *See* Exchange Act, *supra* note 5 at §§ 3(a)(11), 3(a)(12), 5, 6(a)(2), 7(d), 9(a)(6), 9(b), 9(c), 10(a), 10(b), 11(a), 11(a)(2), 11(b), 11(b)(2), 11(c), 12(b)(1), 12(b)(1)(K), 12(b)(2), 12(d)(twice), 12(e), 12(f), 13(a), 14(a), 14(b), 15, 17(a)(twice), 19(a), 19(b), and 30(a).
[66] 77 CONG. REC. 2918 (1933) (statement of Rep. Rayburn) (committee member).
[67] 77 CONG. REC. 2944 (1933) (statement of Rep. Keller).
[68] 78 CONG. REC. 7939 (1934) (statement of Rep. Truax).

financial clique run wild,"[69] a "small group of men who have no interest in the welfare of the Nation,"[70] or "a handful of men" – [who] had operated like "shell-game artist[s]"[71] or "with stacked cards against the general body of the outside investors."[72] Representative Chapman's remarks exemplified this rhetoric. He said:

> shrewd and crafty men, skilled in the tricks of a crooked game, sit around a table and deliberately and premeditatedly plan, and ruthlessly execute the plan, by devising cunning schemes and resorting to every conceivable trick of financial legerdemain, to loot an unwary public of millions of dollars earned by the sweat of the brow.[73]

The proposition that investor protection depends on identifying and stopping the cunning schemes of a small number of shrewd and crafty men played an important role in the Congressional debates, as did the related proposition that regulation would protect against such individuals by creating a new standard of ethics in the securities business.[74] However, this rhetoric did not go unopposed. Opponents of securities regulation rose to challenge the legislation, but understandably, they did not voice support for cunning schemes or opposition to business ethics. Rather, they challenged the value of investor protection.[75] It was futile, they said, because investors are "suckers" and "fools" and therefore are beyond all help.[76] Nothing, they said, could stop a "fool" from losing his money.[77] This was the rhetorical ground on which the policy of investor protection would be debated. Are investors suckers and fools and beyond all help?

A. Challenge

Federal securities regulation was born on August 4, 1932. That evening, Franklin Roosevelt, a candidate for the Presidency of the United States, met with his campaign policy advisors.[78] They decided that the candidate's next major speech would address regulation of the stock market.[79] At the meeting, Roosevelt told his advisers what he wanted to say. His policy, he said, would have four objectives. The federal government should make sure that only people of character undertake the flotation of securities, that all material facts about securities are known,

[69] 78 CONG. REC. 7867 (1934) (statement of Rep. Maloney of Connecticut) (committee member).
[70] 78 CONG. REC. 7689 (1934) (statement of Rep. Sabath).
[71] H. R. Rep. No. 1383, 73d Cong., 2d Sess., at 6 (April 27, 1934).
[72] 78 CONG. REC. 2271 (1934) (statement of Sen. Fletcher placed in record to accompany the Exchange Act bill).
[73] 77 CONG. REC. 2935 (1933) (statement of Rep. Chapman) (committee member).
[74] *See generally* John H. Walsh, *A Simple Code of Ethics: A History of the Moral Purpose Inspiring Federal Regulation of the Securities Industry*, 29 HOFSTRA L. REV. 1015 (2001).
[75] Statements made in the course of debate by opponents of legislation are generally entitled to little weight. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 203 n.24 (1976). However, these statements have an important role in at least one type of analysis. This is in considering the rhetorical premises underlying the legislative policy. How did opponents challenge the policy? How did supporters respond? To parse the statements of supporters is to consider only half of a dialogue.
[76] *See infra* Part II.A.1.
[77] *Id*.
[78] *See generally* Walsh, *supra* note 74 at 1026-35 (discussing meeting and policy issues it addressed and decided).
[79] A.A. Berle, *Memorandum* (Aug. 5, 1932), *in* NAVIGATING THE RAPIDS; 1918-1971; FROM THE PAPERS OF ADOLF A. BERLE, 53 (Beatrice Bishop Berle, et al., eds. 1973) (hereinafter cited as "Berle Memorandum").

that there shall be continuously public accounts, and that manipulative moves by insiders ought to be disclosed.[80] Through many vicissitudes, over the coming years, this vision – character and disclosure – would be implemented in the federal regulatory regime.[81]

Yet, at this meeting, at very the birth of federal securities regulation, another point of view was heard. Roosevelt's friend and law partner, Basil 'Doc' O'Connor, was present at the meeting. He was always honest with Roosevelt, even to the point of bluntness.[82] He was blunt that evening. Anything that could be enacted could be evaded, he said, and investors – "the public" – are "suckers," and are "likely to continue so, no matter what anyone did or tried to do for them."[83]

The challenge had been made. Investors are suckers and so they would remain. O'Connor's harsh challenge, confronting the meeting with blunt slang, was ignored. An advisor who took notes of the meeting dismissed O'Connor's statement as "wholly cynical."[84] Roosevelt went on to give his speech about stock market regulation in Columbus Ohio on August 20, 1932.[85] In it he criticized the incumbent, President Herbert Hoover, for the scant attention he had given to "the protection of the investing public."[86]

O'Connor did not influence the meeting on August 4th but he may have had another role to play. Roosevelt had wanted to call his campaign policy advisors his "Privy Council."[87] In that spirit, perhaps O'Connor could be viewed as the Council's requisite jester: "all-licensed"[88] to speak his mind freely, challenging and mocking the seriousness of the wise.[89] Moreover, as a member of King Lear's family once had occasion to note, "Jesters do oft prove prophets."[90] In his remarks to the August 4th meeting, O'Connor accurately anticipated a significant challenge that would be raised against the policy of investor protection. As time would show, O'Connor was not alone in thinking that investors are suckers.

1. Investors are "Suckers" and "Fools"

Beginning in 1933, during Congress's floor debates on the legislation that became the Securities Act,[91] and continuing in 1934, during its floor debates on the legislation that became the Exchange Act,[92] investors were repeatedly described as "suckers."[93] If not suckers, then they

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[80] *Id.* at 54-55.
[81] *See generally* Walsh, *supra* note 74.
[82] JAMES ROOSEVELT & SIDNEY SHALETT, AFFECTIONATELY FDR, A SON'S STORY OF A LONELY MAN 360 (1959).
[83] Berle Memorandum, *supra* note 79.
[84] *Id.* (reporting views of A.A. Berle).
[85] Franklin D. Roosevelt, *The Failures of the Previous Administration, Campaign Address at Columbus, Ohio* (Aug. 20, 1932), *in* 1 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 669 (Samuel Rosenman, ed., 1938).
[86] *Id*. at 678 (stating that President Hoover had made only a "vague reference" to his policy in this area during his acceptance speech at the Republican Party Convention).
[87] RAYMOND MOLEY, THE FIRST NEW DEAL 17 (1966). Instead of the 'Privy Council' they quickly became known as the "Brains Trust."
[88] WILLIAM SHAKESPEARE, KING LEAR Act 1, Scene 4, Line 206.
[89] *Id.* at Lines 156-59.
[90] *Id.* at Act 5, Scene 3, Line 71.
[91] Securities Act, *supra* note 4.
[92] Exchange Act, *supra* note 5.
[93] *See e.g.,* 78 CONG. REC. 8490 (1934) (statement of Sen. Hastings); 78 CONG. REC. 8035 (1934) (statement of Rep. Claiborne).

were "fools."[94] Moreover, these statements were not quiet remarks among friends in the cloakroom, or off-color jokes at a Capital Hill nightspot. They were made by members of Congress during formal consideration of the legislation, duly recorded and duly reported in the legislative history. They were made, with all apparent seriousness, to explain the members' substantive positions on the pending bills. They were then reported in the serious press.[95]

Senator Hastings, for example, said that the Congress of the United States "cannot enact legislation to protect the suckers of the Nation."[96] Senator Gore agreed. The legislation, he said, was "an effort to protect a fool against his folly."[97] He doubted it could be done.[98] In Senator Gore's words, "of all 'diseases,' suicide is the hardest to prevent."[99] Representative Merritt had a similar point-of-view. "No bill," he said, "can make everybody honest, virtuous or wise. … Nor can any bill protect the foolish investor."[100] Representative Claiborne suggested that Congress could not write any kind of law to protect "suckers," because if they were shut out of the stock market, they would simply turn to something else, like the Florida land boom.[101] Finally, Representative Bakewell's remarks exemplified this rhetoric. He said:

> Nothing can keep a fool from being parted from his money. No law that can be passed will do that. A very wise man said years ago that the only result of legislation that tried to protect the fools from the consequences of their folly would be to people the entire world with fools.[102]

In short, when Doc O'Connor told Roosevelt that investors are "suckers,"[103] he provided an early warning of the rhetoric to come. Several of the Senators and Representatives who would eventually vote on the policy of investor protection felt the same way.

2. Regulation to Protect "Suckers" and "Fools" would be Futile

Who were these suckers and fools? Some insight can be gained by asking what these words meant. The 1934 edition of a leading dictionary defines a "sucker" as "one who is sucked, or bled, or victimized; hence one easily duped or gulled." [104] The same dictionary defines a "fool" as "a person deficient in judgment; one who acts absurdly or stupidly; a simpleton, dolt." [105]

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[94] *See e.g.,* 77 CONG. REC. 2934 (1933) (statement of Rep. Merritt) (committee member); 78 CONG. REC. 8575 (1934) (statement of Sen. Gore) (committee member); *Id.* at 7938 (statement of Rep. Bakewell).
[95] *Senate Presses Stock Control,* L. A. TIMES, May 11, 1934, at 4 (quoting Senator Hastings to say: "'you can't protect suckers' by passing laws").
[96] 78 CONG. REC. 8490 (1934)(statement of Sen. Hastings).
[97] *Id*. at 8575 (statement of Sen. Gore).
[98] *Id.*
[99] *Id.*
[100] 77 CONG. REC. 2934 (1933) (statement of Rep. Merritt).
[101] 78 CONG. REC. 8035 (1934) (statement of Rep. Claiborne). In the 1920s Florida enjoyed "the greatest land boom in the history of the country." *Another Prosperity Index,* WALL ST. J., Aug. 13, 1925, at 2. *Accord* C.W. Barron, *Florida Flowers and Finance: Miami's Jump in Population and Land Values – the Good and the Bad of It*, WALL ST. J., Feb. 20, 1926, at 1 (rise of new cities without precedent).
[102] 78 CONG. REC. 7938 (1934) (statement of Rep. Bakewell).
[103] *See* Berle, *supra* text accompanying note 83.
[104] WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2518 (1934)(hereinafter cited as "WEBSTER'S").
[105] *Id*. at 982.

Harsh as these definitions may have been, popular usage of these terms in the early 1930s was consistent with the dictionary.

The term sucker was frequently used in the early 1930s to describe people who were – as the dictionary definition would suggest – dupes or gulls. Suckers rushed into Hollywood, ready to waste money trying to break into movies.[106] They invested in phony land grant claims, where everyone, "excepting the suckers," knew the claims were baseless.[107] They invested in the 'heirs-to-vast-estates' game, where their funds would ostensibly be used to establish their claim to the wealth of a family of the same name.[108] No one was immune. Suckers ran "about fifty-fifty" men and women,[109] although there were spirited debates about whether "millionaire widows" were especially susceptible.[110] Education was no defense. Professionals rated high as suckers, including doctors, teachers, and lawyers.[111] Even as sophisticated a city as New York was just another "sucker town."[112]

The term sucker was also frequently used for securities investors. As *Collier's* magazine put it in a 1933 editorial entitled "Don't be a Sucker," much of the "recent wild buying" in stocks had been "imbecilic," and in "the excitement of market gambling" people who "ought to know better" had risked "their savings absurdly."[113] Broadway plays were presented about stock market suckers. In some the suckers recovered their wits and resources.[114] In others, the play ended with new suckers starting out on the same foolish path.[115] Contemporary humorist Will Rogers frequently spoke of stock market suckers. When the market rose it meant that stocks were "about back up to where the suckers can start buying again;"[116] when businesses created holding companies, it seemed like they "had something, so the suckers went for it;"[117] and when investors, even prominent and well placed investors, had stock die on their hands, it placed them on a "'sucker list.'"[118]

The sucker list, in particular, was a contemporary institution. Stock swindlers would use sucker lists to obtain the names of potential victims.[119] The *Wall Street Journal* reported that the "racketeer choosing to deal in securities, works on the age-old theory of 'once a sucker, always a sucker.'"[120] The article continued that two or three places existed in the city where, for a nominal sum, a prospective racketeer could obtain a list of names of proven value, usually consisting of the names of customers who had been caught in previous swindles.[121] These places were known as sucker list houses[122] or the usual sellers.[123] These houses prepared lists of

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106 John Scott, *Filmdom Sucker-Money Rackets Find Easy Prey*, L. A. TIMES, May 1, 1932, at B13.
107 Chapin Hall, Editorial, *Land Grant Claims Magnet to Gullible*, N.Y.TIMES, Apr. 20, 1930, at 46.
108 Alma Whitaker, *'Suckers' Keep Bunko Artists*, L. A. TIMES, Jan. 25, 1932, at A1.
109 *Id*.
110 *Along the Highways of Finance; 'The Millionaire Widows,'* N.Y.TIMES, June 8, 1930, at 43.
111 *Finds New Yorkers Gullible Investors*, N.Y.TIMES, Oct. 21, 1931, at 32.
112 Robert M. Coates, *New York Likes to be Swindled*, N.Y.TIMES, Mar. 17, 1929, at SM10.
113 Editorial, *Don't be a Sucker*, COLLIER'S THE NAT'L WKLY, Aug. 26, 1933, at 50.
114 *Gambler's Folly*, WALL ST. J., Apr. 15, 1932, at 4 (reviewing "Take My Tip").
115 J. Brooks Atkinson, *Saga of the Market*, N.Y.TIMES, May 7, 1932, at 11 (reviewing "Bulls, Bears and Asses").
116 Will Rogers, *Will Rogers Muses on What There is to Be Grateful For*, N.Y.TIMES, Nov. 28, 1929, at 29.
117 Will Rogers, *Rogers Offers an Analysis of Wall Street's Problem*, N.Y.TIMES, May 30, 1931, at 11.
118 Will Rogers, *Will Rogers Now Discovers It Really Was a 'Sucker List*,' N.Y.TIMES, May 27, 1933, at 15.
119 *Stock Swindlers Shift*, N.Y.TIMES, Dec. 5, 1933, at 37.
120 *Renew Stock Frauds Drive*, WALL ST. J., Aug. 8, 1929, at 14.
121 *Id*.
122 *To Investigate Stock Frauds*, WALL ST. J., Oct. 9, 1929, at 13.
123 *Says a Curb Stock was Worthless*, N.Y.TIMES, Apr. 22, 1933, at 8.

"professional types," and also lists devoted exclusively to specific occupations, including clergymen, nurses, chiropractors, dentists, "and even janitors."[124]

Once names were selected from a sucker list, the swindlers could visit the victims,[125] or contact them by telephone.[126] Apparently these methods were successful. The *New York Times* reported on swindlers who received "scores of replies" in a few days, many of which "contained checks of large denominations"[127] Of course, after the stock market crashed in 1929, the number of "'sucker' customers" appeared to diminish.[128] Yet, quickly enough, the racketeers were back in the market, "testing out their sucker lists,"[129] and running swindles appropriate to the new market conditions, such as the high-grader scheme.[130] In the high-grader the swindler convinces holders of securities that had declined in value to part with their certificates so they could be traded for stock of higher value; but instead the swindler would sell the certificates, pocket the money, and disappear.[131]

Securities investors were also sometimes called fools. In the mid-1920s, in an editorial on bogus securities, the *Wall Street Journal* had said: "There are fools anywhere, and a fool and his money are soon parted."[132] More specifically, in the early 1930s, a columnist for the *Los Angeles Times* wrote that stock market investors had been fools,[133] because they had said: "The price of that stock is much greater than its value. I am a blankety-blank fool to buy it at such a price. But some blankety-blanker fool will come along and pay me still more."[134] When that final "nitwit" refused to buy, the whole game came crashing down.[135]

When members of Congress looked around their society in the early 1930s they could easily have seen suckers everywhere, especially in the stock market. Members of Congress could have read about suckers in magazines and in the newspapers, could have seen them on stage, could have joined Will Rogers in laughing at them, and could have known where to find them – on those carefully targeted sucker lists. They also could have heard about the fools and nitwits who thought they could play the stock market game.

In short, the terms suckers and fools were readily available to members of Congress. Why they chose to use them in the debates is another question. To some extent, we can safely assume that they did so for tactical political reasons. From this perspective, the very harshness of the rhetoric gives it the appearance of simple name calling. If so, then it would exemplify the lowest form of deliberative rhetoric. Aristotle said that in a deliberative setting such diatribes should only be used when one is "at a loss for something to say."[136] In the political climate of the early 1930s, one should not ignore the possibility that opponents of securities regulation were, in fact, at a loss for something to say.

In both 1933 and 1934, opponents of securities regulation revealed a high level of political ambivalence. This can be seen in the Congressional debates. In 1933, several members gave

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124 *Id*.
125 *Two are Seized Here in $100,000 Swindles*, N.Y.TIMES, Mar. 16, 1930, at 10.
126 *Stock Swindlers Shift*, *supra* note 119.
127 *Seize 2 in Swindle of $30,000 A Week*, N.Y.TIMES, Apr. 6, 1930, at 1.
128 *Finds Bucket Shops on the Wane Here*, N.Y.TIMES, Mar. 31, 1930, at 18.
129 *Securities Frauds Rising, Says Bureau*, N.Y.TIMES, May 15, 1933, at 21.
130 *Bunko Experts Filch Millions*, L. A. TIMES, Nov. 14, 1932, at A1.
131 *Id*.
132 *Wall Street and the Law*, WALL ST. J., Nov. 18, 1926, at 1.
133 Strikland Gillilan, *The Washington Wash*, L. A. TIMES, Sept. 28, 1931, at A4.
134 *Id*.
135 *Id*.
136 Aristotle, *supra* note 1 at 275 (Book 3, Chapter 17, Section 10).

tepid support to the bill,[137] even though they questioned the need for regulation, and later opposed the Exchange Act.[138] Since the 1933 Act passed both chambers without a roll call vote,[139] these members were never put to the test of an up-or-down position. Similarly, in 1934, when the rhetorical divisions had become open,[140] and both chambers concluded their debates with a roll call vote,[141] many opponents of the legislation took care to say that they favored stock exchange regulation; they opposed only the pending bill.[142] For example, as quoted above, Representative Cooper of Ohio argued in 1934 that "people who invest their money in securities are entitled to some protection."[143] At the same time, he opposed the Exchange Act bill because, he said, it went far beyond the regulation of stock exchanges.[144] This rhetorical position – arguing in favor of regulation while opposing the pending bill -- appears to have been a settled strategy, and drew unfavorable comments from the legislation's supporters.[145]

While the rhetoric of suckers and fools may have been a diatribe intended to mask political ambivalence, it also may have been a diatribe directed at the new president. In August 1932, a few weeks after Doc O'Connor had told him that members of the public are suckers, Franklin Roosevelt published an autographed statement in *Liberty* magazine, entitled: "Making Suckers of Americans."[146] In it, Roosevelt charged that watered stock, unsound foreign loans and fake investments had been unloaded on the public without protest from the incumbent administration.[147] The national administration, he said, "did not lift a finger to point out the dangers of any of these particularly vicious courses of financial exploitation."[148] He admitted that no federal administration "can prevent individuals from being suckers," but he argued that the incumbent administration did not "deserve the confidence of the investing public."[149]

When members of Congress rose to call investors suckers and fools, they could have been responding to either of these tactical considerations: masking their ambivalence or responding to the new President's campaign rhetoric. But many of the remarks went well beyond simple name-calling. Some members of Congress affirmatively took the position that the investing public had been responsible for the problems in the market. For example, Representative Fish rose on the floor of the House to say that it was the "American people themselves" who had caused the disastrous inflation in stock prices and its ruinous consequences.[150] If there was a "guilty" party, he said, it was "the American public."[151] Moreover, members of Congress

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[137] *See e.g.*, 77 CONG. REC. 2934 (1933) (statement of Rep. Merritt) ("this legislation is useful, but in a rather limited way").
[138] *See e.g.*, 78 CONG. REC. 7710-12 & 8117 (1934) (statement and vote of Rep. Merritt).
[139] 77 CONG. REC. 2954 (1933) (vote on House bill); *Id*., at 2996 (vote on Senate bill); *Id*. at 3903 (House vote on Conference Report); *Id*. at 4009 (Senate vote on Conference Report).
[140] *See e.g.,* 78 CONG. REC. 7694 (1934) (statement of Rep. Rayburn).
[141] 78 CONG. REC. 8116 (1934) (House); *Id*. at 8714 (Senate).
[142] *See e.g., infra* text accompanying notes 240 to 242 (exchange between Rep.'s Bakewell & Maloney of Connecticut).
[143] *See supra* text accompanying note 39.
[144] 78 CONG. REC. 7928-30 (1934) (statement of Rep. Cooper of Ohio).
[145] *See e.g.,* 78 CONG. REC. 8013 (1934) (statement of Rep. Rayburn) (saying that this was the talk of every man "…who was trying to chisel and defeat stock exchange legislation"). *Accord id*., at 8107 (statement of Rep. Rankin).
[146] Franklin D. Roosevelt, *Making Suckers of Americans*, LIBERTY, August 20, 1932, at 37.
[147] *Id*.
[148] *Id*.
[149] *Id*.
[150] 78 CONG. REC. 7948 (1934)(statement of Rep. Fish).
[151] *Id*. (recognizing some culpability on the part of the "big international banks").

offered specific characterizations of investors that explained why they had behaved in this way. These characterizations were elaborated in the debates.

a. Regulation would fail just like the effort to prohibit alcohol

In 1934, during consideration of the Exchange Act, Senator Hastings explained his opposition to the bill. He remembered, he said, "the various efforts made by the States of the Union to control the miserable liquor traffic."[152] He continued:

> I saw crimes committed due to excessive use of alcohol. I saw women and children put into the streets because the husbands and fathers, intelligent enough, and able to earn a good living for a family, would not do so because they could not control their appetites for strong drink.[153]

He believed, he said, as did millions of others, that the only way to get rid of liquor was to make it illegal all over the nation, and to do so by an amendment to the Federal Constitution. But then, as the years passed, he became doubtful. Now, he said, the American people have overwhelmingly decided that they did not want to bother with that type of law. He then came to the matter at hand by saying that in his judgment, securities legislation was "pretty nearly equal" to the failed prohibition of strong drink.[154] Securities regulation was an effort to protect people "from doing what they desire to do."[155]

The idea that securities regulation was pretty nearly equal to the prohibition of alcohol may appear surprising. Financial regulation seems a world away from gin mills, speakeasies, bootleggers, and Al Capone. Even more, securities regulation hardly seems to be protecting people from some dangerous appetite. Yet, opponents of securities regulation made this point explicitly.[156] Obviously, in the early 1930s, there was a connection between Prohibition and securities regulation that may now be obscure.

To understand why the failure of Prohibition was an argument against securities regulation one must take account of certain propositions about investors that were raised by the opponents of the legislation. One of the leading opponents explained his views clearly. There are, said Senator Gore, three classes of investors.[157] The first he called "investors." Their goal is to keep their principal safe and earn a reasonable return.[158] They investigate an industry and a particular concern, including its resources, assets, financial structure, management, earnings, and prospects.[159] They then act on that investigation.[160] The second class Senator Gore called "speculators."[161] Their goal, he said, is to sell for a profit.[162] They also conduct an investigation,

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[152] *Id*. at 8490 (statement of Sen. Hastings).
[153] *Id*.
[154] *Id*.
[155] *Id*.
[156] *See e.g.,* 77 CONG. REC. 2934 (1933)(statement of Rep. Merritt); 78 CONG. REC. 7942-43 (1934)(statement of Rep. Studley).
[157] 78 CONG. REC. 8574 (1934)(statement of Sen. Gore).
[158] *Id*.
[159] *Id*.
[160] *Id*.
[161] *Id*.
[162] *Id*.

but they are distinguished from investors by their motives.[163] Finally, the Senator called the third class "gamblers."[164] They know little and care less about industrial conditions in general, about a particular industry, or about a particular enterprise.[165] Instead of investigating, they yield to contagion.[166] As Senator Gore put it, gamblers catch "a fever and this fever is contagious."[167] They buy on a rising market and sell on a falling market.[168] In 1929 the "judge and the janitor, the waitress and the heiress were infected with the fever."[169]

Senator Gore added that speculation is not an illegitimate purpose or object.[170] Speculation has driven the progress of the American economy.[171] On gambling he took a different tack. In this context he said:

> The pending legislation is an effort to protect the fool against his folly. I doubt if it can be done. With all his folly, I think he can outwit our wisdom and beat us to it. Of all "diseases," suicide is the hardest to prevent.[172]

The "fool," in other words, was not the investor, nor the speculator, but the gambler. It was the gambler who could not be protected from his own folly; it was the gambler who could not be protected from financial suicide; and in the late 1920s, from top to bottom, American society had been infected with gambling fever.

Other opponents of the legislation echoed this view. In a contemporary radio address reported in the *Congressional Record*, Representative Fish said that the public gambled and speculated with their earnings "in the hope and delusion of becoming rich overnight without work or effort."[173] On the floor of the House he returned to this theme. The American public, he said, had gone "money mad."[174] In the stock market, Senator Walcott said, "nearly everyone from the 'bellhop' to the boss was gambling."[175]

Here are powerful appetites comparable to an uncontrollable taste for strong drink: gambling, the fever of buying into a rising market, the delusion of overnight riches, and money madness. This connection was recognized in popular discourse. In the summer of 1929, when prohibition and stock speculation were both running strong, the *New York Times* ran an article entitled: "How Financial 'Speakeasies' Net 'Suckers.'"[176] The article compared the "financial speakeasy" and the "liquor speakeasy," and found they had much in common.[177] Not least, the article stated, because the country probably would never be entirely rid of either.[178] Financial speakeasies in

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163 *Id*.
164 *Id*. at 8575.
165 *Id*.
166 *Id*.
167 *Id*.
168 *Id*.
169 *Id*.
170 *Id*. at 8574.
171 *Id*. at 8575.
172 *Id*.
173 *Id*. at 7692 (transcript of radio address by Rep. Fish placed in Congressional Record by Rep. Crowther).
174 *Id*. at 7948 (statement of Rep. Fish).
175 *Id*. at 8283 (statement of Sen. Walcott)(committee member).
176 W.F. Wamsley, *How Financial "Speakeasies" Net "Suckers,"* N.Y.TIMES, Aug. 25, 1929, at XX3.
177 *Id*.
178 *Id*.

particular would flourish during big markets, because there would always be unscrupulous people on the fringe chasing what appears to be an easy dollar.[179]

An important argument of those opposing the policy of investor protection was that the appetite to gamble could not be controlled.[180] Senator Fess took this position on the floor of the Senate. The people, he said: "get into such a psychological condition that machine guns cannot keep them from buying and selling stocks."[181] Representative Treadway agreed. He said that people who want to speculate or gamble will find a way to do so.[182] The Congress, he concluded, cannot legislate against "the instincts of human nature."[183]

This proposition led inexorably to the conclusion that regulation would fail, just like the attempt to prohibit alcohol. Richard Whitney, head of the New York Stock Exchange, had recently been quoted in the press making this point:

> "You can't stop a man from taking a drink by passing a law prohibiting it," he said. "And any attempt to regulate by statute and in minute detail the operation of securities markets is just as impossible of accomplishment."[184]

On the floor of the House, Representative Studley stated a similar view. He rose to say that he earnestly trusted "that this stock market regulation law will not ultimately develop into just another noble experiment."[185] Smashing the saloon had been a "holy crusade," he said, "the dries carried State after State."[186] But, he continued, the American people's "appetite" and "long established customs" made the law impotent.[187] The Congress, Representative Studley said, "with all its vast and far-reaching powers, is impotent to cope with such deep-seated human impulses."[188] Following securities regulation, he said, our people will continue to trade and speculate through "bootleg channels."[189] Then as "we have lately done with prohibition," he said, "we shall retrace our steps in pathos and humiliation."[190]

Moreover, not only would the effort at regulation fail, it would simply drive speculation to some other venue. Representative Claiborne made this argument. As he put it, if suckers were shut out of the stock market, they would simply turn to something else, like the Florida Land Boom.[191] Representative Claiborne was not the first to make this connection. At the height of the Florida Land Boom, in the mid-1920s, the *Wall Street Journal* reported that Florida real

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[179] *Id*.
[180] Modern psychologists have identified such a clinical condition, known as compulsive gambling. *See* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, DSM-IV-TR, 312.31, at 671-74 (2000). It is similar to other addictions, such as alcoholism. *See* COMMITTEE ON THE SOCIAL AND ECONOMIC IMPACT OF PATHOLOGICAL GAMBLING, ET AL., PATHOLOGICAL GAMBLING: A CRITICAL REVIEW, at 18 (1999).
[181] 78 CONG. REC. 8491 (1934)(statement of Sen. Fess).
[182] *Id*. at 8008 (statement of Rep. Treadway).
[183] *Id*. at 8009.
[184] *Whitney Sees Curb as Nationalization*, N.Y.TIMES, Mar. 1, 1934, at 16.
[185] 78 CONG. REC. 7942 (1934)(statement of Rep. Studley). When beginning his campaign for the Presidency in 1928, Herbert Hoover had called the effort to prohibit alcohol a noble experiment. *Hoover's Dry Views Sought by Women*, N.Y.TIMES, July 30, 1928, at 3 (a great social and economic experiment, noble in motive).
[186] 78 CONG. REC. 7942 (1934)(statement of Rep. Studley).
[187] *Id*. at 7943.
[188] *Id*. at 7942.
[189] *Id*. at 7943.
[190] *Id*.
[191] *Id*. at 8035 (statement of Rep. Claiborne).

estate attracted speculators because it was not subject to the margin requirements and brokers' capital requirements imposed on Wall Street.[192] Florida, the article reported, had "became a magnified magnet to attract the speculative spirit of the country when shunted out of Wall Street."[193]

The argument that suckers would simply find another venue to exercise their instinct for gambling led to one of the more intriguing suggestions in the debates. A Representative who opposed regulation argued that the only way to fight stock market gambling was to give investors another outlet for their appetites. [194] To stop speculation in securities, Representative Kenney said, Congress should establish a national lottery.[195] This was consistent with the view that stock market gambling was an uncontrollable product of human nature. It was also consistent with the move in many states, in the desperate economic conditions of the early 1930s, to turn to sports and gambling as new sources of taxation.[196] More surprisingly though, it may have been consistent with the confidential views of at least some members of the Roosevelt administration. In April 1934 a prominent columnist for the *New York Times* reported that "some of the most thoughtful and influential persons in the administration" favored the rise in gambling.[197] In their view, he reported, "the simpler and safer it is made for Americans to bet on horses, dogs, roulette wheels and baseball games, the less will be their temptation to gamble in the stock market."[198] Gambling, according to this view, leads to private losses; while stock market speculation leads to "false booms, lures innocent investors into speculation and finally helps to produce panics and depressions."[199] Of course, the columnist went on to say, "nobody in the government seems willing to say this sort of thing publicly just yet."[200]

In short, those arguing this position said, suckers and fools lose money in the securities markets because they are driven by an uncontrollable urge to gamble. Nothing could be done to help them. They do it all to themselves. As Representative Fish put it: "If we speculate and lose we must expect to pay the piper and not blame anyone but ourselves."[201]

b. Regulation cannot prevent the "weak" and "incompetent" from bringing "ruin to themselves"

In 1934, during consideration of the Exchange Act, Representative Dirksen of Illinois made a sophisticated and clever argument against securities regulation. His remarks were sophisticated, because they went beyond name-calling and suggested a coherent system for explaining and justifying investor losses. They were clever, because he used the words of the "enlightened and socially minded" jurist, Supreme Court Justice Oliver Wendell Holmes.[202]

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[192] C.W. Barron, *Florida Flowers and Finance: Miami the World Wonder – Florida the National Speculation – The Cause*, WALL ST. J., Feb. 16, 1926, at 8.
[193] *Id*. (growth accompanied by "crazy" land speculation).
[194] 78 CONG. REC. 8027 (1934)(statement of Rep. Kenney)(committee member). He voted against the Exchange Act. *Id*. at 8116.
[195] *Id*.
[196] *States Legalizing Gambling for Revenue,* LITERARY DIGEST, Apr. 15, 1933, at 16.
[197] Arthur Krock, *Growth of Betting Laws Stirs Little Opposition*, N.Y.TIMES, Apr. 24, 1934, at 22.
[198] *Id*.
[199] *Id*.
[200] *Id*.
[201] 78 CONG. REC. 7948 (1934)(statement of Rep. Fish).
[202] *Id*. at 7959 (statement of Rep. Dirksen).

Dirksen quoted from Holmes' opinion in *Board of Trade v. Christie Grain & Stock Co.*[203] In that case, the Board of Trade had sought to enjoin certain "bucket shops"[204] from using its system of continuous quotations for their own purposes. The bucket shops responded that the Board of Trade, by permitting speculation in future contracts, was itself a bucket shop, and thus lacked equity to enjoin them. In a portion of Holmes' opinion quoted by Dirksen, the Justice had written:

> Of course, in a modern market, … People will endeavor to forecast the future and to make agreements according to their prophecy. Speculation of this kind by competent men is the self-adjustment of society to the probable. Its value is well known as a means of avoiding or mitigating catastrophes, equalizing prices, and providing for periods of want. It is true that the success of the strong induces imitation by the weak and that incompetent persons bring themselves to ruin by undertaking to speculate in their turn. But legislatures and courts, generally, have recognized that the natural evolutions of a complex society are to be touched only with a cautious hand, and that such coarse attempts at a remedy for the waste incident to every social function as a simple prohibition and laws to stop its being are harmful and vain.[205]

Dirksen uses Holmes' words to say that investors who are "weak" and "incompetent" ruin themselves by speculating. On the other hand, investors who are "strong" and "competent" are successful. In fact, the losses of the weak are the mere "waste incident to every social function." Finally, the social structures in which these functions take place are the result of "natural evolutions."

This analysis – dividing society into strong and weak, competent and incompetent, successful and waste, and looking to natural evolution as the driving social mechanism – strongly suggests the doctrine known as Social Darwinism. Social Darwinism applied Charles Darwin's evolutionary theory to human society.[206] According to this doctrine, society progresses through "survival of the fittest."[207] Of course, it also means that society progresses through extinction of the unfit.

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[203] 198 U.S. 236 (1905).

[204] The term "bucket shop" has had several meanings over the years. In current usage a bucket shop is a broker that makes trades on a client's behalf and promises a certain price; the broker, however, waits until a different price arises and then makes the trade keeping the difference as profit. *See generally Bucket Shop*, INVESTOPIA, http://www.Investopia.com/terms/b.bucketshop.asp. In the 1930s the term was generally applied to a broker where dubious securities were sold or fraudulent sales practices were used. *See e.g., Bucketshops Try to Reopen Here*, N.Y.TIMES, Feb. 4, 1934, at 14. In the early years of the 20th Century, the time period relevant to Justice Holmes' opinion, the best definition was given in federal legislation introduced by Representative Gillett of Massachusetts: "The term bucket shop shall include every place where any person …engages in the business of making or offering … contracts … respecting the purchase or sale … of any grain, … or other securities, wherein both parties … intend that such contract … shall be … settled according … to the public market quotations of prices made on any board of trade or exchange .…" *To Prevent Gambling*, WALL ST. J., Dec. 28, 1903, at 7.

[205] 78 CONG. REC. 7959 (1934)(statement of Rep. Dirksen)(quoting from 198 U.S. 247-48).

[206] *See* PAUL F. BOLLER, JR., AMERICAN THOUGHT IN TRANSITION: THE IMPACT OF EVOLUTIONARY NATURALISM, 1865-1900, 49-52 (1969).

[207] *See id*., at 2 (tracing origin of phrase to Herbert Spencer, although it was later adopted by Charles Darwin).

Herbert Spencer, the leading English theorist of Social Darwinism, wrote that society progresses by "weeding out" the ignorant and incompetent.[208] In human terms, this means "inconvenience, suffering and death."[209] As a result, there is likely to be some spontaneous sympathy from one person to another, and some effort to mitigate the harshness of this result.[210] Spencer counsels against such efforts, because, in his view, they lead to harmful ultimate results.[211] "It is best," he said, "to let the foolish man suffer the penalty of his foolishness."[212] Society should not, he said, step between ignorance and its consequences, because doing so suspends society's progress.[213]

Dirksen's use of Holmes' words to advance a Social Darwinistic position was a legitimate use of the Justice's words. Modern scholarship recognizes Holmes' Social Darwinistic views, particularly on economic matters.[214] Indeed, in a letter written ten years before the opinion in the *Board of Trade* case, Holmes had said that he doubted that any writer of English, except Darwin himself, had done more than Spencer to affect "our whole way of thinking about the universe."[215] Moreover, as modern scholars note, Holmes supported some of Social Darwinism's uglier aspects, such as the compulsory sterilization of those deemed 'defective.'[216]

For his time Dirksen appears unusually insightful. Contemporaries viewed Holmes as a paragon of progressive thinking.[217] Moreover, Holmes' most famous public statement on Social Darwinism had been to reject its applicability to Constitutional analysis. In dissent, in *Lochner v. New York*,[218] he had written, "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."[219] Hence, within the understanding of the early 1930s, Dirksen's characterization of Holmes as "enlightened and socially minded" was well nigh unassailable. As a result, Dirksen could expect his rhetorical use of Holmes' Social Darwinism to carry a lot of weight.

In addition, Holmes' specific characterization of speculators – strong or weak, competent or incompetent – should be read in light of the highly moral tone adopted by American Social Darwinists. William Graham Sumner, the leading American theorist of Social Darwinism, wrote that "'the strong' and 'the weak' are terms which admit of no definition unless they are made equivalent to the industrious and the idle, the frugal and the extravagant."[220] Thus, strength and competence are matters of industry and frugality, or, as Sumner put it in a slightly different

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[208] HERBERT SPENCER, SOCIAL STATICS, 413 (D. Appleton and company)(1865).
[209] *Id.*at 412.
[210] *Id*. at 414.
[211] *Id*. at 414-415.
[212] *Id*. at 413.
[213] *Id*. at 412-413.
[214] *See e.g.,* G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF, 360 (1993)(Homes was an "unreconstructed social Darwinist on economic issues").
[215] Letter from Justice Holmes to Lady Frederick Pollock, July 2, 1895, *published in* (ed. Mark DeWolfe Howe & John Gorham Palfrey), HOLMES-POLLOCK LETTERS, THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874-1932, 57-58 (1941).
[216] *See* WHITE, JUSTICE OLIVER WENDELL HOLMES, *supra* note 214 at 320 & 404-08.
[217] *See id*., at 333 (Holmes was "mythologized as a 'liberal' judge").
[218] 198 U.S. 45 (1905).
[219] *Id*. at 75 (Holmes, J. dissenting).
[220] William Graham Sumner, *The Influence of Commercial Crises on Opinions About Economic Doctrines*, (1879), *published in* (A.G. Keller & Maurice R. Davie, ed.'s), 2 ESSAYS OF WILLIAM GRAHAM SUMNER, 44, 56 (1934)(hereinafter cited as "ESSAYS OF WILLIAM GRAHAM SUMNER").

context: industry, economy, prudence and sound judgment.[221] Weakness and incompetence are matters of idleness and extravagance, or again, in a slightly different context, vices and mistakes.[222] This type of thinking was also reflected in the Congressional debates. In speaking of investors, Representative Fish said that they "wanted to become rich overnight" and "indulged in a veritable orgy not only of extravagance and waste but also of gambling and speculation."[223]

This characterization of investor behavior, particularly the types of behavior underlying losses in the stock market, leads to a fairly clear view of regulation. There should be none. At a minimum, it is unneeded. As Sumner had put it: "Gambling and less mentionable vices cure themselves by the ruin and dissolution of their victims."[224] Even worse, regulation promotes undesirable conduct. Representative Bakewell argued this position. When he said, as quoted above, that a "very wise man said years ago that the only result of legislation that tried to protect the fools from their folly would be to people the entire world with fools,"[225] the wise person to whom he alluded was probably Herbert Spencer. As a professor of philosophy at Yale University from 1905 to 1933,[226] Representative Bakewell had probably encountered Spencer's work. Spencer's exact words had been: "A sad population of imbeciles would our schemers fill the world with, could their plans last."[227] The schemers condemned by Spencer were those supporting governmental regulation.

Specifically, Spencer was writing in opposition to proposals to regulate the medical profession. He was forthright in stating that if the government failed to step between "quacks" and those who patronize them,[228] many people, particularly of the poorer classes, would be injured.[229] Nonetheless, he said, if it is as safe to be ignorant as to be wise, no one would become wise.[230] Laws to save "silly" people from the evils of putting faith in empirics would do this, and therefore are bad.[231] Instead, Spencer said, it is better to "clear the world" of these fools, and "make room for better."[232]

This leads inevitably to the conclusion that regulation is positively harmful. Sumner said: "The whole system of social regulation by boards, commissioners, and inspectors consists in relieving negligent people of the consequences of their negligence and so leaving them to continue negligent without correction."[233] This view was reflected in the debates of the 1930s. As stated in a telegram Representative Claiborne placed in the *Congressional Record*, regulation would be "an effort to protect the sucker."[234] The author of the telegram said, "I do not speculate

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[221] William Graham Sumner, *The Forgotten Man* (1883), *published in* 1 ESSAYS OF WILLIAM GRAHAM SUMNER, 466, 474 (describing institutions of civil liberty).
[222] *Id*. (same).
[223] 78 CONG. REC. 7948 (1934)(statement of Rep. Fish).
[224] William Graham Sumner, *The Forgotten Man* (1883), *published in* 1 ESSAYS OF WILLIAM GRAHAM SUMNER, at 481.
[225] 78 CONG. REC. 7938 (1934)(statement of Rep. Bakewell).
[226] BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774-PRESENT, http://www.loc.gov/rr/Electronic Resources (hereinafter cited as "BIOGRAPHICAL DIRECTORY OF THE CONGRESS")(Bakewell, Charles Montague).
[227] SPENCER, SOCIAL STATICS, *supra* note 208 at 205.
[228] *Id*. at 201.
[229] *Id*. at 204.
[230] *Id*. at 205.
[231] *Id*.
[232] *Id*.
[233] William Graham Sumner, *The Forgotten Man*, *supra* note 221 at 483.
[234] 78 CONG. REC. 8035 (1934)(telegram placed in record by Rep. Claiborne).

in the market, and believe those who gamble should not burden the Government with their guardianship at the expense of the enterprises of the country and those who have money to invest in them."[235]

In short, those arguing this position said, suckers and fools lose money in the securities markets because they are weak and incompetent. Nothing could be done to help them. A regulatory guardianship for suckers would serve only to populate the world with fools. If investors are too silly to see through the tricks of empirics and quacks – or in this case, shills and manipulators – Congress should let the natural forces of survival weed them out, clear the world of them, and make room for better.

B. Response

Members of Congress who supported the policy of investor protection did not sit idly while investors were called suckers and fools. Some members responded with vehemence. After "plundering the nation and the investing public," they rose to say, Wall Street now had the "gall" to call those who had lost money "suckers and fools."[236] They also pointed out that the Wall Street brokers had made billions "off of these people whom they now call suckers and fools."[237] Others tried to turn the derogatory terms back on those who used them. Representative Rayburn cited to a business person who felt he had been "played for a sucker" when he discovered how he had been used by those lobbying against the legislation.[238] Others still responded with conciliation. "Let us stop calling names," one member said, "and analyze the bill."[239] The most powerful response, though, took the form of a question.

In May of 1934, when Representative Bakewell expressed the view, discussed above, that "nothing can keep a fool from being parted from his money,"[240] Representative Maloney immediately rose to ask: "Does the gentleman mean to infer that all the people who lost money in the stock market since 1929 were fools?"[241] Representative Bakewell responded, "Certainly not."[242]

The ease with which a simple question could force the rhetoric of suckers and fools into retreat demonstrates its fundamental weakness in the political environment of the time. Representative Bakewell went on to say that a lot of investors "would have been saved if some of the provisions of this bill had been in effect."[243] He was not opposed to stock market regulation, he said, only to the "objectionable and dangerous features" of the bill then before the Congress.[244] As previously noted, this appears to have been a settled strategy.[245] When challenged, opponents of the legislation frequently asserted that they favored stock market regulation, just not in the form then before Congress.[246] Nonetheless, however he cloaked his

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[235] *Id.*
[236] *Id.* at 8089 (statement of Rep. Truax).
[237] *Id*. at 7940 (statement of Rep. Truax).
[238] *Id*. at 7696 (statement of Rep. Rayburn).
[239] *Id*. at 7927 (statement of Rep. Pettengill) (committee member).
[240] *Id*. at 7938 (statement of Rep. Bakewell).
[241] *Id*. at 7938 (statement of Rep. Maloney of Conn). Representative Maloney appears to have meant "imply" not "infer." But the author chooses not to mark it "sic," to allow the member to speak in his own words.
[242] *Id.* (statement of Rep. Bakewell).
[243] *Id*.
[244] *Id*.
[245] *See supra* text accompanying notes 136 to 145.
[246] *Id*.

answer, Representative Bakewell had conceded the fallacy of the major – although unstated -- premise supporting his argument: investors who lose money in the stock market are fools.[247]

Representative Bakewell's admission exemplified a significant rhetorical advantage enjoyed by those favoring the policy of investor protection. In the conditions of the early 1930s, if only suckers and fools had been parted from their money, then a lot of Americans were suckers and fools.

1. In the Unregulated Market the "Innocent Suffered with the Guilty"

Beginning in 1933, during Congress's floor debates on the legislation that became the Securities Act,[248] and continuing in 1934, during the floor debates on the legislation that became the Exchange Act,[249] members supporting investor protection repeatedly advanced the proposition that the collapse of stock values in the early 1930s had harmed many "innocent" investors. The Report of the House Committee on Interstate and Foreign Commerce on the Exchange Act ("1934 House Committee Report") said that the market collapse had carried away the gains not only of those who had participated in "the speculative debauch," but also the "the savings of the most frugal and most thrifty invested in securities."[250] Members echoed this language during the debates.[251] They spoke of the "fabulous amount … lost each year by innocent purchasers of securities."[252] Throughout the debates, members repeatedly described investors simply as "innocent"[253] or "honest."[254] As one member put it, the "innocent suffered with the guilty."[255] Presentation of this proposition took several forms including humor, pathos, and accusation.

Humor was exemplified by an exchange that took place on the floor of the House as Congress considered the Securities Act. Representative Marland rose to address a question to Representative McFadden. Representative McFadden answered the question, and then continued:

> May I say to the House that the gentleman who has just interrupted me has been the victim of manipulations of houses that have issued a great many of the securities where the public has been mulcted. The gentleman himself is a victim of that situation.[256]

At this point, Representative Evans rose and asked: "Does the gentleman know of anyone who has not been?"[257] The *Congressional Record* reports that his sally was greeted with laughter.[258]

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[247] *See generally* CORBETT & CONNORS, CLASSICAL RHETORIC, *supra* note 28 at 38-58 (discussing major premises).
[248] Securities Act, *supra* note 4.
[249] Exchange Act, *supra* note 5.
[250] H.R. No. 1383, 73d Cong., 2d Sess., 4 (April 27, 1934).
[251] 78 CONG. REC. 7864 (1934)(statement of Rep. Wolverton) (committee member).
[252] *See e.g.,* 77 CONG. REC. 2930-31 (1933)(statement of Rep. Wolverton).
[253] *See e.g., id*. at 1019 (statement of Senator Ashurst).
[254] *See e.g.,* 78 CONG. REC. 10267 (1934)(statement of Rep. Sabath).
[255] *Id*. at 7864 (statement of Rep. Wolverton).
[256] 77 CONG. REC. 2940-41 (1933)(statement of Rep. McFadden).
[257] *Id*. (statement of Rep. Evans).
[258] 77 CONG. REC. 2940-41 (1933)(reporter's note).

Another member made the same point more bluntly by reminding his colleagues that: "You and I took our losses too."[259]

Pathos was exemplified by members' descriptions of the "widows and orphans" and "aged and infirm" who had lost money in the market, in many cases by buying securities "scarcely worth the paper they are written on."[260] Representative Cannon said: "I have seen men and women, old and bent with age, suffer the loss of their life savings as a result of purchasing fraudulent worthless stocks from bankers and others engaged in the selling of securities."[261] Senator Fletcher spoke of specific investors: a "maiden lady," a "street sweeper," and a "trucker down in Florida."[262] All of them had suffered in the stock market because they had been persuaded to sell their Liberty Bonds, invest their life savings in securities, or had purchased the stock of a company in bankruptcy.[263]

Finally, accusation was exemplified by members reproaching the people or forces that had caused investors harm. Accusations directed against people tended to be colorful, as with the Senator who said promoters had "sunk their fangs into the pocketbooks of the innocent investors with greater rapacity than a school of sharks ever sank teeth into human flesh."[264] Accusations directed against forces tended to be relatively impersonal, as with the Representative who said excessive speculation had caused "financial panics and enormous financial losses and ruin to millions of industrious Americans."[265]

In any event, regardless of how it was said, with humor, pathos, or accusation, the point was made. Not only suckers and fools had been parted from their money. So had the frugal, the thrifty, the honest, and the industrious. Indeed, so had members of Congress. What could be done to protect these innocent investors?

2. Regulation Should Protect those who "Have Not Shown That They Can Protect Themselves"

Before members of Congress could give substance to investor protection, they had to decide a preliminary point: Who were these "innocent" investors? As before, some insight can be gained by asking what the word meant. The 1934 edition of the same dictionary cited above defines an "innocent," as someone who is "free from guilt or sin, or from evil action or effect."[266] "Innocent," however, is a complex term. Once the same dictionary turns to the specific characteristics of an innocent, ambiguity arises. Innocent, it says, includes people who are "unacquainted with evil; pure; untainted; as an innocent child;" but it also includes people who are "free from blame or censure; blameless, as to be innocent of wrong intentions."[267] When applied to investors, these more specific definitions produce very different results. Investors who act with child-like innocence are likely to be very different from those who act with blameless intentionality.

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[259] *See e.g*. 78 CONG. REC. 8027 (1934)(statement of Rep. Kopplemann).
[260] *Id*. at 8107 (1934)(statement of Rep. Rankin).
[261] 77 CONG. REC. 2941 (1933)(statement of Rep. Cannon).
[262] 78 CONG. REC. 8175 (1934)(statement of Sen. Fletcher).
[263] *Id*.
[264] 77 CONG. REC. 1019 (1933)(statement of Sen. Ashurst).
[265] 78 CONG. REC. 10267 (1934)(statement of Rep. Sabath).
[266] WEBSTER'S, *supra* note 104 at 1282.
[267] *Id*.

Several members of Congress characterized investors in a manner suggestive of child-like innocence. Representative Chapman, for example, said that "innocent purchasers" of worthless securities had suffered an "irreparable loss amounting to billions of dollars."[268] In the same passage, almost close enough to have been on the same breath, he also said that unscrupulous issuers and underwriters had preyed upon "the uninformed and the credulous."[269] Representative Chapman leaves little room for doubt about his view of investors. They are "innocent," but they are also "uninformed" and "credulous."

Representative Chapman was not the only member to link innocence to such attributes. One member said that "uninformed and trusting investors" had been lured into buying shares at prices far above their true value.[270] Others preferred to say that investors had been "unsuspecting;"[271] including, as one member put it, those "unsuspecting home folks."[272] Finally, members turned to that perennial image of uninformed innocence: the lamb. As one Representative put it, with "little, if any, information as to the real value of the stocks they traded in, and no knowledge of the intricacies of market practices," the "vast majority" of investors were "as innocent and gullible as lambs."[273]

Many members of Congress probably chose to use this characterization of investors simply as a tit-for-tat response to the rhetoric of suckers and fools. Opponents of regulation said investors were guilty, so supporters of regulation said they were innocent. Opponents of regulation said it was investors' own fault that they lost money, so supporters of regulation said they were not to blame. In other words, when the opponents of regulation said investors suffered from money madness, the delusion of overnight riches, the fever of buying into a rising market, supporters of regulation said that investors were innocent of such characteristics. There may have been some amount of this during the floor debates. But those supporting regulation seem to have recognized that when they characterized investors as uninformed, credulous, unsuspecting, and lamb-like, on some level they were agreeing with the opponents of regulation. Representative Sabath, a supporter of regulation, made this connection explicit. He rose to say that:

> in view of the fact that we cannot, as the gentleman from Massachusetts [Mr. Treadway] states, prohibit speculation or gambling, that it is our duty to see that the investing public, or rather the "lambs," be protected by this Government."[274]

Senator Bulkley, in particular argued this characterization. Uninformed investors, he said, "have not shown that they can protect themselves."[275] Congress, he continued, had a duty to protect the "great mass" of such people.[276] How this could be done was elaborated in the debates.

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268 77 CONG. REC. 2935 (1933)(statement of Rep. Chapman).
269 *Id*.
270 78 CONG. REC. 8391 (1934)(statement of Sen. Bulkley) (committee member).
271 *See e.g.,* H.R. 85, 73d Cong., 1st Sess., 3 (1933); 77 Cong. Rec. 2942 (1933)(statement of Rep. Arens).
272 77 CONG. REC. 2945 (1933)(statement of Rep. Gibson).
273 78 CONG. REC. 7863 (1934)(statement of Rep. Wolverton).
274 *Id*. at 8011 (statement of Rep. Sabath)(bracketed text in original). *See also id*., at 8008 (statement of Rep. Treadway).
275 *Id*. at 8391 (statement of Sen. Bulkley).
276 *Id*.

a. Regulation should protect the investor who "knows nothing" about finance

In 1933, when Representative Chapman said investors are uninformed and credulous, he gave some explanation for why they are so. The "average investor," he said, "has little if any technical knowledge concerning the value of securities."[277] Later the same day Representative Mott rose to say:

> [T]he average investor knows nothing about securities or securities transactions. He knows nothing about the financial structure of the corporations which issue securities. The average investor does not know how to read or interpret a balance sheet, even when he has all the facts before him which went into the make-up of the balance sheet.[278]

Beyond technical knowledge, some investors were simply uneducated. Representative Rayburn noted that some of the correspondence he received on the Exchange Act bill was from "almost illiterate stockholders and bondholders."[279] Their "pathetic letters" reflected the high-pressure methods still being used by those who opposed regulation.[280]

If investors had no knowledge of securities, how had they made their investments? The answer, at least in the Report of the House Committee on Interstate and Foreign Commerce on the Securities Act ("1933 House Committee Report"), was that the "rank and file of securities buyers" had "hitherto bought blindly."[281]

There was only one way, Representative Mott argued, to protect such investors. Securities that are "illegitimate and fundamentally unsound" should not be sold at all.[282] The investing public should be protected from such securities by prohibiting their sale and by giving a federal securities commissioner authority to make an investigation of every security to be sold.[283] This type of review, Representative Mott said, would not guarantee against losses, because even legitimate businesses may lose money.[284] But it would at least assure investors that a security is legitimate and had been issued honestly and in good faith.[285] Any smaller step, Representative Mott concluded, even a step in the right direction, would fail.[286]

In the debate Representative Mott emphasized his experience as a securities commissioner,[287] having served as Corporation Commissioner of Oregon from 1931 to 1932.[288] In that capacity he had enforced Oregon's securities statute. It appears he enforced it with a great deal of enthusiasm. Shortly after he was elected to Congress the Supreme Court of Oregon ruled that a suspension order he had issued was defective because it did not comply with the formalities of

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[277] 77 CONG. REC. 2935 (1933)(statement of Rep. Chapman).
[278] *Id*. at 2947 (statement of Rep Mott)(emphasis added).
[279] 78 CONG. REC. 7696 (1934)(statement of Rep. Rayburn).
[280] *Id*.
[281] H.R. 85, 73d Cong. 1st Sess., 8 (May 4, 1933).
[282] 77 CONG. REC. 2947 (1933)(statement of Rep. Mott).
[283] *Id*.
[284] *Id*.
[285] *Id*.
[286] *Id*. at 2948.
[287] *Id*. at 7930.
[288] BIOGRAPHICAL DIRECTORY OF THE CONGRESS, *supra* note 226 (Mott, James Wheaton).

the Oregon Act.[289] Representative-Elect Mott promptly wrote to a special prosecutor asking him to reopen the suspension proceeding.[290] In his request to the special prosecutor he added that it was "difficult for a person familiar with the facts of this case to comment on the action of the state supreme court without losing his temper."[291]

While Representative Mott's service as Corporation Counsel may have had some unhappy moments, his argument for federal regulation was in the tradition of the Blue Sky laws. An address given to the Oregon Bar Association in October 1926 gave a contemporary view of those laws.[292] As a general matter, the speaker said, it was necessary under those laws for an issuer to secure a license from the state before any securities could be sold.[293] The purpose of the license was to protect the public against securities issued by fraudulent promoters, and to prevent the exploitation of "innocent investors" by way of "exorbitant commissions and salaries paid to promoters and salesmen, by manipulation of companies in reorganization, watering of stock, the failure to provide sufficient working capital, and other abuses."[294]

Much as Representative Mott would later state in Congress, the speaker at the Oregon Bar Association indicated that these laws would protect those who could not protect themselves. "No doubt," the speaker said, "many who are not capable of exercising intelligent judgment and are easily allured by the prospect of large profits on small investments have been saved from considerable loss by the passage of these enactments."[295] The speaker also indicated that the Oregon statute had "met with much public favor."[296]

In short, those arguing this position said, investors who know nothing about finance should be protected from themselves. The government should review the merits of securities issues. Will Rogers found humor in this type of regulation. He said: "There ought to be some form of guardianship for people that buy all this junk."[297] Representative Mott took it seriously. He said: "I want to do away with the rule of caveat emptor altogether where the sale of a fraudulent security is concerned. I want to make it impossible by law for any financial crook to operate in the United States."[298]

b. Regulation should protect the investor who is "gullible" and "easily swayed"

In 1933, toward the end of the debate on the Securities Act bill, Representative Lambeth rose to explain what he thought should be done to protect investors. It is through house-to-house solicitation, he said, "that the unwary, the unworldly, and the uninformed are chiefly defrauded."[299] "We are all familiar" he continued, "with the high-pressure security salesman, his elaborate technique of approach and of closing, his prepared harangue to outtalk the unprepared

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289 State v. Charlesworth, 16 Pac.Rptr 2d 1116 (Sup. Ct. Or. 1932).
290 *Rehearing of Charlesworth Case Sought*, OREGON DAILY JOURNAL, December 14, 1932, at 7.
291 *Id*.
292 Arthur M. Whiteside, *Legislation Relating to Public Companies*, 6 OR. L. REV. 93 (1927) (reproducing an address before the Oregon Bar Association given in October 1926).
293 *Id*. at 94.
294 *Id*.
295 *Id*. at 95.
296 *Id*.
297 *Mr. Rogers Would Guard the Educated Investor*, N.Y.TIMES, November 13, 1933, at 19.
298 *Id*.
299 77 CONG. REC. 2949 (1933) (statement of Rep. Lambeth).

prospect, and his faked-up enthusiasm."[300] To deal with this problem, he had an amendment to offer to the bill, should the opportunity arise.[301] The draft amendment made it unlawful for any person to go from house-to-house offering securities for subscription or purchase.[302] In the event, the opportunity to offer the amendment did not arise.

Many other members joined Representative Lambeth in condemning high pressure salesmen. The 1933 House Committee Report spoke of high-pressure salesmanship "with all its demonstrated evil effects."[303] One Senator identified the problem as "supersalesmanship"[304] But salesmen were only half of the problem. Investors were the other.

Along with condemning high-pressure salesmanship, members also bemoaned investors' susceptibility to such tactics. As one member put it, they are "easily swayed by smooth salesmanship," and they do "not look deeply into a situation."[305] Representative Rayburn, when speaking of the conditions under which stocks and bonds had been issued, said that "P.T. Barnum once remarked that the American people pay to be gulled."[306] Just as some members referred in passing to investors as innocent or honest,[307] others referred to them in passing as "gullible."[308]

This view of investors as shallow and easily swayed was consistent with current thinking on public opinion. Walter Lippmann, a contemporary writer and commentator, worried about the "incompetence" of public opinion.[309] The citizen, Lippmann said, "gives but a little of his time to public affairs, has but a casual interest in facts and but a poor appetite for theory."[310] As a result:

> The individual man does not have opinions on all public affairs. He does not know how to direct public affairs. He does not know what is happening, why it is happening, what ought to happen. I cannot imagine how he could know.[311]

Moreover, when the public did form an opinion, it was inexpert in its curiosity, intermittent, slow to be aroused, quickly diverted, and it discerned only "gross distinctions."[312] Nor, Lippmann said, did the "compounding of individual ignorances in masses of people" produce a better result.[313] When members of Congress asserted that investors do not look deeply into a situation and are easily swayed, they could well have had Lippmann's writings in mind.

How could Congress protect these gullible investors? One such effort was led by Senator Bulkley. In 1934 he offered an amendment to the Exchange Act bill that would have prohibited

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300 *Id*.
301 *Id*.
302 *Id*. at 2948.
303 H.R. REP. NO. 73-85, at 3 (1933).
304 78 CONG. REC. 8699 (1934) (statement of Sen. Kean) (committee member).
305 *Id*. at 8027 (statement of Rep. Kopplemann).
306 77 CONG. REC. 2918 (1933) (statement of Rep. Rayburn).
307 *See supra* text accompanying notes 250-55.
308 *See e.g.,* 77 CONG. REC. 2920 (1933) (statement of Rep. Parker of New York) (committee member); 78 CONG. REC. 7701 (1934) (statement of Rep. Brown); *id.* at 8169 (statement of Sen. Fletcher).
309 WALTER LIPPMANN, THE PHANTOM PUBLIC, 22-39 (Harcourt, Brace & Co. 1925).
310 *Id*. at 24-25.
311 *Id*. at 38-39.
312 *Id*. at 65.
313 *Id*. at 38-39.

margin lending for the purchase of securities.[314] The debate on this proposal made it plain that it was intended to protect investors from themselves.

Senator Bulkely's rhetoric led the way. When he introduced the amendment he said:

> [T]here ought not be a money desk on the floor of the stock exchange where any man, without any reference to whether he can afford it or not, whether he knows what he is doing or not, can borrow up to the hilt to take a flyer in any stock on the board.[315]

He also placed in the *Congressional Record* a letter from a correspondent who said that if Congress recognized margin, it would legalize "the biggest gambling game in the world, of which the public know nothing, wherein 98 percent of them always lose."[316] Moreover, Senator Bulkley's correspondent said, if Congress regulated margin, as the Exchange Act bill proposed, instead of banning it, Congress was "simply standardizing the borrowing capacity of millions of gamblers who are not entitled to credit, who are able to put up their life savings as margin, thus they are gambling on a shoe string."[317]

Senator Glass supported this effort. It was suggested at the time that Senator Bulkley's proposal "probably would have attracted no great attention but for its support by Senator Glass."[318] Senator Glass also rose to link this provision to investors' ignorance of the securities markets. He reported that in a hearing he had asked a businessperson:

> [I]f he would indicate, in his judgment, what percentage of persons who engaged in stock speculation on the exchanges had the remotest idea of the condition of the companies there represented by their stocks, as to whether they were paying dividends, or losing money, or anything about them, and it will surprise the Senate to have me state that his answer was that less than 5 percent, outside the professional speculators and brokers, had the remotest idea of the condition of the companies in whose stock they were buying and speculating.[319]

That being so, Senator Glass continued, he wondered how much good would be accomplished by detailed reports, how many of the people who speculate in stocks would know the meaning of the detailed reports, or even "how many of them will take the time to look at one of the reports."[320] For his view, he said, he favored abolishing gambling on margin.[321]

Senator Norris rose to add a moral tone. He indicated that borrowing on margin had started "thousands of clerks, workmen, business men, [and] professional men…on the road to ruin."[322] They think a stock is going up in value, so they take money from their employer to invest, with the honest intention of putting it back.[323] When the stock goes down, they lose the money and

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[314] 78 CONG. REC. 8386 (1934).
[315] *Id*. at 8387 (statement of Sen. Bulkley).
[316] *Id*. 8388 (letter placed in Record by Senator Bulkley).
[317] *Id*.
[318] *Trading on a Margin*, N.Y.TIMES, May 11, 1934, at 20.
[319] 78 CONG. REC. 8391 (1934) (statement of Sen. Glass)(committee member).
[320] *Id*.
[321] *Id*.
[322] *Id*. at 8393 (statement of Sen. Norris).
[323] *Id*.

"either commit[] suicide or go[] to the penitentiary;" but either way, the Senator concluded, the "gambling goes on just the same."[324]

Senator Fletcher joined in this moralistic rhetoric. He cited to the testimony of a federal judge who believed that "the penitentiaries [were] 'crowded' with men found guilty of embezzlement and other offenses, all by reason of their operations on the stock exchanges."[325] They and hundreds of thousands of others, the judge said, had lost their businesses, their property, their reputation, and their good names because they had been "tempted" to speculate on margin.[326] Another correspondent added inheritance, life insurance, trust funds, savings, and even cherished family heirlooms to the losses swept up in stock exchange speculation.[327] Finally, Senator Fletcher placed a letter in the *Congressional Record* from an association of Massachusetts Congregational Churches that believed it had identified the source of opposition to securities regulation.[328] Opposition to regulation, the Association said, was coming from those who were "addicted to speculation."[329] The Association urged Senator Fletcher to regulate and condemn all stock market operations "as may be called gambling."[330]

This moralistic approach to securities regulation was consistent with contemporary religious writing on the stock market. While thoughtful pieces in religious magazines wrestled with the distinctions among investment, speculation, and gambling,[331] other pieces simply condemned the evils of "stock gambling."[332] As one article put it: "the whole nest of speculators and gamblers [should be] driven out of our financial markets and to our race tracks, our crap parlors, our pool rooms and keno hells where they belong."[333]

Prohibiting margin, Senators Bulkley and Norris argued, would require investors who wish to speculate on borrowed money to obtain a loan from a bank, where they would be subject to sound credit requirements.[334] In Senator Bulkley's view, this would ensure that speculators had the resources to "try their luck" in the stock market, either with their own funds or with the "basic requisites of bank credit."[335] Senator Norris took a stronger view. He suggested that requiring investors to obtain a loan from a bank would have the effect of cutting off all credit for speculating.[336] As he put it:

> If one should go to his banker and say, "I want to borrow $10,000 to gamble on margin on the stock exchange of New York", [sic] he would not get anything; the banker would not lend it to him. It would not be a legitimate loan; it would not be respectable; because it would be gambling.[337]

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[324] *Id*.
[325] *Id*. at 8175 (statement of Sen. Fletcher); *see also* S.Rep. No. 792, 73d Cong., 2d Session, 7 (1934) (citing to judge's testimony).
[326] 78 CONG. REC. 8175 (1934)(statement of Sen. Fletcher).
[327] *Id.* at 8184 (letter placed in Record by Sen. Fletcher).
[328] *Id*. at 8177-78 (letter placed in Congressional Record by Sen. Fletcher).
[329] *Id*. at 8177.
[330] *Id*. at 8178.
[331] Collis Stocking, *Investment, Speculation, Gambling*, THE CHRISTIAN CENTURY, May 10, 1933, at 622.
[332] John T. Flynn, *Abolish Stock Gambling*, THE CHRISTIAN CENTURY, August 9, 1933, at 1011, 1013.
[333] *Id*.
[334] 78 CONG. REC. 8389 (1934) (statement of Sen. Bulkley); *id.* at 8392 (statement of Sen. Norris).
[335] *Id*. at 8389 (statement of Sen. Bulkley).
[336] *Id*. at 8392 (statement of Sen. Norris).
[337] *Id*.

While the debate on prohibiting margin trading was the most significant,[338] other similar measures were considered. In 1934 Senator Kean offered an amendment to the Exchange Act bill that would have prohibited door-to-door sales.[339] As Senator Kean put it, the amendment would prohibit sales "to the house-wife by people unknown to her."[340] As seen above, in 1933 Representative Lambeth had hoped to offer a similar amendment in the House.[341]

Finally, in 1934, Senator Barkley suggested a similar amendment, although he appears to have done so ironically. Senator Bulkley, arguing in favor of his amendment to prohibit margin lending said: "the customer's man in the broker's office is engaged today – in this year 1934 – in calling up on the telephone to ask domestic servants, and others who should not be engaged in stock-market transactions, to go in and make investments."[342] Senator Barkley rose and responded: "It would be much easier, and I think much wiser, probably, to adopt an amendment preventing any customer's man from calling anybody up on the telephone to suggest that he buy a stock."[343]

In short, those arguing this position said, gullible investors -- housewives, domestic servants, those not entitled to credit, clerks, workmen, and businessmen – should be protected from themselves. As suggested in a letter that Senator Bulkley placed in the *Congressional Record*, Congress "must regulate the public."[344] Or, as an investor said in a letter Senator Fletcher placed in the *Congressional Record*: "We who are unable to protect ourselves … beg you to protect us by law."[345]

3. Regulation Should Protect the "Solid Little Fellows" Who Have "Tried to Invest Intelligently"

Not all members of Congress who supported regulation gave the same answer to the question: Who were these innocent investors? To return again to the meaning of the word and the 1934 dictionary cited above, innocents can include those who act with blameless intentionality.[346] Investing with blameless intentionality is quite different from investing with child-like innocence.

Several members of Congress characterized investors in a manner suggestive of blameless intentionality. Representative Maloney of Connecticut, for example, spoke of the "clear headed, sober, intelligent workingmen who have tried to invest intelligently."[347] These investors included "the little banks, the small industries, the business men of America, and the hundreds of thousands of individuals who have periodically been caught in the vortex of juggled finance."[348] They were, in Representative Maloney's words, the "hundreds of thousands of the solid little

[338] *Id*. at 8386-96 (debate and vote on amendment offered by Sen. Bulkley).
[339] *Id*. at 8699 (statement of Sen. Kean).
[340] *Id*.
[341] *See supra* text accompanying notes 299-302.
[342] 78 CONG. REC. 8396 (1934) (statement of Sen. Bulkley).
[343] *Id*. (statement of Sen. Barkley) (committee member).
[344] *Id*. at 8388-89 (letter placed in Congressional Record by Sen. Bulkley). Senator Fletcher quoted from the same letter. *Id*. at 8177.
[345] *Id*. at 8179 (letter placed in Congressional record by Sen. Fletcher) (correspondent sought protection from "self-perpetuating managers … who habitually run the large corporations for their own benefit and enrichment").
[346] *See supra* text accompanying notes 266 to 267.
[347] 78 CONG. REC. 7867 (1934) (statement of Rep. Maloney of Connecticut).
[348] *Id*. at 7866.

fellows."[349] Some of these solid little fellows were "in and out of the market."[350] Others, in particular New Englanders, bought for investment holding.[351] Not a little of that region's investment demand, Representative Maloney noted, came from New England's "carefully conservative banks, and its magnificently operated insurance companies, which safeguard the humble estates men endeavor to create by real self-sacrifice."[352]

This was a new departure in the debates. Unlike the previous arguments, which shared an equally skeptical view of investors – suckers and fools or gullible lambs – this argument characterized investors as intelligent, solid, and carefully conservative. This different characterization of investors led to a different policy conclusion. Where the previous arguments had assumed that investor protection is a form of guardianship, and opposed or supported the policy on that ground, here regulation would enable investors to help themselves. As Representative Bulwinkle put it in 1933, regulation could protect investors by seeing to it "that any person of ordinary intelligence, by due care and due diligence, can protect himself against purchasing securities which are either fraudulent or worthless."[353] How this could be done was elaborated in the debates.

a. Regulation should protect the investor who will exercise "reasonable care" and utilize the information regulation would make available

In 1933 Representative Wolverton rose on the floor of the House to explain his support for the Securities Act bill. The "merit of this bill," he said, is that it provides a "means of protection to the investing public," without the government assuming the "stupendous task of passing upon the value, quality, or desirability of the multitude" of securities in interstate and international commerce.[354] It will prove, he continued, "highly beneficial to any investor who is intelligent and prudent enough to utilize the information made available."[355] The *Congressional Record* reports that this last phrase was greeted with applause.[356]

Representative Wolverton's suggestion that some investors may be "intelligent" and "prudent" seems straightforward, even conventional. The fact that it was viewed in the debate as a line worthy of applause shows just how far some members had gone in contrary directions. In the face of arguments that investors are suckers and fools and beyond all help, or gullible lambs, and therefore require protection from themselves, words like "intelligent" and "prudent" could have an especially powerful effect.

For example, in 1933, Representative Mapes said that the proposed Securities Act bill: "Will not prevent anybody from putting his money into rat holes or into highly speculative ventures if he sees fit to do so," but he continued, "in the exercise of reasonable care he can go to [the federal securities regulator] or the underwriter or the dealer in securities and find out the facts relating to the business of the corporation issuing the securities."[357] Similarly, Representative

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349 *Id*
350 *Id*. at 8012 (statement of Rep. Mapes) (committee member).
351 *Id*. at 7867 (statement of Rep. Maloney of Connecticut).
352 *Id*.
353 77 CONG. REC. 2925 (1933) (statement of Rep. Bulwinkle) (committee member).
354 *Id*. at 2931 (statement of Rep. Wolverton).
355 *Id*. at 2931-32.
356 *Id*. at 2932 (reporter's notes).
357 *Id*. at 2912 (statement of Rep. Mapes).

Rayburn said that the bill would make information available to the prospective purchaser: "if he is wise enough to use it."[358]

One of the most important characteristics of these intelligent investors is that they exercise judgment. A recurring argument made by those supporting the proposed bills was that investors should be left to exercise their own judgment. For example, in 1934, Representative Lea said:

> We do not mean that the Federal Government will attempt to substitute its judgment for the judgment of the stockholder in the matter of determining the prudence of the investment. That is a problem that must be assumed by the investor and of which the Government does not try to relieve him[.][359]

Other members made the same point: investors must exercise their own judgment as to the merits of their investments.[360]

Perhaps the fundamental point of this argument was that public disclosure of accurate information about issuer companies "is essential to give the investor an adequate opportunity to evaluate his investment."[361] As a result, those making this argument criticized the unregulated market because even investors who had sought to act with intelligence had been frustrated in their efforts. For example, Representative Rayburn said that the "inquiring investor" had been able to get "little except blurbs."[362] Senator Fletcher said that people had been persuaded to invest without any information "except the advertisements put forth by the agents or representatives of those issuing the securities, and such advertisements have not given full information to the public."[363] Even institutions, such as corresponding banks, have taken on allotments of securities "solely on the word" of the investment bank as to the securities' worth and value.[364]

In one sense, this rhetoric was populist. Investors should be given access to the same information heretofore available only to the elites. The 1934 House Committee Report complained that the possession of business facts "has for a number of years been the exclusive prerequisite of powerful banking and industrial groups."[365] The Exchange Act bill, said Representative Maloney, "gives the man on the outside a knowledge up to now reserved to himself by the man on the inside."[366] Many other similar references can be found in the debates. Representative Rayburn said that the purpose of regulation is "to place the buyer on the same plane so far as available information is concerned, with the seller."[367] Representative Wolverton said that "an assurance that full and true information is available to the small investor on the outside as well as to the insider cannot help but produce a more ready and substantial market for securities."[368]

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[358] *Id*. at 2919 (statement of Rep. Rayburn).
[359] 78 CONG. REC. 7862 (1934)(statement of Rep. Lea) (committee member).
[360] *See e.g.*, 77 CONG. REC. 2913 (1933) (statement of Rep. Mapes).
[361] 78 CONG. REC. 8163 (1934) (statement of Sen. Fletcher).
[362] 77 CONG. REC. 2918 (1933) (statement of Rep Rayburn).
[363] *Id*. at 2982.
[364] *Id*. at 2914 (statement of Rep. Greenwood).
[365] House Report 1383, 73d Cong. 2d Sess., at 13 (April 27, 1934) (to accompany H.R. 9323).
[366] 78 CONG. REC. 7869 (1934) (statement of Rep. Maloney of Connecticut).
[367] 77 CONG. REC. 2918 (1933) (statement of Rep. Rayburn).
[368] 78 CONG. REC. 7865 (1934) (statement of Rep. Wolverton).

In another sense this rhetoric was didactic. Investors must be taught to conduct themselves properly. As the 1933 House Committee Report put it: "The rank and file of securities buyers who have hitherto bought blindly should be made aware that securities are intricate merchandise."[369] Representative Wolverton counted it a benefit of the 1933 legislation that it worked not by allowing but by "requiring" the purchaser to exercise judgment in regards to his or her own investments.[370] As the 1934 House Committee Report put it: "No investor, no speculator, can safely buy and sell securities upon the exchanges without having an intelligent basis for forming his judgment as to the value of the securities he buys or sells."[371] Senator Fletcher's remarks exemplified this rhetoric. He said:

> An investor should always investigate; and … if he cannot do that, he should stay away from any buying as he is almost helplessly on the outside, subject to suggestions that reach him, not to strengthen his position, but just to make him inclined to buy.[372]

Finally, the nature of this rhetoric was illustrated by those who opposed it. Critics tried to turn its emphasis on intelligence and judgment against it. Representative Mott, who was skeptical of investors' ability to fend for themselves, noted that the regulatory regime embodied in the pending legislation would only help the "shrewd investor," not those who are "poor and untutored."[373] Also, Representative Merritt, who occupied an ambiguous position in 1933 and then opposed regulation in 1934, said:

> I suppose when good times come again, with money plentiful and the people hopeful, it will happen, as it happened before, that a man will ask some friend what he thinks is a good thing to buy and the friend will name a stock, and the man will buy without any more inquiry or information.[374]

In short, those arguing this position said, regulation would help those who were able to help themselves. In the unregulated market the solid little fellows' efforts at investigation had been frustrated. Only sales blurbs had been available. Through regulation, disclosure would give these investors an opportunity to investigate their investments and exercise their judgment with reasonable care.

b. Regulation should protect the investor who is "thrifty" and has "trust" in the nation's great financial institutions

In 1933, Representative Rayburn explained why he supported the Securities Act bill. "Today," he said, "an important part of the wealth of individual citizens consists of interest in great enterprises of which no single person owns a major portion."[375] "Today," he continued, "the owner does not possess actual physical properties;" instead "he holds a piece of paper which

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[369] House Report 85, 73d Congress, 1st Sess., at 8 (May 4, 1933) (to accompany H.R. 5480).
[370] 77 CONG. REC. 2931 (1933)(statement of Rep Wolverton).
[371] House Report 1383, 73d Cong. 2d Sess., at11 (April 27, 1934) (to accompany H.R. 9323).
[372] 78 CONG. REC. 8173 (1934) (statement of Sen. Fletcher).
[373] 77 CONG. REC. 2948 (1933) (statement of Rep. Mott).
[374] *Id*. at 2934 (statement of Rep. Merritt).
[375] *Id*. at 2917 (statement of Rep. Rayburn).

represents certain rights and expectations….But the owners of these pieces of paper have little control over the property," and "no actual responsibility with respect to the enterprise."[376] Thus, as Professor Berle so well says:

> The spiritual values that formerly went with ownership have been separated from it * * * Physical property capable of being shaped by its owner could bring to him direct satisfaction apart from the gain it yielded * * * It represented an extension of his own personality. * * * This quality has been lost to the property owner.[377]

With only a symbol, nothing more, an owner cannot directly enjoy wealth in securities.[378] Only through sale in the market can the owner obtain the direct use of his wealth.[379] Yet, Representative Rayburn said, sale in the market depends on forces beyond the owner's control: the "great swings in the appraisal by society of its own immediate future."[380] As a result, "the owner of securities is chained to the market."[381] The pending legislation had been drawn, he concluded, for the protection of these "owners of symbols."[382]

Investors' willingness to defer the current enjoyment of their resources and instead invest them in symbolic claims on the future has traditionally been regarded as a cardinal virtue of capitalism.[383] In the Congressional debates of the early 1930s, several members emphasized the presence of this virtue among contemporary investors. Members spoke of the millions who practiced "self-stinting thrift,"[384] the "great mass of thrifty people,"[385] the "humble estates men endeavor to create by real self-sacrifice,"[386] and the "thousands and tens of thousands of honest, hard-working, God-fearing men and women, who had saved a meager few thousands."[387]

For many members, the great tragedy of the financial crisis of the early 1930s had been the damage done to the confidence of these thrifty savers and owners. Representative Pettengill said: a "burned child fears the fire" and the public has taken "a terrific burning with worthless securities.[388] Manipulation and misleading statements, Representative Maloney said, did not stop after crippling banks, insurance companies, industry, and investors;[389] they went on to dull the faith of conservative investors in the investment banking houses long engaged in the business of selling high grade securities.[390] Moreover, many members believed they had identified the specific source of the harm. As Representative Rayburn put it:

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[376] *Id*.
[377] *Id.* at 2917 (statement of Rep. Rayburn) (quoting from A.A. BERLE & G. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY, 66-67 (1932)).
[378] *Id*. at 2917-18.
[379] *Id*.
[380] *Id*. at 2917.
[381] *Id*. at 2918.
[382] *Id*.
[383] *See* MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM, 155-83 (Talcott Parsons trans., Scribner's Press 1958).
[384] 78 CONG. REC. 7866 (1934) (statement of Rep. Maloney of Connecticut).
[385] *Id*. at 8391 (statement of Sen. Bulkley).
[386] *Id*. at 7867 (statement of Rep. Maloney of Connecticut).
[387] *Id*. at 7958 (statement of Rep. Snyder).
[388] 77 CONG. REC. 2928 (1933) (statement of Rep. Pettengill).
[389] 78 CONG. REC. 7869 (1934) (statement of Rep. Maloney of Connecticut).
[390] *Id*.

> [The huge loss] did not follow from the kind of confidence game against which parents could warn their sons. It came through the leadership that the average investor had a right to believe he could trust.[391]

Similarly, Representative Ford said: "No sane man enters a gambling house expecting to get a fair break for his money."[392] But when investors entered the securities markets, they thought they were dealing with "conservative, responsible, business men who are affording them the facilities of the market on an even chance with all others who use the market for the purpose of buying and selling securities."[393]

In other words, investors had placed their trust in financial institutions, and that trust had been abused. Representative Rayburn said that the thousands of stockholders of a great corporation had "come to trust implicitly" in the board of directors.[394] Similarly, Representative Eltse argued that investors relied upon the bankers, "since faith in the bankers was virtually the only measuring rod for the investor."[395] In investors' losses, he said, were "countless tragedies for individuals who lost all their possessions because of misplaced trust in supposedly reliable institutions."[396]

This argument led readily to a critique of the financial operators who were not "as wise, not as conservative, and sometimes are not as trustworthy as millions of American investors have been persuaded to believe."[397] But there is another equally important element as well. Representative Maloney made this second element explicit. He said that "great financial business" is made possible by the millions of investors who practice "self-stinting thrift" and invest with "possibly pathetic faith in the integrity" of financial operators and the stability of markets.[398] In other words, thrift and faith were not simply personal virtues; they were necessary for the establishment of America's great financial businesses.

In short, those arguing this position said, investors are thrifty savers and owners who are willing to defer the use of their resources. Regulation would protect them by restoring their trust in financial institutions. With regulation they could proceed "not only with open eyes but with honest information."[399] With that confidence, the "great financial business" of the nation could resume.[400]

c. Regulation should protect the investor from the "deliberate introduction of a mob psychology"

In 1934, when Representative Rayburn rose on the floor of the House to explain why he supported the Exchange Act bill, he pointed to the testimony of Governor Black, of the Board of Governors of the Federal Reserve, before the House Committee.[401] Governor Black had been

[391] 77 CONG. REC. 2918 (1933) (statement of Rep. Rayburn).
[392] 78 CONG. REC. 7717 (1934) (statement of Rep. Ford).
[393] *Id*.
[394] 77 CONG. REC. 2916 (1933) (statement by Rep. Rayburn).
[395] *Id*. at 2951 (statement of Rep. Eltse of California).
[396] *Id*. at 2925 (statement of Rep. Kelly of Pennsylvania).
[397] *Id*. at 2918 (statement of Rep. Rayburn).
[398] 78 CONG. REC. 7866 (1934) (statement of Rep. Maloney of Connecticut).
[399] 77 CONG. REC. 2928 (1933) (statement of Rep. Pettengill).
[400] 78 CONG. REC. 7866 (1934) (statement of Rep. Maloney of Connecticut).
[401] *Id*. at 7699-7700 (statement of Rep. Rayburn).

asked what effect a law similar to the Exchange Act would have had on the stock market situation in 1929.[402] He had replied that if such a law had been in effect in 1927 and 1928, it could have lessened the speculation in the market, but by 1929 it would have been too late.[403] Governor Black said, Representative Rayburn remembered, that "nothing could have stopped the wild speculation of 1929 because the people practically went insane."[404] A few days later, when Representative Mapes rose on the floor to voice his support for the bill, he also pointed to Governor Black's testimony.[405] He had a slightly different recollection. Representative Mapes remembered Governor Black saying: "I do not think anything could have stopped the gambling mania of 1929 after it got underway."[406] In either event, whether Governor Black said "insane" or "mania," Representatives Rayburn's and Mape's recollections were fundamentally consistent: investors suffered from a mental condition that in 1929 had grown so severe it could not be cured.[407]

The proposition that investors' behavior was insane or maniacal ran through the debates in the early 1930s. Some of the most colorful, even libidinous language of the debates was used to describe this behavior. The securities market in the 1920s, members said, had been a "saturnalia"[408] where speculation had been "naked,"[409] "unrestrained,"[410] "wild,"[411] a "spree,"[412] and most common of all, an "orgy,"[413] even a "wild orgy."[414]

This view of investor behavior was stated by members of Congress on all sides of the debate, and was reflected in all of the arguments. Those opposing the investor protection regime pointed to this behavior, ascribed it to human nature, and argued that it was futile to try and stop it.[415] Those favoring regulation to protect investors from themselves pointed to this behavior, ascribed it to ignorance or gullibility, and argued that regulation had to impose affirmative restrictions on investor behavior.[416] Even those favoring the pending legislation noted this behavior, but doing so placed them in something of a rhetorical bind. If investors were so intelligent and their trust so appropriate, what could explain their recent behavior?

The public "went wild," a member supporting regulation said, but their behavior had been "induced and led on, in a way," by efforts to expand their speculative spirit.[417] As the 1933 House Committee Report put it, investors had behaved irrationally, but they did so because they had been subjected to a "deliberate overstimulation" of their appetite to purchase securities.[418]

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[402] *Id*. at 7699.
[403] *Id.* at 7699-7700.
[404] *Id*.
[405] *Id*. at 7922 (statement of Rep. Mapes).
[406] *Id*.
[407] Representative Mapes had the better memory. Governor Black had said: "I do not think anything could have stopped the gambling mania of 1929 after it got underway." Stock Exchange Regulation, Hearings before the Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., 812 (March 23, 1934).
[408] 77 CONG. REC. 2982-83 (1933) (statement of Sen. Fletcher).
[409] H. Rep 1383, 73d Cong., 2d Sess., at 1 (April 27, 1934).
[410] 78 CONG. REC. 7864-65 (1934) (statement of Rep. Wolverton).
[411] *Id*. at 8390 (statement of Sen. Bulkley).
[412] *Id*. at 8098 (statement of Rep. Johnson of Oklahoma).
[413] *See e.g*., 77 CONG. REC. 3232 (1933) (statement of Sen. Norbeck); 78 CONG. REC. 7863 (1934) (statement of Wolverton); *id*. at 8012 (statement of Rep. McGugin).
[414] 78 CONG. REC. 8098 (1934) (statement of Rep. Johnson of Oklahoma).
[415] *See supra* Section II.A.
[416] *See supra* Section II.B.2.
[417] 78 CONG. REC. 8167 (1934) (statement of Sen. Fletcher).
[418] H. REP. NO. 73-85, pt. 2, at 2 (1933).

Similarly, as the 1934 House Committee Report put it, in describing the harm that the Act was intended to address: "the deliberate introduction of a mob psychology into the speculative markets by the fanfare of organized manipulation menace(s) the true functioning of the exchanges."[419]

The 1930s may have been the heyday of mob psychology. The fascist dictators of Europe were viewed as masters of mob psychology.[420] In the early 1930s, the American press carried stories of extraordinary events, such as Nazi rallies that included almost half the population of Berlin.[421] At home, mob psychology was used to explain events from riots by farmers,[422] to runs on banks,[423] to disruptions by students.[424] The work of Gustave Le Bon, an academic who had studied mob psychology,[425] was influential with American political leaders.[426] Finally, mob psychology had been used to explain the stock market. As the stock market crashed in 1929, mob psychology figured prominently in the press as an explanation for the event.[427]

In the Congressional debates in the early 1930s, members pointed to several specific means by which the markets were influenced. Hints, tips, and financial publications all played a role, because all were designed to increase turnover.[428] An "appearance of financial success," that is, an ability to make a show of rapid and large profits, instead of "proof of actual financial accomplishment,"[429] also played a role. Finally, "tricky devices" like wash sales, matched orders, and manipulations, were, Representative Ford said, on a par with the use of loaded dice by crooked professional gamblers.[430] The 1934 House Report said these devises were "designed to create a misleading appearance of activity with a view to enticing the unwary into the market on the hope of quick gains."[431] "By an appeal to their avarice [speculation] first destroys the investment consciousness of countless small investors," according to a letter Senator Fletcher placed in the *Congressional Record*, and then it "destroys their savings and their confidence."[432]

Against the destructive psychology of manipulation, members asserted the wholesome effects of regulation. For example, in 1933 Representative Greenwood said:

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419 H. REP. NO. 73-1383, at 11 (1934).
420 Shepard Stone, *Hitler's Showmen Weave a Magic Spell*, N.Y. TIMES, December 3, 1933, at SM8.
421 *Nazis Will Stage Fete For 2,000,000*, N.Y. TIMES, April 29, 1934, at E3.
422 *Iowa Troops Rule Farm Riot Areas; Mob Blocks a Sale*, N.Y. TIMES, April 29, 1933, at 1.
423 *Red Plot to Start Bank Run Revealed by Broderick Aides*, N.Y. TIMES, December 26, 1930, at 1.
424 *47 Students Face Sentences For Riot,* N.Y. TIMES, December 31, 1930, at 2.
425 Le Bon argued that under certain circumstances: "an agglomeration of men presents new characteristics very different from those of the individuals composing it. The sentiments and ideas of all the persons in the gathering take one and the same direction, and their conscious personality vanishes. A collective mind is formed, doubtless transitory, but presenting very clearly defined characteristics." GUSTAVE LE BON, THE CROWD: A STUDY OF THE POPULAR MIND 26 (MacMillan & Co. 1896). These characteristics included that the feelings shown by a crowd were "very simple and very exaggerated," and that a participating individual's intellectual standard is "immediately and considerably lowered." *Id*. at 59.
426 *Dr. Gustave Le Bon, Scientist, Is Dead*, N.Y. TIMES, December 15, 1931, at 27 (reporting that his work had influenced Theodore Roosevelt, President from 1901 to 1909, and Charles Dawes, Vice President from 1925 to 1929).
427 *Premier Issues Hard Hit, Selling by Europeans and 'Mob Psychology' Big Factors in Second Big Break*, N.Y. TIMES, October 28, 1929, at 1; *Lays Stock Crash to Gullible Public, Guaranty Survey Critical of 'Mob Psychology' in Exaggerated Buying and Selling*, N.Y. TIMES, October 28, 1929, at 41.
428 78 CONG. REC. 8166 (1934) (statement of Sen. Fletcher).
429 77 CONG. REC. 2939 (1933) (statement of Rep. Mapes).
430 78 CONG. REC. 7717 (1934) (statement of Rep. Ford).
431 H. REP. NO. 73-1383, at 10 (1934).
432 78 CONG. REC. 8176 (1934) (letter placed in Record by Sen. Fletcher).

> It has been said that we have drifted into a gambler's civilization, in which men are no longer inclined to invest their money in proven and honest business; but believing they can make more money in the negotiation and sale of securities, sometimes upon a margin and upon a basis of gambling, our whole financial system has taken on the psychology of gambling instead of honest methods of banking and industry. So publicity concerning investments will have a wholesome psychological effect in every community ….[433]

Once subject to these effects, Representative Greenwood suggested, investors would make more knowledgeable investments in local enterprises and there would be less high- powered promotion by big city banks.[434] Similarly, Representative Ford said that the citizen who desires to invest his money in legitimate securities should have an "honest, fair, and open chance."[435] If, Representative Ford continued, "he loses through the natural or ordinary hazard in industry and commerce, that is a loss he is willing to take."[436] Finally, Representative Mapes said, those supporting the legislation did not attempt to distinguish between speculation and investment; that is, to legislate where investment ends and speculation begins.[437] They seem to have assumed that once regulation was in place, the solid little fellows would figure out the difference between investment and speculation on their own.

In short, those arguing this position said, the mob psychology that had led to the maniacal behavior of the 1920s could be controlled by prohibiting the tricky devices used by crooked professional gamblers. This would give investors an opportunity to focus on the ordinary hazards of industry and commerce, free of the "deliberate over stimulation" of their appetites.[438]

C. Result

When the debates of the early 1930s are parsed out into their different rhetorical positions, as above, they lose much of the energetic give-and-take that members of Congress must have experienced on the floors of the Senate and House. The positions described above were being raised and challenged throughout the debates. This is illustrated by an exchange on the floor of the House. Throughout the 1933 debate, Representative Mott constantly returned to the limitations in the Securities Act to support his argument for merit review.[439] At one point he rose to challenge the liability provisions of the Act. What good, he asked, would it do to bring criminal proceedings seven or eight years afterward?[440] In this case, instead of provoking a defense of the disclosure and liability regime, his statement led Representative Parker of New York to reply: "There is an old saying that you cannot protect a fool from his folly."[441] The rhetoric of investor protection in the early 1930s can only be understood in light of this ongoing

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433 77 CONG. REC. 2914 (1933) (statement of Rep Greenwood) (paragraph-breaks omitted).
434 *Id*.
435 78 CONG. REC. 7717 (1934) (statement of Rep. Ford).
436 *Id*.
437 *Id*. at 7921 (statement of Rep Mapes).
438 *See supra* note 419.
439 77 CONG. REC. 2948 (1933) (statement of Rep. Mott) (summarizing the questions he had raised through the debate).
440 *Id*. at 2922.
441 *Id*. (statement of Rep. Parker of New York).

three-way characterization of investors as suckers and fools, as gullible lambs, or as intelligent and thrifty.

A certain amount of care must be exercised in analyzing rhetorical exchanges. Rhetorical terms are not protected by copyright. Speakers advocating opposing views are free to use each other's vocabulary. Astute use of an opponent's terms can be a powerful rhetorical technique. For example, as seen above, in the Congressional debates in the early 1930s, some members used the lamb as an image of the investor as innocent victim. So did Representative Britten when he challenged the value of the Securities Act. He asked: what protection the disclosure and liability regime would give to the "poor lamb in the street."[442] His irony remains vivid, decades later.

Care must also be taken to remember that members of Congress have different constituencies, and their rhetoric may take various forms depending on the intended audience. Several members, particularly those in leadership positions, touched on several different, and arguably incompatible, positions in their rhetoric. Representative Rayburn, Chairman of the House Committee on Interstate and Foreign Commerce and floor manager of both securities bills, made statements that supported almost every line of rhetoric advanced by those supporting regulation. He had seen "the lambs shorn for many, many years;"[443] he had encountered investors who were pathetic and almost illiterate;[444] he spoke of wise investors who would use the information that regulation would make available;[445] and he spoke of thrifty investors who gave up the current use of their property to invest in securities.[446] Within a few years Representative Rayburn would be Speaker of the House.[447] Senator Fletcher and Representative Wolverton showed a similar aptitude for touching all the rhetorical bases. Senator Fletcher had chaired the Senate Committee on Banking and Commerce in the early 1930s; and when the Republicans next took control of the House in the 80th Congress, Representative Wolverton would Chair the House Committee on Interstate and Foreign Commerce.[448]

Finally, care must be taken to avoid partisan generalizations about the members who advocated each of these characterizations of investors. Many of the members who called investors suckers and fools were Republicans, but there were notable exceptions, including Senator Gore, Democrat of Oklahoma, and Representative Studley, Democrat of New York. Similarly, those who supported regulation tended to be Democrats, but again there were notable exceptions. In particular, Republicans played an important role in arguing that regulation should protect investors who could not protect themselves. Republican members arguing this position included Senator Norris, Republican of Nebraska, and Representative Mott, Republican of Oregon. Senator Norris was well-known as a Progressive Republican.[449] Representative Mott was less well-known, but Republican Progressivism had influence in his district.[450] Finally, several Republicans rose in favor of the administration's bills, including Representative Wolverton, Republican of New Jersey, and Representative Mapes, Republican of Michigan.

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[442] 77 CONG. REC. 2921 (1933) (statement of Rep. Britten).
[443] 78 CONG. REC. 8013 (1934) (statement of Rep. Rayburn).
[444] *See supra* text accompanying notes 279 to 230.
[445] *See supra* text accompanying note 358.
[446] *See supra* text accompanying notes 375 to 383.
[447] BIOGRAPHICAL DIRECTORY OF THE CONGRESS, *supra* note 226 (Rayburn, Samuel Taliafero).
[448] *Id.* (Wolverton, Charles Anderson).
[449] Senator Norris was regarded as a leader of "progressive" Republican Senators. *Norris Leads Move for Biparty Union of 'Progressives,'* N.Y. TIMES, February 26, 1933, at 1.
[450] Editorial, THE OREGON STATESMAN, Nov. 13, 1932 at 4 (Salem) (stating that "while gladly claiming loyalty" to the Republic Party, paper "endeavored to take the liberal and progressive view").

Even with these caveats in mind, significant rhetorical conflicts emerged during the debates of the early 1930s. The most important divide was between those who scorned investors, calling them suckers and fools and responsible for their own losses, and those who extolled investors, calling them intelligent, trusting, and innocent of the market catastrophe of the early 1930s. In between, an ambiguous position was occupied by those who asserted investors' innocence, but expressed skepticism about their ability to help themselves, calling them gullible and easily swayed. In this rhetorical environment, where investors were being called suckers and fools, or gullible lambs, the positive expectations of those who supported the pending legislation stand out. Presumably, these were the members who burst into applause when Representative Wolverton told the House that investors could be "intelligent" and "prudent."[451]

At the end of the day, those who called investors suckers and fools simply did not have enough votes. They were spared a roll call vote in 1933,[452] but in 1934, the results were devastating for their position. The Exchange Act bill passed the House on a vote of 281 yeas to 84 nays.[453] Representatives Bakewell, Claiborne, Dirksen, Fish, Kenney, Merritt, Studley, and Treadway all voted nay.[454] In the Senate, the bill passed by an even greater margin, with 62 yeas and only 13 nays.[455] Senators Fess, Gore, and Hastings all voted nay.[456] Senator Walcott did not vote, but he indicated for the *Congressional Record* that if he had, he would have voted nay.[457] The rhetoric of suckers and fools had failed.

Those who argued that regulation should protect investors who could not protect themselves also failed, but were in their only roll call vote and by a much closer division. Senator Bulkley's effort to amend the Exchange Act bill to prohibit margin lending failed in a vote of 30 yeas and 48 nays.[458] He at least enjoyed a full debate on his proposal.[459] Senator Kean's effort to prohibit door-to-door sales was rejected in a voice vote[460] after a brief discussion.[461] Representative Mott's call for merit review[462] never even made it to a vote on the House floor. The rhetoric of protecting those who could not protect themselves had also failed.

The legislation's ultimate margin of victory was due to the ability of the bills' supporters to retain the votes of those who had questioned investors' ability to protect themselves. Senators Bulkley, Glass, and Norris voted to prohibit margin lending.[463] Yet after that amendment had been rejected, all voted for the surviving bill.[464] Representative Mott advocated a regulatory regime based on federal merit review. Yet, after his efforts were ignored, he supported the pending bills. As he put it, in regards to the Securities Act:

> I am going to vote for this bill, of course. I doubt if there will be one dissenting vote in the House. But I am going to vote for it, not because I think it is a good

[451] *See supra* text accompanying notes 354 to 356.
[452] *See supra* note 139.
[453] 78 CONG. REC. 8116 (1934).
[454] *Id*.
[455] *Id*. at 8714.
[456] *Id*.
[457] *Id*.
[458] *Id*. at 8396.
[459] 78 CONG. REC. 8386-96 (1934).
[460] *Id*. at 8700.
[461] *Id*. at 8699.
[462] 77 CONG. REC. 2947-48 (1933) (statement of Rep. Mott).
[463] 78 CONG. REC. 8396 (1934).
[464] *Id.* at 8714.

> securities bill, for I do not, but because I know that it is the only securities bill we shall be permitted to vote on this session.[465]

Of those proposing measures to protect investors from themselves, only Senator Kean of New Jersey went on to vote against the Exchange Act, and he had been expected to oppose the legislation even before the debates had begun.[466]

With the votes of those who supported the pending bills, and those who wished to take measures to protect investors from themselves, Congress passed the investor protection regime. At the end of the debates, the characterization of investors advanced by those who supported the investor protection regime embodied in the Securities Act and the Exchange Act stands out as distinct. They alone described investors as intelligent and trusting in the nation's financial institutions, and yes, susceptible to mob psychology, but that was a susceptibility from which they could be protected. In the 1930s this was the rhetoric that carried the day.

Indeed, it carried the day so successfully that by the late 1930s the rhetoric of suckers and fools had disappeared. From 1936 to 1940, Congress passed several significant securities laws.[467] During floor debates on these bills there was none of the rhetoric of suckers and fools that had been so common only a few years before.[468] In part, the rhetoric may have disappeared because many of the members who espoused it had disappeared. The elections of 1934 and 1936 were cruel to those who called investors suckers and fools. In 1934, Senators Fess and Walcott and Representative Bakewell were unsuccessful in seeking reelection.[469] Representative Studley did not run.[470] In 1936 Senator Gore and Representative Claiborne were unsuccessful in seeking re-nomination,[471] and Senator Hastings and Representative Merritt were unsuccessful in seeking re-election.[472] Some members who had espoused this rhetoric remained. Representatives Fish, Treadway, Dirksen, and Crowther remained in the House into the 1940s.[473] Nonetheless, by the late 1930s, both the rhetoric of suckers and fools and many of those who had spoken for it had passed from the scene. The rhetorical challenge of the early 1930s was over.

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[465] 77 CONG. REC. 2947 (1933) (statement of Rep. Mott).

[466] *Changes Forecast in Securities Act*, N.Y. TIMES, April 3, 1934, at 1 (when Exchange Act bill is called up in the Senate, Senator Kean of New Jersey is expected to "direct the opposing forces").

[467] Securities Exchange Act Amendments of 1936, ch. 462, 49 Stat. 1375 (1936) (codified as amended in scattered sections of 15 U.S.C.); Securities Exchange Act Amendments of 1938, ch. 677, 52 Stat. 1070 (1938) (codified as amended in scattered sections of 15 U.S.C.); Investment Company Act of 1940, ch. 686, 54 Stat. 789 (1940) (codified as amended at 15 U.S.C. §§ 80a-1 et seq); Investment Advisers Act of 1940, ch. 686, tit. II, 54 Stat. 847 (1940) (codified as amended at 15 U.S.C. §§ 80b-1 et seq.).

[468] 80 CONG. REC. 6040-43, 7856-57 (1936) (Senate consideration of the Securities Exchange Act Amendments of 1936); *id*. at 7724-25, 7728-30 (House consideration of same); 83 CONG. REC. 4447-51 (1938) (Senate consideration of Securities Exchange Act Amendments of 1938); *id*. at 9444-46 (House consideration of same); 86 CONG. REC. 9807-19 (1940) (House consideration of Investment Company Act and Investment Advisers Act of 1940); *id*. at 10069-71 (Senate consideration of same).

[469] BIOGRAPHICAL DIRECTORY OF THE CONGRESS, *supra* note 226 (Fess, Simeon Davidson; Walcott, Frederic Collin; and Bakewell, Charles Montague).

[470] *Id*. (Studley, Elmer Ebenezer).

[471] *Id*. (Gore, Thomas Pryor; and Claiborne, James Robert).

[472] *Id*. (Hastings, Daniel Oren; and Merritt, Schuyler).

[473] *Id*. (Fish, Hamilton; Treadway, Allen Towner; Dirksen, Everett McKinley; and Crowther, Frank). Representative Dirksen was later elected to the Senate, where he served in the 1950s and 1960s. *Id*. (Dirksen, Everett McKinley).

III. THE RHETORIC OF INVESTORS AND INVESTOR PROTECTION IN MODERN SECURITIES REGULATION

In the early 1930s, the debate over investor protection was won by those who characterized investors as intelligent and trusting, albeit with a weakness for mob psychology. Members of Congress who characterized investors as suckers and fools were unable to stop the program; and those who characterized investors as gullible lambs were unable to reshape it into a more affirmative and restrictive form of protection. One should not expect, however, that a single encounter will decide forever such a fundamental rhetorical struggle.

Certainly, in the current intellectual environment, challenges can be found for the received policy and rhetoric. For example, a member of Congress who wanted to renew Representative Bakewell's or Representative Dirksen's arguments against investor protection might find support in the writings of Ayn Rand. Rand was a writer who has influenced prominent regulators[474] and finance professionals.[475] She called for "a full, pure, uncontrolled, unregulated laissez-faire capitalism."[476] She also welcomed a harsh fate for the incompetent.[477] At the other end of the spectrum, a member of Congress who wanted to renew Senator Bulkely's or Representative Mott's arguments for protecting investors from themselves might find support in the writings of Stephen Choi. Choi is an academic who argues that instead of regulating issuers or intermediaries, the investor protection regime should regulate investors.[478] In Choi's proposal investors would be required to obtain a license from the Commission[479] that would restrict the types of investments they would be permitted to make depending on their level of sophistication.[480] For example, unsophisticated investors would be restricted to investing in passive index mutual funds.[481]

The ideas of Rand and Choi offer comprehensive alternatives to the policy of investor protection embodied in the federal securities laws. If one were simply looking for challenges, they are available. As always, though, the true test of a policy and the rhetoric challenging and supporting it is in an open debate, with a substantive decision hanging in the balance. Set out below are four examples of such debates. They have been selected because each could be viewed as a challenge to the received policy and rhetoric.

The first example is drawn from the Supreme Court's opinion in *Bateman Eichler, Hill Richards, Inc., v. Carl F. Berner*.[482] In *Bateman Eichler*, investors purchased stock because,

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[474] *See e.g.,* JEFF WALKER, THE AYN RAND CULT, 203-18 (Open Court Publ'g Co. 1999) (Alan Greenspan, former Chairman of the Board of Governors of the Federal Reserve was active in Ayn Rand's movement and while in public service advocated many of her ideas).

[475] *See e.g.,* BETHANY MCLEAN & PETER ELKIND, THE SMARTEST GUYS IN THE ROOM; THE AMAZING RISE AND SCANDALOUS FALL OF ENRON, 214-17 (Portfolio 2003) (favorite book of the head of Enron's trading desk was Ayn Rand's THE FOUNTAINHEAD).

[476] Ayn Rand, *The Objectivist Ethics*, *published in* THE VIRTUE OF SELFISHNESS: A NEW CONCEPT OF EGOISM, 33 (New American Library 1964).

[477] In the fictional rhetoric that serves as the dramatic centerpiece of her novels, Rand has her heroes divide society into competent and incompetent, and state that when someone of the latter type encounters reality, "reality will wipe him out, as he deserves." *See e.g.*, AYN RAND, ATLAS SHRUGGED, 1018 & 1062 (1985) (Galt's Speech).

[478] Stephen Choi, *Regulating Investors Not Issuers: A Market-Based Proposal*, 88 CALIF. L. REV. 279 (2000).

[479] *Id*. at 310.

[480] *Id*. at 299-302.

[481] *Id*.

[482] *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299 (1985).

they admitted, they thought they had received inside information.[483] A registered securities broker told them that he personally knew insiders at an issuing company and had learned that vast amounts of gold had been discovered in Surinam; the company had options on thousands of acres in the gold-producing regions; the discovery was not publicly known; and when the information was made public the company's stock was certain to increase in value.[484] The investors purchased the stock "on the premise that [the broker] was privy to certain information not otherwise available to the public."[485] The shares initially increased in value, but ultimately dropped below the purchase price.[486] The investors then sued the broker and his employer for fraud, alleging that the broker had divulged false and materially incomplete information "on the pretext that it was accurate inside information."[487] The district court dismissed their claim, reasoning that trading on inside information is itself an antifraud violation, and therefore, that the investors were *in pari delicto* with the broker.[488] The Court of Appeals for the Ninth Circuit reversed.[489] In turn, the Supreme Court affirmed the Court of Appeals, and permitted the action to go forward.[490] For purposes of this article, though, the relevant point was the rhetoric used to characterize the investor-plaintiffs.

In their argument to the Supreme Court, the investors claimed that they could not be *in pari delicto* with the broker, because the defense requires that the parties engage in relatively equal conduct,[491] and "a duped investor is never *in pari delicto* with someone who, from the outset, is intentionally defrauding him."[492] Their use of the term "duped" is intriguing, because a "dupe," according the same dictionary cited frequently above, is one "who has been deceived or is easily deceived, as by flattering promises; a gull."[493] In its decision upholding the investors' ability to bring suit, the Supreme Court joined in this characterization. It stated that in their pleadings the investors had alleged that they were "unwitting dupes" who had been used by the masterminds of the scheme.[494] The addition of the term "unwitting" spoke volumes. As an adjective it means: "unknown, unconscious, unaware," or perhaps most relevant, "disregarding, paying no attention."[495] The Court went on to say that the investors "may well have violated the securities laws,"[496] and that it placed no "stamp of approval on their conduct,"[497] but accepting the facts in the complaint as true,[498] the broker's conduct was far more culpable, and there was no basis for concluding that the investors were *in pari delicto* with him, because he "awakened in the [investors] a desire for wrongful gain that might otherwise have remained dormant, inspired in

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[483] *Id*. at 301-02.
[484] *Id*.
[485] *Id*. at 302.
[486] *Id*.
[487] *Id*. at 301.
[488] *Id*. at 304.
[489] *Id*.
[490] *Id*. at 311-19.
[491] Brief for Respondents at 22-23, Bateman Eichler, Hill Richards, Incorporated, Petitioner, vs. Berner, on writ of certiorari to the U.S. Court of Appeals for the Ninth Circuit, (March 27, 1985), *published in* CIS Law Reprints, 9 SECURITIES REGULATION SERIES, 135, 168-69 (1984/85 Term).
[492] *Id*. at 10, *published in id.* at 156.
[493] WEBSTER'S, *supra* note 104 at 799.
[494] *Bateman Eichler*, 472 U.S. at 314 (describing allegations in the investors' complaint).
[495] WEBSTER'S, *supra* note 104 at 2797.
[496] *Bateman Eichler*, 472 U.S. at 314.
[497] *Id*.
[498] As it must, the Court said, when reviewing the District Court's dismissal on the pleadings. *Id*.

their minds an unfounded idea that they were going to secure it, and then by fraud and false pretenses deprived them of their money."[499]

Viewing the rhetoric of *Bateman Eichler* in light of the rhetoric of the early 1930s, one could note its similarity to the rhetoric of protecting investors from themselves. In the early 1930s members of Congress spoke of gullible lambs and in 1985 the Supreme Court spoke of unwitting dupes. In the 1930s the lambs were easily swayed by high-pressure salespersons. In 1985 the dupes had a desire for wrongful gain awakened by those who masterminded the scheme. In short, in both settings, gulls and dupes must be protected from their own "voluntary … decisions"[500] even when ill-intentioned. One could ask whether, as of the 1980s, *Bateman Eichler* signaled continued life for the rhetoric of protecting investors who have not shown that they can protect themselves.

The second example is drawn from a Congressional debate in the mid-1990s. In 1996, for the first time since the 1930s, Congress revisited and revised the statutory requirement that the Commission consider the protection of investors in many of its administrative actions.[501] The Capital Markets Deregulation and Liberalization Act of 1996[502] amended the Securities Act and the Exchange Act to state that when the Commission is engaged in rulemaking and is required to consider or determine whether an action is in the public interest, it shall also consider "in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation."[503]

In the floor debates members noted that when the legislation containing this provision had been introduced the previous year it had been viewed as "controversial"[504] and likely to spark a "huge ideological debate."[505] In the event the debate was, in one member's words, an "exchange of roses."[506] Members rose to speak of how the bill was "good bipartisan legislation,"[507] and how it enjoyed "support on both sides of the aisle."[508] Most importantly, though, members emphasized that it modernized securities regulation, "without sacrificing investor protection;"[509]

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[499] *Id*. citing *Stewart v. Wright*, 147 F. 321 (1906) (brackets in original eliminated). The Court also considered that a tippee of inside information is generally less culpable than a tipper. *Bateman Eichler*, 472 U.S. at 313.

[500] *See id*. at 312. The Court also considered whether such actions should be allowed to promote a high standard of business ethics in the securities business. *Id*. at 315-19. The Commission had urged this view, among others, on the Court. Brief for the SEC as Amicus Curiae Supporting Respondents at 10, Bateman Eichler, Hill Richards, Inc. v. Berner, on writ of certiorari to the U.S. Court of Appeals for the Ninth Circuit, 10 (March 1985), *published in* CIS Law Reprints, 9 SECURITIES REGULATION SERIES, 207 (1984/85 Term). The author states no view on this portion of the Court's opinion.

[501] *See supra* note 65.

[502] Capital Markets Deregulation and Liberalization Act of 1996, Title I of the National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416 (1996).

[503] *Id*. at § 106, 110 Stat, 3424-25 (adding new §§ 2(b) to the Securities Act, 3(f) to the Exchange Act). It also amended the Investment Company Act. *Id*.

[504] 142 CONG. REC. H6446 (June 18, 1996)(statement of Rep. Dingell) (1996 committee member). When a member served on a committee responsible for this legislation, in the Senate the Committee on Banking, Housing, and Urban Affairs, s*ee* CONGRESSIONAL DIRECTORY, 104th Cong., Standing Committees of the Senate at 4-8, *available at* www.gpoaccess.gov; or in the House the Committee on Commerce, *see id*. Standing Committees of the House at 5-11; it will be shown thus: "(1996 committee member)" at the first citation to a statement by that member.

[505] *Id*. at H6444 (June 18, 1996) (statement of Rep. Markey) (1996 committee member).

[506] *Id*. at H6448 (June 18, 1996) (statement of Rep. Moran).

[507] *Id*. at H6443 (June 18, 1996) (statement of Rep. Bliley) (1996 committee member).

[508] *Id*. at S12093 (October 1, 1996) (statement of Sen. D'Amato) (1996 committee member).

[509] *Id*. at S7214 (June 27, 1996) (statement of Sen. Bryan) (1996 committee member).

while maintaining, in some cases even enhancing, "the full strength of investor protections'"[510] and "without in any way compromising our longstanding commitment to maintaining the highest possible standard of investor protection."[511] As the Joint Explanatory Statement of the Committee of Conference said, the legislation would preserve "important investor protections."[512]

Viewing this debate in light of the rhetoric of the early 1930s, one could note the absence of any vocal challenge to investor protection. In the early 1930s, opponents of the securities laws directly challenged the value of investor protection. Investors are suckers and fools they said, and beyond all protection. Yet, even as Congress set out to amend the existing statutory structure of investor protection, members of Congress professed their support for the policy.[513] The actual effect of this provision on the investor protection regime would be left to the future.[514] At least one commentator has suggested that the new language "recognizes the intrinsic linkage between investor protection and market integrity, and efficient competitive markets that provide low-cost capital for issuers."[515] But one could ask whether, as of the 1990s, this amendment signaled a new willingness to reconsider the fundamentals of the received policy of investor protection.

The third example is drawn from several cases addressing the legal doctrine known as "puffery." Puffery arose as a legal doctrine many years before the federal securities laws. The classic statement of puffery was by Judge Learned Hand in 1918.[516] He said:

> There are some kinds of talk which no sensible man takes seriously, and if he does he suffers from his credulity. If we were all scrupulously honest, it would not be so; but, as it is, neither party [to a sale] usually believes what the seller says about his own opinions, and each knows it.[517]

The doctrine is used in securities actions to take the determination of whether statements are material[518] away from the jury, the usual finder of fact, so it may be resolved summarily by the court.[519] The doctrine has been rejected by the Commission,[520] and for a time was in such

[510] *Id*. at S12094 (October 1, 1996) (statement of Sen. Dodd) (1996 committee member).
[511] *Id*. at H6444 (June 18, 1996) (statement of Rep. Markey).
[512] H. R. REP. NO. 104-864, p. 39 (1996).
[513] Indeed, outside of Congress, both the President and the Chairman of the Commission argued that the legislation did not compromise investor protection. Statement on Signing the National Securities Markets Improvement Act on 1996, 32 Weekly Comp. Pres. Doc. 2038 (Oct. 11, 1996); Peter Morton, *SEC to be Watchdog of U.S. Funds Industry*, FINANCIAL POST, October 2, 1996, at 9.
[514] The author states no opinion of law on this provision.
[515] Ethiopis Tafara & Robert J. Peterson, *A Blueprint of Cross-Border Access to U.S. Investors: A New International Framework*, 48 HARV. INT'L L. J. 31, 45 (2007).
[516] Jennifer O'Hare, *Resurrection of the Dodo: The Unfortunate Re-emergence of the Puffery Defense in Private Securities Fraud Actions*, 59 OHIO ST. L.J. 1697, 1704-05 (1998).
[517] *Id*.
[518] *See TSC Industries, Inc. v. Northway, Inc*., 426 US 438, 449 (1976) (defining information as material when: "[T]here is a substantial likelihood that a reasonable [investor] would consider [the information] important in deciding how to [act] …Put another way, there must be a substantial likelihood that the disclosure of the [information] would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.").
[519] *See e.g*., O'Hare, *Resurrection of the Dodo, supra* note 517 at 1702.
[520] *Id*. at n.56 (collecting cases).

disfavor that one scholar said it had "all but gone the way of the dodo."[521] In recent years it has enjoyed a dramatic return to prominence.[522]

The doctrine of puffery is founded on a rhetorical characterization of investors. That is, as stated in an influential opinion of the Fourth Circuit, *Raab v. General Physics Corporation*,[523] soft or puffy statements are immaterial because: "No reasonable investor would rely on these statements."[524] Unfortunately, as noted by David Hoffman, the *Raab* court left this proposition "unadorned by empirical evidence, such as non-movement in [the] stock price after the disclosures."[525] Other scholars have commented on the "lack of reasoned analysis" underlying recent puffery cases.[526] In fact, as Hoffman goes on to discuss, economic literature on persuasive speech suggests that a significant portion of the population is influenced by such statements.[527] Studies suggest this type of sales talk is increasing while the communication of hard information is declining.[528] As one court upholding the doctrine put it, puffery is "numbingly familiar to the marketplace."[529] This leads to the paradox that sellers "increasingly rely on persuasive, puffing, speech, but are protected from liability because such speech is assumed not to work."[530]

Beyond the naked rhetorical assertion at the heart of the doctrine -- that reasonable investors do not rely on such talk - the tone of the rhetoric of puffery is also important. Courts have said that "[n]o prudent person would treat as gospel statements such as" those alleged by the plaintiff,[531] that plaintiff's claim was the "common plaint of any loser against his investment adviser,"[532] that "even a naïve investor is expected to know of the risks inherent in investing in the stock market,"[533] and that the "law does not give premiums for naiveté."[534]

Viewing the rhetoric of puffery in light of the rhetoric of the early 1930s, one could note its similarity to the rhetoric of suckers and fools. In both, it is the incompetent or naïve who are denied protection. Under puffery, those deemed insufficiently sophisticated are denied the opportunity to put forward a claim of materiality. Moreover, again as with the rhetoric of suckers and fools, in the rhetoric of puffery there is an unmistakable tone of name-calling. The unsophisticated are not only bereft of protection, they are fit subjects for verbal sport: losers, naïve, and treating statements as gospel. One could ask whether, as of the 1990s, the revival of the doctrine of puffery signaled the revival of the rhetoric of suckers and fools.

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[521] *Id*. at 1697 (quoting LOUIS LOSS AND JOEL SELIGMAN, SECURITIES REGULATION 3434 (Little Brown & Co. Law & Bus. 3rd ed. 1991)).
[522] *See generally* R. Gregory Roussel, *Securities Fraud or Mere Puffery: Refinement of the Corporate Puffery Defense*, 51 VAND. L. REV. 1049 (1998)("every circuit has recently applied some variation of the puffery concept to dismiss private securities fraud actions").
[523] 4 F.3d 286 (4th Cir. 1993). *See also* David A. Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. 1395, 1407 (2006) (discussing *Raab*).
[524] *Raab*, 4 F.3d at 290.
[525] Hoffman, *supra* note 524 at 1407.
[526] O'Hare, *supra* note 524 at 1699 (noting especially cases against non-broker defendants).
[527] Hoffman, *supra* note 524 at 1427-47.
[528] *Id*. at 1440-41.
[529] *Kurtzman v. Compaq Computer Corp.*, 2002 U.S. Dist. LEXIS 26569, 2002 WL 32442832 at *59-60 (S.D. Tex. March 30, 2002).
[530] Hoffman, *supra* note 540 at 1441-42.
[531] *Assocs. in Adolescent Psychiatry v. Home Life Ins. Co*., 941 F.2d 561, 570 (7th Cir. 1991).
[532] *Bowman v. Hartig*, 334 F. Supp. 1323, 1328 (S.D.N.Y 1971).
[533] *Shamsi v. Dean Witter Reynolds, Inc*., 743 F. Supp. 87, 91 (D. MA. 1989).
[534] *Bowman*, 334 F. Supp. at 1328. Of course, to question this rhetorical assault on naïve investors does not mean that every statement is material, or that every investor is reasonable.

The fourth and final example is drawn from *Carr v. Cigna Securities, Inc.*[535] In C*arr*, a professional athlete purchased two limited-partner interests in commercial real estate partnerships for $450,000.[536] He lost every penny of his investment when the commercial real estate market collapsed in the late 1980s.[537] The investor brought suit against the securities firm that had created the partnerships, and when the action was dismissed, he appealed to the Court of Appeals.[538] The investor claimed that the salesperson had told him that the limited partnerships were safe, conservative investments, when the opposite was true.[539] The investor acknowledged that the salesperson had given him documents that disclosed the risk of the investments.[540] But he did not read them.[541] The investor said:

> [The salesman] knew I didn't understand them. He said they were boilerplate kind of stuff, and breezed through them. He just explained them in his own words. He didn't say they were contrary to what he told me. What I understood was what he told me.[542]

The Court of Appeals for the Seventh Circuit rejected the investor's claim. In an opinion written by Judge Posner the court held that the investor could not bring suit for fraud when he had been given documents that fully disclosed the riskiness of the investment.[543] As the court put it, the documents he was given warned him "in capitals and bold face that it was a RISKY investment."[544] These written warnings precluded Carr's claim that the salesperson had told him that the partnerships were a safe investment.[545]

As always in this article, the relevant aspect of *Carr* was its rhetoric. In a forceful opinion Judge Posner wrote:

> The claims are barred by a very simple, very basic, very sensible principle of the law of fraud, both the law of securities fraud and the common law of fraud. If a literate, competent adult is given a document that in readable and comprehensible prose says X (X might be "this is a risky investment"), and the person who hands it to him tells him, orally, not-X ("this is a safe investment"), our literate, competent adult cannot maintain an action for fraud against the issuer of the document.[546]

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535 95 F.3d 544 (7th Cir. 1996).
536 *Id*. at 545.
537 *Id*.
538 *Id*.
539 *Id*.
540 *Id*.
541 *Id*.
542 *Id*.
543 *Id*. at 547-48.
544 *Id*. at 547 (emphasis in original).
545 *Id*. at 546-48; see *also* Donald C. Langevoort, *Disclosures that "Bespeak Caution*," 49 BUS. LAW. 481, 483-86 (1994) (discussing judicial doctrine of precluding securities fraud claims because investor was provided with cautionary language); *see also* Jennifer O'Hare, *Good Faith and the Bespeaks Caution Doctrine: It's not Just a State of Mind*, 58 U. Pitt L. Rev. 619 (1997) (discussing similar statutory safe harbor enacted in Private Securities Litigation Reform Act of 1995).
546 *Carr*, 95 F.3d at 547.

Much like the rhetorical proposition at the heart of puffery, Judge Posner's assertion that "literate, competent adults" give greater credence to written as opposed to oral disclosure was unadorned by empirical evidence.[547] In fact, modern research suggests the opposite. When confronted by disparities between written and oral disclosures, people tend to give more credence to the latter, especially when the written disclosure is presented as boilerplate.[548]

Moreover, while Judge Posner seems to emphasize the importance of written disclosure, in his rhetoric he scorns it. It is, he says, "fine-print legal mumbo-jumbo"[549] or again, "legal and accounting mumbo-jumbo."[550] "Mumbo-jumbo," the dictionary often cited above says, is meaningless incantation or mummery.[551] Instead of such mumbo-jumbo, Judge Posner says, the investor should read a "short and plain statement of what one is buying," in this case the subscription agreement.[552] However, other than warnings designed to protect the issuer against lawsuits,[553] one wonders how much an investor will actually learn about an investment from such an agreement. Indeed, Judge Posner's opinion could be read to allow someone to immunize large swathes of disclosure through a few conclusory statements of risk. District courts in Judge Posner's Circuit have wrestled with such claims in the years since he issued *Carr*.[554]

Viewed in light of the rhetoric of the early 1930s, one could see the rhetoric of *Carr* as the mirror image, sixty years later, of the rhetoric of the intelligent investor. In the early 1930s, disclosure was needed to allow intelligent investors to gather accurate information and exercise their judgment. The flaw of the unregulated market had been that instead of reliable information, investors could obtain only sales blurbs.[555] In *Carr*, on the other hand, disclosure is scorned as so much mumbo-jumbo. Investors are expected to make their decisions based on the legal warnings in the subscription agreement.[556] One could ask whether, as of the 1990s, the rhetoric of *Carr* signaled the most serious rhetorical challenge yet: from enabling the intelligent investor to help him or herself, disclosure has become nothing more than mumbo-jumbo.

In short, by the end of the 1990s an observer could have wondered what these examples signaled about the status of the policy of investor protection and the rhetoric of the intelligent and trusting investor. None of the examples advanced comprehensive alternative policies like

[547] *Id.*
[548] Robert Prentice, *Contract-Based Defenses in Securities Fraud Litigation: A Behavioral Analysis*, 2003 U. ILL. L. REV. 337, 374 (2003).
[549] *Carr,* 95 F.3d at 547.
[550] *Id.* at 547.
[551] WEBSTER'S, *supra* note 104 at 1611.
[552] *Id*. at 547-48.
[553] *See* DENIS T. RICE & CHARLES P. ORTMEYER, 6 SECURITIES REGULATION FORMS, § 1:44, "Subscription Agreement," at 1-162 (West Group 2001) (among principal functions of agreement is to "protect against lawsuits brought by investors by highlighting particular risk and disclosure problems").
[554] *See e.g*., Talton v. Unisource Network Services, Inc., No. 00 C 7967, 2004 US Dist. Lexis 193000 (N.D. Ill. Sept. 23, 2004) (Carr inapplicable because written documentation made no representation concerning litigated issue); Beedie v. Battelle Memorial Institute, No. 01 C 6740, 2002 U.S. Dist. Lexis 171 (N.D. Ill. January 4, 2002) (Carr inapplicable because disclaimer was general and did not address specific misrepresentations); Vigortone AG Products, Inc., v. PM AG Products, Inc., 217 F.Supp. 2d 858, 864-65 (N.D. Ill. 2001) (Carr inapplicable because no single written warning); Baghdady v. Robbins Futures Inc., et al., No. 97 C. 8794, 1999 U.S. Dist. Lexis 3394 (N.D. Ill. March 11, 1999) (Carr limited to oral claims that investment safe, does not permit "any and all" oral claims); Fugman v. Aprogenex, Inc., et al., 961 F.Supp. 1190, 1198 (N.D. Ill. 1997) (Carr inapplicable because written warnings that the investment was risky did not contradict plaintiff's specific claims).
[555] *See supra* text accompanying notes 354 to 374.
[556] One could also note the silence of the rhetoric of *Carr* on the conduct of the salesperson who was apparently making sales by contradicting the issuers' written disclosures.

the writings of Rand or Choi. Nonetheless, one could have asked where this rhetoric was headed, after an abrupt shift from rhetoric reminiscent of protecting investors from themselves in the 1980s to rhetoric increasingly reminiscent of suckers and fools in the 1990s. This question remains open. But it must be considered in light of a final and more recent example, one of the most significant events in the rhetoric of investors and investor protection.

IV. THE RHETORICAL CRISIS OF THE "NEW ECONOMY"

In the early years of the Twenty-First Century, Congress again debated investor protection, and in doing so members again characterized investors. The timing of this debate gave its rhetoric a unique importance. This was because the debate took place in the death throes of the New Economy.

The New Economy of the 1990s, like the New Era of the 1920s, was a period of lasting technological progress and transitory stock market exuberance. In the 1990s, new technologies, like the internet and cell phones, grew and transformed business, communications, and productivity, [557] much as radio had grown dramatically in the 1920s.[558] Nobel Prize winning economist Joseph Stiglitz has said that "the New Economy is real," but its effects have "been exaggerated."[559] This exaggeration could be seen in the stock market. When assessing the stock values of companies that claimed to be pioneering new markets, analysts became preoccupied with the growth potential of those new markets, but rarely dealt with a firm's return on capital or how it would make money in those new markets.[560] As a result, a company could have tiny revenues, big losses, a short operating history, never achieve profitability, and yet have its stock price rise "instantly" to more than ten times its initial offering price.[561] Moreover, again like the New Era of the 1920s,[562] the New Economy was characterized by "an irrational belief that stocks (as well as operating results and salaries and investment returns) could continue to go up indefinitely."[563] This belief was false. Just as the New Era crashed in the sell-off of the early 1930s,[564] the New Economy crashed in a sell-off in the early years of the Twenty-First Century.[565] The final blows came with a wave of bankruptcies, financial restatements, and revelations of financial fraud at major public companies, such as Enron.[566] Commentary on the era came to view the New Economy "as a mix of collective folly and outright criminality."[567]

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[557] *See* JOSEPH E. STIGLITZ, THE ROARING NINETIES: A HISTORY OF THE WORLD'S MOST PROSPEROUS DECADE (2003).
[558] *See supra* note 41.
[559] STIGLITZ, THE ROARING NINETIES, *supra* note 557, at 321.
[560] Chris Higson, *Enron's Foolish Things: Was the Company Fooling Investors about its Value or Were the Investors Too Willing to Fool Themselves*, FINANCIAL TIMES, April 4, 2002, at 2.
[561] DOUG HENWOOD, AFTER THE NEW ECONOMY: THE BINGE AND THE HANGOVER THAT WON'T GO AWAY, 188-89 (The New Press 2003) (discussing 1998 offering of TheGlobe.com).
[562] *See supra* text accompanying note 51.
[563] Jonathan A. Knee, *House of Gas*, NEW YORK TIMES, October 26, 2003, at 7-14.
[564] *See supra* text accompanying note 47.
[565] *See* Nasdaq Composite Index, 1978-2006, Stockcharts.com, http://*stockcharts*.com/charts/historical (comparing 2000 to 2002, the Nasdaq Market, where most of the new technology companies traded, lost more than 75% of its value).
[566] STIGLITZ, THE ROARING NINETIES, 241 (2003) (Enron "has become emblematic of all that went wrong in the Roaring Nineties.").
[567] HENWOOD, *supra* note 561 at 1.

As the New Economy peaked and began to crash, the term "sucker" enjoyed a revival in popular usage.[568] In this environment, once again, investors were suckers and fools. While countless examples of this popular usage could be cited,[569] Enron was a major focus. Enron was a natural gas company that had ridden the technology boom into new business processes, grown dramatically, made fabulous gains in the stock market, suddenly declared bankruptcy, and then was shown to have been tainted to an extraordinary degree with fraud.[570] Many of its senior executives were eventually convicted of various forms of criminal fraud.[571] When Enron collapsed, the shock was palpable. Commentators opined that Enron taught people "What fools we were;"[572] that people "felt they had been played for suckers;"[573] that Enron was all about "screwing suckers;"[574] that Enron executives "walked off with hundreds of millions through insider trading, leaving the suckers holding worthless paper;"[575] and that Enron showed "how gullible we were, which only infuriates us more. Who wants to be played for a sucker?"[576] Finally, as one commentator ruefully noted: "we figured we were just too dumb to understand this New Economy. Now we know we weren't the only fools."[577]

The similarities between the collapse of the New Era and the New Economy are striking. Irrational beliefs about the stock market had been exposed, the market had crashed, fraud appeared wide-spread, and investors were widely characterized as suckers and fools. The environment seemed primed for a reprise of the rhetorical challenge of the early 1930s. Indeed, given the acceptance of similar rhetoric in regulatory settings, as discussed in the examples above, and the renewed popular usage of the terms suckers and fools, the environment seemed primed for a reprise in the same terms.

In 2002, in this atmosphere, Congress took up the legislation that would eventually become known as the Sarbanes-Oxley Act.[578] In the floor debates, members expressed their anger,

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[568] One means of assessing the popularity of a word is to track the frequency of its appearances in a major publication. Searches in PROQUEST (from 2004 to 2006) and PROQUEST HISTORICAL (from 1990 to 2003) reveal that the word "sucker" appeared in the NEW YORK TIMES (for any purpose) an average of 118.8 times each year through the 1990s, with appearances declining through the last years of the decade to only 98 in 1999. Then suddenly, appearances rose to 241 in 2000 and 214 in 2001. Following this dramatic upward spike, from 2002 to 2006 appearances again declined to a level similar to the 1990s, with an average of 117.8 per year. It is intriguing that over this 17 year period, use of the word "sucker" in the NEW YORK TIMES rose dramatically and peaked in the two years that the New Economy peaked and began to crash.

[569] *See e.g.,* Ken Brownlee, *There was an Old Lady who Swallowed a Fly*, CLAIMS MAGAZINE, Apr. 2002, at 98 ("there's a sucker born every minute"); Jim Grant, Reporter's notebook, *Enron collapse said to have undermined trust of investors*, CBS News Transcripts Feb. 10, 2002 (by the late 1990s "people literally believed anything").

[570] *See generally* MCLEAN & ELKIND, *supra* note 476.

[571] *Epilogue* to BETHANY MCLEAN & PETER ELKIND, THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON, 406-24 (photo. reprint 2006) (2004).

[572] Anthony Mason, Reporter's notebook, *Enron collapse said to have undermined trust of investors*, CBS News Transcripts Feb. 10, 2002.

[573] Editorial, *Lessons of the Enron Scandal*, CHICAGO TRIBUNE, Mar. 31, 2002, at C6.

[574] Joel Rogers, *Wow! Greed Really Isn't Enough*, CAPITAL TIMES, July 8, 2002, at 7A..

[575] Editorial, *Enron's End Run*: *Scandal is Slap in the Face of Capitalism,* COLUMBUS DISPATCH, Jan., 17, 2002, at 12A.

[576] Robert Reed, *Anderson-Enron Saga: Who Gets Last Laugh?* CRAIN'S CHICAGO BUSINESS, Jan. 28, 2002, at 8.

[577] Michael Collins – Commentary, http://www.marketwatch.com/news/story/its-time-revolution-wall-street/story.aspx?guid=%7BA987AA86-3512-46B5-8251-EE60B5C1DA9B%7D.

[578] *See generally* The Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 Stat. 15 & 18 (codified as amended in scattered sections of 15 & 18 U.S.C) (Among other things it established a Public

shock, and extreme concern at the revelations that had emerged over the previous months.[579] They worried that the economy and the stock market had been "devastated by a wave of scandals,"[580] and a "staggering rush of corporate debacles,"[581] especially among companies that were "supposed models" of the "[N]ew [E]conomy."[582] They condemned the "disgraceful" moral and ethical breakdown among some executives[583] and spoke of the need to raise ethical standards.[584] They also spoke of the need to punish – "and do so swiftly and severely" – those who sought to cheat and steal from others.[585] They worried that even as they debated the stock market continued to fall, with members rising to report how many points the market had dropped that day.[586] Moreover, of most relevance to this article, they spoke of investors.

During the floor debates on the Sarbanes-Oxley legislation, the members who spoke of investors almost universally characterized them within the tradition of the intelligent and trusting investor. The legislation, members said, will "help people make better decisions."[587] Congress needs to make sure that investors have "timely and clear information,"[588] members said, and it will do so by giving them access to the "clear and understandable information needed to judge a firm's financial performance, condition and risks."[589] Because of the pending legislation, members argued, investors will have confidence in income statements,[590] balance sheets,[591] and annual reports.[592] Investors will get "better information and [they] will get it faster and they will have more faith in the numbers."[593] They will not be kept in the dark, "and when they make an investment, that investment will be sound and based on truth and openness and honesty."[594]

Members rising in the debates on the Sarbanes-Oxley legislation also emphasized that the free market system is based on trust;[595] that trust is only as reliable as the information that is available to the public;[596] and that the American market was inviting to investors because of the "sense of fairness and trust and soundness to our financial institutions and the structures that we

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Company Accounting Oversight Board to supervise audits of public companies and required certain executives to certify the financial statements of public companies).

579 *See e.g.,* 148 CONG. REC. S6766 (daily ed. July 15, 2002) (statement of Sen. Domenici).

580 *Id*. at H4838 (daily ed. July 17, 2002) (statement of Rep. Conyers).

581 *Id*. at H4842 (daily ed. July 17, 2002) (statement of Rep. Dingell).

582 *Id*. at S6530 (daily ed. July 10, 2002) (statement of Sen. Corzine) (2002 committee member, served on a committee responsible for this legislation, in the Senate the Committee on Banking, Housing, and Urban Affairs).

583 *Id*. at S6339 (daily ed. July 8, 2002) (statement of Sen. Enzi) (2002 committee member).

584 *Id*. at H5463 (daily ed. July 25, 2002) (statement of Rep. Baker) (2002 committee member); *Id*. at H5469 (daily ed. July 25, 2002) (statement of Rep. Cox) (2002 committee member).

585 *Id*. at H5462 (daily ed. July 25, 2002) (statement of Rep. Oxley) (2002 committee member).

586 *See e.g., Id*. at S6558 (daily ed. July 10, 2002) (statement by Sen. Reid); *Id*. at S6614 (daily ed. July 11, 2002)(statement of Sen. Enzi); *Id*. at S6622 (daily ed. July 11, 2002)(statement of Sen. Nelson); *Id*. at S6746 (daily ed. July 15, 2002) (statement of Sen. Biden); *Id*. at S6772 (daily ed. July 15, 2002) (statement of Sen. Dodd) (2002 committee member). *See also Id*. at S6744 (daily ed. July 15, 2002) (statement of Sen. Allen); *Id*. at S6741 (daily ed. July 15, 2002) (statement of Sen. Levin).

587 *Id*. at H5471 (daily ed. July 25, 2002) (statement of Rep. Hart) (2002 committee member).

588 *Id*. at H1545 (daily ed. April 24, 2002) (statement of Rep. Oxley).

589 *Id*. at S6759 (daily ed. July 15, 2002) (statement of Sen. Smith).

590 *Id*. at S7357 (daily ed. July 25, 2002) (statement of Sen. Corzine).

591 *Id*.

592 *Id.* at S7357 (daily ed. July 25, 2002) (statement of Sen. Boxer).

593 *Id*. at H5462 (daily ed. July 25, 2002) (statement of Rep. Oxley).

594 *Id*. at H5466 (daily ed. July 25, 2002) (statement of Rep. Kelly) (2002 committee member).

595 *Id*. at H5470 (daily ed. July 25, 2002) (statement of Rep. Ferguson) (2002 committee member); *Id*. at H5479 (daily ed. July 25, 2002) (statement of Rep. Kind).

596 *Id*. at H5479 (daily ed. July 25, 2002) (statement of Rep. Kind).

created to protect them."[597] Investors will not trust the market, members stated, if they believe their money is not safe.[598] The concerns felt by employees, investors, and retirees all undermined confidence in the financial markets, and had the potential to derail an economic recovery.[599] The purpose of the original securities laws was to increase public trust in America's financial markets,[600] a member said, and the federal government should continue to "help investors . . . in their quest for accurate information about the financial condition of America's businesses."[601] As one member put it, it is important for Congress to "protect [America's investors,] and provide them with the information that they need."[602]

One line of rhetoric that was not heard in 2002 was that intelligent and trusting investors suffer from a weakness for mob psychology. This is surprising, given investors' behavior during the boom years of the New Economy. Indeed, a historian of financial markets has noted a similarity between trading on the Internet in the 1990s, and trading during the boom of the 1920s.[603] In 1999, John Steele Gordon said: "the Internet has proved fertile ground for a nearly endless number of get-rich-quick schemes and forums where traders can discuss stocks and egg each other on to trade in a certain way, just as tips used to pass from mouth to mouth in the 1920s."[604] Perhaps the absence of the rhetoric of mob psychology in the Congressional debate of 2002 can be explained by the very dominance of the rhetoric of the intelligent and trusting investor. Lacking any serious challenge to the dominant characterization, apologetics for foolish investors were unneeded.

The rhetorical dominance of the intelligent and trusting investor can also be seen by considering the alternative characterizations that were used in the debates. While several members referred to investors as "innocent,"[605] only one spoke of investors as uneducated or uninformed. The sole reference was in a story told by Senator Bennett of an investor who believed his broker had lied to him because the broker had told him his investment in a venture had made hundreds of thousands of dollars, but when the investor looked at the financial information he saw that the assets and liabilities balanced – "to the exact cent."[606] Of course, the Senator explained, the investor did not understand generally accepted accounting.[607] But instead of drawing the conclusion that members of Congress had drawn from such statements in the early 1930s, that uninformed investors should be protected from themselves, Senator Bennett concluded by arguing that the pending legislation was crafted to make it easier for the ordinary investor to understand what a company is worth, and to make accounting conform with generally understood business activities.[608] In other words, in 2002, even a narrative of an uninformed investor supported a policy conclusion within the rhetorical tradition of the intelligent investor.

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[597] *Id*. at S6343 (daily ed. July 8, 2002) (statement of Sen. Dodd).
[598] *Id*. at H5469 (daily ed. July 25, 2002) (statement of Rep. Jones) (2002 committee member).
[599] *Id*. at H5472 (daily ed. July 25, 2002) (statement of Rep. Jackson-Lee of Texas).
[600] *Id*. at S6343 (daily ed. July 8, 2002) (statement of Sen. Dodd).
[601] *Id*. at S6763 (daily ed. July 15, 2002) (statement of Sen. Hatch).
[602] *Id*. at H1550 (daily ed. Apr. 24, 2002) (statement of Rep. Hart).
[603] JOHN STEELE GORDON, THE GREAT GAME; THE EMERGENCE OF WALL STREET AS A WORLD POWER; 1653-2000, 295 (1999).
[604] *Id.*
[605] 148 CONG. REC. H1551 (daily ed. Apr. 24, 2002) (statement of Rep. Doggett); *Id*. at H1553 (daily ed. Apr. 24, 2002) (statement of Rep. Grucci) (2002 committee member); *Id*. at H1556 (daily ed. Apr. 24, 2002) (statement of Rep. Blumenauer); *Id*. at H5478 (daily ed. July 25, 2002) (statement of Rep. Jackson-Lee of Texas).
[606] *Id*. at S6751 (daily ed. July 15, 2002) (statement of Sen. Bennett) (2002 committee member).
[607] *Id.*
[608] *Id*. at S6752.

In only one instance in 2002, was a sustained effort made on behalf of a provision drawn from the tradition of protecting investors who could not protect themselves. In 1933 Representative Mott had argued that a federal securities commissioner should be given authority to make an investigation of every security to be sold.[609] In 2002, Representative Kucinich offered an amendment to the Sarbanes-Oxley legislation that would have established a Federal Bureau of Audits to audit annually the financial statements of reporting issuers.[610] Intriguingly, members supporting the Kucinich Amendment did not argue that it was a means to protect uninformed investors from themselves. Rather, they argued that it would ensure that investors and employees get "an accurate assessment of a corporation,"[611] and that it would even guarantee accurate information for investors.[612] In other words, as with Senator Bennett's narrative of an uninformed investor, Representative Kucinich's proposal for a Federal Bureau of Audits did not lead to a rhetoric of protecting investors from themselves, but rather back to the rhetoric of intelligent investors acting on the basis of accurate information.[613]

Finally, in 2002, only one member rose to challenge directly the policy of investor protection: Representative Paul. Representative Paul argued that unless the proposed legislation "eliminates original sin, it will not eliminate fraud."[614] Moreover, when he turned to investors, Representative Paul argued that government regulations "harm investors by inducing a sense of complacency."[615] Investors, he said, "are much less likely to invest prudently and ask tough questions of the companies they are investing in when they believe government regulations are protecting their investments."[616] "In a true free market," Representative Paul said:

> investors are responsible for their own decisions, good or bad. This responsibility leads them to vigorously analyze companies before they invest, using independent financial analysts. In our heavily regulated environment, however, investors and analysts equate SEC compliance with reputability. The more we look to the government to protect us from investment mistakes, the less competition there is for truly independent evaluations of investment risk.[617]

Representative Paul's statements should be considered in light of his background as a libertarian. In 1988 he had been the Libertarian Party candidate for election for President of the United States.[618] As a general matter the libertarian movement is supportive of a laissez-faire economy.[619] Moreover, during the 1988 campaign Representative Paul had argued that the only

[609] *See* Mott, *supra* note 283.
[610] 148 CONG. REC. H1567 (daily ed. Apr. 24, 2002) (Amendment Number 4 offered by Rep. Kucinich).
[611] *Id*. at H1572 (daily ed. Apr. 24, 2002) (statement of Rep. Filner).
[612] *Id*. at H1572 (daily ed. Apr. 24, 2002) (statement of Rep. Kucinich).
[613] *Id*. at H1571 (daily ed. Apr. 24, 2002) (statement of Rep. Kucinich) (The amendment's supporters also argued that it would eliminate the inherent conflict of interest of an auditor who can be hired and fired by the audit client); *see also Id*. at H1571 (daily ed. Apr. 24, 2002) (statement of Rep. Jackson-Lee of Texas) (it would provide a strong oversight bureau)..
[614] *Id*. at H1555 (daily ed. Apr. 24, 2002) (statement of Rep. Paul) (2002 committee member).
[615] *Id*.
[616] *Id*.
[617] *Id*.
[618] BIOGRAPHICAL DIRECTORY OF THE CONGRESS, *supra* note 226 (Paul, Ronald Ernest).
[619] *See generally* BRIAN DOHERTY, RADICALS FOR CAPITALISM; A FREEWHEELING HISTORY OF THE MODERN LIBERTARIAN MOVEMENT, 15 (2007) (libertarians radical supporters of capitalist system of property and exchange).

government departments that should be kept were those identified in the Constitution.[620] All of the others, the "new" ones, were unneeded.[621] With this background one could expect him to oppose an investor protection regime administered by a federal agency that had been created in the 1930s.

Moreover, while the Libertarian Party did not exist in the early 1930s,[622] one could see the views expressed by Representative Paul in 2002 as a more refined version of the arguments raised in the early 1930s about the dangers of a regulatory "guardianship" for suckers.[623] In the 1930s Representative Bakewell argued that regulation would populate the world with fools.[624] In 2002 Representative Paul argued that regulation would induce a sense of complacency, a loss of prudence, and a failure to ask tough questions.[625] Of course, even in the 1930s this position could be argued with a greater refinement than some members' recourse to terms like suckers and fools would suggest. Herbert Spencer appeared in the Congressional debates only as "a very wise man" who had spoken "years ago;"[626] and the characterization of unsuccessful investors as weak, incompetent, and the waste incident to every social function appeared only in the words of the "enlightened and socially minded" Oliver Wendell Holmes.[627]

In the event, in the final form set forth in the Conference Report, the Sarbanes-Oxley Act passed both houses of Congress by overwhelming bi-partisan majorities.[628] Simply put, neither Representative Kucinich nor Representative Paul had enough votes. The rhetoric of the intelligent and trusting investor had triumphed once again. In fact, the scale of its triumph had increased considerably since the 1930s. This can be seen by comparing the votes obtained by its rivals in the 1930s and in 2002.

In the 1930s, Representative Mott's proposal for federal review of all publicly issued securities was never put to a vote on the floor of the House, so the closest proxy for his approach to regulation was the Senate's vote on prohibiting margin. Thirty Senators voted to prohibit margin and 48 opposed the measure. In 2002, 39 Representatives voted in favor of Representative Kucinich's amendment to establish a Federal Bureau of Audits and 381 were opposed. In other words, support for this type of measure fell from 38% of the voting members in the 1930s to only 9% of the voting members in 2002.

Similarly, in the 1930s, when the Exchange Act came to a vote, 84 Representatives voted against the proposed regulatory regime and 281voted in favor; while 13 Senators voted against it and 62 voted in favor.[629] In 2002, three Representatives voted against the Sarbanes-Oxley legislation in its final form, compared to 423 in favor,[630] and no Senators voted against it,

[620] *The McNeil/Lehrer NewsHour: Educational Broadcasting and GWETA*, #3286 (PBS television broadcast Oct. 24, 1988) (statement by Ronald Paul).
[621] *Id*.
[622] The Libertarian Party was formed in 1971. Libertarian National Committee, *Organization, Our History*, *available at* www.lp.org/organization/history.shtml.
[623] *See supra* notes 234-35.
[624] *See supra* note 102.
[625] *See supra* notes 650-51.
[626] *See supra* text notes 225-27.
[627] *See supra* text notes 202-05.
[628] 148 CONG. REC. H5489 (daily ed. July 25, 2002) (House Roll No. 348); *Id*., at S7365 (daily ed. July 25, 2002) (Senate Roll Call Vote No. 192 Leg).
[629] The votes on the House and Senate bills provide the best measure of support because the Conference Report passed both chambers without a roll call vote. 78 CONG. REC. 10269 (1934); *Id*. at S10185.
[630] 148 CONG. REC. H5489 (daily ed. July 25, 2002).

compared to 99 in favor.[631] In other words, opposition fell from 30% in the House and 17% in the Senate to less than one percent in the House and zero percent in the Senate.

In short, despite the signals of change in regulatory debates, despite the market conditions of the early Twenty-First Century, and despite a revival of the term sucker in popular usage, in 2002 Congress continued to espouse the rhetoric of the intelligent and trusting investor. Members of Congress recognized that the Sarbanes-Oxley Act offered "more change, breadth of change and significance of change, than any Congressional action since the 1933 and 1934 Securities Act themselves[,]"[632] and that it contained the strongest reforms in corporate law "since FDR was President."[633] Nonetheless, the policy of investor protection and the rhetoric of the intelligent and trusting investor dominated these debates even more decisively than the debates of the early 1930s.

CONCLUSION

The rhetorical conflict of the early 1930s was a vivid and extended illustration of the relationship between rhetoric and regulation. When Congress first debated a federal policy of investor protection, it also debated how to characterize investors. The characterizations raised in the debates and the different types of policies to which each characterization leads, can still be seen in contemporary debates. There are signals of change. Over the years there have been challenges to the received policy and rhetoric. Nonetheless, in Congress, the ultimate forum for the rhetoric of regulation, at least as of its last major action, the policy of investor protection and the rhetoric of the intelligent and trusting investor continue to hold sway. This continuing history of success should not be ignored. But as anyone familiar with securities regulation has heard time and again, past performance does not guarantee future results.[634]

*** * * Postscript * * ***

At the end of this article, it would be worthwhile to hear a few words from one of the subjects of the piece, a sucker. David Denby is a self-confessed sucker. In his memoir, *American Sucker*, he recounts his adventures as an amateur investor in the New Economy.[635] He started investing heavily in new technology stocks in 2000, determined to make a million dollars.[636] Instead, when the technology sector collapsed, he ended up losing $900,000.[637] He had slipped, he said, into a "minicatastrophe."[638] Even worse, he said, he had known about the delusions, the great manias of the past; he had even read an academic study of financial manias.[639] Yet, he said, hope and greed are such commanding emotions that he "filtered, censored, abolished what [he] didn't

[631] *Id*. at S7365.
[632] *Id*. at H5463 (daily ed. July 25, 2002) (statement of Rep. Baker).
[633] *Id*. at H5464 (daily ed. July 25, 2002) (statement of Rep. Maloney of New York) (2002 committee member).
[634] *See* 17 C.F.R. § 230.482(b)(3)(i) (legend that must accompany all mutual fund and variable annuity advertising that contains performance data).
[635] DAVID DENBY, AMERICAN SUCKER (2004).
[636] *Id*. at 12-13.
[637] *Id*. at 311.
[638] *Id*. at 221.
[639] *Id*. (*citing* CHARLES KINDELBERGER, MANIAS, PANICS, AND CRASHES: A HISTORY OF FINANCIAL CRISES (2000)).

want to hear."[640] Ultimately, he felt betrayed by the insiders who "plundered" their own companies, in many cases, "just before the stock price disintegrated."[641] He said:

> We had been blinded by our own desire and by the dazzling lies. Chumps! Suckers! Some of the insiders stole from us – from ordinary shareholders, and in some cases from employees, too. They stole from *me*.[642]

For the insiders, he said, regulators, prosecutors, and ethics are needed.[643] But what was his future as an investor? Even after his experience as a sucker he continued to invest. As Americans, Denby said:

> It's very hard – indeed psychologically impossible – for us to think of the market as going down or staying down forever, even if it does stay flat for periods … And this hopefulness is not some foolish illusion, it's central to the American temperament and to the longtime success of the stock market, which does, as we know, rise over time. For Americans … time is on our side. We can be suckered by apparent success, but the greater fault is to be suckered by loss.[644]

Rhetoric matters. It warrants careful attention.

[640] *Id.*
[641] *Id*. at 276.
[642] *Id*. at 279 (emphasis in original).
[643] *Id*. at 303.
[644] *Id*. at 324-25.